The Changing Face of Parentage:

Navigating Waters with LGBT Families

Materials

Cases:

- **Obergefell v Hodges*, ___US___; 135 S Ct 2584; 192 L Ed 2d 609 (2015) (Available at: https://supreme.justia.com/cases/federal/us/576/14-556/case.pdf);
- *Pavan v Smith*, ___US___; 137 S Ct 2075; 198 L Ed 2d 636 (2017), PDF at 1.;
- *VL v EL*, ___US___; 136 S Ct 1017; 194 L Ed 2d 92 (2016), PDF at 9;
- *Matter of Christopher YY v Jessica ZZ*, ___AD3d___; 2018 NY Slip Op 00495 (App Div), PDF at 10;
- *Matter of Brooke SB v Elizabeth ACC*, 28 NY3d 1; 2016 NY Slip Op 05903; 39 NYS3d 89; 61 NE3d 488, PDF at 25;
- *Matter of Beth R v Ronald S*, 149 AD3d 1216; 2017 NY Slip Op 02711; 51 NYS3d 244 (App Div), PDF at 45;
- *Strickland v Day*, ___So 3d___; 2018 Miss. LEXIS 155 (Apr. 5, 2018), PDF at 48;
- *McLaughlin v Jones*, 240 Ariz 560; 382 P3d 118 (Ct App, 2016), PDF at 58;
- *G.W. (Mother) vs State of Alaska, DHSS, OCS*, Case No. S16516 (Appellant's Brief on Appeal), PDF at 68;
- *Mabry v Mabry*, 499 Mich 997; 882 NW2d 539 (2016) (Dissenting Opinion on decision to deny leave to appeal), PDF at 118.

Articles:

- *Nancy Polikoff, *Neglected Lesbian Mothers** ___Fam. L. Q. ____ (2018) (pending publication; will be made available prior to CLE);
- S. Kerene Moore & Katherine Sharkey*, Advocating for Same-Sex Couples Post Obergefell*, Michigan ICLE Family Law Institute (2018), PDF at 122;
- Michael S. DePrince, *Same-Sex Marriage and Disestablishing Parentage; Reconceptualizing Legal Parenthood Through Surrogacy*, 100 Minn. L. Rev. 797 (2015), PDF at 145;
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- Kathi L.H.Harp & Carrie B.Oser*, Factors associated with two types of child custody loss among a sample of African American mothers: A novel approach,* 60 Social Science Research 283-296 (2016) (mothers who identified as lesbian or bisexual were four times more likely than those who identified as heterosexual to have lost custody of their children to the state), PDF at 224;
- Courtney G. Joslin, *Nurturing Parenthood Through the UPA (2017)*, 127 Yale L.J.F. 589 (2018), PDF at 251;
- *Legal Recognition of LGBT Families*, National Center For Lesbian Rights (2016), PDF at 267;

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- Douglas NeJaime, *Marriage Equality and the New Parenthood*, 129 Harvard Law Rev. 1185 (2016), PDF at 288;
- *Ian Parker, *What Makes a Parent,* The New Yorker, March 22, 2017 (discussing *Gunn v. Hamilton*, which is expected to go to New York's highest court) (Available at: https://www.newyorker.com/magazine/2017/05/22/what-makes-a-parent);
- Angela Ruffini, *Who's Your Daddy?: The Marital Presumption of Legitimacy in the Modern World and its Application to Same-Sex Couples*. 55 Family Ct. Rev. 307 (2017), PDF at 370;
- *Merle H. Weiner, *A Parent-Partner Status for American Family Law* (2015). (Available at:https://www.cambridge.org/core/books/a-parent-partner-status-for-american-family-law/29AD44AE74F66C7FA90103E47DC332CF).

**PDFs of these items are available on the links indicated, or are pending publication and will be made available prior to the CLE.*

Per Curiam

SUPREME COURT OF THE UNITED STATES

MARISA N. PAVAN, ET AL. *v.* NATHANIEL SMITH

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF ARKANSAS

No. 16–992. Decided June 26, 2017

PER CURIAM.

As this Court explained in *Obergefell* v. *Hodges*, 576 U. S. ___ (2015), the Constitution entitles same-sex couples to civil marriage "on the same terms and conditions as opposite-sex couples." *Id.,* at ___ (slip op., at 23). In the decision below, the Arkansas Supreme Court considered the effect of that holding on the State's rules governing the issuance of birth certificates. When a married woman gives birth in Arkansas, state law generally requires the name of the mother's male spouse to appear on the child's birth certificate—regardless of his biological relationship to the child. According to the court below, however, Arkansas need not extend that rule to similarly situated same-sex couples: The State need not, in other words, issue birth certificates including the female spouses of women who give birth in the State. Because that differential treatment infringes *Obergefell*'s commitment to provide same-sex couples "the constellation of benefits that the States have linked to marriage," *id.,* at ___ (slip op., at 17), we reverse the state court's judgment.

The petitioners here are two married same-sex couples who conceived children through anonymous sperm donation. Leigh and Jana Jacobs were married in Iowa in 2010, and Terrah and Marisa Pavan were married in New Hampshire in 2011. Leigh and Terrah each gave birth to a child in Arkansas in 2015. When it came time to secure birth certificates for the newborns, each couple filled out paperwork listing both spouses as parents—Leigh and Jana in one case, Terrah and Marisa in the other. Both

times, however, the Arkansas Department of Health issued certificates bearing only the birth mother's name.

The department's decision rested on a provision of Arkansas law, Ark. Code §20–18–401 (2014), that specifies which individuals will appear as parents on a child's state-issued birth certificate. "For the purposes of birth registration," that statute says, "the mother is deemed to be the woman who gives birth to the child." §20–18–401(e). And "[i]f the mother was married at the time of either conception or birth," the statute instructs that "the name of [her] husband shall be entered on the certificate as the father of the child." §20–18–401(f)(1). There are some limited exceptions to the latter rule—for example, another man may appear on the birth certificate if the "mother" and "husband" and "putative father" all file affidavits vouching for the putative father's paternity. *Ibid.* But as all parties agree, the requirement that a married woman's husband appear on her child's birth certificate applies in cases where the couple conceived by means of artificial insemination with the help of an anonymous sperm donor. See Pet. for Cert. 4; Brief in Opposition 3–4; see also Ark. Code §9–10–201(a) (2015) ("Any child born to a married woman by means of artificial insemination shall be deemed the legitimate natural child of the woman and the woman's husband if the husband consents in writing to the artificial insemination").

The Jacobses and Pavans brought this suit in Arkansas state court against the director of the Arkansas Department of Health—seeking, among other things, a declaration that the State's birth-certificate law violates the Constitution. The trial court agreed, holding that the relevant portions of §20–18–401 are inconsistent with *Obergefell* because they "categorically prohibi[t] every same-sex married couple . . . from enjoying the same spousal benefits which are available to every opposite-sex married couple." App. to Pet. for Cert. 59a. But a divided

Arkansas Supreme Court reversed that judgment, concluding that the statute "pass[es] constitutional muster." 2016 Ark. 437, 505 S. W. 3d 169, 177. In that court's view, "the statute centers on the relationship of the biological mother and the biological father to the child, not on the marital relationship of husband and wife," and so it "does not run afoul of *Obergefell*." *Id.,* at 178. Two justices dissented from that view, maintaining that under *Obergefell* "a same-sex married couple is entitled to a birth certificate on the same basis as an opposite-sex married couple." 505 S. W. 3d, at 184 (Brill, C. J., concurring in part and dissenting in part); accord, *id.,* at 190 (Danielson, J., dissenting).

The Arkansas Supreme Court's decision, we conclude, denied married same-sex couples access to the "constellation of benefits that the Stat[e] ha[s] linked to marriage." *Obergefell*, 576 U. S., at ___ (slip op., at 17). As already explained, when a married woman in Arkansas conceives a child by means of artificial insemination, the State will—indeed, *must*—list the name of her male spouse on the child's birth certificate. See §20–18–401(f)(1); see also §9–10–201; *supra,* at 2. And yet state law, as interpreted by the court below, allows Arkansas officials in those very same circumstances to omit a married woman's female spouse from her child's birth certificate. See 505 S. W. 3d, at 177–178. As a result, same-sex parents in Arkansas lack the same right as opposite-sex parents to be listed on a child's birth certificate, a document often used for important transactions like making medical decisions for a child or enrolling a child in school. See Pet. for Cert. 5–7 (listing situations in which a parent might be required to present a child's birth certificate).

Obergefell proscribes such disparate treatment. As we explained there, a State may not "exclude same-sex couples from civil marriage on the same terms and conditions as opposite-sex couples." 576 U. S., at ___ (slip op.,

at 23). Indeed, in listing those terms and conditions—the "rights, benefits, and responsibilities" to which same-sex couples, no less than opposite-sex couples, must have access—we expressly identified "birth and death certificates." *Id.,* at ___ (slip op., at 17). That was no accident: Several of the plaintiffs in *Obergefell* challenged a State's refusal to recognize their same-sex spouses on their children's birth certificates. See *DeBoer* v. *Snyder*, 772 F. 3d 388, 398–399 (CA6 2014). In considering those challenges, we held the relevant state laws unconstitutional to the extent they treated same-sex couples differently from opposite-sex couples. See 576 U. S., at ___ (slip op., at 23). That holding applies with equal force to §20–18–401.

Echoing the court below, the State defends its birth-certificate law on the ground that being named on a child's birth certificate is not a benefit that attends marriage. Instead, the State insists, a birth certificate is simply a device for recording biological parentage—regardless of whether the child's parents are married. But Arkansas law makes birth certificates about more than just genetics. As already discussed, when an opposite-sex couple conceives a child by way of anonymous sperm donation—just as the petitioners did here—state law requires the placement of the birth mother's husband on the child's birth certificate. See *supra,* at 2. And that is so even though (as the State concedes) the husband "is definitively not the biological father" in those circumstances. Brief in Opposition 4.* Arkansas has thus chosen to make its birth certif-

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*As the petitioners point out, other factual scenarios (beyond those present in this case) similarly show that the State's birth certificates are about more than genetic parentage. For example, when an Arkansas child is adopted, the State places the child's original birth certificate under seal and issues a new birth certificate—unidentifiable as an amended version—listing the child's (nonbiological) adoptive parents. See Ark. Code §§20–18–406(a)(1), (b) (2014); Ark. Admin. Code 007.12.1–5.5(a) (Apr. 2016).

icates more than a mere marker of biological relationships: The State uses those certificates to give married parents a form of legal recognition that is not available to unmarried parents. Having made that choice, Arkansas may not, consistent with *Obergefell*, deny married same-sex couples that recognition.

The petition for a writ of certiorari and the pending motions for leave to file briefs as *amici curiae* are granted. The judgment of the Arkansas Supreme Court is reversed, and the case is remanded for further proceedings not inconsistent with this opinion.

It is so ordered.

SUPREME COURT OF THE UNITED STATES

MARISA N. PAVAN, ET AL. *v.* NATHANIEL SMITH

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF ARKANSAS

No. 16–992. Decided June 26, 2017

JUSTICE GORSUCH, with whom JUSTICE THOMAS and JUSTICE ALITO join, dissenting.

Summary reversal is usually reserved for cases where "the law is settled and stable, the facts are not in dispute, and the decision below is clearly in error." *Schweiker* v. *Hansen*, 450 U. S. 785, 791 (1981) (Marshall, J., dissenting). Respectfully, I don't believe this case meets that standard.

To be sure, *Obergefell* addressed the question whether a State must recognize same-sex marriages. But nothing in *Obergefell* spoke (let alone clearly) to the question whether §20–18–401 of the Arkansas Code, or a state supreme court decision upholding it, must go. The statute in question establishes a set of rules designed to ensure that the biological parents of a child are listed on the child's birth certificate. Before the state supreme court, the State argued that rational reasons exist for a biology based birth registration regime, reasons that in no way offend *Obergefell*—like ensuring government officials can identify public health trends and helping individuals determine their biological lineage, citizenship, or susceptibility to genetic disorders. In an opinion that did not in any way seek to defy but rather earnestly engage *Obergefell*, the state supreme court agreed. And it is very hard to see what is wrong with this conclusion for, just as the state court recognized, nothing in *Obergefell* indicates that a birth registration regime based on biology, one no doubt with

many analogues across the country and throughout history, offends the Constitution. To the contrary, to the extent they speak to the question at all, this Court's precedents suggest just the opposite conclusion. See, *e.g.*, *Michael H.* v. *Gerald D.*, 491 U. S. 110, 124–125 (1989); *Tuan Anh Nguyen* v. *INS*, 533 U. S. 53, 73 (2001). Neither does anything in today's opinion purport to identify any constitutional problem with a biology based birth registration regime. So whatever else we might do with this case, summary reversal would not exactly seem the obvious course.

What, then, is at work here? If there isn't a problem with a biology based birth registration regime, perhaps the concern lies in this particular regime's exceptions. For it turns out that Arkansas's general rule of registration based on biology does admit of certain more specific exceptions. Most importantly for our purposes, the State acknowledges that §9–10–201 of the Arkansas Code controls how birth certificates are completed in cases of artificial insemination like the one before us. The State acknowledges, too, that this provision, written some time ago, indicates that the mother's husband generally shall be treated as the father—and in this way seemingly anticipates only opposite-sex marital unions.

But if the artificial insemination statute is the concern, it's still hard to see how summary reversal should follow for at least a few reasons. First, petitioners didn't actually challenge §9–10–201 in their lawsuit. Instead, petitioners sought and the trial court granted relief eliminating the State's authority under §20–18–401 to enforce a birth registration regime generally based on biology. On appeal, the state supreme court simply held that this overbroad remedy wasn't commanded by *Obergefell* or the Constitution. And, again, nothing in today's opinion for the Court identifies anything wrong, let alone clearly wrong, in that conclusion. Second, though petitioners' lawsuit didn't

challenge §9–10–201, the State has repeatedly conceded that the benefits afforded nonbiological parents under §9–10–201 must be afforded equally to both same-sex and opposite-sex couples. So that in this particular case and all others of its kind, the State agrees, the female spouse of the birth mother must be listed on birth certificates too. Third, further proof still of the state of the law in Arkansas today is the fact that, when it comes to adoption (a situation not present in this case but another one in which Arkansas departs from biology based registration), the State tells us that adopting parents are eligible for placement on birth certificates without respect to sexual orientation.

Given all this, it seems far from clear what here warrants the strong medicine of summary reversal. Indeed, it is not even clear what the Court expects to happen on remand that hasn't happened already. The Court does not offer any remedial suggestion, and none leaps to mind. Perhaps the state supreme court could memorialize the State's concession on §9–10–201, even though that law wasn't fairly challenged and such a chore is hardly the usual reward for seeking faithfully to apply, not evade, this Court's mandates.

I respectfully dissent.

Per Curiam

SUPREME COURT OF THE UNITED STATES

V. L. *v.* E. L., ET AL.

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF ALABAMA

No. 15–648 Decided March 7, 2016

PER CURIAM.

A Georgia court entered a final judgment of adoption making petitioner V. L. a legal parent of the children that she and respondent E. L. had raised together from birth. V. L. and E. L. later separated while living in Alabama. V. L. asked the Alabama courts to enforce the Georgia judgment and grant her custody or visitation rights. The Alabama Supreme Court ruled against her, holding that the Full Faith and Credit Clause of the United States Constitution does not require the Alabama courts to respect the Georgia judgment. That judgment of the Alabama Supreme Court is now reversed by this summary disposition.

I

V. L. and E. L. are two women who were in a relationship from approximately 1995 until 2011. Through assisted reproductive technology, E. L. gave birth to a child named S. L. in 2002 and to twins named N. L. and H. L. in 2004. After the children were born, V. L. and E. L. raised them together as joint parents.

V. L. and E. L. eventually decided to give legal status to the relationship between V. L. and the children by having V. L. formally adopt them. To facilitate the adoption, the couple rented a house in Alpharetta, Georgia. V. L. then filed an adoption petition in the Superior Court of Fulton County, Georgia. E. L. also appeared in that proceeding. While not relinquishing her own parental rights, she gave her express consent to V. L.'s adoption of the children as a

second parent. The Georgia court determined that V. L. had complied with the applicable requirements of Georgia law, and entered a final decree of adoption allowing V. L. to adopt the children and recognizing both V. L. and E. L. as their legal parents.

V. L. and E. L. ended their relationship in 2011, while living in Alabama, and V. L. moved out of the house that the couple had shared. V. L. later filed a petition in the Circuit Court of Jefferson County, Alabama, alleging that E. L. had denied her access to the children and interfered with her ability to exercise her parental rights. She asked the Alabama court to register the Georgia adoption judgment and award her some measure of custody or visitation rights. The matter was transferred to the Family Court of Jefferson County. That court entered an order awarding V. L. scheduled visitation with the children.

E. L. appealed the visitation order to the Alabama Court of Civil Appeals. She argued, among other points, that the Alabama courts should not recognize the Georgia judgment because the Georgia court lacked subject-matter jurisdiction to enter it. The Court of Civil Appeals rejected that argument. It held, however, that the Alabama family court had erred by failing to conduct an evidentiary hearing before awarding V. L. visitation rights, and so it remanded for the family court to conduct that hearing.

The Alabama Supreme Court reversed. It held that the Georgia court had no subject-matter jurisdiction under Georgia law to enter a judgment allowing V. L. to adopt the children while still recognizing E. L.'s parental rights. As a consequence, the Alabama Supreme Court held Alabama courts were not required to accord full faith and credit to the Georgia judgment.

II

The Constitution provides that "Full Faith and Credit shall be given in each State to the public Acts, Records,

and judicial Proceedings of every other State." U. S. Const., Art. IV, §1. That Clause requires each State to recognize and give effect to valid judgments rendered by the courts of its sister States. It serves "to alter the status of the several states as independent foreign sovereignties, each free to ignore obligations created under the laws or by the judicial proceedings of the others, and to make them integral parts of a single nation." *Milwaukee County* v. *M. E. White Co.*, 296 U. S. 268, 277 (1935).

With respect to judgments, "the full faith and credit obligation is exacting." *Baker* v. *General Motors Corp.*, 522 U. S. 222, 233 (1998). "A final judgment in one State, if rendered by a court with adjudicatory authority over the subject matter and persons governed by the judgment, qualifies for recognition throughout the land." *Ibid.* A State may not disregard the judgment of a sister State because it disagrees with the reasoning underlying the judgment or deems it to be wrong on the merits. On the contrary, "the full faith and credit clause of the Constitution precludes any inquiry into the merits of the cause of action, the logic or consistency of the decision, or the validity of the legal principles on which the judgment is based." *Milliken* v. *Meyer*, 311 U. S. 457, 462 (1940).

A State is not required, however, to afford full faith and credit to a judgment rendered by a court that "did not have jurisdiction over the subject matter or the relevant parties." *Underwriters Nat. Assurance Co.* v. *North Carolina Life & Accident & Health Ins. Guaranty Assn.*, 455 U. S. 691, 705 (1982). "Consequently, before a court is bound by [a] judgment rendered in another State, it may inquire into the jurisdictional basis of the foreign court's decree." *Ibid.* That jurisdictional inquiry, however, is a limited one. "[I]f the judgment on its face appears to be a 'record of a court of general jurisdiction, such jurisdiction over the cause and the parties is to be presumed unless disproved by extrinsic evidence, or by the record itself.'"

Milliken, *supra*, at 462 (quoting *Adam* v. *Saenger*, 303 U. S. 59, 62 (1938)).

Those principles resolve this case. Under Georgia law, as relevant here, "[t]he superior courts of the several counties shall have exclusive jurisdiction in all matters of adoption." Ga. Code Ann. §19–8–2(a) (2015). That provision on its face gave the Georgia Superior Court subject-matter jurisdiction to hear and decide the adoption petition at issue here. The Superior Court resolved that matter by entering a final judgment that made V. L. the legal adoptive parent of the children. Whatever the merits of that judgment, it was within the statutory grant of jurisdiction over "all matters of adoption." *Ibid.* The Georgia court thus had the "adjudicatory authority over the subject matter" required to entitle its judgment to full faith and credit. *Baker*, *supra*, at 233.

The Alabama Supreme Court reached a different result by relying on Ga. Code Ann. §19–8–5(a). That statute states (as relevant here) that "a child who has any living parent or guardian may be adopted by a third party . . . only if each such living parent and each such guardian has voluntarily and in writing surrendered all of his or her rights to such child." The Alabama Supreme Court concluded that this provision prohibited the Georgia Superior Court from allowing V. L. to adopt the children while also allowing E. L. to keep her existing parental rights. It further concluded that this provision went not to the merits but to the Georgia court's subject-matter jurisdiction. In reaching that crucial second conclusion, the Alabama Supreme Court seems to have relied solely on the fact that the right to adoption under Georgia law is purely statutory, and "'[t]he requirements of Georgia's adoptions statutes are mandatory and must be strictly construed in favor of the natural parents.'" App. to Pet. for Cert. 23a–24a (quoting *In re Marks*, 300 Ga. App. 239, 243, 684 S. E. 2d 364, 367 (2009)).

That analysis is not consistent with this Court's controlling precedent. Where a judgment indicates on its face that it was rendered by a court of competent jurisdiction, such jurisdiction "'is to be presumed unless disproved.'" *Milliken*, *supra*, at 462 (quoting *Adam*, *supra*, at 62). There is nothing here to rebut that presumption. The Georgia statute on which the Alabama Supreme Court relied, Ga. Code Ann. §19–8–5(a), does not speak in jurisdictional terms; for instance, it does not say that a Georgia court "shall have jurisdiction to enter an adoption decree" only if each existing parent or guardian has surrendered his or her parental rights. Neither the Georgia Supreme Court nor any Georgia appellate court, moreover, has construed §19–8–5(a) as jurisdictional. That construction would also be difficult to reconcile with Georgia law. Georgia recognizes that in general, subject-matter jurisdiction addresses "whether a court has jurisdiction to decide a particular class of cases," *Goodrum* v. *Goodrum*, 283 Ga. 163, 657 S. E. 2d 192 (2008), not whether a court should grant relief in any given case. Unlike §19–8–2(a), which expressly gives Georgia superior courts "exclusive jurisdiction in all matters of adoption," §19–8–5(a) does not speak to whether a court has the power to decide a general class of cases. It only provides a rule of decision to apply in determining if a particular adoption should be allowed.

Section 19–8–5(a) does not become jurisdictional just because it is "'mandatory'" and "'must be strictly construed.'" App. to Pet. for Cert. 23a–24a (quoting *Marks*, *supra*, at 243, 684 S. E. 2d, at 367). This Court "has long rejected the notion that all mandatory prescriptions, however emphatic, are properly typed jurisdictional." *Gonzalez* v. *Thaler*, 565 U. S. 134, ___ (2012) (slip op., at 10–11) (internal quotation marks and ellipsis omitted). Indeed, the Alabama Supreme Court's reasoning would give jurisdictional status to *every* requirement of the Geor-

gia adoption statutes, since Georgia law indicates those requirements are all mandatory and must be strictly construed. *Marks*, *supra*, at 243, 684 S. E. 2d, at 367. That result would comport neither with Georgia law nor with common sense.

As Justice Holmes observed more than a century ago, "it sometimes may be difficult to decide whether certain words in a statute are directed to jurisdiction or to merits." *Fauntleroy* v. *Lum*, 210 U. S. 230, 234–235 (1908). In such cases, especially where the Full Faith and Credit Clause is concerned, a court must be "slow to read ambiguous words, as meaning to leave the judgment open to dispute, or as intended to do more than fix the rule by which the court should decide." *Id.*, at 235. That time-honored rule controls here. The Georgia judgment appears on its face to have been issued by a court with jurisdiction, and there is no established Georgia law to the contrary. It follows that the Alabama Supreme Court erred in refusing to grant that judgment full faith and credit.

The petition for writ of certiorari is granted. The judgment of the Alabama Supreme Court is reversed, and the case is remanded for further proceedings not inconsistent with this opinion.

It is so ordered.

Cited
As of: April 4, 2018 5:38 PM Z

Matter of Christopher YY. v Jessica ZZ.

Supreme Court of New York, Appellate Division, Third Department

January 25, 2018, Decided; January 25, 2018, Entered

522068

Reporter
2018 N.Y. App. Div. LEXIS 489 *; 2018 NY Slip Op 00495 **

[1]** In the Matter of CHRISTOPHER YY., Respondent, v JESSICA ZZ., Appellant, and NICHOLE ZZ., Respondent.

Notice: THE LEXIS PAGINATION OF THIS DOCUMENT IS SUBJECT TO CHANGE PENDING RELEASE OF THE FINAL PUBLISHED VERSION.
THIS OPINION IS UNCORRECTED AND SUBJECT TO REVISION BEFORE PUBLICATION IN THE OFFICIAL REPORTS.

Core Terms

paternity, marriage, child born, sperm, presumption of legitimacy, Relations, birth, testing, internal quotation marks, couples, donated, married, parties, spouse, same-gender, best interests of the child, equitable estoppel, conceived, married couple, rebutted, rights, asserting, genetic, parent-child, respondents', parentage, parental rights, partner, gender, doctrine of equitable estoppel

Case Summary

Overview
HOLDINGS: [1]-The rebuttable presumption applied in the instant paternity action, Family Ct Act § 532, Domestic Relations Law § 24, because the child was born to a married couple, who were same gender, and the sperm donor failed to establish, by clear and convincing evidence, that the child was not entitled to the legal status as "the product of the marriage"; [2]-The sperm donor was equitably estopped from asserting paternity because the donor, inter alia, unequivocally understood that he was donating sperm to permit the mother and the wife to be the sole parents of any child conceived, expressly disavowed any parental intention, rights, or responsibilities, did not know the child's birth date, never paid child support, never signed an acknowledgment of paternity or asked to do so, donated sperm as a "humanitarian" gesture, and delayed in asserting parental rights.

Outcome
Amended order reversed; motion to dismiss paternity petition granted.

LexisNexis® Headnotes

Family Law > ... > Custody
Awards > Standards > Best Interests of Child

Family Law > ... > Proof of Paternity > Inferences & Presumptions > Rebuttals

Family Law > ... > Proof of Paternity > Defenses > Estoppel

HN1[] **Standards, Best Interests of Child**

Pursuant to Family Ct Act § 532(a), when a paternity petition is filed, Family Court, on the court's own motion or the motion of any party, shall order the mother, her child and the alleged father to submit to one or more genetic marker or DNA tests. However, this directive is qualified by an exception providing that no such test shall be ordered upon a written finding by the court that it is not in the best interests of the child on the basis of res judicata, equitable estoppel, or the presumption of legitimacy of a child born to a married woman. Family Ct Act §§ 532(a), § 418(a). Thus, where paternity is in issue, a family court is required to order biological tests unless it relies upon the best interests of the child exception and, if so, it must justify its refusal to order such tests. Even if the presumption of legitimacy applies, the court must proceed to the best interests

analysis before deciding whether to order a test. To that end, the "paramount concern" in a proceeding to establish paternity is the "best interests of the child." Importantly, biology is not dispositive in a court's paternity determination.

Family Law > ... > Proof of Paternity > Inferences & Presumptions > Factors

Family Law > Marriage > Types of Marriages > Same Sex Marriages

HN2[] **Inferences & Presumptions, Factors**

A child born to a married person by means of artificial insemination with the consent of the other spouse is deemed to be the child of both spouses, regardless of the couple's sexual orientation.

Family Law > ... > Proof of Paternity > Inferences & Presumptions > Rebuttals

HN3[] **Inferences & Presumptions, Rebuttals**

The presumption of legitimacy is rebuttable upon clear and convincing evidence excluding the spouse as the child's parent or otherwise tending to prove that the child was not the product of the marriage. In cases involving spouses of different genders, the presumption has been rebutted with proof that a husband did not have "access to" his wife at the time that she conceived a child and he acknowledged that he was not the biological father, combined with testimony that the child was conceived during a trip with the putative father with whom his wife was in a monogamous relationship.

Family Law > ... > Proof of Paternity > Inferences & Presumptions > Factors

Family Law > Marriage > Types of Marriages > Same Sex Marriages

HN4[] **Inferences & Presumptions, Factors**

A child born to a same-gender married couple is presumed to be their child and, further, the presumption of parentage is not defeated solely with proof of the biological fact that, at present, a child cannot be the product of same-gender parents. If courts were to conclude otherwise, children born to same-gender couples would be denied the benefit of this presumption without a compelling justification. The difficulty is in fashioning the presumption so as to afford the same, and no greater, protections.

Family Law > Paternity & Surrogacy > Surrogacy > Assisted Reproduction Parentage

Family Law > ... > Proof of Paternity > Inferences & Presumptions > Factors

HN5[] **Surrogacy, Assisted Reproduction Parentage**

Domestic Relations Law § 73 only covers one specific situation by providing a mechanism for married couples who utilize artificial insemination by donor (AID) to have a child with assurances that the child will be, for all purposes, considered the legitimate child of both the impregnated woman and her spouse. The Third Department has expressly recognized that this is not the "exclusive means" for a nonbiological parent/spouse to establish parentage of a child born through AID procedures to a married woman. Prior to the enactment of Domestic Relations Law § 73, the common-law rule was that a child born of consensual AID during a valid marriage is a legitimate child entitled to the rights and privileges of a naturally conceived child of the same marriage.

Contracts Law > ... > Estoppel > Equitable Estoppel > Elements of Equitable Estoppel

HN6[] **Equitable Estoppel, Elements of Equitable Estoppel**

The essential purpose of equitable estoppel is to preclude a person from asserting a right after having led another to form the reasonable belief that the right would not be asserted, and loss or prejudice to the other would result if the right were asserted. The law imposes the doctrine as a matter of fairness. Its purpose is to prevent someone from enforcing rights that would work injustice on the person against whom enforcement is sought and who, while justifiably relying on the opposing party's actions, has been misled into a detrimental change of position.

Family Law > ... > Proof of Paternity > Defenses > Estoppel

HN7[] **Defenses, Estoppel**

The doctrine of equitable estoppel is a defense in a paternity proceeding which, among other applications, precludes a man from asserting his paternity when he acquiesced in the establishment of a strong parent-child bond between the child and another person. It is significant that courts impose equitable estoppel to protect the status interests of a child in an already recognized and operative parent-child relationship. While this doctrine is invoked in a variety of situations, whether it is being used in the offensive posture to enforce rights or the defensive posture to prevent rights from being enforced, it is only to be used to protect the best interests of the child.

Family Law > ... > Proof of Paternity > Defenses > Estoppel

HN8[] **Defenses, Estoppel**

The parties asserting equitable estoppel have the initial burden of establishing a prima facie case sufficient to support that claim and, assuming that burden is met, the burden then shifts to the nonmoving party to establish that it would be in the best interests of the child to order the genetic marker test.

Family Law > ... > Custody Awards > Standards > Best Interests of Child

Family Law > Paternity & Surrogacy > Proof of Paternity

HN9[] **Standards, Best Interests of Child**

The best interest analysis traditionally requires consideration of numerous factors, including the child's interest in knowing the identity of his or her biological father, whether testing may have a traumatic effect on the child, and whether continued uncertainty may have a negative impact on a parent-child relationship in the absence of testing. Consideration is given to whether the child would suffer irreparable loss of status, destruction of the child's family image, or other harm to the child's physical or emotional well-being if the proceeding is permitted to go forward.

Counsel: **[*1]** Ouida F. Binnie-Francis, Elmira, for appellant.

Pamela B. Bleiwas, Ithaca, for Christopher YY., respondent.

Lisa A. Natoli, Norwich, for Nichole ZZ., respondent.

Michelle E. Stone, Vestal, attorney for the child.

Judges: Before: Egan Jr., J.P., Devine, Clark, Mulvey and Rumsey, JJ. Egan Jr., J.P., Devine, Clark and Rumsey, JJ., concur.

Opinion by: Mulvey

Opinion

Mulvey, J.

Appeal, by permission, from an amended order of the Family Court of Chemung County (Tarantelli, J.), entered November 23, 2015, which, in a proceeding pursuant to Family Ct Act article 5, among other things, denied respondents' motion to dismiss the petition.

Respondent Jessica ZZ. (hereinafter the mother) and respondent Nichole ZZ. (hereinafter the wife) were married prior to the mother giving birth to the subject child in August 2014. It is undisputed that the child was conceived, on the second attempt, through an informal artificial insemination process performed in respondents' home using sperm donated by petitioner. The parties, who had known one another for a short time through family, had discussed respondents' desire to have a child together, and petitioner volunteered to donate his sperm for this purpose. The parties agree that petitioner, with his partner present, **[*2]** knowingly provided his sperm to assist respondents in having a child, and that the wife performed the insemination. Prior to the insemination, the parties had entered into a written agreement drafted **[**2]** by petitioner that was signed by respondents and petitioner in the presence of his partner. Pursuant to that written agreement, which was entered into without formalities or the benefit of legal advice, petitioner volunteered to donate his sperm so that respondents could have a child together, expressly waived any claims to paternity with regard to any child conceived from his donated sperm and further waived any right to custody or visitation, and respondents, in

turn, waived any claim for child support from petitioner[1]. At some point after the birth of the child, the parties disagreed on petitioner's access to the child, and his partner subsequently admitted in sworn testimony that she had destroyed the only copy of that agreement. The legality of that agreement is not before this Court, although it is relevant to the parties' understanding, intent, and expectations at the time that petitioner donated his sperm and the wife impregnated the mother (*compare Laura WW. v Peter WW.*, 51 AD3d 211, 213-214, 856 N.Y.S.2d 258 [2008]). Upon her birth, the child was **[*3]** given the wife's surname, and respondents lived together as a family with the child and the mother's other two children. Petitioner did not see the child until she was one or two months old.

In April 2015, petitioner filed this paternity petition (*see* Family Ct Act § 522) and, later, a petition seeking custody of the child. The mother opposed the request for a paternity test, requested a stay of any testing and a hearing, and apparently filed a cross petition for custody. At Family Court's direction, the wife was added as a party respondent in the paternity proceeding and an attorney for the child was assigned to represent the child, who was over seven months old when the paternity petition was filed. The mother moved to, among other things, dismiss the paternity petition based upon both the presumption of legitimacy accorded to a child born of a marriage (*see* Domestic Relations Law § 24 [1]) and the doctrine of equitable estoppel, and the wife also asserted those grounds in opposition to the paternity petition[2]. An evidentiary hearing was held on the paternity petition at which all parties, who were represented by counsel, testified, and respondents and the attorney for the child opposed the request for a paternity test. Family **[*4]** Court denied the motion to dismiss and ordered genetic testing. With permission of this Court, the mother appeals.[3]

HN1[↑] Pursuant to Family Ct Act § 532 (a), when a paternity petition is filed, Family Court, "on the court's own motion or the motion of any party, shall order the mother, her child and the alleged father to submit to one or more genetic marker or DNA tests." However, this directive is qualified by an exception providing that "[n]o such test shall be ordered . . . upon a written **[**3]** finding by the court that it is not in the best interests of the child on the basis of res judicata, equitable estoppel, or the presumption of legitimacy of a child born to a married woman" (Family Ct Act § 532 [a]; *see* Family Ct Act § 418 [a]). Thus, where, as here, paternity is in issue, Family Court is required to order biological tests unless it relies upon the best interests of the child exception and, if so, it must "justify its refusal to order [such] tests" (*Matter of Shondel J. v Mark D.*, 7 NY3d 320, 329, 853 N.E.2d 610, 820 N.Y.S.2d 199 [2006]; *see Matter of Suffolk County Dept. of Social Servs. v James D.*, 147 AD3d 1067, 1069, 48 N.Y.S.3d 248 [2017]; *Matter of Tralisa R. v Max S.*, 145 AD3d 727, 727-728, 43 N.Y.S.3d 427 [2016]). Even if the presumption of legitimacy applies, the court must proceed to the best interests analysis before deciding whether to order a test (*see Matter of Mario WW. v Kristin XX.*, 149 AD3d 1227, 1228, 51 N.Y.S.3d 678 [2017]). To that end, the "paramount concern" in a proceeding to establish paternity is the "best interests of the child," and Family Court proceeded properly **[*5]** by holding a hearing addressed to that determination (*Matter of Juanita A. v Kenneth Mark N.*, 15 NY3d 1, 5, 930 N.E.2d 214, 904 N.Y.S.2d 293 [2010] [internal quotation marks and citation omitted]). Importantly, biology is not dispositive in a court's paternity determination (*see id.* at 3 ["biological father may assert an equitable estoppel defense in paternity and child support proceedings"]; *Matter of Shondel J. v Mark D.*, 7 NY3d at 326, 330 [paternity by estoppel]; *Matter of Carlos O. v Maria G.*, 149 AD3d 945, 946-947, 52 N.Y.S.3d 392 [2017] [test denied although parties agreed the petitioner is the biological father]; *Matter of Melissa S. v Frederick T.*, 8 AD3d 738, 738-739, 777 N.Y.S.2d 774 [2004], *lv dismissed* 3 NY3d 688, 818 N.E.2d 650, 785 N.Y.S.2d 9 [2004]; *Matter of Richard W. v Roberta Y.*, 240 AD2d 812, 814, 658 N.Y.S.2d 506 [1997] ["resolution of the estoppel issue in (the married couple's) favor would have rendered the results of (the putative father's) blood test irrelevant"], *lv denied* 90 NY2d 809, 686 N.E.2d 1366, 664 N.Y.S.2d 271 [1997];

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[1] While petitioner denied that there was such a written agreement, and partially disputed respondents' account of the parties' understanding as to the extent of his expected involvement in the life of any child conceived, Family Court credited the contrary testimony of respondents and petitioner's partner. We defer to those credibility determinations, which are fully supported by a sound and substantial basis in the record (*see Matter of Catherine A. v Susan A.*, 155 AD3d 1360, 1361, 65 N.Y.S.3d 339 [2017]).

[2] While the wife did not formally move to dismiss the paternity petition, or expressly join the mother's motion to dismiss prior to the hearing, respondents and the attorney for the child all moved to dismiss the petition at the close of petitioner's case. Family Court denied that motion.

[3] This Court granted a stay pending appeal.

see also Family Ct Act §§ 532 [a] [best interests test]; 418 [a] [same]; Domestic Relations Law § 73 [irrebuttable presumption of paternity]; *Matter of Joshua AA. v Jessica BB.*, 132 AD3d 1107, 1108, 19 N.Y.S.3d 116 [2015]).

Respondents argue that since the child was born to the mother while they were married, they are entitled to the presumption of legitimacy afforded to a child born to a marriage[4]. We agree. Domestic Relations Law § 24, entitled "Effect of marriage on legitimacy of children," expressly provides, as relevant here, that "[a] child . . . born of parents who prior or subsequent to the birth of such child shall have entered into a civil or religious marriage . . . is the legitimate child of both birth parents" (Domestic Relations Law § 24 [1]; *see* Family Ct Act § 417 [entitled "Child of ceremonial marriage"]) **[*6]** [5]. Domestic Relations Law § 24 and Family Ct Act § 417 codify the common-law presumption of legitimacy **[**4]** (*see Matter of Findlay*, 253 NY 1, 170 N.E. 471 [1930] [adopting an evidentiary presumption]; *see also Michael H. v Gerald D.*, 491 U.S. 110, 124-128, 109 S. Ct. 2333, 105 L. Ed. 2d 91 [1989])[6]. As the child was born to respondents, a married couple, they have established that the presumption of legitimacy applies, a conclusion unaffected by the gender composition of the marital couple or the use of informal artificial insemination by donor (hereinafter AID) (*see Matter of Maria-Irene D. [Carlos A.—Han Ming T.]*, 153 AD3d 1203, 1205, 61 N.Y.S.3d 221 [2017]; *Matter of Beth R. v Ronald S.*, 149 AD3d 1216, 1217, 51 N.Y.S.3d 244 [2017]; *Matter of Kelly S. v Farah M.*, 139 AD3d 90, 100-101, 28 N.Y.S.3d 714 [2016]; *Laura WW. v Peter WW.*, 51 AD3d at 215-216; *Wendy G-M. v Erin G-M.*, 45 Misc 3d 574, 593, 985 N.Y.S.2d 845 [Sup Ct, Monroe County 2014]).[7]

HN3[↑] The presumption of legitimacy is rebuttable, however, "upon clear and convincing evidence excluding the [spouse] as the child's [parent] or otherwise tending to prove that the child was not the product of the marriage" (*Matter of Beth R. v Ronald S.*, 149 AD3d at 1217)[8]. **[**5]** In cases involving spouses

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[4] Family Court's jurisdiction to address the contested paternity of a child born to a married woman has been recognized (*see Matter of Nathan O. v Jennifer P.*, 88 AD3d 1125, 1126, 931 N.Y.S.2d 198 [2011], *appeal dismissed and lv denied* 18 NY3d 904, 963 N.E.2d 790, 940 N.Y.S.2d 212 [2012]).

[5] As a noted commentator observed, "The [Family Ct Act §] 417 presumption of legitimacy applies to married 'parents.' Hence it should apply to same[-]sex as well as heterosexual married couples; a child born to a same[-]sex couple who married at any time prior or subsequent to the child's birth is presumptively deemed to be legitimate. The problem . . . is that the presumption is evidentiary and is hence rebuttable. When appropriate, equitable estoppel may be applied to defeat an attempted rebuttal, but estoppel is always an uncertain doctrine" (Merril Sobie, 2014 Supp Practice Commentaries, McKinney's Cons Laws of NY, Book 29A, Family Ct Act § 417, 2017 Cum Pocket Part at 100).

[6] A noted commentator questioned the relevance of the presumption of legitimacy, given the modern availability of genetic and DNA testing that can conclusively establish paternity, and suggested that it has been effectively replaced by principles of equitable estoppel (*see* Merril Sobie, Practice Commentaries, McKinney's Cons Laws of NY, Book 29A, Family Ct Act § 417 at 285-286; *see also* Family Ct Act §§ 532 [a]; 418 [a]; Merril Sobie, Practice Commentaries, McKinney's Cons Laws of NY, Book 29A, Family Ct Act § 418 at 292).

[7] Indeed, it has been recognized that ***HN2***[↑] "a child born to a married person by means of artificial insemination with the consent of the other spouse is deemed to be the child of both spouses, regardless of the couple's sexual orientation" (*Matter of Brooke S.B. v Elizabeth A.C.C.*, 28 NY3d 1, 32, 39 N.Y.S.3d 89, 61 N.E.3d 488 [2016, Pigott, J., concurring]; *see Laura WW. v Peter WW.*, 51 AD3d at 213-214).

[8] Respondents did not raise an equal protection or other constitutional challenge to the presumption of legitimacy or the manner in which it may be rebutted in the context of a child born to a married, same-gender couple. We recognize that the concept of "legitimacy" — which concerns the effect of a marriage on a child's legal and social status, particularly inheritance rights and child support obligations — has historically focused on fatherhood/paternity, and the stigma and burdens of illegitimacy, and is somewhat archaic (*see Matter of Fay*, 44 NY2d 137, 141-142, 375 N.E.2d 735, 404 N.Y.S.2d 554 [1978], *appeal dismissed* 439 U.S. 1059, 99 S. Ct. 820, 59 L. Ed. 2d 25 [1979]; *Matter of Findlay*, 253 NY at 7-8). However, in recognition of the fundamental right of all persons to marry (*see Obergefell v Hodges*, __ U.S. __, __, 135 S Ct 2584, 2604-2605, 192 L. Ed. 2d 609 [2015]; Domestic Relations Law § 10-a [2]; L 2011, ch 95, § 2) and the need to afford comparable protections and rights to same-gender spouses, the presumption may, more accurately, be viewed in modern times as a presumption of *parentage* as to both the biological parent and his or her spouse, whether male or female (*see e.g. Matter of Maria-Irene D. [Carlos A.—Han Ming T.]*, 153 AD3d at 1205). The applicability of the presumption of parentage to same-gender married couples is arguably compelled by the Marriage Equality Act (*see* ***[*7]*** L 2011, ch 95), which provides, in part, that "[n]o government treatment or *legal status*, effect, right, benefit, privilege, *protection or responsibility relating to marriage*, whether deriving from statute, administrative or court rule, public policy, common law or any other source of law, shall differ based on the parties to the marriage being or having been of the same

of different genders, the presumption has been rebutted with proof that a husband did not have "access to" his wife at the time that she conceived a child and he acknowledged that he was not the biological father, combined with testimony that the child was conceived during a trip with the putative father with whom his wife was in a monogamous relationship (*see id.*; *see also Matter of Jason E. v Tania G.*, 69 AD3d 518, 519, 893 N.Y.S.2d 542 [2010]).

Application of existing case law involving different-gender spouses, addressing whether the presumption has been rebutted, to a child born to a same-gender married couple is inherently problematic, as it is not currently scientifically possible for same-gender couples to produce a child that is biologically "the product of the marriage" (*Matter of Beth R. v Ronald S.*, 149 AD3d at 1217). We have recognized that this "is an evolving area of law" (*Matter of Mario WW. v Kristin XX.*, 149 AD3d at 1228 n 1). This changing legal and social landscape requires reexamination of the traditional analysis governing the presumption of legitimacy (*see e.g. Matter of Brooke S.B. v Elizabeth A.C.C.*, 28 NY3d at 13, 25-28)[9]. If the presumption of legitimacy turns primarily upon biology, as some earlier cases indicate, rather than legal status (*see Matter of Paczkowski v Paczkowski*, 128 AD3d 968, 969, 10 N.Y.S.3d 270 [2015]),[10] it may be automatically **[**6]** rebutted in cases involving same-gender married parents (*see e.g. id.*; *Matter of Q.M. v B.C.*, 46 Misc 3d 594, 598-599, 995 N.Y.S.2d 470 [2014]). This result would seem to conflict with this state's "strong policy in favor of legitimacy," which has been described as "one of the strongest and most persuasive known to the law" (*Laura WW. v Peter WW.*, 51 AD3d at 216 [internal quotation marks and citations omitted]). Summarily extinguishing the presumption of legitimacy for children born to same-gender **[*8]** married parents would seem to violate the dictates of the Marriage Equality Act (*see* L 2011, ch 95), which guarantees to such couples the same "legal status, effect, right, benefit, privilege, protection or responsibility relating to marriage" as exist for different-gender couples (Domestic Relations Law § 10-a [2]; *see Matter of Kelly S. v Farah M.*, 139 AD3d at 97-98; *but see Matter of Q.M. v B.C.*, 46 Misc 3d at 599 ["the Marriage Equality Act does not require the court to ignore the obvious biological differences between husbands and wives" and, "while the language of Domestic Relations Law § 10—a requires same-(gender) married couples to be treated the same as all other married couples, it does not preclude differentiation based on essential biology," decided before *Matter of Brooke S.B. v Elizabeth A.C.C.* (28 NY3d at 27-28)])[11]. As the common-law and statutory presumptions of legitimacy predate the Marriage Equality Act, they will need to be reconsidered.

While a workable rubric has not yet been developed to afford children the same protection regardless of the gender composition of their parents' marriage, and the Legislature has not addressed this dilemma, we believe that it must be true that ***HN4***[⬆] a child born to a same-gender married couple is presumed to be their child and, further, that the presumption of **[*9]** parentage is not defeated solely with proof of the biological fact that, at present, a child cannot be the product of same-gender parents (*see Matter of Maria-Irene D. [Carlos A.—Han Ming T.]*, 153 AD3d at 1205; *Matter of Kelly S. v Farah M.*, 139 AD3d at 100-101, 104-105; *see generally Matter of Brooke S.B. v Elizabeth A.C.C.*, 28

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sex rather than a different sex" (Domestic Relations Law § 10-a [2] [emphases added]). In adopting this Act, the Legislature declared its unambiguous intent that "[s]ame-sex couples should have the same access as others to the protections, responsibilities, rights, obligations and benefits of civil marriage" and that "marriages of same-sex and different-sex couples *be treated equally in all respects under the law*" (L 2011, ch 95, § 2 [emphasis added]). The Legislature has not clarified how the presumption of legitimacy is to be employed or rebutted in the context of either same-gender marriages or informal AID.

[9] A noted commentator has opined that "since the presumption of legitimacy is evidentiary and hence rebuttable, it may be of no value to a same[-]sex couple (at least unless the child was conceived via [AID] in accordance with Domestic Relations Law [§] 73)" (Merril Sobie, 2015 Supp Practice Commentaries, McKinney's Cons Laws of NY, Book 29A, Family Ct Act § 417, 2017 Cum Pocket Part at 100).

[10] Notably, *Matter of Paczkowski v Paczkowski* (*supra*) relied upon *Debra H. v Janice R.* (14 NY3d 576, 930 N.E.2d 184, 904 N.Y.S.2d 263 [2010]), which was later abrogated by *Matter of Brooke S.B. v Elizabeth A.C.C.*, (28 NY3d at 27-28), which held that the non-adoptive partner of a child's birth mother had standing to seek visitation and custody of a child where the couple had agreed to conceive and raise the child together.

[11] One trial court concluded, to the contrary, that because the statutory presumptions of legitimacy predate both the Marriage Equality Act and the increasing availability of artificial insemination, they "only have applicability in opposite-sex marriages as evidenced by the fact that the usual technique to confirm parentage is a genetic test of the putative father which establishes an irrefutable genetic link between the child and the father" (*Wendy G-M. v Erin G-M.*, 45 Misc 3d at 578).

NY3d at 25)[12]. If we were to conclude otherwise, children born to same-gender couples would be denied the benefit of this presumption without a compelling justification. The difficulty is in fashioning the presumption so as to afford the same, and no greater, protections. With that said, we discern no facts in this record on which to conclude that petitioner established, by clear and convincing evidence, that the child is not entitled to the legal status as "the product of the marriage" (*Matter of Beth R. v Ronald S.*, 149 AD3d at 1217). Thus, we find that the presumption was not rebutted. Further, even if the presumption was rebutted by the undisputed fact that petitioner was the sole sperm donor, we find, for reasons to be explained, that the doctrine of equitable estoppel applies to the circumstances here and that it is not in the child's best interests to grant petitioner's request for a paternity test.

Before addressing the issue of equitable estoppel, we note that petitioner's reliance on the parties' noncompliance **[*10]** with Domestic Relations Law § 73 is unavailing. That statutory provision creates an irrebuttable presumption of parentage for a married couple who utilizes *formal* AID performed by medical personnel and meets certain conditions. Domestic Relations Law § 73 states:

"Any child born to a married woman by means of artificial insemination performed by persons duly authorized to practice medicine and with the consent in writing of the woman and her [spouse], shall be deemed the legitimate, birth child of the [spouse] and his [or her] wife for all purposes. The aforesaid written consent shall be executed and acknowledged by both the [spouse] and wife and the physician who performs the technique shall certify that he [or she] had rendered the service" (Domestic Relations Law § 73 [1], [2]).

We have noted that ***HN5***[↑] this statute only "covers one specific situation" by "provid[ing] a mechanism for married couples who utilize AID to have a child with assurances that the child will be, for all purposes, considered the legitimate child of both the [impregnated] woman and her [spouse]" (*Laura WW. v Peter WW.*, 51 AD3d at 214-215). We expressly recognized that this is not the "exclusive means" for a nonbiological parent/spouse to establish parentage of a child born through AID procedures to a married woman (*id.*; *see Matter of Kelly S. v Farah M.*, 139 AD3d at 102). While respondents **[*11]** admittedly cannot benefit from this statutory protection, which they attributed to the prohibitive costs associated with such services and the lack of health insurance coverage for a medical AID procedure, this only leads to the conclusion that this statute does not establish the wife's rights; it does not mean that the wife's rights as a spouse to the mother cannot otherwise be established (*see Laura WW. v Peter WW.*, 51 AD3d at 214). Indeed, we have recognized that, prior to the enactment of Domestic Relations Law § 73, the common-law rule was that "a child born of consensual AID during a valid marriage is a legitimate child entitled to the rights and privileges of a naturally conceived child of the same marriage" (*id.* at 216 [internal quotation marks and citation omitted]). The child here is entitled to that status regardless of the gender of her parents.

We further agree with respondents that it is appropriate to apply the doctrine of equitable estoppel to preclude petitioner from asserting paternity. Generally stated, ***HN6***[↑] the essential "purpose of equitable estoppel is to *preclude a person from asserting a right after having led another to form the reasonable belief that the right would not be asserted*, and loss or prejudice to the other would result if the **[*12]** right were asserted. The law imposes the doctrine as a matter of fairness. Its purpose is to prevent someone from enforcing rights that would work injustice on the person against whom enforcement is sought and who, while justifiably relying on the opposing party's actions, has been misled into a detrimental change of position" (*Matter of Shondel J. v Mark K.*, 7 NY3d at 326 [emphasis added]; *see Matter of Carlos O. v Maria G.*, 149 AD3d at 946; *Matter of Stephen N. v Amanda O.*, 140 AD3d 1223, 1224, 33 N.Y.S.3d 496 [2016]; *Matter of Richard W. v Roberta Y.*, 240 AD2d at 814).

As relevant here, ***HN7***[↑] the doctrine "is a defense in a paternity proceeding which, among other **[**7]** applications, precludes a man from asserting his paternity when he acquiesced in the establishment of a strong parent-child bond between the child and another [person]" (*Matter of John J. v Kayla I.*, 137 AD3d 1500, 1501, 28 N.Y.S.3d 485 [2016] [internal quotation marks, ellipsis and citations omitted]; *see Matter of Stephen N. v Amanda O.*, 140 AD3d at 1224; *see also* Family Ct Act § 522). It is significant that "courts impose equitable estoppel to protect the status interests of a child in an already recognized and operative parent-child relationship" (*Matter of Shondel J. v Mark D.*, 7 NY3d at

[12] It is unclear whether Family Court concluded that the presumption was rebutted here. To the extent that the court may have concluded that it was rebutted based solely on the fact that the child's parents are of the same gender, we cannot agree.

327 [internal quotation marks and citation omitted]; *see Matter of Suffolk County Dept. of Social Servs. v James D.*, 147 AD3d at 1069; *see also Matter of Baby Boy C.*, 84 NY2d 91, 102, 638 N.E.2d 963, 615 N.Y.S.2d 318 n [1994]). While this doctrine is invoked in a variety of situations, "whether it is being used in the offensive posture to enforce rights or the defensive posture to prevent rights from being enforced, [it] is only to be used to protect the best interests of the child" **[*13]** (*Matter of Juanita A. v Kenneth Mark N.*, 15 NY3d at 6; *see Matter of Suffolk County Dept. of Social Servs. v James D.*, 147 AD3d at 1069; *Matter of Tralisa R. v Max S.*, 145 AD3d at 728). For that reason, this dispute "does not involve the equities between [or among] the . . . adults; the case turns exclusively on the best interests of the child" (*Matter of Shondel J. v Mark D.*, 7 NY3d at 330; *accord Matter of Carlos O. v Maria G.*, 149 AD3d at 946).

HN8[↑] The parties asserting equitable estoppel — the mother and the wife — have "the initial burden of establishing a prima facie case sufficient to support that claim" and, "[a]ssuming that burden is met, the burden then shifts to the nonmoving party — here, petitioner — to establish that it would be in the best interests of the child[] to order the genetic marker test" (*Matter of Patrick A. v Rochelle B.*, 135 AD3d 1025, 1026, 23 N.Y.S.3d 660 [2016] [internal quotation marks and citation omitted], *lv dismissed* 27 NY3d 957, 29 N.Y.S.3d 919, 49 N.E.3d 1213 [2016]; *see Matter of Starla D. v Jeremy E.*, 95 AD3d 1605, 1606, 945 N.Y.S.2d 779 [2012], *lv dismissed* 19 NY3d 1015, 976 N.E.2d 239, 951 N.Y.S.2d 711 [2012]). We find that respondents satisfied their initial burden to support invoking this doctrine, and that petitioner failed to satisfy his corresponding burden of establishing that it would be in the child's best interests to order the test. The credible testimony established that, at the time that petitioner voluntarily donated his sperm to respondents, he had engaged in several discussions with them and his partner about donating sperm to enable respondents to have a child together. He unequivocally understood that he was doing so to permit the mother and the **[*14]** wife to be the sole parents of any child conceived, aware that they wanted to raise the child together and planned to marry, as they did prior to the birth of the child. Most significantly, petitioner had no expectation of parentage in any form; indeed, he had expressly disavowed any such parental intention, rights or responsibilities and took steps to preclude respondents from later pursuing him for paternity or child support.

Petitioner's conduct was likewise consistent with that agreement. He was not involved in the child's prenatal care or present at her birth, did not know her birth date, never attended doctor appointments and did not see her for at least one or two months after her birth. He was employed, but never paid child support, and provided no financial support aside from a single cash Christmas gift intended for all of the children in respondents' home and one or two outfits of clothing for the child. By his own admission, he donated sperm as a "humanitarian[]" gesture, to give respondents "the gift of life" and expected only "contact" with the child as a "godparent" by providing her mothers with "a break" or "help." He never signed an acknowledgment of paternity or asked **[*15]** to do so (*see* Family Ct Act § 516-a), and no aspect of his testimony or conduct supports the conclusion that he donated sperm with the expectation that he would have a parental role of any kind in the child's life, and he never had or attempted to assert such a role (*compare Matter of Leon L. v Carole H.*, 210 AD2d 484, 485, 621 N.Y.S.2d 93 [1994]).

By contrast, it was uncontroverted that, like the mother, the wife was in a "recognized and operative parent-child relationship" with the child and had "assum[ed] actual physical and psychological burdens attendant to parenting a newborn" (*Matter of John J. v Kayla I.*, 137 AD3d **[**8]** at 1501-1502 [internal quotation marks and citation omitted]; *see Matter of Carlos O. v Maria G.*, 149 AD3d at 946-947; *Matter of Felix O. v Janette M.*, 89 AD3d 1089, 1090, 934 N.Y.S.2d 424 [2011]; *compare Matter of Beth R. v Ronald S.*, 149 AD3d at 1218; *Matter of John J. v Kayla J.*, 137 AD3d at 1501-1502). The wife was present at the child's birth, gave the child her surname, is recorded as a mother on the child's birth certificate and was listed as a parent for purposes of government benefits. There was no dispute that the wife "played a significant role in raising, nurturing [and] caring for the child" and, to that end, "provided food, clothing and shelter for the child for most of her life" and "otherwise carried out all the traditional responsibilities of a [parent]" (*Matter of Starla D. v Jeremy E.*, 95 AD3d at 1607 [internal quotation marks, brackets and citations omitted]; *see Matter of Carlos O. v Maria G.*, 149 AD3d at 946; *Matter of Richard W. v Roberta Y.*, 240 AD2d at 814; *compare Matter of Gutierrez v Gutierrez-Delgado*, 33 AD3d 1133, 1135, 823 N.Y.S.2d 248 [2006])[13]. As Family Court expressly

[13] As this Court explained in a case involving a putative father seeking a paternity test with respect to a child born to a married woman and her husband in which we determined that equitable estoppel precluded the test, "we have considered all

found **[*16]** and the record unequivocally establishes, it was respondents who "provided all of the parenting, emotional and financial support for the child" (*compare Matter of Patrick A. v Rochelle B.*, 135 AD3d at 1026; *Matter of Starla D. v Jeremy E.*, 95 AD3d at 1606-1607; *Matter of Richard W. v Roberta Y.*, 240 AD2d at 814).

Consequently, the only conclusion that may be reached from the testimony is that petitioner — aware during the mother's entire pregnancy and for over seven months thereafter that he was the probable biological father — "acquiesced in the establishment of a strong parent-child bond between the child and [the wife]" for a protracted period of time (*Matter of John J. v Kayla I.*, 137 AD3d at 1501 [internal quotation marks and citation omitted]; *see Matter of Richard W. v Roberta Y.*, 240 AD2d at 814). At the time that he filed this paternity petition, the child, then over seven months old, was "in an already recognized and operative parent-child relationship" (*Matter of Shondel J. v Mark D.*, 7 NY3d at 327 [internal quotation marks and citation omitted]; *see Matter of Carlos O. v Maria G.*, 149 AD3d at 946-947; *compare Matter of Beth R. v Ronald S.*, 149 AD3d at 1218-1219; *Matter of Patrick A. v Rochelle B.*, 135 AD3d at 1026; *Matter of Starla D. v Jeremy E.*, 95 AD3d at 1606-1607; *Matter of Isaiah A. C. v Faith T.*, 43 AD3d 1048, 1049, 842 N.Y.S.2d 69 [2007]). Having led respondents to reasonably believe that he would not assert — and had no interest in acquiring — any parental rights and was knowingly and voluntarily donating sperm to enable them to parent the child together and exclusively, representations on which respondents justifiably relied in impregnating the mother, it would represent an injustice to the child and her family to permit him to much **[*17]** later change his mind and assert parental rights (*see Matter of* ***[**9]*** *Shondel J. v Mark K.*, 7 NY3d at 326; *Matter of Richard W. v Roberta Y.*, 240 AD2d at 814; *compare Matter of Beth R. v Ronald D.*, 149 AD3d at 1218-1219).[14]

Significantly, invocation of the doctrine of equitable estoppel is warranted here "to protect the status interests of [the] child," who was born to married parents and thereafter lived with them in a family unit (*Matter of John J. v Kayla I.*, 137 AD3d at 1501 [internal quotation marks and citation omitted]; *see Obergefell v Hodges*, 135 S Ct at 2600-2601; *Matter of Carlos O. v Maria G.*, 149 AD3d at 946-947). While the child, now over three years old, was an infant when the paternity proceeding was commenced, we nonetheless find that petitioner's representations in donating sperm combined with his delay in asserting parental rights compel against ordering a test. While young, the child's "image of her family" — consisting of two mothers — would be devastated by an outsider, who merely donated sperm, belatedly asserting parental rights (*Matter of Edward WW. v Diana XX.*, 79 AD3d 1181, 1183, 913 N.Y.S.2d 785 [2010] [internal quotation marks and citation omitted]; *compare Matter of John J. v Kayla I.*, 137 AD3d at 1502; *Matter of Starla D. v Jeremy E.*, 95 AD3d at 1607).

To overcome respondents' prima facie showing, petitioner was required to establish that it would be in the child's best interests to order the tests[15]. This he

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of the actions [the husband] took, both before and after the birth . . . in reliance upon his belief that he was the child's father. Thus, in addition to [his] assumption of the actual physical and psychological burdens attendant to parenting a newborn, and the extent of the parent-child relationship that he forged with the baby after she was born, it is necessary to take into account the time, energy and money he expended to prepare for her arrival, his participation in decision making with regard to her upbringing and, not insignificantly, the fact that he married [his wife, the child's mother,] earlier than he had otherwise planned so as to legitimize the child" (*Matter of Richard W. v Roberta Y.*, 240 AD2d at 814). This analysis applies equally to the facts sub judice.

[14] By parity of reasoning, if the posture of the paternity proceeding were altered, and the mother were seeking a test to establish petitioner's paternity in order to obtain child support from him or to preclude the wife's exercise of parental rights, the presumption would apply and the same conclusion regarding equitable estoppel should obtain (*see Matter of Juanita A. v Kenneth Mark N.*, 15 NY3d at 6; *Matter of Sharon GG. v Duane HH.*, 95 AD2d 466, 467-468, 467 N.Y.S.2d 941 [1983], *affd* 63 NY2d 859, 472 N.E.2d 46, 482 N.Y.S.2d 270 [1984]; *see also Matter of Brooke S.B.v Elizabeth A.C.C.*, 28 NY3d at 28; *Matter of Kelly S. v Farah M.*, 139 AD3d at 104-105; *Matter of Ettore I. v Angela D.*, 127 AD2d 6, 14, 513 N.Y.S.2d 733 [1987] ["It would be incongruous, illogical and unrealistic to conclude that a child would be any less devastated by being forced to accept a stranger as her father merely because the stranger initiated the legal proceeding"]). Likewise, if the wife, having consented to AID, were seeking a test to relieve her of parental rights and obligations, the doctrine of equitable estoppel may well be invoked to protect the child and her operative parental relationship with the wife (*see e.g. Hammack v Hammack*, 291 AD2d 718, 720, 737 N.Y.S.2d 702 [2002]; *see also Laura WW. v Peter WW.*, 51 AD3d at 216-218).

[15] Although Family Court's decision did not clearly make a best interests determination, the record is sufficient to permit this Court doing so (*compare Matter of Mario WW. v Kristin XX.*, 149 AD3d at 1228).

failed to do. ***HN9***[] The analysis traditionally requires consideration of numerous factors, including "the child's interest in knowing the identity of his or her biological **[*18]** father, whether testing may have a traumatic effect on the child, and whether continued uncertainty may have a negative impact on a parent-child relationship in the absence of testing" (*Matter of Mario WW. v Kristin XX.*, 149 AD3d at 1228; *see Matter of Beth R. v Ronald S.*, 149 AD3d at 1218-1219; *Matter of Gutierrez v Gutierrez-* ***[**10]*** *Delgado*, 33 AD3d at 1134; *Matter of Anthony M.*, 271 AD2d 709, 711, 705 N.Y.S.2d 715 [2000]). Consideration is given to whether the child "would suffer irreparable loss of status, destruction of [her] family image, or other harm to [her] physical or emotional well-being if this proceeding were permitted to go forward" (*Matter of Starla D. v Jeremy E.*, 95 AD3d at 1607 [internal quotation marks and citation omitted]). Also relevant are the wife's relationship with the child, trauma to the child attributable to identifying a third person as a parent and the very real disruption to the "stability of the child's existing family" that would result (*Matter of Mario WW. v Kristin XX.*, 149 AD3d at 1229; *see Obergefell v Hodges*, 135 S Ct at 2600-2601; *Matter of Ettore I. v Angela D.*, 127 AD2d at 14-15).

Application of the best interest factors fails to support Family Court's decision to order genetic testing. The testimony at the hearing established that the child had a bonded relationship with both parents, and the fact that they are both mothers does not warrant a finding that the child has an interest in knowing the identity of, or having a legal or familial relationship with, the man who donated sperm that enabled the mother's conception. **[*19]** "To permit petitioner to take over the parental role at this juncture would be unjust and inequitable" (*Matter of Richard W. v Roberta Y.*, 240 AD2d at 814 [citation omitted]). Contrary to Family Court's apparent conclusion, granting the request of a sperm donor for a paternity test would effectively disrupt, if not destroy, this family unit and nullify the child's established relationship with the wife, her other mother. Testing in these circumstances exposes children born into same-gender marriages to instability for no justifiable reason other than to provide a father-figure for children who already have two parents. This would be indefensible, and not warranted by the facts adduced at the hearing. Further, it would undermine the "compelling public policy of protecting children conceived via AID" (*Laura WW. v Peter WW.*, 51 AD3d at 217). While Family Court recognized that testing would be harmful to respondents' marital relationship and to the wife's maternal relationship with the child, and then disregarded that finding, the record does not support doing so. Moreover, we find that the harm to the child's mothers and to the child's relationships with her family cannot be separated from the analysis of the child's best interests. That is, the relational damage within **[*20]** the child's family is relevant to, and supports, our finding that testing is not in the child's best interests (*see Obergefell v Hodges*, 135 S Ct at 2600-2601).

Finally, a new attorney for the child was appointed to represent the child on appeal who, contrary to the position taken by the attorney for the child in Family Court, advocated in favor of petitioner's request for genetic testing, based on events that occurred subsequent to the 2015 hearing and Family Court's determination. At oral argument, this Court was advised that the child has been in foster care for a lengthy period of time since the hearing and that there are reportedly neglect petitions pending against respondents, the details of which were not known to any of the parties' counsel (*compare Matter of John J. v Kayla J.*, 137 AD3d at 1502). These developments are certainly relevant, concerning and appropriately considered. However, we find that the subsequent events, on which we take no position, do not alter our conclusion that respondents established at the hearing that petitioner should be equitably estopped from asserting paternity under the circumstances known to Family Court at the time of the hearing (*compare Matter of Anthony M.*, 271 AD2d at 709-711). Allowing ongoing, successive consideration of subsequent developments and problems within **[*21]** the child's family *after* respondents had already established, at the hearing, that petitioner should be estopped from asserting paternity, should not be permitted. Doing so would continue to invite challenges to the then-established family unit into which the child was born, creating instability and uncertainty.

Egan Jr., J.P., Devine, Clark and Rumsey, JJ., concur.

ORDERED that the amended order is reversed, on the law and the facts, without costs, and motion to dismiss the paternity petition granted.

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Matter of Brooke S.B. v Elizabeth A.C.C.

Court of Appeals of New York

June 2, 2016, Argued; August 30, 2016, Decided

No. 91, No. 92

Reporter
28 N.Y.3d 1 *; 61 N.E.3d 488 **; 39 N.Y.S.3d 89 ***; 2016 N.Y. LEXIS 2668 ****; 2016 NY Slip Op 05903

[1] In the Matter of Brooke S.B., Respondent, v Elizabeth A.C.C., Respondent. R. Thomas Rankin, Esq., Attorney for the Child, Appellant. In the Matter of Estrellita A., Respondent, v Jennifer L.D., Appellant.

Prior History: Appeal, in the first above-entitled proceeding, by permission of the Court of Appeals, from an order of the Appellate Division of the Supreme Court in the Fourth Judicial Department, entered June 19, 2015. The Appellate Division affirmed an order of the Family Court of Chautauqua County (Judith S. Claire, J.), which had dismissed a petition for custody and visitation in a Family Court Act article 6 proceeding.

Appeal, in the second above-entitled proceeding, by permission of the Court of Appeals, from an order of the Appellate Division of the Supreme Court in the Second Judicial Department, entered December 24, 2014. The Appellate Division affirmed an order of the Family Court of Suffolk County (Theresa Whelan, J.), which had, insofar as appealed from, granted a petition to the extent of awarding petitioner visitation in a Family Court Act article 6 proceeding. The appeal to the Appellate Division brought up for review the denial, by that Family Court (op 40 Misc 3d 219, 963 NYS2d 843 [2013]), of respondent's motion to dismiss the petition for lack of standing.

Matter of Estrellita A. v Jennifer L.D., 123 AD3d 1023, 999 NYS2d 504, 2014 N.Y. App. Div. LEXIS 8893 (N.Y. App. Div. 2d Dep't, 2014), affirmed.
Matter of Brooke S.B. v Elizabeth A.C.C., 129 AD3d 1578, 10 NYS3d 380, 2015 N.Y. App. Div. LEXIS 5226 (2015), reversed.

Disposition: Order reversed, without costs, and matter remitted to Family Court, Chautauqua County, for further proceedings in accordance with the opinion herein (For Case No. 91). Order affirmed, without costs (For Case No. 92).

Core Terms

visitation, Domestic, couple, custody, biological, same-sex, best interests of the child, married, partner, marriage, cases, rights, artificial insemination, parties, courts, judicial estoppel, child born, unmarried, conceive, families, adoptive parent, non-biological, heterosexual, child adoption, circumstances, purposes, equitable estoppel, support proceeding, biological mother, motion to dismiss

Case Summary

Overview

HOLDINGS: [1]-The high court reversed Matter of Alison D. v Virginia M. and held that where a partner showed by clear and convincing evidence that the parties agreed to conceive a child and to raise the child together, the non-biological, non-adoptive partner had standing to seek visitation and custody under Domestic Relations Law § 70; therefore, if petitioner one proved by clear and convincing evidence her allegation that a pre-conception agreement existed, the order affirming the dismissal of her action would be reversed; [2]-Petitioner two was properly found to have standing to seek visitation as a "parent" under § 70(a) based on judicial estoppel, as respondent had obtained an order compelling petitioner to pay child support based on her claim that petitioner was a parent to the child and was thus estopped from arguing that petitioner was not a parent for purposes of visitation.

Outcome

The order in case one was reversed and the order in case two was affirmed.

LexisNexis® Headnotes

Evidence > Burdens of Proof > Clear & Convincing Proof

Family Law > Paternity & Surrogacy > Surrogacy > Assisted Reproduction Parentage

Family Law > Child Custody > Custody Awards > Nonparents

HN1[] **Burdens of Proof, Clear & Convincing Proof**

In light of more recently delineated legal principles, the definition of "parent" established by the Court of Appeals of New York in Matter of Alison D. v Virginia M., 572 NE2d 27 (N.Y. 1991), has become unworkable when applied to increasingly varied familial relationships. Accordingly, it overrules Alison D. and holds that where a partner shows by clear and convincing evidence that the parties agreed to conceive a child and to raise the child together, the non-biological, non-adoptive partner has standing to seek visitation and custody under Domestic Relations Law § 70.

Family Law > ... > Custody Awards > Standards > Best Interests of Child

Family Law > Child Custody > Custody Awards

Family Law > Child Custody > Child Custody Procedures

HN2[] **Standards, Best Interests of Child**

See Domestic Relations Law § 70(a).

Family Law > Child Custody

Family Law > Parental Duties & Rights

HN3[] **Family Law, Child Custody**

Only a "parent" may petition for custody or visitation under Domestic Relations Law § 70, yet § 70 does not define that critical term, leaving it to be defined by the courts.

Governments > Courts > Judicial Precedent

HN4[] **Courts, Judicial Precedent**

Under stare decisis, a court's decision on an issue of law should generally bind the court in future cases that present the same issue. The doctrine promotes predictability in the law, engenders reliance on our decisions, encourages judicial restraint and reassures the public that our decisions arise from a continuum of legal principle rather than the personal caprice of the members of the Court of Appeals of New York. But in the rarest of cases, the Court of Appeals may overrule a prior decision if an extraordinary combination of factors undermines the reasoning and practical viability of its prior decision.

Civil Procedure > Preliminary Considerations > Justiciability > Standing

Evidence > Burdens of Proof > Clear & Convincing Proof

Family Law > Paternity & Surrogacy > Surrogacy > Assisted Reproduction Parentage

Family Law > Child Custody > Custody Awards > Nonparents

Family Law > Child Custody > Visitation

HN5[] **Justiciability, Standing**

Where a petitioner proves by clear and convincing evidence that he or she has agreed with the biological parent of a child to conceive and raise the child as co-parents, the petitioner has presented sufficient evidence to achieve standing to seek custody and visitation of the child.

Headnotes/Syllabus

Headnotes

Parent, Child and Family — Custody — Standing of Non-Biological, Non-Adoptive Parent

1. *Matter of Alison D. v Virginia M.* (77 NY2d 651, 572

NE2d 27, 569 NYS2d 586 [1991]), which held that, in an unmarried couple, a partner without a biological or adoptive relation to a child is not the child's "parent" for purposes of standing to seek custody or visitation under the statute, notwithstanding their established relationship with the child, is overruled. In light of more recently delineated legal principles, including conferring parental standing based on equity in the context of adoption and support proceedings and the enactment of same-sex marriage in New York, the narrow definition of "parent" established in *Alison D.* had become unworkable when applied to increasingly varied familial relationships.

Parent, Child and Family — Custody — Standing of Non-Biological, Non-Adoptive Parent

2. Where, in an unmarried couple, a partner without a biological or adoptive relation to a child proves by clear and convincing evidence that he or she agreed with the biological parent of the child to conceive and raise the child as co-parents, the non-biological, non-adoptive partner has standing to seek visitation and custody as the child's "parent" under Domestic Relations Law § 70 (a). Accordingly, in separate Family Court Act article 6 proceedings where each petitioner—the non-biological, non-adoptive partner—alleged that she entered into a pre-conception agreement with the respondent biological parent to conceive and raise a child as co-parents, the allegations, if proved by clear and convincing evidence, were sufficient to establish petitioners' standing to seek custody and visitation under the statute. Because both cases were necessarily decided based on the facts presented, it would be premature to consider adopting a test for situations in which a couple did not enter into a pre-conception agreement. Additionally, the ultimate determination of whether the custody or visitation rights sought by the non-biological, non-adoptive parent should be granted rested in the sound discretion of the court, which determines the best interests of the child.

Parent, Child and Family — Custody — Standing of Non-Biological, Non-Adoptive Parent

3. In a Family Court Act article 6 proceeding brought by the partner in an unmarried couple without a biological or adoptive relation to the other partner's biological child, the Appellate Division order affirming Family Court's dismissal of the petition on constraint of *Matter of Alison D. v Virginia M.* (77 NY2d 651, 572 NE2d 27, 569 NYS2d 586 [1991]) was reversed and the matter remitted to Family Court for further proceedings, as that decision has been overruled and no longer prevents the courts below from determining standing. Where, in an unmarried couple, a partner without a biological or adoptive relation to a child proves by clear and convincing evidence that he or she agreed with the biological parent of the child to conceive and raise the child as co-parents, the non-biological, non-adoptive partner has standing to seek visitation and custody as the child's "parent" under Domestic Relations Law § 70 (a). Accordingly, *Alison D.* no longer poses any obstacle to the consideration by the courts below of standing by equitable estoppel if petitioner proves by clear and convincing evidence her allegation that a pre-conception agreement existed.

Parent, Child and Family — Custody — Standing of Non-Biological, Non-Adoptive Parent

4. In a Family Court Act article 6 proceeding brought by the partner in an unmarried couple who did not have a biological or adoptive relation to the other partner's biological child but had been ordered to pay child support, the courts below correctly resolved the question of standing by recognizing petitioner's standing to seek visitation as a "parent" under Domestic Relations Law § 70 (a) based on judicial estoppel. Respondent had obtained an order in the child support proceeding between the parties based on her successful argument that petitioner was a parent to the child, and was therefore estopped from taking the inconsistent position that petitioner was not, in fact, a parent to the child for purposes of visitation.

Counsel: [**1]** *Warshaw Burstein, LLP*, New York City (*Eric I. Wrubel, Linda Genero Sklaren* and *Alex R. Goldberg* of counsel), and *Goodell & Rankin*, Jamestown (*R. Thomas Rankin* of counsel), for appellant in the first above-entitled proceeding. I. Parentage by estoppel—rejected by *Matter of Alison D. v Virginia M.* (77 NY2d 651, 572 NE2d 27, 569 NYS2d 586 [1991]) and *Debra H. v Janice R.* (14 NY3d 576, 930 NE2d 184, 904 NYS2d 263 [2010])—has been used by New York courts for more than half a century to hold that non-adoptive, non-biological men are parents as a matter of law. (*Matter of Commissioner of Social Servs. v Julio J.*, 20 NY3d 995, 985 NE2d 127, 961 NYS2d 363; *Matter of Shondel J. v Mark D.*, 7 NY3d 320, 853 NE2d 610, 820 NYS2d 199; *Matter of Sharon GG. v Duane HH.*, 63 NY2d 859, 472 NE2d 46, 482 NYS2d 270; *Matter of Luis Hugo O. v Paola O.*, 129 AD3d 976, 12 NYS3d 183; *Matter of Angelo A.R. v Tenisha N.W.*, 108 AD3d 561, 969 NYS2d 109; *Matter of Starla D. v Jeremy E.*, 95 AD3d 1605, 945 NYS2d 779; *Matter of*

Antonio H. v Angelic W., 51 AD3d 1022, 859 NYS2d 670; *Matter of Greg S. v Keri C.*, 38 AD3d 905, 832 NYS2d 652; *Matter of Bruce W.L. v Carol A.P.*, 46 AD3d 1471, 848 NYS2d 493; *Matter of Diana E. v Angel M.*, 20 AD3d 370, 799 NYS2d 484.) II. Equitable estoppel should be extended to custody and visitation proceedings for purposes of establishing standing for parents unrelated to children by biology or adoption. (*Matter of Ettore I. v Angela D.*, 127 AD2d 6, 513 NYS2d 733; *Matter of Sharon GG. v Duane HH.*, 95 AD2d 466, 467 NYS2d 941; *State of New York ex rel. H. v P.*, 90 AD2d 434, 457 NYS2d 488; *Hill v Hill*, 20 AD2d 923, 249 NYS2d 751; *Brite v Brite*, 61 Misc 2d 10, 305 NYS2d 65; *Matter of Anonymous*, 50 AD2d 890, 377 NYS2d 530; *Matter of Tropea v Tropea*, 87 NY2d 727, 665 NE2d 145, 642 NYS2d 575; *Matter of Lincoln v Lincoln*, 24 NY2d 270, 247 NE2d 659, 299 NYS2d 842; *Matter of Juan R. v Necta V.*, 55 AD2d 33, 389 NYS2d 126; *Kramer v Griffith*, 119 AD3d 655, 990 NYS2d 69.) III. The Marriage Equality Act and the decision of the United States Supreme Court in *Obergefell v Hodges* (576 US —, 135 S Ct 2584, 192 L Ed 2d 609 [2015]) obviated the bright-line rule of *Matter of Alison D. v Virginia M.* (77 NY2d 651, 572 NE2d 27, 569 NYS2d 586 [1991]) and *Debra H. v Janice R.* (14 NY3d 576, 930 NE2d 184, 904 NYS2d 263 [2010]), which tied parenthood solely to biology or adoption. (*Hernandez v Robles*, 7 NY3d 338, 855 NE2d 1, 821 NYS2d 770; *Langan v St. Vincent's Hosp. of N.Y.*, 25 AD3d 90, 802 NYS2d 476; *Gonzalez v Green*, 14 Misc 3d 641, 831 NYS2d 856.) IV. Stare decisis is not a bar to overruling the obsolete, unjust precedent of *Matter of Alison D. v Virginia M.* (77 NY2d 651, 572 NE2d 27, 569 NYS2d 586 [1991]). (*People v Bing*, 76 NY2d 331, 558 NE2d 1011, 559 NYS2d 474; *Gallagher v St. Raymond's R. C. Church*, 21 NY2d 554, 236 NE2d 632, 289 NYS2d 401; *Silver v Great Am. Ins. Co.*, 29 NY2d 356, 278 NE2d 619, 328 NYS2d 398; *Gelbman v Gelbman*, 23 NY2d 434, 245 NE2d 192, 297 NYS2d 529; *People v Rudolph*, 21 NY3d 497, 997 NE2d 457, 974 NYS2d 885; *People v Epton*, 19 NY2d 496, 227 NE2d 829, 281 NYS2d 9; *Matter of Lewis*, 25 NY3d 456, 13 NYS3d 323, 34 NE3d 833; *People v Taylor*, 9 NY3d 129, 878 NE2d 969, 848 NYS2d 554; *People v Saunders*, 85 NY2d 339, 648 NE2d 1331, 624 NYS2d 568; *Grace Plaza of Great Neck v Elbaum*, 82 NY2d 10, 623 NE2d 513, 603 NYS2d 386.) V. Petitioner has made out a prima facia case of parentage by estoppel, giving her standing to bring a petition for custody and visitation with the child. (*Cron v Hargro Fabrics*, 91 NY2d 362, 694 NE2d 56, 670 NYS2d 973; *Sanders v Winship*, 57 NY2d 391, 442 NE2d 1231, 456 NYS2d 720; *Morone v Morone*, 50 NY2d 481, 413 NE2d 1154, 429 NYS2d 592; *Underpinning & Found. Constructors v Chase Manhattan Bank, N.A.*, 46 NY2d 459, 386 NE2d 1319, 414 NYS2d 298; *Westhill Exports v Pope*, 12 NY2d 491, 191 NE2d 447, 240 NYS2d 961.)

Susan L. Sommer, Lambda Legal Defense and Education Fund, Inc., New York City, *Blank Rome LLP*, New York City (*Margaret Canby* and *Caroline Krauss-Browne* of counsel), and *Brett M. Figlewski, The LGBT Bar Association of Greater New York*, New York City, for Brooke S.B., respondent in the first above-entitled proceeding. I. This Court should not adhere to outmoded and unworkable precedents that unjustly deny standing to parents like Brooke S.B. (*Matter of Alison D. v Virginia M.*, 77 NY2d 651, 572 NE2d 27, 569 NYS2d 586; *Debra H. v Janice R.*, 14 NY3d 576, 930 NE2d 184, 904 NYS2d 263; *Lawrence v Texas*, 539 US 558, 123 S Ct 2472, 156 L Ed 2d 508; *Bowers v Hardwick*, 478 US 186, 106 S Ct 2841, 92 L Ed 2d 140; *People v Peque*, 22 NY3d 168, 980 NYS2d 280, 3 NE3d 617; *Bing v Thunig*, 2 NY2d 656, 143 NE2d 3, 163 NYS2d 3; *People v Bing*, 76 NY2d 331, 558 NE2d 1011, 559 NYS2d 474; *People v Hobson*, 39 NY2d 479, 348 NE2d 894, 384 NYS2d 419; *Silver v Great Am. Ins. Co.*, 29 NY2d 356, 278 NE2d 619, 328 NYS2d 398; *Gelbman v Gelbman*, 23 NY2d 434, 245 NE2d 192, 297 NYS2d 529.) II. Brooke S.B. is entitled to standing as a parent under both Domestic Relations Law § 70's express terms and common law. (*Eschbach v Eschbach*, 56 NY2d 167, 436 NE2d 1260, 451 NYS2d 658; *Braschi v Stahl Assoc. Co.*, 74 NY2d 201, 543 NE2d 49, 544 NYS2d 784; *Matter of Jacob*, 86 NY2d 651, 660 NE2d 397, 636 NYS2d 716; *Matter of Village of Chestnut Ridge v Howard*, 92 NY2d 718, 708 NE2d 988, 685 NYS2d 915; *Troxel v Granville*, 530 US 57, 120 S Ct 2054, 147 L Ed 2d 49; *Perry-Rogers v Fasano*, 276 AD2d 67, 715 NYS2d 19; *Counihan v Bishop*, 111 AD3d 594, 974 NYS2d 137; *Laura WW. v Peter WW.*, 51 AD3d 211, 856 NYS2d 258; *Matter of H.M. v E.T.*, 14 NY3d 521, 930 NE2d 206, 904 NYS2d 285; *Yonaty v Mincolla*, 97 AD3d 141, 945 NYS2d 774.) III. This Court's rulings recognizing the parental status of a non-biological parent like Brooke S.B. for purposes of child support but not for purposes of custody and visitation are irreconcilable and disserve a child's compelling interest in the emotional support of a second parent. (*Matter of Shondel J. v Mark D.*, 7 NY3d 320, 853 NE2d 610, 820 NYS2d 199; *Matter of Juanita A. v Kenneth Mark N.*, 15 NY3d 1, 930 NE2d 214, 904 NYS2d 293; *Mahoney-Buntzman v Buntzman*, 12 NY3d 415, 909 NE2d 62, 881 NYS2d 369; *Matter of Sharon GG. v Duane HH.*, 95 AD2d 466, 467 NYS2d 941; *Jean Maby*

H. v Joseph H., 246 AD2d 282, 676 NYS2d 677; *Hiross v Hiross*, 224 AD2d 662, 639 NYS2d 70; *Matter of Gilbert A. v Laura A.*, 261 AD2d 886, 689 NYS2d 810; *Matter of Lorie F. v Raymond F.*, 239 AD2d 659, 657 NYS2d 235; *Matter of Boyles v Boyles*, 95 AD2d 95, 466 NYS2d 762; *Matter of Christopher S. v Ann Marie S.*, 173 Misc 2d 824, 662 NYS2d 200.) IV. Inaction by the legislature calls for the courts to address, not ignore, the needs of this child. (*Windsor v United States*, 699 F3d 169; *Bourquin v Cuomo*, 85 NY2d 781, 652 NE2d 171, 628 NYS2d 618; *Clark v Cuomo*, 66 NY2d 185, 486 NE2d 794, 495 NYS2d 936; *Matter of Mashnouk v Miles*, 55 NY2d 80, 432 NE2d 761, 447 NYS2d 889.) V. This Court should adopt standards, as many other states' courts have, recognizing the parental status of a person who, with the consent of a child's biological or adoptive parent, functions as the child's intended second parent. (*Matter of Shondel J. v Mark D.*, 7 NY3d 320, 853 NE2d 610, 820 NYS2d 199; *Matter of Juanita A. v Kenneth Mark N.*, 15 NY3d 1, 930 NE2d 214, 904 NYS2d 293; *Matter of Multari v Sorrell*, 287 AD2d 764, 731 NYS2d 238.) VI. Recognizing the standing of bonded intended parents would enhance, not diminish, certainty and stability for children and their parents. (*Debra H. v Janice R.*, 14 NY3d 576, 930 NE2d 184, 904 NYS2d 263; *Matter of Alison D. v Virginia M.*, 77 NY2d 651, 572 NE2d 27, 569 NYS2d 586; *Matter of Tropea v Tropea*, 87 NY2d 727, 665 NE2d 145, 642 NYS2d 575; *Matter of Bonfiglio v Bonfiglio*, 134 AD2d 426, 521 NYS2d 49; *Stanley v Illinois*, 405 US 645, 92 S Ct 1208, 31 L Ed 2d 551.) VII. Neither the availability of marriage and civil union, nor of second-parent adoption, cures the injustice of refusing standing to Brooke S.B. (*Zablocki v Redhail*, 434 US 374, 98 S Ct 673, 54 L Ed 2d 618; *Godfrey v Spano*, 13 NY3d 358, 920 NE2d 328, 892 NYS2d 272; *M. L. B. v S. L. J.*, 519 US 102, 117 S Ct 555, 136 L Ed 2d 473; *Matter of Sebastian*, 25 Misc 3d 567, 879 NYS2d 677; *Plyler v Doe*, 457 US 202, 102 S Ct 2382, 72 L Ed 2d 786; *Debra H. v Janice R.*, 14 NY3d 576, 930 NE2d 184, 904 NYS2d 263; *Matter of Behrens v Rimland*, 32 AD3d 929, 822 NYS2d 285; *Matter of Janis C. v Christine T.*, 294 AD2d 496, 742 NYS2d 381; *Beth R. v Donna M.*, 19 Misc 3d 724, 853 NYS2d 501.) VIII. Denying M.B. and Brooke S.B. the right to enforce their parent-child relationship violates the New York and U.S. Constitutions. (*Planned Parenthood of Central Mo. v Danforth*, 428 US 52, 96 S Ct 2831, 49 L Ed 2d 788; *Smith v Organization of Foster Families For Equality & Reform*, 431 US 816, 97 S Ct 2094, 53 L Ed 2d 14; *Lehr v Robertson*, 463 US 248, 103 S Ct 2985, 77 L Ed 2d 614; *Michael H. v Gerald D.*, 491 US 110, 109 S Ct 2333, 105 L Ed 2d 91; *Prince v Massachusetts*, 321 US 158, 64 S Ct 438, 88 L Ed 645; *Troxel v Granville*, 530 US 57, 120 S Ct 2054, 147 L Ed 2d 49; *Matter of E.S. v P.D.*, 8 NY3d 150, 863 NE2d 100, 831 NYS2d 96; *Gomez v Perez*, 409 US 535, 93 S Ct 872, 35 L Ed 2d 56; *Weber v Aetna Casualty & Surety Co.*, 406 US 164, 92 S Ct 1400, 31 L Ed 2d 768; *Levy v Louisiana*, 391 US 68, 88 S Ct 1509, 20 L Ed 2d 436.)

Sherry A. Bjork, Frewsburg, for Elizabeth A.C.C., respondent in the first above-entitled proceeding. I. The argument for equitable estoppel is not applicable to this case and should not be extended to putative parents in custody and visitation proceedings concerning children with whom they lack a biological or adoptive relation. (*Matter of A.F. v K.H.*, 121 AD3d 683, 993 NYS2d 370; *Debra H. v Janice R.*, 14 NY3d 576, 930 NE2d 184, 904 NYS2d 263; *Matter of Shondel J. v Mark D.*, 7 NY3d 320, 853 NE2d 610, 820 NYS2d 199; *Nassau Trust Co. v Montrose Concrete Prods. Corp.*, 56 NY2d 175, 436 NE2d 1265, 451 NYS2d 663; *Matter of Palmatier v Dane*, 97 AD3d 864, 948 NYS2d 181; *Matter of Behrens v Rimland*, 32 AD3d 929, 822 NYS2d 285; *Matter of Janis C. v Christine T.*, 294 AD2d 496, 742 NYS2d 381; *Matter of Multari v Sorrell*, 287 AD2d 764, 731 NYS2d 238.) II. The definition of "parent" set forth in *Matter of Alison D. v Virginia M.* (77 NY2d 651, 572 NE2d 27, 569 NYS2d 586 [1991]), is not obsolete in light of the Marriage Equality Act, Domestic Relations Law § 10-a, and the decision of the United States Supreme Court in *Obergefell v Hodges* (576 US —, 135 S Ct 2584, 192 L Ed 2d 609 [2015]), which implicitly recognizes that biology and adoption are no longer the sole means to establish parentage. III. Constitutional due process and equal protection guarantees do not require courts to grant standing to a putative parent to bring a custody and visitation proceeding concerning a child with whom the putative parent lacks a biological or adoptive relation, where the biological or adoptive parent has consented to the formation of a parent-child relationship between the putative parent and the child, and the putative parent has assumed the full panoply of parental functions. IV. Constitutional due process and equal protection guarantees do not give a child the right to maintain a relationship with a person unrelated to the child through biology or adoption, who, with the consent of the child's biological or adoptive parent, has developed a parent-child relationship with the child and who has assumed the full panoply of parental functions. V. A partner of an unmarried parent can be denied standing to seek custody and visitation even where the unmarried parent has consented to the establishment of a parental relationship between the parent's partner and

child; and the partner assumed the obligations of parenthood, resulting in formation of a bonded parental relationship with the child. (*People ex rel. Kropp v Shepsky*, 305 NY 465, 113 NE2d 801; *Matter of Bennett v Jeffreys*, 40 NY2d 543, 356 NE2d 277, 387 NYS2d 821.) VI. *Matter of Alison D. v Virginia M.* (77 NY2d 651, 572 NE2d 27, 569 NYS2d 586 [1991]), approved in dicta in *Debra H. v Janice R.* (14 NY3d 576, 930 NE2d 184, 904 NYS2d 263 [2010]), should be not be overruled by the Court. (*Wendy G-M. v Erin G-M.*, 45 Misc 3d 574, 985 NYS2d 845.)

Quatela, Hargraves & Chimeri, PLLC, Hauppauge (*Christopher J. Chimeri* and *Margaret Schaefler* of counsel), for appellant in the second above-entitled proceeding. A hearing court may not grant visitation to non-parents absent the fit biological parent's consent and respondent lacked standing absent statutory criteria. (*Perry-Rogers v Fasano*, 276 AD2d 67, 715 NYS2d 19; *Meyer v Nebraska*, 262 US 390, 43 S Ct 625, 67 L Ed 1042; *Troxel v Granville*, 530 US 57, 120 S Ct 2054, 147 L Ed 2d 49; *Matter of Darlene T.*, 28 NY2d 391, 271 NE2d 215, 322 NYS2d 231; *Matter of Bennett v Jeffreys*, 40 NY2d 543, 356 NE2d 277, 387 NYS2d 821; *Debra H. v Janice R.*, 14 NY3d 576, 930 NE2d 184, 904 NYS2d 263; *Matter of Alison D. v Virginia M.*, 77 NY2d 651, 572 NE2d 27, 569 NYS2d 586; *Matter of Multari v Sorrell*, 287 AD2d 764, 731 NYS2d 238; *Matter of Palmatier v Dane*, 97 AD3d 864, 948 NYS2d 181; *Matter of A.F. v K.H.*, 121 AD3d 683, 993 NYS2d 370.)

Kramer Levin Naftalis & Frankel LLP, New York City (*Andrew J. Estes* and *Jeffrey S. Trachtman* of counsel), and *Gervase & Mintz P.C.*, Garden City (*Susan G. Mintz* of counsel), for respondent in the second above-entitled proceeding. I. Estrellita A. has standing to seek visitation because she was adjudicated a parent in the support matter at Jennifer L.D.'s request. (*Debra H. v Janice R.*, 14 NY3d 576, 930 NE2d 184, 904 NYS2d 263; *Matter of Alison D. v Virginia M.*, 77 NY2d 651, 572 NE2d 27, 569 NYS2d 586; *Matter of H.M. v E.T.*, 14 NY3d 521, 930 NE2d 206, 904 NYS2d 285; *Perry-Rogers v Fasano*, 276 AD2d 67, 715 NYS2d 19; *Matter of Shondel J. v Mark D.*, 7 NY3d 320, 853 NE2d 610, 820 NYS2d 199; *Counihan v Bishop*, 111 AD3d 594, 974 NYS2d 137; *Troxel v Granville*, 530 US 57, 120 S Ct 2054, 147 L Ed 2d 49; *Meyer v Nebraska*, 262 US 390, 43 S Ct 625, 67 L Ed 1042; *Matter of Tropea v Tropea*, 87 NY2d 727, 665 NE2d 145, 642 NYS2d 575; *Weiss v Weiss*, 52 NY2d 170, 418 NE2d 377, 436 NYS2d 862.) II. The Family Court and the Appellate Division properly applied judicial estoppel to prevent Jennifer L.D. from challenging Estrellita A.'s status as a legal parent. (*Anonymous v Anonymous*, 137 AD2d 739, 524 NYS2d 823; *Ford Motor Credit Co. v Colonial Funding Corp.*, 215 AD2d 435, 626 NYS2d 527; *Matter of Mukuralinda v Kingombe*, 100 AD3d 1431, 954 NYS2d 316; *Mahoney-Buntzman v Buntzman*, 12 NY3d 415, 909 NE2d 62, 881 NYS2d 369; *Crespo v Crespo*, 309 AD2d 727, 765 NYS2d 59; *Perkins v Perkins*, 226 AD2d 610, 641 NYS2d 396; *Matter of A.F. v K.H.*, 121 AD3d 683, 993 NYS2d 370; *Gabrelian v Gabrelian*, 108 AD2d 445, 489 NYS2d 914; *CDR Créances S.A.S. v Cohen*, 23 NY3d 307, 991 NYS2d 519, 15 NE3d 274; *Alvarez v Snyder*, 264 AD2d 27, 702 NYS2d 5.) III. Even if, arguendo, the Family Court decision was inconsistent with *Debra H. v Janice R.* (14 NY3d 576, 930 NE2d 184, 904 NYS2d 263 [2010]) or *Matter of Alison D. v Virginia M.* (77 NY2d 651, 572 NE2d 27, 569 NYS2d 586 [1991]), this Court should modify, abrogate, or overrule those decisions to recognize standing here. (*Matter of Bennett v Jeffreys*, 40 NY2d 543, 356 NE2d 277, 387 NYS2d 821; *Matter of Gilbert A. v Laura A.*, 261 AD2d 886, 689 NYS2d 810; *Telaro v Telaro*, 25 NY2d 433, 255 NE2d 158, 306 NYS2d 920; *Matter of Shondel J. v Mark D.*, 7 NY3d 320, 853 NE2d 610, 820 NYS2d 199; *People v Peque*, 22 NY3d 168, 980 NYS2d 280, 3 NE3d 617; *People v Bing*, 76 NY2d 331, 558 NE2d 1011, 559 NYS2d 474; *Matter of Angelo A.R. v Tenisha N.W.*, 108 AD3d 561, 969 NYS2d 109; *Matter of Bruce W.L. v Carol A.P.*, 46 AD3d 1471, 848 NYS2d 493; *Matter of Enrique G. v Lisbet E.*, 2 AD3d 288, 769 NYS2d 533; *Matter of Lorie F. v Raymond F.*, 239 AD2d 659, 657 NYS2d 235.)

Legal Aid Society of Suffolk County, Inc., Central Islip (*John B. Belmonte* and *Robert C. Mitchell* of counsel), Attorney for the Child, in the second above-entitled proceeding. I. Applying the principle of estoppel against inconsistent positions to determine respondent had standing as a parent to seek custody of or visitation with H.E.A.-D. does not violate the precedents of this honorable Court. (*Matter of Alison D. v Virginia M.*, 77 NY2d 651, 572 NE2d 27, 569 NYS2d 586; *Matter of Shondel J. v Mark D.*, 7 NY3d 320, 853 NE2d 610, 820 NYS2d 199; *Matter of H.M. v E.T.*, 14 NY3d 521, 930 NE2d 206, 904 NYS2d 285; *Debra H. v Janice R.*, 14 NY3d 576, 930 NE2d 184, 904 NYS2d 263; *Matter of Multari v Sorrell*, 287 AD2d 764, 731 NYS2d 238; *Anonymous v Anonymous*, 137 AD2d 739, 524 NYS2d 823; *New Hampshire v Maine*, 532 US 742, 121 S Ct 1808, 149 L Ed 2d 968.) II. If this Court determines that applying the principle of estoppel against inconsistent

positions to determine respondent has standing as a parent to seek custody of or visitation with H.E.A.-D. violates the rule of law in *Matter of Alison D. v Virginia M.* (77 NY2d 651, 572 NE2d 27, 569 NYS2d 586 [1991]) and *Debra H. v Janice R.* (14 NY3d 576, 930 NE2d 184, 904 NYS2d 263 [2010]), then this Court should overrule those cases because they deny the rights of the child without due process of law. (*Matter of Bennett v Jeffreys*, 40 NY2d 543, 356 NE2d 277, 387 NYS2d 821.)

Suzanne B. Goldberg, Columbia Law School, New York City, for Richard J. Adago and others, amici curiae in the first above-entitled proceeding. I. Family law academics overwhelmingly endorse a functional approach to recognizing the legal family. II. Adoption of a functional approach to recognizing parent-child relationships in jurisdictions across the country, including New York, confirms the approach's viability and simplicity. (*People v Damiano*, 87 NY2d 477, 663 NE2d 607, 640 NYS2d 451; *People v Taylor*, 9 NY3d 129, 878 NE2d 969, 848 NYS2d 554; *People v Hobson*, 39 NY2d 479, 348 NE2d 894, 384 NYS2d 419; *People v Bing*, 76 NY2d 331, 558 NE2d 1011, 559 NYS2d 474; *Burnet v Coronado Oil & Gas Co.*, 285 US 393, 52 S Ct 443, 76 L Ed 815, 1932 CB 265, 1932-1 CB 265; *Bing v Thunig*, 2 NY2d 656, 143 NE2d 3, 163 NYS2d 3; *Matter of Shondel J. v Mark D.*, 7 NY3d 320, 853 NE2d 610, 820 NYS2d 199; *Matter of Bennett v Jeffreys*, 40 NY2d 543, 356 NE2d 277, 387 NYS2d 821; *Finlay v Finlay*, 240 NY 429, 148 NE 624; *Debra H. v Janice R.*, 14 NY3d 576, 930 NE2d 184, 904 NYS2d 263.)

Cleary Gottlieb Steen & Hamilton LLP, New York City (*Carmine D. Boccuzzi* and *Daniel D. Queen* of counsel), for National Association of Social Workers and others, amici curiae in the first and second above-entitled proceedings. I. Parent-child attachment relationships are critical to a child's healthy development. II. The absence of a biological or adoptive connection between Brooke S.B. and Estrellita A. and the children did not affect the development of attachment relationships. III. Terminating the children's attachment relationships with Brooke S.B. and Estrellita A. would result in emotional harm to the children. IV. The children's health and welfare are best served by nurturing and maintaining their relationships with Brooke S.B. and Estrellita A. as well as their biological mothers.

Ropes & Gray LLP, New York City (*Christopher Thomas Brown* and *Michael Y. Jo* of counsel), *Ropes & Gray LLP*, Boston, Massachusetts (*Kathryn E. Wilhelm* and *Joshua D. Rovenger* of counsel), *National Center for Lesbian Rights*, San Francisco, California, *American Civil Liberties Union*, New York City, *New York Civil Liberties Union*, New York City, and *New York City Gay and Lesbian Anti-Violence Project*, New York City, for National Center for Lesbian Rights and others, amici curiae in the first above-entitled proceeding. I. New York lags behind other states by denying unmarried non-biological parents standing to protect their relationships with their children. (*Laura WW. v Peter WW.*, 51 AD3d 211, 856 NYS2d 258.) II. Recognizing the standing of unmarried non-biological parents to seek custody or visitation rights would not violate the constitutional rights of biological parents. III. Granting unmarried non-biological parents the right to seek custody and visitation is necessary to protect the rights of such parents and their children under the United States Constitution. (*Lehr v Robertson*, 463 US 248, 103 S Ct 2985, 77 L Ed 2d 614; *Matter of Robert O. v Russell K.*, 80 NY2d 254, 604 NE2d 99, 590 NYS2d 37; *Smith v Organization of Foster Families For Equality & Reform*, 431 US 816, 97 S Ct 2094, 53 L Ed 2d 14; *Michael H. v Gerald D.*, 491 US 110, 109 S Ct 2333, 105 L Ed 2d 91; *M. L. B. v S. L. J.*, 519 US 102, 117 S Ct 555, 136 L Ed 2d 473; *Zablocki v Redhail*, 434 US 374, 98 S Ct 673, 54 L Ed 2d 618; *Shapiro v Thompson*, 394 US 618, 89 S Ct 1322, 22 L Ed 2d 600; *Little v Streater*, 452 US 1, 101 S Ct 2202, 68 L Ed 2d 627; *Stanley v Illinois*, 405 US 645, 92 S Ct 1208, 31 L Ed 2d 551; *Planned Parenthood of Central Mo. v Danforth*, 428 US 52, 96 S Ct 2831, 49 L Ed 2d 788.)

Ropes & Gray LLP, New York City (*Christopher Thomas Brown* and *Michael Y. Jo* of counsel), *Ropes & Gray LLP*, Boston, Massachusetts (*Kathryn E. Wilhelm* and *Joshua D. Rovenger* of counsel), *National Center for Lesbian Rights,* San Francisco, California, *American Civil Liberties Union*, New York City, and *New York City Gay and Lesbian Anti-Violence Project*, New York City, for National Center for Lesbian Rights and others, amici curiae in the second above-entitled proceeding. In this case, both the Family Court and the Second Department correctly found that Estrellita A. is a parent to her child and is therefore responsible for child support and entitled to visitation. (*Matter of H.M. v E.T.*, 14 NY3d 521, 930 NE2d 206, 904 NYS2d 285.)

Latham & Watkins LLP, New York City (*Virginia F. Tent*, *Grant F. Wahlquist* and *Katelyn M. Beaudette* of

counsel), for Association of the Bar of the City of New York and others, amici curiae in the first above-entitled proceeding. I. The current interpretation of Domestic Relations Law § 70 under *Matter of Alison D. v Virginia M.* (77 NY2d 651, 572 NE2d 27, 569 NYS2d 586 [1991]) and its progeny harms parents like Brooke S.B. and children like M.B. (*People ex rel. Glendening v Glendening*, 259 App Div 384, 19 NYS2d 693; *Debra H. v Janice R.*, 14 NY3d 576, 930 NE2d 184, 904 NYS2d 263; *People ex rel. Spreckels v deRuyter*, 150 Misc 323, 269 NYS 100; *Ullman v Ullman*, 151 App Div 419, 135 NYS 1080; *Linda R. v Richard E.*, 162 AD2d 48, 561 NYS2d 29; *People ex rel. Watts v Watts*, 77 Misc 2d 178, 350 NYS2d 285; *Troxel v Granville*, 530 US 57, 120 S Ct 2054, 147 L Ed 2d 49.) II. *Matter of Alison D. v Virginia M.* (77 NY2d 651, 572 NE2d 27, 569 NYS2d 586 [1991]) and its progeny violate the constitutional rights of LGBT parents and their children. (*Stanley v Illinois*, 405 US 645, 92 S Ct 1208, 31 L Ed 2d 551; *Meyer v Nebraska*, 262 US 390, 43 S Ct 625, 67 L Ed 1042; *Planned Parenthood of Central Mo. v Danforth*, 428 US 52, 96 S Ct 2831, 49 L Ed 2d 788; *Troxel v Granville*, 530 US 57, 120 S Ct 2054, 147 L Ed 2d 49; *Smith v Organization of Foster Families For Equality & Reform*, 431 US 816, 97 S Ct 2094, 53 L Ed 2d 14; *Lehr v Robertson*, 463 US 248, 103 S Ct 2985, 77 L Ed 2d 614; *Windsor v United States*, 699 F3d 169; *Matter of C.M. v C.H.*, 6 Misc 3d 361, 789 NYS2d 393; *Matter of Gilbert A. v Laura A.*, 261 AD2d 886, 689 NYS2d 810; *Matter of Christopher S. v Ann Marie S.*, 173 Misc 2d 824, 662 NYS2d 200.) III. Equity demands that Brooke S.B., and those like her, be recognized as parents. (*Nassau Trust Co. v Montrose Concrete Prods. Corp.*, 56 NY2d 175, 436 NE2d 1265, 451 NYS2d 663; *Metropolitan Life Ins. Co. v Childs Co.*, 230 NY 285, 130 NE 295; *Triple Cities Constr. Co. v Maryland Cas. Co.*, 4 NY2d 443, 151 NE2d 856, 176 NYS2d 292; *Romano v Metropolitan Life Ins. Co.*, 271 NY 288, 2 NE2d 661; *Rothschild v Title Guar. & Trust Co.*, 204 NY 458, 97 NE 879; *White v La Due & Fitch, Inc.*, 303 NY 122, 100 NE2d 167; *Matter of Sandfort v Sandfort*, 278 App Div 331, 105 NYS2d 343; *Finlay v Finlay*, 240 NY 429, 148 NE 624; *Matter of Rich v Kaminsky*, 254 App Div 6, 3 NYS2d 689; *Matter of Shondel J. v Mark D.*, 7 NY3d 320, 853 NE2d 610, 820 NYS2d 199.) IV. The *In re Custody of H.S.H.-K.* (193 Wis 2d 649, 533 NW2d 419 [1995]) test provides a model for assessing the claims of parents like Brooke S.B. (*Debra H. v Janice R.*, 14 NY3d 576, 930 NE2d 184, 904 NYS2d 263; *Kujek v Goldman*, 150 NY 176, 44 NE 773, 4 NY Ann Cas 11; *Matter of Molinari v Tuthill*, 59 AD3d 722, 875 NYS2d 495; *Matter of Shreve v Shreve*, 229 AD2d 1005, 645 NYS2d 198.)

Latham & Watkins LLP, New York City (*Virginia F. Tent*, *Grant F. Wahlquist* and *Katelyn M. Beaudette* of counsel), for Association of the Bar of the City of New York and others, amici curiae in the second above-entitled proceeding. I. *Matter of Alison D. v Virginia M.* (77 NY2d 651, 572 NE2d 27, 569 NYS2d 586 [1991]) adopted an unconstitutional and unnecessarily restrictive definition of "parent." (*People ex rel. Glendening v Glendening*, 259 App Div 384, 19 NYS2d 693; *People ex rel. Spreckels v deRuyter*, 150 Misc 323, 269 NYS 100; *Troxel v Granville*, 530 US 57, 120 S Ct 2054, 147 L Ed 2d 49.) II. Equity demands that Estrellita A. be recognized as a parent. (*White v La Due & Fitch, Inc.*, 303 NY 122, 100 NE2d 167; *Matter of Sandfort v Sandfort*, 278 App Div 331, 105 NYS2d 343; *Finlay v Finlay*, 240 NY 429, 148 NE 624; *Matter of Rich v Kaminsky*, 254 App Div 6, 3 NYS2d 689; *Matter of Shondel J. v Mark D.*, 7 NY3d 320, 853 NE2d 610, 820 NYS2d 199; *Anonymous v Anonymous*, 137 AD2d 739, 524 NYS2d 823; *Davis v Citibank, N.A.*, 116 AD3d 819, 984 NYS2d 388; *Matter of Mukuralinda v Kingombe*, 100 AD3d 1431, 954 NYS2d 316; *Mahoney-Buntzman v Buntzman*, 12 NY3d 415, 909 NE2d 62, 881 NYS2d 369; *Debra H. v Janice R.*, 14 NY3d 576, 930 NE2d 184, 904 NYS2d 263.) III. The *In re Custody of H.S.H.-K.* (193 Wis 2d 649, 533 NW2d 419 [1995]) test provides a model for assessing the claims of parents like Estrellita A.

David P. Miranda, New York State Bar Association, Albany, and *Paul, Weiss, Rifkind, Wharton & Garrison, LLP*, New York City (*Roberta A. Kaplan* and *Nila M. Merola* of counsel), for New York State Bar Association, amicus curiae in the first above-entitled proceeding. I. The Court is not bound by past precedent that is manifestly unjust. (*Silver v Great Am. Ins. Co.*, 29 NY2d 356, 278 NE2d 619, 328 NYS2d 398; *Bing v Thunig*, 2 NY2d 656, 143 NE2d 3, 163 NYS2d 3; *Payne v Tennessee*, 501 US 808, 111 S Ct 2597, 115 L Ed 2d 720; *Helvering v Hallock*, 309 US 106, 60 S Ct 444, 84 L Ed 604, 1940-1 CB 223; *People v Hobson*, 39 NY2d 479, 348 NE2d 894, 384 NYS2d 419; *Moragne v States Marine Lines, Inc.*, 398 US 375, 90 S Ct 1772, 26 L Ed 2d 339; *People v Rudolph*, 21 NY3d 497, 997 NE2d 457, 974 NYS2d 885; *People v Epton*, 19 NY2d 496, 227 NE2d 829, 281 NYS2d 9; *Woods v Lancet*, 303 NY 349, 102 NE2d 691; *Funk v United States*, 290 US 371, 54 S Ct 212, 78 L Ed 369.) II. *Matter of Alison D. v Virginia M.* (77 NY2d 651, 572 NE2d 27, 569 NYS2d 586 [1991]) is outmoded and should be overturned. (*Troxel v Granville*, 530 US 57, 120 S Ct 2054, 147 L Ed

2d 49; *Braschi v Stahl Assoc. Co.*, 74 NY2d 201, 543 NE2d 49, 544 NYS2d 784; *Matter of Jacob*, 86 NY2d 651, 660 NE2d 397, 636 NYS2d 716; *Counihan v Bishop*, 111 AD3d 594, 974 NYS2d 137; *Wendy G-M. v Erin G-M.*, 45 Misc 3d 574, 985 NYS2d 845; *Matter of Leora F. v Sofia D.*, 167 Misc 2d 840, 635 NYS2d 418; *Anonymous v Anonymous*, 20 AD3d 333, 797 NYS2d 754; *Matter of Multari v Sorrell*, 287 AD2d 764, 731 NYS2d 238; *Beth R. v Donna M.*, 19 Misc 3d 724, 853 NYS2d 501; *Matter of C.M. v C.H.*, 6 Misc 3d 361, 789 NYS2d 393.) III. *Matter of Alison D. v Virginia M.* (77 NY2d 651, 572 NE2d 27, 569 NYS2d 586 [1991]) "bright-line rule" creates more uncertainty and has been rejected by other states. (*Debra H. v Janice R.*, 14 NY3d 576, 930 NE2d 184, 904 NYS2d 263.) IV. Application of *Matter of Alison D. v Virginia M.* (77 NY2d 651, 572 NE2d 27, 569 NYS2d 586 [1991]) is increasingly untenable and illogical. (*Matter of Shondel J. v Mark D.*, 7 NY3d 320, 853 NE2d 610, 820 NYS2d 199; *Matter of H.M. v E.T.*, 14 NY3d 521, 930 NE2d 206, 904 NYS2d 285; *Kalechman v Drew Auto Rental*, 33 NY2d 397, 308 NE2d 886, 353 NYS2d 414; *Anonymous v Anonymous*, 20 AD3d 333, 797 NYS2d 754; *Matter of Janis C. v Christine T.*, 294 AD2d 496, 742 NYS2d 381; *Matter of Cindy P. v Danny P.*, 206 AD2d 615, 614 NYS2d 479; *Matter of Gilbert A. v Laura A.*, 261 AD2d 886, 689 NYS2d 810; *Jean Maby H. v Joseph H.*, 246 AD2d 282, 676 NYS2d 677; *Matter of Christopher S. v Ann Marie S.*, 173 Misc 2d 824, 662 NYS2d 200; *Moragne v States Marine Lines, Inc.*, 398 US 375, 90 S Ct 1772, 26 L Ed 2d 339.)

Loeb & Loeb, LLP, New York City (*Eugene R. Licker* of counsel), for American Academy of Adoption Attorneys and others, amici curiae in the first above-entitled proceeding. I. This Court's decisions regarding standing under Domestic Relations Law § 70 affect significant numbers of couples conceiving children through assisted reproductive technology. (*Matter of Alison D. v Virginia M.*, 77 NY2d 651, 572 NE2d 27, 569 NYS2d 586.) II. A child's emotional bond to their "parent" is not dependent on whether they are genetically related to that person. (*Matter of Jacob*, 86 NY2d 651, 660 NE2d 397, 636 NYS2d 716.) III. Adoption is not a proper litmus test for parenthood for purposes of Domestic Relations Law § 70. (*Matter of Jacob*, 86 NY2d 651, 660 NE2d 397, 636 NYS2d 716; *T.V. v New York State Dept. of Health*, 88 AD3d 290, 929 NYS2d 139; *Matter of Sebastian*, 25 Misc 3d 567, 879 NYS2d 677; *Matter of J.J.*, 44 Misc 3d 297, 984 NYS2d 841; *Itskov v New York Fertility Inst., Inc.*, 11 Misc 3d 68, 813 NYS2d 844.) IV. This Court should apply a facts and circumstances test to determine parenthood. (*Debra H. v Janice R.*, 14 NY3d 576, 930 NE2d 184, 904 NYS2d 263; *Matter of Suarez v Williams*, 26 NY3d 440, 23 NYS3d 617, 44 NE3d 915; *Matter of Granger v Misercola*, 21 NY3d 86, 990 NE2d 110, 967 NYS2d 872; *Matter of Tropea v Tropea*, 87 NY2d 727, 665 NE2d 145, 642 NYS2d 575; *Matter of Shondel J. v Mark D.*, 7 NY3d 320, 853 NE2d 610, 820 NYS2d 199; *Matter of Chaya S. v Frederick Herbert L.*, 90 NY2d 389, 683 NE2d 746, 660 NYS2d 840; *People ex rel. Sibley v Sheppard*, 54 NY2d 320, 429 NE2d 1049, 445 NYS2d 420; *Matter of Corey L v Martin L*, 45 NY2d 383, 380 NE2d 266, 408 NYS2d 439; *Matter of Boden v Boden*, 42 NY2d 210, 366 NE2d 791, 397 NYS2d 701; *Matter of Stuart*, 280 NY 245, 20 NE2d 741.)

Cahill Gordon & Reindel LLP, New York City (*S. Penny Windle, Kerry Burns, Cindy Hong* and *Rebecca Salk* of counsel), for Sanctuary for Families and others, amici curiae in the first above-entitled proceeding. I. Applying a functional standard to determine parental standing would have unintended negative consequences for parents and children. (*Prince v Massachusetts*, 321 US 158, 64 S Ct 438, 88 L Ed 645; *Troxel v Granville*, 530 US 57, 120 S Ct 2054, 147 L Ed 2d 49; *Stanley v Illinois*, 405 US 645, 92 S Ct 1208, 31 L Ed 2d 551; *Pierce v Society of Sisters*, 268 US 510, 45 S Ct 571, 69 L Ed 1070; *Meyer v Nebraska*, 262 US 390, 43 S Ct 625, 67 L Ed 1042; *Debra H. v Janice R.*, 14 NY3d 576, 930 NE2d 184, 904 NYS2d 263; *Matter of Alison D. v Virginia M.*, 77 NY2d 651, 572 NE2d 27, 569 NYS2d 586; *Matter of Fountain v Fountain*, 83 AD2d 694, 442 NYS2d 604; *Caban v Mohammed*, 441 US 380, 99 S Ct 1760, 60 L Ed 2d 297.) II. The Court should recognize the parental rights of Brooke S.B. without adopting a dangerous functional standard to determine parental standing in New York. (*Matter of Jacob*, 86 NY2d 651, 660 NE2d 397, 636 NYS2d 716; *Debra H. v Janice R.*, 14 NY3d 576, 930 NE2d 184, 904 NYS2d 263; *Matter of Bennett v Jeffreys*, 40 NY2d 543, 356 NE2d 277, 387 NYS2d 821; *Jean Maby H. v Joseph H.*, 246 AD2d 282, 676 NYS2d 677; *Matter of Shondel J. v Mark D.*, 7 NY3d 320, 853 NE2d 610, 820 NYS2d 199.)

Fried, Frank, Harris, Shriver & Jacobson LLP, New York City (*Jennifer L. Colyer, Justin J. Santolli* and *Naz E. Wehrli* of counsel), for Lawyers for Children and another, amici curiae in the first and second above-entitled proceedings. I. The continuity of the parent-child attachment bond is critical to a child's development and well-being and should be preserved in the child's best

interest. (*Matter of Tropea v Tropea*, 87 NY2d 727, 665 NE2d 145, 642 NYS2d 575.) II. *Matter of Alison D. v Virginia M.* (77 NY2d 651, 572 NE2d 27, 569 NYS2d 586 [1991]) has imposed unjustifiable hardships on children and should be overturned. (*Matter of C.M. v C.H.*, 6 Misc 3d 361, 789 NYS2d 393; *Beth R. v Donna M.*, 19 Misc 3d 724, 853 NYS2d 501; *Anonymous v Anonymous*, 20 AD3d 333, 797 NYS2d 754; *Matter of Multari v Sorrell*, 287 AD2d 764, 731 NYS2d 238.) III. New York courts have the necessary competence to adjudicate claims of non-biological, intended parenthood. (*Matter of Juanita A. v Kenneth Mark N.*, 15 NY3d 1, 930 NE2d 214, 904 NYS2d 293; *Matter of Shondel J. v Mark D.*, 7 NY3d 320, 853 NE2d 610, 820 NYS2d 199; *Matter of Baby Boy C.*, 84 NY2d 91, 638 NE2d 963, 615 NYS2d 318; *Matter of H.M. v E.T.*, 76 AD3d 528, 906 NYS2d 85, 14 NY3d 521, 930 NE2d 206, 904 NYS2d 285; *Jean Maby H. v Joseph H.*, 246 AD2d 282, 676 NYS2d 677; *Matter of Christopher S. v Ann Marie S.*, 173 Misc 2d 824, 662 NYS2d 200; *Matter of Christian N. v Shante Jovan B.*, 132 AD3d 470, 18 NYS3d 368.) IV. The availability of second-parent adoption or the right for same-sex couples to marry does not adequately protect children. (*Debra H. v Janice R.*, 14 NY3d 576, 930 NE2d 184, 904 NYS2d 263.)

Judges: Opinion by Judge Abdus-Salaam. Chief Judge DiFiore and Judges Rivera, Stein and Garcia concur. Judge Pigott concurs in a separate concurring opinion. Judge Fahey took no part (For Case No. 91). Opinion by Judge Abdus-Salaam. Chief Judge DiFiore and Judges Rivera, Stein and Garcia concur. Judge Pigott concurs in a separate concurring opinion. Judge Fahey took no part **[****2]** (For Case No. 92).

Opinion by: ABDUS-SALAAM

Opinion

[*91] [**490] [*13]** Abdus-Salaam, J.

These two cases call upon us to assess the continued vitality of the rule promulgated in *Matter of Alison D. v Virginia M.* (77 NY2d 651, 572 NE2d 27, 569 NYS2d 586 [1991])—namely that, in an unmarried couple, a partner without a biological or adoptive relation to a child is not that child's "parent" for purposes of standing to seek custody or visitation under Domestic Relations Law § 70 (a), notwithstanding their "established relationship with the child" **[*14]** (77 NY2d at 655). Petitioners in these cases, who similarly lack any biological or adoptive connection to the subject children, argue that they should have standing to seek custody and visitation pursuant to Domestic Relations Law § 70 (a). We agree that,***HN1***[] in light of more recently delineated legal principles, the definition of "parent" established by this Court 25 years ago in *Alison D.* has become unworkable when applied to increasingly varied familial relationships. Accordingly, today, we overrule *Alison D.* and hold that where a partner shows by clear and convincing evidence that the parties agreed to conceive a child and to raise the child together, the non-biological, non-adoptive partner has standing to seek visitation and custody under Domestic Relations Law § 70.

I.

Matter of Brooke S.B. v Elizabeth A.C.C.

Petitioner and respondent entered into a relationship in 2006 and, one **[****3]** year later, announced their engagement.[1] At the time, however, this was a purely symbolic gesture; same-sex couples could not legally marry in New York. Petitioner and respondent lacked the resources to travel to another jurisdiction to enter into a legal arrangement comparable to marriage, and it was then unclear whether New York would recognize an out-of-state same-sex union.

[*92] [**491]** Shortly thereafter, the couple jointly decided to have a child and agreed that respondent would carry the child. In 2008, respondent became pregnant through artificial insemination. During respondent's pregnancy, petitioner regularly attended prenatal doctor's appointments, remained involved in respondent's care, and joined respondent in the emergency **[3]** room when she had a complication during the pregnancy. Respondent went into labor in June 2009. Petitioner stayed by her side and, when the subject child, a baby boy, was born, petitioner cut the umbilical cord. The couple gave the **[****4]** child petitioner's last name.

The parties continued to live together with the child and raised him jointly, sharing in all major parental responsibilities. Petitioner stayed at home with the child for a year while respondent returned to work. The child referred to petitioner as "Mama B."

[1] The parties in both cases before us dispute the relevant facts. Given the procedural posture of these cases, our summary of the facts is derived from petitioners' allegations in court filings and relevant decisions of the courts below.

[*15] In 2010, the parties ended their relationship. Initially, respondent permitted petitioner regular visits with the child. In late 2012, however, petitioner's relationship with respondent deteriorated and, in or about July 2013, respondent effectively terminated petitioner's contact with the child.

Subsequently, petitioner commenced this proceeding seeking joint custody of the child and regular visitation. Family Court appointed an attorney for the child. That attorney determined that the child's best interests would be served by allowing regular visitation with petitioner.

Respondent moved to dismiss the petition, asserting that petitioner lacked standing to seek visitation or custody under Domestic Relations Law § 70 as interpreted in *Alison D.* because, in the absence of a biological or adoptive connection to the child, petitioner was not a "parent" within the meaning of the statute. Petitioner and the attorney for the child opposed **[****5]** the motion, contending that, in light of the legislature's enactment of the Marriage Equality Act (*see* L 2011, ch 95; Domestic Relations Law § 10-a) and other changes in the law, *Alison D.* should no longer be followed. They further argued that petitioner's long-standing parental relationship with the child conferred standing to seek custody and visitation under principles of equitable estoppel.

After hearing argument on the motion, Family Court dismissed the petition. While commenting on the "heartbreaking" nature of the case, Family Court noted that petitioner did not adopt the child and therefore granted respondent's motion to dismiss on constraint of *Alison D*. The attorney for the child appealed.[2]

The Appellate Division unanimously affirmed (*see* 129 AD3d 1578, 1578-1579, 10 NYS3d 380 [4th Dept 2015]). The Court concluded that, because petitioner had not married respondent, had not adopted the child, and had no biological relationship to the child, *Alison D.* prohibited Family Court from ruling that petitioner had standing to seek custody or visitation (*see id.* at 1579). We granted the attorney for the child leave to appeal (*see* 26 NY3d 901, 17 NYS3d 81, 38 NE3d 827 [2015]).

[4] *Matter of Estrellita A. v Jennifer **[****6]** L.D.*

Petitioner and respondent entered into a relationship in 2003 and moved in together later that year. In 2007, petitioner and **[*16]** respondent registered as domestic partners, and thereafter, they agreed to have a **[**492]** **[***93]** child. The couple jointly decided that respondent would bear the child and that the donor should share petitioner's ethnicity. In February 2008, respondent became pregnant through artificial insemination. During the pregnancy, petitioner attended medical appointments with respondent. In November 2008, respondent gave birth to a baby girl. Petitioner cut the umbilical cord. The couple agreed that the child should call respondent "Mommy" and petitioner "Mama."

The child resided with the couple in their home and, over the next three years, the parties shared a complete range of parental responsibilities. However, in May 2012, petitioner and respondent ended their relationship, and petitioner moved out in September 2012. Afterward, petitioner continued to have contact with the child.

In October 2012, respondent commenced a proceeding in Family Court seeking child support from petitioner. Petitioner denied liability. While the support case was pending, petitioner filed a petition in **[****7]** Family Court that, as later amended, sought visitation with the child. The court appointed an attorney for the child.

After a hearing, Family Court granted respondent's child support petition and remanded the matter to a support magistrate to determine petitioner's support obligation. The court held that "the uncontroverted facts establish[ed]" that petitioner was "a parent" to the child and, as such, "chargeable with the support of the child." Petitioner then amended her visitation petition to indicate that she "ha[d] been adjudicated the parent" of the child and therefore was a legal parent for visitation purposes.

Thereafter, respondent moved to dismiss the visitation petition on the ground that petitioner did not have standing to seek custody or visitation under Domestic Relations Law § 70 as interpreted in *Alison D*. The attorney for the child supported visitation and opposed respondent's motion to dismiss. Petitioner also opposed respondent's motion to dismiss, asserting that *Alison D.* and our decision in *Debra H. v Janice R.* (14 NY3d 576, 930 NE2d 184, 904 NYS2d 263 [2010]) did not foreclose a finding of standing based on judicial estoppel, as the prior judgment in the support proceeding determined that petitioner was a legal parent to the subject child. Respondent contended that the prerequisites **[****8]** for judicial estoppel had not been met.

[2] Petitioner appealed but, citing her financial condition, proceeded without an attorney. Her appeal was subsequently dismissed.

[*17] Family Court denied respondent's motion to dismiss the visitation petition (*see* 40 Misc 3d 219, 219-225, 963 NYS2d 843 [Fam Ct, Suffolk County 2013]). Citing *Alison D.* and *Debra H.*, the court acknowledged that petitioner did not have standing to petition for visitation based on equitable estoppel or her general status as a de facto parent (*see id.* at 225). However, given respondent's successful support petition, the court concluded that the doctrine of judicial estoppel conferred standing on petitioner to request visitation with the child (*see id.* at 225). The court distinguished **[5]** *Alison D.* and *Debra H.*, reasoning that, in those cases, the Court "did not address the situation . . . where one party has asserted inconsistent positions" (*id*.). Here, in light of respondent's initial claim that petitioner was the child's legal parent in the support proceeding, the court "ma[de] a finding that respondent [wa]s judicially estopped from asserting that petitioner [wa]s not a parent based upon her sworn petition and testimony in a prior court proceeding where she took a different position because her interest in that case was different" (*id*.). Respondent filed an interlocutory appeal, **[**493]** **[***94]** which was dismissed by the Appellate Division.

Subsequently, Family Court **[****9]** held a hearing on the petition. The court found that petitioner's regular visitation and consultation on matters of import with respect to the child would serve the child's best interests. Respondent appealed.

Family Court's order was unanimously affirmed (*see* 123 AD3d 1023, 1023-1027, 999 NYS2d 504 [2d Dept 2014]). The Appellate Division determined that, while Domestic Relations Law § 70, as interpreted in *Alison D.*, confers standing to seek custody or visitation only on a biological or adoptive parent, *Alison D.* does not preclude recognition of standing based upon the doctrine of judicial estoppel. Under that doctrine, the Court found, "a party who assumes a certain position in a prior legal proceeding and secures a favorable judgment therein is precluded from assuming a contrary position in another action simply because his or her interests have changed" (*id.* at 1026 [internal quotation marks and citations omitted]). The Appellate Division agreed with Family Court that the requirements of judicial estoppel had been met: respondent's position in the support proceeding was inconsistent with her position in the visitation proceeding; respondent had won a favorable judgment based on her earlier position; and allowing respondent to maintain an inconsistent position in the visitation **[****10]** proceeding would prejudice petitioner (*see id.* at 1026). Accordingly, the **[*18]** Appellate Division concluded that respondent was judicially estopped from denying petitioner's standing as a "parent" of the child within the meaning of Domestic Relations Law § 70 (*see id.* at 1026-1027). We granted respondent leave to appeal (*see* 26 NY3d 901, 17 NYS3d 81, 38 NE3d 827 [2015]).

II.

Domestic Relations Law § 70 provides:

> ***HN2***[] "Where a minor child is residing within this state, *either parent* may apply to the supreme court for a writ of habeas corpus to have such minor child brought before such court; and on the return thereof, the court, on due consideration, may award the natural guardianship, charge and custody of such child to either parent for such time, under such regulations and restrictions, and with such provisions and directions, as the case may require, and may at any time thereafter vacate or modify such order. In all cases there shall be no prima facie right to the custody of the child in either parent, but the court shall determine solely what is for the *best interest of the child, and what will best promote its welfare and happiness*, and make award accordingly" (Domestic Relations Law § 70 [a] [emphases added]).

HN3[] Only a "parent" may petition for custody or visitation under Domestic Relations Law § 70, yet the statute does not define that critical term, leaving it to be defined **[****11]** by the courts.[3]

In *Alison D.* (77 NY2d 651, 572 NE2d 27, 569 NYS2d 586), we supplied a definition. In that case, Alison D. and Virginia M. were in a long-term relationship and decided to have a child (*see Alison D.*, 77 NY2d at 655). They agreed that Virginia M. would carry the baby and that they would jointly raise the child, sharing parenting responsibilities (*see id*.). After the **[**494]** **[***95]** child was born, Alison D. acted as a parent in all major respects, providing financial, emotional and practical support (*see id*.). Even after the couple ended their relationship and moved out of their shared home, Alison D. continued to regularly visit the child until he was about six years old, at which point Virginia M. terminated contact between them (*see id*.).

[*19] Alison D. petitioned for visitation pursuant to

[3] We note that by the use of the term "either," the plain language of Domestic Relations Law § 70 clearly limits a child to two parents, and no more than two, at any given time.

Domestic Relations Law § 70 (*see id.* at 656). In support of the petition, Alison D. argued that, although Virginia M. was concededly a fit parent, Alison D. nonetheless had standing to seek visitation with the child (*see id*.). The lower courts dismissed Alison D.'s petition for lack of standing, ruling that only a biological parent—and not a de facto parent—is a **[****12]** legal "parent" with standing to seek visitation under Domestic Relations Law § 70 (*see id.*; *see also Matter of Alison D. v Virginia M.*, 155 AD2d 11, 13-16, 552 NYS2d 321 [2d Dept 1990]).

We affirmed the lower courts' dismissal of Alison D.'s petition for lack of standing (*see Alison D.*, 77 NY2d at 655, 657). We decided that the word "parent" in Domestic Relations Law § 70 should be interpreted to preclude standing for a de facto parent who, under a theory of equitable estoppel, might otherwise be recognized as the child's parent for visitation purposes (*see id.* at 656-657). Specifically, we held that "a biological stranger to a child who is properly in the custody of his biological mother" has no "standing to seek visitation with the child under Domestic Relations Law § 70" (*id.* at 654-655).

We rested our determination principally on the need to preserve the rights of biological parents (*see id.* at 656-657). Specifically, we reasoned that, "[t]raditionally, in this State it is the child's mother and father who, assuming fitness, have the right to the care and custody of their child" (*id.* at 656). We therefore determined that the statute should not be read to permit a de facto parent to seek visitation of a child in a manner that "would necessarily impair the parents' right to custody and control" (*id.* at 656-657).

Additionally, we suggested that, because the legislature expressly allowed certain **[6]** non-parents—namely, grandparents and siblings—to seek custody **[****13]** or visitation (*see* Domestic Relations Law §§ 71-72), it must have intended to exclude de facto parents or parents by estoppel (*see Alison D.*, 77 NY2d at 657). And so, because Alison D. had no biological or adoptive connection to the subject child, she had no standing to seek visitation and "no right to petition the court to displace the choice made by this fit parent in deciding what is in the child's best interests" (*id*.).

Judge Kaye dissented on the ground that a person who "stands in loco parentis" should have standing to seek visitation under Domestic Relations Law § 70 (*see id.* at 657-662 **[*20]** [Kaye, J., dissenting]). Observing that the Court's decision would "fall[ ] hardest" on the millions of children raised in nontraditional families—including families headed by same-sex couples, unmarried opposite-sex couples, and stepparents—the dissent argued that the majority had "turn[ed] its back on a tradition of reading section 70 so as to promote the welfare of the children" (*id.* at 658-660). The dissent asserted that, because Domestic Relations Law § 70 did not define "parent" **[**495]** —and **[***96]** because the statute made express reference to the "best interest of the child"—the Court was free to craft a definition that accommodated the welfare of the child (*id*.). According to the dissent, well-established principles of equity—namely, "Supreme Court's **[****14]** equitable powers that complement" Domestic Relations Law § 70—supplied jurisdiction to act out of "concern for the welfare of the child" (*id.* at 660; *see Matter of Bachman v Mejias*, 1 NY2d 575, 581, 136 NE2d 866, 154 NYS2d 903 [1956]; *Finlay v Finlay*, 240 NY 429, 433-434, 148 NE 624 [1925]; *Langerman v Langerman*, 303 NY 465, 471, 104 NE2d 857 [1952]).

At the same time, Judge Kaye in her dissent recognized that

> "there must be some limitation on who can petition for visitation. Domestic Relations Law § 70 specifies that the person must be the child's 'parent,' and the law additionally recognizes certain rights of biological and legal parents. . . .
>
> "It should be required that the relationship with the child came into being with the consent of the biological or legal parent" (*Alison D.*, 77 NY2d at 661-662 [Kaye, J., dissenting] [citations omitted]).

The dissent also noted that a properly constituted test should likely include other factors as well, to ensure that all relevant interests are protected (*see id.* at 661-662 [Kaye, J., dissenting]). Judge Kaye further stated in the dissent that she would have remanded *Alison D.* so that the lower court could engage in a two-part inquiry: first, to determine whether Alison D. stood "in loco parentis" under whatever test the Court devised; and then, "if so, whether it is in the child's best interest to allow her the visitation rights she claims" (*id.* at 662).

In 1991, same-sex partners could not marry in this state. Nor could a biological parent's **[****15]** unmarried partner adopt the child. As a result, a partner in a same-sex relationship not biologically related to a child was entirely precluded from obtaining standing to seek custody or visitation of that child under our definition of "parent" supplied in *Alison D.*

[*21] Four years later, in *Matter of Jacob* (86 NY2d 651, 660 NE2d 397, 636 NYS2d 716 [1995]), we had occasion to decide whether "the unmarried partner of a child's biological mother, whether heterosexual or **[7]** homosexual, who is raising the child together with the biological parent, can become the child's second parent by means of adoption" (*id.* at 656). We held that the adoptions sought in *Matter of Jacob*—"one by an unmarried heterosexual couple, the other by the lesbian partner of the child's mother"—were "fully consistent with the adoption statute" (*id.*). We reasoned that, while the adoption statute "must be strictly construed," our "primary loyalty must be to the statute's legislative purpose—the child's best interest" (*id.* at 657-658). The outcome in *Matter of Jacob* was to confer standing to seek custody or visitation upon unmarried, non-biological partners—including a partner in a same-sex relationship—who adopted the child, even under our restrictive definition of "parent" set forth in *Alison D.* (*id.* at 659). **[****16]**

Thereafter, in *Matter of Shondel J. v Mark D.* (7 NY3d 320, 853 NE2d 610, 820 NYS2d 199 [2006]), we applied a similar analysis, holding that a "man who has mistakenly represented himself as a child's father may be estopped from denying paternity, and made to pay child support, **[**496]** **[***97]** when the child justifiably relied on the man's representation of paternity, to the child's detriment" (*id.* at 324). We based our decision on "the best interests of the child," emphasizing "[t]he potential damage to a child's psyche caused by suddenly ending established parental support" (*id.* at 324, 330).[4]

Despite these intervening decisions that sought a means to take into account the best interests of the child in adoption and support proceedings, we declined to revisit *Alison D.* when confronted with a nearly identical situation almost 20 years later. *Debra H.*, as did *Alison D.*, involved an unmarried same-sex couple. Petitioner alleged that they agreed to have a child, and to that end, Janice R. was artificially inseminated **[****17]** and bore the child. Debra H. never adopted the child. After the couple ended their relationship, Debra H. petitioned for custody and visitation (*Debra H.*, 14 NY3d at 586-588). We declined to expand the definition of "parent" for purposes of Domestic Relations Law § 70, **[*22]** noting that "*Alison D.*, in conjunction with second-parent adoption, creates a bright-line rule that promotes certainty in the wake of domestic breakups" (*id.* at 593).

Nonetheless, in *Debra H.*, we arrived at a different result than in *Alison D*. Ultimately, we invoked the common-law doctrine of comity to rule that, because the couple had entered into a civil union in Vermont prior to the child's birth—and because the union afforded Debra H. parental status under Vermont law—her parental status should be recognized under **[8]** New York law as well (*see id.* at 598-601). Seeing no obstacle in New York's public policy or comity doctrine to the recognition of the non-biological mother's standing, we declared that "New York will recognize parentage created by a civil union in Vermont," thereby granting standing to Debra H. to petition for custody and visitation of the subject child (*id.* at 600-601).

In a separate discussion, we also "reaffirm[ed] our holding in *Alison D.*" (*id.* at 589). We acknowledged the apparent tension in our decision to **[****18]** authorize parentage by estoppel in the support context (*see Shondel J.*, 7 NY3d 320, 853 NE2d 610, 820 NYS2d 199) and yet deny it in the visitation and custody context (*see Alison D.*, 77 NY2d 651, 572 NE2d 27, 569 NYS2d 586), but we decided that this incongruity did not fatally undermine *Alison D.* (*see Debra H.*, 14 NY3d at 592-593).

Chief Judge Lippman and Judge Ciparick concurred in the result, agreeing with the majority's comity analysis but asserting that *Alison D.* should be overruled (*see id.* at 606-609 [Ciparick, J., concurring]). This concurrence asserted that *Alison D.* had indeed caused the widespread harm to children predicted by Judge Kaye's dissent (*see id.* at 606-607). Noting the inconsistency between *Alison D.* and the Court's ruling in *Shondel J.*, the concurrence concluded that "[s]upport obligations flow from parental rights; the duty to support and the rights **[**497]** **[***98]** of parentage go hand in hand and it is nonsensical to treat the two things as severable" (*id.* at 607). According to the concurrence, Supreme Court had "inherent equity powers and authority pursuant to Domestic Relations Law § 70 to determine who is a parent and what will serve the child's best interests" (*id.* at 609). Echoing the dissent in *Alison D.*, and "taking into consideration the social changes" that occurred since that decision, the concurrence called for a "flexible, multi-factored" approach to determine

[4] Furthermore, in *Matter of H.M. v E.T.* (14 NY3d 521, 930 NE2d 206, 904 NYS2d 285 [2010]), for purposes of child support proceedings, we construed Family Ct Act § 413 (1) (a) in a manner consistent with principles of equitable estoppel by interpreting the term "parents" to include a biological parent's former same-sex partner, notwithstanding the lack of a biological or adoptive connection to the child (*H.M.*, 14 NY3d at 526-527).

whether **[****19]** a parental relationship had been established (*id.* at 608).

A separate concurrence by Judge Smith in that case acknowledged the same social changes and proposed that, in the interest **[*23]** of insuring that "each child begins life with two parents," an appropriate test would focus on whether "a child is conceived through [artificial insemination] by one member of a same-sex couple living together, with the knowledge and consent of the other" (*id.* at 611-612). Judge Smith observed that "[e]ach of these couples made a commitment to bring a child into a two-parent family, and it is unfair to the children to let the commitment go unenforced" (*id*. at 611).

III.

We must now decide whether, as respondents claim, the doctrine of stare decisis warrants retention of the rule established in *Alison D.* ***HN4***[] Under stare decisis, a court's decision on an issue of law should generally bind the court in future cases that present the same issue (*see People v Rodriguez*, 25 NY3d 238, 243, 10 NYS3d 495, 32 NE3d 930 [2015]; *People v Taylor*, 9 NY3d 129, 148-149, 878 NE2d 969, 848 NYS2d 554 [2007]). The doctrine "promotes predictability in the law, engenders reliance on our decisions, encourages judicial restraint and reassures the public that our decisions arise from a continuum of legal principle rather than the personal caprice of the members of this Court" (**[9] [****20]** *People v Peque*, 22 NY3d 168, 194, 980 NYS2d 280, 3 NE3d 617 [2013]). But in the rarest of cases, we may overrule a prior decision if an extraordinary combination of factors undermines the reasoning and practical viability of our prior decision (*see People v Rudolph*, 21 NY3d 497, 500-503, 997 NE2d 457, 974 NYS2d 885 [2013]; *see id.* at 505-507 [Graffeo, J., concurring]; *People v Reome*, 15 NY3d 188, 191-195, 933 NE2d 186, 906 NYS2d 788 [2010]; *People v Feingold*, 7 NY3d 288, 291-296, 852 NE2d 1163, 819 NYS2d 691 [2006]).

Long before our decision in *Alison D.*, New York courts invoked their equitable powers to ensure that matters of custody, visitation and support were resolved in a manner that served the best interests of the child (*see Finlay*, 240 NY at 433; *Wilcox v Wilcox*, 14 NY 575, 578-579 [1856]; *see generally Guardian Loan Co. v Early*, 47 NY2d 515, 520, 392 NE2d 1240, 419 NYS2d 56 [1979]; *People ex rel. Lemon v Supreme Ct. of State of N.Y.*, 245 NY 24, 28, 156 NE 84 [1927]; *De Coppet v Cone*, 199 NY 56, 63, 92 NE 411 [1910]). Consistent with these broad equitable powers, our courts have historically exercised their "inherent equity powers and authority" in order to determine "who is a parent and what will serve a child's best interests" (*Debra H.*, 14 NY3d at 609 [Ciparick, J., concurring]; *see also* NY Const, art VI, § 7 [a]).

Domestic Relations Law § 70 evolved in harmony with these equitable practices. **[**498]** **[***99]** The statute expanded in scope from a law narrowly conferring standing in custody and visitation matters **[*24]** upon a legally separated, resident "husband and wife" pair (L 1909, ch 19) to a broader measure granting standing to "either parent" without regard to separation (L 1964, ch 564). The legislature made many of these changes to conform to the courts' preexisting equitable practices (*see* L 1964, ch 564, § 1; Mem of Joint Legis **[****21]** Comm on Matrimonial and Family Laws, Bill Jacket, L 1964, ch 564 at 6). Tellingly, the statute has never mentioned, much less purported to limit, the court's equitable powers, and even after its original enactment, courts continued to employ principles of equity to grant custody, visitation or related extra-statutory relief (*see People ex rel. Meredith v Meredith*, 272 App Div 79, 82-90, 69 NYS2d 462 [2d Dept 1947], *affd* 297 NY 692, 77 NE2d 8 [1947]; *Matter of Rich v Kaminsky*, 254 App Div 6, 7-9, 3 NYS2d 689 [1st Dept 1938]; *cf. Langerman*, 303 NY at 471-472; *Finlay*, 240 NY at 430-434).

Departing from this tradition of invoking equity, in *Alison D.*, we narrowly defined the term "parent," thereby foreclosing "all inquiry into the child's best interest" in custody and visitation cases involving parental figures who lacked biological or adoptive ties to the child (*Alison D.*, 77 NY2d at 659 [Kaye, J., dissenting]). And, in the years that followed, lower courts applying *Alison D.* were "forced to . . . permanently sever strongly formed bonds between children and adults with whom they have parental relationships" (*Debra H.*, 14 NY3d at 606 [Ciparick, J., concurring]). By "limiting their opportunity to maintain bonds that may be crucial to their development," the rule of *Alison D.* has "fall[en] hardest on the children" (*Alison D.*, 77 NY2d at 658 [Kaye, J., dissenting]).

As a result, in the 25 years since *Alison D.* was decided, this Court has gone to great lengths to escape the inequitable results dictated by a **[****22]** needlessly narrow interpretation of **[10]** the term "parent." Now, we find ourselves in a legal landscape wherein a non-biological, non-adoptive "parent" may be estopped from disclaiming parentage and made to pay child support in a filiation proceeding (*Shondel J.*, 7 NY3d 320, 853

NE2d 610, 820 NYS2d 199), yet denied standing to seek custody or visitation (*Alison D.*, 77 NY2d at 655). By creating a disparity in the support and custody contexts, *Alison D.* has created an inconsistency in the rights and obligations attendant to parenthood. Moreover, *Alison D.*'s foundational premise of heterosexual parenting and nonrecognition of same-sex couples is unsustainable, particularly in light of the enactment of same-sex marriage in New York State, and the United States Supreme Court's holding in **[*25]** *Obergefell v Hodges* (576 US __, 135 S Ct 2584, 192 L Ed 2d 609 [2015]), which noted that the right to marry provides benefits not only for same-sex couples, but also the children being raised by those couples.

Under the current legal framework, which emphasizes biology, it is impossible—without marriage or adoption—for both former partners of a same-sex couple to have standing, as only one can be biologically related to the child (*see Alison D.*, 77 NY2d at 656). By contrast, where both partners in a heterosexual couple are biologically related to the child, both former partners **[****23]** will have standing regardless of marriage or adoption. It is this context that informs the Court's determination of a proper test for standing that ensures **[**499] [***100]** equality for same-sex parents and provides the opportunity for their children to have the love and support of two committed parents.

The Supreme Court has emphasized the stigma suffered by the "hundreds of thousands of children [who] are presently being raised by [same-sex] couples" (*Obergefell*, 576 US at ___, 135 S Ct at 2600-2601). By "fixing biology as the key to visitation rights" (*Alison D.*, 77 NY2d at 657-658 [Kaye, J., dissenting]), the rule of *Alison D.* has inflicted disproportionate hardship on the growing number of nontraditional families across our state. At the time *Alison D.* was decided, estimates suggested that "more than 15.5 million children [did] not live with two biological parents, and that as many as 8 to 10 million children are born into families with a gay or lesbian parent" (*id.*). Demographic changes in the past 25 years have further transformed the elusive concept of the "average American family" (*Troxel v Granville*, 530 US 57, 63-64, 120 S Ct 2054, 147 L Ed 2d 49 [2000]); recent census statistics reflect the large number of same-sex couples residing in New York, and that many of New York's same-sex couples are raising children who are related to only one **[****24]** partner by birth or adoption (*see* Gary J. Gates & Abigail M. Cooke, The Williams Institute, *New York Census Snapshot: 2010* at 1-3).

Relatedly, legal commentators have taken issue with *Alison D.* for its negative impact on children. A growing body of social science reveals the trauma children suffer as a result of separation from a primary attachment figure—such as a de facto parent—regardless of that figure's biological or adoptive ties to the children (*see* Amanda Barfield, Note, *The Intersection of Same-Sex and Stepparent Visitation*, 23 JL & Pol'y 257, 259-260 [2014]; Ayelet Blecher-Prigat, *Rethinking Visitation: From a Parental to a Relational Right*, 16 Duke J Gender L & Pol'y 1, 7 **[*26]** [2009]; Suzanne B. Goldberg, *Family Law Cases as Law Reform Litigation: Unrecognized Parents and the Story of Alison D. v Virginia M.*, 17 Colum J Gender & L 307 [2008]; Mary Ellen Gill, Note, *Third Party Visitation in New York: Why the Current Standing Statute Is Failing Our Families*, 56 Syracuse L Rev 481, 488-489 [2006]; Joseph G. Arsenault, Comment, *"Family" but not "Parent": The Same-Sex Coupling Jurisprudence of the New York Court of Appeals*, 58 Alb L Rev 813, 834, 836 [1995]; *see also* brief for National Association of Social Workers as amicus curiae at 13-17 [collecting articles]).

We must, however, protect the substantial and fundamental right of biological or adoptive parents to control the upbringing of their children (*see Alison D.*, 77 NY2d at 656-657; *Troxel v Granville*, 530 US 57, 65, 120 S Ct 2054, 147 L Ed 2d 49 [2000]). For certainly, "the interest of parents in the care, **[****25]** custody, and control of their children . . . is perhaps the oldest of the fundamental liberty interests," and any infringement on that right "comes with an obvious cost" (*Troxel*, 530 US at 64-65). But here we do not consider whether to allow a third party to contest or infringe on those rights; rather, the issue is who qualifies as a "parent" with coequal rights. Nevertheless, the fundamental nature of those rights mandates caution in expanding the definition of that term and makes the element of consent of the biological or adoptive parent critical.

[1] While "parents and families have fundamental liberty interests in preserving" intimate family-like bonds, "so, too, do children have these interests" (*Troxel*, 530 US at 88-89 [Stevens, J., **[**500] [***101]** dissenting]), which must also inform the definition of "parent," a term so central to the life of a child. The "bright-line" rule of *Alison D.* promotes the laudable goals of certainty and predictability in the wake of domestic disruption (*Debra H.*, 14 NY3d at 593-594). But bright lines cast a harsh light on any injustice and, as predicted by Judge Kaye, there is little doubt by whom that injustice has been most finely felt and most finely perceived (*see Alison D.*, 77 NY2d at 658 [Kaye, J., dissenting]). We will no longer

engage in the "deft legal maneuvering" **[****26]** necessary to read fairness into an overly-restrictive definition of "parent" that sets too high a bar for reaching a child's best interest and does not take into account equitable principles (*see Debra H.*, 14 NY3d at 606-608 [Ciparick, J., concurring]). Accordingly, we overrule *Alison D.*

[*27] IV.

Our holding that Domestic Relations Law § 70 permits a non-biological, non-adoptive parent to achieve standing to petition for custody and visitation requires us to specify the limited circumstances in which such a person has standing as a "parent" under Domestic Relations Law § 70 (*see Alison D.*, 77 NY2d at 661 [Kaye, J., dissenting]; *Troxel*, 530 US at 67). Because of the fundamental rights to which biological and adoptive parents are undeniably entitled, any encroachment on the rights of such parents and, especially, any test to expand who is a parent, must be, as Judge Kaye acknowledged in her dissent in *Alison D.*, appropriately narrow.

Petitioners and some of the amici urge that we endorse a functional test for **[11]** standing, which has been employed in other jurisdictions that recognize parentage by estoppel in the custody and/or visitation context (*see In re Custody of H.S.H-K.*, 193 Wis 2d 649, 694-695, 533 NW2d 419, 435-436 [1995] [visitation only]; *see also Conover v Conover*, 448 Md 548, 576-577, 141 A3d 31, 47-48, 2016 Md. LEXIS 433, 2016 WL 3633062, *14 [2016] [collecting cases from other jurisdictions that have adopted the functional test in contexts of custody or visitation]). The functional test **[****27]** considers a variety of factors, many of which relate to the post-birth relationship between the putative parent and the child. Amicus Sanctuary for Families proposes a different test that hinges on whether petitioner can prove, by clear and convincing evidence, that a couple "jointly planned and explicitly agreed to the conception of a child with the intention of raising the child as co-parents" (brief for Sanctuary for Families as amicus curiae at 39).

Although the parties and amici disagree as to what test should be applied, they generally urge us to adopt a test that will apply in determining standing as a parent for all non-biological, non-adoptive, non-marital "parents" who are raising children. We reject the premise that we must now declare that one test would be appropriate for all situations, or that the proffered tests are the only options that should be considered.

[2] Petitioners in the two cases before us have alleged that the parties entered into a pre-conception agreement to conceive and raise a child as co-parents. We hold that these allegations, if proved by clear and convincing evidence, are sufficient to establish standing. Because we necessarily decide these cases based on the facts presented **[****28]** to us, it would be premature for us to consider adopting a test for situations in which a couple **[*28]** did not enter into a pre-conception agreement. Accordingly, we do not now decide whether, in a case where a biological or adoptive parent consented to **[**501]** **[***102]** the creation of a parent-like relationship between his or her partner and child after conception, the partner can establish standing to seek visitation and custody.

Inasmuch as the conception test applies here, we do not opine on the proper test, if any, to be applied in situations in which a couple has not entered into a pre-conception agreement. We simply conclude that,***HN5***[ ] where a petitioner proves by clear and convincing evidence that he or she has agreed with the biological parent of the child to conceive and raise the child as co-parents, the petitioner has presented sufficient evidence to achieve standing to seek custody and visitation of the child. Whether a partner without such an agreement can establish standing and, if so, what factors a petitioner must establish to achieve standing based on equitable estoppel are matters left for another day, upon a different record.

Additionally, we stress that this decision addresses only the ability **[****29]** of a person to establish standing as a parent to petition for custody or visitation; the ultimate determination of whether those rights shall be granted rests in the sound discretion of the court, which will determine the best interests of the child.

V.

We conclude that a person who is not a biological or adoptive parent may obtain **[12]** standing to petition for custody or visitation under Domestic Relations Law § 70 (a) in accordance with the test outlined above.

[3] In *Brooke S.B.*, our decision in *Alison D.* prevented the courts below from determining standing because the petitioner was not the biological or adoptive parent of the child. That decision no longer poses any obstacle to those courts' consideration of standing by equitable estoppel here, if Brooke S.B. proves by clear and convincing evidence her allegation that a pre-conception agreement existed. Accordingly, in *Brooke S.B.*, the order of the Appellate Division should be reversed,

without costs, and the matter remitted to Family Court for further proceedings in accordance with this opinion.

[4] In *Estrellita A.*, the courts below correctly resolved the question of standing by recognizing petitioner's standing based on judicial estoppel. In the child support proceeding, respondent **[*29] [****30]** obtained an order compelling petitioner to pay child support based on her successful argument that petitioner was a parent to the child. Respondent was therefore estopped from taking the inconsistent position that petitioner was not, in fact, a parent to the child for purposes of visitation. Under the circumstances presented here, Family Court properly invoked the doctrine of judicial estoppel to recognize petitioner's standing to seek visitation as a "parent" under Domestic Relations Law § 70 (a). Accordingly, in *Estrellita A.*, the order of the Appellate Division should be affirmed, without costs.

Concur by: PIGOTT

Concur

Pigott, J. (concurring). While I agree with the application of judicial estoppel in *Matter of Estrellita A. v Jennifer L.D.*, and that the Appellate Division's decision in *Matter of Brooke S.B. v Elizabeth A.C.C.* should be reversed and the case remitted to Supreme Court for a hearing, I cannot join the majority's opinion overruling *Matter of Alison D. v Virginia M.* (77 NY2d 651, 572 NE2d 27, 569 NYS2d 586 [1991]). The definition of "parent" that we applied in that case was consistent with the legislative history of Domestic Relations Law § 70 and the common law, and despite several opportunities to do so, the legislature has never altered our conclusion. Rather than craft a new definition to achieve a result the **[**502] [***103]** majority perceives as more just, I would retain the rule that **[****31]** parental status under New York law derives from marriage, biology or adoption and decide *Brooke S.B.* on the basis of extraordinary circumstances. As we have said before, "any change in the meaning of 'parent' under our law should come by way of legislative enactment rather than judicial revamping of precedent" (*Debra H. v Janice R.*, 14 NY3d 576, 596, 930 NE2d 184, 904 NYS2d 263 [2010]).

It has long been the rule in this State that, absent extraordinary circumstances, only parents have the right to seek custody or visitation of a minor child (*see* Domestic Relations Law § 70 [a] ["Where a minor child is residing within this state, either parent may apply to the . . . court for a writ of habeas corpus to have such minor child brought before such court; and on the return thereof, the court . . . may award the natural guardianship, charge and custody of such child to either parent"]). The legislature has not seen the need to define that term, and in the absence of a statutory definition, our Court has consistently interpreted it in the most obvious and **[13]** colloquial sense to mean a child's natural parents or parents by adoption (*see e.g. People ex rel. Portnoy v Strasser*, 303 NY 539, 542, 104 NE2d 895 [1952] ["No court can, for any but the gravest reasons, transfer a child from its **[*30]** natural parent to any other person"]; *People ex rel. Kropp v Shepsky*, 305 NY 465, 470, 113 NE2d 801 [1953]; *see also* Domestic Relations Law § 110 [defining adoption as a legal act **[****32]** whereby an adult acquires the rights and responsibilities of a parent with respect to the adoptee]). Thus, in *Matter of Ronald FF. v Cindy GG.*, we held that a man who lacked biological or adoptive ties to a child born out of wedlock could not interfere with a fit biological mother's right to determine who may associate with her child because he was not a "parent" within the meaning of Domestic Relations Law § 70 (70 NY2d 141, 142, 511 NE2d 75, 517 NYS2d 932 [1987]).

We applied the same rule to a same-sex couple in *Matter of Alison D. v Virginia M.*, holding that a biological stranger to a child who neither adopted the child nor married the child's biological mother before the child's birth lacked standing to seek visitation (77 NY2d 651, 656-657, 572 NE2d 27, 569 NYS2d 586 [1991]). The petitioner in that case conceded she was not the child's "parent" within the meaning of Domestic Relations Law § 70 but argued that her relationship with the child, as a *nonparent*, entitled her to seek visitation over the objection of the child's indisputably fit biological mother. Framed in those terms, the answer was easy: the petitioner's concession that she was not a parent of the child, coupled with the statutory language in Domestic Relations Law § 70 "giv[ing] *parents* the right to bring proceedings to ensure their proper exercise of [a child's] care, custody and control," deprived the petitioner of standing to seek visitation **[****33]** (*id.* at 657).

Notwithstanding the fact that it may be "beneficial to a child to have continued contact with a nonparent" in some cases (*id.*), we declined to expand the word "parent" in section 70 to include individuals like the petitioner who were admittedly nonparents but who had developed a close relationship with the child. Our reasoning was that, where the legislature had intended to allow other categories of persons to seek visitation, it

had expressly conferred standing on those individuals and given courts the power to determine whether an award of visitation would be in the child's best interest (*see id.*). Specifically, the legislature had previously provided that "[w]here circumstances show that conditions exist which equity would see fit to **[**503] [***104]** intervene," a brother, sister or grandparent of a child may petition to have such child brought before the court to "make such directions as the best interest of the child may require, for visitation rights for such brother or sister [or grandparent or grandparents] in respect to such child" **[*31]** (Domestic Relations Law §§ 71, 72 [1]). The legislature had also codified the common-law marital presumption of legitimacy for children conceived by artificial reproduction, so that any **[****34]** child born to a married woman by means of artificial insemination was deemed the legitimate, birth child of both spouses (*see* Domestic Relations Law § 73 [1]). In the absence of further legislative action defining the term "parent" or giving other nonparents the right to petition for visitation, we determined that a non-biological, non-adoptive parent who had not **[14]** married the child's biological mother lacked standing under the law (77 NY2d at 657).

Our Court reaffirmed *Alison D.*'s core holding just six years ago in *Debra H. v Janice R.* (14 NY3d 576, 930 NE2d 184, 904 NYS2d 263 [2010]). Confronting many of the same arguments petitioners raise in these appeals, we rejected the impulse to judicially enlarge the term "parent" beyond marriage, biology or adoption. We observed that in the nearly 20 years that had passed since our decision in *Alison D.*, other states had *legislatively* expanded the class of individuals who may seek custody and/or visitation of a child (*see id.* at 596-597, citing Ind Code Ann §§ 31-17-2-8.5, 31-9-2-35.5; Colo Rev Stat Ann § 14-10-123; Tex Fam Code Ann § 102.003 [a] [9]; Minn Stat Ann § 257C.08 [4]; DC Code Ann § 16-831.01 [1]; Or Rev Stat Ann § 109.119 [1]; Wyo Stat Ann § 20-7-102 [a]). Our State had not—and has not, to this day. In the face of such legislative silence, we refused to undertake the kind of policy analysis reserved for the elected representatives of this State, who are better positioned to "conduct hearings and solicit comments from interested parties, evaluate the voluminous **[****35]** social science research in this area . . . , weigh the consequences of various proposals, and make the tradeoffs needed to fashion the rules that best serve the population of our state" (*id.* at 597).

The takeaway from *Debra H.* is that *Alison D.* didn't break any new ground or retreat from a broader understanding of parenthood. It showed respect for the role of the legislature in defining who a parent is, and held, based on the legislative guidance before us, that the term was intended to include a child's biological mother and father, a child's adoptive parents, and, pursuant to a statute enacted in 1974, the spouse of a woman to whom a child was born by artificial insemination. Although many have complained that this standard "is formulaic, or too rigid, or out of step with the times" (*id.* at 594), such criticism is properly directed at the legislature, who **[*32]** in the 107 years since Domestic Relations Law § 70 was enacted has chosen not to amend that section or define the term "parent" to include persons who establish a loving parental bond with a child, though they lack a biological or adoptive tie.

To be sure, there was a time when our interpretation of "parent" put same-sex couples on unequal footing with their heterosexual counterparts. **[****36]** When *Alison D.* was decided, for example, it was impossible for both members of a same-sex couple to become the legal parents of a child born to one partner by artificial insemination, because same-sex couples were not permitted to marry or adopt. Our Court eventually held that the adoption statute permitted **[***105]** unmarried **[**504]** same-sex partners to obtain second-parent adoptions (*see Matter of Jacob*, 86 NY2d 651, 656, 660 NE2d 397, 636 NYS2d 716 [1995]), but it was not until 2011 that the legislature put an end to all sex-based distinctions in the law (*see* Domestic Relations Law § 10-a).

The legislature's passage of the Marriage Equality Act granted same-sex couples the right to marry and made clear that "[n]o government treatment or legal status, effect, right, benefit, privilege, protection or responsibility relating to marriage . . . shall differ based on the parties to the marriage being or having been of the same sex rather than a different sex" **[15]** (Domestic Relations Law § 10-a [2]). Having mandated gender neutrality with respect to every legal benefit and obligation arising from marriage, and eliminated every sex-based distinction in the law and common law, the legislature has formally declared its intention that "[s]ame-sex couples should have the same access as others to the protections, responsibilities, rights, obligations, **[****37]** and benefits of civil marriage" (L 2011, ch 95, § 2).

Same-sex couples are now afforded the same legal rights as heterosexual couples and are no longer barred from establishing the types of legal parent-child relationships that the law had previously disallowed. Today, a child born to a married person by means of

artificial insemination with the consent of the other spouse is deemed to be the child of both spouses, regardless of the couple's sexual orientation (2-22 NY Civil Practice: Family Court Proceedings § 22.08 [1] [Matthew Bender]; *Laura WW. v Peter WW.*, 51 AD3d 211, 217-218, 856 NYS2d 258 [3d Dept 2008] [holding that a child born to a married woman is the legitimate child of both parties and that, absent evidence to the contrary, the spouse of the married woman is presumed **[*33]** to have consented to such status]; *Matter of Kelly S. v Farah M.*, 139 AD3d 90, 103-104, 28 NYS3d 714 [2d Dept 2016] [finding that the failure to strictly comply with the requirements of Domestic Relations Law § 73 did not preclude recognition of a biological mother's former same-sex partner as a parent to the child conceived by artificial insemination during the couple's domestic partnership]; *Wendy G-M. v Erin G-M.*, 45 Misc 3d 574, 593, 985 NYS2d 845 [Sup Ct, Monroe County 2014] [applying the marital presumption to a child born of a same-sex couple married in Connecticut]). And if two individuals of the same sex choose not to marry but later conceive a child by artificial insemination, **[****38]** the non-biological parent may now adopt the child through a second-parent adoption.

The Marriage Equality Act and *Matter of Jacob* have erased any obstacles to living within the rights and duties of the Domestic Relations Law. The corollary is, absent further legislative action, an unmarried individual who lacks a biological or adoptive connection to a child conceived after 2011 does not have standing under Domestic Relations Law § 70, regardless of gender or sexual orientation. Unlike the majority, I would leave it to the legislature to determine whether a broader category of persons should be permitted to seek custody or visitation under the law. I remain of the view, as I was in *Debra H.*, that we should not "preempt our Legislature by sidestepping section 70 of the Domestic Relations Law as presently drafted and interpreted in *Alison D.* to create an additional category of parent . . . through the exercise of our common-law and equitable powers" (14 NY3d at 597).

I do agree, however, with the results the majority has reached in these cases. The Marriage Equality Act did not benefit the same-sex couples before us in these appeals, **[***106]** **[**505]** who entered into committed relationships and chose to rear children before they were permitted to exercise what our legislature and the **[****39]** Supreme Court of the United States have now declared a fundamental human right (*see generally Obergefell v Hodges*, 576 US ___, 135 S Ct 2584, 192 L Ed 2d 609 [2015]). That **[16]** Brooke and Elizabeth did not have the same opportunity to marry one another before they decided to have a family means that the couple (and the child born to them through artificial insemination) did not receive the same legal protection our laws would have provided a child born to a heterosexual couple under similar circumstances. That is, the law did not presume—as it would have for a married heterosexual couple—that any child **[*34]** born to one of the women during their relationship was the legitimate child of both.

In my view, this inequality and the substantial changes in the law that have occurred since our decision in *Debra H.* constitute extraordinary circumstances that give these petitioners standing to seek visitation (*see Ronald FF.*, 70 NY2d at 144-145 [barring the State from interfering with a parent's "(fundamental) right . . . to choose those with whom her child associates" unless it "shows some compelling State purpose which furthers the child's best interest"]). Namely, each couple agreed to conceive a child by artificial insemination at a time when they were not allowed to marry in New York and intended to **[****40]** raise the child in the type of relationship the couples would have formalized by marriage had our State permitted them to exercise that fundamental human right. On the basis of these facts, I would remit the matter in *Brooke S.B.* to Supreme Court for a hearing to determine whether it would be in the child's best interest to have regular visitation with petitioner. As the majority correctly concludes, the petitioner in *Estrellita A.* has standing by virtue of judicial estoppel (majority op at 29).

Matter of Brooke S.B. v Elizabeth A.C.C.: Order reversed, without costs, and matter remitted to Family Court, Chautauqua County, for further proceedings in accordance with the opinion herein.

Opinion by Judge Abdus-Salaam. Chief Judge DiFiore and Judges Rivera, Stein and Garcia concur. Judge Pigott concurs in a separate concurring opinion. Judge Fahey taking no part.

Matter of Estrellita A. v Jennifer L.D.: Order affirmed, without costs.

Opinion by Judge Abdus-Salaam. Chief Judge DiFiore and Judges Rivera, Stein and Garcia concur. Judge Pigott concurs in a separate concurring opinion. Judge Fahey taking no part.

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Matter of Beth R. v Ronald S.

Supreme Court of New York, Appellate Division, Third Department

April 6, 2017, Decided; April 6, 2017, Entered

522961

Reporter
149 A.D.3d 1216 *; 51 N.Y.S.3d 244 **; 2017 N.Y. App. Div. LEXIS 2651 ***; 2017 NY Slip Op 02711 ****; 2017 WL 1254532

[**1]** In the Matter of BETH R., Petitioner, v RONALD S., Respondent. MATTHEW Q., Appellant. (And Two Other Related Proceedings.)

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Core Terms

equitable estoppel, paternity, testing, genetic marker, birth

Case Summary

Overview
HOLDINGS: [1]-Petitioner mother rebutted a presumption that appellant, her ex-husband, was the father of her child born during their marriage by clear and convincing evidence because her testimony showed he had no access to her when the child was conceived, and he knew he was not the child's father; [2]-The mother was not equitably estopped from claiming respondent father's paternity because the ex-husband did not invoke equitable estoppel and he did not show he and the child had a parent-child relationship; [3]-The ex-husband did not show it was not in the child's best interests to order genetic marker testing because such testing was in her best interests given her age and maturity and stated interest in knowing her biological father's identity, and nothing showed her irreparable loss of status, destruction of her family image, or other harm to her physical or emotional well-being.

Outcome
Judgment affirmed.

LexisNexis® Headnotes

Family Law > ... > Proof of Paternity > Inferences & Presumptions > Rebuttals

HN1[] **Inferences & Presumptions, Rebuttals**

A child born during a marriage is presumed to be the biological product of the marriage (Family Ct Act § 417). This presumption, however, may be rebutted upon clear and convincing evidence excluding the husband as the child's father or otherwise tending to prove that the child was not the product of the marriage.

Counsel: **[***1]** Lisa K. Miller, McGraw, for appellant.

Irene C. Graven, Owego, attorney for the child.

Judges: Before: McCarthy, J.P., Egan Jr., Lynch, Devine and Clark, JJ. McCarthy, J.P., Egan Jr., Lynch and Devine, JJ., concur.

Opinion by: Clark

Opinion

[*1216] **[**245]** Clark, J.

MEMORANDUM AND ORDER

Appeals from three orders of the Family Court of Tioga County (Morris, J.), entered April 22, 2016, which, among other things, granted petitioner's application, in a proceeding pursuant to Family Ct Act article 5, to

adjudicate respondent as the father of a child born to petitioner.

Beginning in January 1999 and continuing through July 2000, petitioner and respondent were involved in an intimate relationship. **[**246]** Thereafter, in August 2000, petitioner met Matthew Q. and, on January 31, 2001, they married. Roughly three weeks later, on February 22, 2001, petitioner gave birth to a daughter.

Petitioner and Matthew Q. separated the following summer and they ultimately divorced in May 2003. In April 2014, when the child was 13 years old, petitioner commenced the first of these proceedings seeking, among other things, an order of filiation adjudicating respondent to be the child's father. In October 2014, respondent filed a cross petition against Matthew Q., asserting that Matthew Q. **[***2]** was the child's presumptive father because he was married to petitioner at the **[****2]** time of the child's birth[1]. Thereafter, the attorney for the child moved to invoke the doctrine of equitable estoppel against respondent to preclude him from denying paternity, and Matthew Q. filed a petition seeking visitation with the child.

Initially, the matter proceeded to a hearing solely on the issue of whether the presumption of legitimacy could be overcome. Following the hearing, at which only petitioner testified, Family Court concluded that petitioner had presented clear and convincing evidence to exclude Matthew Q. as the child's father and, thus, had rebutted the presumption of legitimacy. Family Court then conducted a hearing, which included in camera testimony from the child on the issue of equitable estoppel, at the conclusion of which Family Court determined that **[*1217]** there was insufficient evidence to warrant application of the doctrine. The court further concluded that it was in the child's best interests to order the parties to submit to genetic marker tests to determine paternity. The results of the court-ordered genetic marker tests indicated that respondent was the child's biological father **[***3]** and also excluded Matthew Q. as the father. Family Court subsequently issued an order of filiation adjudicating respondent to be the child's father, an order dismissing respondent's paternity petition against Matthew Q. and an order dismissing Matthew Q.'s visitation petition for lack of standing. Matthew Q. appeals from all three orders.

Initially, Matthew Q. challenges Family Court's determination that petitioner rebutted the presumption of legitimacy. ***HN1***[] A child born during a marriage is presumed to be the biological product of the marriage (*see* Family Ct Act § 417; *Matter of Findlay*, 253 NY 1, 7, 170 N.E. 471 [1930]; *Matter of Barbara S. v Michael I.*, 24 AD3d 451, 452, 805 N.Y.S.2d 425 [2005]). This presumption, however, may be rebutted upon clear and convincing evidence excluding the husband as the child's father or otherwise tending to prove that the child was not the product of the marriage (*see Matter of Findlay*, 253 NY at 7-8; *Michaleas v Michaleas*, 136 AD3d 616, 617, 25 N.Y.S.3d 246 [2016]; *Matter of Penny MM. v Bruce MM.*, 118 AD2d 979, 979, 500 N.Y.S.2d 199 [1986]).

Here, petitioner acknowledged that she was married to Matthew Q. when the child was born, that he was present for the child's birth and that the child bears his last name on her birth certificate. However, petitioner's uncontroverted testimony established that Matthew Q. did not have access to her at the time that the child was conceived in May 2000. Indeed, petitioner stated that she identified the date of conception with her **[***4]** doctor and determined that the child had been conceived during a trip that she and respondent had taken to Ohio prior to ending their monogamous relationship. She also testified that Matthew Q. was incarcerated at the time that **[**247]** the child was conceived and that she did not meet him until several months later in August 2000. Petitioner further testified that Matthew Q. knew that the child was not his biological child prior to marrying her and that he had declined to sign an acknowledgment of paternity following the child's birth. Moreover, petitioner produced into evidence a 2001 letter from Matthew Q. in which he acknowledged that he was not the child's father. In view of this uncontroverted evidence, the record provides ample support for Family Court's conclusion that petitioner rebutted the presumption of legitimacy by clear and convincing evidence (*see Matter of Findlay*, 253 NY at 9-10; **[*1218]** *Matter of Jason E. v Tania G.*, 69 AD3d 518, 519, 893 N.Y.S.2d 542 [2010]; *compare Matter of Backus v Backus*, 72 AD2d 893, 893-894, 422 N.Y.S.2d 161 [1979]).

Matthew Q. also contends that Family Court prevented him from asserting the doctrine of equitable estoppel against petitioner to preclude her from claiming that respondent is the child's father. This contention, however, is belied by the record, as Matthew Q. did not at any **[****3]** point invoke the doctrine of equitable estoppel **[***5]** against petitioner and, thus, his

[1] Matthew Q. was joined as a necessary party on petitioner's paternity petition.

arguments with respect thereto are unpreserved (*see Batales v Friedman*, 144 AD3d 849, 851, 41 N.Y.S.3d 275 [2016]; *Conner v State of New York*, 268 AD2d 706, 707, 701 N.Y.S.2d 481 [2000]). As observed by Family Court, only the attorney for the child invoked the doctrine of equitable estoppel, and she did so to preclude respondent from denying paternity. Nevertheless, Family Court concluded that, had Matthew Q. sought to estop petitioner from claiming that respondent was the child's father (*see Matter of Juanita A. v Kenneth Mark N.*, 15 NY3d 1, 6, 930 N.E.2d 214, 904 N.Y.S.2d 293 [2010]; *Matter of Shondel J. v Mark D.*, 7 NY3d 320, 327, 853 N.E.2d 610, 820 N.Y.S.2d 199 [2006]; *Matter of Sharon GG. v Duane HH.*, 95 AD2d 466, 468-469, 467 N.Y.S.2d 941 [1983], *affd* 63 NY2d 859, 472 N.E.2d 46, 482 N.Y.S.2d 270 [1984]), it would have found that Matthew Q. failed to satisfy his initial evidentiary burden of establishing that he and the child had a parent-child relationship (*see Michaleas v Michaleas*, 136 AD3d at 617; *Matter of Patrick A. v Rochelle B.*, 135 AD3d 1025, 1026-1028, 23 N.Y.S.3d 660 [2016], *lv dismissed* 27 N.Y.3d 957, 29 N.Y.S.3d 919, 49 N.E.3d 1213 [2016]), so as to shift the burden to petitioner to prove that it was nonetheless in the child's best interests to order genetic marker testing (*see Matter of Patrick A. v Rochelle B.*, 135 AD3d at 1026; *Matter of Edward WW. v Diana XX.*, 79 AD3d 1181, 1182, 913 N.Y.S.2d 785 [2010]; *Matter of Sharon GG. v Duane HH.*, 95 AD2d at 469). Were Matthew Q.'s equitable estoppel arguments properly before us, we would find the same, as the record evidence demonstrates that Matthew Q. had not had contact with the child since she was a baby and he had been incarcerated for most of her life (*see Matter of Sidney W. v Chanta J.*, 112 AD3d 950, 953-954, 978 N.Y.S.2d 274 [2013]; *compare Matter of Dustin G. v Melissa I.*, 69 AD3d 1019, 1020, 891 N.Y.S.2d 735 [2010], *lv denied* 14 N.Y.3d 708, 927 N.E.2d 563, 901 N.Y.S.2d 142 [2010]).

We are unpersuaded by Matthew Q.'s further contention that genetic marker testing was not in the child's best interests. Considering the child's age and maturity and the attorney for the **[***6]** child's indication that the child had an interest in knowing with certainty the identity of her biological father, as well as the absence of any "evidence that [she] would suffer irreparable loss of status, destruction of **[**248]** [her] family image, or other harm to [her] physical or emotional well-being if testing were **[*1219]** permitted" (*Michaleas v Michaleas*, 136 AD3d at 617; *see Matter of William X. v Linda Y.*, 132 AD3d 1195, 1197, 19 N.Y.S.3d 353 [2015]), we agree with Family Court that genetic marker testing was in the child's best interests (*see Matter of Sidney W. v Chanta J.*, 112 AD3d at 953-954; *Matter of Derrick H. v Martha J.*, 82 AD3d 1236, 1239, 922 N.Y.S.2d 83 [2011]).

To the extent that we have not discussed any of Matthew Q.'s remaining arguments, they have been examined and found to be without merit.

McCarthy, J.P., Egan Jr., Lynch and Devine, JJ., concur.

ORDERED that the orders are affirmed, without costs.

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Strickland v. Day

Supreme Court of Mississippi

April 05, 2018, Decided

NO. 2016-CA-01504-SCT

Reporter
2018 Miss. LEXIS 155 *

CHRISTINA STRICKLAND v. KIMBERLY JAYROE STRICKLAND DAY

Notice: Decision text below is the first available text from the court; it has not been editorially reviewed by LexisNexis. Publisher's editorial review, including Headnotes, Case Summary, Shepard's analysis or any amendments will be added in accordance with LexisNexis editorial guidelines.

Core Terms

sperm donor, anonymous, court of chancery, couple, parental rights, donor, sperm, custody, loco parentis, trial court, married, rights, termination, birth, conceived, equitable estoppel, marriage, parties, parentage, issues, child support, plurality, spouse, minor child, child born, biological, visitation, natural father, birth certificate, anonymous donor

Opinion

[*1] DATE OF JUDGMENT: 10/17/2016

TRIAL JUDGE: HON. JOHN S. GRANT, III

TRIAL COURT ATTORNEYS: PRENTISS M. GRANT DIANNE HERMAN ELLIS

COURT FROM WHICH APPEALED: RANKIN COUNTY CHANCERY COURT

ATTORNEYS FOR APPELLANT: DIANNE HERMAN ELLIS ELIZABETH LYNN LITTRELL

ATTORNEY FOR APPELLEE: PRENTISS M. GRANT

NATURE OF THE CASE: CIVIL - CUSTODY

DISPOSITION: REVERSED, RENDERED IN PART, AND REMANDED IN PART - 04/05/2018

MOTION FOR REHEARING FILED:

MANDATE ISSUED:

EN BANC.

ISHEE, JUSTICE, FOR THE COURT:

¶1. Christina Strickland and Kimberly Day were a same-sex couple legally married in Massachusetts in 2009-a marriage that later was recognized legally in Mississippi. At the time of their marriage, the couple resided in Mississippi. A year later, the newlywed couple sought to bring a child into their family through the use of artificial insemination (AI) of sperm from an anonymous donor. Kimberly served as the gestational mother and eventually gave birth to Z.S.[1] in 2011. Z.S. was born in Mississippi.

¶2. The couple separated in 2013. And eventually, in October 2016, the Rankin County Chancery Court entered a final judgment of divorce. In the judgment, **[*2]** the chancery court found, among other things, that Christina acted *in loco parentis* to Z.S., but that Christina was not Z.S.'s legal parent. Central to the chancery court's decision was the finding that the anonymous sperm donor had parental rights that must be terminated and thus precluded Christina from being Z.S.'s legal parent. Christina appeals to this Court.

¶3. This case presents an issue of first impression. We never before have addressed what rights, if any, an anonymous sperm donor has in a child conceived of his sperm. Accordingly, we must determine whether the chancery court erred in finding that the rights of the anonymous sperm donor precluded a finding that Christina was Z.S.'s legal parent. After review of the record and the relevant law, we find that the chancery court erred in this finding. First, an anonymous sperm donor is not a legal parent whose rights must be

terminated. And second, the doctrine of equitable estoppel precludes Kimberly from challenging Christina's legal parentage of Z.S. And so we reverse the findings of the chancery court and remand the case for a custody determination in a manner that is consistent with this opinion.

FACTS AND PROCEDURAL HISTORY [*3]

¶4. Christina and Kimberly first began a romantic relationship in 1999. Later, while still unmarried, the couple decided to adopt a child. After going through the adoption process, the couple adopted a child named E.J.,[2]finalized in 2007. Kimberly alone served as the adoptive parent because Mississippi law precluded same-sex couples from adopting jointly. In 2009, Kimberly and Christina were married in Massachusetts. Kimberly took Christina's last name.

¶5. In 2010, the newlywed couple decided to add to their family through the use of assisted reproductive technology[3] (ART)-specifically, AI of sperm from an anonymous donor. Both Kimberly and Christina considered, and were evaluated to determine, which one of them should carry the child. And after testing and consultation with a fertility clinic, the couple decided that Kimberly would serve as the gestational mother, and that they first would attempt in vitro fertilization[4] (IVF) with Kimberly's ova.

¶6. They searched for sperm, eventually choosing sperm from a Maryland sperm bank. The name of the anonymous donor is unknown and he was identified only as a number-"Donor No. 2687." Kimberly signed an acknowledgment agreeing that she **[*4]** would "never seek to identify the donor." The acknowledgment further stipulated that the donor never would be advised of Kimberly's identity. In the clinic paperwork, Kimberly was recognized as a married woman, and Christina was identified as her spouse. Both women signed an acknowledgment stating that they were:

voluntarily undergoing, individually and as a couple, treatment . . . in order to conceive a child through this treatment and that [they] acknowledged [their] natural parentage of any child born to [them] through this technique.

Christina testified that she was involved in and supportive through every step of the conception and pregnancy.

¶7. As for the birth of Z.S., Christina testified that the couple planned on traveling to Massachusetts to have the child, so that both she and Kimberly could be listed as parents on the birth certificate. But on April 12, 2011, six weeks before her due date, Kimberly gave birth to Z.S. via a cesarean section in a Mississippi hospital. The reason Z.S. was born in Mississippi, and not in Massachusetts, is disputed. Kimberly claimed it was because she did not want Christina on the birth certificate,[5] while on the other hand, Christina claimed **[*5]** it was due to the unforseen, emergency cesarean section. Nevertheless, because Z.S. was born in Mississippi, Kimberly's name was the only name placed on his birth certificate.

¶8. As it relates to child rearing, Christina testified that, as a family unit, Kimberly and she raised their two children as coparents. And during the first year of Z.S.'s life, Christina stayed home with him while Kimberly worked full time. Christina further testified that the children-both Z.S. and E.J.-share a close child-parent bond with her, and they call her "Mom."

¶9. In January 2013, Christina and Kimberly separated. Following the separation, Christina continued to visit both children. She also paid child support, medical, and daycare expenses for Z.S.

¶10. On August 13, 2015, while still married to Christina, Kimberly married a second spouse. Christina then filed for divorce in the Harrison County Chancery Court on August 31, 2015. On November 16, 2015, Kimberly filed a motion for declaratory judgment and complaint for divorce in the Rankin County Circuit Court. In that motion, Kimberly sought a declaration that her second marriage was valid and that her first marriage was dissolved. Christina then filed **[*6]** her answer and counterclaim for divorce in which she sought legal and physical custody of the children, and to be named a parent of Z.S. The Harrison County and Rankin County cases were consolidated in Rankin County. And on May 17, 2016, an order was entered declaring Christina's and Kimberly's marriage valid, and Kimberly's remarriage void.

¶11. On September 27, 2016, Kimberly and Christina filed a consent and stipulation agreeing that Z.S. was born during their marriage, that they jointly would pay all school expenses for Z.S., and that Kimberly would retain physical and legal custody of E.J. Kimberly and Christina agreed to allow the chancery court to decide custody, visitation, and child support as to Z.S., child support and visitation of E.J., and Christina's parentage of Z.S.

¶12. A hearing was held on September 27, 2016, and a

final judgment of divorce was entered on October 18, 2016. In the final judgment, the chancery court made various findings. Relevant to this appeal, the chancery court ordered Christina to pay child support for both children, and held that Z.S. was born during a valid marriage. But the chancery court held that Z.S. was "a child born during the marriage, **[*7]** not of the marriage,"and so both parties were not considered parents. The chancery court found that the anonymous sperm donor constituted "an absent father," and even though the donor might never be identified, the donor's legal parentage precluded a determination that Christina was Z.S.'s legal parent. The chancery court concluded that Christina had acted *in loco parentis*[6]to Z.S. and awarded her visitation rights.

¶13. On October 21, 2016, three days after entry of the final judgment, Christina filed her timely notice of appeal.

STANDARD OF REVIEW

¶14. A chancellor's findings will not be disturbed on review unless he abused his discretion, was manifestly wrong, or made a finding which was clearly erroneous. ***Bank of Mississippi v. Hollingsworth***, 609 So. 2d 422, 424 (Miss. 1992). A chancellor's conclusions of law are reviewed de novo. ***Consolidated Pipe & Supply Co. v. Colter***, 753 So. 2d 958, 961 (Miss. 1999). Because the issues here raise questions of whether a chancellor correctly applied the law, we review this case de novo.

DISCUSSION

I.Parental Rights and Anonymous Sperm Donors

¶15. The chancery court's decision, finding Christina not the legal parent of Z.S., turned largely on its determination that the sperm donor was the "natural father," whose **[*8]** parental rights were subject to termination. On appeal, Christina argues that this finding is not supported by the evidence and is an erroneous conclusion of law. We agree.

¶16. At the outset, we are cognizant of the fact that we never before have determined what parental rights, if any, anonymous sperm donors possess in the children conceived through the use of their sperm. As such, this is an issue of first impression.

¶17. In searching our state's existing law, the only law that even addresses AI is the disestablishment-of-paternity statute-Mississippi Code Section 93-9-10(2)(d) (Rev. 2013). And while Section 93-9-10(2)(d) does not address anonymous sperm donors' parental rights directly, we find it useful as it illustrates the Legislature's intent on such rights. Indeed, under Section 93-9-10(2)(d), a father cannot seek to disestablish paternity when the child was conceived by AI during the marriage to the child's mother. Reading this provision, in light of the context before us, the logical conclusion-while not explicit-is that the Legislature never intended for an anonymous sperm donor to have parental rights in a child conceived from his sperm-irrespective of the sex of the married couple that utilized his sperm to have that child.

¶18. How, on one hand, can the law contemplate **[*9]** that a donor is a legal parent who must have his rights terminated, while at the same time prohibiting the nonbiological father of a child conceived through AI from disestablishing paternity? These two policies cannot co-exist. And for one to make such a logical leap effectively would say that the child has three legal parents: the mother who birthed the child, the natural father who donated his sperm, and the person who was married to the child's mother (and is statutorily prohibited from disestablishing paternity). Three parents-that cannot be what the Legislature intended. Indeed, even the chancery court here said that cannot be possible.

¶19. In making its determination, the chancery court seemed to place great weight on the biological connection between the anonymous sperm donor and Z.S. Yet the Supreme Court of the United States has held that "[p]arental rights do not spring full-blown from the biological connection between the parent and child. *They require relationships more enduring*." ***Lehr v. Robertson***, 463 U.S. 248, 260, 103 S. Ct. 2985, 77 L. Ed. 2d 614 (1983) (quoting ***Cubanv. Mohammed***, 441 U.S. 360, 397, 99 S. Ct. 1760, 60 L. Ed. 2d 297 (1979) (Stewart, J., dissenting)) (emphasis added). In a similar vein, we too have held that a biological connection alone is not enough to establish parentage. *See****Griffith v. Pell [*10]*** , 881 So. 2d 184, 186 (Miss. 2004) (finding that a biological father does not have any paternity rights where "he fails to establish that he has had a substantial relationship with the child").

¶20. As a broader policy consideration, we find that requiring parents of a child conceived through the use of AI to terminate parental rights of the donor would not be in the best interest of the child-to say nothing of the expense and time it would require. When children are involved, we consistently have held that "the polestar consideration . . . is the best interest and welfare of the

child." ***Albright v. Albright***, 437 So. 2d 1003, 1005 (Miss. 1983).

¶21. The consequences of assigning rights to donors, who do not engage in an act of procreation but provide biological material with no intention to act as a parent, would disrupt the familial relationships and expectations of Mississippians who have conceived children through the use of AI. For one, it would elevate the rights of a donor-who is a complete stranger to the child, and likely never will be identified-over the rights of a person who has known and cared for the child. Make no mistake-affirmance here arguably would impose parentage, and all its responsibilities, on anonymous sperm donors who contribute **[*11]** sperm to assist families in achieving pregnancy-perhaps creating a chilling effect on sperm donation. Furthermore, it effectively would leave many children conceived through this method with *one* legal parent. And in the tragic situation in which a mother dies during childbirth or before a proper termination proceeding-it would leave the child an orphan. Such a notion is untenable and certainly contrary to the public policy of this state.

¶22. On appeal, Kimberly's position is that all of the nonbiological parents of children conceived through AI should be required to terminate the sperm donor's parental rights and then establish parentage through the adoption process. We disagree. As a practical matter, the process of requiring one under these circumstances to adopt her own child (one which she intentionally agreed to bring into the family) would be intrusive, time-consuming, and expensive. In fact, it would require: parents who use AI with anonymous sperm donation to file a petition and wait thirty days to seek a hearing; a guardian ad litem to be appointed by the court at the parents' expense; and a hearing to be held to determine whether an unknowable sperm donor has abandoned the **[*12]** child. *See* Miss. Code Ann. _ 93-15-107 (Rev. 2013).

¶23. One of the rationales behind termination statutes no doubt is to safeguard the rights of any potential parent-child relationship. Indeed, this Court has held that "[p]arents have a liberty interest, more precious than any property interest, in the care, custody, and management of their children and families." ***G.Q.A. v. Harrison Cty. Dep't Of Human Res.***, 771 So. 2d 331, 335 (Miss. 2000) (citing ***Santosky v. Kramer***, 455 U.S. at 753-54, 758-59, 102 S. Ct. 1388, 71 L. Ed. 2d 599 (1982)). The seriousness of the action is reflected in the fact that termination of such rights requires clear and convincing evidence of the statutory grounds for termination. ***Chism v. Bright***, 152 So. 3d 318, 322 (Miss. 2014) (citing ***Kramer***, 455 U.S. at 754).

¶24. But with anonymous sperm donors there is no reason to protect the donor, as the donor has no intention or desire to act as a father. In reaching its conclusion in this case, the chancery court found that the donor was merely an "absent father," but in reality, the donor is a nonexistent father. For the child could never find the donor, much less have a meaningful relationship with him. It is one thing for a child to cling to the hope of a possibility of discovering and eventually building a relationship with an absent father; it is quite another thing **[*13]** for a child to know that he has a natural father that he has no possibility of ever discovering, let alone having a relationship with. That is, short of perhaps a court order mandating the disclosure of the donor's identity, it is arguably factually and legally impossible for the child ever to obtain the identity of the donor.

¶25. The impracticality and futility of applying the termination statute in this context is clear. Under Section 93-15-107, the natural father is a necessary party to such termination action, but here, or with any anonymous donor, whose identification cannot be known, compliance with the statute arguably is impossible. One cannot serve a party with no information to act upon and which likely never can be acquired.

¶26. To that end, Kimberly argues that Christina, and nonbiological parents alike, can effectuate this service though publication. To be sure, the text of the statute does allow for publication of service of a "necessary party whose *address* is unknown after diligent search[.]" Miss. Code Ann. _93-15-107(1)(b) (Rev. 2013) (emphasis added.) Publication in this instance is for a party whose address is unknown, not a party whose *identity* is unknown. (Emphasis added). What **[*14]** is more, how can it be evaluated whether there was a diligent search for the party, if the party is unknown? The chancery court itself conceded that it is unlikely that the donor ever could be hailed before the court. The chancery court also conceded that this donor's identification likely would never be known. And with an absence of identification, publication practically cannot be effectuated in every case in which a couple utilizes AI to bring a child into the family. Indeed, publication under the statute presupposes that, while one may not know the exact location of the party, one at least knows, at a minimum, the identity of the party. This is not to say that, under these circumstances, service by publication

could not be accomplished; it is, however, to say that, as a matter of public policy, we find it unwise to demand that it must be accomplished.

¶27. And so, we ask, would it not be futile for the chancery court to require parties to comply with a statute the chancery court itself admits cannot be satisfied due to reasons beyond the control of the parties? Though this exact question is not before us here, we find it demonstrative of the impracticability and futility of requiring **[*15]** compliance with Section 93-15-107(1)(b) in this context.

¶28. Aside from our determination that anonymous sperm donors, in general, do not possess parental rights in the children conceived through the use of their sperm, we also find that there is no other vehicle which allows us to conclude that the anonymous sperm donor here is Z.S.'s parent. The donor was not married to the mother at the time of Z.S.'s conception or birth, he has not executed a voluntary acknowledgment of paternity, and he has not been adjudicated to be the child's "natural" father under state law. Miss. Code Ann. _ 93-9-28 (Rev. 2013).

¶29. In sum, we find that the chancery court erred in finding that an anonymous sperm donor was Z.S.'s parent whose parental rights had to be terminated. Indeed, we find that there is no legal or policy basis to find that an anonymous sperm donor is a parent in this specific context.

II. Equitable Estoppel

¶30. Christina argues that the chancery court erred in failing to apply equitable estoppel as a bar to Kimberly's argument that Christina was not Z.S.'s legal parent. At the very core of the doctrine of equitable estoppel are "fundamental notions of justice and fair dealings." ***PMZ Oil Co. v. Lucroy***, 449 So. 2d 201, 206 (Miss. 1984). The **[*16]** doctrine applies when "there is a (1) belief and reliance on some representation; (2) a change of position as a result thereof; and (3) detriment or prejudice caused by the change of position." ***B.C. Rogers Poultry Inc. v. Wedgeworth***, 911 So. 2d 483, 492 (Miss. 2005). Indeed, we previously have defined equitable estoppel "as the principle *by which a party is precluded from denying any material fact*, induced by his words or conduct upon which a person relied, whereby the person changed his position in such a way that injury would be suffered if such denial or contrary assertion was allowed." ***Koval v. Koval***, 576 So. 2d 134, 137 (Miss. 1991) (emphasis added).

¶31. Reviewing the record before us, we find that the elements of estoppel are met here. First, the evidence in the record shows that Kimberly made numerous representations that Christina was an equal coparent to Z.S. Indeed, Kimberly, along with Christina, signed an agreement at the clinic acknowledging the couple's joint intention to undergo the AI procedure. Additionally, after the birth of Z.S., the couple sent out birth announcements that read: "Hatched by Two Chicks. Chris[tina] and Kimberly proudly announce the birth of their son." And the record is replete with evidence of Christina's belief **[*17]** and reliance on this representation.

¶32. Second, as a result of her belief of and reliance on Kimberly's representation, Christina clearly changed her position. For example, Christina signed an acknowledgment to undergo the AI treatment with Kimberly as "a couple," served as Z.S.'s primary caretaker for at least the first year of the child's life, and gave Z.S. her last name-Strickland. And lastly, the record shows that Christina suffered detriment which was caused by the change of position. That is, by changing her position in reliance on her belief that she would be an equal coparent, Christina took on all the responsibilities and rewards that accompany parenthood. To now deprive Christina of these responsibilities and rewards, and diminish her parent-child relationship with Z.S., is certainly a detriment to Christina, to say nothing of the detriment to Z.S. himself.

¶33. At the hearing, Kimberly argued that the fact that she was married to Christina at the time was not material to her decision to have Z.S.; she was planning on having a child of her own regardless of her marital circumstances. But the evidence in the record belies this assertion. For one, Kimberly allowed Christina **[*18]** to take part in the process of conceiving Z.S.-even signing an acknowledgment at the clinic together. In fact, in the clinic paperwork, Kimberly was recognized as a married woman, and Christina was specifically identified as her spouse. What is more, Kimberly admitted in her testimony that the couple had discussed the possibility of Christina, and not Kimberly, carrying and having the baby. This further evidences the couple's plan to undertake the role of parenthood together, as it undercuts Kimberly's assertion that her primary reason for having Z.S. was to fulfill a lifelong desire to have a child biologically her own. It also is particularly telling that Kimberly and Christina sent out birth announcements which held out Z.S. as their own. Simply put, it is strong evidence of Kimberly's position regarding Christina's coparent status. This

announcement, by its own terms, represented to those receiving it that both Kimberly and Christina were Z.S.'s parents.

¶34. All this in the record shows that Kimberly's original representation was that Christina was Z.S.'s equal coparent, and that Christina relied on this representation in changing her position. To now allow Kimberly to challenge **[*19]** Christina's parentage of Z.S. undoubtedly will cause injury to Christina and the child. The gravity of the injury is particularly clear in this case, as Christina has had to confront the possibility that Kimberly will allow another adult to adopt Z.S. And Christina, with an inferior *in loco parentis* status, could do nothing to prevent it. At bottom, to deny Christina the relationship she has built with Z.S. would be a miscarriage of justice. And so, we find that Kimberly is estopped from challenging Christina's parental rights as to Z.S., as this position is wholly inconsistent with her earlier position, which held Christina out to be the parent of Z.S.

CONCLUSION

¶35. In this case of first impression, we hold that under Mississippi law, an anonymous sperm donor does not possess any parental rights in a child conceived through the use of his sperm. And to that end, the chancery court erred in finding that the anonymous sperm donor here was Z.S.'s parent, whose rights were subject to termination.

¶36. As for Christina's parental rights, we hold that the doctrine of equitable estoppel precluded Kimberly from challenging Christina's parentage of Z.S.-where there was ample evidence the then-married **[*20]** couple jointly and intentionally agreed to have Z.S. through the use of AI. In reaching this holding, we reverse the chancery court's finding that Christina acted *in loco parentis*, but was not an equal parent with parental rights as to Z.S. And so we remand the case to the Rankin County Chancery Court with instructions to determine custody as to Z.S. in accord with the multifactor test articulated in ***Albright***, 437 So. 2d at 1005. The ***Albright*** analysis shall be on the record, and with a guardian ad litem representing Z.S. through the course of the proceedings. *See generally****Albright***, 437 So. 2d at 1005.

¶37. **REVERSED, RENDERED IN PART, AND REMANDED IN PART.**

KITCHENS, P.J., KING AND BEAM, JJ., CONCUR. WALLER, C.J., CONCURS IN PART AND IN RESULT WITH SEPARATE WRITTEN OPINION JOINED IN PART BY RANDOLPH, P.J., COLEMAN, MAXWELL AND CHAMBERLIN, JJ. COLEMAN, J., CONCURS IN PART AND DISSENTS IN PART WITH SEPARATE WRITTEN OPINION JOINED BY CHAMBERLIN, J.; RANDOLPH, P.J., AND MAXWELL, J., JOIN IN PART. MAXWELL, J., CONCURS IN PART AND DISSENTS IN PART WITH SEPARATE WRITTEN OPINION JOINED BY RANDOLPH , P.J., AND COLEMAN, J.; CHAMBERLIN, J., JOINS IN PART. RANDOLPH, P.J., DISSENTS WITH SEPARATE WRITTEN OPINION JOINED IN PART BY COLEMAN, [*21] MAXWELL AND CHAMBERLIN, JJ.

WALLER, CHIEF JUSTICE, CONCURRING IN PART AND IN RESULT:

¶38. The narrow issue before the Court is whether two people legally married who jointly engage in a process of assisted reproduction technology resulting in the natural birth by the gestational mother are both considered parents for purposes of divorce and determination of parental rights of the minor child. I conclude that they are and that the decision of the chancellor should be reversed and remanded.

¶39. This decision is based on the legal status of the parties at the time of birth and on the basis of equitable estoppel. The conception and birth was a process both parties agreed to and relied upon. ***Simmons Hous., Inc. v. Shelton ex rel. Shelton***, 36 So. 3d 1283, 1287 (¶15) (Miss. 2010) (Equitable estoppel "is defined generally as 'the principle by which a party is precluded from denying any material fact, induced by his words or conduct upon which a person relied, whereby the person changed his position in such a way that injury would be suffered if such denial or contrary assertion was allowed.'"). *See also****Koval v. Koval***, 576 So. 2d 134, 137 (Miss. 1991) ("The doctrine of estoppel is based upon the ground of public policy, fair dealing, good faith and justice, and its **[*22]** purpose is to forbid one to speak against his own act, representations, or commitments to the injury of one to whom they were directed and who reasonably relied thereon.").

¶40. While this Court can use common-law principles to render a decision here,[7] the Legislature should speak directly to the recognition of the legal status of children born during a marriage as the result of assisted reproductive technology. ***Miss. Baptist Hosp. v. Holmes***, 214 Miss. 906, 931, 55 So. 2d 142, 152 (1951) ("[T]he function of creating a public policy is primarily

one to be exercised by the Legislature and not by the courts."). The Legislature has spoken that a spouse cannot "disestablish" paternity of a child born by this process. Miss. Code Ann. § 93-9-10(2)(d) (Rev. 2013). Today's decision is the only logical extension of that code section, but the Legislature should nonetheless further address these developments in the law.

¶41. For the preceding reasons, I respectfully concur only in part and in the result.

RANDOLPH, P.J., COLEMAN, MAXWELL AND CHAMBERLIN, JJ., JOIN THIS OPINION IN PART.

COLEMAN, JUSTICE, CONCURRING IN PART AND DISSENTING IN PART:

¶42. All justices agree that, at least in the instant case, the trial judge erred in finding that the parental rights of the anonymous sperm donor **[*23]** must be terminated before the legal status of Christina Day could be adjudicated. However, I agree with Presiding Justice Randolph that we should not be rendering a decision based on an issue never presented to the trial court, *e.g.*, the application of equitable estoppel. Accordingly, I would reverse the chancellor's order, hold that he erred in finding that the anonymous sperm donor enjoyed parental rights, and remand the case to the trial court to allow the parties to present whatever evidence and arguments they wish that accord with the Court's holding.

CHAMBERLIN, J., JOINS THIS OPINION. RANDOLPH, P.J., AND MAXWELL, J., JOIN THIS OPINION IN PART.

MAXWELL, JUSTICE, CONCURRING IN PART AND DISSENTING IN PART:

¶43. I agree with the plurality that the chancellor wrongly declared the sperm donor the natural father. He was neither a party to the proceeding nor asserted any claim to the child. So it was error to grant him parental rights. I also agree with Presiding Justice Randolph and Justice Coleman that it is improper to decide this case based on equitable estoppel-an argument not presented to the chancellor. Restraint is particularly called for here, because the facts the plurality and **[*24]** Chief Justice Waller rely on to find equitable estoppel are hotly contested on appeal. The proper course is to remand to the chancellor for factual findings, keeping in mind the polestar consideration of all custody matters-the best interest of the child.

¶44. I do, however, agree with Chief Justice Waller on one point-what parental rights a sperm donor may or may not have is a policy issue for the Legislature, not the Court. And since the Legislature admittedly has never spoken on this issue, we should be extremely hesitant to draw conclusions about the disestablishment-of-paternity statute, when that statute is wholly inapplicable here. Indeed, it is dangerous for the plurality to weigh in so heavily with what it views to be the best policy, since we all agree the chancellor erroneously inserted this issue into the case.

RANDOLPH, P.J., AND COLEMAN, J., JOIN THIS OPINION. CHAMBERLIN, J., JOINS THIS OPINION IN PART.

RANDOLPH, PRESIDING JUSTICE, DISSENTING:

¶45. Time-tested maxims of trial practice and appellate review constrain me to depart from opinions of my fellow justices. First, due process requires that courts may not adjudicate rights or liabilities of persons not made parties **[*25]** to a proceeding. *See* ***Baker by Williams v. Williams***, 503 So. 2d 249, 254 (Miss. 1987) ("[A] decree in equity cannot adjudicate the rights or liabilities of persons not parties to the proceeding."). The next fundamental tenet is that appellate review is constrained to the trial court record presented on appeal.[8] *See* ***Copeland v. Copeland,*** 235 So. 3d 91 (Miss. 2017) ("This Court may not act upon or consider matters which do not appear in the record and must confine itself to what actually does appear in the record."). Finally, our precedent mandates that a trial court cannot be held in error for an issue not presented to it for determination. *See* ***Burnham v. Burnham***, 185 So. 3d 358, 361 (Miss. 2015) ("The well-recognized rule is that a trial court will not be put in error on appeal for a matter not presented to it for decision.").

¶46. The trial-court record reveals that Christina and Kimberly entered a Consent and Stipulation, jointly agreeing on the issues to be presented to and decided by the chancellor. (*See* Appendix I). *Inter alia*,[9] Christina and Kimberly agreed to submit to the trial court the issues of visitation and child support of and for E.J. and Z.S. The issue of custody was raised as to Z.S. only. Christina claimed, and Kimberly testified, that they "shared . . . parenting" **[*26]** of both children. The chancellor held, based on the pleadings, exhibits, and testimony, that Christina stood *in loco parentis* to both children., E.J. and Z.S. *See* ***Logan v. Logan***, 730 So. 2d 1124, 1126 (Miss. 1998) ("[A] person acting *in loco*

parentis [is] one who has assumed the status and obligations of a parent without a formal adoption.")

¶47. In this appeal, Christina challenges the chancellor's findings as to Z.S. only, vastly expanding and reframing issues that were never presented to, nor considered by, the trial court. (*See* Appendix II, comparing the agreed-upon issues before the trial court *visàvis* the issues raised in this appeal, *verbatim et literatim*). Equitable estoppel was raised for the first time on appeal, and therefore should not be considered by this Court. *See***Burnham**, 185 So. 3d at 361.[10]

¶48. As to the sperm donor, the chancellor erred in declaring him a natural father whose parental rights had to be terminated. However, I disagree with the plurality's blanket assertion that in any case, no anonymous sperm donors will be accorded the burdens and benefits of natural fathers. Because the record is devoid of an attempt to notice the sperm donor in order to make him a party to these **[*27]** proceedings, the trial court erred in granting the sperm donor such rights. No citation is required for the proposition that in all child-custody, support, and visitation cases, a bonafide effort to give notice of the proceedings is required. Our state and federal constitutions require no less. Further, the parties failed to offer the chancellor documented evidence of a waiver or consent to the proceedings. A diligent review of the record reveals that neither party presented pleadings or affidavits supporting a purported waiver. Our precedent mandates that cases be decided on the facts contained in the record. *See* ***In re Adoption of Minor Child***, 931 So. 2d 566, 579 (Miss. 2006).

¶49. The plurality's holding regarding sperm donors begins with suggesting that the "legislative intent"[11] of the disestablishment-of-paternity statute-a statute not at issue in this case-puts the plurality at odds with paragraphs ten through fourteen of the chancellor's final decree. I agree that paragraphs ten through fourteen should be struck from the final decree after remand, but only because they are *obiter dictum*. The statute referenced in the plurality's opinion never was quoted or argued by either **[*28]** party at the trial level.

¶50. Christina sought custody of Z.S. only. The trial court awarded custody of E.J. and Z.S. to Kimberly based on the best interests of the children.[12] Still, the trial court found that Christina, standing *in loco parentis* to Z.S. and E.J., was entitled to the burdens and benefits of a parent, granting her rights to visitation and ordering child support. This finding is consistent with established legal principles, with or without the sperm donor or a determination of who is Z.S.'s natural father. *See***Griffith v. Pell**, 881 So. 2d 184, 186 (Miss. 2004) ("Merely because another man was determined to be the minor child's biological father does not automatically negate the [parent-child] relationship held by [Christina] and the minor [children].") Further, substantial evidence in the record supports the chancellor's finding. Christina argues that the trial court erred in this finding as to Z.S. only, for Christina pleaded that she stood *in loco parentis* to E.J.

¶51. As to Z.S., she argues that married men had their "parental status . . . recognized notwithstanding a lack of genetic relationship to their marital children." Christina cites ***J.P.M. v. T.D.M.***, 932 So. 2d 760, 762 (Miss. 2006), and ***Griffith***, 881 So. 2d at 185. According to this Court: **[*29]**

In both ***Pell*** and ***J.P.M.***, a husband learned during the pendency of divorce proceedings that he was not the biological father of a child born of, or just prior to, the marriage. In those cases, we reasoned that the natural-parent presumption had been overcome based on several facts: (1) ***the husbands stood in loco parentis*** . . . .

In re Waites, 152 So. 3d 306, 312 (Miss. 2014) (quoting ***Smith v. Smith***, 97 So. 3d 43, 47 (Miss. 2012)). In ***Pell*** and ***J.P.M***., nonbiological fathers were granted *in loco parentis* status, entitling them to burdens and benefits associated with parenthood, successfully rebutting the natural-parent presumption in a child-custody battle. In ***Pell***, the Court remanded for a best-interest ***Albright***[13] analysis. Significantly, in ***J.P.M.***, the Court affirmed the chancellor's decision to award physical custody to the husband standing *in loco parentis*, for his decision was based on the best interest of the child-the polestar consideration in all child-custody cases.

¶52. In the case *sub judice*, the chancellor found that it was not in the best interest of either child for Christina to have custody. While the chancellor's custody determination was not manifestly wrong or clearly erroneous, the chancellor erred by failing to address each ***Albright [*30]*** factor on the record.

¶53. Christina's equal-protection argument as it relates to her standing *in loco parentis* is without merit. *In loco parentis* is a gender-neutral legal principle. There is no different treatment, analysis, or outcome for men and women who establish *in loco parentis* status. *See*, e.g., ***In re Waites***, 152 So. 3d at 307 (finding that husband of child's mother acted *in loco parentis*, even though husband and mother were married during child's birth

and raised child together, because he was not biological father of child). Christina's *in loco parentis* status was a gender-neutral determination.

¶54. For the reasons herein stated, I would reverse and remand for the trial court to examine the record and the chancellor's notes and issue a final decree consistent with this dissent.

COLEMAN, MAXWELL AND CHAMBERLIN, JJ., JOIN THIS OPINION IN PART.

APPENDIX I

Issues presented to the trial court *verbatim et literatim*[14]

ISSUES THAT THE PARTIES WISH FOR THE COURT TO DECIDE

The following issues are therefore, presented to his Court for determination:

A. Custody of the minor child. [Z.S.];

B. Child support for the benefit of [Z.S.];

C. Visitation of the minor child [Z.S.];

D. Whether Christina Strickland shall **[*31]** be placed on the birth certificate of [Z.S.] and named as a parent thereon;

E. Child support for the benefit of [E.J.];

F. Visitation of the minor child [E.J.];

G. Who will claim the children for Federal and State Income tax purposes;

APPENDIX II

"ISSUES THAT THE PARTIES WISH FOR THE COURT TO DECIDE" APPELLANT'S "STATEMENT OF ISSUES" Presented on appeal *verbatim et literatim* (*See* Appellant's Brief 1)

A. Custody of the minor child, [Z.S.]; 1. Whether the trial court erred in holding that a child born to a married couple who achieved pregnancy via medically assisted reproductive technology ("A.R.T.") with sperm from an anonymous donor may be denied the benefit and protection of a parental relationship with both spouses.

B. Child support for the benefit of [Z.S.]; *a. Whether children born to married parents who give birth to a child via A.R.T. with sperm from an anonymous donor are entitled to the marital presumption that both spouses are their legal parents.*

C. Visitation of the minor child, [Z.S.]; *b. Whether the Supreme Court's decision in Obergefell v. Hodges requires Mississippi to apply laws relating to the marital presumption of parentage in a* ***[*32]*** *gender-neutral manner so as to apply equally to married same-sex couples.*

D. Whether Christina Strickland shall be placed on the birth certificate of [Z.S.] and named as a parent thereon; *c. Whether the doctrine of equitable estoppel precludes a parent from seeking to disestablish her spouse's parentage of the couple's marital child based solely on the absence of a genetic relationship, when the child was born as a result of anonymous donor insemination, to which both spouses consented.*

E. Child support for the benefit of [E.J.]; *d. Whether the trial court erred in ruling that a man who contributes sperm anonymously for use in A.R.T., whose identity is not and cannot be known, constitutes the legal parent of a child born to a married woman and therefore prevents recognition of the spouse as a parent.*

F. Visitation of the minor child, [E.J.]; *e. Whether the trial court committed reversible error by failing to apply precedent that recognizes the parental rights of a spouse to a child born during the marriage, reared as her own from birth, with an attached parent-child relationship and where no putative father exists or seeks to displace her parental rights.*

G. Who **[*33]** will claim the children for Federal and State Income tax purposes; 2. Whether the trial court erred in failing to recognize the constitutionally protected liberty interests of Christina and Z.S. in their parent-child relationship that may not be disturbed absent a compelling governmental interest.

3. Whether, consistent with the U.S. Constitution, the marital presumption may denied only to same-sex couples.

[1] Because Z.S. was a minor at the time, initials will be used to protect his anonymity.

[2] Because E.J. was a minor at the time, initials will be used to protect his anonymity.

[3] ART refers to various practices and procedures beyond AI, including in vitro fertilization,

intracytoplasmic sperm injection, egg donation, and surrogacy, which provide individuals the opportunity to conceive children other than through sexual intercourse.

[4] IVF refers to a method of fertilizing a human ovum outside of the body. K. Anderson, L. Anderson, and W. Glanze, *IVF*, Mosby's Medical, Nursing, & Allied Health Dictionary 842 (4th ed. 1994).

[5] Mississippi law at the time precluded both members of a same-sex couple from being listed on a birth certificate. *See* Miss. Code Ann. **[*34]** _ 41-57-14 (Rev. 2013).

[6] "[A] person acting *in loco parentis* [is] one who has assumed the status and obligations of a parent without a formal adoption." ***Logan v. Logan***, 730 So. 2d 1124, 1126 (Miss. 1998). A person acting *in loco parentis* has a right to custody of a child, but only against third persons. ***Farve v. Medders***, 128 So. 2d 877, 879 (Miss. 1961). The custody rights of a person holding this status are inferior to the custody rights of the natural parent. ***Davis v. Vaughn***, 126 So. 3d 33, 37 (Miss. 2013).

[7]*See****Funk v. United States***, 290 U.S. 371, 383, 54 S. Ct. 212, 216, 78 L. Ed. 369 (1933) (noting the power of the "courts, in the complete absence of . . . legislation on the subject, to declare and effectuate, upon common-law principles, what is the present rule upon a given subject in the light of fundamentally altered conditions[.]"); ***State v. Edward Hines Lumber Co.***, 150 Miss. 1, 115 So. 598, 605 (1928) ([T]he public policy of the state must be found in its constitution and statutes, 'and when they have not directly spoken, then in the decisions of the courts . . . .'").

[8] Otherwise, parties could "sandbag" trial judges in hopes of prevailing before appellate courts. Such a practice contravenes the fair and efficient administration of justice on appeal. *See* Order Adopting the Mississippi Rules of Appellate Procedure (Dec. 15, 1994).

[9] Additionally, they asked who would **[*35]** claim E.J. and Z.S. for state and federal income tax purposes, and whether Christina would be placed on the birth certificate of Z.S. and named as a parent thereon. Christina failed to name the State Board of Health as a party in to these proceedings. *See* Miss. Code Ann. § 41-57-23(1) (Rev. 2013).

[10] Assuming *arguendo* that this Court is not procedurally barred from considering equitable estoppel, the "facts" relied upon by the plurality were disputed at trial. The chancellor, who heard the testimony and observed the witnesses' demeanor, commented in his bench ruling that "[t]here are two different versions of how the child was cared for and how it came to be that Christina Strickland became a part of his life. Kimberly actually maintains that she was primarily involved in seeking out this procedure [artificial insemination]. Christina claims that she was very much involved with the whole thing. There is a little bit of diametrically opposed testimony as to who was making these decisions." Notwithstanding, the plurality relies on Christina's testimony and opines that "Kimberly is estopped from challenging Christina's parental rights as to Z.S. . . ." (Plurality Op. ¶ 34.)

[11] An inquiry into legislative intent is a hazardous **[*36]** undertaking under even the best of circumstances.

[12] "Court[s] shall in all cases attempt insofar as possible, to keep the children together in a family unit." ***Bredemeier v. Jackson***, 689 So. 2d 770, 775 (Miss. 1997).

[13] ***Albright v. Albright,*** 437 So. 2d 1003 (Miss. 1983).

[14]Substituted initials for full name.

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McLaughlin v. Jones

Court of Appeals of Arizona, Division Two

October 11, 2016, Decided

No. 2 CA-SA 2016-0035

Reporter
240 Ariz. 560 *; 382 P.3d 118 **; 2016 Ariz. App. LEXIS 256 ***; 749 Ariz. Adv. Rep. 32

KIMBERLY MCLAUGHLIN, Petitioner, v. HON. LORI B. JONES, JUDGE PRO TEMPORE OF THE SUPERIOR COURT OF THE STATE OF ARIZONA, IN AND FOR THE COUNTY OF PIMA, Respondent, and SUZAN MCLAUGHLIN, Real Party in Interest.

Subsequent History: Review granted by McLaughlin v. Jones, 2017 Ariz. LEXIS 91 (Ariz., Apr. 18, 2017)

Prior History: [*1]** Special Action Proceeding, Pima County. Cause No. DC20130015.

Disposition: JURISDICTION ACCEPTED; RELIEF DENIED.

Core Terms

paternity, marriage, biological, couples, same-sex, parenthood, birth, child born, statutes, spouse, marry, presumption of paternity, marital, dissolution, parties, special-action, equitable, estopped, rights, artificial insemination, rebutting a presumption, parental rights, heterosexual, presumptive, applies, custody, rebut, woman, fundamental rights, putative father

Case Summary

Overview
HOLDINGS: [1]-The superior court correctly found a birth mother's wife was a child's legal parent under Ariz. Rev. Stat. § 25-401(4) because the mother was estopped from rebutting the presumption of parenthood pursuant to Ariz. Rev. Stat. § 25-814(C); [2]-The mother and wife were lawfully married when the mother became pregnant, the wife entered into an agreement that guaranteed her equal parental rights with the mother, and by agreeing to the mother's artificial insemination, the wife bound herself under Ariz. Rev. Stat. § 25-501 to provide support for the child; [3]-Having two parents to love and support the child was in his best interest; [4]-Section 25-814 accommodates a gender-neutral application and the United States Supreme Court decision that same-sex couples could exercise the fundamental right to marry required the courts to apply it in that manner.

Outcome
Petition for special-action relief denied.

LexisNexis® Headnotes

Family Law > Marriage > Types of Marriages > Same Sex Marriages

HN1 **Types of Marriages, Same Sex Marriages**

Same-sex couples may exercise the fundamental right to marry.

Civil Procedure > Appeals > Appellate Jurisdiction > State Court Review

Governments > Legislation > Interpretation

HN2 **Appellate Jurisdiction, State Court Review**

The court of appeals has discretion whether to accept special-action jurisdiction. In determining whether to exercise that discretion, the court of appeals considers whether the petitioner has an equally plain, speedy, and adequate remedy by appeal. Ariz. R.P. Spec. Actions 1(a). Additionally, questions of law regarding the interpretation of a statute are particularly suited for special-action review, as are issues of first impression and statewide importance.

Civil Procedure > Appeals > Standards of Review > De Novo Review

Civil Procedure > Appeals > Standards of Review > Questions of Fact & Law

HN3 **Standards of Review, De Novo Review**

The interpretation and application of statutes involve questions of law, which the court of appeals reviews de novo.

Governments > Legislation > Interpretation

HN4 **Legislation, Interpretation**

The courts' primary task in interpreting statutes is to give effect to the intent of the legislature. The plain language of a statute is the best indicator of that intent. Therefore, when a statute is clear and unambiguous, the courts apply its plain language and need not engage in any other means of statutory interpretation. But the courts must also attempt to construe and apply statutes in a manner that would render them constitutional. If possible, the courts construe statutes to avoid rendering them unconstitutional.

Family Law > Child Custody > Custody Awards

Family Law > Paternity & Surrogacy > Establishing Paternity > Father's Acknowledgment

Family Law > Paternity & Surrogacy > Proof of Paternity > Inferences & Presumptions

HN5 **Child Custody, Custody Awards**

Ariz. Rev. Stat. § 25-401(4) defines "legal parent" for purposes of marital dissolution proceedings under Title 25, as the biological or adoptive parent. The statute adds, legal parent does not include a person whose paternity has not been established pursuant to Ariz. Rev. Stat. § 25-812 (acknowledgment of paternity) or Ariz. Rev. Stat. § 25-814 (presumptions of paternity). Thus, "legal parent" includes a person whose paternity is established under § 25-814.

Family Law > Paternity & Surrogacy > Surrogacy > Assisted Reproduction Parentage

Family Law > Parental Duties & Rights > Duties > Support of Children

HN6 **Surrogacy, Assisted Reproduction Parentage**

Ariz. Rev. Stat. § 25-501 is a support statute. It requires the spouse of a woman who bears a child as a result of artificial insemination to pay child support when that spouse is the biological parent or agreed to the insemination in writing. Ariz. Rev. Stat. § 25-501(B). The plain language of the statute does not create "legal parent" status in a person who agreed to the insemination or give that person parental rights.

Constitutional Law > Substantive Due Process > Privacy > Personal Decisions

Family Law > Marriage > Types of Marriages > Same Sex Marriages

HN7 **Privacy, Personal Decisions**

State statutes that do not permit and will not recognize same-sex marriages deny same-sex couples the liberty-based, fundamental right to marry, thereby violating the Due Process and Equal Protection Clauses of the Constitution. Same-sex couples may not be deprived of the fundamental right to marry and state laws that exclude same-sex couples from civil marriage on the same terms and conditions as opposite-sex couples are invalid. Liberty-based, constitutionally protected rights that are related to the right to marry include the right to procreate, raise children and make decisions relating to family relationships.

Family Law > Child Custody > Custody Awards

Family Law > ... > Proof of Paternity > Inferences & Presumptions > Factors

Family Law > Marriage > Types of Marriages > Same Sex Marriages

HN8 **Child Custody, Custody Awards**

Under Ariz. Rev. Stat. § 25-814(A)(1), the male spouse of a woman who delivers a child is the presumptive

parent, and, therefore, a "legal parent" for purposes of Ariz. Rev. Stat. § 25-401(4). If the female spouse of the birth mother of a child born to a same-sex couple is not afforded the same presumption of parenthood as a husband in a heterosexual marriage, then the same-sex couple is effectively deprived of civil marriage on the same terms and conditions as opposite-sex couples, particularly in terms of safeguarding children and families.

Constitutional Law > The Judiciary > Case or Controversy > Constitutionality of Legislation

HN9[] **Case or Controversy, Constitutionality of Legislation**

The courts have an obligation to find statutes constitutional if possible.

Constitutional Law > Substantive Due Process > Privacy > Personal Decisions

Family Law > ... > Proof of Paternity > Inferences & Presumptions > Factors

Family Law > Marriage > Types of Marriages > Same Sex Marriages

HN10[] **Privacy, Personal Decisions**

Ariz. Rev. Stat. § 25-814 accommodates a gender-neutral application and the United States Supreme Court decision that same-sex couples may exercise the fundamental right to marry requires the courts to apply it in this manner.

Family Law > ... > Proof of Paternity > Inferences & Presumptions > Factors

Family Law > Paternity & Surrogacy > Establishing Paternity > Father's Acknowledgment

HN11[] **Inferences & Presumptions, Factors**

Notwithstanding the use of male-specific terms such as "man," "paternity" and "father," a man's paternity under Ariz. Rev. Stat. § 25-814 and, therefore, his status as a legal parent under Ariz. Rev. Stat. § 25-401(4) is not necessarily biologically based. Of the four circumstances specified in § 25-814(A) that give rise to the presumption of paternity, only § 25-814(A)(2) is based on the establishment of a biological connection between the man and child through scientific testing. Section 25-814(A)(1) presumes paternity if the child is born during the marriage or within ten months thereafter. It does not require a biological connection between the father and child. The mere fact that the child was born during the marriage or shortly thereafter gives rise to the presumption of the husband's paternity, without regard to whether the husband is the biological parent. Similarly, neither § 25-814(A)(3), the father's signature on the birth certificate, nor § 25-814(A)(4), acknowledgment of paternity, requires a biological link with the child. Both are based on the presumed father's declared intent to be the child's parent and thereby assume the responsibility of supporting the child. The word "paternity" therefore signifies more than biologically established paternity. It encompasses the notion of parenthood, including parenthood voluntarily established without regard to biology.

Family Law > Paternity & Surrogacy > Establishing Paternity

Family Law > Paternity & Surrogacy > Proof of Paternity > Inferences & Presumptions

HN12[] **Paternity & Surrogacy, Establishing Paternity**

The purpose of paternity statutes appears to be to provide financial support for the child from the natural parent.

Family Law > ... > Proof of Paternity > Inferences & Presumptions > Factors

Family Law > Child Custody > Custody Awards > Inferences & Presumptions

HN13[] **Inferences & Presumptions, Factors**

The marital presumption is intended to assure that two parents will be required to provide support for a child born during the marriage. Ariz. Rev. Stat. § 25-503(A), (F) requires the presumed parent under Ariz. Rev. Stat. § 25-814(A) to pay child support unless clear and convincing evidence shows paternity was established by fraud, duress or material mistake of fact. The marital

presumption of paternity serves the additional purpose of preserving the family unit. Presumptions of paternity are driven, not by biological paternity, but by the State's interest in the welfare of the child and the integrity of the family. The public policy behind the presumption of paternity is preservation of families. These purposes and policies are equally served whether the child is born during the marriage of a heterosexual couple or to a couple of the same sex. Safeguarding children and families, which is among bases for protecting right to marriage, applies equally to same-sex as opposite-sex couples.

Family Law > ... > Proof of Paternity > Inferences & Presumptions > Rebuttals

HN14[] **Inferences & Presumptions, Rebuttals**

The marital presumption of parenthood cannot constitutionally be rebuttable when the presumed parent is a man, the husband in a heterosexual marriage, but not when the spouse of the birth mother is a woman.

Civil Procedure > Appeals > Appellate Jurisdiction > State Court Review

HN15[] **Appellate Jurisdiction, State Court Review**

The appellate court will not grant special-action relief if the respondent reaches the right result for the wrong reason.

Civil Procedure > ... > Defenses, Demurrers & Objections > Affirmative Defenses > Estoppel

HN16[] **Affirmative Defenses, Estoppel**

Equitable estoppel applies when a party engages in acts inconsistent with a position later adopted and the other party justifiably relies on those acts, resulting in injury.

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Judges: Judge Espinosa authored the opinion of the Court, in which Presiding Judge Howard and Judge Staring concurred.

Opinion by: ESPINOSA

Opinion

[*561] **[**119]** ESPINOSA, Judge:

P1 In *Obergefell v. Hodges*, __ U.S. __, __, 135 S. Ct. 2584, 2604-05, 192 L. Ed. 2d 609 (2015), the United States Supreme Court held ***HN1***[] "same-sex couples may exercise the fundamental right to marry." In this special action, we are asked to decide whether, in light of that decision, the respondent judge erred **[***2]** by finding real-party-in-interest Suzan McLaughlin, the female spouse of petitioner Kimberly McLaughlin, is the presumptive parent of the child born to Kimberly, pursuant to A.R.S. § 25-814(A)(1), and finding Kimberly may not rebut that presumption pursuant to § 25-814(C). For the reasons that follow, we accept jurisdiction and deny relief.

Factual and Procedural Background

P2 Kimberly and Suzan were legally married in October 2008 in California. The couple agreed to have a child through artificial insemination, using an anonymous sperm donor selected from a sperm bank. Although efforts to have Suzan conceive and give birth through this process did not prove successful, Kimberly became pregnant in 2010. Before the child was born, the couple moved to Arizona. Anticipating the birth, they entered into a joint parenting agreement and executed mirror wills, declaring they were to be equal parents of the

child Kimberly was carrying.[1] After E.'s birth in June 2011, Suzan stayed at home and cared for him, while **[*562] [**120]** Kimberly worked as a physician. The relationship deteriorated, however, and when E. was almost two years old, Kimberly moved out of the home, taking E. with her and cutting off his contact with Suzan.

P3 Suzan filed a Petition for Dissolution of Marriage in April 2013, as well as a Petition for Legal Decision-Making and Parenting Time In Loco Parentis and Petition for Temporary Orders. The respondent judge subsequently stayed the proceedings while *Obergefell* was pending before the Supreme Court. In January 2016, six months after the Court decided *Obergefell*, holding same-sex couples have the same fundamental right to marry as heterosexual couples, __ U.S. at __, 135 S. Ct. at 2602-03, Kimberly moved to set the case for trial. The respondent ordered briefing concerning the issue whether the case was a dissolution proceeding with **[***4]** or without children in view of the presumption of paternity set forth in § 25-814(A). The respondent subsequently found in her April 7, 2016 minute entry that, based on *Obergefell*, it would violate Suzan's rights under the Fourteenth Amendment not to apply to her the same presumption of parenthood that applies to a man. The respondent thus ordered that the case proceed as a dissolution action with children.

P4 Kimberly then filed a Motion for Declaratory Judgment, asking the respondent judge to decide whether she would be permitted to rebut the presumption pursuant to § 25-814(C). In her May 2 order, the respondent ruled that Kimberly would not be permitted to rebut the presumption. The respondent reasoned that because Suzan was not basing her parenthood on a presumption of paternity, it was not an issue in the case and there was nothing for Kimberly to rebut under the statute. The respondent added, a "family presumption applies to same sex and opposite sex non-biological spouses married to a spouse who conceived a child during the marriage via artificial insemination." The respondent also relied on A.R.S. § 25-501, a support statute applicable when a child is born as a result of artificial insemination, finding it necessarily gives rise **[***5]** to parental rights in the non-biological spouse. The respondent again ruled the case would proceed as a dissolution action with children. This special action followed.

[1] The agreement stated **[***3]** the parties' intent that Suzan would "participate in a second parent adoption of the child if and when the parties reside in a jurisdiction that permits second parent adoptions," and Suzan would be a "co-parent" of the child; Kimberly "waive[d] any constitutional, federal or state laws that provide her with a greater right to custody and visitation than that enjoyed by Suzan," and the parties further agreed, "[s]hould the relationship between [them] . . . end before a second parent adoption can take place," the parent-child relationship between Suzan and the child would "continue with shared custody . . . ."

Jurisdiction

P5 ***HN2***[] This court has discretion whether to accept special-action jurisdiction. *Lincoln v. Holt*, 215 Ariz. 21, ¶ 3, 156 P.3d 438, 440 (App. 2007). In determining whether to exercise that discretion, we consider whether the petitioner has an equally plain, speedy, and adequate remedy by appeal. Ariz. R. P. Spec. Act. 1(a). Additionally, questions of law regarding the interpretation of a statute are particularly suited for special-action review, as are issues of first impression and statewide importance. *See State v. Bernini*, 230 Ariz. 223, ¶ 5, 282 P.3d 424, 426 (App. 2012).

P6 The respondent judge's ruling could be challenged on appeal, after the case has been decided and a final decree and parenting order is entered. *See* Ariz. R. Fam. L. P. 78; *Antonsen v. Superior Court*, 186 Ariz. 1, 4, 918 P.2d 203, 206 (App. 1996) (acknowledging order regarding paternity testing could be raised on direct appeal from final custody order but finding it in child's best interest to accept special-action jurisdiction and address legal issue). But this case raises significant legal questions of first impression and statewide importance regarding the interpretation and implications of *Obergefell*, and it involves a young child, whose best interest is at stake, **[***6]** compelling reasons to decide these matters now. *See Alvarado v. Thompson*, 240 Ariz. 12, ¶ 10, 375 P.3d 77, 79 (App. 2016); *see also Sheets v. Mead*, 238 Ariz. 55, ¶ 6, 356 P.3d 341, 342-43 (App. 2015) (accepting special-action jurisdiction in part because child would face prolonged period of uncertainty while appeal pending); *K.D. v. Hoffman*, 238 Ariz. 278, ¶ 4, 359 P.3d 1022, 1023 (App. 2015) (special-action jurisdiction accepted in part because issues involved welfare of child).

P7 For all of these reasons, we accept jurisdiction of this special action.

Discussion

P8 Kimberly does not dispute that she and Suzan agreed Kimberly would be artificially inseminated, they

would both be the child's parents, and they would have equal parental rights. She nevertheless contends Suzan is **[*563] [**121]** not a parent as that term is defined in A.R.S. § 25-401(4). She argues that as E.'s biological mother, she is, by definition, the only parent and therefore the only person who has parental rights, which are fundamental rights. Kimberly asserts the respondent judge thus erred by construing § 25-501(B) and § 25-814(A)(1) to give Suzan the same parental rights as she possesses. Suzan responds that in light of *Obergefell*, those statutes must be applied and interpreted in a gender-neutral manner so that same-sex couples' fundamental marital rights are not restricted and they are afforded the same benefits of marriage as heterosexual couples and on the same terms. **[***7]** *Obergefell*, __ U.S. at __, 135 S. Ct. at 2604.

P9 ***HN3***[] The interpretation and application of statutes involve questions of law, which we review de novo. *See Adrian E. v. Dep't of Child Safety*, 239 Ariz. 240, ¶ 8, 369 P.3d 264, 266 (App. 2016). ***HN4***[] "Our primary task in interpreting statutes is to give effect to the intent of the legislature." *State v. Lee*, 236 Ariz. 377, ¶ 16, 340 P.3d 1085, 1090 (App. 2014), *quoting In re Estate of Winn*, 214 Ariz. 149, ¶ 8, 150 P.3d 236, 238 (2007). The plain language of a statute is the best indicator of that intent. *Id.* Therefore, "[w]hen a statute is clear and unambiguous, we apply its plain language and need not engage in any other means of statutory interpretation." *Kent K. v. Bobby M.*, 210 Ariz. 279, ¶ 14, 110 P.3d 1013, 1017 (2005). But we must also "attempt to construe and apply statutes in a manner that would render them constitutional." *Adrian E.*, 239 Ariz. 240, ¶ 21, 369 P.3d at 269; *see also Hayes v. Continental Ins. Co.*, 178 Ariz. 264, 272-73, 872 P.2d 668, 676-77 (1994) ("[I]f possible, this court construes statutes to avoid rendering them unconstitutional.").

P10 Section 25-401(4) ***HN5***[] defines "legal parent" for purposes of marital dissolution proceedings under Title 25, as the "biological or adoptive parent."[2] The statute adds, "Legal parent does not include a person whose paternity has not been established pursuant to [A.R.S.] § 25-812 [acknowledgment of paternity] or 25-814 [presumptions of paternity]." Thus, "legal parent" includes a person whose paternity is established under § 25-814.

P11 Section 25-814(A) provides, in relevant part, as follows:

> A. A man is presumed to be the father of the child if:
>
> 1. He and the mother of the child were married at any time in the ten months immediately preceding the birth . . . .
>
> 2. Genetic testing affirms at least a ninety-five per cent probability of paternity.
>
> 3. A birth certificate is signed by the mother and father of a child born out of wedlock.
>
> 4. A notarized or witnessed statement is signed by both parents acknowledging paternity or separate substantially similar notarized or witnessed statements are signed by both parents acknowledging paternity.

Enacted well before the Supreme Court decided *Obergefell*, this statute was written with gender-specific language at a time when the marriage referred to in subsection (A)(1) could only be between a man and a woman.[3] *See* Ariz. Const. art. XXX, § 1 (only union of one man and one woman valid or recognized as marriage); A.R.S. § 25-101(C) (prohibiting marriage between persons of same sex).

P12 Kimberly first contends the respondent judge erred by relying on § 25-501 to imply a "family presumption" in § 25-814. We agree. Section 25-501 ***HN6***[] is a support statute; it requires the spouse of a woman who bears a child as a result of artificial insemination to pay child support when that spouse is the biological parent or agreed to the insemination in writing. § 25-501(B). The plain language of the statute does not create "legal **[*564] [**122]** parent" status in a person who agreed to the insemination or give that person parental rights. Had the legislature intended to confer those rights, it could have done so when it enacted § 25-401(4) and defined "legal parent." *See* 2012 Ariz. Sess. Laws, ch. 309, § 4.[4] We disagree with Kimberly, however, that it

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[2] Although Kimberly also refers to a similar definition of parent in A.R.S. § 1-602(E), which is part of Arizona's Parents' Bill of Rights, A.R.S. §§ 1-601 to 1-602, we confine our discussion to the issue before us, which **[***8]** is whether Suzan is a parent for purposes of a marital dissolution proceeding under Title 25 and the definition of parent in § 25-401(4).

[3] Initially enacted as A.R.S. § 12-854 in 1994 as part of comprehensive child-support legislation, the legislature renumbered the statute as § 25-814 in 1996. *See* 1994 Ariz. Sess. Laws, ch. 374, § 5 **[***9]** ; 1996 Ariz. Sess. Laws, ch. 192, § 14.

[4] Other states have specifically addressed parentage in the context of assisted reproduction and have adopted the Uniform Parentage Act (UPA), which recognizes a parent-child **[***10]** relationship under those circumstances. *See*

would be impossible and absurd to apply § 25-814(A)(1) in a gender-neutral manner to give rise to presumptive parenthood in Suzan. Indeed, *Obergefell* mandates that we do so and the plain language of the statute, as well as the purpose and policy behind it, are not in conflict with that application.

P13 In *Obergefell*, the Supreme Court held that ***HN7***[⬆] state statutes that do not permit and will not recognize same-sex marriages deny same-sex couples the liberty-based, fundamental right to marry, thereby violating the Due Process and Equal Protection Clauses of the Constitution. __ U.S. at __, __, 135 S. Ct. at 2602-03, 2604-05. The Court expressly stated that same-sex couples "may not be deprived" of the fundamental right to marry and state laws that "exclude same-sex couples from civil marriage on the same terms and conditions as opposite-sex couples" are invalid. *Id.* at __, 135 S. Ct. at 2604-05. Relying, in part, on its previous decision in *Zablocki v. Redhail*, 434 U.S. 374, 384, 386, 98 S. Ct. 673, 54 L. Ed. 2d 618 (1987), in which it had reaffirmed the holding in *Loving v. Virginia*, 388 U.S. 1, 12, 87 S. Ct. 1817, 18 L. Ed. 2d 1010 (1967), that the right to marry is fundamental, the Court identified liberty-based, constitutionally protected rights that are related to the right to marry, including the right to procreate, raise children and make decisions relating to family relationships. *Obergefell*, __ U.S. at __, 135 S. Ct. at 2598-600.[5]

P14 ***HN8***[⬆] Under § 25-814(A)(1), the male spouse of a woman who delivers a child is the presumptive parent, and, therefore, a "legal parent" for purposes of § 25-401(4). If the female spouse of the birth mother of a child born to a same-sex couple is not afforded the same presumption of parenthood as a husband in a heterosexual marriage, then the same-sex couple is effectively deprived of "civil marriage on the same terms and conditions as opposite-sex couples," particularly in terms of "safeguard[ing] children and families." *Obergefell*, __ U.S. at __, __, 135 S. Ct. at 2600, 2605.[6] We therefore must reject Kimberly's rigid interpretation of § 25-814. Mindful of ***HN9***[⬆] our obligation to find statutes constitutional if possible, *Adrian E.*, 239 Ariz. 240, ¶ 21, 369 P.3d at 269, and given the language and purpose of § 25-814, we find ***HN10***[⬆] it accommodates a gender-neutral application and *Obergefell* requires us to apply it in this manner.

P15 ***HN11***[⬆] Notwithstanding the use of male-specific terms such as "man," "paternity" and "father," a man's paternity under the statute and, therefore, his status as a legal parent under § 25-401(4) is not necessarily biologically based. Indeed, of the four circumstances specified in § 25-814(A) that give rise to the presumption of paternity, only subsection (A)(2) is based on the establishment of a biological connection between the man and the child through scientific testing. Section 25-814(A)(1) presumes paternity if the child is born during the marriage or **[*565]** **[**123]** within ten months thereafter. It does not require a biological connection between the father and child. The mere fact that the child was born during the marriage or shortly thereafter gives rise to the presumption of the husband's paternity, without regard to whether the husband is the biological parent. Similarly, neither subsection (A)(3), the father's signature **[***13]** on the birth certificate, nor (A)(4), acknowledgment of paternity, requires a biological link with the child. Both are based, instead, on the presumed father's declared intent to be the child's parent and thereby assume the responsibility of supporting the child.

P16 The word "paternity" therefore signifies more than biologically established paternity. It encompasses the notion of parenthood, including parenthood voluntarily established without regard to biology. As our supreme court observed decades ago, ***HN12***[⬆] the purpose of paternity statutes "appears to be to provide financial support for the child from the natural parent." *Hurt v.*

Unif. Parentage Act §§ 703, 704 (Unif. Law Comm'n 2002). Although our courts have found the policies of the UPA "persuasive," *Hall v. Lalli*, 194 Ariz. 54, ¶ 22, 977 P.2d 776, 783 (1999), our legislature has not adopted it, *see Stephenson v. Nastro*, 192 Ariz. 475, ¶ 16, 967 P.2d 616, 621-22 (App. 1998), and it is not for us to do so.

[5] In *Obergefell*, the Court also held "there is no lawful basis for a State to refuse to recognize a lawful same-sex marriage **[***11]** performed in another State on the ground of its same-sex character." __ U.S. at __, 135 S. Ct. at 2607-08. Kimberly and Suzan were legally married in California in 2008. Following *Obergefell*, Arizona must recognize their marriage.

[6] That Arizona's adoption statutes, post-*Obergefell*, permit same-sex couples to adopt a child, and allow a birth mother's female spouse to adopt her child, does not place same-sex and heterosexual couples on equal footing. *See* A.R.S. § 8-103(A) (defining who **[***12]** may adopt a child in Arizona); A.R.S. § 8-117(C) (effect of adoption order when spouse of parent adopts); Ariz. R. P. Juv. Ct. 79 (setting forth procedures for adoption, including mandatory content of petition). Aside from the fact that adoption of E. was not a viable option for Suzan in Arizona before *Obergefell*, the adoption process is not comparable to presumptive parenthood based on marriage.

Superior Court, 124 Ariz. 45, 48, 601 P.2d 1329, 1332 (1979). Indeed, initially enacted as A.R.S. § 12-854 in 1994, the statute was part of sweeping changes to Arizona's child support statutes. *See* 1994 Ariz. Sess. Laws, ch. 374, § 5; 1996 Ariz. Sess. Laws, ch. 192, § 14 (renumbered as § 25-814). ***HN13***[⬆] The marital presumption is intended to assure that two parents will be required to provide support for a child born during the marriage. *See* A.R.S. § 25-503(A), (F) (requiring presumed parent under § 25-814(A) to pay child support unless clear and convincing evidence shows "paternity was established by fraud, duress or material mistake of fact").

P17 The marital presumption of paternity serves **[***14]** the additional purpose of preserving the family unit. *See Ban v. Quigley*, 168 Ariz. 196, 199, 812 P.2d 1014, 1017 (App. 1990); *see also Partanen v. Gallagher*, 475 Mass. 632, 59 N.E.3d 1133, 1141, 2016 WL 5721061, at *7 (Mass. 2016) (finding that presumptions of paternity "'are driven, not by biological paternity, but by the [S]tate's interest in the welfare of the child and the integrity of the family'"), *quoting In re Guardianship of Madelyn B.*, 166 N.H. 453, 98 A.3d 494, 500 (N.H. 2014)(alteration in *Partanen*); *CW v. LV*, 2001 PA Super 332, 788 A.2d 1002, 1005 (Pa. Super. Ct. 2001) (public policy behind presumption of paternity is preservation of families). These purposes and policies are equally served whether the child is born during the marriage of a heterosexual couple or to a couple of the same sex. *See Obergefell*, __ U.S. at __, 135 S. Ct. at 2600 (safeguarding children and families, which is among bases for protecting right to marriage, applies equally to same-sex as opposite-sex couples).[7]

P18 Kimberly maintains that § 25-814 pertains to paternity and fatherhood, and is a "biological **[***15]** paternity statute" that cannot apply to Suzan because she cannot possibly be E.'s father and has no biological connection to him. And, she argues, it is constitutionally permissible to treat men and women differently in this context, based on biological distinctions, relying on *Nguyen v. I.N.S.*, 533 U.S. 53, 121 S. Ct. 2053, 150 L. Ed. 2d 115 (2001). There, the Court found constitutional a federal statute that determines the citizenship of a child born out of the country and out of wedlock differently if the mother is a citizen than if the purported father is a citizen. *Id.* at 70-71. The Court concluded the gender-based classification had a biological basis and the government has an important interest in verifying that a biological parent-child relationship exists before a child born out of the country and out of wedlock may be regarded as an American citizen. *Id.* at 71-72. No such reasons for treating men and women differently exist here, where the issue is parenthood of a child born during a marriage.

P19 The respondent judge thus correctly found that Suzan is presumptively E.'s parent. She erred, however, when she concluded that only a presumption of paternity is rebuttable under § 25-814(C). *See* § 25-814(C) ("Any presumption under [§ 25-814(A)] shall be rebutted by clear and **[*566]** **[**124]** convincing evidence."). By doing **[***16]** so, the respondent applied portions of § 25-814 in a gender-neutral manner but not others. ***HN14***[⬆] The marital presumption of parenthood cannot constitutionally be rebuttable when the presumed parent is a man, the husband in a heterosexual marriage, but not when the spouse of the birth mother is a woman. *Cf. Soos v. Superior Court*, 182 Ariz. 470, 474-75, 897 P.2d 1356, 1360-61 (App. 1994) (finding A.R.S. § 25-218, which prohibits surrogate parentage contracts, violated equal protection principles insofar as it allowed men to rebut presumption of paternity but did not permit a woman, whose egg had been implanted in the surrogate, to rebut the presumption of maternity).

P20 Here, however, we need not decide how the rebuttal provision in § 25-814(C) applies in a same-sex marriage because we determine Kimberly is estopped from rebutting the presumption. *See Calderon-Palomino v. Nichols*, 201 Ariz. 419, ¶ 3, 36 P.3d 767, 769 (App. 2001) (***HN15***[⬆] appellate court will not grant special-action relief if respondent reaches right result for wrong reason). ***HN16***[⬆] Equitable estoppel applies when a party engages in acts inconsistent with a position later adopted and the other party justifiably relies on those acts, resulting in injury. *Flying Diamond Airpark, LLC v. Meienberg*, 215 Ariz. 44, ¶ 28, 156 P.3d 1149, 1155 (App. 2007).

P21 The parties do not dispute that they were lawfully married when Kimberly became pregnant as a result of artificial insemination the parties agreed should be undertaken, and **[***17]** E. was born. Nor does Kimberly dispute that Suzan stayed home to care for E.

[7] Section 25-103(B), A.R.S., provides: "It . . . is the declared public policy of this state and the general purpose of this title that . . . it is in a child's best interest: 1. To have substantial, frequent, meaningful and continuing parenting time with both parents[;] 2. To have both parents participate in decision-making about the child." Subsection (C) of the statute further provides: "A court shall apply the provisions of [Title 25] in a manner that is consistent with this section."

during the first two years of his life, until Kimberly left the home with him. Additionally, Kimberly and Suzan entered into an express agreement contemplating E.'s birth and agreed unequivocally that both would be E.'s parents, with equal rights in every respect. In fact, Kimberly specifically "waive[d] any constitutional, federal or state laws that provide her with a greater right to custody and visitation than that enjoyed by Suzan." The parties even agreed that, "[s]hould the relationship between [them] end before a second parent adoption can take place," the parent-child relationship between Suzan and the child would "continue with shared custody . . . ." Finally, the couple agreed Suzan would "participate in a second parent adoption of the child if and when the parties reside in a jurisdiction that permits second parent adoptions," but Kimberly left the home and separated from Suzan before *Obergefell* was decided and adoption was possible.

P22 The doctrine of equitable estoppel is not a stranger to family law jurisprudence in Arizona. *See Fenn v. Fenn*, 174 Ariz. 84, 89-90, 847 P.2d 129, 134-35 (App. 1993) (fundamental estoppel elements of representation and detrimental reliance considered **[***18]** in determining child support obligations, though ultimately not relied upon); *see also Unruh v. Indus. Comm'n*, 81 Ariz. 118, 120, 301 P.2d 1029, 1031 (1956) (rejecting dissolution litigant's claim where "conscience of the court" repelled by assertion of rights inconsistent with litigant's past conduct). Although no Arizona case has, until now, addressed a situation such as the one before us, we find helpful and persuasive a Wisconsin decision, *Randy A.J. v. Norma I.J.*, 2004 WI 41, 270 Wis. 2d 384, 677 N.W.2d 630 (Wis. 2004).

P23 In that case, the Wisconsin Supreme Court found the biological mother of a child born during her marriage and the child's putative father equitably estopped from rebutting the statutory presumption that the mother's husband was the child's father. *Id.* at 640-41. The husband, who had no idea another man could be the child's biological father, had supported the child and acted as her father in every respect for years before the mother was convicted of embezzlement and incarcerated, and divorce proceedings began. *Id.* at 633-34. During those proceedings, the mother questioned her husband's paternity for the first time and the putative father then filed a paternity action. *Id.* at 634.

P24 The Wisconsin court identified the issue as "whether the actions and inactions of [the mother] and [the putative father] were so unfair as to preclude them from **[***19]** overcoming the public's interest in the marital presumption" under the Wisconsin statute, which is similar to § 25-814(A)(1). *Id.* at 640- **[**125]** 41. **[*567]** The court concluded that all elements of equitable estoppel existed: action or inaction that induces reliance by another to that person's detriment. *Id.* It noted the arguments of the child and the father that the "uncontradicted evidence" showed the mother and the putative father had done nothing to assert his paternity, had permitted the husband to pay all birthing expenses and meet her financial needs, even after genetic testing, and had allowed the husband and the child "to develop deep emotional ties with each other." *Id.* at 641. It noted the following additional factors: "breaking those ties would be very harmful to [the child], as [the husband] is the only father she has ever known," and, the husband was "fully committed" to acting as the child's father and had done so throughout her life, providing for her emotional and financial needs for six years. *Id.* "In contrast," the court observed, the mother and the putative father had "asserted nothing" but biological test results and the resulting presumption of paternity to counter the arguments of the child and the father and the **[***20]** trial court's findings, which included a determination that it was in the child's best interest to adjudicate the husband as the child's father. *Id.*

P25 The Wisconsin court also concluded that the mother and putative father's "actions and lack of action, which were relied on by both [the child] and [the husband], [were] so unfair, that when combined with the state's interest in preserving [the child's] status as a marital child, they outbalance the public's interest in a purely biological approach to parenthood." *Id.* The court found them "equitably estopped from rebutting the marital presumption" establishing the husband's paternity of the child. *Id.*

P26 Other courts have applied the principle of equitable estoppel in the same manner under similar circumstances. *See Van Weelde v. Van Weelde*, 110 So. 3d 918, 921-22 (Fla. Dist. Ct. App. 2013) (wife equitably estopped from challenging husband's status as legal father, given his name on birth certificate, mutual written acknowledgment of paternity, husband held child out as his own, and provided care and support); *Hinshaw v. Hinshaw*, 237 S.W.3d 170, 172-73 (Ky. 2007) (wife in custody dispute precluded from using genetic test results to show husband who believed he was father of child born during marriage was not biological father); *S.R.D. v. T.L.B.*, 174 S.W.3d 502, 510 (Ky. Ct. App. 2005) (in post-dissolution action,

husband **[***21]** estopped from disclaiming paternity and financial obligations to children born during marriage and treated as own for years); *Riddle v. Riddle*, 619 N.E.2d 1201, 1204, 1211-12 (Ohio Ct. Com. Pl. 1992) (mother estopped from challenging husband's paternity of child born during marriage after she had permitted him to believe he was father and he had relied on that representation); *Clark v. Edens*, 2011 OK 28, 254 P.3d 672, ¶¶ 15-16 (Okla. 2011) (same); *Pettinato v. Pettinato*, 582 A.2d 909, 912-13 (R.I. 1990) (same).

P27 The reasoning of these cases applies equally here, compelling us to reach the same conclusion. Suzan entered into an agreement that guaranteed her equal parental rights with Kimberly. And by agreeing to Kimberly's artificial insemination, she thereby bound herself under § 25-501 to provide support for E. It is of no moment that during oral argument before this court, Kimberly stated she would not be seeking to enforce Suzan's support obligation, since the duty is owed to E. Significantly, Suzan executed a will designating Kimberly and E. as beneficiaries, stayed home and cared for E. for the first two years of his life, and was his de facto parent. In addition, there is no other person asserting presumptive parentage of E. and expressing a willingness to care for and support him. *Cf. In re Marriage of Worcester*, 192 Ariz. 24, ¶ 7, 960 P.2d 624, 627 (1998) (stating, "we find no suggestion in the statutes that the court must or may permit the **[***22]** presumption [of parenthood] to be rebutted unless the mother is seeking child support from another"). Suzan is the only parent other than Kimberly, and having two parents to love and support E. is in his best interest. Under these circumstances, Kimberly is estopped from rebutting the presumption of parenthood pursuant to § 25-814(C).

Conclusion

P28 Albeit for the different reasons discussed in this opinion, the respondent judge **[*568]** **[**126]** correctly found Suzan to be E.'s legal parent and ordered this matter to proceed as a dissolution action with children. Accordingly, Kimberly's petition for special-action relief is denied. Both parties have requested an award of attorney fees pursuant to A.R.S. § 25-324 which, based on the limited record in this regard, we deny. As the prevailing party in this special action, however, Suzan is granted her taxable costs upon compliance with Rule 21, Ariz. R. Civ. App. P. *See* Ariz. R. P. Spec. Act. 4(g).

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S-16516

IN THE SUPREME COURT OF THE STATE OF ALASKA

G.W. (Mother), Appellant, vs. STATE OF ALASKA, DHSS, OCS, Appellees.	)	Supreme Court No. S-16516
Trial Court No. 4FA-14-00051/52CN		

APPEAL FROM THE SUPERIOR COURT
FOURTH JUDICIAL DISTRICT AT FAIRBANKS
HONORABLE MICHAEL P. McCONAHY, JUDGE

OPENING BRIEF OF APPELLANT

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VRA CERTIFICATION AND APP. R. 513.5 CERTIFICATION

I certify that this document and its attachments do not contain (1) the name of a victim of a sexual offense listed in AS 12.61.140 or (2) a residence or business address or telephone number of a victim of or witness to any offense unless it is an address used to identify the place of the crime or it is an address or telephone number in a transcript of a court proceeding and disclosure of the information was ordered by the court. I further certify, pursuant to App. R. 513.5, that the font used in this document is Arial 12.5 point.

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Alaska Statute 18.50.160 provides:

Birth registration.

(a) A certificate of birth for each live birth that occurs in the state shall be filed with the bureau, as provided in this section, within five days after the birth. When a birth occurs on a moving conveyance within the United States and the child is first removed from the conveyance in this state, the birth shall be registered in this state and the place where the child is first removed shall be considered the place of birth. When a birth occurs on a moving conveyance in international waters, international air space, a foreign country, or a foreign country's air space and the child is first removed from the conveyance in this state, the birth shall be registered in this state but the certificate shall show the actual place of birth if the place can be determined.

(b) When a birth occurs in or en route to an institution, the person in charge of the institution or a designated representative of the person in charge of the institution shall obtain the personal data, prepare the certificate, certify that the child was born alive at the place and time and on the date stated either by signature on the certificate or another certification process, including an electronic process, approved by the bureau, and file the certificate as directed in (a) of this section. The physician or other person in attendance shall provide the medical information required by the certificate within 72 hours after the birth.

(c) When a birth occurs outside an institution, the certificate shall be prepared and filed by one of the following in the indicated order of priority:

(1) the physician in attendance at or immediately after the birth; or, in the absence of a physician,

(2) a person other than a parent in attendance at or immediately after the birth; or

(3) a parent; or, if a parent is unable,

(4) the person in charge of the premises where the birth occurs.

(d) If the mother was married at conception, during the pregnancy, or at birth, the name of the husband shall be entered on the certificate as the father of the child unless

(1) paternity has been lawfully determined otherwise by a tribunal, in which case the name of the father, if determined by a tribunal, shall be entered; or

(2) both the mother and the mother's husband execute affidavits attesting that the husband is not the father and that another man is the father, and the mother and the other man execute affidavits attesting that the other man is the father, so long as the affidavits meet the requirements of (g) of this section.

(e) If the mother was not married at conception, during the pregnancy, or at birth, the name of the father may not be entered on the certificate of birth unless

(1) paternity has been lawfully determined by a tribunal, in which case the name of the father, if determined by the tribunal, shall be entered;

(2) both the mother and the man to be named as the father have executed affidavits attesting that that man is the father, so long as the affidavits meet the requirements of (g) of this section and AS 18.50.165; or

(3) otherwise specified by statute.

(f) In the case of a child born out of wedlock, the certificate of birth shall be filed in accordance with (a), (b), and (c) of this section unless the state registrar directs another procedure.

(g) An affidavit under (d) or (e) of this section must meet the following requirements:

(1) the affidavit must be executed by all required individuals; an affidavit may be executed jointly, individually, or in combination of jointly and individually; and

(2) if an affidavit is executed by more than one individual, the signature of each individual must be individually notarized.

(h) In this section, unless the context requires otherwise, "tribunal" means a court, administrative agency, or quasi-judicial entity authorized by law to determine parentage.

Alaska Statute 25.20.050 provides:

Legitimation by subsequent marriage, acknowledgment in writing, or adjudication.

(a) A child born out of wedlock is legitimated and considered the heir of the putative parent when (1) the putative parent subsequently marries the undisputed parent of the child; (2) for acknowledgments made before July 1, 1997, the putative parent acknowledges, in writing, being a parent of the child; (3) for acknowledgments made on or after July 1, 1997, the putative father and the mother both sign a form for acknowledging paternity under AS 18.50.165; or (4) the putative parent is determined by a superior court without jury or by another tribunal, upon sufficient evidence, to be a parent of the child. Acceptable evidence includes evidence that

the putative parent's conduct and bearing toward the child, either by word or act, indicates that the child is the child of the putative parent. That conduct may be construed by the tribunal to constitute evidence of parentage. When indefinite, ambiguous, or uncertain terms are used, the tribunal may use extrinsic evidence to show the putative parent's intent.

(b) The Bureau of Vital Statistics, as custodian of the original certificates of birth of all persons born in the state, is designated as the depository for such acknowledgment and adjudication. The acknowledgment or adjudication shall be forwarded to the bureau in accordance with appropriate regulations of the bureau, and shall be noted on and filed with the corresponding original certificate of birth.

(c) In case of the birth in this state of a child out of wedlock and the legitimation of the child in accordance with this section, at the written request of the parents, or either of them or of the legal guardian, or of the person when of legal age, the Bureau of Vital Statistics shall prepare and place on file a substitute birth certificate, in accordance with the laws and regulations of the bureau pertaining to new certificates of this type.

(d) The results of a genetic test that is of a type generally acknowledged as reliable by an accreditation body designated by the Secretary of Health and Human Services and performed by a laboratory approved by such an accreditation body shall be admitted and weighed in conjunction with other evidence in determining the statistical probability that the putative parent is a legal parent of the child in question. However, a genetic test described in this subsection that establishes a probability of parentage at 95 percent or higher creates a presumption of parentage that may be rebutted only by clear and convincing evidence.

(e) Except as provided in (i) of this section, in proceedings in which paternity is contested, the tribunal shall order the parties, including the child, to submit to testing as described in (d) of this section upon request of

(1) the child support services agency created in AS 25.27.010 or the child support enforcement agency of another state; or

(2) a party, including a sworn statement

(A) alleging the paternity of an individual and setting out facts that show a reasonable possibility that the mother and that individual had sexual contact that could have resulted in the conception of the child; or

(B) denying the paternity of an individual and setting out facts that show a reasonable possibility that the mother and that individual did not have sexual contact that could have resulted in the conception of the child.

(f) The child support enforcement agency or child support services agency, as appropriate, may recover the costs of testing ordered under (e) of this section from the alleged father unless the testing establishes that the individual is not the father, except that costs may not be recovered from a person who is a recipient of cash assistance or self-sufficiency services under AS 47.27 (Alaska temporary assistance program). For purposes of this subsection, a person who receives a diversion payment and self-sufficiency services under AS 47.27.026 is not considered to be a recipient of cash assistance or self-sufficiency services under AS 47.27.

(g) A default judgment shall be entered against the defendant in an action where paternity is contested upon

(1) a showing that process was served on the defendant as required under applicable state law and court rules;

(2) a showing that the defendant has failed to appear at a hearing in the action or has failed to respond within a reasonable period of time as specified in court rules; and

(3) any additional showing determined necessary by the court.

(h) The tribunal in a paternity action shall give full faith and credit to a determination of paternity made by another state, whether established through voluntary acknowledgment or through administrative or judicial procedures.

(i) If a tribunal finds that good cause exists not to order genetic testing after considering the best interests of the child, the tribunal may not order testing under (e) of this section.

(j) Invoices, bills, or other standard documents showing charges for medical and related costs of pregnancy, childbirth, or genetic testing are admissible in an action to establish paternity without testimony or other evidence from the medical or other provider or third-party payor to provide the foundation for admissibility of the documents. The documents shall constitute prima facie evidence of the amounts incurred for such charges.

(k) Upon the motion of the child support enforcement agency or child support services agency, as appropriate, or another party in the action to establish paternity, the tribunal shall issue a temporary order for support of the child whose paternity is being determined. The order may require periodic payments of support, health care coverage, or both. The order shall be effective until the tribunal issues a final order on paternity and a permanent order for support is issued or the tribunal dismisses the action. The temporary order may only be issued if the tribunal finds clear and convincing evidence of the paternity of the putative father on the basis of the results of the genetic tests and other evidence admitted in the proceeding.

(l) The tribunal shall consider a completed and signed form for acknowledging paternity that meets the requirements of AS 18.50.165(a) as a legal finding of paternity for a child born out of wedlock. For an acknowledgment signed on or after July 1, 1997, the acknowledgment may only be withdrawn by the earlier of the following dates: (1) 60 days after the date that the person signed it, or (2) the date on which judicial or administrative procedures are initiated to establish child support in the form of periodic payments or health care coverage for, or to determine paternity of, the child who is the subject of the acknowledgement. After this time period has passed, the acknowledgment may only be contested in superior court on the basis of fraud, duress, or material mistake. The parent wishing to contest the acknowledgment carries the burden of proof by a preponderance of the evidence. Unless good cause is shown, the court may not stay child support or other legal responsibilities while the action to contest the acknowledgment is pending.

(m) If a parent signs an acknowledgment of paternity under (a) of this section and does not successfully challenge the acknowledgment under (l) of this section, the child born out of wedlock is considered legitimated and the heir of the parent without further action of the tribunal to ratify the acknowledgment of paternity.

(n) Each paternity order or acknowledgment made under this section must include in the records relating to the matter the social security numbers, if ascertainable, of the following persons:

(1) the father;

(2) the mother;

(3) the child.

(o) In this section, unless the context requires otherwise, "tribunal" means a court, administrative agency, or quasi-judicial entity authorized by state law to determine parentage.

Alaska Statute 47.10.990 provides:

Definitions.

In this chapter, unless the context otherwise requires,

. . .

(26) "parent" means the biological or adoptive parent of the child;

. . . .

25 United States Code § 1912(f) provides:

Pending court proceedings

. . .

(f)Parental rights termination orders; evidence; determination of damage to child
No termination of parental rights may be ordered in such proceeding in the absence of a determination, supported by evidence beyond a reasonable doubt, including testimony of qualified expert witnesses, that the continued custody of the child by the parent or Indian custodian is likely to result in serious emotional or physical damage to the child.

RULES

Alaska Child in Need of Aid 2(k) & (l) provide:

Definitions

. . .

(k) "Parent" means a biological or adoptive parent whose parental rights have not been terminated.

(l) "Party" means the child, the parents, the guardian, the guardian ad litem, the Department, an Indian custodian who has intervened, an Indian child's tribe which has intervened, and any other person who has been allowed to intervene by the court.

Alaska Child in Need of Aid 18(c)(A) provides:

Petition or proxy for adoption or legal guardianship of a child under AS 47.10.111

. . .

(c) Burden of Proof. Before the court may terminate parental rights, the Department must prove:

. . .

(A) the child has been subjected to conduct or conditions described in AS 47.10.011 and

(i) the parent has not remedied the conduct or conditions in the home that place the child at substantial risk of harm; or

(ii) the parent has failed, within a reasonable time, to remedy the conduct or conditions in the home that place the child in substantial risk so that returning the child to the parent would place the child at substantial risk of physical or mental

injury; or

. . . .

Alaska Rule of Civil Procedure 19(a) provides:

Joinder of Persons Needed for Just Adjudication.

(a) Persons to Be Joined if Feasible. A person who is subject to service of process and whose joinder will not deprive the court of jurisdiction over the subject matter of the action shall be joined as a party in the action if (1) in the person's absence complete relief cannot be accorded among those already parties, or (2) the person claims an interest relating to the subject of the action and is so situated that the disposition of the action in the person's absence may (i) as a practical matter impair or impede the person's ability to protect that interest or (ii) leave any of the persons already parties subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations by reason of the claimed interest. If the person has not been joined, the court shall order that the person be made a party. If the person should join as a plaintiff but refuses to do so, the person may be made a defendant, or, in a proper case, an involuntary plaintiff. If the joined party objects to venue and joinder of that party would render the venue of the action improper, that party shall be dismissed from the action.

. . . .

Alaska Rule of Civil Procedure 24(a) provides:

Intervention.

(a) Intervention of Right. Upon timely application anyone shall be permitted to intervene in an action when the applicant claims an interest relating to the property or transaction which is the subject of the action and the applicant is so situated that the disposition of the action may as a practical matter impair or impede the applicant's ability to protect that interest, unless the applicant's interest is adequately represented by existing parties.

. . . .

CONSTITUTIONAL PROVISIONS

ALASKA CONSTITUTION
Article I, Section 1 provides:

Inherent Rights.

This constitution is dedicated to the principles that all persons have a natural right to life, liberty, the pursuit of happiness, and the enjoyment of the rewards of their own industry; that all persons are equal and entitled to equal rights, opportunities, and

protection under the law; and that all persons have corresponding obligations to the people and to the State.

ALASKA CONSTITUTION
Article I, Section 7 provides:

Due Process.

No person shall be deprived of life, liberty, or property, without due process of law. The right of all persons to fair and just treatment in the course of legislative and executive investigations shall not be infringed.

UNITED STATES CONSTITUTION
Amendment V provides:

Trial and Punishment, Compensation for Takings.

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

UNITED STATES CONSTITUTION
Amendment XIV provides in pertinent part:

Citizenship Rights.

1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

. . . .

STATEMENT OF JURISDICTION

G.W. appeals to this court from the order terminating her parental rights to her children by the Honorable Michael P. McConahy, Fourth Judicial District at Fairbanks, Alaska, which was entered and distributed on October 17, 2016. [Exc. 53] Notice of Appeal was filed on November 1, 2016.

This appeal is brought as a matter of right in accordance with Alaska Appellate Rule 218. This court has jurisdiction over this appeal from a final judgment pursuant to AS 22.07.010.

ISSUES PRESENTED FOR REVIEW

1. Gloria and Alice[1] are a same-sex couple, who decided to start a family. Gloria gave birth to two children, Kate and Anthony, and Alice was a stay-at-home parent to the two children while Gloria worked. In May 2014, before same-sex marriage was legalized in Alaska, the state removed the children from the couple's home and instituted a child-in-need-of-aid proceeding against Gloria, the biological mother of the two children.

Alice sought to intervene multiple times in the litigation, including after the Bureau of Vital Statistics issued amended birth certificates for the children naming her as a parent. The trial court denied those requests, ruling that, as neither a biological nor adoptive parent, she was not a party to the case. Did the trial court err in denying Alice's motion to intervene after she was named a parent on the children's birth certificates?

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1 Pseudonyms have been used to protect the family's privacy.

2. Kate and Anthony are Indian children for purposes of the Indian Child Welfare Act. Before the trial court could terminate Gloria's parental rights under the Act, it was required to find, beyond a reasonable doubt, that continued custody of the children by Gloria was likely to result in serious emotional or physical damage to the children. Did the trial court's termination findings satisfy this requirement of the Indian Child Welfare Act?

STATEMENT OF THE CASE

Gloria W. and Alice W. are the same-sex parents of Kate and Anthony. In 2011, Gloria and Alice decided to start a family. [Tr. 19-20, 176, 178] To conceive Kate and Anthony, Gloria met individuals through the internet who agreed to donate sperm by having sex with her. [Tr. 176, 178] Gloria does not know the name of either donor nor does she have any identifying information for either of them. [Tr. 173-6, 177-78] Kate was born on March 28, 2012, and Anthony was born on January 9, 2013. [Tr. 22] Gloria also has an older daughter, Margaret, who spends time in the home with the couple but primarily lives with her father. [Tr. 135]

Alice was the primary caregiver of the couple's children, while Gloria supported the family by working. [Tr. 21, 70, 143-44] The family's involvement with the Office of Children's Services (OCS) began with reports concerning Margaret [Tr. 138], and it continued after the births of Kate and Anthony. [Tr. 142-44] The majority of the reports concerned Alice's use of physical discipline, both against her children and against children she was watching in the couple's home. [Tr. 144-51] Gloria was not present for many of the incidents that raised concerns at OCS about Alice's parenting, but she was present for some, and she and Alice spoke about

Alice's use of physical discipline. [Tr. 145-47, 151-57]

Gloria herself was also the subject of reports to OCS of physical abuse. [Tr. 151-52, 158-60] In late 2013, Gloria was accused of slapping an infant in the face, and shortly after that, the couple took Kate and Anthony to visit Gloria's father and stepmother in Oregon. [Tr. 158-59] Gloria was concerned that she might be criminally charged, risking her custody of the children, and she wanted the children to be safe with her father. [Tr. 158, 163-64]

Also in late 2013, OCS received a report that Kate had bruising on her head and that Gloria and Alice had conflicting reports about its cause. [Tr. 323] OCS caseworker Rebecca Whitman tried to contact the family to discuss the report, but they were already in Oregon. [Tr. 324] Gloria and Alice returned in January without the children, and they met with Whitman. [Tr. 324] The couple worked with OCS to put a safety plan in place, and the children returned to the couple's home in Fairbanks in early February. [Tr. 164, 350]

The family continued with the safety plan, with Whitman making monthly home visits and having more frequent phone contact with the couple.[2] [Tr.

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[2] The couple's initial safety plan involved one participant living in the home with the couple. [Tr. 324] That participant left the home during the duration of the initial safety plan after witnessing an argument between Gloria and Alice that she felt required her to remove herself and her children from the home. [Tr. 325] When the couple met with Whitman to renew the safety plan after the first 30 days, they chose not to include that participant in future safety plans. [Tr. 324-26]

That incident was not the only incident of domestic violence between Gloria and Alice. In 2011, when Gloria was pregnant with Kate, the couple engaged in a physical and verbal fight in which Alice called the troopers and was examined by a forensic nurse after reporting Gloria had choked her and threw her against a

326] In April 2014, Whitman transferred the case to OCS caseworker Amber Atchley. [Tr. 273] In mid-May, while Gloria was at work, Alice was caring for both children when she tripped while cooking and spilled hot water on Anthony. [Tr. 309] Alice called Gloria, who came home from work, and the couple took Anthony to the hospital. [Tr. 306] Anthony suffered mostly first-degree burns, with some second-degree burns, on his face, shoulder, and leg, and he was released to his parents the day he was seen at the hospital. [Tr. 48-49, 307-310]

Gloria asked Alice to call OCS to report Anthony's burn, and Alice reported trying to call both caseworker Atchley and Atchley's supervisor, Nicole Havrilek, and leaving a message with OCS regarding what had happened. [Tr. 52, 124, 172] Havrilek, however, denied receiving any message regarding Anthony's burns, and the couple cancelled the in-home visits of providers who were working with the family the following week. [Tr. 125, 231, 173]

A week later, Atchley came to the home. [Tr. 56] Alice was home alone with the children, and everyone was sick. [Tr. 55, 57] Before Atchley arrived, Kate had a tantrum, and Alice spanked her once or twice out of frustration. [Tr. 55] When Atchley arrived, Anthony was sleeping in his bedroom, and Alice and Kate were together sleeping in the back bedroom. [Tr. 57, 126] Alice did not hear Atchley's knock, and Atchley called the police to gain entry into the home. [Tr. 57-59] Upon entering the home, Atchley removed the children, and Alice was charged

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television, causing her to hit her head and black out. [Tr. 80-4] Gloria also reported being physically harmed by Alice, and both filed domestic violence protective orders against the other. [Tr. 79-86] Both were granted short-term orders, but they talked things over and withdrew their petitions for long-term orders. [Tr. 87]

with fourth-degree assault against Kate; those charges were later dropped. [Tr. 64, 257]

With the children's removal, the state filed an emergency petition, alleging that Kate and Anthony were in need of aid. [Exc. 1-10] The petition only listed Gloria as a parent. [Exc. 1] At a contested probable cause hearing several weeks after the filing of the petition, Gloria's lawyer noted Alice's presence in the courtroom and her status as the psychological parent, and she asked that Alice be appointed counsel. [R. 227] Judge Jane Kauvar, handling the hearing for the judge assigned to the case, stated she would not delay the hearing for Alice's participation; Judge Kauvar stated that Alice would have to request counsel herself from the assigned judge. [R. 227]

In August 2014, Alice filed a pro se motion "to become legal party to the case and to be granted counsel." [Exc. 11-12] At the time, Alice was not included in OCS's case plan. [Tr. 282] In her motion, Alice argued that she was the other parent to the children and was part of the children's life beginning with Gloria's pregnancies. [Exc. 11] She noted that she was the primary caregiver to the children and that she was the parent present when the children were removed from the couple's home. [Exc. 11]

The guardian ad litem (GAL) opposed Alice's request. [Exc. 13-15] The GAL conceded that Alice and Gloria had been in a relationship for a significant period of time, that the two had decided to become pregnant together, and that Alice was the primary caregiver to the children. [Exc. 13] Relying on child-in-need-of-aid court rules and statutes, however, the GAL argued that Alice was not a "parent" of

either Kate or Anthony.[3] [Exc. 13-15] The GAL likened Alice's status to a stepparent, and she argued that Alice should work with OCS to develop a caseplan and that she could participate in meetings regarding the case with Gloria's permission. [Exc. 14] The GAL further argued that, because Alice was not a "parent," she was not entitled to court-appointed counsel. [Exc. 14-15] Using the order lodged by the GAL, the trial court denied Alice's motion. [Exc. 16]

Despite the GAL's suggestion that Alice work with OCS, OCS did not involve Alice in the case until she and Gloria were married in October 2014. [Exc. 18; Tr. 282] In July 2015, Gloria filed a second motion to intervene, arguing that, due to her marriage to Gloria and under the Fourteenth Amendment to the United States Constitution, she was entitled to be a legal party to the case. [Exc. 17-22] Alice attached to her motion the certificate of marriage for her and Gloria, listing the date of their marriage as October 24, 2014, a personal statement, and a statement from Gloria. [Exc. 18-22]

In her statement, Alice detailed the history of her relationship with Gloria, including the fact that she and Gloria had been legally precluded from getting married at the time the children were removed. [Exc. 19] Alice recounted her and Gloria's decision to start a family, their financial inability to undergo artificial insemination, and her involvement in Gloria's pregnancies and the births of both children. [Exc. 19] Alice explained the role she played as the primary caregiver to

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[3] Under AS 47.10.990, a "parent" is "the biological or adoptive parent of the child." AS 47.10.990(26). Under CINA Rule 2, a "parent" is the "biological or adoptive parent whose rights have not been terminated." Alaska R. CINA P. 2(k).

both children, and she argued that she was entitled to the same rights as a parent in an opposite-sex relationship. [Exc. 19] Gloria's statement further supported Alice as a co-equal parent to Kate and Anthony, and she equated Alice's support during her pregnancies and childbirths as equivalent to that which a mother receives from the father to the children. [Exc. 21] Gloria also referenced the Fourteenth Amendment in asking that Alice be made a party to the case. [Exc. 21]

The GAL again opposed Alice's motion, arguing that Alice's failure to adopt either child precluded recognition as a legal parent. [Exc. 10-11] The GAL pointed out that Alice participated in hearings concerning the children, and she argued that recognizing Alice as a parent would require release of the children's counseling records to her, which, the GAL contended, was not in the children's best interests. [Exc. 11] The state joined the GAL's opposition, noting that "[Alice] married the children's mother during the pendency of this action, that [Alice] is the alleged perpetrator of physical abuse on the above children, and that the department is the process of providing [Alice] with supervised contact with the children."[4] [Exc. 25] Again using the order lodged by the GAL, the trial court denied Alice's motion. [Exc. 26]

A month later, Alice filed birth certificates for both children listing her and Gloria as parents. [Exc. 27-28] Accompanying those birth certificates, Alice

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[4] OCS began offering Alice supervised visitation in June 2015. [Tr. 284] Earlier visitation was denied because she was not a biological parent and had been a cause of the children's placement into OCS custody. [Tr. 285] Alice, however, only had three visits until OCS cancelled further visitation because of Kate's nightmares. [Tr. 66-69]

filed a CR-205 form request for appointed counsel. [Exc. 29] The trial court rejected Alice's filings as insufficient, stating that Alice had to file another motion to intervene, along with an explanation of what effect the birth certificates had on her right to intervene and whether she had adopted the children. [Exc. 30-31]

Alice followed the court's directive, filing both a motion to intervene and a motion for court-appointed counsel. [Exc. 32-38, 39-45] In her motion to intervene, Alice stated that she was entitled to intervene because she was listed as a parent on the children's birth certificates; in a statement attached to her motion, she explained that the Bureau of Vital Statistics issued new birth certificates after receiving proof from the couple that they were together before the children were born. [Exc. 40] Alice questioned why she was being discriminated against for being in a same-sex marriage, and she argued that she had the same parental rights to Kate and Anthony that a father listed on a birth certificate would have. [Exc. 40]

Alice also attached a statement from Gloria, who asked that Alice be given legal representation so she could participate in the case. [Exc. 41] Gloria argued that "[a]fter the Same Sex Marriage passed in the United States they now have the right as the other parent to be part of their families legally and have the same rights as every other person in the United States." [Exc. 41] Alice also attached the couple's marriage certificate and both children's birth certificates. [Exc. 42-45] In her motion for court-appointed counsel, Alice attached the same statements and documentation, and she asked that she be appointed counsel because, as the listed parent on the birth certificate, she should have the same rights a father listed on the birth certificate would have. [Exc. 32-38]

The GAL again opposed both motions. [Exc. 46-48, 49-50] With respect to the motion to intervene, the GAL confirmed that the Bureau of Vital Statistics "will allow that if a couple can show that they were in a relationship at the time of the child's birth and unable to be married because of the laws that existed at the time of birth then the parent who . . . was not originally on the birth certificate can seek to be added to the birth certificate." [Exc. 46-47] The GAL, however, argued that notwithstanding her listing on the birth certificate, Alice was not a biological parent of the children. And because Alice never moved to adopt the children, the GAL argued, she was not a "parent" for purposes of the child-in-need-of-aid proceeding. [Exc. 47]

In her opposition to Alice's request for court-appointed counsel, the GAL argued that Alice, as neither a biological nor an adoptive parent, was not statutorily entitled to counsel. [Exc. 50] The GAL questioned the Bureau of Vital Statistics' determination that Alice could be listed as a parent on the birth certificates, and she argued that Alice's failure to adopt the children before removal precluded her involvement in the case as a parent entitled to court-appointed counsel. [Exc. 50]

The trial court issued a written order denying Alice's motions. [Exc. 51-52] In that order, the court detailed Alice's prior attempts to intervene in the case, and it characterized Alice's latest request as failing to comply with the trial court's directive to explain why her listing on the birth certificate permitted her intervention and to state whether she had adopted the children. [Exc. 51-52] The trial court indicated that it had confirmed through Courtview that no adoption had occurred,

and it stated that because Alice was neither a biological or adoptive parent she was not a parent who could be a party to the case. [Exc. 52] The trial court stated that Alice "failed to cite any legal authority for the proposition that listing her name on the birth certificate elevates her to party status." [Exc. 52]

After Gloria and Alice's marriage, OCS began including Alice in the caseplan, and Alice participated in services, some of which she and Gloria identified on their own, and underwent a parental risk assessment. [Tr. 273-74, 282, 233-34] OCS believed, however, that neither Gloria nor Alice was able to translate what they learned in their services into skills applicable in daily life. [Tr. 234] The case, therefore, proceeded to a termination trial occurring in May and June 2016. [Tr. 4-733]

During the trial, Alice was excluded from the courtroom for a time. Prior to testimony concerning Alice's parental risk assessment, Gloria's lawyer asked that the courtroom be closed given the confidential nature of the testimony. [Tr. 403] Gloria's lawyer did not object to Alice's continued presence, given that the testimony concerned Alice's own evaluations, but the state argued that, if the courtroom was to be closed, Alice must be excluded. [Tr. 404] The court ruled that any testimony concerning confidential matters would "be only handled here by parties and the court." [Tr. 406] Alice was excluded from hearing testimony from the provider that performed her parental risk assessment, the provider that performed a recertifying neuropsychological examination for services she was receiving from the Fairbanks Resource Agency, and her mental health therapist. [Tr. 404, 517]

After the trial concluded, the trial court entered a decision on the record

terminating Gloria's parental rights. [Tr. 736-65] In doing so, the trial court again stated that Alice "really [was] not the parent of these children." [Tr. 737] The trial court likened her relationship to the children to that of a stepparent, and it referred to Alice throughout its findings as the children's stepmother. [Tr. 737, 739-64] The court followed this decision on the record with a written order. [Exc. 53]

Gloria appeals.

STANDARDS OF REVIEW

This court applies its independent judgment to questions of constitutional and statutory interpretation and to denials of motions for intervention of right.[5] The question whether a trial court's factual findings comport with relevant child in need of aid statutes is reviewed by this court *de novo*.[6]

ARGUMENT

I. The Trial Court Erred in Denying Alice's Third Motion to Intervene.

Under AS 47.10.990, a "parent" is the biological or adoptive parent to a child. In denying Alice's third motion to intervene, the trial court held that, because Alice was neither the biological nor adoptive parent of Kate and Anthony, she was not a parent for purposes of the child-in-need-of-aid proceeding. But because Alice

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[5] *See Turney v. State*, 936 P.2d 533, 538 (Alaska 1997) (discussing standard of review applicable to questions of statutory and constitutional interpretation); *McCormick v. Smith*, 793 P.2d 1042, 1044 n.3 (Alaska 1990) (stating that, where facts relevant to application for intervention of right are not in dispute, court independently reviews denial of motion).

[6] *Vivian P. v. State, Dep't of Health & Soc. Servs., Div. of Family & Youth Servs.*, 78 P.3d 703, 706 (Alaska 2003).

was named as a parent on the children's birth certificates, the trial court's refusal to consider Alice a parent under AS 47.10.990 violated the state and federal equal protection and due process clauses, requiring reversal of the order terminating Gloria's parental rights.

A. The Bureau of Vital Statistics properly named Alice as a parent on the children's birth certificates.

With her third motion to intervene, Alice submitted as attachments birth certificates for Kate and Anthony naming both her and Gloria as parents. [Exc. 43-44] As she detailed in her motion to intervene, the Bureau of Vital Statistics issued the new birth certificates after receiving proof from Alice and Gloria that they were together before the children were born. [Exc. 40] The GAL confirmed that the Bureau altered its policy such that a couple who could show that they were in a relationship at the time of the child's birth and that they were legally prohibited from marrying at that time could seek to have the parent not originally named on the birth certificate added to the birth certificate. [Exc. 46-47]

Neither Alice nor the GAL provided the reasoning underlying the Bureau's decision to change its policy. And contemporary reports concerning the change in policy likewise fail to fully provide the reasoning behind the decision,[7] but they do indicate that the policy change followed the United States Supreme Court's

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[7] *See, e.g.*, Suzanna Caldwell, *After months of back and forth, state allows same-sex couples to be listed on birth certificates*, ALASKA DISPATCH NEWS, July 19, 2015; Shannon Ballard, Alaska issues first birth certificates to same-sex parents, KTVA 11, July 7, 2015, *available at* http://www.ktva.com/alaska-issues-first-birth-certificates-to-same-sex-parents-755 (last visited January 23, 2017).

decision in *Obergefell v. Hodges*.[8] Regardless of the Bureau's reasoning, its decision to change its policy was compelled under the Alaska Statutes and federal and state constitutional law.

The determination of who is named as a parent on a birth certificate is governed by AS 18.50.160. Under that statute, if a mother

> was married at conception, during the pregnancy, or at birth, the name of the husband shall be entered on the certificate as the father unless
>
> (1) paternity has been lawfully determined otherwise by a tribunal, in which case the name of the father, if determined by a tribunal, shall be entered; or
>
> (2) both the mother and the mother's husband execute affidavits attesting that the husband is not the father and that another man is the father, and the mother and the other man execute affidavits attesting that the other man is the father.[9]

Although the statute uses gendered terms, AS 01.10.050 provides that "[w]ords of any gender may, when the sense so indicates, refer to any other gender."[10] The Bureau could properly read the gendered terms as applying to the other gender.[11] Read in gender-neutral terms, the statute provides that when a

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8 ___ U.S. ___, 135 S.Ct. 2584 (2015) (holding that same-sex couples may not be denied fundamental right to marry).

9 AS 18.50.160(d). The affidavits referenced in AS 18.50.160(d)(2) must meet certain requirements. *See* AS 18.50.160(g).

10 AS 01.10.050(c).

11 *See Partanen v. Gallagher*, 59 N.E.3d 1133, 1137 (Mass. 2016) (construing statute that defined children as being people "born to a man and woman not married to each other" as including people "born to [two people] who are not married to each other" by virtue of statute stating that "words of one gender may be construed to include the other gender and the neuter").

mother "was married at conception, during pregnancy, or at birth, the name of the [spouse] shall be entered on the certificate as [a parent]."

The Bureau could also have determined that principles of federal and state constitutional law required it to interpret the statute to apply to partners in same-sex relationships. As the Supreme Court recognized in *Obergefell*, a same-sex couple's fundamental right to marry includes marriage "on the same terms and conditions as opposite-sex couples;" state laws excluding same-sex couples from civil marriage equal to that provided to opposite-sex couples are invalid under the federal due process and equal protection clauses.[12] Because a husband in an opposite-sex relationship is presumed to be the parent of the child born to his wife and is named as a parent on the birth certificate, the Bureau may have properly determined that a spouse in a same-sex relationship is entitled to the same presumption.[13]

Whether the Bureau altered its policy pursuant to AS 01.15.050 or in reaction to *Obergefell*, its decision to issue new birth certificates for the children

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12 *Obergefell*, 135 S.Ct. at 2605.

13 *See McLaughlin v. Jones*, 382 P.3d 118, 122 (Ariz. 2016) (holding that *Obergefell* compelled court to apply statute presuming husband to be legal parent of child the wife delivers to female spouse of birth mother of child born to same-sex couple); *Gartner v. Iowa Dep't of Pub. Health*, 830 N.W. 335, 354 (Iowa 2013) (holding that presumption of parentage statute, which provided for husband of married woman to be named father on birth certificate unless paternity has been otherwise established by a court, violated state equal protection clause as applied to married lesbian couples).

naming Alice as a parent was proper.[14] To do otherwise would have violated the family's constitutional rights to equal protection and due process.[15]

B. As a named parent on the children's birth certificates, Alice was a "biological parent" for purposes of the child-in-need-of-aid proceeding.

Having been named a parent on the children's birth certificates and without a challenge to her status as a parent by an individual claiming parent status, Alice qualified as a "biological parent" for purposes of the child-in-need-of-aid proceeding. Neither OCS nor the GAL, however, considered her to be a biological parent, apparently relying on the fact that Alice lacked a genetic relationship to the children.[16] But because a husband named as a father on a birth certificate need not have a genetic relationship to the child to be considered a "biological parent" for

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[14] *See also* AS 25.20.050(a) (providing that child born out of wedlock is legitimated and considered heir to putative parent when putative parent subsequently marries undisputed parent of child) and AS 25.20.050(c) (directing Bureau of Vital Statistics to prepare substitute birth certificate for child legitimated in accordance with subsection (a)).

[15] UNITED STATES CONST., amend. V, XIV; ALASKA CONST. art. I, §§ 1, 7.

Indeed, the Child Support Services Division (CSSD) has recognized the Bureau's determination that Alice is a parent. In May 2016, before Gloria's rights were terminated, CSSD issued an administrative child support order requiring Alice to pay monthly child support [Appendix A]; because Alice was not a party to the child-in-need-of-aid case, this obligation continues, even though Gloria's rights have been terminated. [Appendix B]

[16] The GAL suggested in its various oppositions to Alice's motions to intervene that Alice's lack of a genetic relationship to the children precluded a finding that she was a "biological parent," stating in its last opposition: "Even though she is on the birth certificate, there is no possible way she is a biological parent. The fact is, there is an unknown biological parent who exists for both of these children and [Alice] is not that person." [Exc. 46-47] The state joined the GAL's opposition to Alice's second motion to intervene. [Exc. 25]

purposes of a child-in-need-of-aid proceeding, the failure to consider Alice a biological parent violated the family's rights to equal protection and due process.[17]

1. Under the state and federal equal protection clauses, a female second parent named on a birth certificate may be a "biological parent" under AS 47.10.990.

a. The state's interpretation of "biological parent" treats named female second parents differently than named male second parents.

"A person or group asserting an equal protection violation must demonstrate that the challenged law treats similarly situated persons differently."[18] Here, Alice, a female second parent named on a birth certificate, was treated differently than a male second parent named on a birth certificate would be.

Contrary to the implicit assumption below, a man named as a father on a birth certificate need not have a genetic relationship with the child to be considered a "biological parent" under AS 47.10.990.[19] As explained above, under AS 18.50.160, when a woman is married at conception, during the pregnancy, or at birth, her husband is named as the father of the child unless paternity has otherwise been lawfully determined by a tribunal or the mother, husband, and another man execute affidavits attesting to the child's paternity.[20] When a woman is not married

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17 UNITED STATES CONST., amend. V, XIV; ALASKA CONST. art. I, §§ 1, 7.

18 *Alaska Civil Liberties Union v. State*, 132 P.3d 781, 787 (Alaska 2005).

19 Alaska Statute 47.10.990 defines "parent" as "the biological or adoptive parent of the child." AS 47.10.990(26).

20 AS 18.50.160(d). For contrast, consider Oregon's former comparable statute, which provided, "The child of a wife cohabitating with her husband *who was not impotent or sterile at the time of the conception* shall be conclusively presumed to be the child of her husband, whether or not the marriage of the husband and wife

at conception, during the pregnancy, or at birth, AS 18.50.160 provides that no father shall be named on the birth certificate unless a tribunal has determined paternity or both the mother and the man to be named the father have executed affidavits acknowledging paternity.[21]

Under these statutes, a genetic relationship between a child and a man is only one means by which the man will be named the father of the child on the birth certificate. For children born of a marriage between a man and a woman or for children born to a woman where the mother and a man execute affidavits attesting the man is the father, the man will be named as the father on the birth certificate without any genetic testing to confirm a biological relationship between the man and the child.[22]

Indeed, even for a child for whom paternity is established by a tribunal, a genetic relationship is not necessary. In a proceeding to determine parentage,

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may be void." Former ORS 109.070(1) (2003). Because the statute spoke to the virility of the husband, the Oregon Supreme Court held that the presumption of parentage through marriage was a biological presumption not applicable to a same-sex spouse; the court, however, held that Oregon's statute granting legal parentage to spouses who conceive through artificial insemination did apply to same-sex couples. *See Shineovich and Kemp*, 214 P.3d 29, 36, 39-40 (Or. 2009).

[21] AS 18.50.160(e); *see also supra* note 14 (citing statutes governing legitimation by subsequent marriage).

[22] *See McLaughlin v. Jones*, 382 P.3d 118, 123 (Ariz. 2016) (stating that Arizona's statute providing that husband is presumed father of child born to his wife applies "without regard to whether the husband is the biological parent"); *see also* AS 25.20.045 (providing that child, born to married woman by means of artificial insemination performed by licensed physician and consented to by both spouses in writing, "is considered for all purposes the natural and legitimate child of both spouses").

whether contested or uncontested, a court can consider, among other things, whether the putative parent subsequently married the undisputed parent of the child or whether the putative parent acted in a manner toward the child that indicates that the child is the child of the putative parent.[23] And where parentage is contested, the directive that a trial court order genetic testing can be overcome by a finding of good cause after considering the best interests of the child.[24]

Thus, whether paternity is established by virtue of marriage, by affidavit, or by tribunal, a man named as a father on a birth certificate need not be genetically related to the child. Yet, absent a challenge to his paternity from an interested party – the mother, the man, or another man claiming paternity – the named father will be considered the "biological parent" in a child-in-need-of-aid proceeding.[25] Here, Alice was the named second parent on the children's birth certificate and no individual challenged her parentage. Yet, unlike a male second parent, she was not considered a "biological parent."

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23 AS 25.20.050(a); 7 Alaska Administrative Code (AAC) 05.390.

24 AS 25.20.050(e) and (i).

25 *See* 2.5.1 Establishing Paternity, Child Protective Services Manual, Alaska office of Children's Services (rev. Nov. 15, 2013) (directing OCS workers to consider man named on birth certificate as father and to consider paternity to be in question only in five instances – when mother alleges someone other than the individual named as the father on the birth certificate is the father; when someone other than the named father claims paternity; when the named father denies paternity; when no father is named on the birth certificate or in Child Support Services Division (CSSD) records; or paternity was established through a default order by CSSD).

b. Treating named female second parents differently than named male second parents violates equal protection under the Alaska Constitution.

Because the state treats female second parents differently than male second parents, this court must apply "a sliding scale of scrutiny" to the practice.[26] In doing so, this court "first determine[s] the importance of the constitutional right at stake;" the constitutional right at issue is the most important variable in determining the appropriate level of scrutiny.[27] The court then reviews the state's interests, which may range from "merely legitimate to compelling, depending on the burden that the challenged regulation places on the exercise of constitutional rights."[28] Finally, the court "consider[s] the means the state used to advance its interests. Depending on the importance of the right involved, the means-to-ends fit may range from a substantial relationship, at the low end of the sliding scale, to the least restrictive means available to achieve that interest at the highest end of the scale."[29]

The interest at stake here is a named female second parent's right to parent, which is a fundamental right.[30] Because a fundamental right is involved, the

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26 *Alaska Inter-Tribal Council v. State*, 110 P.3d 947, 967 (Alaska 2005).

27 *Id.*

28 *Id.*

29 *Id.*

30 *Troxel v. Granville*, 530 U.S. 57, 66 (2000) ("[I]t cannot now be doubted that the Due Process Clause of the Fourteenth Amendment protects the fundamental right of parents to make decisions concerning the care, custody, and control of their children."); *Richard B. v. State, Dep't of Health & Soc. Servs., Div. of Family & Youth Servs.*, 71 P.3d 811, 824 (Alaska 2003).

state must provide a compelling interest to treat named female second parents differently from named male second parents.[31] It cannot do so. The children of same-sex couples are no different than children of opposite-sex couples.[32] Given the equality between the children of same-sex couples and opposite-sex couples, the state cannot articulate a compelling interest to treat the parents named on those children's birth certificates differently. Its decision to do so violated the state equal protection clause.[33]

c. Under the federal equal protection clause, a named female second parent may be a "biological parent" under AS 47.10.990.

As explained above, named female second parents are treated differently than named male second parents.[34] This is a classification based on gender. Gender is a quasi-suspect class, requiring intermediate scrutiny under the

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31 *Planned Parenthood of the Great Northwest v. State*, 375 P.3d 1122, 1138 (Alaska 2016).

32 *Cf. Obergefell v. Hodges*, ___ U.S. ___, 135 S.Ct. 2584 (2015) (explaining that protecting right of same-sex couples to marry safeguards children and families and recognizing that "many same-sex couples provide loving and nurturing homes to their children, whether biological or adopted").

33 Even if the state could provide a compelling reason to treat named male second parents differently than named female second parents, it cannot demonstrate that its method of achieving that interest justified the disparate burden placed on named female second parent's fundamental right to parent. To do so, the state would be required to demonstrate that its treatment of named female second parents furthers a compelling state interest and does so by the least restrictive means available. *Planned Parenthood*, 375 P.3d. at 1139.

34 *See supra* Part I.B.1.a.

federal constitution.[35] But this gender classification originates in the parents' sexual orientation, a classification for which the Supreme Court has not yet determined whether heightened scrutiny is necessary.[36]

This court, however, need not consider what level of scrutiny must be afforded classifications based on sexual orientation under the federal constitution. Because the classification implicates the fundamental right to parent,[37] this court must apply strict scrutiny.[38] Under strict scrutiny, the state must prove that the law is necessary to achieve a compelling purpose.[39] As explained above, the state cannot provide a compelling reason for treating named female and male second parents differently.[40] Its decision to do so violated the federal equal protection

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35 *Craig v. Boren*, 429 U.S. 190, 197 (1976) ("To withstand constitutional challenge, previous cases establish that classifications by gender must serve important governmental objectives and must be substantially related to those objectives.").

36 *See* ERWIN CHEMERINSKY, CONSTITUTIONAL LAW, § 9.7.4, at 807-08 (4th ed. 2011) ("The Supreme Court has not yet ruled as to whether discrimination based on sexual orientation warrants the application of intermediate or strict scrutiny.").

37 *See supra* Part I.B.1.b.

38 *See, e.g., Reynolds v. Sims*, 377 U.S. 533 (1964); *Skinner v. Oklahoma*, 316 U.S. 535 (1942); *see also Treacy v. Municipality of Anchorage*, 91 P.3d 252, 264 (Alaska 2004) ("The Equal Protection Clause of the Fourteenth Amendment is essentially a directive that all persons similarly situated should be treated alike. The general rule is that legislation is presumed to be valid and will be sustained if the classification drawn by the statute is rationally related to a legitimate state interest. But if a classification impinges a fundamental right or disadvantages a suspect class, the ordinance is subject to strict scrutiny." (internal quotation marks and footnotes omitted)).

39 *See, e.g., Plyler v. Doe*, 457 U.S. 202, 218 (1982).

clause.

2. Under both state and federal guarantees of substantive due process, a named female second parent may be a "biological parent" under AS 47.10.990.

The state's treatment of named female second parents also violates substantive due process under the state and federal constitutions.[41] The doctrines of substantive due process and equal protection are related:[42] a federal equal protection claim asks whether the state's discrimination as to who can exercise a right is sufficiently justified, while a substantive due process claim asks whether the state's interference in the exercise of a given right is justified by a sufficient purpose.[43]

Here, because the right at issue is the fundamental right to parent and because a named female second parent's right to parent is infringed when denied "biological parent" status in a child-in-need-of-aid proceeding, the state must demonstrate that the infringement is narrowly tailored to serve a compelling interest.[44] Its inability to do so[45] violates the state and federal substantive due

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40 *See supra* Part I.B.1.b.

41 UNITED STATES CONST., amend. XIV; ALASKA CONST. art. I, § 7.

42 *See Allam v. State*, 830 P.2d 435, 439 (Alaska App. 1992) (noting that Alaska's substantive due process test is "essentially the same as" federal equal protection test).

43 *See* CHEMERINKSY, *supra* note 36, § 10.1.1, at 813.

44 *Raney v. Whitewater Eng'g*, 122 P.3d 214, 222 (Alaska 2005) ("Where a fundamental right is infringed, we require the state to articulate a compelling interest and to demonstrate the absence of a less restrictive alternative."); *Treacy v. Municipality of Anchorage*, 91 P.3d 252, 268 (Alaska 2004) ("The due process

process rights of named female second parents.

3. Because Alice was a named parent on the birth certificate, she was not required to adopt the children to be considered a "parent" for the purposes of the child-in-need-of-aid proceeding.

As Alice was a named parent on the children's birth certificates, she qualified as a "biological parent" and was not required to adopt the children to be considered a parent under AS 47.10.990. Under *Obergefell*, a same-sex couple's marriage must be "on the same terms and conditions as opposite-sex couples."[46] Because a husband named on a birth certificate pursuant to AS 18.50.160 need not adopt the child to be considered a "parent" under AS 47.10.990, a same-sex spouse need not adopt the child born to her wife to be considered a parent for purposes of a child-in-need-of-aid proceeding.[47]

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clause [of the United States Constitution] guarantees more than fair process, however; it also includes a substantive component that provides heightened protection against government interference with certain fundamental rights and liberty interests. Thus, the Fourteenth Amendment prohibits the government from infringing on fundamental liberty interests unless that infringement is narrowly tailored to serve a compelling state interest." (internal quotation marks and footnotes omitted)).

45 *See supra* Part I.B.1.b.

46 *Obergefell v. Hodges*, ___ U.S. ___, 135 S.Ct. 2584, 2605 (2015).

47 *Cf. Gartner v. Iowa Dep't of Pub. Health*, 830 N.W.2d 335, 352-53 (Iowa 2013) (rejecting state's claim that its interest in accuracy of birth certificates allowed it to require non-birthing spouse in married same-sex relationship to go through adoption proceeding).

4. Because Alice was a named parent on the birth certificate, she was not the equivalent of a stepparent.

In its decision on the record, the trial court reiterated its conclusion that Alice was not a parent to Kate and Anthony, invoking the concept of "mutatis mutandis" to support its decision to treat Alice as a stepparent in its findings terminating Gloria's rights. [Tr. 736-37] The court stated:

> I do note that [Alice] really is not the parent of these children. I don't minimize her role in the children – and in fact her role has had some significance in the ultimate result of these proceedings – nor do I underestimate the status of – a spouse can have in the dynamics of a family. There's a Latin phrase that is used in proceedings, really high English court proceedings and in some Oxford proceedings, but it's a Latin phrase, two words, mutatis mutandis. That's M-U-T-A-T-I-S M-U-T-A-N-D-I-S.
>
> And basically it means the necessary changes have been made or once the necessary changes have been made. It really is used in this context to acknowledge that a comparison being made requires certain obvious alterations which are left unstated. Here the status of a parent that remarries, what the – their partner, their new spouse would be a stepparent. I'm going to refer to [Alice] as a stepparent. A stepparent doesn't have legal rights to proceed in a case, but certainly has an impact in the day to day lives of that family.

[Tr. 737] The court acknowledged that stepparent was not "the exact, correct word to use" but determined it was "the best word" it could come up with to "accurately reflect[] her legal status and accurately reflect[] the fact that she has a familiar role in this whole proceeding." [Tr. 737-38]

The trial court's invocation of the doctrine of "mutatis mutandis" illustrates its failure to recognize the import of Alice's name on the children's birth certificates. "Mutatis mutandis" means "[a]ll necessary changes having been made;

with the necessary changes."[48] It is used to mean that "matters or things are generally the same, but to be altered when necessary, as to names, offices, and the like."[49] The trial court invoked the doctrine to classify Alice as a stepparent, apparently construing the "necessary change" made by the doctrine as that of the traditional gender of a stepparent to a woman's child. That is, the trial court appears to have considered a stepparent to be an opposite-sex spouse of a parent, and it invoked the doctrine of mutatis mutandis to apply the stepparent classification to Alice.

But whether a same-sex spouse could properly be classified a stepparent was irrelevant in the context of this case. A stepparent is not listed on a child's birth certificate as a parent; Alice was. With her named as a parent on the children's birth certificates, Alice was, as explained above, one of the children's two "biological" parents. To treat Alice as a stepparent, where a similarly-situated man named on a birth certificate as a parent would be treated as a parent, violated the couple's equal protection and substantive due process rights under the state and

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48 BLACK'S LAW DICTIONARY (10th ed. 2014).

49 BLACK'S LAW DICTIONARY (6th ed. 1990). *See, e.g.*, *HJ (Iran) and HT (Cameroon) v. Sec'y of State for the Home Dep't*, [2010] UKSC 31, at 36 (applying principle in explaining that right to live openly as gay man included more than right to attract sexual partners and establish relationships in same way as straight man: "To illustrate the point with trivial stereotypical examples from British society: just as male heterosexuals are free to enjoy themselves playing rugby, drinking beer and talking about girls with their mates, so male homosexuals are to be free to enjoy themselves going to Kylie concerts, drinking exotically colored cocktails and talking about boys with their straight female mates. Mutatis mutandis – and in many cases the adaptations would obviously be great – the same must apply to other societies.").

federal constitutions.[50]

C. Because Alice was a biological parent, the trial court erred in denying her motion to intervene.

Because Alice was a "biological parent," she was a party to the case,[51] and she was not required to meet any standard for intervention or joinder in order to participate in the case. Nevertheless, she met the civil standards for intervention and joinder, and the trial court's refusal to permit her to participate in the case was error.

The procedure by which a party excluded from a child-in-need-of-aid proceeding may seek participation in the case is not covered by the Child in Need of Aid Rules of Procedure; those rules, however, dictate that, in the absence of an applicable rule, a "court may proceed in any lawful manner," including by applying the Civil Rules.[52]

Under Civil Rule 24, a person "shall be permitted to intervene in an action when the applicant claims an interest relating to the property or transaction which is the subject of the action and the applicant is so situated that the disposition of the action may as a practical matter impair or impede the applicant's ability to

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50 *See supra* Part I.B.1 and I.B.2.

51 Alaska R. CINA P. 2(k); 2(l) (defining "party" as including "the parents" and "parent" as "a biological or adoptive parent whose parental rights have not been terminated").

52 Alaska R. CINA P. 1(f).

protect that interest."[53] Intervention for applicants that meet this standard is mandatory, so long as the applicant makes a timely application and there is not an existing party who can adequately represent the applicant's interest.[54]

As a parent to Kate and Anthony, Alice had an interest in the proceeding, and her participation in the case was necessary to protect her interest in parenting her children. Alice's application was timely, with her third motion to intervene being filed within a month of the new birth certificates being issued and nine months before Gloria's termination trial. [Exc. 39, 43-44; Tr. 4] And as the person who OCS determined was primarily responsible for the children being taken into state custody, Alice could not rely on any other person to adequately represent her interest. As such, the trial court's denial of her motion to intervene was improper.

Alice was also entitled to participate in the case under Civil Rule 19, which governs the joinder of persons needed for just adjudication. Under that rule, a person shall be joined as a party in the action if "in the person's absence complete relief cannot be accorded among those already parties" or if "the person claims an interest relating to the subject of the action and is so situated that the disposition of the action in the person's absence may as a practical matter impair or impede the person's ability to protect that interest."[55] Again, as a parent, Alice had an interest

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53 Alaska R. Civil. P. 24(a).

54 *Id.*

55 Alaska R. Civil P. 19(a).

relating to her children, the subject of the action, and disposition of a child-in-need-of-aid proceeding without her participation left her unable to protect her interest in her children.

D. The trial court's failure to include Alice as a party to the case requires this court to reverse the termination of Gloria's parental rights.

1. Disallowing participation by a parent in a child-in-need-of-aid proceeding constitutes structural error, requiring reversal of a termination order entered against the parent participating in the case.

In *Chapman v. California*,[56] the United States Supreme Court recognized that "there are some constitutional rights so basic to a fair trial that their infraction can never be treated as harmless error."[57] And in *Arizona v. Fulminate*,[58] the Court discussed how to differentiate between those errors that can be reviewed for harmlessness and those so great that they constitute structural error requiring reversal without a consideration of prejudice.[59] The court noted that structural errors, like deprivation of the right to counsel, lack of an impartial judge, deprivation of the right to self-representation, exclusion of members of the defendant's race from the grand jury, and the right to a public trial, are ones that "affect[] the framework within which the trial proceeds, rather than simply an error in the trial process

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56 386 U.S. 18 (1972).

57 *Id.* at 23.

58 499 U.S. 279 (1991).

59 *Id.* at 306-12.

itself."[60] Such errors prevent a criminal trial from serving its function of determining guilt or innocence, and no punishment resulting from such a trial "may be regarded as fundamentally fair."[61]

This court does not appear to have applied the doctrine of structural error to a child-in-need-of-aid proceeding. But given a parent's constitutional rights in such proceedings, the doctrine can properly transfer from the criminal realm to the child-in-need-of-aid realm.[62] Indeed, both the Wisconsin Supreme Court and the Court of Appeals of Kansas have applied the doctrine of structural error to proceedings involving the fundamental right to parent.[63]

Here, the error in disallowing participation by a parent from an intact

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60 *Id.* at 310.

61 *Id.* (internal quotation marks omitted); *see also Neder v. United States*, 527 U.S. 1, 8-9 (1999) (describing structural errors as one that "infect the entire trial process" and "necessarily render a trial fundamentally unfair" (internal quotation marks omitted)).

62 *See Molly O. v. State, Dep't of Health & Soc. Servs., Office of Children's Servs.*, 320 P.3d 303, 310-11 (Alaska 2014) (Bolger, J., dissenting) (questioning court's review for harmlessness where Indian custodian was deprived of counsel and referencing structural nature of such errors in context of criminal cases and noting that errors depriving a criminal defendant of counsel "are necessarily unquantifiable and indeterminate" and such errors in child-in-need-of-aid proceedings are similar (internal quotation marks omitted)).

63 *See In re Adoption of B.J.M.*, 209 P.3d 200 (Kan. 2009) (finding structural error depriving imprisoned biological father of opportunity to be heard at meaningful time and in meaningful manner regarding adoption of his child by stepfather without his consent); *In re Torrance P., Jr.*, 724 N.W.2d 623 (Wis. 2006) (holding that denial of statutory right to counsel places in doubt fairness and integrity of termination proceeding and deprives parent of basic protection without which termination proceeding cannot reliably serve its function and constitutes structural error).

family is the type of error that affected the framework of the entire child-in-need-of-aid proceeding. Because Alice, the other parent, was precluded from participating – and consequently, deprived of the right to counsel party status would have provided her – any review of the prejudice to Gloria as a result is both "unquantifiable and indeterminate."[64] This court cannot determine how Alice's participation in the case would have affected the services offered to the family, the parents' visitation with the children, or how those services and visitation would have affected the state's decisions in the case, much less the trial court's decision at the termination trial.[65]

Moreover, rather than considering the actions of two co-equal parents in an intact family, the trial court here was only tasked with considering whether to terminate the rights of one of those parents. By excluding one parent from the proceeding, the integrity of the proceeding was rendered fundamentally unfair and the proceeding became an unreliable vehicle for determining the best interests of the children. Accordingly, this court should reverse the order terminating Gloria's parental rights and remand for renewed proceedings with both parents as parties to the case.

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64 *Molly O.*, 320 P.3d at 311 (Bolger, J., dissenting).

65 For instance, it is conceivable that, with a lawyer appointed to represent Alice, the two parents may have taken conflicting positions in the trial court. Had that occurred, Gloria was likely to benefit, as it was Alice's behavior that caused OCS the majority of its concern with respect to the safety of the children.

2. Even if the error does not constitute structural error, the denial of Alice's motion to intervene was not harmless, requiring reversal of the termination order against Gloria.

Should this court determine that structural error does not apply, this court should nevertheless reverse the order terminating Gloria's rights. Kate and Anthony were part of an intact two-parent family, and they were taken into state custody as a result of both parents' behaviors. With only Gloria as a party to the child-in-need-of-aid proceeding, however, she was forced to defend both her and Alice's behavior during the termination trial. The court heard a significant amount of testimony about Alice: Alice herself testified [Tr. 15-133], the court heard three expert witnesses who testified exclusively about Alice [Tr. 408-446, 448-67, 474-16], and the caseworker, service provider, and family and friends all testified about Alice. [Tr. 225-44, 270-87, 307-97, 517-32, 533-40, 662-69, 675-97, 702-09, 727-30]

Much of the state's evidence regarding Alice was negative, requiring Gloria to counter that evidence in her defense. To do so, Gloria called Alice's mother and a friend of Alice's with whom Alice visited in her effort to demonstrate that the children were not at risk in Alice's care and to demonstrate Alice's fitness to be a parent. [Tr. 533-40; 727-30] But given that Gloria was already defending her own fitness to parent her children, Alice's fitness was properly defended by Alice herself.

The trial court's findings demonstrate that the court considered Alice's fitness as a parent when considering whether to terminate Gloria's rights. [Tr. 755-64] As the court stated at the outset of its findings, Alice's "role has had some significance in the ultimate result of these proceedings." [Tr. 737] The court noted

that neither Gloria nor Alice had remedied the conduct that placed the children at risk, and it stated that there was no evidence to suggest that Alice could or would regulate her behavior so as to protect the children. [Tr. 756, 758-59] Because Alice was denied party status, the court's evaluation of whether to terminate Gloria's parental rights was improperly influenced by Alice's absence in the case.

II. The Trial Court's Findings Did Not Satisfy the Requirements of the Indian Child Welfare Act.

Before a court may terminate a parent's rights to an Indian child, ICWA requires a trial court to find, beyond a reasonable doubt, that continued custody of the children is likely to result in serious emotional or physical damage to the children.[66] This finding must be supported by the testimony of a qualified expert witness.[67]

Here, the trial court did not acknowledge this requirement of the Indian Child Welfare Act when it recited the findings necessary for it to terminate Gloria's parental rights [Tr. 744], and it made no findings to support this requirement. [Tr. 745-64] Because the trial court's findings failed to satisfy the Indian Child Welfare Act, this court must reverse the termination of Gloria's parental rights.

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66 25 U.S.C. § 1912(f); Alaska R. CINA P. 18(c)(4).

67 25 U.S.C. § 1912(f); Alaska R. CINA P. 18(c)(4).

CONCLUSION

Because the trial court wrongly denied party status to Alice and failed to make sufficient findings under the Indian Child Welfare Act to terminate Gloria's parental rights, this court should reverse the order terminating Gloria's rights. The case should be remanded to the trial court for further proceedings.

DATED at Anchorage, Alaska this 8 day of March 2017.

PUBLIC DEFENDER AGENCY

By: Renee McFarland
RENEE McFARLAND (0202003)
ASSISTANT PUBLIC DEFENDER

Neutral
As of: April 4, 2018 5:22 PM Z

Mabry v. Mabry

Supreme Court of Michigan

August 2, 2016, Decided

SC: 153082

Reporter
499 Mich. 997 *; 882 N.W.2d 539 **; 2016 Mich. LEXIS 1610 ***

DEANNA D. MABRY, Plaintiff-Appellant, v JOHANNA SUZANNE-GRAINE MABRY, Defendant-Appellee.

Subsequent History: As Amended August 3, 2016.

Prior History: [*1]** COA: 329786. Washtenaw CC: 15-001873-DC.

Mabry v. Mabry, 2015 Mich. App. LEXIS 2491 (Mich. Ct. App., Dec. 18, 2015)

Core Terms

same-sex, married, marriage, couples, equitable-parent, partner, custody, rights, parties, benefits, unconstitutionally, biological, child born, equal protection, courts

Judges: Robert P. Young, Jr., Chief Justice. Stephen J. Markman, Brian K. Zahra, Bridget M. McCormack, David F. Viviano, Richard H. Bernstein, Joan L. Larsen, Justices. MCCORMACK, J. (dissenting). BERNSTEIN, J., joins the statement of MCCORMACK, J.

Opinion

Order

[539] [*997]** On order of the Court, the application for leave to appeal the December 18, 2015 order of the Court of Appeals is considered, and it is DENIED, because we are not persuaded that the questions presented should be reviewed by this Court.

Dissent by: Bridget M. McCormack

Dissent

[540]** McCormack, J. (*dissenting*).

I respectfully dissent from this Court's order denying leave to appeal. I would grant leave to appeal to address whether *Obergefell v Hodges*, 576 U.S. __; 135 S Ct 2584; 192 L. Ed. 2d 609 (2015), compels us to apply our equitable-parent doctrine to custody disputes between same-sex couples who were unconstitutionally prohibited from becoming legally married.

Until 2015, same-sex couples were not permitted to marry in Michigan. See MCL 551.1. Nor did Michigan recognize a legal marriage between a same-sex couple solemnized in another jurisdiction. See MCL 551.271; Const 1963, art 1, § 25. Michigan also prohibited second-parent adoption between unmarried couples. See MCL 710.24. Thus, before the Supreme Court's decision in *Obergefell*, a same-sex partner **[***2]** had no legal recourse to seek parental rights to a child born or adopted into his or her committed relationship but carried or adopted by his or her partner. I would grant leave to appeal to consider whether the Court of Appeals' peremptory order in this case illustrates and perpetuates the troubling effect of this state's unconstitutional ban on same-sex marriage and second-parent adoption identified by the Supreme Court in *Obergefell*.

The relationship between the parties in this case was longstanding and committed. The plaintiff and the defendant began their relationship in 1995 in Philadelphia, and soon after moved together to Michigan. The parties took repeated steps to solidify their relationship and demonstrate their commitment to one another. These steps included filing a declaration of domestic partnership, purchasing a home together, entering a formal domestic-partnership agreement, solemnizing their relationship in a commitment ceremony in Hawaii, and entering into a marriage covenant in the form of a ketubah. The defendant took the plaintiff's last name. During the entire course of their

relationship, they were prohibited from marrying each other in Michigan, and Michigan **[***3]** did not recognize extra-jurisdictional same-sex marriage.

After taking these deliberate steps to solidify their relationship, the parties decided to have children. They agreed that the defendant would carry the children through pregnancy using an anonymous donor. The parties had three children between 2001 and 2008, all of whom were biological children of the defendant but took the plaintiff's last name and were parented by both the defendant and the plaintiff. During their relationship, the plaintiff's parental role in the children's lives was significant: She provided the defendant and the children with health insurance, she was the sole financial provider for the family, and she provided care and guidance to the children. The defendant executed a will and trust agreements that provided that in the event of her death, the plaintiff would be the children's legal guardian and conservator.

In 2010, five years before the decision in *Obergefell*, the parties ended their 15-year relationship. For the following year, the plaintiff remained in the family home, continued paying for health insurance for the defendant and the children, and paid all other family bills and living **[*998]** expenses. Eventually, **[***4]** the parties were unable to resolve custody and financial-support arrangements, and the defendant prohibited the plaintiff from seeing the children.

After *Obergefell* was decided, the plaintiff filed a complaint for custody and parenting time, seeking legal and physical custody of the parties' three children pursuant to Michigan's common-law equitable-parent doctrine. The trial court denied the defendant's early motion for summary disposition, noting that it needed further **[**541]** factual development before it could decide whether the plaintiff had standing to pursue custody under the equitable-parent doctrine. See *Atkinson v Atkinson*, 160 Mich App 601; 408 N.W.2d 516 (1987). The defendant filed an interlocutory appeal in the Court of Appeals, and the Court of Appeals peremptorily vacated the trial court's denial of summary disposition. The order held that the plaintiff did not have standing to bring a custody action pursuant to the equitable-parent doctrine because that doctrine is only available to a parent who was married. *Mabry v Mabry*, unpublished order of the Court of Appeals, entered December 18, 2015 (Docket No. 329786). The plaintiff sought leave to appeal in this Court, arguing that the failure to apply the equitable-parent doctrine to nonbiological **[***5]** parents who were unconstitutionally prohibited from marrying the biological parent of their children violated her equal protection and due process rights as well as those of her children.

The equitable-parent doctrine recognizes a third person who is not a biological parent as the child's parent when (1) the would-be equitable parent and the child acknowledge the parental relationship or the biological or adoptive parent has cultivated the development of a relationship over a period of time, (2) the would-be equitable parent desires to have the rights afforded a parent, and (3) the would be-equitable parent is willing to pay child support. *Atkinson*, 160 Mich App at 608-609. This Court endorsed the equitable-parent doctrine in *Van v Zahorik*, 460 Mich 320, 330-331; 597 N.W.2d 15 (1999), but limited its application to would-be parents who were married.

The plaintiff's constitutional challenges merit further review from this Court. I would grant leave to consider whether *Obergefell* compels us to apply the equitable-parent doctrine to same-sex couples who had children conceived or adopted by one party during their relationship but were unconstitutionally prohibited from marrying under this state's law. I would address whether the line drawn by the Court of Appeals in this case **[***6]** impermissibly violates both the plaintiff's and her children's equal protection and due process rights by creating an untenable requirement that same-sex couples have sought a legal marriage in another jurisdiction, despite the fact that any extra-jurisdictional marriage would have been legally unrecognized in Michigan.

In *Obergefell*, the Supreme Court held that Michigan's ban on same-sex marriage was unconstitutional, that marriage is a fundamental right, and that same-sex couples and their children are equally entitled to the benefits of marriage. *Obergefell*, 576 U.S. __, __; 135 S Ct at 2604-2605. Indeed, the children of same-sex couples and their constitutional rights were central to the Court's analysis in *Obergefell*. The Court reasoned:

> **[*999]** Excluding same-sex couples from marriage thus conflicts with a central premise of the right to marry. Without the recognition, stability, and predictability marriage offers, their children suffer the stigma of knowing their families are somehow lesser. They also suffer the significant material costs of being raised by unmarried parents, relegated through no fault of their own to a more difficult and uncertain family life. The marriage laws at issue here thus harm and humiliate the children

> of same-sex **[***7]** couples. [*Id.* at __; 135 S Ct at 2600-2601.]

The Court's decision in *Obergefell* reflects a long-recognized constitutional principle that children born to unmarried parents are entitled to the same benefits as children born to married parents. See, e.g., **[**542]** *Weber v Aetna Cas & Surety Co*, 406 U.S. 164, 165; 92 S. Ct. 1400; 31 L. Ed. 2d 768 (1972) (holding that a workers' compensation statute denying equal recovery rights to dependent unacknowledged children violated equal protection); *Clark v Jeter*, 486 U.S. 456, 457, 465; 108 S. Ct. 1910; 100 L. Ed. 2d 465 (1988) (holding that a six-year statute of limitations for paternity actions to seek support, required for a child of an unmarried couple but not a child of a married couple, violated equal protection); *New Jersey Welfare Rights Org v Cahill*, 411 U.S. 619, 621; 93 S. Ct. 1700; 36 L. Ed. 2d 543 (1973) (holding that a state program that denied benefits to children who were not of the marriage violated equal protection).

The Court of Appeals' order in this case overlooks this general principle. If not for this state's unconstitutional prohibition on their parents' right to marry, the children in this case would be entitled to all the benefits conferred on children of opposite-sex couples by the equitable-parent doctrine. And as a result of the Court of Appeals' order, the parties' children will be unable to seek the love and guidance of the plaintiff, have access to her healthcare benefits, social security benefits, and death benefits, **[***8]** or inherit from her if she dies intestate.

What is more, the plaintiff's fundamental right to parent her children is potentially violated by the Court of Appeals' ruling. Denying individuals who were unconstitutionally prohibited from marrying access to the equitable-parent doctrine perpetuates the constitutional harms inflicted by the state's unconstitutional prohibition of same-sex marriage. By denying the parties access to marriage, and subsequently to the benefits of marriage, including the equitable-parent doctrine, the Court of Appeals' ruling may contravene the United States Supreme Court's direction in *Obergefell* that same-sex couples have a fundamental right to marriage and the benefits of marriage.

This case is of course distinguishable from our decision in *Van*, in which the parties had the option to get married, but chose not to. *Van*, 460 Mich at 323. The plaintiff here was unconstitutionally prohibited from marrying the defendant, though she took every legal step available to replicate marriage. In my view, the Court of Appeals' decision overlooks our central reasoning in *Van*, in which we noted that limiting the equitable-parent doctrine to children born or adopted within a marriage reinforces **[***9]** the "importance of marriage and legitimacy." *Id.* at 333. When the parents themselves did not choose not to marry, but **[*1000]** instead had that choice made for them by our state's laws, and the parents otherwise demonstrated the same commitment and legitimacy as married parents, their children should not be barred from the potential benefits of our common-law rule. In other words, we should consider whether the constraint that makes it impossible for the children of same-sex parents to benefit from the equitable-parent doctrine is constitutionally viable post-*Obergefell*.

The defendant's argument that this Court should not apply the equitable-parent doctrine to the plaintiff because it would enable any third party to gain parental rights is not powerful.[1] The plaintiff **[**543]** is not *any* person. She acted as a parent, providing her name, her love, support, and affection, her financial support, and her health insurance to these children. Yet, under the Court of Appeals' order, she is a legal third party to the children. I think that this Court might fashion a rule to ensure that the plaintiff's and the children's constitutional rights are protected without opening the doctrine to any third party seeking parental **[***10]** rights.

Not surprisingly, this issue is not unique to Michigan. Other state courts have grappled with the implications of *Obergefell* on common-law doctrines akin to our equitable-parent doctrine. Many have already extended similar equitable doctrines to same-sex couples who were prohibited from marrying yet had children during their relationship. These states have provided guidance and workable rules for trial courts under similar doctrines while preserving the constitutional rights of same-sex couples who were unconstitutionally prohibited from marrying and parenting their children. See, e.g., *In re Registered Domestic Partnership of Madrone*, 271 Or App 116, 129; 350 P.3d 495 (2015) (holding that "[b]ecause the question is whether a couple would have married *if they could have*, the

[1] The defendant has argued that the equitable-parent doctrine should not apply to the plaintiff because it would infringe her rights to parent by allowing any person the ability to seek custody. See *Troxel v Granville*, 530 U.S. 57; 120 S. Ct. 2054; 147 L. Ed. 2d 49 (2000) (holding that a visitation statute that allowed *any person* to petition a court for visitation rights violated the fundamental right of the child's parents to parent).

factfinder must determine what the individual's views would have been if marriage had not been prohibited"); *Ramey v Sutton*, 2015 Okla 79, ¶ 13; 362 P3d 217, 220-221 (2015) (holding that a same-sex couple's **[***11]** failure to marry before *Obergefell* could not be used to prevent the nonbiological parent from seeking custody of the child when she had acted *in loco parentis* to the child); cf. *Conover v Conover*, 448 Md 548, 577, 2016 Md. LEXIS 433 (July 7, 2016) (Docket No. 79), pp 35-36 (holding that a same-sex partner had standing under the de facto parent doctrine to pursue custody of a child born to her partner before their marriage).[2]

[*1001] As with all child custody disputes, the child's best interests are paramount, and trial courts regularly engage in fact-finding to determine how those interests should be served. I believe Michigan's trial courts are capable of evaluating the parties' relationship to determine whether the parties would have married but for **[**544]** Michigan's unconstitutional prohibition of same-sex marriage in the limited number of cases in which this issue will arise.[3]

Like the many other state courts addressing this issue, then, I would grant leave to appeal to consider whether *Obergefell v Hodges* compels us to apply our equitable-parent doctrine to custody disputes between same-sex couples who were unconstitutionally prohibited from becoming legally married. The Constitution might require that the children born and adopted into same-sex families be able to access the same benefits that children born into opposite-sex families have under Michigan law when they arrive at our courthouse doors. At the very least, this question deserves this Court's considered analysis.

BERNSTEIN, J., joins the statement of MCCORMACK, J.

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[2] Many other states addressed this issue before *Obergefell*. See, e.g., *Bethany v Jones*, 2011 Ark 67, 378 S.W.3d 731, pp 10-12 (2011) (holding that a same-sex partner, who was not legally married, stood *in loco parentis* to the child); *ENO v LMM*, 429 Mass 824, 829-830; 711 N.E.2d 886 (1999) (holding that a same-sex partner was the de facto parent of the biological child of her former partner); *Mullins v Picklesimer*, 317 SW3d 569, 574-577 (Ky, 2010) (holding that a same-sex partner had standing to pursue custody of her former partner's biological child when the child was born into the relationship and the partner coparented the child); *In re Parentage of LB*, 155 Wash 2d 679, 683; 122 P.3d 161 (2005) (holding that a same-sex partner had standing to pursue custody of her former partner's biological child when she was the de facto parent).

And while some other states have yet to squarely address the issues raised in this case post-*Obergefell*, they have resolved similar issues on the basis of their unique state statutes. See, e.g., *McGaw v McGaw*, 468 SW3d 435, 442-443, 448 (Mo App, 2015) (holding that the equitable-parentage **[***12]** theory did not apply to a same-sex couple who had separated before *Obergefell* because there was a separate statute enabling the parent to seek third-party custody and visitation); *Russell v Pasik*, 178 So 3d 55, 61 (Fla App, 2015) (holding that a same-sex partner did not have standing to seek custody and visitation rights by asserting de facto parent status, but noting that the same-sex partner could have adopted the children under Florida's adoption statutes); *Sheets v Mead*, 238 Ariz 55, 58; 356 P.3d 341 (Ariz App, 2015) (denying nonparent visitation to a same-sex partner, who had been a foster parent of the child with her partner before the couple's separation, after the other partner adopted the child because the child was no longer "born out of wedlock" as required by the statute providing nonparent visitation rights).

[3] Any exception to our decision **[***13]** in *Van*, 460 Mich 320; 597 N.W.2d 15, limiting the equitable-parent doctrine to married couples would extend only to the small group of same-sex couples who were unconstitutionally prohibited from marrying but separated before the Supreme Court's decision in *Obergefell* and have a custody dispute.

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Advising Clients in a Post-Obergefell Era

S. KERENE MOORE KATHERINE M. SHARKEY MATERIALS

I. Introduction

The holding in *Obergefell v. Hodges* addressed two major questions: (1) whether the Fourteenth Amendment requires states to recognize legally performed same-sex marriages from other states, and (2) whether states are required to issue marriage licenses to same-sex couples.[1] In finding that states were obligated to recognize and perform these marriages, the Court opened doors for same-sex families to create legally enforceable spousal and parent-child relationships. The Court also included language that encourages same-sex families to enforce the benefits of marriage equality immediately through the judiciary.

> The dynamic of the United States' constitutional system is that individuals need not await legislative action before asserting a fundamental right. The Nation's courts are open to injured individuals who come to them to vindicate their own direct, personal stake in the United States' basic charter. An individual can invoke a right to constitutional protection when he or she is harmed, even if the broader public disagrees and even if the legislature refuses to act....[2]

This is significant because *Obergefell* and its predecessor *Windsor v. Hodges* ostensibly released over thousands benefits of marriage to same-sex couples, though the varying nature of state family laws, left many issues open to interpretation. Most recent legal questions surround whether common practices, such as administrative norms regarding issuance of birth certificates, qualify as a benefit of marriage. Practitioners also continue to struggle with how to equally and fairly apply legal standards when an unconstitutional deprivation of rights barred individuals from legally marrying. Although courts and policymakers have provided some guidance on these issues, practitioners must be prepared to skillfully apply the law when confronting novel questions. This discussion addresses recent legal developments involving same-sex families in Michigan post-*Obergefell* with an in-depth focus on parentage and property division in divorce.

II. The Evolution of Parentage Laws

A full understanding of the plight of same-sex families to establish legally recognized parent-child relationships, requires consideration of how parentage has evolved over time. Though family law is generally within the purview of the states, technology, cultural changes, and federal policies have undeniably shaped parentage regulations. [3] One common example of this is the area of paternity and child support. Prior to the advent of reliable genetic testing, the marital presumption served as the most functional means for determining parentage. Derived from British common law, children born during a marriage were presumed the offspring of the husband.[4] All states maintain the presumption in some form today, but have also established modern paternity statutes that heavily rely on genetic testing. Other than advances in science, the latter was also influenced by an increase in children born out of wedlock[5] and federal welfare policies that required states to adopt uniform support laws. Supreme Court decisions also significantly impacted state parentage laws. A string of decisions prohibited states from discriminating against non-marital children [6] and *Stanley v. Illinois* granted unmarried fathers a right to a hearing prior to termination of parental rights. [7]

The modern focus on biology may seem foreboding to same-sex parentage, but just as the Supreme Court took time to acknowledge the strength of non-biological parent-child relationships in *Stanley*,[8] many states also took measures to support these relationships. Common examples include state policy changes that address both blended families and the increasing use of assisted reproductive technology ("ART").[9] When drafting the first Uniform Parentage Act ("UPA"), the Uniform Law Commission included policy that presumed a husband's paternity where he consented to his wife's use of ART[10], and both UPA and non-UPA states adopted such policies.[11] Similarly, stepparent adoption is a relatively new concept that facilitates legal parent-child relationships within blended families. [12] Michigan, for example, made changes to the stepparent adoption process in 1995[13] and 2016 to ease the stepparent adoption.[14]

Same-sex families rely on multiple parentage doctrines to protect family stability, but there is much controversy over how *Obergefell* impacts application of these laws.

A. The Presumption and Birth Certificates

Courts have not directly addressed how the presumption doctrine applies to children of same-sex married couples in Michigan, but existing laws and recent court decisions offer insight. Since as early as 1846, Michigan statute has dictated that "[t]he legitimacy of all children begotten before the commencement of [divorce] shall be presumed until the contrary be shown."[15] The presumption of legitimacy is deemed "one of the strongest presumptions in the law."[16] Though no longer conclusive, the presumption can only be rebutted by clear and convincing evidence.[17] In conformity with this doctrine, statute dictates that "[t]he name of the husband at the time of conception or, if none, the husband at birth shall be registered as the father of the child."[18]*Obergefell* requires that states offer the same benefits of marriage to same-sex and opposite sex couples and repeatedly stressed that unequal application of marriage laws harm children of same-sex families.[19] A gender-neutral reading gives the privilege of the presumption of legitimacy to a birth mother's same-sex spouse. Shortly after *Obergell* was published, Michigan's Department of Vital Records quietly confirmed that it would start listing names of both same-sex female spouses on birth certificates, and that couples could request a corrected birth certificate where a child was born during a previously unrecognized legal

marriage. No court order is required.[20] Instead of listing same-sex spouses as "mother" and "father", the state also has the ability to issue birth certificates with "parent" and "parent" designations.[21] Biologically male spouses would need to obtain an adoption order before obtaining a birth certificate with both spouses, however.[22]

Some argue that states should not extend the presumption to female spouses, and that it is automatically rebuttable because the presumption is based in biology and a female non-birth parent cannot establish paternity. This argument is flawed for a number of reasons. Through use of in-vitro fertilization, a birth mother can carry her wife's egg(s) to term. In this scenario, the non-birth mother can establish biological maternity of the child. Moreover, both Indiana and Arkansas have tried to deny the presumption to non-biological female spouses and failed.[23] Although Indiana appealed the federal court's decision to the Seventh Circuit, in *Pavan v. Smith* the U.S. Supreme Court reversed a decision by the Arkansas Supreme Court that relied on the same theory.

> The Arkansas Supreme Court's decision, we conclude, denied married same-sex couples access to the "constellation of benefits that the Stat[e] ha[s] linked to marriage." [citation omitted] As already explained, when a married woman in Arkansas conceives a child by means of artificial insemination, the State will—indeed, *must*—list the name of her male spouse on the child's birth certificate. [citation omitted] And yet state law, as interpreted by the court below, allows Arkansas officials in those very same circumstances to omit a married woman's female spouse from her child's birth certificate. [citation omitted] As a result, same-sex parents in Arkansas lack the same right as opposite-sex parents to be listed on a child's birth certificate, a document often used for important transactions like making medical decisions for a child or enrolling a child in school. See Pet. for Cert. 5-7 (listing situations in which a parent might be required to present a child's birth certificate). *Obergefell* proscribes such disparate treatment. As we explained there, a State may not "exclude same-sex couples from civil marriage on the same terms and conditions as opposite-sex couples." [citation omitted] Indeed, in listing those terms and conditions—the "rights, benefits, and responsibilities" to which same-sex couples, no less than opposite-sex couples, must have access—we expressly identified "birth and death certificates."[24]

The Court emphasized the differential treatment provided to same-sex female spouses and heterosexual married spouses in its decision. Arkansas already granted heterosexual married fathers the privilege of being listed on the birth certificate where ART was used to bring about a wife's pregnancy. Since the state permitted this for heterosexual married men, but allowed "in those very same circumstances to omit a married woman's female spouse from her child's birth certificate" it violated the mandate of *Obergefell*. [25] The same differential treatment by Indiana is one of the primary reasons cited by a federal district court when finding that the state's refusal to list female non-birth parents on the birth certificate violates the Fourteenth Amendment.[26] Though biology is certainly an important part of marriage, these decisions support the traditional view that marriage is an avenue for establishing legal parentage.

Michigan's statutory structure regarding spouses who use ART is analogous to that of Arkansas. Just as other states responded to advances in fertility science, the Michigan legislature made it clear that "[a] child conceived by a married woman with consent of her husband following the

utilization of assisted reproductive technology is considered to be the legitimate child of the husband and wife."[27] Once again, a gender-neutral reading would indicate that a spouse who conceives "with consent of her [spouse] following utilization of [ART] is considered to be the legitimate child of the [spouse] and [spouse]." The only question that remains is whether the presumption is easily rebutted by DNA.

It is doubtful that the legislature intended for the presumption to be rebutted solely by a DNA test; instead, the more rational explanation is that this family bears the same legitimacy as a biologically related family created within the confines of marriage. As discussed recently by the Michigan Court of Appeals, the Revocation of Paternity Act " expressly 'governs an action to determine that a presumed father is not a child's father,'" including situations where spouses utilize ART[28].[29] Indeed it would be absurd to permit a spouse a to rebut the presumption solely through use of DNA testing after a joint agreement to have a child via ART. The Court noted that RPA's best-interest factors "already provide sufficient safeguards for such situations."[30]

> In particular, MCL 722.1443(4)(a) allows a court to consider "[w]hether the presumed father is estopped from denying parentage because of his conduct." If a husband had full knowledge that his wife was attempting to get pregnant through IVF with an anonymous sperm donor and supported the process, it would be a simple matter for a court to find that the best interests would favor not revoking paternity under these circumstances.[31]

There is little doubt that this same analysis would hold true for same-sex married couples who utilize ART. A consenting spouse with no genetic ties should be estopped from denying parentage of a child legitimized through marriage.[32]

Michigan intestacy laws also weigh against arguments that biology is the sole marker for parentage. Just as Court noted in *Jones*, Michigan Probate Code states as follows:

> [F]or purposes of intestate succession by, through, or from an individual, an individual is the child of his or her natural parents, regardless of their marital status. The parent and child relationship may be established in any of the following manners: (a) If a child is born or conceived during a marriage, both spouses are presumed to be the natural parents of the child for purposes of intestate succession. A child conceived by a married woman with the consent of her husband following utilization of assisted reproductive technology is considered as their child for purposes of intestate succession. Consent of the husband is presumed unless the contrary is shown by clear and convincing evidence.[33]

Similarly, the common law doctrine of equitable adoption is used to give children a right to intestate succession where an effort to adopt failed due to a failure to meet the statutory requirements of adoption code.[34] Though these policies address intestacy and not custody, the Court has explicitly extended the common law doctrine of equitable parentage to same-sex married couples. [35] Equitable parentage was derived from the equitable parent doctrine, and as discussed in detail below, is used to maintain parent-child relationships when there is no genetic connection. In defining equitable parentage, the Court stressed that custodial rights and

intestacy rights are linked: "It is only logical that a person recognized as a natural parent in death should have the same recognition in life."[36]

Taken together, it is clear that the Michigan legislature and courts have already extended the presumption to married couples even where there is no genetic connection to bind the parent-child relationship.

B. Equitable Parentage

The equitable parent doctrine is a common law remedy that allows a non-biological parent of a child born during a marriage to maintain parentage. A party may have standing as an equitable parent where:

1. The would-be equitable parent and the child acknowledge the parental relationship or the biological or adoptive parent has cultivated the development of a relationship over a period of time,

2. the would-be equitable parent desires to have the rights afforded a parent, and

3. the would-be equitable parent is willing to pay child support.[37]

Michigan courts have made it clear that equitable parents have equal rights, duties, and responsibilities as other natural parents. "An individual who has been found as an equitable parent under the *Atkinson* doctrine stands on equal footing with any other natural or adoptive parent.[38] The doctrine stresses the significance of security and permanence in parent-child relationships.

> First, it would undermine the principle set forth in *Soumis* that equitable parents stand on equal footing with natural and adoptive parents. If equitable parenthood could ebb and flow over time, it would be a class of parenthood inferior to natural or adoptive parenthood, which are usually permanent statuses. Second, stability in acknowledged parent child relationships is generally in the child's best interest. [39]

Though the Court has refused to extend the doctrine to unmarried couples,[40] it has extended the doctrine to legally married female couples who conceive a child using ART.[41] The decision not to extend the doctrine outside of marriage was first addressed in the context of heterosexual non-marital relationships.[42] The underlying rationale of the Court in *Van v. Zahorik* leaves little room for argument.

> Mr. Van asks this Court to extend the doctrine outside the context of marriage. As indicated above, the extension of substantive rights regarding child custody implicates significant public policy issues and is within the province of the Legislature, not the judiciary. Accordingly, the primary reason we will not extend this theory here is that the Child Custody Act, which occupies the field of child custody, does not recognize such a theory.[43]

The failure of the Court to extend the equitable parent doctrine to unmarried couples has detrimentally impacted non-biological parents who could not marry or co-adopt a minor

child[44] during Michigan's ban on same-sex marriage. In *Lake v. Putnam*, the Court of Appeals declined to use Obergefell to "[r]etroactively transform an unmarried couple's past relationship into marriage for purposes of custody proceedings."[45]*Putnam* did not address whether a couple would have married but for Michigan's unconstitutional ban on marriage, and a concurring opinion discussed consideration of circumstances where an unmarried couple would have married, but for Michigan's unconstitional ban.[46] Shortly thereafter, however, the Michigan Supreme Court declined leave to appeal where a would-be equitable parent offered substantial evidence that the parties would have married.[47] Two justices joined in a strong dissent from the court's decision to deny leave:

> If not for the state's unconstitutional prohibition on their parents' right to marry, the children… would be entitled to all the benefits conferred by the equitable parent doctrine… [T]he parties' children will be unable to seek the love and guidance of the plaintiff, have access to her healthcare benefits, social security benefits, and death benefits, or inherit from her if she dies intestate…[48]

According to the U.S. Census, at least 22,000 same-sex couples were raising families together during Michigan's ban on same-sex marriage.[49] Some of these parents were able to receive second-parent adoptions, while others chose to marry and obtain stepparent adoptions after *Obergfell*. There are undoubtedly others who experienced a breakdown in the relationship prior to the Obergefell decision, but face barriers to bringing a court case. Many parties are able to establish parenting agreements through mediation, and some advocates are still exploring options for expanding the doctrine.

Where equitable parentage is not available, practitioners should also investigate whether an intended party has standing to bring a custody case as a third-party. Third parties have standing in custody proceedings only where the legislature has specifically granted them standing pursuant to MCL 722.26.[50] Under MCL 722.26c(1)(a), a third party can seek custody if the child at issue has been 1) placed for adoption with the third party, and 2) the child has resided with the third party for at least six months. The second way a third party can establish standing is pursuant to MCL 722.26(1)(b). This statute sets forth three conditions that must be met before standing is conferred on the third party: 1) the biological parents have never been married, *and* 2) the child's custodial parent has died or is missing, and the other parent does not have custody, *and* 3) the third person is related to the child within the third degree.

Practitioners should also keep in mind that equitable parents who entered a same-sex marriage during the marriage ban may struggle with legal parentage issues that married heterosexual couples do not. Non-biological fathers presenting as equitable parents are generally married to the birth mother, on the child's birth certificate, and receiving benefits of the marital presumption, including joint legal and physical custody. Conversely, a same-sex couple with an out-of-state marriage license may be co-parenting a child, but lack standard legal protections. Where a child was born or adopted during the marriage ban, the birth parent may be the only parent on the child's birth certificate, or a court may have only permitted one spouse to adopt a minor child. By refusing to recognize the marriage, the state denied a spouse parentage rights that would have been obtained via the presumption or an adoption order. As discussed above, married parents can generally obtain a corrected birth certificate from the Department of Vital Records post-*Obergefell*. Where a child was adopted, but one parent lacks rights, the parties can also complete a stepparent adoption to legitimize the other spouse's parentage. However,

problems arise where the parties are separating and no longer interested in jointly parenting. Since only legal guardians or an individual listed on a birth certificate can request a corrected birth certificate, an unlisted parent may need to obtain a court order if the listed parent is uncooperative. At least one Michigan trial court has extended the equitable parent doctrine to a non-adoptive spouse where her spouse adopted the child during a same-sex marriage, but the equitable parent was prohibited from doing so due to the ban on marriage recognition.[51]

C. Same-Sex Adoption and Parentage Orders

Though parentage laws recognize that biology is not the only building block of family, same-sex parents are either required or strongly recommended to complete an adoption or obtain a parentage order. When given the opportunity, practitioners must advise parents of the benefits of these options.

Adoption, the most optimal remedy, either establishes legal parentage rights, or it closes off subsequent parentage litigation. For example, where a child is being adopted from another family, or through surrogacy, the birth parents' rights must be formally terminated and an adoption completed before a same-sex married couple has legally enforceable parental rights. Similarly, married female couples must be advised that Michigan law does not preclude known sperm donors from pursuing parental rights. Though married female spouses are presumed parents without a court order, either spouse, or a known donor could attempt to revoke the non-biological parent's rights for the purpose of establishing paternity under RPA.[52] As detailed above, adoption is not always necessary to establish a legally recognized parent-child relationship (the presumption applies and cannot be rebutted by biology alone, *see infra*). Though practitioners should encourage parties to adopt, a failure to adopt does not foreclose a presumed parent from having or maintaining a legal parent-child relationship.

Adoption orders are also entitled to full faith and credit which allows families to move freely throughout the country without worrying how another state's parentage laws might apply[53] This holds true for both traditional adoptions, which require adoption petitioners to be married, and second-parent adoptions, which can be granted to unmarried petitioners. Even during the marriage ban, Michigan courts required recognition of second-parent adoption orders from other states.[54] Until recently, not all states were in agreement on this issue. Shortly after issuance of *Obergefell*, the Alabama Supreme Court refused to extend full faith and credit to a second parent adoption completed by unmarried same-sex partners in Georgia. The Alabama court highlighted that Georgia statute did not provide statutory authority for issuing the order. The U.S. Supreme Court reversed, ordering Alabama to extend full faith and credit. "The judgment appears on its face to have been issued by a court with jurisdiction and there is no established Georgia law to the contrary."[55] Thousands of second-parent adoptions were issued by Michigan judges during Michigan's ban on recognition and performance of same-sex marriage. As Michigan also lacks a statutory structure to support these orders, this ruling affirms the stability of these parent-child relationships.

Same-sex parents do not generally pursue parentage orders in Michigan; however, practitioners should be aware of this alternative, as these orders are also entitled to full faith and credit. Examples of parentage orders include paternity orders, maternity orders, equitable parentage orders, and de facto parentage orders. The most common mechanism for obtaining a parentage order out-of-state is through the Uniform Parentage Act ("UPA Action"). Orders can be obtained

when a child is born to a married couple, or in a state that recognizes their civil union, or comprehensive domestic partnership.[56] Parentage orders make it extremely difficult for same-sex parents to deny a spouse's status as a legal parentage.

Michigan is not a UPA state, and advocates are still exploring avenues for same-sex parents to file affirmative parentage actions in Michigan. Courts are already making parentage determinations in divorce cases. Standing for custody is generally based on the presumption, equitable parentage, or a pre-existing adoption order.[57] Though a married couple cannot bring a UPA claim after a child is born in Michigan, it may be possible to obtain a parentage order by filing a custody case under the Child Custody Act. The order obtained would be declaratory, stating the foundation of the legal parent-child relationship and reiterating joint custodial rights. However, The Child Custody Act defines a parent as a "natural or adoptive parent of a child."[58] The only open question is whether presumed parents are natural parents. As detailed above, the U.S. Supreme Court's findings in *Obergefell* and *Pavan* have likely foreclosed arguments that a same-sex spouse is not entitled to this status in Michigan. Michigan statute already assigns the presumption of legitimacy to husband's whose wives conceive via ART. "[A] child conceived by a married woman with consent of her [spouse] following the utilization of assisted reproductive technology is considered to be the legitimate child of the husband and wife."[59] Intestacy law also indicates that a husband who uses ART is a natural parent. When children are born or conceived during a marriage "both spouses are presumed to be the natural parents of the child" and "[a] child conceived by a married woman with the consent of her husband following utilization of [ART] is considered as their child for purposes of intestate succession."[60] As such, a same-sex married parties may be able to obtain parentage orders by filing a custody case shortly after a child is born into the family using ART. The only problem is that all interested parties may not be fully addressed, as in an adoption case.

Attorneys should also be aware that same-sex parents are not happy with the idea that an adoption might be necessary or the family's best interests. Though the Michigan law on stepparent adoption is the best avenue for having same-sex married couples complete an adoption, experts recommend utilizing the term *confirmatory adoption* throughout the process. This way, both the courts and the parties are acknowledging the pre-existing status of parent-child relationships.

III. Property Division & Spousal Support for "Short-Term" Same-Sex Marriages: Creative Strategies

A. The Standard Property Division and Spousal Support Framework Can Lead to Inequitable Results for Divorcing Couples Precluded from Marrying Pre-*Obergefell*

Susie walks into your office. She and Bonnie were college sweethearts and have lived together as romantic partners since 1988. They raised two children who are now adults. Susie was the biological parent of one child; Bonnie was the biological parent of the other child. The children were raised as full siblings with two moms and their relative "legal" positions were never an issue for the parents or the children.

Susie was a stay-at-home parent until 2003 and is now a social worker earning $35,000 annually. Bonnie is an investment banker and earns $200,000. Both parties are in their early 50's.

Their combined assets are:

1. $200,000 equity in a marital home purchased in 2000 (jointly titled)
2. Investment accounts in Bonnie's name, totaling $500,000
3. 401(k) in Bonnie's name worth $800,000
4. 403(b) in Susie's name worth $50,000
5. Bank accounts: Susie's individual—$2,000; Bonnie's individual—$20,000;
6. Joint—$12,000

They married on June 30, 2015. They are experiencing marital difficulties and are considering divorce.

Byington v. Byington is often cited for the concept that marriage can only be terminated upon death or divorce and that only property earned by one spouse *during* the existence of a marriage is presumed to be marital property.[61] The "period of marriage" or "marital estate" cannot be expanded based on periods of cohabiting.[62] That is, strictly speaking, the concept of "marital property" is a static one and cannot *exclude* property that accrued during the marriage but after separation *simply* because the parties separated; nor can it *include* property that accrued prior to the marriage (unless commingling occurred).

For Bonnie and Susie, the knee-jerk response based on MCL 552.19 and *Byington*, *Reeves* and their progeny would likely be to divide the jointly titled assets equally and the change in value of the individual accounts after June 2015. The commonly used spousal support software, based on a 2 year marriage, calls for spousal support to run for ".08 to 5 years" at $3,033 per month from Bonnie to Susie. Is this an equitable result for Susie?

The problem we face as advocates for the "Susies" is best illustrated by reviewing the Court of Appeals opinion in *Korth v. Korth*.[63] In that case, after a 10 year marriage but 23 year relationship, the trial court awarded Wife $420/month in spousal support for 15 years. The Court of Appeals remanded to the trial court on the issue of spousal support because

> …in awarding spousal support, the trial court indicated that the marriage had lasted ten years, but *appeared to rely on the fact* that the parties had been a couple for twenty-three years in awarding plaintiff $420 a month in spousal support for fifteen years, or until plaintiff remarries. Although the past relations and conduct of the parties is one factor the trial court may consider in determining whether to award spousal support, Michigan has a strong public policy supporting the institution of marriage. *Van v. Zahorik*, 460 Mich. 320, 332, 597 N.W.2d 15 (1999). This policy was undermined by the trial court's holding in the present case. The trial court was required to limit its consideration to "the length of the *marriage*,"

> not the length of the *relationship*, in awarding spousal support. *Magee, supra* at 162, 553 N.W.2d 363 (emphasis added).[64]

Korth is a troubling holding in that it seems to rule that the length of the marriage is the *only* relevant factor. However, the Court of Appeals cited other relevant factors: Husband was quite a bit older than Wife (60 as to 47), was retired, and had a limited ability to pay spousal support. Furthermore, the public policy argument relied upon in *Van* can and should be used to argue that because same-sex couples were precluded from taking advantage of the institution of marriage—so strongly favored by public policy in Michigan—until June 2015, the *Korth* holding cannot apply to same-sex couples.

So what does this mean for same-sex couples that cohabited but did not marry before June 2015? *Korth* aside, our existing marital property and spousal support landscape has plenty of wiggle room for the skilled practitioner willing to make creative arguments and potentially new case law.

B. Alternative Dispute Resolution

Alternative Dispute Resolution is the most predictable and least risky path for all cases, but particularly for same-sex divorcing couples.

Mediation and collaborative law can provide a safe environment for same-sex divorcing couples to reach agreements that are in the best interests of both spouses and their families. The vast majority of couples we see—both as mediators and as advocates—are interested in dividing their "estate" equitably regardless of the law. In the context of mediation, bridges can be built and creative solutions can be reached. Particularly given the biases that unfortunately still exist in some members of the bench and bar, and a proclivity on the part of many to "cookie-cutter" divorce, the practitioner's safest bet is and will always be ADR. Because this area of law is ripe for appellate work on both sides, advocates should work particularly hard to reach bargained-for agreements to provide finality for clients.

Unfortunately, however, many cases end up in litigation. These materials will provide a framework for advocating for clients in "Susie's" shoes.

C. Reclassify "Commingled" Property Wherever Possible

Commingling is your strongest argument. If the commingling argument is available, it should always be made first. If property has been sufficiently commingled, said property loses its "separate" character and becomes part of the marital estate.

Pickering v. Pickering held in part that separate assets may lose their character as separate property and transform into marital property if they are commingled with marital assets and "treated by the parties as marital property."[65] In that case, a personal injury settlement check was deposited into a joint account and the parties used settlement proceeds to pay debts. Based entirely on the way that the parties treated the settlement proceeds (as a joint asset) the trial court's decision that this amounted to commingling was affirmed.

In *Pickering*, husband also argued that $22,000 of his "separate" assets should be returned to him as he used pre-marital money to fund a down payment on the parties' first home built

before the marriage. The mortgage was paid with marital money and improvements to the home were made with marital money. The trial court's determination that the "contribution" lost any separate character was affirmed by the appellate court.

In *Cunningham v. Cunningham*, a worker's compensation check deposited into a joint account and used for the "marital" purpose of purchasing a home.[66] The court concluded that "because defendant commingled those monies with marital funds and with plaintiff's separate funds to purchase the marital home, it lost any separate character it may have had and should have been included in the marital estate."[67]

According to *McNamara v. McNamara*, if the commingling is such that it is "not possible to accurately determine the premarital appreciation of these assets," said assets will be included in the marital estate.[68]

Commingling is the strongest argument for equitably dividing property that was accrued prior to a marriage. If commingling can be proven, then the commingled property is no longer separate and should be divided "equitably" as marital property.

D. Take Another Look at *Byington*: Use the *Sparks* Factors to Argue Congruence Is Not Equitable

1. *Byington*

If reclassifying property is not available, the "marital" estate will, by definition, be smaller. In our hypothetical, if Bonnie is awarded all her "separate" property and Susie is awarded all her "separate" property, Bonnie will be quite comfortable while Susie struggles.

The practitioner should take another look at *Byington*. *Byington* addresses more than the "temporal" nature of the marital estate. *Byington* discusses at length the case *Wilson v. Wilson*, which stands for the proposition that the marital estate can terminate when there is a "public manifestation of intent."[69] In overruling this reasoning, the *Byington* court determined that separation *cannot* equal the termination of the marital estate.

However, *Byington* went on to say that the "court may properly consider *manifestations of intent to lead separate lives* when *apportioning* the marital estate…the goal of the court when apportioning a marital estate is to reach an equitable division in light of all the circumstances."[70]

Therefore, although *Byington* can be cited for the maxim that the marital estate is *only* property that accrues during the marriage, it can also stand for the proposition that a "public manifestation of intent" can be significant to the analysis of the *Sparks* factors. This public manifestation, in fact, can make the "presumption of congruence" attenuated. Anything other than congruence must be explained; but the law certainly does not foreclose varying from congruence. *Byington* made clear that the separation of the parties may be of "crucial significance when apportioning the marital estate,"[71] but it *does not* stand for the proposition that the bonds of marriage end when the parties separated.

> It is with respect to this weighing of the significance of the *Sparks* factors that a public manifestation of intent to lead separate lives has relevance. As a practical matter, we believe that the factor of the "contribution of each party to the marital

> estate" will generally take on increasing significance with regard to property acquired after such a manifestation."[72]

In fact, incongruent (unequal) divisions have been upheld in many Court of Appeals cases. For example, an arbitrator's 75/25 division based on Wife's dissipation was approved in *Washington v. Washington*:

> An equitable distribution need not be an equal distribution, as long as there is an adequate explanation for the chosen distribution. *Id.* at 717, 747 N.W.2d 336, citing *McNamara v. Horner*, 249 Mich.App. 177, 188, 642 N.W.2d 385 (2002), and *Gates v. Gates*, 256 Mich.App. 420, 423, 664 N.W.2d 231 (2003). See also *Ackerman v. Ackerman*, 163 Mich.App. 796, 807, 414 N.W.2d 919 (1987) (A property award "need not be equal, it need only be equitable."). As a result, an unequal division in the range of 70 percent to 30 percent is not contrary to Michigan law as long as it is based on appropriate criteria. *Berger, supra* at 718–722, 747 N.W.2d 336. And, as a corollary to that, *there is no Michigan statute or case that precludes outright a substantial deviation from numerical equality in a property distribution award*.[73]

2. *Sparks* Factors Applied

Pursuant to MCL 552.19, the Court may divide all property that came to either party by reason of the marriage, and increases in assets that accrued during the marriage must be "equitably" divided.[74]

Courts generally look to the factors set forth in *Sparks v. Sparks* when determining how to equitably divide marital property:[75]

1. *Duration of the Marriage*
2. *Contribution of the parties to the marital estate*
3. *Age of the parties*
4. *Health of the parties*
5. *Life status of the parties*
6. *Necessities and circumstances of the parties:*
7. *Earning abilities of the parties*
8. *Past relations and conduct of the parties.*
9. *General principles of equity*.

When dividing the property and analyzing the *Sparks* factors, the Court must make findings on the relevant factors, and not all factors will apply in every case. In fact, of the 9 *Sparks* factors, the *actual length of the marriage* is only relevant to 2 factors: factor # 1) duration of the

marriage, and factor #2) contributions of the parties to the "marital estate." The other 7 factors can, and should, be argued separate and apart from the length of the actual marriage.

The court can find some factors more relevant than others.[76] So, the persuasive advocate will argue that factor #1 and factor #2 should have little relevance.

Creative arguments will focus on the parties' *manifestation of intent* as it relates to the relevant Sparks factors. In particular, *age of the parties, life status of the parties, necessities and circumstances of the parties, earning abilities of the parties and general principles of equity* are all ripe for persuasive arguments that an "incongruous" division of property is appropriate.

In fact, these factors are highly relevant to the long-term relationships, short-term marriage scenario. Same-sex couples, just as married couples, often reside together for years, amassing wealth (and debt) as a unit. Spouses separating after decades and at ages that make re-entry into the workforce an impossibility can argue, under these factors, that "congruence" is not appropriate if the vast majority of the "marital" estate is in one party's name.

Examples of cases that rely on factors other than #1 and #2:

Harris v. Harris[77]**: Age, life status, earning ability, past relations and conduct, and equity.** The court reviewed the trial court's analysis of the Sparks factors, and found that the age of the parties, the earning ability of the parties (in particular, Defendant's ability to earn more money) and equity all supported the property award that required Defendant to pay more of the marital debt than Plaintiff.

Hosted v. Hosted,[78] Court of Appeals affirmed a 57/43 split: **Earning ability of parties and past relations and conduct:** "deviation justified based on plaintiff's inability to produce income and defendant's hiding of assets."

McNamara v. McNamara:[79] 55/45 split is equitable given the "age disparity of the parties their present and future earning potential."

Zimmers v. Zimmers and ***Fansler v. Fansler***[80]**. Necessities and Circumstances** factor can include the consideration that one person has primary custody of the children.

Uygur v. Uygur[81]**: on appeal from Oakland County Circuit Court.** 55/45 split affirmed because defendant made "all the significant financial contributions to the marriage." The facts of this case makes this an outlier, but it is a good demonstration of the deference given to trial courts and that creative arguments about "equity" can win the day.

Demman v. Denman[82]: 74/26 split affirmed: "the division of the marital assets in a divorce proceeding is left to the sound discretion of the trial court." In that case, Husband received a substantial inheritance (only some of which was included in marital estate).

E. Make the *Invasion* Argument

Just as *Byington* is often cited for the holding that the "marital estate" includes all property that accrued during the marriage, *Reeves* is often cited for the proposition that real estate purchased by one party pre-marriage is only marital to the extent of that property's appreciation. [83]*Reeves*, however, also discusses at length that equity in "separate" property can be awarded

to the non-owner party under two statutory exceptions: ***contribution*** (MCL 552.401) and ***need*** (MCL 552.23).

Case law interpreting these two statutes, particularly MCL 552.23, create a wide opening for arguments for invasion.

1. Contribution: MCL 552.401

MCL 552.401 allows for that court to include "provisions awarding to any party property owned by the other party in equity if it appears from the evidence that the party contributed to the acquisition, improvement of accumulation of the property."

This section can be applied *regardless* of the relative assets or needs of the parties. *Charlton v. Charlton*.[84] Therefore, Susie need not prove that she will live in destitution from a traditional 50/50 split of "marital" property if she can prove that she contributed in some way to the property.

Once again, however, the *Korth* opinion is a problem. In *Korth*, the Court of Appeals makes clear that the contribution must occur *during* the marriage:

> "Because plaintiff contributed to the improvement of the property *after the parties were married*, the trial court properly considered the equity in the property after the marriage as part of the marital estate. As explained in *Reeves, supra* at 495, 575 N.W.2d 1, the sharing and maintenance of a marital home gives both spouses an *293 interest in any increase in value during the course of the marriage. This increase in value is part of the marital estate.[85]

Hanaway v. Hanaway[86]: one party's separate property may be rightfully invaded when the non-owner spouse performs household and family services. "That plaintiff's contribution to the asset came in the form of household and family services is irrelevant. The marriage was a partnership….[the business] appreciated because of defendant's efforts, facilitated by plaintiff's activities at home."[87]

Skinner v. Skinner:[88] trial court "gave undue consideration to plaintiff's larger monetary contributions. The court's rationale does not justify its departure from the goal of congruent distribution….it was inequitable to deprive a spouse of a share in the value of the assets on the basis that 'she enjoyed the benefits of her husband's salaries over the years.'"

Martin v. Martin:[89] Trial court awarded a portion of Husband's business to Wife under both the *contribution* and the *need* theory. *Contribution:* Wife was the vice president and secretary of Husband's business and Husband's business used her building license. *Need:* there was a disparity in the parties' income in that Wife interrupted her career to work for the construction company and Husband's earning potential was significantly greater than Wife's.

Jacobsen v. Jacobsen,[90] unpublished opinion of the Michigan Court of Appeals issued on August 17, 1999 (Docket No. 211172): Wife inherited stocks and added husband's name to the stock account. The stocks were treated as a joint asset. Joint decisions made about savings were based on the inheritance. Trial court's decision that Husband contributed toward the "improvement and accumulation of the stocks in the portfolio" was not an abuse of discretion.

Meadows v. Meadows,[91] Docket No. 288893: Wife owned lakefront property before the marriage. Marital estate paid property taxes on the land. Payment of taxes was deemed enough to be "contribution."

Myers v. Myers:[92] Husband's contribution of $74,500 from his inheritance toward the marital home does not justify awarding the equity in that home to him where wife contributed to the "acquisition, improvement and accumulation of the property."

2. Necessity: MCL 552.23

MCL 552.23 allows the court to award separate property to the non-owner spouse if it is "necessary for the support of the party and the children, only if the support is needed and there are insufficient assets to be awarded from the marital estate."

In ***Reeves***, the Court of Appeals found it was error to include Husband's pre-marital property in the marital estate because there was no finding that the Wife contributed to the acquisition or accumulation of the property. The court remanded the case to the trial court for a determination on need. The court stated that because no contribution was established, "the only statutory ground that would allow invasion of defendant's separate estate would be if the court found that the award that would otherwise be given to plaintiff would be insufficient for her suitable support and maintenance."[93]

In *Pickering*, the trial court awarded Wife 100% of Husband's survivorship benefits, even though some of those benefits accrued prior to the marriage.[94] The Court of Appeals affirmed, stating that "the security of the family as a primary concern, a court can use property of either to achieve just and reasonable support after taking into consideration the parties' ability to pay, the character of the situation of the parties, and the circumstances of the case."[95]

Charlton v. Charlton[96]: Wife's inheritance was invaded based on need—the marital property awarded to Husband was "insufficient for suitable support in the manner *to which the family was accustomed*." Section 23 applies regardless of the "source" of the property. The Court of Appeals quoted the trial court's findings: "it is apparent that the Charltons, upon divorce, together had insufficient funds with which to support themselves in the manner to which they were accustomed".[97] The language "to which they were accustomed" once again creates a huge opening for an advocate: this language is extremely subjective and entitles the invading spouse to get to the owner spouse's assets if it will help he/she maintain their lifestyle.

Zimmers v. Zimmers[98]: award of stock gifted to Husband to Wife proper because of Wife's "lack of earning ability and on the conclusion that security for her, and for the home that she was maintaining for herself and her children, rendered it proper and expedient to award to her income-producing property."

Booth v. Booth:[99] pre-marital pension benefits can be touched based on need.

Demman v. Denmam:[100] inheritance may be treated as part of the marital estate if an award otherwise is insufficient to maintain either party. Decision to include inheritance is discretionary.

Vertz v. Vertz[101]: Plaintiff's pension benefits earned before marriage were used to improve marital home. Relied on *Booth* for the proposition that pre-marital pension benefits can be

divided if it is appropriate given the circumstances of the case. The "other circumstances of the case" make it appropriate to invade because the parties have a large disparity in income.

F. Finally, Argue the *Sparks* Factors as Applied to a Spousal Support Award

Once again, ADR and negotiated agreements are generally the best route. Spousal support can be an attractive option for the "payer" (the Bonnies of the world) because the payments are deductible. A generous spousal support agreement for Susie may avoid litigation and leave Susie with what she needs to be financially secure.

MCL 552.23 is the statutory basis for spousal support:

> Upon entry of a judgment of divorce or separate maintenance, if the estate and effects awarded to either party are insufficient for the suitable support and maintenance of either party and any children of the marriage who are committed to the care and custody of either party, the court may also award to either party the part of the real and personal estate of either party and spousal support out of the real and personal estate, to be paid to either party in gross or otherwise as the court considers just and reasonable, after considering the ability of either party to pay and the character and situation of the parties, and all the other circumstances of the case.

The *Sparks* factors also apply to spousal support. In addition to the 9 factors listed above, the Court looks to:

1. ***The source of and amount of property awarded to the parties.*** If the trial court decides to divide only the property accrued during the marriage, this factor should be relied upon when arguing for a significant spousal support award for your client. Pursuant to Hanaway, one party should not be required to dissipate his or her property award to support himself or herself.[102]

2. ***The prior standard of living of the parties and whether either is responsible for the support of others.*** *Demman v. Demman:* spousal support is necessary to ensure that both parties are able to sustain the prior standard of living. [103]

3. ***General principles of equity*** (as applied to spousal support):

The opinion in *Korth* is an obstacle to the fair and equitable division of property and the award of spousal support. However, the impact of the *Korth* opinion can be viewed as narrow and/or limited because: 1) the opinion specifies that the trial court failed to look at the relative circumstances of the parties, and 2) these couples were foreclosed from entering into an institution that public policy so favors.

"Equity" further blows a hole in the *Korth* reasoning. Spousal support is based on what is "just and equitable" under the circumstances. At trial, the practical impact of the potential property and spousal support awards should be outlined for the trial court. Use income projection models to show the court where potential property division awards will leave each party. Use

spreadsheets to demonstrate the "inequity" of a straight 50/50 marital property division and a spousal support award based on a short-term marriage.

IV. Conclusion

Practitioners must be prepared to address complexities in cases involving same-sex clients. Having knowledge of the history of parentage and recent court decisions can open doors that may first appear closed. As substantial rights flow from legal parentage, practitioners must counsel clients on how best to protect parent-child relationships. Remedies are available, but there is still work to be done before the law on same-sex parentage in Michigan is settled. In contrast, the existing case law and statutory landscape offer a litigation roadmap for practitioners navigating same-sex divorces with property and spousal support issues. Practitioners should use ADR whenever possible to avoid the unpredictability of litigation, but make clear to opposing counsel that the law does not foreclose your client from an equitable result.

Exhibit A *Jones v Jones*, No 334937 (June 22, 2017)

Exhibit B *Mabry v Mabry*, No 153082 (June 22, 2016)

Exhibit C *Stankevich v Milliron*, 498 Mich 877 (Sept 11, 2015)

Exhibit D *VL v EL*, 136 S Ct 1017 (Mar 7, 2016)

Exhibit E *Mabry* Order Dismissing Circuit Court Case

Exhibit F *Pavan v Smith*, 137 S Ct 2075 (June 26, 2017)

Exhibit G *Stankevich v Milliron (On Remand)*, 313 Mich App 233, 882 NW2d 194 (Nov 19, 2015)

Footnotes

1 *Obergefell v Hodges*, __ US __; 135 S Ct 2584; 192 L Ed 2d 609 (2015).

2 *Id.*

3 *See* Cynthia Grant Bowman, *Unmarried Couples, Law, and Public Policy*, 93-97 (2010); Nancy F. Scott, *Public Vows*, 202–03 (2000); Grace Ganz Blumberg, *Cohabitation Without Marriage: A Different Perspective*, 28 UCLA L. Rev. 1125 (1981).

4 *See* Michael Grossberg, *Governing the Hearth*, 197 (1985). *See also* Douglas NeJaime, *Marriage Equality and the New Parenthood*, 129 Harv. L. Rev. 1185 (2016).

5 *See* Cynthia Grant Bowman, *Unmarried Couples, Law, and Public Policy*, 93–97 (2010); Nancy F. Scott, *Public Vows*, 202–03 (2000); *See also* Blumberg, *infra*, note 4.

6 *See, e.g., Levy v Louisiana*, 391 US 68, 72; 88 S Ct 1509; (1968); *Glona v. Am. Ins. Co.*, 391 U.S. 73, 75–76 (1968).

7 *Stanley v. Illinois*, 405 U.S. 645, 649, 92 S. Ct. 1208 (1972).

8 The *Stanley* Court stated that "familial bonds" outside the context of marriage are "often as warm, enduring, and important as those arising within a more formally organized family unit." *Id* at 652.

9 Douglas NeJaime, *Marriage Equality and the New Parenthood*, 129 Harv. L. Rev. 1185, 1196 (2016).

10 Unif. Parentage Act §4(a)(4); MCL 700.2114; MCL 333.2824.

11 Michigan is one non-UPA state that adopted such a policy in MCL 333.2824. Nineteen states have adopted the APA, according to the Uniform Law Commission. *Why states should adopt UPA*, Uniform Law Commission, Available at: http://www.uniformlaws.org/.

12 NeJaime, *supra*, note 9 at 1196.

13 *Adopting a Child in Michigan*. Michigan Department of Health and Human Services, 1 (2013) Available at: https://www.michigan.gov/docu...

14 MCL 710.51 was amended by Public Act 143 of 2016, clarifying that a proposed stepparent's spouse does not need to obtain sole legal custody prior to petitioning for a stepparent adoption.

15 MCL §552.29, R.S. 1846, Ch. 84.

16 *Family Independence Agency v. Jefferson* (In re K.H.), 469 Mich. 621, 635, 677 N.W.2d 800, 806 (2004).

17 *Id.*

18 MCL §333.2824.

19 E.g. "Without the recognition, stability, and predictability marriage offers, their children suffer the stigma of knowing their families are somehow lesser." *Obergefell*, infra, note 1 at 2590.

20 *State Now Recognizing Married Same-Sex Parents on Birth Certificates*, Between the Lines (July 2015). Available at: http://www.pridesource.com/ar...

21 *Id.* However, parents must often request a corrected birth certificate to receive the gender-neutral designations.

22 Depending on an individual's medical history, a Female-to-Male transgender individual could give birth within a same-sex marriage. His male spouse would be entitled to the presumption.

23 *Pavan v. Smith*, __ US __; 137 S Ct 2075; 198 L Ed 2d 636 (2017); *Henderson v Adams*, 209 F Supp 3d 1059 (SD Ind. 2016) (finding that Indiana's "refusal to apply the same presumption of parenthood to the non-birth mother same-sex spouse as would apply to the husband of a birth mother who conceives by artificial insemination violates the Equal Protection Clause of the Fourteenth Amendment") (pending appeal in 7th Cir.).

24 *Pavan*, supra, note 24.

25 *Id* at 2079.

26 *Henderson*, supra, note 24.

27 MCL §333.2824.

28 Though the Court of Appeals determined that RPA governs when ART is used, the statute explicitly excludes situations involving surrogacy or adoption. MCL §722.1443(9).

29 *Jones v Jones*, __ NW2d __; 2017 Mich. App. LEXIS 1032, at *4 (Ct App, June 22, 2017) (finding that a husband's paternity could be revoked under the RPA where the wife conceived via IVF without the husband's consent, and there was no bond between the father and child).

30 *Id* at 9.

31 *Id.*

32 RPA removed the common-law remedy for revoking paternity. If RPA encompasses situations involving ART where genetics are irrelevant, *Jones v Jones* implies that parentage (not just paternity) can be revoked or established under this Act.

33 *See Jones*, infra, note 30 at 5 (citing MCL §700.2114 when determining that application of RPA to parents who receive the presumption due to ART is consistent with both state birth certificate policy as well as Michigan intestacy law).

34 *Travelers Ins Co v Young*, 580 F Supp 421 (ED Mich 1984). *See also Wright v. Wright*, 99 Mich 170 (1984) (use of equitable adoption where an adoption failed due to an unconstitutional statute).

35 *Stankevich v Milliron*, 313 Mich App 233; 882 NW2d 194 (2015).

36 *Atkinson v Atkinson*, 160 Mich App 601, 611; 408 NW2d 516 (1987).

37 *Atkinson v Atkinson*, 160 Mich App 601; 408 N.W.2d 516 (1987); *Mabry v Mabry*, 499 Mich 997, 998; 882 NW2d 539 (2016) (dissenting opinion citing factors established in *Atkinson*).

38 *Soumis v Soumis*, 218 Mich App 27; 553 NW2d 619 (1996).

39 *York v. Morofsky*, 225 Mich App 333; 571 NW2d 524 (1997).

40 *Van v. Zahorik*, 460 Mich 320, 597 NW2d 15 (1999).

41 *Stankevich v Milliron*, 313 Mich App 233; 882 NW2d 194 (2015).

42 *Van v. Zahorik*, 460 Mich. 320; 597 N.W.2d 15 (1999), *Killingbeck v Killingbeck*, 269 Mich App 132; 711 NW2d 759 (2005).

43 *Van* at 331, 21.

44 MCL 712.24(2)(b) generally requires parties to be married to jointly adopt a minor child. Courts have only only rarely performed second-parent adoptions for parties in Michigan due to the absence of statutory guidance.

45 *Lake v Putnam*, 316 Mich App 247; 894 NW2d 62 (2016) (unpublished).

46 *Id.*

47 *Mabry v. Mabry*, 499 Mich 997 (2016)(unpublished).

48 *Id.*

49 Same-sex Couple and LGBT Demographic Data Interactive (May 2016). Los Angeles, CA: The Williams Institute, UCLA School of Law. Available at: http://williams.law.ucla.edu/demographics/michigan/ss-couples- summary-june-2014-3.

50 *Bowie v. Arder* (Duong v. Hong) 441 Mich. 23, 43–47, 490 NW2d 568 (1992).

51 Equitable adoptions provide intestacy rights where an adoption has failed due to a failure of a proposed adoptive parent to meet statutory requirements (precisely the case where only one spouse can adopt a child due to the marriage ban). Equitable parentage was derived from equitable adoption so that "a person recognized as a natural parent in death [could] have the same recognition in life." *See infra, note* 37. *See also Wright v. Wright*, 99 Mich. 170 (1984) (use of equitable adoption where an adoption failed due to an unconstitutional statute). A spouse can avail herself of the equitable parent doctrine where the law prohibited her from completing the adoption.

52 MCL §722.1443(3)(c) and (e) define an "alleged father" and "presumed father" to be "a man". However, since RPA terminated use of common law *Sarafin* hearings to rebut the presumption and being a presumed father is a benefit of marriage, a non-biological spouse could have standing under the Act to revoke her parentage. Similarly, a known donor could attempt to meet the requirements of an "alleged father" and request that the presumed parent's rights be revoked so that he can pursue paternity. *See* MCL §722.1441. The presumption, however, remains extremely difficult to rebut. E.g. To bring a successful RPA claim against a married lesbian couple, an alleged father would have to show by clear and convincing evidence that he was not aware the child's mother was married at the time of conception, or that she was not married at the time of conception. *See* MCL §722.1441(3).

53 *In re Adoption of D.P.P.*, No. 5D13-1766, WL 2109130 (Fla. Dist. Ct. App. May 21, 2014); *In re Chrisitan J.W.* 803 N.W.2d 869, 337 Wis.2d 91 (Wis. Ct. App. 2011) (unpublished); *In re adoption of T.A.M. and E.J.M.*, 791 NW.2d 573 (Minn. App. 2010); *S.J.L.S. v. T.L.S.*, 265 S.W.3d 804 (Ct. App. Ky. 2008); *Mariga v. Flint*, 822 N.E.2d 620 (Ind. Ct. App. 2005); *Goodson v. Castellanos*, 214 S.W.3d 741 (Tex. App. 2007), reh'g overruled (Mar. 01, 2007), rev. denied (Feb 22, 2008).

54 *See Giancaspro v. Congleton*, 2013 Mich App LEXIS 1701 (Unpublished) (holding that a trial court's decision to uphold second-parent adoption from Illinois was valid, despite Michigan's ban on recognition of same-sex relationships).

55 *V.L. v. E.L.*, 577 U.S. __; 136 S. Ct. 1017, 1019 (2016).

56 *Legal Recognition of LGBT Families*, National Center For Lesbian Rights, 2 (2016). Available at: www.nclrights.org/.

57 A party may also have a parentage order from another state, or based on third-party standing from another state. *See infra*.

58 MCL §722.22(i).

59 MCL §333.2824.

60 MCL §700.2114.

61 224 Mich. App. 103; 568 NW2d 141 (1997).

62 *Reeves v. Reeves*, 224 Mich. App. 490, 575 N.W.2d 1 (1997).

63 256 Mich. App. 286; 662 NW2d 111 (2003).

64 *Id.* at 289, 114.

65 268 Mich. App. 1; 706 N.W.2d 835 (2005).

66 289 Mich. App. 195; 795 N.W.2d (2010).

67 *Id.* at 195.

68 249 Mich. App. 177, 642 NW2d 385 (2002).

69 179 Mich. App. 519, 524; 446 N.W.2d 496, 499 (1989).

70 *Byington*, 224 Mich. App. at 112, 568 N.W. 2d at 145, citing *Ackerman v. Ackerman*, 163 Mich. App. 796, 807 (emphasis added).

71 *Id.* at 145, 122.

72 *Id.*

73 *Washington v Washington*, 283 Mich App 667, 673; 770 NW2d 908, 913 (2009)(emphasis added).

74 *Bone v. Bone*, 148 Mich. App. 834, 838; 385 N.W. 2d 706, 708(1986).

75 440 Mich. App. 141; 485 N.W. 2d (1992).

76 *Berger v. Berger*, 277 Mich. App. 700, 717; 747 N.W.2d 336, 349 (2008).

77 Docket No. 310215, 2012 WL 6604672 (Mich. App. December 18, 2012).

78 Docket No. 299116, 2012 WL 6376027 (Mich. App. December 20, 2012).

79 249 Mich. App. 177, 642 N.W.2d 385.

80 346 Mich 28, 77 NW2d 267 (1956), 344 Mich. 569, 75 NW 2d 1 (1956).

81 Docket No. 258207, 2006 WL 1568845 (unpublished, Mich. App. June 8, 2006).

82 195 Mich. App. 109, 489 N.W.2d 161 (1992).

83 *Reeves*, 226 Mich. App. at 497; 575 N.W.2d at 4.

84 397 Mich. 84; 243 N.W.2d 261 (1976).

85 256 Mich App 286, 292–93; 662 NW2d 111, 115 (2003).

86 208 Mich. App. 278, 527 N.W.2d 792 (1995).

87 *Id.* at 294, 800.

88 Docket No. 216404, 2000 WL 33391089 (unpublished, Mich.App. December 15, 2000).

89 Docket No. 237595, 2006 WL 21419271 (unpublished, Mich.App. June 19, 2003).

90 Docket No. 211172, 1999 WL 33437816 (unpublished, Mich. App. August 17, 1999).

91 Docket No. 288893, 2010 WL 1687666 (unpublished, Mich. App. April 27, 2010).

92 Docket No. 197045, 1998 WL 1990488 (unpublished, Mich. App. July 24, 1998)

93 *Reeves*, 226 Mich. App. at 498, 575 N.W. 2d at 4.

94 *Pickering*, 268 Mich. App. 1, 706 N.W.2d 835.

95 *Id.* at 6, 840.

96 397 Mich. 84; 243 N.W.2d 261 (1976).

97 *Id.* at 266, 94 (emphasis added).

98 346 Mich. 28, 77 N.W. 2d 267 (1956).

99 194 Mich. App. 284, 486 N.W. 2d 116 (1992).

100 *Demman*, 195 Mich. App. 109, 489 N.W. 2d (1992).

101 Docket No. 294406, 2011 WL 2555372 (Mich. App. June 28, 2011).

102 208 Mich. App. 278, 527 N.W.2d 792 (1995).

103 *Demman*, 195 Mich. App. 109, 489 N.W. 2d (1992).

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Note

Same-Sex Marriage and Disestablishing Parentage: Reconceptualizing Legal Parenthood Through Surrogacy

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Recently married, Anne and Andrew decide they want to have their first child. After multiple failed attempts, the couple learns that Andrew has a low sperm count, rendering him functionally infertile. Desiring a child that is genetically related to at least one of them, Anne and Andrew pursue alternative biological reproduction in lieu of adoption. They obtain sperm from an anonymous donor and Anne undergoes artificial insemination, resulting in a viable pregnancy. Shortly before the child's birth, however, the couple files for divorce. At this time, Andrew maintains that he is not the child's genetic father and, consequently, should not be responsible for the child upon the dissolution of the marriage. To the contrary, Anne indicates that notwithstanding biology, Andrew is equally the child's legal parent. Can Andrew successfully disestablish his parenthood?

Now, entertain instead an alternative iteration of the above factual scenario: Anne and Andrew are *Bill* and Andrew. Bill and Andrew, a married couple, decide to have a child. Because the couple is structurally infertile, they obtain an egg from an anonymous donor. The couple uses Bill's sperm to create a viable embryo and subsequently implants the embryo into the womb of a third-party gestational carrier. Shortly before the child's birth, however, the couple files for divorce. Can An-

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drew, being genetically unrelated to the child, disestablish his legal fatherhood? Does the answer differ because Bill and Andrew are not Anne and Andrew? What if they were Anne and Barbara instead?

Parenthood is quite easily determined when a married couple conceives a child through sexual reproduction. "The biological mother and father are the child's legal parents, and marriage unites them in an enterprise of lifelong duration."[1] However, family law has undergone dramatic changes in recent decades,[2] and the deviation from this historic unification of sex, reproduction, and marriage yields inherent uncertainty underlying the above scenarios. Today, the definition of parentage, and in turn "the determination of which adults receive legal recognition in children's lives," represents one of modern family law's most contentious issues: "Not only are jurisdictions irreconcilably divided in their approach to parentage, decisions under settled law in a given county may not necessarily come out the same way."[3]

Same-sex couples are uniquely situated in this family law transformation—not only through the advent of same-sex marriage, but also because they cannot procreate through sexual intercourse. Unprecedented advances in technology have increased the frequency of conception through assisted reproductive techniques[4]—and more specifically, surrogacy: when a woman carries and births a child for its intended parents.[5] In turn, surrogacy has increased the complexity of determining parenthood, and parentage laws have not kept pace with this technology.[6] Much akin to the fractured same-sex marriage

1. June Carbone & Naomi Cahn, *Which Ties Bind? Redefining the Parent-Child Relationship in an Age of Genetic Certainty*, 11 WM. & MARY BILL RTS. J. 1011, 1017 (2003) [hereinafter *Which Ties Bind?*].

2. *See infra* Part I.A.2. *See generally* Theresa Glennon, *Somebody's Child: Evaluating the Erosion of the Marital Presumption of Paternity*, 102 W. VA. L. REV. 547, 548–50 (2000) (discussing the rise in children born to unmarried mothers, the dissolution of marriages with children, and the weakening of the martial presumption of paternity).

3. June Carbone, *The Legal Definition of Parenthood: Uncertainty at the Core of Family Identity*, 65 LA. L. REV. 1295, 1295 (2005).

4. *E.g.*, Anne R. Dana, Note, *The State of Surrogacy Laws: Determining Legal Parentage for Gay Fathers*, 18 DUKE J. GENDER L. & POL'Y 353, 353–54 (2011).

5. A surrogate may or may not have a genetic relation to the child she carried based on the type of surrogacy undertaken: traditional or gestational. "What sets gestational surrogacy apart from traditional surrogacy is that the woman who bears the child is not genetically related to the child." *Id.* at 362.

6. *See id.*

landscape prior to *Obergefell v. Hodges*,[7] "[n]o uniformity exists among states concerning the legal relationships established through collaborative reproduction."[8] This uncertainty stems from the dissociation of sex and reproduction, which represents a paradigmatic shift in society's understanding of parentage. Same-sex assisted reproduction erodes the traditional mother-father framework, as well as mother-father duality, by requiring a third individual—not party to the marriage—to play an integral *biological* role in conception (albeit oftentimes with no intent to play a *functional* role as a parent). With more children conceived through alternative reproductive means and born into same-sex marriages, determining parentage proves "increasingly problematic and ripe for growing caseloads."[9]

Moreover, same-sex marriage yields same-sex divorce, a concept and practice still evolving in the United States.[10] Traditional parentage frameworks were largely contested when divorce rates spiked amongst the heterosexual population during the latter-twentieth century. Previously, husbands would not have inquired into their paternity at divorce, as no confirmatory means then existed. Because the upsurge in divorce occurred at the same time as the advent of near-certain paternity testing, however, an unprecedented wave of presumed fathers—who thought (and held out) a child born during the marriage to be their own—sought to disestablish their parenthood by proving non-biological paternity at divorce.[11] Thus, while advocates and academics stress the importance of clear legal frameworks

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7. The Supreme Court decided the landmark marriage equality decision, *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015), during this Note's publication. Nonetheless, jurisdictional discord persists around collaborative reproduction and legal parentage.

8. June Carbone & Naomi Cahn, *The Past, Present and Future of the Marital Presumption*, *in* THE INTERNATIONAL SURVEY OF FAMILY LAW 387, 394 (Bill Atkin & Fareda Banda eds., 2013) [hereinafter *The Past, Present and Future*].

9. Dana, *supra* note 4, at 357.

10. *See generally* Courtney G. Joslin, *Modernizing Divorce Jurisdiction: Same-Sex Couples and Minimum Contacts*, 91 B.U. L. REV. 1669, 1679 (2011) (outlining the challenge same-sex couples faced in meeting jurisdictional-based divorce residency requirements); Joseph William Singer, *Same Sex Marriage, Full Faith and Credit, and the Evasion of Obligation*, 1 STAN. J. C.R. & C.L. 1, 13–14 (2005) (identifying the geographic limitations of same-sex divorce pre-*Obergefell*).

11. *See infra* Part I.A.2; *see, e.g.*, Jana Singer, *Marriage, Biology, and Paternity: The Case for Revitalizing the Marital Presumption*, 65 MD. L. REV. 246, 261 (2006).

to establish same-sex parentage,[12] its discussion within the context of a same-sex partner's attempt to disestablish parenthood proves equally pressing. As all states begin to recognize same-sex marriages, a subset of these marriages will not only inevitably result in same-sex divorce, but also the birth of children that will only be biologically related to, at most, one of their parents.[13]

This Note explores the currently indeterminate legal status of intended same-sex parents who are party to a surrogacy arrangement, with express concern regarding same-sex marriages that dissolve while a child is still in the womb. Same-sex couples, like infertile heterosexual couples, are different from fertile heterosexual couples in that they must intend a pregnancy for it to occur. Same-sex couples must therefore arrange for the conception of a child with the involvement of a third-party sperm donor, egg donor, and/or surrogate. This need for third-party involvement offers the opportunity to establish intended parentage in writing, and same-sex couples can also arrange for the severance of the parental status of third-party participants. State law ultimately determines the timing of such severance, with some doing so at the time of conception and others after a child's birth. It is possible, however, that a same-sex couple could arrange for the severance of the parental status of other parties, yet be unable to establish the parental status of the intended same-sex parents—namely, the non-biological partner—until after birth. In the period between the severance of the third party's parental status and the establishment of the intended parents' parental status, the marital relationship could end. At this time, the non-biological partner could attempt to disestablish any and all responsibility for the child, leaving the child with the support of only one of its intended parents at birth.

While the discussion focuses namely on the LGBT[14] community, this Note acknowledges that the same uncertainties and resultant concerns can potentially arise with heterosexual

12. *See* Dana, *supra* note 4, at 373.

13. *Cf.* Tiffany L. Palmer, *The Winding Road to the Two-Dad Family: Issues Arising in Interstate Surrogacy for Gay Couples*, 8 RUTGERS J.L. & PUB. POL'Y 895, 916 (2011) ("There have been few reported cases of custody disputes between gay male partners who have co-parented a child through surrogacy, as compared with cases involving lesbian couples [so] embroiled . . . .").

14. LGBT is an initialism referring to lesbian, gay, bisexual, and transgender.

marriages that dissolve mid-surrogacy arrangement.[15] Though states can deal with this scenario in a variety of ways, almost all states have used estoppel or intent to lock in an intended parent who participated in bringing about the conception of a child.[16] Same-sex couples, however, are uniquely situated within this family law quandary given the implicit heterosexism—the implicit social, legislative, and judicial preference for children having both a mother and a father[17]—that pervades social structures in the United States.[18] Accordingly, this Note's proposed solutions are drafted to enhance legal certainty for same-sex couples procreating through surrogacy, but are also designed to uniformly apply to the heterosexual population.

Meaningful examination of this issue first requires an understanding of the basis for modern social perceptions of parenthood and their deficiencies as broadly applied to same-sex couples choosing to procreate through alternative reproductive means. Part I examines the evolution of legal parenthood, the transformation of the American family unit, and the frameworks now employed in heterosexual contested parentage cases. Next, Part II posits that laterally applying current parentage frameworks to procreative same-sex parents unduly allows a non-biological intended parent to disestablish future parenthood. In response, Part III proposes model surrogacy statutes, influenced by intent-based and labor-based parentage theories, which will better define the legal roles and responsibilities—both pre-conception and pre-birth—of intended parents and surrogates alike.

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15. *E.g.*, *In re* Marriage of Buzzanca, 72 Cal. Rptr. 2d 280 (Ct. App. 1998) (involving the legal parentage determination of a child conceived with donor egg and donor sperm and carried by a gestational surrogate whose intended parents' heterosexual marriage ended mid-pregnancy).

16. *See* Interview with June Carbone, Robina Chair in Law, Sci., & Tech., Univ. of Minn. Law Sch., in Minneapolis, Minn. (Mar. 6, 2015).

17. *Compare In re* Baby M, 537 A.2d 1227 (N.J. 1988) ("There is nothing in our culture or society that even begins to suggest a fundamental right on the part of the father to the custody of the child as part of his right to procreate when opposed by the claim of the [natural] mother to the same child."), *with* A.G.R. v. D.R.H., No. FD-09-001838-07 (N.J. Super. Ct. Ch. Div. Dec. 23, 2009) (granting parental rights to a same-sex couple's gestational carrier who had no genetic link to the children).

18. For a succinct overview of heterosexism and gender bias, see Dana, *supra* note 4, at 373–74.

I. WHAT IT MEANS TO BE A PARENT: THEN AND NOW

Discussion of disestablishing same-sex parentage is inextricably linked to the foundational underpinnings of establishing traditional parentage, still deeply rooted in American society and law. To further illustrate the uncertainty around disestablishing same-sex parentage, this Part traces the evolution of family law and parentage. Section A describes the development of the marital presumption and its subsequent weakening alongside the decline of the traditional family unit. Section B then explains the current jurisdictional split as to the presumption's application given new societal perceptions and values around the meaning of "parentage." Lastly, Section C introduces the evolution of same-sex marriage, reproduction, and parenthood.

A. DEFINING PARENTHOOD IN THE CONTEMPORARY UNITED STATES

In the United States today, no express legal construct imposes a lifetime of ostracism and economic hardship on children born out of wedlock. Even so, modern conceptions of parentage display vestiges of early common law when such illegitimacy resulted in severe social stigma. Cognizing contemporary notions of parenthood necessitates understanding not only its common law roots, but its swift evolution during the latter-twentieth century.

1. The Evolution of the Marital Presumption and the American Family Unit

Influenced by Ancient Roman law, early English common law deemed a child born outside of marriage *filius nullius*: literally, no one's son.[19] Such a framework yielded dire consequences to bastard children. As the "son of nobody," bastardy subjected a child to discrimination "in all realms of life," and nullified the right to parental support—in turn severing the line of succession.[20] Hence developed "one of the most firmly-

19. Glennon, *supra* note 2, at 553.

20. *Id.* at 563; *see also* Mikaela Shotwell, Note, *Won't Somebody Please Think of the Children?!: Why Iowa Must Extend the Marital Presumption to Children Born to Married, Same-Sex Couples*, 15 J. GENDER RACE & JUST. 141, 143–44 (2012) (addressing the martial presumption as it applies to same-sex couples and their children under Iowa law).

established and persuasive precepts known in law": the marital presumption of parenthood.[21]

Under English common law, the marital presumption served a twofold function. When a child was born into a marriage, the woman, having given birth as a function of biology, was presumed the child's mother; likewise, the woman's husband, by virtue of marriage to the mother, was presumed the child's father.[22] This effectively framed parenthood biologically, but during an era wherein genetic certainty lay only with the mother (as no method existed to confirm a father's genetic relation to a child).[23] Nonetheless, a child's legitimacy filled "society's need for stability and certainty in family relationships."[24] The marital presumption thus restricted evidence "that might disprove a husband's [biological] paternity . . . [and] call into question the child's identity and inheritance," thereby limiting any post-birth inquiry around illegitimacy and rendering the presumption of parenthood virtually irrebuttable.[25]

The marital presumption of parentage framework later crossed the Atlantic and was absorbed into early American law.[26] This absorption effectively imbedded the marital presumption within the United States' sociocultural landscape, bolstering the cultural unification of sex, reproduction, and

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21. Rhonda Wasserman, *DOMA and the Happy Family: A Lesson in Irony*, 41 CAL. W. INT'L L.J. 275, 280 (2010).

22. *Id.* at 279.

23. *See* Glennon, *supra* note 2, at 555.

24. *Id.* at 563.

25. *Which Ties Bind?*, *supra* note 1, at 1019, 1050. *But see id.* at 1018 (noting the presumption was not *absolute*, but administered so as to avoid introducing facts at odds with irrefutability); *cf.* Glennon, *supra* note 2, at 562–63 ("The mother and presumed father could only rebut that presumption by proving that the husband did not have access to his wife during the crucial period of conception."). The presumption went beyond establishing and ensuring legitimacy, however: the doctrine also implicitly reinforced a sociocultural stigma attached to nonmarital sexual relations and childrearing. *See Which Ties Bind?*, *supra* note 1, at 1018. In buttressing marriage's societal function, the marital presumption created a system rooted in the number two, "channel[ing] childrearing into two parent families and keep[ing] it there." *The Past, Present and Future*, *supra* note 8, at 387. Indeed, most states still refuse to recognize more than two legal parents for a child. *See, e.g.*, Ann E. Kinsey, Comment, *A Modern King Solomon's Dilemma: Why State Legislatures Should Give Courts the Discretion To Find that a Child Has More than Two Legal Parents*, 51 SAN DIEGO L. REV. 295, 297–98 (2014).

26. And its vestiges still run deep in American family law. *See, e.g.*, Lehr v. Robertson, 463 U.S. 248, 257 (1983) ("[S]tate laws [still] almost universally express an appropriate preference for the formal family.").

childrearing.[27] Marrying "until death do us part" and establishing a traditional household comprised of a husband, wife, and children became reinforced as an expected (and perhaps unquestioned) trajectory for the majority of Americans.[28] Indeed, this strong presumption applied in strict form in the United States through the mid-twentieth century.[29]

Beginning in the 1960s, however, the United States experienced revolutionary social change. The confluence of second-wave feminism, sexual liberation, and the availability of birth control yielded an unprecedented transformation of sex, marriage, and parenthood.[30] With sex severed from marriage, more births occurred out of wedlock, unraveling the strong tether between marriage and parenthood.[31] And as jurisdictions increasingly recognized no-fault divorce, marriages dissolved at a staggering rate.[32]

Thus, the prototypical traditional family unit, albeit expected in theory, proves exceptional in fact.[33] Whereas 72% of American adults were married in 1960, this figure decreased to 52% in 2008.[34] Likewise, down from 40% in 1970, only 20% of

27. *See Which Ties Bind?*, *supra* note 1, at 1020.

28. *See generally* Brigid Schulte, *Unlike in the 1950s, There Is No "Typical" U.S. Family Today*, WASH. POST (Sept. 4, 2014), http://www.washingtonpost.com/news/local/wp/2014/09/04/for-the-first-time-since-the-1950s-there-is-no-typical-u-s-family (recognizing the predominance of the traditional breadwinner-homemaker families in the 1950s).

29. *See* Glennon, *supra* note 2, at 553–54.

30. *See* JANE F. GERHARD, DESIRING REVOLUTION: SECOND-WAVE FEMINISM AND THE REWRITING OF AMERICAN SEXUAL THOUGHT, 1920 TO 1982, at 1–50 (2001).

31. Between 1960 and 2008, the share of children born to unmarried mothers rose eightfold, from 5% to 41%. *The Decline of Marriage and Rise of New Families*, PEW RES. CTR. (Nov. 18, 2010), http://www.pewsocialtrends.org/2010/11/18/the-decline-of-marriage-and-rise-of-new-families/2.

32. During the same period, the share of American adults currently divorced or separated increased from 5% to 14%. *Id.*

33. *See* Deborah H. Wald, *The Parentage Puzzle: The Interplay Between Genetics, Procreative Intent, and Parental Conduct in Determining Legal Parentage*, 15 AM. U. J. GENDER SOC. POL'Y & L. 379, 381 (2007) (noting that the "model 'traditional' family" is neither the norm nor the majority); *cf.* David D. Meyer, *Parenthood in a Time of Transition: Tensions Between Legal, Biological, and Social Conceptions of Parenthood*, 54 AM. J. COMP. L. 125, 132 (2006) (describing today's American domestic unit as a "crazy quilt of one-parent households, blended families, singles, unmarried partnerships, and same-sex unions" (internal quotations omitted)).

34. *The Decline of Marriage and Rise of New Families*, *supra* note 31.

American households today are comprised of married couples living with their own children.[35]

2. Rebutting the Once-Irrebuttable Presumption: A Rise in Contested Parentage at Divorce

Although illegitimacy once resulted in a life of social stigma and economic deprivation, the Supreme Court has recognized the "unfairness of punishing children for the circumstances of their conception."[36] Though this benefits children born out of wedlock, this notion places children born into a dissolved marriage in a precarious position. With the social disadvantages of illegitimacy lessened, the strength of the marital presumption—designed to insulate society from the harms of bastardy—also has diminished in turn.[37]

Given higher rates of divorce, both law and society increasingly view former marital partners as "independent persons who owe each other nothing after divorce."[38] Similarly, based on the notion that "a parent owes a duty of support only to his or her natural or legally adopted child," a number of state courts hold that "men who are presumed to be fathers through marriage may challenge their paternity at the time of divorce."[39] The net effect of a weaker presumption of parenthood, staggering divorce rates, and the advent of reliable paternity testing is a wave of presumed fathers—upon discovering they are not genetically related to at least one of their children—seeking to rebut the marital presumption and *disestablish* their paternity.[40]

The success of rebuttal varies with any given court's view of the marital presumption's underlying purpose. Challenges to the marital presumption are complex, resulting in a "doctrinal

35. JONATHAN VESPA ET AL., U.S. CENSUS BUREAU, AMERICA'S FAMILIES AND LIVING ARRANGEMENTS 5 (2013), http://www.census.gov/prod/2013pubs/p20-570.pdf.

36. Susan Frelich Appleton, *Presuming Women: Revisiting the Presumption of Legitimacy in the Same-Sex Couples Era*, 86 B.U. L. REV. 227, 243–44 (2006).

37. *See* Singer, *supra* note 11, at 255.

38. Glennon, *supra* note 2, at 560.

39. *Id.* at 578.

40. *See, e.g.*, NPA v. WBA, 380 S.E.2d 178 (Va. Ct. App. 1989). *See generally* Tamar Lewin, *In Genetic Testing for Paternity, Law Often Lags Behind Science*, N.Y. TIMES (Mar. 11, 2001), http://www.nytimes.com/2001/03/11/us/in-genetic-testing-for-paternity-law-often-lags-behind-science.html ("[T]he unseemly thing . . . is forcing a man . . . to assume financial responsibility for children . . . another man should be supporting.").

chaos" of "dramatically different substantive and procedural law applied . . . in different states."[41] For example, some jurisdictions view the presumption as a marital safeguard, and in the event of divorce, there no longer exists a "salvageable marriage to preserve."[42] Such courts permit divorce to end the marital presumption, allowing a father to overcome his presumed parenthood by confirming non-paternity through genetic testing. In contrast, other courts "are [not] as openly dismissive of the marital presumption," instead viewing the presumption as protecting reasonable expectations.[43] In such jurisdictions, equitable doctrines such as estoppel, laches, and the best interests of the child, are applied to prevent blanket disestablishment of parentage, viz. rendering once-legitimate children illegitimate en masse.[44]

In short, whereas the marital presumption once proved nearly ironclad,[45] "the destruction of the system that tied children to two married parents," coupled with sophisticated genetic testing, effectively turned the presumption on its face.[46] Consequently, a new understanding of legal parentage has evolved alongside this starkly changing family landscape.

B. FUNCTION, BIOLOGY, OR MARRIAGE? JURISDICTIONAL DISCORD OVER REBUTTING THE PRESUMPTION

Marriage is an institution in decline. Compared with earlier eras in which the majority of marriages did not end in divorce and scientific knowledge did not enable near-certain ge-

41. Glennon, *supra* note 2, at 566.

42. *See* Wasserman, *supra* note 21, at 282–83. *See generally* T.P.D. v. A.C.D., 981 P.2d 116 (Alaska 1999); Walter v. Gunter, 788 A.2d 609 (Md. 2002); Williams v. Williams, 843 So. 2d 720 (Miss. 2003) (en banc); Doran v. Doran, 820 A.2d 1279 (Pa. Super. Ct. 2003).

43. Singer, *supra* note 11, at 257.

44. *See* Glennon, *supra* note 2, at 566; *see also* Wasserman, *supra* note 21, at 283 (discussing courts' best interest determinations). *See generally* Pedregon v. Pedregon, 132 Cal. Rptr. 2d 861 (Ct. App. 2003); Ferguson v. Winston, 996 P.2d 841 (Kan. Ct. App. 2000); S.R.D. v. T.L.B., 174 S.W.3d 502 (Ky. Ct. App. 2005); J.C. v. J.S., 826 A.2d 1 (Pa. Super Ct. 2003). Indeed, the Uniform Parentage Act imposes an equitable bar such that no individual can challenge a presumed father's paternity more than two years after the child's birth. UNIF. PARENTAGE ACT § 607 (UNIF. LAW COMM'N 2002). *But cf.* Glennon, *supra* note 2, at 570–71 ("Given the dramatic differences in judicial interpretations . . . this provision is unlikely to create uniformity in . . . challenges to the paternity of presumed fathers.").

45. *See* Singer, *supra* note 11, at 248.

46. *Which Ties Bind?*, *supra* note 1, at 1021–22 (noting this "historically unprecedented issue").

netic testing, marriage today proves a less-secure standard for measuring parentage.[47] The Supreme Court nonetheless upheld the presumption's constitutionality in the 1989 landmark plurality decision *Michael H. v. Gerald D.*[48] The extraordinary facts involved a child, Victoria, born into the marriage of Carole D. and Gerald D.[49] Unbeknownst to Gerald, who was listed on the birth certificate, Victoria was the biological daughter of Michael H., the family's neighbor.[50] Shortly after Victoria's birth, Carole informed Michael of his possible paternity.[51] Within five months, Carole and Gerald separated, and Carole allowed Michael to establish a relationship with his daughter.[52] But when Carole reconciled with Gerald, she severed the relationship between Michael and Victoria, and Michael sought to establish paternity and visitation rights.[53] The Supreme Court ultimately affirmed California's ruling: Gerald's presumed paternity, stemming from his marriage to Carole at the time of Victoria's birth, barred conferring any parental rights to Michael, notwithstanding his biological connection to and relationship with Victoria.[54]

This outcome is significant in that the Court refused to hold the marital presumption unconstitutional in order to protect and preserve the "integrity of the marital union."[55] But more importantly, in upholding the constitutionality of the presumption, the Court did not *require* the marital presumption's use.[56] Because *Michael H.* has not been overturned or successfully challenged, states are granted "wide latitude in constructing children's relationships to their parents."[57]

"All states continue to recognise [sic] least a *rebuttable* presumption that a child born within marriage is the child of the husband . . . ."[58] But when parentage is contested, viz. a pre-

47. *Cf.* June Carbone, *Out of the Channel and into the Swamp: How Family Law Fails in a New Era of Class Division*, 39 HOFSTRA L. REV. 859, 881 (2011) [hereinafter *Out of the Channel*] (discussing the competing objectives of privileging marriage, biological paternity, and functional parenthood).

48. 491 U.S. 110 (1989) (plurality opinion).

49. *Id.* at 113.

50. *Id.* at 113–14.

51. *Id.* at 114.

52. *Id.*

53. *Id.* at 115.

54. *Id.* at 131.

55. *Id.*

56. *Id.* at 129–30.

57. *Which Ties Bind?*, *supra* note 1, at 1050.

58. *The Past, Present and Future*, *supra* note 8, at 390 (emphasis added).

sumed parent seeks disestablishment, many states have reshaped parentage laws to advance certain objectives in the modern family unit.[59] In turn, marriage—though a valid benchmark when presuming legal parentage—does not serve as the exclusive factor for *disestablishing* parentage. Disestablishment frameworks instead have evolved disparately amongst the states,[60] yielding a clear jurisdictional split. While some states continue to back marriage as the determinative consideration, other states look to a presumed parent's function or biology in adjudicating such parentage contests.[61]

1. Assuming Responsibility: The Functional Approach

In the realm of contested parentage, California represents the paradigmatic example of a state's judicial recognition of functional parenthood. The "true test of [parent]hood" in California is the "actual caretaking" role and an "investment in the relationship with the child."[62] Two primary motivating factors toward this doctrinal shift include "the conviction that two parents are better than one, and the functional assumption that the responsibilities of parenthood are more important than biology or marriage."[63] Within such a framework, the resolution of disputed parenthood is neither contingent upon establishing a genetic connection to the child, nor merely assigned through marriage to a biological parent.[64]

This is not to say that biology and marriage are unimportant or inconsequential social roles. Indeed, each is recognized as a foundational underpinning for establishing a parent-

59. *See* Meyer, *supra* note 33, at 144 (noting the difficulty of balancing "respect for tradition" with the "changing realities of the American family").

60. *See* Glennon, *supra* note 2, at 552 (highlighting this "extraordinary lack of consistency").

61. *See Out of the Channel*, *supra* note 47; *see also* Melanie B. Jacobs, *Overcoming the Marital Presumption*, 50 FAM. CT. REV. 289, 289 (2012) (identifying the competing roles of biology, function, and intent in parentage determinations).

62. Glennon, *supra* note 2, at 589.

63. June Carbone, *From Partners to Parents Revisited: How Will Ideas of Partnership Influence the Emerging Definition of California Parenthood?*, 7 WHITTIER J. CHILD & FAM. ADVOC. 3, 8 (2007); *see also id.* at 15 (noting a judicial recognition of the emotional and financial stability derivative of the support of two parents).

64. Glennon, *supra* note 2, at 589; *cf.* Leslie Joan Harris, *The Basis for Legal Parentage and the Clash Between Custody and Child Support*, 42 IND. L. REV. 611, 612 (2009) ("Functioning as a parent is considered, if at all, only when the primary issue is custody or access to a child.").

child relationship.[65] But when an individual attempts to disestablish parenthood, or two presumed fathers compete for parentage as in *Michael H.*, California courts will not give undue weight to biology or marriage in its determination. Rather, the court will holistically weigh "considerations of policy and logic in determining the most appropriate parent[s]" to continue in a child's life.[66]

2. Genetic Ties Prevail: The Biological Approach

"As biological certainty increases, and family forms multiply, the genetic link has assumed greater importance."[67] Texas, so aligned with this approach, utilizes biological relationships as a "dominant basis" for settling parentage disputes.[68] The impetus of such a policy decision is, in part, that biological parents constitute the "readiest source of support" when compared against a functional parent, for whom the legal status with and obligations to a child are comparatively uncertain (and potentially transitory).[69] This approach also signifies a judicial response to *Michael H.*, which prevented the biological parent from asserting parental rights over the non-biological parent.[70]

A framework wherein biology prevails, though grounded in undisputed genetic certainty, produces unique (and inconsistent) results. For example, a parent, while raising a child as his own since birth, effectively becomes a "third party to the child" in the event genetic testing establishes that he is not the biological father—with no biological ties to the child, a subsequent divorce would confer "the right to simply walk away from parenting and child support."[71] Moreover, a contested parentage dispute, such as in *Michael H.*, would permit an unmarried biological father to establish legal parentage of a child born into a marriage "over the objections of the mother's husband . . . even when that means extinguishing a substantial pre-existing

65. *See* Glennon, *supra* note 2, at 589. Under such a functional approach, marriage still serves as a presumption that a spouse has assumed a parental role, and biology still factors when there is no presumed second parent fulfilling a child's need.

66. *See* Meyer, *supra* note 33, at 139 (internal quotations omitted); *see, e.g.*, *In re* Nicholas H., 46 P.3d 932, 937 (Cal. 2002).

67. *Which Ties Bind?*, *supra* note 1, at 1024; *see also* Harris, *supra* note 64 ("[B]iological parenthood is usually controlling when the issue is liability for child support.").

68. Glennon, *supra* note 2, at 588.

69. *See Which Ties Bind?*, *supra* note 1, at 1024–25.

70. *E.g.*, *In re* J.W.T., 872 S.W.2d 189, 198 (Tex. 1994).

71. Glennon, *supra* note 2, at 588.

parent-child bond."[72]

3. Marriage as Sacrosanct: The Marital Approach

Lastly, some states such as Utah continue to treat parenthood and marriage as non-severable. Pursuant to this framework, contested parentage disputes are resolved not by holistically weighing who would best fulfill a parental role or who has established a biological relationship to the child; the individual married to the mother at the time of birth is favored regardless of the foregoing considerations.[73] The primary goal underlying this clear preference is to preserve family integrity by distilling a child's best interests to birth within a marriage.[74] In other words, "[t]he legal commitment of marriage to the child's mother would form the basis of the opportunity to parent as well as the *responsibility* to do so."[75]

A parent's ability to disestablish parentage upon establishing non-paternity proves exceedingly difficult when parent-child relationships are formed through a marriage.[76] Indeed, in the event of a paternity dispute similar to *Michael H.*, the goal of preserving the family unit will trump an unmarried biological father's claim to a relationship with a biological child.[77] Establishing a judicial commitment to preserving marriage necessarily will "foreclose[] the possibility of the child having a relationship with her or his biological and functional father . . . even if that is not a result that matches the child's best interests."[78]

C. THE MODERN FAMILY LANDSCAPE: SAME-SEX MARRIAGE AND CO-PARENTAGE

Since the 1960s, the United States has experienced a breakdown of the traditional family.[79] But juxtaposed against this institutional decline is the rise of same-sex marriage, which has gained significant support and momentum.[80] This

72. Meyer, *supra* note 33, at 138–39.

73. *See* Jacobs, *supra* note 61, at 291.

74. *Cf. Which Ties Bind?*, *supra* note 1, at 1016 ("Some legislatures equate children's well-being with the existence of a two-parent family.").

75. Glennon, *supra* note 2, at 589 (emphasis added).

76. *See, e.g.*, Pearson v. Pearson, 2008 UT 24, 182 P.3d 353, 354, 359.

77. *See* Jacobs, *supra* note 61, at 291.

78. *Id.* at 290–91.

79. *See supra* notes 30–35 and accompanying text.

80. Whereas in 2001, "Americans opposed same-sex marriage by a 57% to 35% margin," 55% of Americans now "support same-sex marriage, compared

unparalleled development has further altered traditional notions around the American family and marriage landscapes. Before the Supreme Court decided *Obergefell* in June 2015,[81] thirty-seven states and the District of Columbia had legalized same-sex marriage, with increasing numbers of children growing up within such unions.[82]

When a state sanctions same-sex marriages, "these new family units typically are deemed equal to, or the same as, longstanding opposite sex marriages."[83] Though a portion of these children will be adopted, several will be born into a same-sex marriage through productive means.[84] However, two genetic parents are required to conceive a child—one providing sperm and the other an ovum. Same-sex couples lack one of these biological components, meaning they necessarily cannot conceive their own biological children without third-party contribution of the missing reproductive cell.[85] Thus, because same-sex couples "simply cannot themselves produce children through intrafamily [sic] intercourse, as can opposite sex couples," "equality and sameness are impossible."[86]

In short, centuries of longstanding precepts of parenthood quickly evolved in response to paradigmatic shifts in family law during the twentieth century. With the emergence of same-sex marriage and extraordinary alternative avenues to biological reproduction, continued application of modern family law doctrine will be inadequate to meet the demands of contemporary families. As with the breakdown of the traditional family unit,

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with 39% who oppose it." *Changing Attitudes on Gay Marriage*, PEW RES. CTR. (July 29, 2015), http://www.pewforum.org/2015/07/29/graphics-slideshow-changing-attitudes-on-gay-marriage.

81. The Supreme Court decreed nationwide marriage equality during this Note's publication. *See supra* note 7.

82. Of the approximately 783,100 same-sex households in the United States, 334,829 are now legally married. *See* U.S. CENSUS BUREAU, CHARACTERISTICS OF SAME-SEX COUPLE HOUSEHOLDS: 2014 (2014), http://www.census.gov/hhes/samesex/data/acs.html [hereinafter U.S. CENSUS BUREAU 2014] (select link to "XLSX" document to download and view).

83. Jeffrey A. Parness & Zachary Townsend, *Procreative Sex and Same Sex Parents*, 13 GEO. J. GENDER & L. 591, 592 (2012).

84. Within the population of same-sex married couples, 12.1% live with their own biological children, and about 17.3% of *all* same-sex couples have children in their household. *See* U.S. CENSUS BUREAU 2014, *supra* note 82.

85. Albeit beyond this Note's scope, the only conceivable exception is a transgendered individual who preserves her or his ova or sperm before transitioning to the other gender and, subsequent to transition, utilizes assisted reproductive technology to reproduce with a person of the same sex.

86. Parness & Townsend, *supra* note 83.

what it means to be a parent will require further social reconceptualization.

II. LATERAL APPLICATION OF EXISTING PARENTAGE FRAMEWORKS FAIL PROCREATIVE SAME-SEX COUPLES AND THEIR CHILDREN

The LGBT community has gained remarkable social acceptance in the United States.[87] Notwithstanding the momentum reshaping marriage laws across the country, "the law still lags behind when it comes to protecting the family relationships these individuals build . . . as the legal system has been slow to recognize families that do not fit the traditional heterogeneous structure."[88] New technology creates extra uncertainty for LGBT family structures, for in lieu of adoption, "many LGBT individuals and couples seek to build their families through [assisted reproductive technology (ART)], so that at least one partner in the relationship has a genetic relationship to the resulting child."[89]

Given this dearth of legal certainty and protection, this Part posits that laterally applying current parentage frameworks to procreative same-sex parents unduly allows a nonbiological intended parent to disestablish parenthood of a child still in utero. Section A explores why applying the marital presumption to instances of ART, albeit important, proves inade-

87. *Compare* Bruce Drake, *As More Americans Have Contacts with Gays and Lesbians, Social Acceptance Rises*, PEW RES. CTR. (June 18, 2013), http://www.pewresearch.org/fact-tank/2013/06/18/as-more-americans-have-contacts-with-gays-and-lesbians-social-acceptance-rises (noting that "68% of those who know a lot of gays and lesbians" say they support same-sex marriage), *and* Lydia Saad, *U.S. Acceptance of Gay/Lesbian Relations Is the New Normal*, GALLUP (May 14, 2012), http://www.gallup.com/poll/154634/acceptance-gay-lesbian-relations-new-normal.aspx (noting the increase in the percentage of American adults who consider gay and lesbian relations morally acceptable from 38% in 2002 to 56% in 2011), *with* Lila Shapiro, *LGBT Americans Feel Growing Acceptance, Lingering Discrimination, Survey Finds*, HUFFINGTON POST (June 13, 2013), http://www.huffingtonpost.com/2013/06/13/lgbt-americans-survey_n_3437253.html (describing a survey wherein 53% of LGBT adults said there continues to be a lot of discrimination against LGBT people), *and* Mackenzie Yang, *LGBT Americans Feel More Accepted, but Still Claim Discrimination*, TIME (June 13, 2013), http://newsfeed.time.com/2013/06/13/lgbt-americans-feel-more-accepted-but-still-claim-discrimination (listing the various ways in which LGBT adults have faced discrimination).

88. Dana, *supra* note 4, at 373. This is likely attributable, in part, to implicit heterosexism: a generalized "institutional discomfort" with recognizing two mothers or two fathers for a child, as well as "judicial bias" reflecting a partiality toward heterosexual procreation. *See id.* at 353, 375.

89. Palmer, *supra* note 13, at 896.

quate. Section B analyzes how current disestablishment frameworks fail as applied to procreative methods of same-sex parents—specifically, surrogacy. Finally, Section C examines alternative parentage frameworks purported by scholars that will better support and define the legal status of same-sex parents. This broad examination of the shortcomings of current contested parentage frameworks as applied to procreative same-sex couples will enable discussion around reconciling and resolving the indeterminate legal status of intended same-sex parents who are party to a surrogacy arrangement.

A. APPLYING THE MARITAL PRESUMPTION IS INADEQUATE FOR SAME-SEX PARENTS

With the rise of same-sex marriage, several states have begun expanding the marital presumption to children born into same-sex marriages.[90] This proves pivotal in achieving stability and legitimacy for these family units: "To the extent that a generalized preference for two parents joined by a legal relationship explains the presumption," applying the presumption to same-sex parents helps to realize this goal.[91] The biological realities of same-sex procreation nonetheless frustrate lateral applicability of the marital presumption to surrogacy agreements.

Amongst heterosexual couples, pregnancy may occur accidentally, and further still, may occur extramaritally. Absent confirmatory paternity testing, a husband may not even be aware of his potential non-paternity at the time of conception. Accordingly, the presumption exists to unify reproduction and childrearing to *sex within the marriage*—in turn creating legal parenthood in the father by presuming a child's biological legitimacy.[92] Though childbirth once resulted exclusively from heterosexual intercourse, modern technology facilitates reproduction notwithstanding functional and structural infertility.[93]

90. *See The Past, Present and Future*, *supra* note 8, at 397.

91. Appleton, *supra* note 36, at 245. "Indeed, gay marriage advocates often invoke protection of the relationship between a child and both of her same-sex parents as a reason for allowing same-sex couples to marry." Nancy D. Polikoff, *A Mother Should Not Have To Adopt Her Own Child: Parentage Laws for Children of Lesbian Couples in the Twenty-First Century*, 5 STAN. J. C.R. & C.L. 201, 247 (2009).

92. *See* Dara E. Purvis, *The Origin of Parental Rights: Labor, Intent, and Fathers*, 41 FLA. ST. U. L. REV. 645, 662 (2014) ("Historically, the marital presumption codified an assumed biological link."); *see also supra* notes 19–35 and accompanying text.

93. Functional infertility occurs when an individual cannot reproduce

Consequently, lesbian and gay couples—though structurally infertile—can utilize various assisted reproductive techniques to procreate.[94]

As a result, "same-sex couples do not conceive children by accident."[95] For lesbian couples, "both women know from the moment of pregnancy that the partner is not the child's biological parent."[96] Likewise for gay couples, only one of the men can fertilize the egg to be utilized in surrogacy. When same-sex couples procreate biologically, this not only circumvents sex within the marriage, but also necessarily inhibits biological connection for at least one intended parent from the outset.[97] The inherent impossibility of genetic relation to at least one intended parent contravenes the underlying purpose of the marital presumption, rendering its application to same-sex couples a biological fallacy.[98]

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with her or his partner for medical reasons, such as unviable ova or sperm, whereas structural infertility "applies to the situation of individuals who are single or those who have a partner of the same sex, and therefore require another party's biological assistance to reproduce." Dana, *supra* note 4, at 359.

94. For lesbian same-sex couples, each partner possesses not only ova, but also a womb. As a result, "artificial insemination-based arrangements, where one partner is inseminated with donor sperm and the biological mother and her partner co-parent the child, are often feasible and inexpensive." Palmer, *supra* note 13, at 898. Nonetheless, to ensure a physical connection between the child and each partner, lesbians may elect *in vitro* fertilization, removing ova from one partner (the biological mother), inseminating them with donor sperm, and implanting them in the other partner (the gestational mother). *See, e.g.*, K.M. v. E.G., 117 P.3d 673, 675–76 (Cal. 2005). Lesbian couples accordingly need not turn to surrogacy to conceive a child. But in the event neither partner can carry a child to term the couple may seek donor sperm and contract for a surrogate. In contrast, "[g]ay male couples face an obvious problem—*neither* individual has the means to carry a child." Palmer, *supra* note 13, at 898 (emphasis added). Lacking ova and a womb to carry the child, the only way to conceive a child is through surrogacy arrangements. *See* Dana, *supra* note 4, at 371–72. Unlike lesbian couples, technology does not currently permit both gay partners to have a genetic or physical connection to the child. They must either artificially inseminate a traditional surrogate with one partner's sperm, or turn to gestational surrogacy, for which the couple obtains donated ova, creates an embryo with one partner's sperm, and implants the fertilized egg into a gestational carrier. *Cf.* Palmer, *supra* note 13, at 896–97.

95. Palmer, *supra* note 13, at 896. However, one of the partners independently can accidentally conceive a child in the event of a heterosexual extramarital affair.

96. Polikoff, *supra* note 91, at 249.

97. *See* Dana, *supra* note 4, at 363.

98. Biological fallacy aside, the marital presumption should nevertheless apply equally to same-sex couples, insofar as one of the presumption's purposes is to "lock in" two parents who can assume responsibility for a child. *See* Wasserman, *supra* note 21, at 289 ("As a normative matter . . . the marital presumption of parentage should apply to children born during a same-sex

Notwithstanding this fallacy, several states now expand the marital presumption to children born into same-sex marriages.[99] This represents a positive trend in family law in theory, for the presumption's equal application helps to realize stability and legitimacy for these family units. However, such presumptive parentage, as applied to heterosexual procreative parents, in fact yields uncertainty as to the status of the nonbiological intended parent. Indeed, lateral application of the marital presumption to same-sex parenthood displays inadequacies unique to surrogacy arrangements, necessitating further statutory reform to define legal parentage for this arising reproductive population.[100]

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marriage. Children of lesbian and gay parents benefit from having two legal parents (especially two legal parents who are obligated to provide financial support)."). Indeed, "even in the face of the ability to determine biological connection to a virtual certainty[,] . . . [w]e do not do genetic testing of every child born to a married woman to determine if that child is the biological child of her husband, although it would be easy to do so." Polikoff, *supra* note 91, at 212. Instead, marriage still holds an esteemed role in parentage determinations. A husband, up to the point of a parentage contest, receives the status of presumed legal father by virtue of marriage—and marriage alone—to the birth mother. "The presumption can be challenged by specified parties on specified grounds, but a husband does not have to prove his fertility and a history of sexual intercourse with his wife to show the possibility of biological connection . . . [in order to] get the presumption . . . ." *Id.* at 216 (emphasis omitted). This continued practice intimates that, with regard to legal parentage, marriage retains social weight that has yet to be wholly extinguished by biology. Consequently, so far as state-sanctioned same-sex marriages are to be viewed in legal parity to longstanding heterosexual marriages, an intended nonbiological parent should similarly receive presumed legal parentage by virtue of marriage—and marriage alone—to her or his same-sex partner who will serve as the intended biological parent. In fact, marriage often serves as an avenue to parenthood for heterosexual couples conceiving through assisted reproduction. "For a married woman who gives birth to a child conceived using an anonymous sperm donor, the law will recognize her husband as the father of the child." Palmer, *supra* note 13, at 907. This should theoretically apply to same-sex parents as well.

99. *See supra* notes 90–91 and accompanying text.

100. Before publication, this Note originally highlighted another area of concern necessitating further statutory reform, cross-jurisdictional recognition. The U.S. Constitution states that "Full Faith and Credit shall be given in each State to the public Acts, Records, and judicial Proceedings of every other State." U.S. CONST. art. 4, § 1, cl. 1. Because states hold an interest in their citizens' family units, however, states need not recognize an extraterritorial marriage should it directly conflict with local values and customs reflected in the state's statutes and constitution. *See* Mark Strasser, *Judicial Good Faith and the* Baehr *Essentials: On Giving Credit Where It's Due*, 28 RUTGERS L.J. 313, 334–35 (1997). The then-surviving section of the Defense of Marriage Act (DOMA) codified this public policy exception as federal law: that no state is required to recognize same-sex relationships granted by other states in spite of the full faith and credit clause. 28 U.S.C. § 1738C (2012). Thus, states needed

When compared with artificial insemination, surrogacy proves problematic largely due to the visibility of the third party's biological role in the reproduction process. When a woman's partner (either woman or man) consents to her impregnation by a third party's sperm, the donor's active role ends within seconds, rendering the donor "essentially invisible."[101] Because only the intended parents are present between conception and birth, the woman's partner more easily receives the presumption. In contrast, when a same-sex couple procreates through surrogacy, third-party anonymity is impossible given a surrogate's active nine-month involvement in the reproduction process. A number of states in fact recognize a surrogate mother as a legal parent absent a post-birth adoption that transfers parentage to another adult.[102] As with artificial insemination, the

not "articulate a sufficiently compelling public policy against recognition of same-sex marriages, nor . . . assert a significant interest in the marital status of the couple in order to deny recognition of extraterritorial same-sex marriage." Julie L. B. Johnson, *The Meaning of "General Laws": The Extent of Congress's Power Under the Full Faith and Credit Clause and the Constitutionality of the Defense of Marriage Act*, 145 U. PA. L. REV. 1611, 1634 (1997). Because not all states recognized same-sex marriage, this "lack of a court judgment . . . render[ed] presumptive parenthood deriving from the status of the couple vulnerable to challenge in other jurisdictions." Polikoff, *supra* note 91, at 216. As a result, if a married same-sex couple, comprised of one biological parent and one presumed parent, moved to a state that did not recognize their marriage, there no longer existed a marriage to which the presumption of parenthood could attach—effectively revoking any status the non-biological parent once held toward the child. To ensure continued presumptive parentage of the non-biological partner, a mere presumption, without more, effectively locked same-sex couples to living exclusively in states that will recognize their marriage. *See, e.g.*, Wasserman, *supra* note 21, at 303 ("When a heterosexual couple marries, the partners . . . strengthen their legal ties to their children. It is deeply ironic, then, that when a gay and lesbian couple makes the same choice—to marry—DOMA threatens, rather than strengthens, any parent-child relationship that derives from the marriage."); *cf.* Palmer, *supra* note 13, at 907 ("[L]egislative restrictions on the recognition of same-sex marriage mean that same-sex couples—even those legally married in a state that allows same-sex marriage—cannot rely upon marital presumptions to confer parental rights.").

101. Dana, *supra* note 4, at 381.

102. Pursuant to traditional surrogacy arrangements where the surrogate is the child's genetic mother, almost all states recognize the surrogate as the legal parent; a minority of states also recognize gestational carriers, notwithstanding no genetic relation, as the legal parent absent a post-birth adoption. Interview with June Carbone, *supra* note 16. *But see* WIS. STAT. §§ 69.14, 891.40 (2009) (codifying both a surrogate's legal parenthood and a marital presumption of fatherhood in her husband); Thomas J. Walsh, *Viewpoint: Wisconsin's Undeveloped Surrogacy Law*, 85 WIS. LAW. (2012), http://www.wisbar.org/newspublications/wisconsinlawyer/pages/article.aspx?Volume=85&Issue=3&ArticleID=2445 ("[A] woman desiring to be a surrogate for a sperm donor

law *theoretically* should recognize a non-biological parent who consents to her or his partner contributing genetic material to a surrogate based on intent to parent.[103] The problem is that some jurisdictions are opposed to surrogacy in principle, and more are concerned about surrogate exploitation.[104] With only one of the intended parents and a third party contributing important biological roles, there is greater hesitance to automatically presume parenthood for the non-biological—albeit intended—parent: "[A] third party is always present to assert a competing claim of [biological] parentage."[105]

In spite of the above shortcomings, when a same-sex couple chooses to procreate through ART, presumptive parenthood should apply to the non-biological intended parent by virtue of marriage—as it has for centuries. This lateral application will help to realize society's desire to channel children into two-parent families. Nonetheless, presuming parentage will inevitably result in presumption rebuttals at the time of divorce. Just as the law struggled with a wave of presumed fathers seeking to disestablish parenthood upon the advent of near-certain paternity testing, there exists a void for how to manage non-biological parents seeking to disestablish future parenthood vesting through surrogacy arrangements.

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and using her own egg may have problems legally separating herself from the child. A parentage action would also need to be filed in a situation in which the child was fertilized in vitro and the surrogate mother is not biologically related to the child.").

103. Lesbian same-sex couples may need to pursue a surrogacy arrangement for reasons of functional infertility. But the biological reality is that whereas many lesbian couples can procreate through artificial insemination, not having a womb *requires* gay same-sex couples to seek a surrogate. Thus, while lesbian parents experience difficulties with establishing parentage, the law disproportionately impacts gay parents, as they cannot exploit presumption loopholes currently available through artificial insemination. *See* Appleton, *supra* note 36, at 264–65. Indeed, due to the surrogate's visibility, the law has "never applied the presumption rule to homosexual male couples." Dana, *supra* note 4, at 381.

104. *See* Interview with June Carbone, *supra* note 16.

105. Dana, *supra* note 4, at 378. Indeed, "if a married man impregnates a woman who is not his wife, the law contains no presumption that overrides the biological mother's status and presumes the child to be that of the biological father's wife." Appleton, *supra* note 36, at 261 (quoting *In re* Opinion of the Justices to the Senate, 802 N.E.2d 565, 577 n.3 (Mass. 2004) (Cordy, J., dissenting)).

B. THE MARITAL PRESUMPTION, AS APPLIED TO SURROGACY, CREATES AN UNDUE UNCERTAINTY FOR REBUTTING THE PRESUMPTION WHILE A CHILD IS IN UTERO

With the rise of surrogacy, the judicial system experienced an unforeseen onslaught of contested parentage cases, wherein surrogates sought to trump the parental rights of the child's intended parents in an effort to establish their own.[106] "[I]t is a sad, but real, possibility that future challenges to the validity of . . . parental rights to a child conceived through surrogacy will not be brought by the surrogates, but instead, by one member of a couple during a separation."[107] It is likewise a sad, but real, possibility that these challenges will occur while the child is still in utero.[108] Whereas the marital presumption should—in theory—apply equally, the presumption of parenthood "does not adequately address the new legal issues created by surrogacy,"[109] for there exists a "lack of statutory clarity on when . . . and on what basis the parentage presumption can be *rebutted*."[110]

When a woman conceives through heterosexual procreative sexual intercourse, the woman who carries the child, by virtue of biology, has undisputed genetic relation to her child. Lest there be a void between the birth and the assumption of parental status, the mother becomes her child's legal parent. And by way of the marital presumption, biological legitimacy, namely genetic relation to the husband, is presumed.[111] Because presumed fathers sought to rebut the presumption well before society comprehended the dawn of same-sex marriage and assisted reproduction, disestablishment frameworks initially

106. Most contested cases involve individuals entering private surrogacy agreements (especially with relatives and friends), rather than through clinics. *See, e.g.*, Johnson v. Calvert, 851 P.2d 776 (Cal. 1993); *In re* Baby M, 537 A.2d 1227 (N.J. 1988); A.G.R. v. D.R.H., No. FD-09-001838-07 (N.J. Super. Ct. Ch. Div. Dec. 23, 2009).

107. Palmer, *supra* note 13.

108. *See, e.g.*, *In re* Marriage of Buzzanca, 72 Cal. Rptr. 2d 280 (Ct. App. 1998). Here, a heterosexual couple contracted for a surrogate, but divorced while the child was still in utero. Though the intended mother indicated that there were children from the marriage, the intended father maintained that he would not be held legally liable for child support on two grounds: (1) that the child was not genetically his; and (2) that the child in utero was being gestated by a third party.

109. Dana, *supra* note 4, at 381.

110. Polikoff, *supra* note 91, at 225 (emphasis added).

111. *See supra* notes 22–29 and accompanying text.

developed in the realm of traditional procreative sex.[112] Under these frameworks, the child's mother served as the only biological constant, and a contested parentage dispute arose with courts evaluating claims by one presumed father—and possibly one biological father.

Procreation through surrogacy frustrates this traditional framework for rebutting the marital presumption.[113] With procreative sex, a presumed parent seeks to disestablish parenthood based upon *discovered* non-paternity.[114] Contrarily, a presumed non-biological parent knows from the outset that she or he will intend to parent and be responsible for a child bearing no genetic relation to her or him: biology constitutes a known variable from the *moment of conception* pursuant to a surrogacy arrangement.[115] "If such a presumption could be rebutted by anyone at any time on the basis of lack of biological connection between the [parent] and the child, then the presumption would be meaningless for a [same-sex] couple."[116] In other words, a non-biological parent would *always* be able to disestablish parentage, severing any liability for future support.[117] However, when states extend the marital presumption to same-sex parents, frameworks tend not to delineate clearly when biology will trump a presumption vesting in the context of surrogacy.[118]

Furthermore, surrogacy frustrates rebutting the presumption by pushing centuries-old conceptions of biology and motherhood to new limits. A surrogate requires societal reconceptualization of a woman who carries and births a child as *not* the

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112. *See supra* notes 38–44 and accompanying text.

113. *Cf.* Appleton, *supra* note 36, at 261 (noting that "[a]pplying these concepts to same-sex couples results in some troubling anomalies") (quoting *In re* Opinion of the Justices to the Senate, 802 N.E.2d 565, 577 n.3 (Mass. 2004) (Cordy, J., dissenting)).

114. With the ease and accessibility of genetic testing, "courts and legislatures have moved to allow men to discard their status as fathers" when they "feel victimized by an obligation to support a child born of their wives' infidelity" upon discovering their genetic non-paternity. Meyer, *supra* note 33, at 138.

115. This does not apply to gay men who deliberately mix their sperm prior to insemination. For purposes of discussion, however, this Note presumes the couple has identified which individual will contribute sperm.

116. Polikoff, *supra* note 91, at 248.

117. *Cf.* Meyer, *supra* note 33, at 137–38 (noting that given the "ease with which genetic parentage can now be determined," genetics are experiencing a "resurgence in the law governing 'disestablishment' of paternity").

118. *Cf.* Polikoff, *supra* note 91, at 255 (arguing that states "need to revisit their parentage statutes and make an explicit decision about when biology will be permitted to trump the child's intact family unit").

mother of that child.[119] Because the surrogate bears the child on behalf of the intended parents, she enters into a contract specifying that she will not assume the role of mother after the child's birth.[120] In the context of lesbian surrogacy arrangements, this instead requires "having *another* woman take on that role."[121] For gay couples, this arrangement "challenge[s] societal norms even further by creating a family where *no one* is the [legal] mother of the child."[122] Thus, when a non-biological intended parent seeks to rebut the presumption and disestablish parenthood, the formula changes. There are instead three parties, comprised of either: two intended mothers—one biological and one non-biological—and a birth mother; or, two intended fathers—one biological and one non-biological—and a birth mother.

Whereas frameworks to rebut the presumption and disestablish parenthood evolved in the context of heterosexual procreation, same-sex marriage and procreation through surrogacy inherently challenges the underlying traditional and societal conceptions of biology and motherhood. Should a non-biological intended parent seek to disestablish parenthood before a child is born to a surrogate, the parties must rely on a court's determination—employing current presumption and disestablishment frameworks—absent a state statute addressing surrogacy. Most states, however, remain "simply silent on parentage determinations in situations involving surrogacy arrangements."[123] As a result, there is an "unacceptable level of uncertainty"[124] around how such challenges will be resolved, necessitating reconceptualization of how to define legal parentage stemming from surrogacy.

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119. *See* Palmer, *supra* note 13, at 899.

120. *See id.* at 902.

121. *Id.* at 899–900 (emphasis added) (noting further that society prefers this outcome to gay male surrogacy arrangements, for at least "*someone* is the mother of the child").

122. *Id.*; *see also* Dana, *supra* note 4, at 363, 377 ("If the intended parents are homosexual, this only compounds the difficulty of determining parentage because having two fathers conflicts with traditional notions of family formation . . . . Without another woman to step in to be the child's mother, a surrogate will not be viewed as a 'surrogate uterus; she [will be] the mother.'").

123. Dana, *supra* note 4, at 369.

124. Polikoff, *supra* note 91, at 225–26.

C. SCHOLARS AND COURTS ALIKE ADVOCATE FOR REFRAMING MODERN PARENTAGE DOCTRINE

Traditional conceptions of family law as they have existed for centuries do not translate into a society experiencing same-sex marriage and parenthood through surrogacy. Family law scholars argue that with most courts making parentage decisions based on marriage and biology, the continued use of the marital presumption for same-sex parents—especially in contested surrogacy agreements—will fail to realize and protect children's best interests.[125] As explained by June Carbone and Naomi Cahn:

> With the changing conceptions of the family, we must face the issue of how society ensures children's well-being, and whether we should continue to police family structure or become more willing to focus attention on children's individual needs . . . .
>
> . . . .
>
> . . . The issue for children therefore is to determine what set of relationships between the adults is most likely to promote children's well-being and how to encourage those relationships in a modern society.[126]

Indeed, the law "cannot protect all children from abandonment and conflict created by their parents, biological or social."[127] But given "current legal chaos and uncertainty"[128] surrounding parentage determinations through existing frameworks, children conceived by same-sex parents through surrogacy arrangements are placed in unduly precarious circumstances from the moment of conception.[129] Before the child's birth, both the accountability between the biological intended parent and the non-biological intended parent, and the legal status of the non-biological parent toward her or his future child, are equivocally defined.

Absent any clear social consensus on the indispensable determinants of parenthood,[130] legislation and jurisprudence

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125. *See Which Ties Bind?*, *supra* note 1, at 1011, 1039.

126. *Id.*

127. Glennon, *supra* note 2, at 587.

128. *Id.*

129. *See* Jacobs, *supra* note 61, at 294 (noting how the status quo often unreasonably places "the sanctity of the marital presumption before the best interests of the child").

130. Instead of explaining why one is—or is not—positioned to fill a parental role, parentage determinations today rely on "unspoken assumptions regarding how parental status is generated . . . 'implicitly appeal[ing] to some preanalytic concept of parenthood.'" Purvis, *supra* note 92, at 651 (quoting Dara E. Purvis, *Intended Parents and the Problem of Perspective*, 24 YALE J.L. & FEMINISM 210, 360 (2012)).

must advance new benchmarks for what constitutes a legal parent who will be responsible for a child's well-being.[131]

1. Moving Toward Intent-Based Parentage Determinations

When sex, marriage, and reproduction are effectively dissociated—and when parents can reproduce outside traditional procreative intercourse—neither marriage nor biological relation to a child are guaranteed variables upon a child's birth. For enhanced certainty behind parentage determinations in a rapidly evolving family law era, scholars assert that legal parentage should be based not on a presumption or biology, but on the more meaningful measure of one's established parenting *intention*.[132]

Such a benchmark aids same-sex intended parents who elect to procreate through surrogacy.[133] The marital presumption and current disestablishment frameworks both center on marriage and biology. In contrast, intent-based evaluations make parentage independent from "a state's view of same-sex relationships"[134] and "place[] diminished importance on genetic or biological connection."[135] Should a non-biological intended parent seek to avoid legal obligation toward a future child, intent-based parentage circumvents judicial determinations of presuming and rebutting parenthood under traditional frameworks. Instead, the two parties who intend to parent the child at its birth are more readily identified as the future child's legal parents, regardless of their marital relation to each other or their genetic relation to the child.[136]

This also helps to realize the best interests of the child con-

131. *See* Meyer, *supra* note 33, at 136; *see also* Purvis, *supra* note 92, at 645 ("[W]hy does a biological relationship generate parental rights?"). *But see* Lehr v. Robertson, 463 U.S. 248, 271 (1983) (White, J., dissenting) (rejecting the notion that biological connection between parent and child is "unimportant in determining the nature of liberty interests").

132. *See* Jacobs, *supra* note 61, at 291; *see also Which Ties Bind?*, *supra* note 1, at 1047 (questioning to what extent a child's relationship with a parent depends on a parent's relationship to her or his other parent).

133. "A pure intent test is the only available method for courts to determine parentage without gender, marital, or sexual orientation biases affecting the outcome." Dana, *supra* note 4, at 358. Conversely, accidental pregnancies frustrate intent-based standards, as there may be no intent to become a parent. This Note presumes surrogacy arrangements do not yield accidental pregnancies.

134. Lynda Wray Black, *The Birth of a Parent: Defining Parentage for* Lenders *of Genetic Material*, 92 NEB. L. REV. 799, 837 (2014).

135. Meyer, *supra* note 33, at 136.

136. *See* Black, *supra* note 134.

ceived through surrogacy, even while in utero.[137] An intent-based inquiry reinforces parental status prior to birth based on "significant actions being undertaken by either party": in the context of a surrogacy arrangement, the deliberate fertilization of an egg to create a life.[138] In the event that a non-biological intended parent does not want to hold the child out as her or his own prior to its birth, an intent-based inquiry will identify the parent as a presumed legal parent to be held financially responsible,[139] notwithstanding a divorce from the biological intended parent, or want of biological relation.[140]

2. Establishing Parentage Through Theories of Labor

Similarly related to an intent-based theory of parenthood, other reform proponents view parentage not as a "product of biology or a natural inheritance," but instead "understood as the product of a Lockean labor interest."[141] This underlying consideration confers parentage status through "investing labor and money into a resource . . . thus generating a claim to that resource."[142]

Such a theory proves especially applicable to surrogacy arrangements. Procreation through the use of a surrogate is time-consuming and requires a "significant financial and emotional investment."[143] But for the labor and investment of the intend-

137. An intent-based determination also helps to protect gestational surrogates. A gestational mother—entering into an arrangement anticipating not to be responsible for the child upon its birth—should not be held responsible should the intended parents seek to renege on their responsibilities toward the child.

138. Dana, *supra* note 4, at 383.

139. "Once the status of legal parent is recognized, it is a profoundly powerful position." Purvis, *supra* note 92, at 649; *see* Dana, *supra* note 4, at 383 (justifying this outcome through the "states' interest in having all children be financially supported").

140. This is not to suggest, however, that presumed parental status becomes ironclad in such instances. For example, a contract or consent form can serve as a clear indication of intent, rebuttable upon a showing of fraud, duress, misrepresentation, or incapacity.

141. Purvis, *supra* note 92, at 654. *See generally* E. Gary Spitko, *The Constitutional Function of Biological Paternity: Evidence of the Biological Mother's Consent to the Biological Father's Co-Parenting of Her Child*, 48 ARIZ. L. REV. 97 (2006) (arguing a father's biological connection to a child is constitutionally significant because it provides evidence that the biological mother consented to the father's relationship with the child).

142. Purvis, *supra* note 92, at 655.

143. Dana, *supra* note 4, at 382. Between legal fees, medical procedure expenses, and surrogate compensation, the process can easily cost $100,000. *See id.* at 363.

ed parents, the child would not exist.[144] One can tangibly measure pre-birth labor through preparations undertaken when expecting a future child. This can include signing a surrogacy contract, attending fertilization appointments, requesting future work accommodations, enrolling in parenting classes, readying a nursery, et cetera.[145] Labor-based parentage determinations thus serve a concrete standard that "operationalizes [the objectives of] intent as a parentage rule."[146]

Because labor-based understandings can be employed "regardless of the sexual orientation of the parents . . . [whether] married or not,"[147] a labor benchmark, as applied to same-sex procreative parents, yields similar outcomes to intent-based considerations.[148] In effect, a gestational carrier serves as the initial legal parent, the biological intended parent becomes the second legal parent, and the non-biological intended parent becomes a parent with the transfer of rights from the surrogate after birth. An equitable estoppel, based on the non-biological parent's labor in engineering the birth, would estop the non-biological parent from denying parentage at the point where the surrogate disclaims maternity, notwithstanding an attempt of pre-birth disestablishment or divorce.

3. Judicial Calls for Legislative Action

Same-sex couples today can "proudly form families that would have been both legally and socially unthinkable in an earlier era."[149] In response to such modern family law developments, intent-based and labor-based parentage theories represent important stepping stones for the reconceptualization of what it now means to be a parent. However, because legal parentage is a matter of law by definition,[150] such theories alone do not suffice to resolve unprecedented parentage issues surrounding surrogacy.

Under current legal frameworks, procreative same-sex couples "have little, if any, opportunity to establish legal parentage early on for both parents."[151] Absent such early legal

144. *See id.* at 382–83.
145. *See* Purvis, *supra* note 92, at 681.
146. *Id.* at 680.
147. *Id.* at 687.
148. *See supra* notes 133–39 and accompanying text.
149. Polikoff, *supra* note 91, at 212.
150. *Id.* at 207.
151. Parness & Townsend, *supra* note 83, at 614.

sanction, many families headed by same-sex parents will thrive nevertheless. In the event of a parentage dispute, however, parties will need to rely on court determinations, as the majority of states fail to statutorily define legal parentage through surrogacy.[152] But even though surrogacy and same-sex parentage do not fit existing doctrine, courts nonetheless hesitate to redefine legal parentage absent legislative action.[153] The present system instead observes judges "clutching at overly rigid approaches to determining parentage . . . that do not allow for the full range of human procreative and parental conduct."[154]

Thus, a new basis to define legal parentage when same-sex couples procreate through surrogacy is necessary.[155] This requires not only social reconceptualization,[156] but also legislative action toward statutory clarification.[157]

III. PROPOSALS FOR ALTERNATIVE STATUTORY SCHEMA

Family law is at a new crossroads. Traditional conceptions of marriage, reproduction, and parenthood were challenged with rapid social and technological revolution in the latter-twentieth century—resulting in jurisprudence struggling with how to disestablish paternity in light of a weakening marital presumption.[158] Today's twenty-first-century crossroad stems from a modern era wherein individuals of the same sex can marry, divorce, and reproduce biologically. Understandings of parentage must be reconceptualized once more so as to be reconciled with marriage equality and assisted reproductive technology. Surrogacy can serve as a keystone to pioneer family law

152. *See* Dana, *supra* note 4, at 369.

153. *See In re* C.K.G., 173 S.W.3d 714, 736 (Tenn. 2005) ("We, as interpreters of the law, not makers of the law, are powerless . . . to reach a different resolution."); *see also In re* Marriage of Buzzanca, 72 Cal. Rptr. 2d 280, 293 (Ct. App. 1998) ("[W]e must call on the Legislature to sort out the parental rights and responsibilities of those involved in artificial reproduction.").

154. Wald, *supra* note 33, at 410.

155. *See* Polikoff, *supra* note 91, at 235 (noting the "dramatic increase in the use of ART" necessitates clarifying "the parentage of all of the children born as a result of modern science" (quoting UNIF. PARENTAGE ACT § 703, cmt. (UNIF. LAW COMM'N 2002))).

156. *See supra* notes 132–46 and accompanying text.

157. *See In re* Adoption of Matthew B., 284 Cal. Rptr. 18, 37 (Ct. App. 1991) (urging the legislature to act expeditiously); Belsito v. Clark, 644 N.E.2d 760, 767 n.3 (Ohio Ct. Com. Pl. 1994) (asking the legislature to act and end the uncertainties of surrogacy).

158. *See supra* notes 30–46 and accompanying text.

away from its seventeenth century common law vestiges, and into a technological era wherein the prototypical traditional family unit, although expected in theory, indeed proves exceptional in fact.[159]

Under the status quo, rigid application of existing frameworks means that same-sex parents who dissolve their relationship consequently will "often leave their children without legal ties" to both intended parents.[160] In response, this Part proposes two model statutory frameworks that will better define the legal roles and responsibilities—both pre-conception and pre-birth—of intended parents and surrogates alike. Section A explores the necessary considerations underlying statutory reform. Section B next recommends two model statutes upon which states can frame surrogacy laws: one that transfers parental rights to intended parents pre-conception; and an alternative that, based on pre-birth intent and labor, transfers rights to intended parents post-birth. Lastly, Section C weighs the benefits and critiques of each.

A. CONSIDERATIONS UNDERLYING STATUTORY REFORM

Prevailing theories of parentage often fail to identify the origins of parenthood, instead hinging the right to parent on marital status or biology.[161] For same-sex parents procreating by way of surrogacy, parenthood should not and cannot vest through these benchmarks.[162] Surrogacy entails calculated and concerted efforts to conceive a child—a child that may not share genetic relation to one of her or his future intended parents. And in the context of same-sex intended parents, this further breaks from archetypal mother-father duality. Thus, surrogacy obliges reexamining issues of marriage, biology, and parental intentionality.[163]

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159. "In an era of readily available divorce and DNA testing, we need to reexamine the policies likely to promote permanent ties . . . ." *Which Ties Bind?*, *supra* note 1, at 1012.

160. Parness & Townsend, *supra* note 83, at 614.

161. *Cf.* Purvis, *supra* note 92, at 645 ("[T]he law has shifted over time, from favoring a property right based in genetics to a Lockean theory of property rights earned through labor.").

162. *See supra* Part II.A–.B.

163. *Cf.* Wald, *supra* note 33, at 383 (explaining further that surrogacy "calls into question the value we place on genetics in assigning parental rights").

1. What Makes a Person a Parent?

In statutorily defining parenthood through surrogacy, legislatures must keep "the question whether a child was born into a marriage" separate from "whether that child has two parents."[164] After all, marriage historically constituted a proxy for presumed biology. In the context of same-sex parents who plan to conceive a child together through surrogacy, however, marriage *cannot* serve as a proxy for biology due to innate structural infertility. Marriage instead would seem "a proxy for consent of the definite legal parent—the biological [intended parent]—to share parental rights" with the non-biological intended parent.[165]

If the actual underlying consideration is consent to parent, legislatures should draft statutory language that does not utilize marriage as the mechanism to confer parenthood to a non-biological intended parent.[166] Instead, surrogacy statutes should attach parental rights to a non-biological parent based exclusively on measures that capture her or his consent to parent the future child.

2. What Triggers Severing a Surrogate's Parental Status?

Surrogacy proves problematic due to an additional third party fulfilling an indispensable biological role in the reproduction process. In other words, "a third party is always present to assert a competing claim of parentage."[167] Thus, a statute that confers parental status to a non-biological intended parent must simultaneously address what rights and responsibilities—if any—will vest in a surrogate who carries the child to term. Due to constitutional concerns, however, legislatures may not treat traditional and gestational surrogacy as existing in parity.[168]

a. Statutes Addressing Traditional Surrogacy

When a same-sex couple procreates through traditional

164. Joanna L. Grossman, *The New Illegitimacy: Tying Parentage to Marital Status for Lesbian Co-Parents*, 20 AM. U. J. GENDER SOC. POL'Y & L. 671, 720 (2012); *see also Which Ties Bind?*, *supra* note 1, at 1047 (noting that marriage should not continue as the primary vehicle for establishing parent-child relationships).

165. Grossman, *supra* note 164, at 718.

166. *Cf.* Polikoff, *supra* note 91, at 212 ("[O]nce marriage does not determine parental rights and responsibilities, the law must decide what does.").

167. Dana, *supra* note 4, at 378.

168. See *supra* note 94 for further definition around this distinction.

surrogacy, a statute cannot automatically strip a surrogate's parentage rights and vest them in a non-biological intended parent. Traditional surrogates utilize their own ova in the reproduction process, creating a biological link between the surrogate and the future child. And the Constitution recognizes a fundamental interest in the companionship of one's natural child.[169] While entering the agreement knowing she bears the child on behalf of its intended parents, a surrogate very well may deem herself unable to part with her child at the time of birth.[170] Accordingly, a statutory provision divesting a biological mother of legal parentage of a child at its birth may be deemed unconstitutional.[171] A non-biological intended parent's legal status instead must be conferred through an adoption only after a traditional surrogate's rights are severed.[172]

b. Statutes Addressing Gestational Surrogacy

In contrast, a statute addressing gestational surrogacy can strip a surrogate's parentage rights and vest them in a non-biological intended parent from the moment of birth or before.[173] Unlike traditional surrogates, gestational surrogates do not utilize their own ova in the production process. The fundamental interest in the companionship of a natural child, recognized in traditional surrogacy, arguably diminishes in gesta-

169. *See* U.S. CONST. amends. I, IX, XIV, § 1; *see also* Wilke v. Culp, 483 A.2d 420, 425 (N.J. Super Ct. App. Div. 1984) ("It has . . . been held that a parent's right to the care and companionship of his or her child are so fundamental as to be guaranteed protection under the . . . Constitution."). This right is not absolute, however. The State may infringe upon a legal parent's right to custody and control over a child if the parent endangers the health or safety of the child. *See* V.C. v. M.J.B., 748 A.2d 539, 548 (N.J. 2000). But absent a showing of unfitness, abandonment, or gross misconduct, there is no reason to interfere with a parent's constitutional prerogatives. *Id.* at 549.

170. *See, e.g.*, *In re* Baby M, 537 A.2d 1227, 1236 (N.J. 1988).

171. Only Virginia's surrogacy statute allows traditional surrogates to sever parental rights through a contract pre-authorized by the court, while reserving for the surrogate a 180-day contract termination period. *See* VA. CODE ANN. §§ 20-156 to -165. Because this statute has not been used or tested in court, its constitutionality is unresolved. Absent a contrary statute, however, states will view the traditional surrogate as the legal parent, and little sentiment exists for changing this result. *See* Interview with June Carbone, *supra* note 16; *cf. Baby M*, 537 A.2d at 1242.

172. *See* Dana, *supra* note 4, at 365 (analogizing a traditional surrogacy agreement to an adoption). In pursuit of uniformity, however, legislatures can promulgate one statute for traditional and gestational surrogacy, both held to the higher constitutional threshold potentially required for the former.

173. *See* UNIF. PARENTAGE ACT § 801 (UNIF. LAW COMM'N 2002).

tional surrogacy.[174] With no genetic link existing between the gestational carrier and the future child, the surrogate "is 'not exercising her own right to make procreative choices; she is agreeing to provide a necessary and profoundly important service' to parents who 'intended to procreate a child genetically related to them by the only available means.'"[175] Thus, a legislature can constitutionally promulgate statutes wherein legal parent status never bestows in a gestational surrogate.

3. How To Create a Portable Set of Parentage Rights

Intended same-sex parents cannot rely exclusively on the marital presumption to confer legal parenthood through surrogacy.[176] Legislatures must instead enact statutory provisions that clarify legal parentage during early stages of a surrogacy agreement, so as to effectively create more concrete rights and responsibilities in non-biological intended parents—regardless of marital status upon a child's birth. Furthermore, the legal recognition bestowed through surrogacy must simultaneously be enforceable across jurisdictions. Such outcomes are achievable by way of birth certificate recognition.

Birth certificates constitute the official legal record evidencing a child's parentage.[177] For a child born through surrogacy, the biological intended parent would appear on the birth certificate. However, competing claims for the birth certificate's remaining blank space exist between the non-biological intended parent and the surrogate. In the event of traditional surrogacy, the birth mother does not intend to serve as a child's legal parent; and in the event of gestational surrogacy, not only does the gestational carrier not intend to serve as a child's legal parent, but no genetic link exists between the surrogate and the

174. Some may disagree with this assertion, arguing that gestation would confer parental rights on the basis of nature by definition. This Note, however, advocates for a diminished parental right absent a genetic link. "The argument that a woman cannot knowingly and intelligently agree to gestate and deliver a baby for intending parents carries overtones of the reasoning that for centuries prevented women from attaining equal economic rights." *See* Dana, *supra* note 4, at 368.

175. *Id.* (quoting Johnson v. Calvert, 851 P.2d 776, 787 (Cal. 1993)).

176. *See supra* Part II.A.

177. Birth certificates do not *establish* legal parentage, but instead dictate parentage in the state of issue. Because parents' names are entered onto a birth certificate by virtue of marriage, states that did not recognize same-sex marriage before *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015), were not required to recognize the birth certificate either. *See* Polikoff, *supra* note 91, at 238–39.

future child. Because gestational carriers often regard intended parents as parents,[178] the stronger claim arguably rests with the non-biological parent who intended to parent the child from the moment of conception.[179] But the underlying problem remains that "parentage statutes that remain gender-specific, with one individual identified as mother and the other identified as father, simply do not contemplate or accommodate parentage by same-sex couples."[180]

Reform thus requires reconceptualizing birth certificates as reflecting a child's intended parentage instead of biological parentage.[181] Placing a non-biological intended parent on the birth certificate will minimize the opportunity and success of disestablishing parentage of a child conceived and birthed through surrogacy.[182]

B. PROPOSED MODEL SURROGACY STATUTES

Acknowledging that not all states will permit gestational surrogacy,[183] whereas others will not permit traditional surrogacy,[184] this Note proposes two distinct solutions—one intended expressly for gestational surrogacy arrangements, and another that states can tailor for purposes of either traditional or gesta-

178. *See What Motivates Gestational Carriers?*, RESOLVE: NAT'L INFERTILITY ASS'N (2015), http://www.resolve.org/family-building-options/surrogacy/what-motivates-gestational-carriers.html. *See generally* Todd D. Pizitz et al., *Do Women Who Choose To Become Surrogate Mothers Have Different Psychological Profiles Compared to a Normative Female Sample?*, 26 WOMEN BIRTH 15 (2013) (noting that surrogate mothers are both resilient and aware of the importance of emotional boundary setting during the surrogacy process).

179. *See generally* D.C. CODE §§ 7-205(e)(3), 16-909(e) (2015); Civil Code of Québec, S.Q. 1991, c 64, art 538–39 (Can.); *cf.* Polikoff, *supra* note 91, at 239.

180. Black, *supra* note 134, at 808.

181. This will require cooperation of state divisions of vital records to modify birth certificates to list parents as "parents" rather than "mother" and "father." *See id.* at 841.

182. A birth certificate, while "not definitive proof" of parentage, "is the one piece of commonly accepted evidence." Polikoff, *supra* note 91, at 238–39. Thus, intended parents can simultaneously obtain a parentage judgment to bolster the birth certificate's strength and to ensure recognition of a non-biological intended parent's rights. NAT'L CTR. FOR LESBIAN RIGHTS, LEGAL RECOGNITION OF LGBT FAMILIES (2015), http://www.nclrights.org/wp-content/uploads/2013/07/Legal_Recognition_of_LGBT_Families.pdf; *cf.* Parness & Townsend, *supra* note 83, at 607 (noting that such acknowledgments make disestablishment more difficult).

183. *E.g.*, ARIZ. REV. STAT. ANN. § 25-218 (2011); D.C. CODE §§ 16-401, -402 (2009); IND. CODE § 31-20-1-1 (2010).

184. *E.g.*, LA. REV. STAT. ANN. § 9:2713 (1987); N.D. CENT. CODE §§ 14-18-05, 08 (2009); UTAH CODE ANN. § 78B-15-801 (2008).

tional surrogacy. Thus, to effectuate the aforementioned considerations underlying statutory reform despite inevitable state-by-state variation, this Section proposes two model statutes upon which states can frame surrogacy laws: one that transfers parental rights to intended parents pre-conception; and an alternative that transfers rights to intended parents post-birth.

1. Pre-Conception Birth Order Statute

To ensure that a non-biological intended parent cannot disestablish parentage while the child remains in utero, this statutory framework suggests requiring a pre-conception parentage order for gestational surrogacy arrangements. A pre-conception order would confer legal parent status to the two intended parents and would occur before a medical professional implants a viable embryo in the surrogate for gestation.[185] Thus, from the point the surrogate begins her active role in the reproduction process, the future child will not be viewed as the child of the gestational carrier, but instead the intended parents.[186] And, upon the child's birth, the intended parents identified on the pre-conception order will be placed on the birth certificate.[187] In the context of same-sex intended parents, this signifies that both the biological parent and non-biological parent will be recognized at the child's birth notwithstanding marital status or biology.

PROPOSED STATUTE
Subdivision 1. Pre-Conception Parentage Order.

185. *Cf.* Polikoff, *supra* note 91, at 249–50 ("[B]oth . . . know from the moment of pregnancy that [one] partner is not the child's biological parent. The decisions the two [intended parents] make at that point have consequences for the child and should have legal consequences.").

186. *See* UNIF. PARENTAGE ACT § 801 (UNIF. LAW COMM'N 2002). "Because the mother's gestational labor has not yet begun, she does not have a greater claim to the status of parent and the attendant decisionmaking [sic] abilities." Purvis, *supra* note 92, at 668.

187. "[T]he law must recognize as parent any individual (regardless of gender, sexual orientation, or marital status) who is biologically related to a child." Black, *supra* note 134, at 812–13. Thus, such a statute cannot apply to traditional surrogacy. Instead, a non-biological intended parent can only be recognized through a second-parent adoption proceeding upon the surrogate's voluntary waiver of parentage.

a) Any person who intends to parent a child born through gestational surrogacy must sign a pre-conception parentage order (order) prior to a surrogate's gestation of a fertilized ovum or ova.
   1) At least one person, and no more than two persons, shall be identified on the order as intending to parent the future child.
      A) If one person is identified on the order, that person shall be recognized as the future child's parent.
      B) If two persons are identified on the order, those persons shall be recognized as the future child's parents.
   2) The gestational surrogate shall sign the order, indicating her understanding that she will not be recognized as the future child's parent.

b) The order shall be enforceable, notwithstanding:
   1) marital status of the person(s) identified on the order;
   2) genetic relation between the person(s) identified on the order and the future child;
   3) sex of the person(s) identified on the order.

Subdivision 2. Recognition of Parents at Birth.

a) After the child's birth, the person(s) identified on the order shall appear on the child's birth certificate, notwithstanding:
   1) marital status of the person(s) identified on the order;
   2) genetic relation between the person(s) identified on the order and the child;
   3) sex of the person(s) identified on the order.

b) The gestational surrogate shall not appear on the child's birth certificate.

2. Intent/Labor-Based Parentage Statute

A legislature may be uncomfortable with divesting a gestational surrogate of any parentage rights to a future child prior to the commencement of her gestational role.[188] Thus, statutory provisions can analogize surrogacy to a quasi-adoption arrangement, recognizing a surrogate—either traditional or gestational—as the legal mother before and at the child's birth. While such a framework offers surrogates an enhanced role relative to the pre-conception parentage order statute, intent-based and labor-based considerations can protect the intended

188. *See supra* Part II.B.

parents' indispensable role in the reproduction process. And further, safeguards can be codified to ensure that a non-intended biological parent cannot move to disestablish parenthood while the child is in utero, despite the surrogate's recognition as the legal mother.

PROPOSED STATUTE

Subdivision 1. Pre-Birth Parentage Order.

a) Any person who intends to parent a child born through traditional or gestational surrogacy must sign a pre-birth parentage order (order) after a surrogate's post-conception gestation of a fertilized ovum or ova begins, but prior to the child's birth.
   1) At least one person, and no more than two persons, shall be identified on the order as intending to parent the future child.
      A) If one person is identified on the order, that person shall be recognized as the future child's parent.
      B) If two persons are identified on the order, those persons shall be recognized as the future child's parents.
   2) The surrogate shall be recognized as the future child's legal mother during gestation.

b) The order shall be enforceable, notwithstanding:
   1) marital status of the person(s) identified on the order;
   2) genetic relation between the person(s) identified on the order and the future child;
   3) sex of the person(s) identified on the order.

Subdivision 2. Recognition of Parents at Birth.

a) After the child's birth, the surrogate—traditional or gestational—and any person identified on the order who shares genetic relation with the child shall be recognized as the child's parents.

b) Traditional Surrogacy. The surrogate shall have up to 72 hours after the child's birth to seek recognition as the child's legal parent.[189]

189. Such a time frame may appear unduly unequivocal. The time frame provision, however, draws heavily from current adoption statutes. For example, forty-seven states and the District of Columbia statutorily specify "when a birth parent may execute consent to adoption." CHILD WELFARE INFO. GATEWAY, CONSENT TO ADOPTION 4 (2013), https://www.childwelfare.gov/pubPDFs/consent.pdf. Thirty-one states require a post-birth waiting period, "[t]he most common waiting period . . . [being] 72 hours." *Id.*

1) The surrogate will automatically receive recognition as a legal parent.
2) If the surrogate fails to act within 72 hours after the child's birth, the person(s) identified on the order shall appear on the child's birth certificate, notwithstanding:
   A) marital status of the person(s) identified on the order;
   B) genetic relation between the person(s) identified on the order and the child;
   C) sex of the person(s) identified on the order.

c) Gestational Surrogacy. The surrogate shall have up to 72 hours after the child's birth to seek recognition as the child's legal parent.
1) A gestational surrogate will not automatically receive recognition as a legal parent. The court shall weigh the surrogate's parentage claim against that of the person(s) identified on the order.
   A) Any person(s) identified on the order shall receive recognition by way of:
      (i) intent to parent;
      (ii) time, money, and labor invested in executing the surrogacy agreement;
      (iii) the child's best interests;
      (iv) other equitable factors.
   B) A gestational surrogate will only be recognized if the court deems such recognition in the child's best interests.
2) If the surrogate fails to act within 72 hours after the child's birth, the person(s) identified on the order shall appear on the child's birth certificate, notwithstanding:
   A) marital status of the person(s) identified on the order;
   B) genetic relation between the person(s) identified on the order and the child;
   C) sex of the person(s) identified on the order.

C. WEIGHING THE OPTIONS

Each of the above statutes has respective strengths and weaknesses, with both resulting in positive and negative consequences around surrogacy arrangements. After weighing and critiquing both models, each state will need to decide which op-

tion best matches the needs, and socioeconomic and political composition, of its constituency.

At least in the realm of gestational surrogacy, the pre-conception birth order statute displays the opportunity for the clearest and most consistent outcomes: the future child will not be viewed as the child of the gestational carrier, but instead of the intended parents. Due to constitutional concerns,[190] such certainty cannot attach to traditional surrogacy arrangements; as a result, same-sex parents, choosing to procreate through this avenue, must rely on comparatively more-uncertain pre-birth parentage orders or traditional adoptions. Statutorily codifying such a disparity, however, can be justified as simply following trends in surrogacy arrangements. Indeed, "ninety-five percent of surrogacy arrangements in the United States are gestational."[191] As a result, implementing statutes requiring a pre-conception parentage order would create certainty in legal parenthood for almost all surrogacy arrangements.

Though such certainty appears attractive, the corollary is that such statutes may incentivize individuals to pursue gestational surrogacy when they would otherwise prefer traditional surrogacy arrangements—the ultimate effect being the herding of collective procreative decision-making in the LGBT community. Furthermore, preference aside, such incentivization toward gestational surrogacy may price future parents out of the option. From conception to birth, the average gestational surrogacy costs approximately $100,000, after taking legal fees, medical procedure expenses, and surrogate compensation into account.[192] Individuals desiring the statutory certainties of gestational surrogacy may be unable to afford this avenue, forcing them either to pursue a traditional surrogacy arrangement or to leave the surrogacy market altogether.

Surrogacy also poses quandaries amongst select demographics throughout the United States, with opponents severely opposed to its practice on ethical grounds.[193] Based on

190. *See supra* Part III.A.2.a.

191. Dana, *supra* note 4, at 363.

192. *See supra* note 143 and accompanying text.

193. *See generally* Rosalie Ber, *Ethical Issues in Gestational Surrogacy*, 21 THEORETICAL MED. & BIOETHICS 153 (2000) (arguing that gestational surrogacy is a form of prostitution and slavery as well as an exploitation of the poor); Jennifer Lahl & Christopher White, *Why Gestational Surrogacy Is Wrong*, NAT'L REV. ONLINE (Apr. 10, 2014), http://www.nationalreview.com/article/375364/why-gestational-surrogacy-wrong-jennifer-lahl-christopher-white (arguing that there are medical and moral consequences of paying

the demographic composition of a given state, legislatures may feel inherent discomfort with advocating for pre-conception parentage orders. Wholly divesting gestational surrogates of any parentage rights before her gestational role begins would certainly meet political backlash in states where surrogacy is already ethically suspect. In response, pre-birth parentage orders effectively make surrogacy appear more akin to a quasi-adoption process, which can have the effect of increased institutional support for—or alternatively, reduced inherent discomfort with—surrogacy. While this provides less certainty than the pre-conception corollary, it can achieve overall enhanced legal certainty in defining parenthood, as compared to surrogacy arrangements pursued absent statutory safeguards.

Unlike the pre-conception parentage order statute, this approach does not implicate constitutional concerns around traditional surrogacy, as it does not entail divesting parentage rights in a surrogate pre-birth. This results in a policy tradeoff. Though pre-birth parentage orders offer less certainty than pre-conception parentage orders, it permits a more equal level of protection between traditional and gestational surrogacy agreements. As a result, couples that prefer traditional surrogacy for personal and economic reasons are afforded more uniform parentage safeguards, instead of being herded toward gestational surrogacy or forced to exit the surrogacy market.

It will be for each state to decide ultimately which model framework will best fit its needs and the needs of its constituency. In so electing, states must keep in mind the fundamental problem underlying reform: existing frameworks do not currently guarantee that children born to same-sex parents will maintain legal ties to both intended parents upon dissolution of the relationship. To the extent that there remains a generalized preference for children having two parents, either of these statutes will help to effectuate and realize that goal.

CONCLUSION

Parenthood was once easily determined: when a married couple conceived of a child through sexual reproduction, the mother and her husband were legally bound as parents. The deviation from the historic unification of sex, reproduction, and marriage during the late-twentieth century, however, introduced inherent uncertainty of what it means to be a parent.

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women to gestate babies and that women and children are exposed to exploitation).

This collapse of the prototypical traditional family unit necessitated revisualization of centuries-old common law. Today, social perceptions around parenthood are now challenged once more by way of same-sex couples not only receiving legal marital recognition, but also the capacity to reproduce biologically through assisted reproductive means. Yet, intended same-sex parents cannot rely exclusively on the current frameworks to confer legal parenthood through surrogacy.

With family law arriving at a new crossroads, a new basis to define legal parentage when same-sex couples procreate through surrogacy is necessary. Such redefinition requires not just social reconceptualization, but legislative action toward statutory clarification. This Note posits two model frameworks for states to adopt and tailor: one requiring a pre-conception parentage order, and the other requiring a pre-birth parentage order. These statutory frameworks will not only create a portable set of cross-jurisdictional parentage rights, but will also better define what makes a person a parent as well as what triggers severing a surrogate's parental status. To the extent that a generalized preference exists for children being raised with the support of two parents, such statutory proposals will help achieve a child's best interests regardless of the sex or marital status of her or his parents when she or he is born.

ARTICLE: Whither the Functional Parent?: REVISITING EQUITABLE PARENTHOOD DOCTRINES IN LIGHT OF SAME-SEX PARENTS' INCREASED ACCESS TO OBTAINING FORMAL LEGAL PARENT STATUS

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Text

[*55] INTRODUCTION

Until relatively recently, the law did not provide avenues through which both members of a same-sex couple could gain recognition as the parents of the children they were raising together. Instead, generally only the member of the same-sex couple who was the child's biological parent was recognized as the child's legal parent, and the nonbiological parent was considered a legal stranger to the child. [1] Historically, nonbiological parents in same-sex relationships could not gain legal parent status because the traditional avenues for establishing legal parent status in the United States have been based upon biology, marriage, and adoption. [2] Since joint biological parenthood was not an option for same-sex couples and for most of the nation's history members of same-sex couples could not marry each other or adopt each other's legal children, the traditional avenues for establishing legal parent status excluded nonbiological parents raising children in same-sex relationships. [3] As a result, if upon the dissolution of the **[*56]** relationship between the "formal legal parent" [4] and the nonbiological parent, the formal legal parent restricted or terminated the nonbiological parent's access to the child, the nonbiological parent generally was left

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[1] Jessica Feinberg, *Consideration of Genetic Connections in Child Custody Disputes Between Same-Sex Parents: Fair or Foul?*, 81 MO. L. REV. 331, 334, 348 (2016).

[2] Pamela Laufer-Ukeles & Ayelet Becher-Prigat, *Between Function and Form: Towards a Differentiated Model of Functional Parenthood*. 20 GEO. MASON L. REV. 419, 428 (2013).

[3] *See infra* notes 22-28 and accompanying text.

[4] For purposes of this article, the term lormal legal parent" will refer to individuals the law concludes or presumes are legal parents as a result of status-based indicators such as, for example, biology, marriage, and adoption.

without legal recourse. [5] In such situations, courts usually denied nonbiological parents any rights to custody or visitation, which effectively ended the relationship between a child and an individual who had functioned, oftentimes since birth, as the child's parent. [6]

In an effort to avoid the harsh results stemming from the application of the traditional avenues of establishing legal parent status to nonbiological parents raising children in same-sex relationships, a number of courts and legislatures adopted doctrines to grant visitation or custody rights under certain circumstances to individuals who had functioned as a child's parent, but who were unable to attain formal legal parent status under existing law. [7] Common titles for such doctrines include "de facto parentage, psychological parent, in loco parentis, [and] parent by estoppel." [8] While the doctrines differ by jurisdiction, they commonly provide visitation- or custody-related rights to individuals who, with the legal parent's consent or encouragement., have lived with the child and have functioned as the child's parent by forming a parent-like bond with the child and assuming the obligations of parenthood. [9] This article will refer to such doctrines collectively as "equitable parenthood doctrines."

Over the years, at least eighteen states have adopted equitable parenthood doctrines that grant child custody or visitation rights in certain circumstances to individuals who are not formal legal parents, but who have functioned in a parental role to a child (functional parents). [10] Proponents of equitable parenthood doctrines stress the essential role that such doctrines play in promoting the well-being and best interests of **[*57]** children, who may suffer significant short- and long-term harm when the relationship they share with an individual whom they view as a parent is severed. [11] Proponents also stress the strict requirements that must be satisfied in order for an individual to qunlify under these doctrines, which generally limit application of the doctrine to truly compelling cases involving individuals who have functioned, with the formal legal parent's consent, as a parent to the child. [12] Conversely, opponents of equitable parenthood doctrines maintain that the standards employed in such doctrines are complicated, non-objective, fact-intensive and lead to unpredictable results, and claim that the adoption of such doctrines results in litigation that is costly, lengthy; and contentious. [13] Other opponents have stressed the belief that by granting functional parents custody and visitation rights over the wishes of formal legal parents, the doctrines infringe on legal parents' fundamental rights to direct the care, custody, and control of their children. [14] Despite the differing views regarding equitable parenthood doctrines, the number of jurisdictions that have adopted

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[5] Feinberg, *supra* note 1, at 348.

[6] *Id.*

[7] *See infra* Section 1.8.1.

[8] Joanna L. Grossman, *The New Elegitimacy: Tying Parentage to Marital Status for Lesbian Co-Parents*, 20 AM. U. J. GENDER SOC. Pon' & L 671, 677 (2012); *see* also Laufer-Ulteles & Blecher-Prigat *supra* note 2, at 446 (-Thus, although achieving functional parental status requires meeting a significant set of criteria, once the conditions are met, many jurisdictions treat functional parental figures as replacements for and equivalent to formal parents.").

[9] *See infra* notes 83-85 and accompanying text.

[10] Steven W. Fitschen & Eric A. DeGrofC *Is it Time for the Court to Accept the* O.F.F.E.R.1: *Applying* Smith v. Organization of Foster Families for Equality and Reform *to Promote Clarity, Consistency, and Federalism in the World of De Facto Parenthood*, 24 S. CAL. INTERDISC. L.J. 419, 427 (2015)

[11] *See infra* notes 53-71 and accompanying text.

[12] *See infra* notes 112-115 and accompanying text.

[13] *See infra* note 118 and accompanying text.

[14] *See infra* note 117 and accompanying text.

such doctrines that provide visitation- or custody-related rights to functional parents in same-sex relationships has increased significantly over the past thirty or so years. [15]

Recent developments in laws governing same-sex parentage, however, have created new questions regarding the future of equitable parenthood doctrines. More specifically, as a result of the nationwide legalization of same-sex marriage in 2015 and the increasing number of jurisdictions recognizing second parent adoption in recent years, a growing number of marriage- and adoption-based avenues to establishing formal legal parent status are now available to nonbiological parents raising children within same-sex relationships. [16] Due to the fact that it was, in significant part, the historical denial of avenues to establishing formal legal parent status for nonbiological parents raising children within same-sex relationships that led many courts and legislatures to adopt equitable parenthood doctrines, these same entities may conclude that now that such parents have access to formal avenues to establishing legal parent status, equity no longer requires application or adoption of equitable parenthood doctrines. In fact, in cases involving same-sex parents, several courts have already cited as a justification for declining to **[*58]** adopt or apply equitable parenthood doctrines the availability of a formal avenue through which the individual seeking parental rights could have established legal parent status. [17]

This article argues that courts and legislatures should continue to adopt and apply equitable parenthood doctrines, despite the increasing availability to nonbiological parents raising children within same-sex relationships of formal avenues to establishing legal parent status. As an initial matter, the current avenues to establishing formal legal parent status for nonbiological parents raising children within same-sex relationships generally require marriage, adoption, or both. [18] Importantly, there are many reasons for why same-sex parents may not pursue these marriage- or adoption-based avenues that are completely unrelated to the relationship between the parents or between the parents and their children. Moreover, excluding equitable parenthood doctrines due to the availability to same-sex couples of marriage- or adoption-based avenues for establishing legal parent status would further exacerbate the law's discriminatory treatment of same-sex parents and disproportionately harm same-sex couples and their children. This is because, unlike same-sex couples, different-sex couples raising children have access to a variety of avenues to establishing legal parent status that require neither marriage nor adoption. [19] Moreover, even if in the future same-sex parents receive greater access to the formal avenues of establishing legal parent status available to different-sex parents, equitable parenthood doctrines will still serve an important function. There will always be couples who, despite jointly raising their children, are unable or unwilling for various reasons to take the steps necessary to establish formal **[*59]** legal parent status for the functional parent, and it is both unfair and unwise to punish children so harshly for the actions of their parents. A legal approach that categorically refuses to

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[15] *See infra* note 84 and accompanying text.

[16] *See infra* Section II.A.

[17] A.H. v. M.P., 857 N.E.2d 1061, 1065, 1073-74 (Mass. 2006) (refusing to apply an equitable parenthood doctrine despite the fact that the plaintiff had planned with the defendant for the child's birth, attended prenatal activities, helped care for the child for the first year and a half of the child's life, and was referred to as "Mama" by the child, and stating that "[i]n this jurisdiction, same-sex couples, like heterosexual couples, are free to adopt the children of their partners"); Debra H. v. Janice R., 930 N.E.2d 184, 189, 194 (N.Y. 2010) (refusing to apply an equitable parenthood doctrine despite the fact that the plaintiff served as a loving and caring parental figate during the first two and a half years of the child's life and stating that "the right of second-parent adoption … furnishes the biological and adoptive parents of children--and, importantly, those children themselves--with a simple and understandable rule by which to guide their relationships and order their lives"), *abrogated by* Brooke S.B. v. Elizabeth A.C.C., 61 N.E.3d 488 (N.Y2Ol6hTitchenalv. Dexter, 693 A.2d 684 683-87 (Vt. 1997) (refusing to apply an equitable parenthood doctrine despite the fact that the plaintiff had held herself out as the child's parent and had provided the majority of care for the child from the time of the child's birth until the child was three and a half years old, and explaining that nonbiological parents in same-sex relationships have the ability to protect their interests through adoption).

[18] *See infra* Section II.A.

[19] See *infra* Section II.B.1.

provide rights to functional parents is an approach that fails to promote one of family law's most essential goals: protecting the best of interests of children.

The article is organized in the following manner: Part I provides a historical overview of the legal treatment of same-sex parents raising children together and traces the development of equitable parenthood doctrines. Part II identifies and examines the avenues to establishing formal legal parent status that have been extended to same-sex couples in recent years as well as those avenues available to different-sex couples that have not yet been extended to same-sex couples. Part III evaluates whether under current law governing the recognition of parent-child relationships there is a continuing need for equitable parenthood doctrines, and argues that there are compelling reasons for legislatures and courts to continue to adopt and apply equitable parenthood doctrines despite the recent expansion to same-sex couples of various avenues to establishing formal legal parent status. Part IV first evaluates whether recognition of equitable parenthood doctrines will be necessary if, in the future, same-sex parents gain greater access to the formal avenues to establishing legal parent status enjoyed by different-sex parents. After answering this question in the affirmative, Part IV concludes by exploring the role that the LGBT rights movement should play with regard to the maintenance and promotion of equitable parenthood doctrines.

I. THE LAW's TREATMENT OF SAME-SEX PARENTS AND THE DEVELOPMENT OF EQUITABLE PARENTHOOD DOCTRINES

A. The Troubled History of the Legal Treatment of Same-Sex Parents and the Need for Equitable Parenthood Doctrines

Historically, the primary bases for bestowing upon an individual the status of legal parent have included "biology, adoption, [and] marriage." [20] As a result, the laws governing the granting of legal parent status had harsh results for same-sex couples raising children, leaving such couples without the ability to establish both members as the legal parents of the children **[*60]** they were raising. [21] With regard to biology as a basis for bestowing legal parent status, it has functioned by providing legal parent status for women based upon giving birth and for men based upon genetic fatherhood. [22] Since in female same-sex couples only one member can give birth to the child and in male same-sex couples only one member can be the child's genetic father, generally biology only has provided the basis for granting legal parent status to one member of a same-sex couple. [23] With regard to marriage as a basis for providing legal parent status, under the longstanding marital presumption of paternity, the law presumes that the husband of a woman who conceives or gives birth to a child during the marriage is the legal father of the child. [24] The historical exclusion of same-sex couples from the institution of marriage meant that same-sex couples could not establish legal parent status through marriage-based parentage laws. [25] Finally, with regard to adoption as a basis for providing legal parenthood, for most of the nation's history adoption laws across the country did not allow an individual to adopt the legal child of his or her nonmalital partner (thereby excluding

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[20] Laufer-Ulteles & Blecher-Prigat, *supra* note 2, at 428.

[21] See *supra* note 5 and accompanying text.

[22] Feinberg, *supra* note 1, at 340.

[23] *Id.* at 348.

[24] *Id.* at 340-41.

[25] The first state to legalize same-sex marriage was Massachusetts, which did so in 2003. *Same-Sex Marriage, State by State*, PEW RES. CTR. (June 28, 2015), http://www.pewforum.org/2015/06/28/same-sex-marriage-state-by-state/ [https://perma.cc/5FWF-FFLC].

same-sex couples who, until recently, were excluded from the institution of marriage) and did not allow for joint adoption by same-sex partners. [26]

Taken together, the historical legal landscape governing the bases for establishing legal parenthood frequently left same-sex couples raising children in the difficult situation wherein only one member of the couple, the member who was the biological or adoptive parent of the child, formally was recognized as the child's legal parent. In situations in which the parents' relationship dissolved and the formal legal parent restricted or terminated the functional parent's access to the child, the functional parent was often viewed by the court as a legal stranger and denied standing to seek child custody or visitation. [27] Many of these cases involved denying any rights to **[*61]** maintain contact with the child to individuals who had. planned for the child, functioned as the child's parent from the time of the child's birth, and/or formed incredibly strong bonds with the child. [28]

As societal acceptance of same-sex relationships grew over the years, the number of same-sex couples raising children increased and cases involving the custody of their children became more frequent. Leading LGBT rights organizations such as the National Center for Lesbian Rights (NCLR), Lambda Legal Defense and Education Fund, Inc. (Lambda Legal), and Gay & Lesbian Advocates & Defenders (GLAD), [29] consistently played important roles in these cases, representing functional parents or submitting amicus briefs on behalf of functional parents. [30] In case

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[26] *Timeline & Victories*, NAT'L CTR. FOR LESBIAN RIGHTS, http://www.nclrights.org/about-us/mission-history/timeline-of-victories/ [https://perma.cc/W68C-CQDF] ("1986--NCLR represents Annie Affleck and Rebecca Smith as they become one of the first same-sex couples to jointly adopt in the U.S. 1987--NCLR wins one of the first second-parent adoption cases in the country and begins promoting second-parent adoption as a legal strategy for protecting same-sex parent families").

[27] Feinberg, *supra* note I, at 348; Courtney G. Joslin, *Leaving No (Nonmarital) Child Behind*, 48 FAN. L.Q. 495, 497-98 (2014).

[28] Feinberg, *supra* note 1, at 348; Joslin, *supra* note 27, at 498 ("As a result, hundreds, if not thousands, of children were abruptly cut off from one of the only parents they ever knew.").

[29] In February of 2016, the organization changed its name to GLBTQ Legal Advocates & Defenders. Janson Wu, *The Generations of a Name*, GLAD (Feb. 23, 2016), http://www.glad.org/post/the-generations-of-a-name [http://perma.cc/N6PB-FLUU].

[30] *See, e.g.*, Reply Brief of Petitioner A.B., *In re* Visitation with C.B.L., 723 N.E.2d 316 (Ill. App. Ct. 1999) (No. 1-98-2011), 1999 WL 33741226; Brief of Amicus Curiae Lambda Legal Defense & Educ. Fund, Inc., In re Parentage of A.B., 837 N.E.2d 965, (Ind. 2005) (No. 53S01-0511-JV-606, http://www.lambdalegal.org/site/default/files/legal-docs/downloads/in-re-parentage-of-ab_in_20050112_amicus-lambda-lagal.pdf [https://perma.cc./D8HL-SYLZ] (in support of the petitioner); Brief of Amici Curiae Am. Civil Liberties Union et al., inSupport of Plaintiff-Appellee, Frazier v. Gaudschaal, 295 P.3d 542 (Kan. 2013) (No. 103,487), 2010 WL 3406816; Brief of Appellee C.E.W., C.E.W. v. D.E.W., 845 A.2d 1146 (Me. 2004) (No. CUM-02-534), 2002 WL 32949148 (in support of the petitioner); Brief of Amicus Curiae Lambda Legal Def. & Educ. Fund, Inc., Conover v. Conover, 141 A.3d 31 (Md. 2016) (No. 79), https://freestate-justice.org/wp-content/uploads/2016/02/Conover-2016.02.25-Amicus-Brief-of-Lambda-Legal.pdf [https://perma.cc/9NF5-2B6M] (in support of the petitioner); Brief of Amicus Curiae Nat']Ctr. for Lesbian Rights et al., Janice M. v. Margaret K., 948 A.2d 73 (Md. 2008) (No. 122), 2007 WL 1336442 (in support of the respondent/cross-petitioner); Appellants' Brief, White v. White, 293 S.W.3d 1 (Mo. Ct. App. 2009) (No. WD69580), 2008 WL 4143932; Brief of Amicus Curiae Nat'l Ctr. for Lesbian Rights in Support of Plaintiff-Appellant, Latham v. Schwerdtfeger, 802 N.W.2d 66 (Neb. Ct. App. 2011) (No. S-10-742), 2010 WL 4892503; Brief of Amici Curiae Nat'l Ctr. for Lesbian Rights et al., Debra H. v. Janice R., 930 N.E.2d 184 (N.Y. 2010) (No. 106569/08), http://www.lambdalegal.org/in-court/legal-doc/debra-h_ny_20100504_lgbt-groups-amicus [http://perrma.cc/WYS6-D88L] (in support of petitioner); Brief of Amicus Curiae Nat'l Ctr. of Lesbian Rights inSupport of Appellant Michele Hobbs, In re Mullen, 953 N.E.2d 302 (Ohio 2011) (No. 2010-02625), 2010 WL 9012297; Brief of Amicus Curiae Lambda Legal Def. & Educ. Fund, Inc. et al., on Behalf of Appellants, In re Bonfield, 780 N.E.2d 241 (Ohio 2002) (No. 2001-0625), 2001 WL 34555949; Brief for Appellant, T.B. v. L.R.M., 874 A.2d 34 (Pa. Super. Ct. 2005) (No. 1241 WDA 2004), 2004 WL 3317890; Brief of Amid Curiae Gay & Lesbian Advocates & Defenders et al., Rubano v. DiCenzo, 759 A.2d 959 (R.I. 2000) (No. 97-604-A), 1997 WL 33808968 (in support of the petitioner); Amicus BriefeLesbian & Gay Rights Project of the Am. Civil Liberties Union et al., In re Parentage of L.B., 122 P.3d 161 (Wash. 2005) (No. 75626-1), 2003 WL 23875746 (in support of the petitioner); Amici Curiae Brief of Nat'l Ctr. for Lesbian Rights et at., In re Parentage of L.B., 122 P.3d 161 (Wash. 2005) (Nos. 75628-1 & 52151-9-1), 2005 WL 723841 (in support of the appellant/respondent); Brief of

after case over the years, these leading LGBT **[*62]** rights organizations argued forcefully for the application of equitable parenthood doctrines to protect the rights and well-being of children and their functional parents, [31] and the arguments in favor of protecting the relationships between children and their functional parents have garnered substantial success. [32] Troubled by the prospect of completely severing the relationship between a child and an adult who had functioned as the child's parent, courts and legislatures in some jurisdictions began to adopt equitable parenthood doctrines to grant custody-and visitation-related parental rights to individuals who had functioned as parents but who lacked legal parent status. [33]

In its influential 1995 decision *In re Custody of H.S.H.-K.*, [34] the Wisconsin Supreme Court rendered one of the earliest decisions granting custody or visitation rights to a functional same-sex parent [35] and established what has since become the most widely adopted test for determining whether an individual qualifies for relief under states' equitable parenthood doctrines [36] The case involved a same-sex couple, Ms. Knott and Ms. Holtzman, who together planned for the conception of their child via donor insemination of Ms. Knott. [37] The couple "attended obstetrical visits and childbirth classes together[,] . . ., [and] [Ms.] Holtzman was present during labor and delivery." [38] The child was given a last name that combined Ms. Holtzman and Ms. Knott's last names. [39] Following the child's birth, "[Ms.] Holtzman provided the primary financial support for [Ms.] Knott, herself and the child and both women shared child-care responsibilities." [40] The couple had co-parented the child together in this manner for four years by the time their relationship ended. [41] Approximately eight months after the couple's relationship ended, Ms. Knott cut off all contact **[*63]** between Ms. Holtzman and the child, and Ms. Holtzman subsequently filed for custody and visitation. [42]

Although the guardian ad litem reported to the trial court that the child believed Ms. Holtzman was his parent and wished to spend time with her, and the court found that Ms. Holtzman had "devoted herself to the child," [43] it

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Amicus Curiae Nat'l Ctr. of Lesbian Rights, Sinnott v. Peck, No. 2015-426 (Vt. Argued May 24, 2016) (No. 2015-426), 2015 WL 10007643; Amicus Brief of Nat'l Ctr. for Lesbian Rights, In re Custody of H.S.H-K, 533 N.W.2d 419 (Wis. 1995) (No. 1993AP2911), 1994 WL 17084701 (in support of the petitioner).

[31] *See supra* note 30 (compiling briefs from leading LGBT rights organizations arguing in favor of the application of equitable parenthood doctrines).

[32] *See infra* Section I.B.1.

[33] Rebecca Aviel, *A New Formalism for Family Law*, 55 WM. & MARY L. REV. 2003, 2053 (2014) ("To avoid the kind of injustices described above and the manifest harm to the children involved, courts have been increasingly responsive to claims that someone who has functioned as a parent should have some legally protectable rights that overcome the objection of the legal parent, even when the statutory scheme makes no such provision.").

[34] In re Custody of H.S.H.-K., 533 N.W.2d 419 (Wis. 1995).

[35] Kimberly D. Richman, *(When) Are Rights Wrong? Rights Discourses and Indeterminacy in Gay and Lesbian Parents' Custody Cases*, 30 L. & SOC. INQUIRY 137, 151 (2005).

[36] Grossman, *supra* note 8, at 677-79.

[37] *In re* Custody of H.S.H.-K, 533 N.W.2d at 421.

[38] *Id.*

[39] Id. at 422.

[40] *Id.*

[41] Id. at 421-22.

[42] Id. at 422.

[43] *Id.*

nonetheless reluctantly granted summary judgment in favor of Ms. Knott. [44] The trial court explained that the relevant custody and visitation laws did not recognize the relationship "between a child and a parent's nontraditional partner." [45] The trial court stressed that by ignoring the trauma experienced by children upon the termination of their relationship with a parent-like figure, the law failed to promote the best interests of children. [46] The trial court urged the legislature "to reexamine the law in light of the realities of modern society." [47]

On appeal, the Wisconsin Supreme Court held that despite the fact that none of the existing child custody or visitation statutes directly applied to Ms. Holtzman's situation, the court nonetheless had equitable power to hear her claim for visitation if she could prove that she shares a "parent-like relationship with the and that a significant triggering event justifies state intervention in the child's relationship with a biological or adoptive parent." [48] The court developed a multipart test to determine whether it was within the court's equitable power to hear a petition for visitation. [49] The first part of the test requires the petitioner to prove each of the following four elements:

> (1) that the biological or adoptive parent consented to, and fostered, the petitioner's formation and establishment of a parent-like relationship with the child; (2) that the petitioner and the child lived together in the same household; (3) that the petitioner assumed obligations of parenthood by taking significant responsibility for the child's care, education and development, including contributing towards the child's support, without expectation of dial compensation; and (4) that the petitioner has been in a parental role for a length of time sufficient to have established with the child a bonded, dependent relationship parental in nature. [50]

The second part of the test requires the petitioner to demonstrate that a "triggering event" has occurred that "justif[ies] state intervention in the child's relationship with a **[*64]** biological or adoptive parent" by proving that the legal parent "interfered substantially with the petitioner's parent-like relationship with the child, and that the petitioner sought court ordered visitation within a reasonable time after the parent's interfarence." [51] If the petitioner is able to satisfy the test; the petitioner has standing to seek visitation, which the court will award if it determines that such visitation is in the best interests of the child. [52]

Although its decision in *In re Custody of H.S.H.-K.* played an essential role in the development of equitable parenthood doctrines, the Wisconsin Supreme Court was far from the first entity to recognize the importance of relationships between children and individuals who function as their parents. In their 1973 book *Beyond the Best Interests of the Child*, which focused on child placement, hill psychoanalysts Anna Freud, Joseph Goldstein, and Albert Solnit set forth the psychological parent concept. [53] As set forth, this concept emphasized the importance of maintaining continuity in the relationship between a bald and a person who had developed a psychological

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[44] *Id.*

[45] *Id.*

[46] *Id.*

[47] *Id.*

[48] Id. at 421.

[49] *Id.*

[50] *Id.* (footnotes omitted).

[51] *Id.*

[52] *Id.*

[53] *See generally* JOSEPH GOLDSTEIN ET AL., BEYOND THE BEST INTERESTS OF THE CHILD 17-20 (1973).

parenting relationship with that child. [54] A psychological parent was defined not by formal markers such as biology, marriage, or adoption, but instead as a person who "on a continuing, day-to-day basis, through interaction, companionship, interplay, and mutuality, fulfills the child's psychological needs for a parent, as well as the child's physical needs." [55] *Beyond the Best Interests of the Child* highlighted the significant harm to the child that could occur if the child's relationship with a psychological parent was disrupted. [56] Although not without controversy, the theories developed in *Beyond the Best Interests of the Child* have had a significant and enduring influence on the law's approach to resolving issues relating to the placement of children. [57] For example, in custody disputes between legal parents, "[t]he continuity of functional caregiving is central . . . [and] the primary caregiver is regularly considered the preferred custodial **[*65]** parent." [58] Notably, over one thousand child custody cases have cited *Beyond the Best Interests of the Child*. [59]

Subsequent research has provided further support for the claims made in *Beyond the Best Interests of the Child* regarding the importance of the relationship between a child and an individual who functions as the child's parent. For example, subsequent research has found that attachment relationships between children and adults form through an adult's conduct as a parental figure, not through his or her status as a legal parent. [60] Specifically, attachment relationships form through an adult's "provision of physical and emotional care, continuity or consistency in the child's life and emotional investment in the child." [61] Importantly, there are a variety of ways in which the attachment relationships formed between children and the adults in their lives who function as parents are critical to children's well-being and development. These relationships "serve to protect the child's development, forming the building blocks for the emerging sense of emotional security, the ability to cope with stress, and an increased self-awareness." [62] "Secure attachment relationships lead[] to the [child's] 'development of awareness, social competence, conscience, emotional growth and emotional regulation.'" [63] Moreover, research in the fields of neurology and psychology indicates that the primary environmental factor that shapes brain development during the time of maximum growth is a child's attachment reiationships. [64]

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[54] *See id.* at 31-34, 99-100.

[55] *Id.* at 98.

[56] *See id.* at 31-34.

[57] June Carbone, *Child Custody and the Best Interests of Children--A Review of* From Father's Property to Children's Rights: The History of Child Custody in the United States, 29 FAM. L.Q. 721, 735 (1995) (book review) ("[O]ver the last thirty years, the single most influential work on the interests of children is Goldstein, Freud, and Solnit's concept of the 'psychological parent' with whom the child has emotionally bonded.").

[58] Laufer-Ukeles & Blecher-Prigat, *supra* note 2, at 430.

[59] DOUGLAS E. ABRAMS ET AL., CONTEMPORARY FAMILY LAW 806 (4th ed. 2015).

[60] Linda D. Elrod, *A Child's Perspective of Defining a Parent: The Case for Intended Parenthood*, 25 BYU J. PUB. L. 245, 249-50 (2011).

[61] Id. at 249.

[62] Id. at 250.

[63] *Id.* (quoting NAT'L RES. COUNCIL, & INST. OF MED., FROM NEURONS TO NEIGHBORHOODS: THE SCIENCE OF EARLY CHILDHOOD DEVELOPMENT 234, 226, 265 (Jack P. Shonkoff & Deborah A. Phillips eds. 2000)).

[64] Brief of Amici Curiae Nat'l Ass'n of Soc. Workers et al., in Support of Petitioner-Appellant Debra H.'s Appeal at 11, Debra H. v. Janice R. 930 N.E.2d 184 (N.Y. 2010) (No. 106569/08), http://www.lambdalegal.org/in-court/legal-docs/debra-h_ny_20100504_brief-of-nasw-amici [https://perma-cc/2LZU-XCQX].

If the relationship between a child and an adult with whom he or she has formed an attachment relationship is disrupted, it can be very detrimental to the overall well-being of the child. [65] The disruption of attachment relationships can cause significant both short- and long-term psychological and emotional harm to children. [66] For example, when the relationship between **[*66]** an infant or toddler and psychological parent is disrupted, the child suffers anxiety and separation distress, and may have difficulty trusting the individuals with whom they form relationships in the future. [67] In addition, the disruption of an attachment relationship may cause children to regress in various areas of development. [68] Disruption of attachment relationships during childhood also can lead to "aggression, fearful relationships, academic problems in school and . . . elevated psychopathology," [69] and disruption experienced during childhood may continue to affect an individual even during adulthood. [70] Overall, "[o]nce an adult has lived with and cared for a child for an extended period of time and become that child's psychological parent, removing that "parent' from the child's life results in emotional distress in the child and a setback of ongoing development " [71] Recognizing the extensive research highlighting the importance of relationships between children and the individuals who function as their parents, a number of jurisdictions have adopted equitable parenthood doctrines.

B. The Current State of Equitable Parenthood Doctrines

1. Jurisdictions That Have Adopted Equitable Parenthood Doctrines

Following the Wisconsin Supreme Court's decision in *In re Custody of H.S.H.-K*, a number of other jurisdictions adopted equitable parenthood doctrines through judicial or legislative action. At least eighteen states have now adopted equitable parenthood doctrines that grant child custody or visitation rights in certain circumstances to individuals who have functioned in a parental role to a child. [72] Though many of the equitable parenthood doctrines share core similarities with the **[*67]** one adopted in *In re Custody of H.S.H.-K.*, the doctrines in existence today are not uniform in name or substance across jurisdictions. Among the jurisdictions that have adopted equitable parenthood doctrines, various titles have been given. The most common titles include "de facto parentage, psychological parent, in loco parentis, [and] parent by estoppel." [73] Jurisdictions also differ with regard

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[65] *Id.* at 18.

[66] Frank J. Dyer, *Termination of Parental Rights in Light of Attachment Theory: The Case of Kaylee*, 10 PSYCHOL. PUB. POL'Y & L. 5, 11 (2004) ("In sum, there are numerous empirical findings that provide a solid research basis for predictions of long-term harm associated with disrupted attachment and loss of a child's central parental love objects."); Elrod, *supra* note 60. at 250-51 ("Continuity of the parent-child relationship is essential to the child's overall well-being. When an attachment relationship is severed by one parent dropping out of a child's life, the child suffers emotional and psychological harm. Disrupting attachments can turn a securely attached child into an insecure one."); Rebecca L. Scharf, *Psychological Parentage*, Trawl, *and the Best Interests of the Child*. 13 GEO.J. GENDER & L. 615, 634-35 (2012).

[67] GOLDETEIN ET AL., *supra* note 53, at 33.

[68] *See id.* at 33-34.

[69] Brief of Amici Curiae Nat'l Asen of Soc. Workers et al., *supra* note 64, at 18 (omission in original) (quoting Ana H. Marty et al., *Supporting Secure Parent-Child Attachments: The Role of the Non-Parental Caregiver*, 175 EARLY CHILD DEV. & CARE 271, 274 (2005)).

[70] GOLDSTEIN ET AL., *supra* note 53, at 34.

[71] Scharf, *supra* note 66, at 634.

[72] Fitschen & DeGroff, *supra* note 10, at 427-28.

[73] Grossman, *supra* note 8, at 677; Laufer-Ukeles & Blecher-Prigat, *supra* note 2, at 446 ("Thus, although achieving functional parental status requires meeting a significant set of criteria, once the conditions are met, many jurisdictions treat functional parental figures as replacements for and equivalent to formal parents.").

to whether individuals who would otherwise satisfy the requirements of the relevant doctrine can be recognized in situations in which the child already has two formal legal parents. [74] In addition, the position occupied by individuals who qualify under these doctrines for purposes of determining custody and visitation rights varies significantly depending on the jurisdiction. [75] More specifically, in a few jurisdictions, individuals who qualify under these doctrines are treated as equal to legal parents for purposes of both custody and visitation determinations. [76] In at least one jurisdiction, a **[*68]** qualifying individual is treated as equal to a legal parent for purposes of visitation determinations, but not custody determinations. [77] In a significant number of jurisdictions qualifying individuals are merely given standing to seek visitation and/or custody, [78] and must meet higher burdens (the language of which differ by jurisdiction) than legal parent [79] in order to obtain such rights. [80] Finally, the elements

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[74] COURTNEY JOSLIN ET AL, LESBIAN, GAY, BISEXUAL & TRANSGENDER FAMILY LAW § 7:14 (2016).

[75] *See* Grossman, *supra* note 8, at 677.

[76] *See, e.g.*, Pitts v. Moore, 90 A.3d 1169, 1181 (Me. 2014) ("A determination that a person is a de facto parent means that he or she is a parent on equal footing with a biological or adoptive parent, that is to say, with the same opportunity for parental rights and responsibilities."); Latham v. Schwerdtfeger, 802 N.W.2d 66, 72 (Neb. 2011) ("[T]he rights, duties, and liabilities of la person *in loco parentis*] are the same as those of the lawful parent."); T.B. v. L.R.M., 786 A.2d 013, 916-17 (Pa. 2001) (stating that in seeking child custody and visitation, "[t]he rights and liabilities arising out of an *in loco parentis* relationship are, as the words imply, exactly the same as between parent and child"); In re Parentage of L.B., 122 P.3d 161, 177 (Wash. 2005) ("We thus hold that henceforth in Washington, a *de facto* parent stands in legal parity with an otherwise legal parent, whether biological, adoptive, or otherwise?). Whether the Establishment of a Parent-Child Relationship Under Delaware's de facto Parent Law Entitles Gabrielle to Child's Benefits on the Earnings Record of the Number Holder, Kathy. PR 01005.009 Delaware (Soc. Sec. Admin. July 10, 2012), https://secure.ssa.gov/poms.nsf/Inx/1501005009https://perma.cc/M5VC-MLDJ] ("According toSection 8-201 of Title 13 of the Delaware Code, there is no legal difference between the parent-child relationship of a natural mother/father and child, an adoptive mother/father and child, and a de facto parent and child."); see also Conover v. Conover, 146 A.3d 433, 463 (Md. 2016) ("We hold that de facto parents have standing to contest custody or visitation and need not show parental unfitness or exceptional circumstances before a trial court can apply a best interests of the child analysis."). See Grossman, *supra* note 8, at 677 ("In a few states, once a third party has established de facto or psychological parent status, she stands in parity to a legal parent."). In two of these jurisdictions, Delaware and Maine, parents who qualify under the relevant equitable parenthood doctrines are designated by statute as legal parents. JOSLIN ET AL., *supra* note 74, § 7:14; DEL. CODE. ANN. tit. 13, §§ 8-201, 8-203 (2016); ME. REV. STAT. ANN. tit. 19-a, §§ 1851, 1891 (2016) (establishing that an adjudication of de facto parentage is one way to establish legal parentage). Although the New Jersey Supreme Court stated that psychological parents "stand[] in parity" with genetic parents, it also stated that if all else is equal in applying the best interests of the child standard, custody should be given to the legal parent, meaning that psychological parents do not actually stand in parity to legal parents for purposes of custody. V.C. v. M.J.B., 748 A.2d 539, 554 (N.J. 2000).

[77] *See, e.g.,* V.C., 748 A.2d at 554 ("[U]nder ordinary circumstances when the evidence concerning the child's best interests (as between a legal parent and psychological parent) is in equipoise, custody will he awarded to the legal parent. Visitation, however, will be the presumptive rule, subject to the considerations set forth in *N.J.S.A.* 9:2-4, as would be the case if two natural parents were in conflict"); *see also* Laufer-Ukeles & Blecher-Prigat *supra* note 2, at 449 ("In fact, courts applying functional parenthood have in practice followed Ethel presumption [that a functional parent is entitled to visitation but not custody] despite conceptually equalizing parenthood."); *see also* Grossman, *supra* note 8, at 677.

[78] "In two jurisdictions, [Arkansas and Wisconsin,] courts have held that a *de facto* parent may seek visitation, but not custody." JOSLIN ET AL., *supra* note 74, § 7:9.

[79] The standard generally governing custody determinations between fit legal parents is the "best interests of the child" standard. HoNum a CLARK, JR. & ANN LAQUER ESTIN, DOMESTIC RELATIONS: CASES AND PROBLEMS ON DOMESTIC RELATIONS 958 (7th ed. 2005) (citations omitted). With regard to visitation, however, the prevailing approach is that a fit legal parent is entitled to visitation unless the court determines that visitation would be significantly harmful to the child's well-being. ABRAMS ET AL., *supra* note 59, at 915; CLARK & ESTIN, *supra*, at 982-83; ROBERT E. OLIPHANT & NANCY VER STEEGH, FAMILY, LAW: EXAMPLES AND EXPLANATIONS 180 (3rd ed. 2010); UNIF. MARRIAGE & DIVORCE ACT § 407 (NAT'L CONFERENCE OF COMM'RS ON UNIF. STATE LAWS, amended 1973).

that a petitioner must meet in order to qualify under these doctrines also differ somewhat by jurisdiction. [81] All of the doctrines, however, seek to promote the best interests of children by providing visitation- or custody-related rights to individuals who, under specified circumstances, have functioned as a child's parent. While cases applying equitable **[*69]** parenthood doctrines in the context of same-sex parenting arrangements have received the most attention from legal scholars and commentators, individuals who have functioned as parents within the context of different-sex relationships may also seek relief under these doctrines. [82]

The most widely adopted test for determining whether an individual qualifies for relief under a state's equitable parenthood doctrine is the one articulated in *In re Custody of H.S.H.-K.* [83] Many jurisdictions have adopted identical or very similar tests. [84] While not every jurisdiction has adopted a test identical to the one set forth in *In re*

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[80] *See, e.g.*, Kinnard v. Kinnard, 43 P.3d 150, 154 (Ala. 2002) (holding in a custody dispute with a psychological parent, a legal parent should receive custody "unless the trial court determines that the parent is unfit, has abandoned the child, or that the welfare of the child requires that a non-parent receive custody."); Egan v. Fridlund-Horne, 211 P.3d 1213, 1222, 1224 (Ariz. Ct. App. 2009) (holding that in order to obtain visitation, a person who stands in loco parentis must "rebut[] [the] presumption that a fit parent's decision to deny or limit visitation is in the child's best interests," while a legal parent is entitled to visitation "unless the court finds that it would seriously endanger the child's" well-being); A.C. v. N.J., 1 N.E.3d 685, 694 n.6 (Ind. Ct. App. 2013) ("Even assuming Partner is a de facto custodian, she was still required to overcome the presumption in favor of Mother as the natural parent."); McAllister v. McAllister, 779 N.W.2d 652, 658 (N.D. 2010) ("When a psychological parent and a natural parent each seek a court-ordered award of custody, the natural parent's paramount right to custody prevails unless the court finds it in the child's best interests to award custody to the psychological parent to prevent serious harm or detriment to the welfare of the child." (quoting Cox v. Cox., 613 N.W.2d 516, 521-22 (N.D. 2000)); Middleton v. Johnson, 633 8.E.2d 162, 171-72 (EC. Ct. App. 2006) (stating that a person who qualifies as a psychological parent is entitled to visitation only if he or she is able to prove that "compelling circumstances" exist and providing as an example of compelling circumstances a situation where denying visitation would cause significant harm to the child).

[81] See *infra* notes 83-111 and accompanying text.

[82] In fact, the common requirements of the equitable parenthood doctrines contain gender neutral language. *See infra* notes 83-85 and accompanying text.

[83] Brief of Amici Curiae Nat'l Ctr. for Lesbian Rights et al., *supra* note 30. This test requires the petitioner to prove that: (1) the legal parent fostered and consented to the petitioner forming a parent-like relationship to the child; (2) the petitioner lived in a household with the child; (3) the petitioner "assumed obligations of parenthood by taking significant responsibility for the child's care, education and development, including contributing towards the child's support, without expectation of financial compensation;" and (4) "the petitioner has been in a parental role for a length of time sufficient to have established with the child a bonded, dependent relationship parental in nature." In re Custody of H.S.H.-K., 533 N.W.2d 419, 421 (Wis. 1995).

[84] In re K.H., 773 S.E.2d 20, 25 n.7 (W. Va. 2015) ("The general legal principles associated with the psychological parent concept were addressed in a 1995 Wisconsin case, and the criteria enumerated in that four-element test have now become incorporated within the definitions of the psychological parent doctrine utilized by most reviewing courts."). Courts in Maryland, New Jersey, Rhode Island, South Carolina, and Washington have adopted the test articulated in *In re Custody of H.S.H-K. See* Conover v. Conover, 146 A.3d 433, 439 (Md. 2016); V.C. v. M.J.B., 748 A.2d 539, 551 (N.J. 2000); Rubano v. Dicenzo, 759 A2d 959, 974 (R.I. 2000) (adopting the approach of V.C., 748 A.2d 539, which adopted the approach of In re H.S.H-K, 533 N.W.2d 419): Middleton v. Johnson, 633 S.E.2d 162, 168 (S.C. Ct. App. 2006); In re Parentage of L.S., 122 P.3d 161. 176 (Wash. 2005). Very similarly approaches have been adopted in a number of other jurisdictions. *See, e.g.*, E.N.O. v. L.M.M., 711 N.E.2d 886, 891 (Mass. 1999) (defining a de facto parent as "one who has no biological relation to the child, but has participated in the child's life as a member of the child's family. The de facto parent resides with the child and, with the consent and encouragement of the legal parent, performs a share of caretaking functions at least as great as the legal parent. The de facto parent shapes the child's daily routine, addresses his developmental needs, disciplines the child, provides for his education and medical care, and serves as a moral guide." (internal citations omitted)); T.B. v. L.R.M., 788 A.2d 913, 916-20 (Pa. 2001) (explaining that "[t]he status of *in loco parentis* embodies two ideas; first, the assumption of a parental status, and, second, the discharge of parental duties" applies "where the child has established strong psychological bonds with a person who, although not a biological parent, has lived with the child and provided care, nurture, and affection, assuming in the child's eye a stature like that of a parent," and involves situations where the legal parent has consented to and encouraged the petitioner to assume parental status); *In re* K.H., 773. S.E.2d 20, 26 (W. Va. 2015) (explaining that "[a] psychological parent is a person who, on a

Custody of H.S.H.-K., the **[*70]** four elements included in the test, in one form or another, represent the elements that appear most frequently in the eligibility requirements of equitable parenthood doctrines. [85]

With regard to the first element, many states' equitable parenthood doctrines require that the petitioner demonstrate that the child's legal parent consented to or encouraged the formation of a parent-like relationship between the petitioner and the child. [86] This requirement is viewed as important for a variety of reasons. As an initial matter, the consent requirement seeks to avoid judicial infringement on a legal parent's fundamental right to make decisions regarding the care and custody of her child by requiring that the legal parent consents to or encourages, as reflected by her words or conduct, the formation of a parent-like relationship between the petitioner and the child. [87] This requirement is essential because it places the legal parent in control and provides her with complete power to maintain a "zone of privacy" around her child and herself. [88] However, this requirement also recognizes that if a legal parent "wishes to maintain that zone of privacy she cannot invite a third party to function as a parent to her child and cannot cede over to that third party parental authority the exercise of which may create a profound bond with the child." [89] The consent requirement seeks to ensure that the rights of legal parents to determine who functions in a parental role to their children are respected and shields legal parents from intrusive and burdensome custody and visitation claims from individuals who did not have the legal parent's consent to form a parent-like relationship with the child. [90]

[*71] The second element commonly included within equitable parenthood doctrines is that the petitioner resided in a household with the child. [91] While a few states specifically indicate a minimum amount of time for which the

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continuing day-to-day basis, through interaction, companionship, interplay, and mutuality, fulfills a child's psychological and physical needs for a parent and provides for the child's emotional and financial support . . . [and that] Nile resulting relationship between the psychological parent and the child must be of substantial, not temporary, duration and must have begun with the consent and encouragement of the chi ea legal parent or guardian . . . [and that] . . . [i]n the cases in which this Court has determined a person to be a psychological parent to a child, that person typically has resided in the child's household and interacted with the child on a daily basis").

[85] *See infra* notes 86, 91, 98.

[86] Katharine T. Bartlett, *Prioritizing Past Caretaking in Child-Custody Decisionmaking*, 77 L. & CONTEMP. PROBS. 29, 62 (2014) ("Contemporary definitions of de facto parent typically depend, as do the ALI Principles, on, a prior, residential, caretaking relationship with the child, developed with the consent or acquiescence of the parent."). *See, e.g.*, DEL. CODE ANN. tit. 13, § 8-201(c) (2009); Pitts v. Moore. 90 A.3d 1169, 1179-80 (Me. 2014); Conover, 146 A.3d at 439-40; *E.N.O.*, 711 N.E.24 at 892; V.C., 748 A.2d at 551; T.B., 786 A.2d at 918-19; Rubano, 759 A.2d at 974; Middleton, 633 S.E.2d at 168; In re Parentage of L.B., 122 P.3d at 176; In re K.H., 773 S.E.2d at 25-28; In re Custody of H.S.H.-K., 533 N.W.2d at 421. Even when not stated specifically in the definition of the equitable parenthood status, courts often consider whether the legal parent consented to the formation of the relationship. See, e.g., Latham v. Schwerdtfeger, 802 N.W.2d 66, 76 (Neb. 2011).

[87] Rubano, 759 A.2d at 974; In re Custody of H.S.H-K., 533 N.W.2d at 436 ("This exercise of equitable power protects parental autonomy and constitutional rights by requiring that the parent-like relationship develop only with the consent and assistance of the biological or adoptive parent.").

[88] V.C., 748 A.2d at 552.

[89] *Id.*

[90] Brief of Amici Curie Family Law Acads. in Support of Petitioner-Appellant at 8-10, Debra H. v. Janice R., 61 A.D.3d 460 (N.Y. App. Div. 2009) (No. 106569/08), http://www.lambdalegal.org/sites/default/files/2009-11-16_fam_law_academics_amicus_br.pdf [https://perma.cc/K2CE-ANR9].

[91] Bartlett, *supra* note 86, at 62 ("Contemporary definitions of de facto parent typically depend, as do the ALI *Principles*, on, a prior, residential, caretaking relationship with the child, developed with the consent or acquiescence of the parent."). *See, e.g.,* Pitts, 90 A.3d at 1179-80; Conover, 146 A.3d at 439-40; V.C., 748 A.2d at 551; T.B., 786 A.2d at 917; Rubano, 759 A.2d at 974; Middleton, 633 S.E.2d at 168; *In re Parentage of L.B.*, 122 P.34 at 176; In re Custody of H.S.H.-K, 533 N.W.2d at 420.

petitioner must have resided with the child, [92] others do not. [93] When this element is considered with the other elements, however, it becomes clear that the amount of time the petitioner resided with the child must have been sufficient for the petitioner and child to have been able to form a parent-child bond. [94] This requirement is viewed as important because it "provides an additional indicator that the [petitioner] has established a genuine familial relationship with the child," the abrupt termination of which likely would harm the child. [95] In addition, the satisfaction of this requirement provides evidence of both the legal parent's consent to the formation of the relationship between the petitioner and child and the commitment of the legal parent and petitioner to mutually provide care for the child. [96] Moreover, this requirement seeks to further protect the **[*72]** rights of the legal parent by significantly restricting the class of individuals who can make equitable parenthood claims. [97]

The final two common elements of equitable parenthood doctrines, which relate to the petitioner assuming the obligations of parenthood and forming a parent-child bond with the child, are generally viewed as the most important [98] and appear in some form in most equitable parenthood doctrines. [99] The requirement that the petitioner "assumed obligations of parenthood by taking significant responsibility for the child's care, education and development, including contributing towards the child's support, without expectation of financial, compensation," is viewed as important for a number of reasons. [100] As an initial matter, the requirement significantly restricts the class of individuals who are eligible to make claims under the doctrine by excluding anyone who has cared for or

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[92] *See, e.g.*, D.C. CODE § 16-831.01(1) (2016) (defining de facto parent as "an individual . . . [w]ho[] . . . [l]ived with the child in the same household [since] the child's birth or adoption," or "for at least [ten] of the [twelve] months preceding the" petition for de facto parent status); IND. CODE § 31-9-2-35.5 (2016) (setting forth requirements for how long a petitioner has to have resided with the child in order to be a de facto parent); ALI PRINCIPLES OF THE LAW OF FAMILY DISSOLUTION: ANALYSIS AND RECOMMENDATIONS § 2.03 (AM. LAW INST. 2002) (requiring that an individual reside "with the child for at least two years" in order to be considered a de facto parent). To be a de facto custodian under Kentucky law, the primary caregiver for, and financial supporter of, a child who has resided with the person for a period of six (6) months or more if the child is under three (3) years of age." If the child is over three years of age, the de facto custodian must have resided with the child for one year. KY. REV. STAT. § 403.270(1)(a) (West 2016). In addition, courts have interpreted the Kentucky de facto parent statute to preclude recognition as de facto parents of individuals who raised the child along with the legal parent. *See* B.F. v. T.D., 194 S.W.3d 310, 310-12 (Ky. 2006) (holding that a partner who lived with the mother and the mother's adopted child as a family did not have standing to seek custody because the child was in the physical custody of the legal parent).

[93] *See, e.g.,* Pitts, 90 A.3d at 1179-80; Conover, 146 A.3d at 439-40; E.N.O. v. L.M.M., 711 N.E.2d 886, 892 (Mass. 1999); V.C., 748 A.2d at 551; T.B., 786 A.2d at 918-19; Rubano, 759 A.2d at 974; Middleton, 633 S.E.2d at 168; In re Parentage of L.B., 122 P.3d at 176; In re Custody of H.S.H.-K, 533 N.W.2d at 421.

[94] Brief of Amici Curie Family Law Acads, in Support of Petitioner-Appellant, supra note 90, at 10.

[95] Brief of Amici Curiae Nat'l Ctr. for Lesbian Rights et al., *supra* note 30, at 21.

[96] *Id.*; Brief of Amid Curie Family Law Acads. in Support of Petitioner-Appellant, *supra* note 90, at 20, n.7.

[97] Middleton, 633 S.E.2d at 169.

[98] V.C., 748 A.2d at 551 ("[M]ost important, a parent-child bond must be forged."); Middleton, 633 S.E.2d at 169 ("The last two prongs are the most important because they ensure both that the psychological parent assumed the responsibilities of parenthood and that there exists a parent-child bond between the psychological parent and child.").

[99] *See* In re E.L.M.C., 100 P.3d 546, 559 (Colo. App. 2004) ("Who may be deemed a psychological parent for the purposes of seeking and receiving an award of parental responsibilities has been variously defined. Common to these definitions is a relationship with deep emotional bonds such that the child recognizes the person, independent of the legal form of the relationship, as a parent from whom they receive daily guidance and nurturance."). *See, e.g.*, DEL. CODE ANN. tit. 13, § 8-201(c) (2016); Kinnard v. Kinnard, 43 P.3d 150, 154 (Ala. 2002); Conover v. Conover, 146 A.3d 433, 453 (Md. 2016); V.C., 748 A.2d at 551; McAllister v. McAllister, 779 N.W.2d 852, 658 (N.D. 2010); T.B. v. L.R.M., 786 A.2d 913, 914, 916-20 (Pa. 2001); Rubano v. Dicenzo, 759 A.2d 959, 967 (R.I. 2000); Middleton, 633 S.E.2d at 168; In re Parentage of L.B., 122 P.3d 161, 176 (Wash. 2006); In re K.H., 773 S.E.2d 20, 24 (W. Va. 2015); In re Custody of H.S.H.-K., 533 N.W.2d 419, 421 (Wis. 1995).

[100] In re Custody of H.S.H-K., 533 N.W.2d at 421.

supported the child "with[] the expectation of financial compensation." [101] More importantly, it seeks to ensure that the petitioner actually functioned as the child's parent, [102] limiting eligibility "to those adults who have served literally as one of the child's de facto parents." [103] The provision of financial support is not determinative in assessing whether an individual has functioned as a child's parent and assumed the obligations of parenthood. [104] Instead, the inquiry focuses more broadly on the nature and quality of the petitioner's parenting actions and the child's response to those actions. [105]

[*73] The requirement that "the petitioner has been in a parental role for a length of time sufficient to have established with the child a bonded, dependent relationship parental in. nature" is viewed as essential for a variety of reasons, not the least of which is that protecting the well-being of children is one of family law's most critical goals. [106] The requirement is directly related to the child development research, described above, regarding children and the adults with whom they form attachment relationships. [107] More specifically, if a functional parent and child have formed a parent-child bond, then severing that relationship can have significant harmful effects on the child's short- and long-term well-being. [108] Thus, at the heart of this requirement is a deep concern for the well-being of children who have developed parent-child bonds with adults who are not their legal parents and who are facing disruption of that relationship. [109] Testimony from experts such as child psychologists, psychiatrists, and social workers regarding the existence and strength of the parent-child bond generally is necessary fim a court to determine whether the petitioner has satisfied this requirement. [110] The development of a parent-child bond between the child and the petitioner is emphasized heavily in court decisions applying equitable parenthood doctrines because it has long been considered the duty of courts to protect children from harm, and this requirement is the one most clearly linked to the well-being of the children involved. [111]

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[101] *Id.; see also* Rubano, 759 A.2d at 974 ("[A] relationship based on payment by the legal parent to the third party will not qualify." (quoting V.C., 748 A.2d at 552)).

[102] Brief of Amici Curie Family Law Amide, in Support of Petitioner-Appellant, *supra* note 90, at 20.

[103] Rubano, 759 A.2d at 974.

[104] V.C., 748 A.2d at 553.

[105] *Id.*

[106] In re Custody of H.S.H-K., 533 N.W.2d 419, 421 (Wis. 1995); Jane C. Murphy, *Rules, Responsibility and Commitment to Children: The New Language of Morality in Family Law*, 60 U. PITT. L. REV. 1111, 1180-81 (1999) (identifying the "protect[ion] of children" as the "central moral goal of family law").

[107] *See supra* notes 53-71 and accompanying text; see also In re Marriage of Martin, 42 P.3d 75, 77-78 (Cola. App. 2002) (citing the work of Freud, Goldstein, and Solnit for the proposition that "[t]he psychological parent is someone other than a biological parent who develops a parent-child relationship with a child through day-to-day interaction, companionship, and caring for the child . . . [and] once this bond forms, many psychologists believe that breaking up the relationship would be harmful to a child's emotional development" (citing JOSEPH GOLDSTEIN ET AL., THE BEST INTERESTS OF THE CHILD: THE LEAST DETRIMENTAL ALTERNATIVE 11-13, 104, 105 (1996)).

[108] *See supra* notes 56, 85-71; *see also* Brief of Amici Curie Nat'l Ctr. far Lesbian Rights, et al., *supra* note 30, at 24; Brief of Amid Curiae Nat'l Ass'n of Soc. Workers, et al., in Support of Petitioner-Appellant Debra H's Appeal, *supra* note 64 at 10.

[109] In re E.L.M.C., 100 P.3d 546, 561 (Colo. App. 2004) (citing a number of cases for the proposition that "[t]his deep concern about emotional harm to the child as a result of separation from a psychological parent is echoed by other jurisdictions").

[110] V.C. v. M.J.B., 748 A.2d 539, 553 (N.J. 2000).

[111] *See* Mary L. Bonauto, et al., *Equity Actions Filed by De Facto Parents, in* PATERNITY AND THE LAW OF PARENTAGE IN MASSACHUSETTS § 12.2.2(a) (2d ed. 2009) (describing "[Massachusetts'] longstanding parent; patriae powers, in which the state has a duty to promote the welfare of children.").

Overall, proponents of equitable parenthood doctrines argue that the common elements in determining eligibility set **[*74]** an appropriately high threshold. [112] More specifically, the common elements severely restrict the class of individuals who qualify as equitable parents by "protect[ing] the legal parent against claims by neighbors, caretakers, baby sitters, fannies, au pairs, nonparental relatives, and family friends." [113] Only individuals who have resided in the same household as the child and who have, with the consent and encouragement of the child's legal parent, taken on the obligations of parenthood in a manner that results in the formation of a parent-child bond are eligible for relief under the common elements of the equitable parenthood doctrines. Proponents argue that these elements strike the appropriate balance by respecting the rights of legal parents while serving the essential function of protecting from harm children who form parent-child bonds with non-legal parents. [114] As one court stated, "emotional harm to a young child is intrinsic in the termination or significant curtailment of the child's relationship with a psychological parent under any definition of that term." [115] It is precisely this harm that equitable parenthood doctrines seek to prevent.

2. Jurisdictions That Have Declined to Adopt Equitable Parenthood Doctrines

To date, in several jurisdictions courts that have ruled on the issue have expressly declined to adopt equitable parenthood doctrines that provide rights relating to visitation or custody to functional parents over the wishes of formal legal parents. As an initial matter, in declining to adopt equitable parenthood doctrines not expressly provided for by state statute, a number of courts have cited a lack of judicial authority or, similarly, the better position of the legislature, to adopt and define these doctrines. [116] Another common reason courts have given for **[*75]** rejecting these doctrines relates to the belief that by granting functional parents visitation- or custody-related rights over the wishes of formal legal parents, the doctrines infringe on the fundamental rights of formal legal parents to direct the care, custody, and control of their children. [117] In addition, a number of courts have declined to adopt such doctrines on the grounds that the standards employed in the doctrines are complicated, nonobjective,

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[112] Conover v. Conover, 146 A.3d 433, 447 (Md. 2016) ("As other courts adopting this test have recognized, these factors set forth a high bar for establishing de facto parent status . . . ."); Brief of Amid Curiae Nat'l Ctr. for Lesbian Rights et al., *supra* note 30, at 23.

[113] In re E.L.M.C., 100 P.3d at 546.

[114] *See supra* notes 88-90 and accompanying text.

[115] In re E.L.M.C., 100 P.3d at 561; Middleton v. Johnson, 633 S.E.2d 162, 169 (S.C. Ct. App. 2006) (stating that "inherent in the bond between child and psychological parent is the risk of emotional harm to the child should the relationship be curtailed or terminated" (quoting *In re E.L.M.C.*, 100 P.M at 560)).

[116] *See, e.g.,* In re Parentage of Scarlett Z.-D., 28 N.E.3d 776, 790 (Ill. 2015) (declining to adopt a functional parent doctrine because "[t]he very difficulty of [the] policy considerations [surrounding recognition of functional parenthood], and the legislature's superior institutional competence to pursue this debate, suggest that legislative and not judicial solutions are preferable"); Debra H. v. Janice IL, 930 N.E.2d 184, 193 (N.Y. 2010) ("[A]ny change in the meaning of 'parent' under our law should come by way of legislative enactment . . . ."), *abrogated by* Brooke S.B. v. Elizabeth A.C.C., 61 N.E.3d 488 (N.Y. 2016); Jones v. Barlow, 154 P.34 808, 817 *(Utah* 2007) (declining to "overstep its bounds and invade the purview of the legislature" by adopting an equitable parent doctrine); Titchenal v. Dexter, 693 A.2d 682, 689 (Vt. 1997) (reasoning that "[g]iven the complex social and practical ramifications of expanding the classes of persons entitled to assert parental rights by seeking custody or visitation, the Legislature is better equipped to deal with the problem"); LP v. LF, 338 P.34 908, 919-20 (Wy. 2014) ("[W]hen we review the involvement of our legislature in the parent-child relationship, we do not find a gap of sufficient size to permit us to adopt the de facto parent doctrine. . . . We. . . defer[] to the Wyoming Legislature to recognize and define that relationship if it wishes to do so."); *see also In re* No. 04-14--00108-CV, 2015 WL 1120913, at *7 (Tex. App. Mar. 1 I, 2015) ([W]e need not discuss the elements of the psychological parent doctrine because we are confined to examining standing within the statutory framework of the Family Cede? (citing In re H.G., 267 S.W.2d 120, 123-24 (Tex. Ct. App. 2008))); Stadter v. Siperko, 661 S.E.2d 494,498-99 (Va. App. 2008) (declining to "implement--by judicial flat--a visitation doctrine of *de facto* or psychological parent in the Commonwealth").

[117] Janice M. v. Margaret K., 948 A.24 73, 78-87 (Md. 2008), overruled by Conover v. Conover, 146 A.3d 433 (Md. 2016); Debra H., 930 N.E.2d at 193; Jones, 154 P.3d at 816, 818.

fact intensive, and lead to unpredictable results. These courts have stressed that the adoption of such doctrines would result in litigation that is costly, lengthy, and contentious. [118] Similarly, some courts have maintained that formal methods of establishing parental status for a nonbiological parent raising a child within a same-sex relationship, such as adoption, provide a straightforward, bright-line approach to parental determinations that is superior in promoting certainty and stability for parents and their children. [119] Notably, several courts have cited the availability of second parent adoption in the jurisdiction in support of decisions declining to adopt equitable parenthood doctrines. [120]

[*76] II. DEVELOPMENTS IN ACCESS TO AVENUES TO ESTABLISHING FORMAL LEGAL PARENT STATUS FOR NONBIOLOGICAL PARENTS IN SAME-SEX RELATIONSHIPS

A. Avenues of Establishing Formal Legal Parenthood Currently Available to Nonbiological Parents in Same-Sex Relationships

1. Marriage

Today, many of the avenues available for establishing formal legal parenthood are based upon marriage. Until relatively recently, same-sex couples were not able to marry in any jurisdiction in the United States, and thus all of the marriage-based avenues for establishing legal parenthood were simply unavailable to same-sex couples. In 2004, however, Massachusetts became the first state to legalize same-sex marriage. [121] Between 2004 and 2015, same-sex marriage expanded rapidly throughout the United States, culminating with the Supreme Court's decision in *Obergefell v. Hodges*, which held that the remaining state bans on same-sex marriage were unconstitutional and resulted in the recognition of same-sex marriage in every U.S. jurisdiction. [122] This decision has given same-sex couples access to avenues to establishing formal parenthood that were previously unavailable to them.

a. The Marital Presumption of Paternity

The marital presumption of paternity, under which a husband is presumed by law to be the father of a child conceived by or born to his wife during the marriage, is "a longstanding legal presumption in the United States" that still exists in some form in every state. [123] Pursuant to *Obergefell*, in which the Court explicitly stated that states

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[118] *Debra H.*, 930 N.E.241 at 192; Jones, 154 P.3d at 816; Titchenal, 693 A.2d at 687.

[119] *See, e.g.,* Debra H., 930 N.E.2d at 192-96.

[120] A.H. v. M.P., 857 N.E.2d 1061, 1073-74 (Mass. 2006) (stating that "[i]n this jurisdiction, same-sex couples, like heterosexual couples, are free to adopt the children of their partners," and refusing to apply an equitable parenthood doctrine in a situation in which the plaintiff had planned with the defendant for the child's birth, helped care for the child for the first year and a half of his life, and was referred to as "Mama" try the child.); Debra H., 930 N.E.2d at 194 (stating that "the right of second-parent adoption . . . furnishes the biological and adoptive parents of children--awl importantly, those children themselves--with a simple and understandable rule by which to guide their relationships and order their lives[,]" and refusing to apply an equitable parenthood doctrine despite the fact that the plaintiff had served as a loving and caring parental figure during the first two and a half years of the child's life); Titchenal, 693 A.2d at 683-87 (refusing to apply an equitable parenthood doctrine despite the fact that the plaintiff had held herself out as the child's parent and had provided the majority of care for the child from the child's birth until the child was three and a half years old, and stressing that nonbiological parents in same-sex relationships can protect themselves through adoption).

[121] *Looking Back at the Legalization of Gay Marriage in Mass.*, BOS. GLOBE (June 26, 2015), https://www.bostonglobe.com/metro/2015/06/26/looking-back-legalization-gay-marriage-mass/uhCeyrSeJtWty9tSUde1PI/story.html [https://perma.cc/UP7L-L5NS].

[122] Obergefell v. Hodges, 135 S. Ct. 2584, 2608 (2015).

[123] Feinberg, *supra* note 1, at 341.

may not "bar same-sex couples from marriage on the same terms as accorded to couples of the opposite sex," [124] the marital presumption of paternity should apply to both different- and same-sex spouses of women who give **[*77]** birth. [125] Significantly, most, though not all, of the courts that have ruled on the issue thus far have concluded that the marital presumption of paternity applies to the same-sex spouse of a woman who gives birth to or conceives a child during the marriage. [126] However, due to the lack of court decisions in many states regarding the applicability of the marital presumption to same-sex couples, the absence of uniform results among court decisions addressing the issue, and the uncertainty regarding whether the presumption, even if extended to female same-sex couples, also would apply to married male same-sex couples, [127] LGBT rights experts continue to strongly recommend that married same-sex couples who conceive a child during the marriage seek **[*78]** adoption or a parentage judgment to ensure that the nonbiological parent is recognized as a legal parent across jurisdictions. [128]

b. Consent to a Spouse's Use of Assisted Reproductive Technology

Under statutory or common law rules in most jurisdictions, a husband who consents to his wife's use of assisted reproductive technology (ART) with the intent to be the resulting child's parent is presumed or conclusively

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[124] Obergefell, 135 S. Ct. at 2607.

[125] COURTNEY JOSLIN ET AL., LESBIAN, GAY, BISEXUAL & TRANSGENDER FAMILY LAW § 5:22 (2016) ("After *Obergefell v. Hodges*, there is no question that all marriage-based parentage rules--including the marital presumption--must be applied equally to same-sex spouses (although some states may initially resist this proposition)." (footnote omitted)). This reading of Obergefell is further supported by the Supreme Court's recent decision in *Pavan v. Smith*, in which the Court held that under Obergefell, Arkansas could not refuse to list the name of a birth mother's female spouse on the child's birth certificate when state law generally required the name of birth mothers' male spouses to appear on birth certificates. Pavan v. Smith, 137 S. Ct. 2075, 2079 (2017). However. Pavan concerned only birth certificates, not the presumption of parentage itself, and generally "a birth certificate is merely prima facie evidence of the information stated within." JOSLIN ET AL., supra note 74, § 5:24.

[126] *See, e.g.*, Bane v. Pasternak, No. HHBFA124030541S, 2015 WL 600973, at *10 (Conn. Super. Ct. Jan. 16. 2015) ("[T]his court finds that the protections of Connecticut's common-law presumption of legitimacy apply equally to children of same-sex and opposite-sex married couples and that the marital presumption applies equally to same-sex and opposite-sex marriages."); Gartner v. Iowa Dep't of Pub. Health, 830 N.W.2d 335, 340-41 (Iowa 2013) (holding that due to its language excluding married female same-sex couples, the existing marital presumption statute was unconstitutional and striking down the portion of the statute containing the exclusionary language); *see also* Kerry Abrams & R. Kent Piacenti, *Immigration's Family Values*, 100 VA. L REV. 629, 709 (2014) ("Most states that recognize same-sex marriages, for example, also extend the marital presumption of paternity to gay and lesbian couples, even though in many of these instances there is no chance that the marital parent is also the genetic parent"); cf. Miller-Jenkins v. Miller-Jenkins, 912 A.2d 951, 970-71 (Vt. 2006) (holding that because civil unions granted same-sex couples all of the rights and obligations of marriage, the marital presumption of paternity applied to same-sex couples who had entered into civil unions). *But see* In re Paczkowski v. Paczkowski, 128 A.D.3d 968, 969 (N.Y. App. Div. 2015) (holding that the statutory marital presumptions of paternity did not apply to the wife of woman who conceived a child during the marriage, "since the presumption of legitimacy [the statutes] create is one of a biological relationship, not of legal status, and, as the nongestational spouse in a same-sex marriage, there is no possibility that [the wife] is the child's biological parent" (citations omitted)). The cases generally involved female same-sex couples, and it is unclear whether courts will be willing to apply the presumption to male same-sex couples, who require a surrogate in order to conceive a child via ART. See Susan Frelich Appleton, *Presuming Women: Revisiting the Presumption of Legitimacy in the Same-Sex Couples Era*, 86 B.U. L. REV. 227, 260-61 (2006); Alexandra Eisman, *The Extension of the Presumption of Legitimacy to Same-Sex Couples in New York*, 19 CARDOZO J.L. & GENDER 579, 593-95 (2013).

[127] *See* Appleton, supra note 126, at 260-31; Eisman, *supra* note 126, at 593-95.

[128] *See, e.g.*, NAT'L CT& FOR LESBIAN RIGHTS, LEGAL RECOGNITION OF LGBT FAMILIES (2016), http://www.nclrights.org/wp-content/uploads/2013/07/Legal_Recopition_of_LGBT_Families.pdf (2018) [https://perma.cc/Y5PM-7PDX] ("Regardless of whether you are married or in a civil union or comprehensive domestic partnership, NCLR always encourages non-biological and non-adoptive parents to get an adoption or parentage judgment even if you are named on your child's birth certificate.").

determined to be the child's second legal parent, regardless of whether he is the biological father. [129] Among these jurisdictions, some require that the consent be in writing and/or that the procedure be performed by or under the supervision of a physician, while others do not. [130] Pursuant to *Obergefell*, these laws should apply to both different- and same-sex spouses who consent to their wife's use of ART with the intent to be the resulting child's parent. [131] Although only a handful of courts have ruled on the issue, those that have addressed it thus far have held that the ART parentage rules, even if set forth in terms that reference married different-sex couples, are equally applicable to married same- and different-sex couples. [132] Again, even in jurisdictions that have adopted marriage-based parentage rules in the ART context, due to the lack of court decisions in many states regarding the applicability of these rules to same-sex couples and the uncertainty regarding whether such rules encompass married male same-sex couples even if they are extended to **[*79]** female same-sex couples, [133] LGBT rights experts continue to forcefully recommend that married same-sex couples who conceive a child during the marriage seek adoption or parentage judgments to ensure that the nonbiological parent is recognized as a legal parent across jurisdictions. [134]

While in most jurisdictions the ART parentage provisions are limited to married couples, ten jurisdictions have expanded the rules to encompass unmarried couples such that a man who consents to a woman's use of ART with the intent to be the resulting child's parent is considered the child's formal legal parent. [135] In six of these ten jurisdictions, the language of the ART parentage provisions encompasses unmarried same-sex couples as well as unmarried different-sex couples. [136] A recent decision by New York's highest court in a case involving an

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[129] JOSLIN ET AL., *supra* note 74, § 3:3.

[130] *Id.*

[131] *Id.* ("After the decision in *Obergefell v. Hodges* requiting that states permit and recognize marriages between same-sox spouses on the 'same terms and conditions' as for different-sex spouses, these rules must be applied equally to same-sex couples who have children through assisted reproduction during their marriage." (footnote omitted)).

[132] *See, e.g.*, Della Corte v. Ramirez, 961 N.E.2d 801, 602-03 (Mass. App. Ct. 2012); Wendy G-M. v. Erin G-M, 45 Misc. 3d 574, 582 (N.Y. Sup. Ct. 2014); Roe v. Patton, No. 2:15-cv-00253-DE, 2015 WL 4476734, at *4 (D. Utah July 22, 2015); *see also* Shineovich and Kemp, 214 P.3d 29, 40 (Or. Ct. App. 2009) (holding, in a decision before the state had legalized same-sex marriage, that the marriage-based ART-provisions extended to female same-sex couples in domestic partnerships bemuse under state law domestic partners were entitled to all of the rights and protections provided to married couples); Douglas NeJaime, *Marriage Equality and the New Parenthood*, 129 HARV. L. REV. 1185, 1244, n.353 (citing In re Parentage of L.D.S., No. 2015-DM-000892, at 3-4 (Kan. Dist. Ct. Sept. 18, 2015)).

[133] Even among jurisdictions that have adopted statutory language to include same-sex couples under the ART-based parentage provisions, the language often refers to any person who consents to a woman's use of ART, which makes the applicability to male same-sex couples uncertain. *See, e.g.*, CAL. FAM. CODE § 7613(a) (West 2017) ("If a woman conceives through assisted reproduction with semen or ova or both donated by a donor not her spouse, with the consent of another intended parent, that intended parent is treated in law as if he or she were the natural parent of a child thereby conceived."); D.C. CODES 16-909(e)(1) (2017) ("A person who consents to the artificial insemination of a woman . . . with the intent to be the parent of her child, is conclusively established as a parent of the resulting child."); ME. REV. STAT. ANN. tit. 19-A, § 1923(2016)("[A] person who consents to assisted reproduction by a woman . . . with the intent to be the parent of a resulting child is a parent of the resulting child."); NEV. REV. STAT. § 126.670 (2016) ("A person who provides gametes for, or consents to assisted reproduction by a woman, as provided in NRS 126.680, with the intent to be a parent of her child is a parent of the resulting child.").

[134] *See, e.g.*, JOSLIN ET AL, *supra* note 74, § 3:4; NAT'L CTR. FOR LESBLAN RIGHTS, supra note 128, at 1 ("Regardless of whether you are married or in a civil union or comprehensive domestic partnership. NCLR always encourages non-biological and non-adoptive parents to get an adoption or parentage judgment, even if you are named on your child's birth certificate.").

[135] JOSLIN ET AL., *supra* note 74. § 3:3.

[136] *Id.*

unmarried same-sex couple adopted a slightly different approach, providing standing as a parent for purposes of custody and visitation actions, as opposed to formal legal parent status, to a petitioner who "proves by clear and convincing evidence that he or she has agreed with the biological parent of the child to conceive and raise the child as co-parents." [137]

c. Stepparent Adoption

All states have stepparent adoption processes through which the spouse of a child's formal legal parent can adopt the **[*80]** child without terminating the legal parent's rights as long as the child does not already have a second legally recognized parent or the rights of the second legally recognized parent are terminated. [138] As a result of the nationwide legalization of same-sex marriage, married same-sex couples in every state should be able to avail themselves of stepparent adoption procedures. [139] Many states treat stepparent adoptions differently than other types of adoptions, waiving or authorizing judicial waiver of requirements for costly and intrusive steps like home studies and financial accountings for stepparent adoptions. [140] This differential treatment is based on the justification that stepparent adoptions are distinct because typically the child already will have been living with the stepparent, and thus the process is simply formalizing an already existing parent-child relationship and does not disrupt the child's living situation. [141] In addition, "the concerns about unlawful payments to birth parents or intermediaries which are expressed about other types of adoptions are arguably not present in stepparent adoptions." [142] Even in jurisdictions that waive requirements such as financial accountings and home studies, the stepparent adoption procedure can nonetheless be costly and complicated. Many individuals require the assistance of an attorney to navigate the process and thus incur attorney's fees, and the procedure often requires, *inter alia*, submitting various documents, paying court fees, appearing in court, and submitting to a background check. [143]

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[137] Brooke S.B. v. Elizabeth A.C.C., 61 N.E.3d 488,501 (N.Y. 2016) ("[W]e stress that this decision addresses only the ability of a person to establish standing as a parent to petition for custody or visitation . . . .").

[138] Mark Strasser, *Courts, Legislatures, and Second-Parent Adoption: On Judicial Deference, Specious Reasoning, and the Beet Interests of the Child*, 66 TENN. L REV. 1019, 1026 (1999); JOSLIN ET AL., *supra* note 74, § 5:3.

[139] JOSLIN ET AL., *supra* note 74, § 5:3; NAT'L CTR. FOR LESBIAN RIGHTS, supra note 128, at 1.

[140] UNIF. ADOPTION ACT § 4-111 (NAT'L CONFERENCE OF COMM'RS ON UNIF. STATE LAWS 1994) ("At present, most States do not requite an evaluation or home-study when a stepparent seeks to adopt a stepchild. Even in States where a home-study is ostensibly required, the court usually has the discretion to waive the requirement"); THOMAS A. JACOBS, CHILDREN AND THE LAW: RIGHTS AND OBLIGATIONS § 4:5 (2017 ed.) ("Most states waive the requirement for a homestudy . . . [and] [f]ormal accounting procedures are generally waived in a stepparent adoption . . . ." (footnote omitted)); Margaret M. Mahoney. *Stepparents as Third Parties in Relation to Their Stepchildren*, 40 FAM. L.Q. 81.94 n.51 (2006); W. Bradford Wilcox & Robin Fretwell Wilson, *Bringing Up Baby: Adoption, Marriage, and the Best Interests of the Child*, 14 WM. & MARY BILL RTS. J. 883, 885 n.6 (2006).

[141] UNIF. ADOPTION ACT § 4 cmt. (NAT'L CONFERENCE OF COMM'R ON UNIF. STATE LAWS 1994).

[142] *Id.*

[143] *See, e.g.*, Roe v. Patton, No. 2:15-cv-00253-DB, 2015 WL 4476734, at *2 (C.D. Utah, July 22, 2015) ("To complete a step-parent adoption, [the petitioners] would have to file a Petition to Adopt a Minor Stepchild in Utah State Court and pay a filing fee of 8360. [The stepparent] would also have to submit to a background check by the Utah Bureau of Criminal Identification and the Utah Division of Child and Family Services. Once the adoption petition is submitted, [the petitioners] would have to wait for a judge to schedule a hearing on their adoption petition, and they would then have to appear in person at the hearing to a get the judge's approval for [the petitioner] to adopt [the child]"); *see also* CHILD WELFARE INFO. GATEWAY, STEPPARENT ADOPTION 2-4 (2013), http://www.childwelfare.gov/pubpdfs/f_step.pdf [https://perma.cc//TZB8-TJSV] (providing a broad overview of stepparent adoption); SUPERIOR COURT OF CALIFORNIA, CTY. OF SACRAMENTO, STEPPARENT ADOPTION 1-3(2017), https://www.saccourt-ca.gov/family/docs/fl-stepparent-adoption.pdf (describing the requirements for a stepparent adoption in California); Stepparent Adoption is Permanent, OHIO STATE BAR ASS'N (Dec. 22, 2015), https://www.ohiobar.org/forpublic/resources/lawyoucanuse/pages/lawyoucanuse-204.aspx [https://perma.cc/A566-E7BC] (describing the Ohio stepparent adoption process).

[*81] 2. Second Parent Adoption

Second parent adoption is currently available statewide in at least thirteen states and the District of Columbia, and is available in certain counties in at least another fourteen jurisdictions. [144] Second parent adoption is similar to stepparent adoption in that the partner of a child's formal legal parent is able to adopt the child without the formal legal parent's rights being terminated, but differs from stepparent adoption in that unmarried couples can utilize the procedure. [145] The first jurisdictions to grant second parent adoptions did so "in the mid-1980s." [146] Since same-sex couples could not marry until recently, for many years second parent adoption represented the primary manner through which both members of same-sex couples could gain recognition as the formal legal parents of the biological child of one of the partners. [147]

Like stepparent adoption, second parent adoption usually requires, *inter alia*, hiring an attorney, paying court fees, executing various documents, submitting to background checks, and appearing in court. [148] Notably, however, the second parent adoption process is often more costly, [149] intrusive, [150] and **[*82]** lengthy [151] than the stepparent adoption process. [152] For example, unlike for stepparent adoptions, home studies, which can be intrusive and costly and can prolong the adoption process, are generally required for second parent adoptions (although some states grant courts discretion to waive the home study requirement). [153] Second parent adoptions cost between $ 2,000 and $ 3,000 on average [154] and, depending on the jurisdiction, can cost upwards of $ 5,000. [155] Until the

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144 NAT'L CTR. FOR LESBIAN RIGHTS, supra note 128, at 2.

145 *Id.*; JOSLIN ET AL., *supra* note 74, § 5:2.

146 *Id.*

147 *Id.*

148 *See. e.g.*, STATE OF COLORADO JUDICIAL DEPT, INSTRUCTIONS FOR SECOND PARENT ADOPTION, http://www.courts.state.co.us/Forms/PDF/JDF%20495%20Second%20Parent%20Adoption%20InstructionsR7+17.pdf [https://perma.cc/Y763-UL4B] (providing instructions ET obtaining a second parent adoption in Colorado).

149 For instance, in California the maximum cost of a home study for a second parent adoption is $ 700, while "the cost of a home investigation for an independent adoption is $ 4,500." JOSLIN ET AL., *supra* note 74, § 5:2.

150 Catherine Connolly, *The Voice of the Petitioner: The Experiences of Gay and Lesbian Parents in Successful Second-Parent Adoption Proceedings*, 36 L. & SOC'Y REV. 325, 334(2002) (comparing stepparent adoptions to second parent adoptions and stating that "[t]he legal process for stepparents to adopt the children of their new spouse is often much more relaxed and usually does not require a full home study").

151 NAT'S CTR. FOR LESBIAN RIGHTS, supra note 128, at 2 (Stepparent "adoptions have the same effect as a second parent adoption, but they may be faster and less expensive than second parent adoptions, depending on where you live?).

152 JOSLIN ET AL., *supra* note 74, § 5:2; Richard F. Storrow, *Rescuing Children from the Marriage Movement: The Case Against Marital Status Discrimination in Adoption and Assisted Reproduction*, 39 U.C. DAVIS 14. REV. 305, 343-44 (2006).

153 JOSLIN ET AL., *supra* note 74, § 5:19; Alexander Newman, *Same-Sex Parenting Among a Patchwork of Laws: An Analysis of New York Same-Sex Parents' Options for Gaining Legal Parental Status*, 2016 CARDOZO L. REV. DE NOVO 77, 85 (2016) ("Stepparent adoptions are often preferable to second-parent adoptions, in part bemuse they frequently are less costly: second-parent adoptions can require expensive home studies before the adoption is approved, whereas stepparent adoptions do not.").

154 *How Much Does Adoption Cost?*, HUMAN RTS. CAMPAIGN http://www.hrc.org/resources/how-much-does-adoption-cost [https://perma.cc/2TVF-LRE2].

155 Blake Ellis, *Adoption Tax Credit for Same-Sex Couples*, CNN MONEY (Feb. 25, 2013, 10:48 AM), http://money.cnn.com/2013/02/25/pf/taxes/same-sex-adoption/ [https://perma-cc/7N3W-U94V].

adoption process is completed and the adoption decree is granted, the adopting parent generally is considered a legal stranger to the child. [156]

B. Avenues for Establishing Legal Parent Status That Generally Have not yet Been Extended to Same-Sex Parents

1. Formal Avenues for Establishing Legal Parent Status That Generally Have not yet Been Extended to Same-Sex Parents

a. Voluntary Acknowledgements of Paternity

The voluntary acknowledgement of paternity (VAP) is the most common avenue through which unmarried fathers establish legal paternity of their children. [157] A VAP is a document that identifies a man as a child's father and is signed by both the child's mother and the man identified as the child's **[*83]** father. [158] The document establishes legal paternity. [159] VAPs are usually signed at the hospital at the time of birth or shortly thereafter. [160] Under federal law, states must make VAPs available to unmarried parents in order to receive welfare funding. [161] Consequently, VAPs are available to unmarried couples in every state. [162] Importantly, "[w]hile the federal legislation contemplated that VAPs would be used simply to establish paternity, usually for the sake of collecting child support, empirical evidence indicates that unmarried parents are using VAPs for another purpose: to identify themselves as a child's co-parents and to memorialize that relationship." [163]

Federal law mandates that state VAP procedures meet a number of requirements. For example, all public and private birthing hospitals as well as birth records offices in the state must offer VAPs. [164] With regard to birthing hospitals specifically, they "must provide voluntary paternity establishment services focusing on the period immediately before and after the birth of a child born out-of-wedlock." [165] In addition, birthing hospitals and birth records offices must have staff trained to advise unmarried parents regarding VAPs, [166] and "each party must be given oral and written notice of the alternatives to, legal consequences of and rights and responsibilities arising from

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[156] Nancy D. Polikoff, *A Mother Should Not Have to Adopt Her Own Child: Parentage Laws for Children of Lesbian Couples in the Twenty-first Century*, 5 STAN. J. C.R. & C.L. 201, 207 (2009).

[157] Leslie Joan Harris, *The New "Illegitimacy": Revisiting Why Parentage Should Not Depend on Marriage: Voluntary Acknowledgments of Parentage for Same-Sex Couples*, 20 AM. U. J. GENDER SOC. POL'Y & L. 487, 469 (2012).

[158] *Id.* at 475.

[159] *Id.; see also* DEP'T OF HEALTH & HUM. SERV., OFF. OF INSPECTOR GEN., OFF. OF EVALUATIONS AND INSPECTIONS, OEI-06-98-00053, PATERNITY ESTABLISHMENT: USE OF VOLUNTARY PATERNITY ACKNOWLEDGMENTS 1 (2000), https://oig.hhs.gov/oei/reports/oei-06-98-00053.pdf [https://perma.cc/HLJ8-3S8G] [hereinafter OFFICE OF THE INSPECTOR GENERAL].

[160] *Child Support 101.2: Establishing Paternity*, NAT'L CONF. ST. LEGIS., (Mar. 19, 2014), http://www.ncsl.org/research/human-services/enforcement-eatablishing-paternity.aspx [https://perma.cd49ZU-VSMN] [hereinafter Child Support 101.2] ("Most often, voluntary paternity acknowledgment is completed in the hospital within days of the child's birth."); Harris,*supra* note 157, at 476 n.36.

[161] Harris, *supra* note 157, at 475.

[162] *Id.; see also* OFFICE OF THE INSPECTOR GENERAL, *supra* note 159, at i.

[163] Harris, *supra* note 157, at 476-77.

[164] 45 C.F.R. §§ 303.5(g)(1)(i)(ii) (2016); Harris, *supra* note 157. at 476.

[165] 45 C.F.R. § 303.5(g)(1)(i).

[166] *Child Support* 101.2., *supra* note 160.

the signed acknowledgment." [167] The state cannot require a man to submit to genetic testing before signing a VAP, although in some states either the VAP or the accompanying instructions indicate that only biological fathers should sign. [168] Either the mother or the putative father may rescind the VAP until either sixty days have passed or there has been "an administrative or judicial proceeding relating to the **[*84]** child," whichever is earlier. [169] Importantly, a VAP that is not rescinded within sixty days, must be "considered a legal finding of paternity." [170] Moreover, states must give full faith and credit to out-of-state VAPs that comply with federal law and the law of the issuing state. [171]

After sixty days have passed, VAPs "can only be challenged on the grounds of fraud, duress, or material mistake of fact." [172] The most frequent challenges to VAPs following the sixty-day rescission period involve claims that the man identified in the VAP is not the child's biological father and allegations of either fraudulent conduct by the mother in misleading the father or mistake of material fact. [173] Most states that have ruled on the issue have allowed challenges to VAPs based upon DNA testing, though test results indicating that the man identified in the VAP is not the child's biological factor do not always result in rescission of the VAP. [174] For example, courts in some states require evidence of fraud or mistake beyond the test results, allow for rescission on this basis only if it is in the best interests of the child, or use theories of equitable estoppel to prevent rescission on this basis in certain situations. [175]

Although at least one scholar has set forth a comprehensive proposal to expand the use of VAPs to same-sex parents, to date same-sex parents generally have not been able to utilize VAPs to establish legal parent status. [176] Due to the fact that in situations involving same-sex parents the parent identified in the VAP would often lack genetic ties to the child, VAP procedures across the United States would need to be restructured so that representations regarding genetic ties were not a part of the execution process and genetics-based claims could not be grounds for rescission. In addition, standards likely would need to be set forth regarding the applicable procedure to be followed when the child's second biological parent is not a member of the couple seeking to execute the VAP, but is known to the couple. [177] The lack of availability of VAPs to same-sex couples farther reflects the substantial differences that continue to exist with regard to the ease with which different- and same-sex **[*86]** couples are able to establish both members of the couple as the formal legal parents of their children.

b. Procedures That Establish Legal Paternity for Unmarried Men Based upon Biology

In addition to VAPs, other avenues exist to establish the legal paternity of unmarried men. In situations in which paternity establishment has not been completed through a VAP, interested parties, such as the mother, the putative

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[167] Harris, *supra* note 157, at 476 (citing 42 U.S.C. § 666(a)(5)(i) (2012)); *see also* 45 C.F.R. § 303.5(g)(2)(i); OFFICE OF THE INSPECTOR GENERAL, *supra* note 159, at 1.

[168] Feinberg, *supra* note 1, at 343-44.

[169] 42 U.S.C. § 686(a)(5)(D)(ii): OFFICE OF THE INSPECTOR GENERAL, *supra* note 159, at 1.

[170] 42 U.S.C. § 666 (a)(5)(D)(ii), (E).

[171] Harris, *supra* note 157, at 476.

[172] *Id.*

[173] *Id.* at 479.

[174] *Id.* at 479-80.

[175] *Id.* at 480.

[176] *See* generally Harris, supra note 157.

[177] *Id.* at 487.

father, or a child support agency, commonly pursue legal proceedings to establish the putative father's paternity. Establishing a putative father's paternity through legal proceedings generally involves genetic testing demonstrating that the putative father is the child's biological father. [178] Notably, federal law governing child support requires that all states adopt:

> [p]rocedures under which the State is required, in a contested paternity case (unless otherwise barred by State law) to require the child and all other parties . . . to submit to genetic tests upon the request of any such party, if the request is supported by a sworn statement by the party . . . alleging paternity, and setting forth facts establishing a reasonable possibility of the requisite sexual contact between the parties; or . . . denying paternity, and setting forth facts establishing a reasonable possibility of the nonexistence asexual contact between the parties. [179]

Furthermore, federal child support law also requires states to adopt standards that create a conclusive or rebuttable presumption of paternity based upon genetic testing results demonstrating that the putative father is the child's biological father. [180] Due to the genetics-based nature of establishing paternity through these legal proceedings and the reality that in same-sex relationships it is usually the nonbiological parent who lacks legal parent status, this avenue of establishing legal parent status generally is unavailable to same-sex couples.

[*86] 2. Function-Based Avenues for Establishing Legal Parent Status That Generally Have not yet Been Extended to Same-Sex Parents: "Holding Out" Presumptions

A number of states have statutory provisions that set forth "holding out" presumptions. [181] Holding out presumptions can be traced to a 1973 Uniform Parentage Act (UPA) provision which stated that a man is entitled to a presumption of paternity if "while the child is under the age of majority, he receives the child into his home and openly holds out the child as his natural child." [182] While a number of states continue to employ holding out presumptions that contain language similar to that of the 1973 UPA, nine states have adopted variations of the holding out provision set forth in the 2002 UPA, which "has a durational requirement, providing that the person must have lived with and held out the child [] as his own for the first two years of the child's life." [183] Because the language of holding out presumptions generally requires that an individual hold the child out as his "natural" or "own" child, the applicability of these provisions to a nonbiological parent in a same-sex relationship with the child's biological parent is uncertain. [184]

In 2005, the Supreme Court of California held that the state's holding out presumption, which provided a presumption of paternity to a man who "receives the child into his home and openly holds out the child as his natural child," applied to a woman in a same-sex relationship with the child's biological mother. [185] The California

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[178] Marilyn Ray Smith & Paula M. Carey, *Paternity Challenges to Children Born During a Marriage, in* PATERNITY AND THE LAW OF PARENTAGE IN MASSACHUSETTS § 8.1 (2d ed. 2009) ("Contested [paternity] matters usually involve compelling the putative father to submit to genetic tests . . . .").

[179] 42 U.S.C. § 666(a)(5)(B)(i) (2012).

[180] *Id.* at § 666(a)(5)(G).

[181] JOSLIN ET AL., *supra* note 74, § 5:22.

[182] UNIF. PARENTAGE ACT § 4(a)(4) (1973).

[183] JOSLIN ET AL., *supra* note 74, § 5:22.

[184] NeJaime, *supra* note 132, at 1215-16 ("The UPA's 'holding out' provision, section 7611(d), was designed for unmarried, biological fathers. It provided that one is a presumed father if be receives the child into his home and openly holds out the child as his *natural* child.' While the provision focused on unmarried fathers' parental conduct, it seemed--with the term 'natural'--constrained by biology," (emphasis in original) (quoting CAL. PAM. CODE § 7611(d) (West 2014))).

[185] *See* Elisa B. v. Superior Court, 117 P.3d 660, 664, 670, 672 (Cal. 2005) (quoting CAL. FAM. CODE § 7611(d) (West 2014)).

legislature recently amended the holding out presumption to make it gender neutral. [186] This avenue for establishing legal parent status, however, is one of the newer avenues, and to date very few court decisions in other jurisdictions have ruled on the applicability of holding out presumptions to **[*87]** same-sex parents. [187] Like the equitable parenthood doctrines discussed above, this avenue for establishing parental rights is not available immediately at the time of birth and requires the petitioner to prove that he or she engaged in certain conduct relating to the child. [188]

III. EVALUATING THE CURRENT NEED FOR CONTINUED LEGAL RECOGNITION OF EQUITABLE PARENTHOOD DOCTRINES

In cases involving same-sex parents, even though it remains far more difficult for same-sex couples to establish both members as formal legal parents as compared to their different-sex counterparts, it will be tempting for judges to refuse to apply equitable parenthood doctrines on the grounds that there were avenues available through which the functional parent could have obtained formal legal parent status, and thus equity does not require application of the doctrine. [189] This will likely be especially true in jurisdictions in which the establishment of formal legal parent status for functional parents in same-sex relationships is available through various marriage-based avenues, second parent adoption, or a combination of these avenues. [190] In addition, in jurisdictions that provide same-sex couples with various marriage- or adoption-based avenues through which the functional parent can obtain formal legal parent status, opponents of equitable parenthood doctrines likely will argue that the failure of the couple to pursue these avenues demonstrates a lack of consent on the part of the formal legal parent to the functional parent forming a parent-like relationship with the child, and that application of an equitable parenthood **[*88]** doctrine is therefore inappropriate. [191] These arguments, however, are ultimately unpersuasive, and it would be a mistake for courts and legislatures to decline to apply or establish equitable parenthood doctrines on the grounds that marriage or adoption-based avenues to establishing legal parent status for functional parents in same-sex relationships exist in the jurisdiction.

This Part will proceed as follows: it first addresses the implications for same-sex parents of courts and legislatures declining to adopt or apply equitable parenthood doctrines based upon the availability of marriage-based avenues to establishing formal legal parent status in the relevant jurisdiction. It then addresses the implications for same-sex parents of courts and legislatures declining to adopt or apply equitable parenthood doctrines due to the availability of second parent adoption as an avenue to establishing formal legal parent status in the relevant jurisdiction. Finally, the Part concludes by exploring whether declining to apply equitable parenthood doctrines on the basis of

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[186] NeJaime, *supra* note 132. at 1261.

[187] JOSLIN ET AL., *supra* note 74, § 522. The Supreme Judicial Court of Massachusetts recently held that the state's holding-out presumption applies to same-sex couples. Partanen v. Gallagher, 59 N.E.3d 1133, 1142 (Mass. 2016).

[188] *See supra* Section I.B.

[189] *See, e.g.*, A.H. v. M.P., 857 N.E.2d 1061, 1073-74 (Mass. 2006); Debra H. v. Janice R., 930 N.E.2d 184, 193 (N.Y. 2010) (citing the availability of second parent adoption in support of decision declining to apply an equitable parenthood doctrine), *abrogated by* Brooke S.B. v. Elizabeth A.C.C., 61 N.E.3d 488 (N.Y. 2016); Titchenal v. Dexter, 693 A.2d 682, 689 (Vt. 1997); NeJaime, *supra* note 132, at 1252 ("Courts that may otherwise have used equitable theories to recognize such parents may find that for nonbiological parents who had the opportunity to legally many a child's biological parent, their choice not to do so undermines their claim to parental rights."); Nancy Polikoff, *The New "Illegitimacy": Winning Backward in the Protection of the Children of Lesbian Couples*, 20 AM. U. J. GENDER SOC. POL'Y & L. 721, 728 (2012) ('The existence of marriage--or an equivalent formal status--makes it easier to implement bright line rules about legal consequences. This ease means that judges and legislators, satisfied that marriage is a good enough dividing line, will be less likely to engage in the messier business of achieving justice.").

[190] *See supra* note 189 and accompanying text.

[191] *See supra* notes 115-116 and accompanying text.

the availability to same-sex couples of marriage- and adoption-based avenues of establishing formal legal parent status will farther the best interests of children.

A. The Preclusion of Equitable Parenthood Doctrines Based Upon Current Avenues for Establishing Legal Parent Status for Same-Sex Parents That Require Marriage

1. Marriage-Based Presumptions of Parentage

With regard to the question of whether the extension of marriage-based presumptions of parentage to married same-sex couples should preclude application of equitable parenthood doctrines, it is important to note at the outset that most jurisdictions have not ruled on whether their existing marriage-based presumptions of parentage actually extend to married same-sex couples. [192] Moreover, those jurisdictions that have ruled on the issue have not all reached the same result. [193] Importantly, even in jurisdictions that have extended marriage-based presumptions of parentage to married same-sex couples, because such presumptions typically remain gendered in that they have as their starting point a woman who gives birth to or conceives a child while married, it is far from clear that the extensions encompass male same-sex couples. [194] Indeed, the **[*89]** court decisions extending marriage-based presumptions of parentage to same-sex couples have arisen in the context of female same-sex couples. [195] Thus, abandoning equitable parenthood doctrines based upon statutes or judicial decisions that on their face extend marriage-based presumptions of parentage to same-sex couples but do not explicitly address the application of such presumptions to male same-sex couples, would be deeply unfair to male same-sex couples. Even for female same-sex couples, however, the availability of marriage-based presumptions of parentage should not exclude application of equitable parenthood doctrines. The potential arguments in favor of requiring a formal legal parent and a functional parent to marry in order for the functional parent to obtain legal recognition of his or her relationship with the couple's child are unpersuasive, and this type of approach to establishing the rights of same-sex parents is both discriminatory and deeply flawed.

Potential arguments for excluding equitable parenthood doctrines based upon the availability to same-sex couples of marriage-based presumptions of parentage likely will arise from the underlying idea that marriage to a child's formal legal parent is a superior basis for establishing parental rights because the decision to marry is uniquely reflective or predictive of certain spousal understandings and conduct relating to children born or conceived during the marriage. [196] a For example, one possibility is that the decision to marry signifies an individual's consent to her spouse serving as a parent to any child born to or conceived by that individual during the marriage. [197] A related possibility is that the decision to marry demonstrates an individual's willingness to assume the obligations of parenthood for any child born to or conceived by his or her spouse during the marriage. [198] Another possibility rests on an assumption that a married individual will form a meaningful parent-child bond with any child born to or

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[192] *See supra* notes 126-127 and accompanying text.

[193] *See supra* note 126 and accompanying text.

[194] Appleton, *supra* note 126, at 260-65.

[195] *See id.* at 265.

[196] *See supra* notes 103-105 and accompanying text; *infra* notes 197-199 and accompanying text.

[197] *See* Joanna L. Grossman. *Parentage Without Gender*, 17 CARDOZO J. CONFLICT RESOL., 717, 740 (2016) ("Second, the biological mother's consent to marry is sometimes treated as consent to share parental rights of any children born during the union. Recall the ruling in *Debra H.*, in which the New York Court of Appeals held that marriage to a child's mother is the only way other than adoption through which a lesbian co-parent can gain parental status. The court based its ruling squarely on the notion of consent. While Janice M., the biological mother, had the power to exclude other adults from her child's life, she gave up that power by entering into a civil union with Debra H. while pregnant and inviting her to assume a parental role." (footnote omitted)).

[198] NeJaime, *supra* note 132, at 1242.

conceived **[*90]** by his or her spouse during the marriage. [199] These arguments for requiring same-sex parents to marry in order for the functional parent to receive legal recognition of his or her relationship with the couple's child, however, are ultimately unpersuasive.

There are many reasons for why couples choose to remain unmarried, and a decision to remain unmarried may say nothing about whether the formal legal parent has consented to the functional parent serving as a parent to the child, the functional parent has assumed the obligations of parenthood, or a meaningful parent-child bond exists between the child and functional parent. [200] Couples may remain unmarried for many reasons, including, *inter alia*, that they do not feel that they are in a stable enough economic position to marry; [201] they wish to avoid the financial consequences accompanying marriage; [202] they are opposed to marriage due to its patriarchal, racist, and discriminatory history and the related societal expectations that still often accompany marriage; [203] or they simply prefer to exist in a relationship that does not include the state as a member. [204] Marriage is simply an ineffective proxy for the determination of questions relating to the formal legal parent's consent, the functional parent's assumption of parental obligations, or the formation of meaningful parent-child bonds between the child and functional parent. Importantly, instead of using an imprecise proxy such as marriage to determine these important questions relating to consent, the assumption of parental obligations, and the formation of meaningful parent-child bonds, the common elements of the equitable parenthood doctrines actually require courts to directly investigate and answer these questions. [205]

[*91] Moreover, excluding equitable parenthood doctrines based upon the availability to same-sex couples of marriage- based presumptions of parentage, and essentially requiring same-sex parents to marry in order for the functional parent to receive parental rights, is discriminatory against same-sex couples and their children. As discussed above, different-sex couples do not need to marry in order for both members to receive parental rights--a variety of avenues to establishing formal legal parent status are available to unmarried different- sex parents. [206] The law recognizes the value of the relationships between unmarried different-sex parents and their children and the importance of providing children with two legally recognized parents. In fact, the establishment of formal legal parent status for unmarried different-sex parents has become an essential goal of family law, and consequently the

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[199] *See* Grossman, *supra* note 197, at 739-40.

[200] *See infra* notes 201-204.

[201] Meg Murphy, *NowUKnow: Why Millennia's Refuse to Get Married*, BENTLEY U., http://www.bentley.edu/impact/articles/nowuknow-why-millennials-refuse-get-married [https://perma.cc/S25X-T2BK]; Wendy Wang & Kim Parker,*Record Share of Americans Have Never Married: As Values, Economics, and Gender Patterns Change*, PEW RES CRT., (Sept. 24, 2014), http://www.pewsocialtrends.org/2014/09/24/record-share-of-americans-have-never-married/ [https://perma.ccW9X-57XR] ("For young adults who want to get married, financial security is a significant hurdle. Compared with their older counterparts, young adults who have never been married are more likely to cite financial security as the main reason for not being currently married.").

[202] *Marriage v. Cohabitation*, FINDLAW, http://family.findlaw.com/living-together/marriage-vs-cohabitation.html [https://perma.cc/74M5-42PW].

[203] Jessica R. Feinberg, *The Survival of Nonmarital Relationship Statuses in the Same-Sex Marriage Era: A Proposal*, 87 TEMP. L. REV. 45, 61-62 (2014).

[204] Keith Ablow, *Let's Make a New Way to Get Married and Get the State Out of the Matrimony Business*, Fox NEWS (Dec. 21, 2011), http://www.foxnews.com/opinion/2011/12/21/lets-make-new-way-to-get-married-and-get-state-out-matrimony-business.html [https://perma.cc/C63P-ELJ7].

[205] *See* Grossman, *supra* note 8, at 719-20 ("The partner's functional role in parent-like activities over a period of time--particularly if the partner was involved in the decision to conceive a child in the first place--would seem a much better indicator of consent to share the role of parent than whether the couple said vows to each other at some point?).

[206] *See supra* Section II.B.

law provides straightforward and uncomplicated procedures for unmarried different-sex parents to obtain formal legal parent status. [207]

Any argument that attempts to justify requiring only same-sex couples to marry in order to receive parental rights by pointing to the greater likelihood that both members of a different-sex couple are biologically related to their child, is unconvincing. Jurisdictions that have extended marriage-based presumptions of parentage to same-sex couples necessarily recognize that biological connections should not be a prerequisite to receiving parental rights, and that children of same-sex parents, like children of different-sex parents, benefit significantly from having two legally recognized parents. Furthermore, the most common avenue for establishing parental rights for unmarried men in different-sex relationships, the VAP, by law does not require proof of a biological connection between the child and the man identified through the VAP as the father. [208] Excluding equitable parenthood doctrines based upon the availability to same-sex couples of marriage-based presumptions of parentage and requiring same-sex parents to marry in order for both parents to receive parental rights is unjustifiable discrimination against same-sex couples and their children.

There are also significant class- and race-based implications of declining to apply equitable parenthood doctrines on the basis of the availability to same-sex couples of marriage-based **[*92]** presumptions of parentage. Today, "[m]arriage itself has become a marker of privilege [and] [t]hose who marry . . . are more likely to be white, relatively educated, and relatively high-income." [209] Consequently, denying rights to functional parents based solely on their decision to remain unmarried would disproportionately harm less privileged parents. Moreover, same-sex couples that include at least one member who is African American or Latino are more likely to be raising children than same-sex couples in which both members are white, and the average income of same-sex couples raising children is substantially lower than the average income of same-sex couples as a broader population. [210] As a result, "if trends regarding marriage . . . by same-sex couples follow more general trends, the members of the LGB community who are statistically *most* likely to be raising children are also statistically *least* likely to marry . . . ." [211] This demonstrates the necessity of maintaining equitable parenthood doctrines to protect parents raising children within same-sex relationships regardless of the extension to same-sex couples of marriage-based avenues to establishing formal legal parent status.

2. Stepparent Adoption

In jurisdictions that do not extend marital presumptions of parentage to married same-sex couples, courts may nonetheless decline to adopt or apply equitable parenthood doctrines on the basis that equity does not require the application of such doctrines because the nonbiological parent could have undertaken a stepparent adoption in order to obtain formal legal parent status. As an initial matter, an individual who wishes to undertake a stepparent adoption must first marry the child's formal legal parent. [212] Although same-sex marriage is now available in every U.S. jurisdiction, for the reasons discussed in the previous subsection, the availability to same-sex couples of avenues for establishing formal legal parent status that require marriage should not preclude recognition of equitable parenthood doctrines. [213] Moreover, there are a number of additional compelling reasons for why the

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[207] *See supra* Section II.11.

[208] *See supra* note 168 and accompanying text.

[209] NeJaime, *supra* note 132, at 1250 (footnote omitted).

[210] Deborah A. Widiss, *Non-Marital Families and (or After?) Marriage Equality*, 42 FLA. ST. U. L. REV. 547, 568 (2015).

[211] *Id.* (emphasis in original).

[212] *See supra* note 138 and accompanying text.

[213] *see supra* Section 111.A 1.

availability to **[*93]** same-sex couples of stepparent adoption should not lead courts to decline to adopt or apply equitable parenthood doctrines.

As detailed above, stepparent adoption is a substantial undertaking. [214] Even in jurisdictions that waive some of the more intrusive and time-consuming requirements such as financial accountings and home studies, the procedure can nonetheless be costly and complicated. [215] Many individuals require the assistance of an attorney to navigate the process and consequently incur attorney's fees, and the procedure often requires, *inter alia*, filing a number of documents, paying court fees, appearing in court, and submitting to a background check. [216] Requiring stepparent adoption in addition to marriage in order for nonbiological parents raising children within same-sex relationships to obtain parental rights would disproportionately harm low-income same-sex parents and their children, and would further exacerbate the differences in the cost and difficulty of obtaining parental rights for same- and different-sex parents. [217] Consequently, the arguments against precluding recognition of equitable parenthood doctrines based upon the availability of stepparent adoption are even more compelling than the arguments against precluding recognition of equitable parenthood doctrines based upon the availability of marriage-based presumptions of parentage.

B. The Preclusion of Equitable Parenthood Doctrines Based Upon the Availability of Second Parent Adoption

As an initial matter, second parent adoption, in which the non-marital partner of a child's formal legal parent is able to adopt the bild without the formal legal parent's rights being terminated, is not available in all jurisdictions. [218] For the reasons discussed in the previous subsections, the need for equitable parenthood doctrines is clear in jurisdictions in which marriage provides the only avenue through which nonbiological parents raising children within same-sex relationships can obtain parental rights. [219] In jurisdictions that do recognize second parent adoption, it will be tempting for courts and legislatures to decline to adopt or apply equitable parenthood **[*94]** doctrines on the grounds that equity does not require the application of such doctrines because the individual who is now seeking parental rights could have obtained formal legal parent status through second parent adoption. In fact, a few courts have already used the availability of second parent adoption procedures in their jurisdictions in support of decisions declining to adopt or apply equitable parenthood doctrines. [220] Although a decision to pursue second parent adoption arguably addresses questions of the legal parent's consent to the formation of a parent-child relationship between the functional parent and the child and the functional parent's assumption of the obligations of parenthood more directly than a decision to marry, it nonetheless would be both unwise and unfair for courts and legislatures to refuse to apply or adopt equitable parenthood doctrines on the basis of the availability of second parent adoption.

Second parent adoption is a complicated process that requires substantial resources, and the failure to undertake a second parent adoption may have nothing to do with whether the legal parent has consented to the formation of parent-child relationship between the child and functional parent or whether the functional parent has assumed the obligations of parenthood. [221] Like stepparent adoption, second parent adoption usually requires, *inter alia*, hiring

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[214] *See supra* Section II.A.3.a.

[215] *See supra* note 143.

[216] *See supra* note 143.

[217] This is because different-sex parents are able to obtain parental rights through avenues that require neither marriage nor adoption. *See supra* Section II.S.

[218] *See supra* note 144 and accompanying text.

[219] *See supra* Sections III.A.1-2.

[220] *See supra* note 120.

[221] Polikoff, *supra* note 189. at 73.3-34 ("There are numerous reasons why couples do not go this route. It is time consuming and expensive, it requires a lawyer, it subjects the family to court scrutiny, and it cannot start until after the child's birth, leaving

an attorney, paying court fees, executing various documents, submitting to background checks, and appearing in court. [222] Moreover, as discussed above, the second parent adoption process is often even more costly, intrusive, and/or lengthy than the stepparent adoption process. [223] For example, unlike for stepparent adoptions, home studies, which can be both intrusive and costly and can prolong the adoption process, are generally required for second parent adoptions (although some states grant courts discretion to waive the home study requirement). [224] Second parent adoptions cost **[*95]** between $ 2,000 and $ 3,000 on average, [225] and, depending on the jurisdiction, can cost upwards of $ 5,000. [226]

Overall, as Nancy Polikoff has explained, the second parent adoption process "is time consuming and expensive, it requires a lawyer, it subjects the family to court scrutiny, and . . . [c]ouples may be unfamiliar with such procedures, may lack resources to pursue them, and may not understand the ramifications of not completing them.." [227] A couple's failure to undergo the second parent adoption process is clearly an ineffective proxy for a lack of consent on the part of the formal legal parent or a lack of the assumption of the obligations of parenthood on behalf of the functional parent, and thus it should not preclude application of the equitable parenthood doctrines. Importantly, the common elements of the equitable parenthood doctrines directly address the questions of the legal parent's consent and the functional parent's assumption of the obligations of parenthood. [228] Thus, it is within the application of the equitable parenthood doctrines that courts can most effectively analyze the issues of the formal parent's consent and the functional parent's assumption of parental obligations, including whether the failure to obtain a second parent adoption was in any way related to these issues. [229] Finally, just like excluding equitable parenthood doctrines due to the availability of marriage-based avenues for establishing formal legal parent status would disproportionately harm same-sex couples and their children, so too would excluding equitable parenthood doctrines on the basis of the availability of second parent adoption. This is because unlike same-sex couples, different-sex couples have access to a variety of avenues to establishing parental rights that require neither adoption nor marriage. [230]

[*96] *C. The Effects on the Best Interests of Children if Equitable Parenthood Doctrines are Eschewed Based on the Availability to Same-Sex Couples of Marriage- and Adoption-Based Avenues to Establishing Formal Legal Parent Status*

As discussed in the previous two subsections, there exist many compelling reasons for maintaining equitable parenthood doctrines even when marriage- and adoption-based avenues of establishing formal legal parent status

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the relationship unrecognized for months or longer until a final adoption decree is signed. Couples may be unfamiliar with such procedures, may lack resources to pursue them. and may not understand the ramifications of not completing them.").

[222] *See supra* notes 140,148 and accompanying text.

[223] *See supra* notes 152-153.

[224] JOSLIN ET AL., *supra* note 74, § 5:19; Newman. *supra* note 153, at 85. ("Stepparent adoptions are often preferable to second-parent adoptions, in part because they frequently are less costly: second-parent adoptions can require expensive home studies before the adoption is approved, whereas stepparent adoptions do not.").

[225] HUMAN RIGHTS CAMPAIGN, supra note 154.

[226] Ellis, *supra* note 155.

[227] Polikofr, *supra* note 189, at 733-34.

[228] *See supra* Section I.B.

[229] This is the approach taken by the ALJ Principles with regard to its "parent by estoppel" doctrine. The comment accompanying the doctrine indicates that the failure to adopt should not preclude application of the doctrine, but may be relevant to the question of agreement between the parties to co-parent. ALJ PRINCIPLES OF THE LAW OF FAMILY DISSOLUTION: ANALYSIS AND RECOMMENDATIONS § 2.03 ant. b.(iii) (AM. LAW INST. 2002).

[230] *See supra* Section 11.B.

are available to same-sex couples. What is perhaps the most compelling reason, however, is that eschewing equitable parenthood doctrines due to the availability of marriage and adoption-based avenues for establishing formal legal parent status does not further the best interests of children. An approach that determines parental rights based exclusively upon formal steps such as marrying a child's formal legal parent or undertaking an adoption, and categorically refuses to provide rights to informal parents regardless of the degree to which they have functioned as a child's parent, is an approach that runs counter to the promotion of children's best interests. [231] As scholar Carlos Ball has correctly noted,

> [O]ver- and under-inelusivity results from the application of a rule that uses the existence of biological or adoptive links between the adult and the or ofa legal relationship between the two adults, as a necessary pie-condition for the granting of parentage status. The rule is overinclusive because it affords legal protections to children even in circumstances in which the adults in question play no meaningful roles in their lives. And it is underinclusive because it denies protections to children who have established parent-child bonds with individuals who are unable to meet the courts' bright-line rules aimed at promoting certainty. [232]

A significant body of research indicates that children form strong bonds with parental figures regardless of the existence of biological or adoptive ties. [233] Disrupting relationships between **[*97]** children and the individuals who they view as parents can have significantly harmful short- and long-term effects on children. [234] It is unfair to punish children due to the failure or inability of their parents to take the steps necessary to obtain formal legal parent status for the functional parent. [235] Precluding the recognition of equitable parenthood doctrines based upon the availability to same-sex parents of marriage- and adoption-based avenues to establishing formal legal parent status, means there will be more children who, "through no fault of their own, miss out on the legal, financial, and emotional benefits of having a second parent." [236] As one judge stated, in these situations, "Mlle child is helpless with the most to lose." [237] Moreover, since there is a positive correlation between income level and marriage rates and the adoption process requires substantial resources, it is the already disadvantaged children of lower-income parents who will most often be denied the substantial benefits of maintaining a relationship with an individual who has functioned as their parent and with whom they have formed a parent-child bond. [238]

IV. THE FUTURE OF EQUITABLE PARENTHOOD DOCTRINES

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[231] J. Herbie DiFonzo & Ruth C. Stern, *Breaking the Mold and Picking up the Pieces: Rights of Parenthood and Parentage in Nontraditional Families*, 51 FAM. CT. REV, 104, 108 (2013) ("[T]he insistence that same-sex partners follow specific and lengthy legal procedures in order to verify their right to parent the children they view as their own will ultimately hurt the children of these families. These children will be ripped from a relationship with one of the parents who was raising them ...").

[232] Carlos Ball, *Rendering Children Illegitimate in Former Partner Parenting Cases: Hiding Behind the Facade of Certainty*, 20 AM. U.J. GENDER SOC. POLY & L 623. 667 (2012).

[233] *See supra* notes 53-71 and accompanying text; *see also* Ball, *supra* note 282, at 666 ("Most children understand, from a very young age, who their parents are. Indeed, that understanding is in place well before they comprehend the legal implications of biological and adoptive links. Young children, therefore, do not make distinctions between their legal and non-legal parents.").

[234] *See supra* notes 53-71 and accompanying text.

[235] Polikoff, *supra* note 189, at 723 ("[C]hildren should not suffer because their parents do not marry.").

[236] Ball, *supra* note 232, at 663.

[237] Chatterjee v. King, 253 P.3d 915, 929 (N.M. Ct. App. 2010) (Vigil, J., dissenting).

[238] *See supra* notes 209, 225-226 and accompanying text; *see also* Michael Greenstone & Allen Looney, *The Marriage Gap: The Impact of Economic & Technological Change on Marriage Rates*, BROOKINGS (Feb. 3, 2012), https://www.brookings.edu/blog/jobs/2012/02/03/the-marriage-gap-the-impact-of-economic-and-technological-change-on-marriage-rates/ [https://perma.cc/43LJ-JEHS].

A. The Continuing Need for Equitable Parenthood Doctrines Even if Same-Sex Couples Receive Greater Access to the Avenues of Obtaining Formal Legal Parent Status Available to Different-Sex Couples

It is possible that in the future, methods of establishing formal legal parent status that require neither marriage nor adoption will be extended to same-sex parents. For example, perhaps states will extend the use of VAPs to same-sex couples or more states will enact statutes that extend formal legal parent status to an individual who consents to a partner's use of ART with the intent to parent the child, regardless of marital status or gender. If it becomes easier for members of same-sex couples to obtain formal legal parent status in efficient, low-cost manners, the argument that equity requires the provision of **[*98]** parental rights to functional parents will weaken. Moreover, in disputes between formal legal parents and functional parents, the increased availability to same-sex couples of straightforward, lost-cost avenues of establishing formal legal parent status will strengthen the argument that the formal legal parent did not actually consent to the functional parent forming a parent-like relationship with the child. In fact, in such situations the formal legal parent will likely argue that the couple's failure to pursue available efficient, low-cost manners of establishing formal legal parent status for the functional parent directly reflects a lack of consent on the part of the formal legal parent to the functional parent forming a parent-like relationship with the child, and thus that application of equitable parenthood doctrines is inappropriate.

Even in a potential future where the more efficient, low-cost avenues to establishing legal parent status are available to same-sex parents, however, there will continue to be some situations in which equity requires the application of equitable parenthood doctrines. As an initial matter, the more efficient, low-cost avenues to establishing legal parent status such as VAPs and consent to a partner's use of ART [239] generally will be of little help to a functional parent who enters the lives of the legal parent and his or her child at some point after the child is born. [240] For these individuals, adoption, which in some jurisdictions requires marriage as a prerequisite, may be the only option available for obtaining formal legal parent status. As discussed in detail above, there are many reasons for why a couple may not pursue adoption. [241] These reasons may have nothing to do with the legal parent's consent, the functional parent's assumption of parental obligations, or the bond between the child and functional parent, and thus equitable parenthood doctrines serve an essential function even when adoption is available in the jurisdiction. [242] Moreover, even functional parents who pursue adoption lack formal recognition as legal parents until the lengthy adoption process is completed, and **[*99]** therefore such parents may require the protection provided by equitable parenthood doctrines. [243]

Another reason that equitable parenthood doctrines should remain--even if there is an expansion to same-sex couples of more efficient, low-cost avenues to establishing formal legal parent status--is that there have been situations where legal parents have, by their words and actions, consented to and encouraged the formation of a parent-like relationship between the functional parent and child, but who have used manipulation to obstruct the

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[239] It is important to note, however, that for couples who would like to use ART without the involvement of a physician, the consent to a spouse's use of an ART avenue would not qualify as a low-cost or efficient option if the governing statute required, as a number currently do, that the procedure be performed by or under the supervision of a physician. *See supra* note 130 and accompanying text.

[240] While VAPs can be signed following discharge from the hospital, most are signed in the hospital or birthing center because that is where these documents are presented to the birth parent. *See supra* notes 160-164 and accompanying text. In addition, the language of many VAPs instructs that only men who believe that they are the child's biological father should sign, and thus it would not be applicable to a parent who entered the picture after the child's birth. *See supra* note 168.

[241] *See supra* Section III.B.

[242] *See infra* Section IV.B

[243] *See supra* note 156 and accompanying text.

functional parent from establishing formal legal parent status [244] For example, in the case of *Debra H. v. Janice R.*, according to the court, the nonbiological parent, Debra, "served as a loving and caring parental figure during the first [two and a half] years of the child's life," until she and the child's biological mother, Janice, separated. [245] At first, Janice allowed Debra to see the child multiple times each week and to speak with the child over the phone each day, but Janice subsequently limited the amount of time Debra spent with the child and eventually terminated all communication between Debra and the child. [246] According to Debra, who had not obtained a second parent adoption even though second parent adoption was available in the jurisdiction, Janice had convinced Debra that they did not need to pursue this formal means of establishing legal parent status, stating "We don't need an adoption. *You are his parent. I'm a lawyer*. I know the court system. We don't want the courts to get involved . . . ." [247] Debra also claimed Janice told Debra that she "would never take [the child] away from her." [248] While manipulating a functional parent in this manner will be more difficult if a variety of efficient, low-cost avenues to obtaining parenthood for same-sex couples are available, it will still be possible. This will be particularly true in situations where the functional parent enters the picture sometime after **[*100]** the child's birth when efficient, low-cost avenues to obtaining legal parent status are less likely to be available. [249]

Additional reasons for maintaining equitable parenthood doctrines despite the expansion to same-sex couples of more efficient, low-cost avenues to establishing formal legal parent status include that there are some individuals who will decline to take steps to establish formal legal parent status due to fear or mistrust of the government or a desire to exclude the state from their home life to the largest extent possible. [250] This may be particularly likely among groups of individuals who have faced discrimination and mistreatment at the hands of the government or legal system in the past. Moreover, for anyone who is not the child's birth mother or her spouse at the time of the child's birth, there likely will always be steps required to obtain formal legal parent status and there will always be some parents who are simply unaware of these steps. This will be true even if the required procedures are efficient and low-cost.

Overall, even if the existing formal avenues to establishing legal parent status or their equivalent are expanded to same-sex couples, there will always be individuals who, for one reason or another, cannot or do not take the steps required to obtain legal parent status through the available formal avenues. For some of these families, the reasons for not pursuing formal legal parent status for the functional parent will be completely unrelated to the consent of the formal legal parent, the assumption of the obligations of parenthood by the functional parent, and the bond between the functional parent and child. In these situations, equitable parenthood doctrines play an essential role in protecting the well-being of children and the important relationships formed between children and their functional parents. Notably, in a number of cases courts have used equitable parenthood doctrines to grant rights to a

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[244] *See* Grossman, *supra* note 8, at 703-04 (explaining that without the equitable parenthood doctrines, "the biological mother alone can decide whether to Permit her female partner to adopt, whether to enter into a marriage or civil union that might result in joint parentage, or whether to consent to shared custody or visitation after a break-up. Yet the couple's decision as to which partner will bear the child may rest on considerations--such as fertility, age, and health--that have nothing to do with which of the two would be a better parent, let alone the *only* parent." (emphasis in original)).

[245] Debra H. v. Janice R., 877 N.Y.S.2d 259, 260 (App. Div. 2009), *rev'd* 930 N.E.2d 184 (N.Y. 2010), *abrogated by* Brooke S.B. v. Elizabeth A.C.C., 61 N.E.3d 488 (N.Y. 2016).

[246] Debra H., 930 N.E.2d at 186.

[247] Verified Petition at P 31, Debra H. v. Janice ft, No. 106569/08, 2008 WL 7675822 (N.Y. Sup. Oct. 2, 2008) (No. 0810656908), 2008 WL 7471048 (emphasis in original).

[248] Debra H., 2008 WL 7675822, at *4.

[249] *See supra* notes 239-240 and accompanying text.

[250] *See supra* note 204 and accompanying text.

functional parent who is involved in a different-sex relationship with the child's formal legal parent. [251] The application of equitable parenthood doctrines in cases involving different-sex parents provides forceful support for the notion that there will be situations in which application of these doctrines is necessary to protect children and their functional parents even if the avenues of obtaining formal legal parent status currently **[*101]** available to different-sex couples are expanded to same-sex couples. Moreover, the decline in marriage among different-sex couples and rise in births outside of marriage over the past several decades have increased the number of children who do not have two formal legal parents and have made it more likely that a significant number of children being raised within different-sex relationships will have a functional parent-child relationship with an individual who has not obtained formal legal parent status. [252] Consequently, abandoning these doctrines will harm not only families that include same-sex parents, but also will harm different-sex parents and their children. Importantly, equitable parenthood doctrines do not seek to supplant, and have not supplanted, formal avenues to establishing legal parent status. [253] Instead, the equitable parenthood doctrines simply serve to provide a safety net for compelling cases involving parents who have, for whatever reason, fallen through the gaps in the avenues of establishing formal legal parent status. [254]

While the availability to functional parents of efficient, low-cost avenues to establishing formal legal parent status should not preclude application of equitable parenthood doctrines, the availability of such avenues may factor into the application of the doctrines. As discussed above, the vast majority of equitable parenthood doctrines include as an element that the formal legal parent consented to or encouraged the formation of a parent-like relationship between the functional parent and the child. [255] A couple's failure to obtain formal legal parent status for the functional parent despite the availability of low-cost, efficient avenues to obtaining such status could be something courts weigh in relevant situations in assessing the consent element of the jurisdiction's equitable **[*102]** parenthood doctrine. [256] In appropriate situations, the failure to obtain formal legal parent status despite the availability of efficient, low-cost avenues might also factor into the analysis of whether the functional parent assumed the obligations of parenthood, which is another common element of equitable parenthood doctrines. [257] The result may be that the availability of various low cost, efficient avenues to establishing formal legal parent

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[251] *See, e.g.*, Kinnard v. Kinnard, 43 P.3d 150 (Ala. 2002); McAllister v. McAllister, 779 N.W.2d 652 (N.D. 2010); Michael L v. Hilary W.-S., No. 947CV2002, 2002 32140828 (Pa. Commw. Ct. Nov. 25, 2002); Middleton v. Johnson, 633 8.E.2d 162 (S.C. Ct. App. 2006); Michaelholt v. Holt, 315 P.3d 470 (Wash. 2013).

[252] *See* Jeffery A. Parness, *Dangers in De Facto Parenthood*, 37 U. ARK. LITTLE ROCK L. REV. 26,28 (2014) (*[T]here has been a significant rise in unwed mothers, who at birth or thereafter, choose to raise their children with new intimate partners or with family members, like grandparents. These mothers' children have no fathers listed on their birth certificates and biological fathers who fail to ever attain parental childcare status." (footnotes omitted)); *see also* Laufer-Ukeles & Blecher-Prigat, *supra* note 2, at 435.

[253] *See supra* Part II (discussing formal avenues to establishing legal parent status).

[254] Ball, *supra* note 232, at 667-68 ("The application of the doctrine, in other words, does not prevent courts from using biology, adoption, and the entering into legally-recognized relationships as means through which to grant parentage status. Instead, the doctrine serves as an alternative means of acquiring that status, one that recognizes the diversity of American families at the beginning of the twenty-first century without jeopardizing the ability of the majority of individuals to be recognized as parents through the application of bright-line rules.").

[255] Suzanne B. Goldberg, et al., *Family Law Scholarship Goes to Court: Functional Parenthood and the Case of* Debra H. v. Janice It, 20 COLUM. J. GENDER & L. 348,363 (2011).

[256] This is the approach taken by the ALI, which states that the failure to adopt should be considered in evaluating whether the parties agreed that the informal parent would take on a parental role. Deborah L. Forman, *Same-Sex Partners: Strangers, Third Parties, or Parents? The Changing Legal Landscape and the Struggle For Parental Equality*, 40 FAM. L.Q. 23, 46 (2006) ("However, the ALI comments to its section on Parenthood by Estoppel' provide that failure to adopt, when it is an available option, relates merely to whether an agreement existed that the partner would assume a parental role.").

[257] *See supra* notes 98-99 and accompanying text.

status makes it more difficult for functional parents to obtain relief through equitable parenthood doctrines. This result is preferable to entirely eliminating equitable parenthood doctrines. Considering that protecting the best interests of children is a fundamental goal of family law, the law should not create a situation where parental rights for an individual who has functioned as a child's parent depend entirely on whether that individual has undertaken the formal steps necessary to obtain legal parent status. [258] To completely abandon the equitable parenthood doctrines based solely on the grounds that formal avenues to establishing legal parent status were available would mean that actually functioning as a parent is a largely unimportant consideration in determining an individual's eligibility for parental rights--a curious approach for an area of the law that purports to place children's best interests at the forefront of its goals.

Finally, while in the coming years same-sex couples will likely edge closer to different-sex couples with regard to access to low-cost, efficient avenues to establishing formal legal parent status, it is unlikely that the ability of same-sex parents to establish formal legal parent status will ever truly be equal in all respects to the ability of different-sex parents to establish formal legal parent status. This is due in significant part to the law's longstanding and continued emphasis on biology in **[*103]** determining formal legal parent status. [259] Consequently, even if in the future same-sex couples gain greater access to low-cost, efficient avenues to establishing formal legal parent status, it is likely that abandoning equitable parenthood doctrines will still disproportionately harm same-sex parents and their children. [260] Overall, equitable parenthood doctrines will continue to play an essential role in protecting LGBT parents and their children regardless of whether same-sex couples gain greater access to avenues of establishing formal legal parent status. The promotion of equitable parenthood doctrines should therefore remain a significant goal of the LGBT rights movement even as the movement continues to pursue greater access to low-cost, efficient avenues to establishing formal legal parent status.

B. The Role of the LGBT Rights Movement in Maintaining and Promoting Equitable Parenthood Doctrines

1. Clarifying the Goals of the Movement

On a broad scale, the LGBT rights movement is reaching a point where it must decide if its ultimate relationship recognition goals simply relate to attaining equal access to formal relationship statuses or if there is something more that the movement is seeking. Specifically, the movement needs to determine whether changing laws relating to marriage, parentage, and other issues is important beyond just the reform that creates greater equality in access to the existing formal relationship statuses. The LGBT rights movement has been stunningly successful on a number of fronts in obtaining greater access to formal relationship statuses for LGBT individuals. [261] To stop at mere equality of access to existing formal relationship statuses, however, would be to leave underdeveloped one of the most impressive accomplishments of the LGBT rights movement to date: challenging law and society to think

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[258] Forman, *supra* note 256, at 46 ("If we look at these cases from the children's perspective, it becomes clearer that whether the partner adopted or not, the completion of a formal adoption seems beside the paint, especially if she functioned as a parent and developed the resulting psychological attachment with the child."); Ball, *supra* note 232, at 860-81 ("It is unlikely that a child under these circumstances will consider [a functional parent who has not obtained legal parent status] to be any leas of a parent--especially if she served in that capacity for an extended period of time.").

[259] *See* Neclaime, *supra* note 132, at 1258-59.

[260] *Id.* at 1258-59 ("Indeed, in observing that lilt is the children of same-sex couples who will be most severely affected by being limited in their opportunity to maintain bonds with a party who is not a biological parent but who has . . . functionally behaved as the children's second parent, the opinion evinced an appreciation for how resistance to nonbiological parentage in both marital and nonmarital families reflects and produces LGBT inequality. Importantly, it suggested that, as a constitutional matter, *Obergefell* calls such inequality into question." (omission and alteration in original) (footnote omitted) (quoting MeGaw v. McGaw, 468 S.W.3d 435, 454 (Mo. Ct. App. 2015))).

[261] This is reflected by the nationwide recognition of same-sex marriage as well as the advancements in access to formal avenues to obtaining legal parent status for same-sex parents discussed in Section II. A.

differently about **[*104]** how family is defined so that important relationships, regardless of their form, are supported and protected.

In terms of the more narrow issue of the LGBT rights movement's goals with regard to parental rights, the movement has been a major force in furthering legal developments that provide parental rights to nonbiological parents raising children within same-sex relationships. One of the most consequential ways it has done this is through the promotion of equitable parenthood doctrines--the LGBT rights movement has played an essential role in advancing these doctrines in jurisdictions throughout the United States. [262] Recently, however, much of the movement's focus has shifted to advocating for the expansion to same-sex couples of existing avenues to obtaining formal legal parent status. There is no doubt that some of this shift stems from the achievement of marriage equality, which opened the door to the application of marriage-based avenues to establishing formal legal parent status to same-sex couples. [263] The movement must now decide whether the promotion of equitable parenthood doctrines will remain a significant part of its focus, or whether instead it will focus more exclusively on obtaining greater access to formal avenues to obtaining legal parent status. In answering this question, the movement should identify and examine any worthy goals furthered by equitable parenthood doctrines and assess whether these goals would be furthered as effectively through increased access for same-sex couples to avenues of establishing formal legal parent status. This will allow the movement to determine whether the promotion of equitable parenthood remains an important and worthy endeavor even as the movement pursues increased access to avenues of establishing formal legal parent status.

One possibility is that the sole worthy goal furthered by equitable parenthood doctrines relates to protecting the rights and interests of individuals in same-sex relationships who have functioned as parents but lack biological ties to their children. If this were the case, one may argue that because the need for equitable parenthood doctrines stemmed from the historical exclusion of nonbiological parents raising Hid= within same- sex relationships from avenues of establishing formal legal parent status, the recent success the movement has had in expanding access to avenues to establishing formal legal parent status for such parents renders equitable parenthood doctrines **[*105]** unnecessary. [264] Even if the sole worthy goal furthered by equitable parenthood doctrines related to protecting the interests of nonbiological parents in same-sex relationships, these doctrines would continue to be necessary to promote this goal regardless of the expansion to same-sex couples of formal avenues to establishing legal parent status. As discussed above, there have been, and there will continue to be, nonbiological parents raising children in same-sex relationships who are unable to use the available formal avenues to establish legal parent status despite increases in access to such avenues for same-sex couples. [265] Consequently, the existence of equitable parenthood doctrines is essential to protecting the rights and interests of these nonbiological parents raising children in same-sex relationships despite increased availability to same-sex couples of formal avenues to establishing legal parent status. [266]

Protecting the rights of nonbiological parents in same-sex relationships, however, is far from the only important goal furthered by equitable parenthood doctrines. The LGBT rights movement must be careful not to overlook what it has long identified as a core purpose of equitable parenthood doctrines: furthering the well-being of children by protecting the relationships formed between children and the individuals in their lives who have functioned as their parents. [267] The arguments set forth by leading LGBT rights organizations, scholars, and attorneys over the last

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[262] *See supra* note 30 and accompanying text.

[263] *See* Polikoff, *supra* note 180, at 721-23

[264] *See supra* Section II.A.

[265] *See supra* Section IV.A.

[266] *See supra* Section IV.A.

[267] *See supra* note 30 (compiling briefs submitted by leading LGBT rights organizations arguing in favor of the application of equitable parenthood doctrines).

several decades in support of the adoption and application of equitable parenthood doctrines have stressed the idea that these doctrines are essential because research indicates children can suffer great harm when their relationship with a parental figure is disrupted, regardless of whether that parental figure is a formal legal parent. [268] To abandon the promotion of these doctrines as a result of the expansion to same-sex couples of avenues to establishing formal legal parent status would be to ignore the arguments made over the years by leading LGBT rights advocates and to render those arguments seemingly disingenuous.

[*108] More importantly, since it is inevitable that, despite the expansion to same-sex couples of formal avenues to establishing legal parent status, situations will continue to arise in which individuals who have formed parent-like bonds with their children could not or did not take the steps necessary to establish formal legal parent status, equitable parenthood doctrines will remain essential in protecting the well-being and best interests of children. [269] Moreover, due to the law's historical reliance on biology in determining legal parent status and the continuing discrimination against same-sex parents with regard to access to formal avenues of establishing legal parent status, it likely will long remain the case that the equitable parenthood doctrines will most frequently serve to protect children within LGBT families. [270] Overall, if protecting the well-being of children, especially children being raised by same-sex parents, is a goal that the LGBT rights movement wishes to continue to promote, the advancement of equitable parenthood doctrines should remain a focus of the movement, regardless of how successful it is in obtaining greater access to formal avenues of establishing legal parent status.

2. Advocating for Increased Access for Same-Sex Couples to Formal Avenues of Establishing Legal Parent Status Without Leaving Functional Parents Behind

While the LGBT rights movement should continue to promote equitable parenthood doctrines, it should also continue to advocate for the expansion to same-sex parents of formal avenues to establishing legal parent status. Obtaining formal legal parent status is important for parents as well as their children for a number of reasons. Even in states that have adopted equitable parenthood doctrines, most do not treat equitable parents as equal to legal parents for purposes of custody and visitation. [271] In addition, while a wide variety of **[*107]** legal rights and obligations attach to formal legal parent-child relationships, "[i]t remains unclear in many states whether equitable parents have [any] rights or obligations outside the context of child custody and visitation." [272] Moreover, application of equitable parenthood doctrines is complicated and intrusive for the parties and their children, and relying on these doctrines to secure parental rights is a risky endeavor. Having the parent in question identified as

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[268] *See, e.g.*, Amici Curiae Brief of Natl Ctr. for Lesbian Rights et al. supra note 30 ("[T]here is a compelling interest in protecting the child from the 'emotional harm… intrinsic in the termination or significant curtailment of the child's relationship with a psychological parent under any definition of that term." (Omission in original) (quoting In re E.LM.C 100 P.3d 646, 561 (Colo. App. 2004))); *see also supra* notes 60-71 and accompanying test

[269] *See supra* Section IV.A.

[270] *See supra* note 239 and accompanying text.

[271] Feinberg, *supra* note 1. at 353-54 (discussing the approach of a number of jurisdictions in which equitable parents are treated as inferior to legal parents in determining custody and visitation rights); Laufer-Ukeles & Blecher-Prigat, *supra* note 2, at 449 ("Thus, although the V.C. court initially equated functional and formal parenthood and indicated that once functional parenthood is assigned that person is a parent for all intents and purposes, it later said there should be a presumptive rule that functional parents (as opposed to formal parents) will receive visitation as opposed to full custody. In fact, courts applying functional parenthood have in practice followed this presumption despite conceptually equalizing parenthood.").

[272] Joslin, *supra* note 27, at 502-03 ("For example, a child may not be entitled to children's Social Security benefits through her functional but nonlegal parent. The child may also not be entitled to child support through her functional but nonlegal parent. Additionally, a de facto parent may not have standing to oppose an adoption by a third person." (footnotes omitted)).

early as possible as a legal parent with all of the attendant rights and obligations is undoubtedly in the best interests of the children involved. [273]

Expanding formal avenues of establishing legal parent status to same-sex parents, while important, will only be effective if same-sex parents actually take advantage of such avenues. Unfortunately, some parents underestimate the importance of obtaining legal parent status or mistakenly believe that functioning as a parent will be enough to result in legal protection of their relationship with the child. Consequently, conveying the idea that obtaining legal parent status is of vital importance in securing parental rights should be a key goal of the LGBT rights movement and the movement should educate same-sex parents regarding the steps necessary to establish formal legal parent status, encourage them to take such steps, and assist them in doing so. However, the movement's message with regard to establishing formal legal parent status needs to be set forth in a way that, while effectively and forcefully highlighting the importance of obtaining formal legal parent status, does not denigrate functional parents.

Specifically, the message should stress that while functional parents are as important to their children's lives as formal parents and deserve equal respect, the reality is that the law places great weight on the establishment of formal legal parent status. The message should convey that establishing formal legal parent status provides rights and protections that are essential not only to functional parents, but also to their children, and that failure to obtain formal legal parent status can result in both children and their functional parents being unjustly denied many of these important rights and protections. **[*108]** Moreover, because many people prefer not to plan for or consider the potential demise of their romantic relationships, the message should stress that the rights and protections accompanying formal legal parent-child relationships are important for children and parents within both intact and non-intact families. [274] Overall, the message should celebrate functional parents while simultaneously encouraging them to become formal parents by stressing that it is the fact that functional parents are so important to the lives of their children that makes it essential that they take the steps necessary for them to obtain formal legal parent status.

Finally, it is important to understand that no amount of messaging from the movement regarding the importance of obtaining formal legal parent status will be enough to help same-sex parents who lack the resources to pursue the available avenues of establishing formal legal parent status. It is therefore essential that the movement commit to providing assistance to same-sex parents in obtaining formal legal parent status. Equally essential, however, is that the movement recognize that it is inevitable that there will be functional parents who could not or did not obtain formal legal parent status and, as a result of this recognition, continue to advocate forcefully for the adoption and application of equitable parenthood doctrines. It is this that is the most important action the movement can take to avoid denigrating functional parents while it continues to pursue increased access to avenues of establishing formal legal parent status.

CONCLUSION

As same-sex parents gain increasing access to formal avenues of establishing legal parent status, the future of equitable parenthood doctrines is uncertain. It will be tempting for courts and legislatures to abandon equitable parenthood doctrines in favor of exclusive reliance on formal avenues to establishing legal parent status. This is in part because the relatively straightforward, bright-line approach to establishing legal parent status that inheres in the formal avenues allows courts to make parentage determinations more efficiently and without having to undertake any significant inquiry into the **[*109]** dynamics of the relationships between the parties or the child and party seeking parental rights. In contrast, application of equitable parenthood doctrines requires courts to examine very closely facts relating to the dynamics of the relationships at issue and to undertake complicated analyses

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[273] Aviel, *supra* note 33, at 2065-66 ("Professor Elizabeth Bartholet has similarly argued that children do better when parental authority is concentrated in two clearly identified parents who enjoy that status from the time of the child's birth."); *see also* Laufer-Ukeles & Blecher-Prigat, *supra* note 2, at 464-65.

[274] For example, whether within the contest of intact or non-intact families, children may not be able to claim Social Security benefits based upon a functional parent-child relationship, and a de facto parent may not have the right to make medical or educational decisions for the child. Joslin, supra note 27, at 502; JOSLIN ET AL., supra note 74, § 7:1.

regarding the consent of the formal legal parent, the assumption of the obligations of parenthood by the functional parent, and the bond between the functional parent and child. In addition, due to the fact that it was, in significant part, the historical denial to same-sex parents of avenues to establishing formal parent status that led many courts and legislatures to adopt equitable parenthood doctrines, these entities may now conclude that the increasing expansion to same-sex parents of formal avenues to establishing legal parent status renders such doctrines unnecessary.

To abandon equitable parenthood doctrines, however, would be a mistake. As an initial matter, the current formal avenues available to same-sex couples for establishing legal parent status are based primarily upon marriage and adoption. Couples may be unable or unwilling to pursue marriage- and adoption-based avenues to establishing formal legal parent status for a wide variety of reasons, and the failure to pursue these avenues may indicate nothing about the functional parent's relationship with the child or the understanding between the functional parent and the formal legal parent regarding that relationship. In addition, excluding equitable parenthood doctrines due to the availability of marriage- or adoption-based avenues for establishing formal legal parent status would disproportionately harm same-sex couples and their children--unlike same-sex couples, different-sex couples have access to a variety of formal avenues to establishing legal parent status that require neither marriage nor adoption. Moreover, equitable parenthood doctrines should not be abandoned even if most of the existing formal avenues of establishing legal parent status or their equivalent are expanded to same-sex couples. There will always be parents who, for whatever reason, are unable or unwilling to take the formal steps necessary to establish legal parent status, and a legal approach that categorically refuses to provide rights to functional parents is an approach to parental rights that fails to promote children's best interests.

For family law to most effectively advance what is perhaps its most essential goal, protecting the best interests of children, it must continue to adopt and apply equitable parenthood doctrines even as formal avenues to establishing **[*110]** legal parent status increasingly are expanded to same-sex couples. Research demonstrates conclusively that children form strong bonds with parental figures regardless of the existence of biological or adoptive ties. [275] The disruption of the relationships between functional parents and their children can lead to significantly harmful short- and long-term effects for the children involved. [276] As a result, it is essential to maintain equitable parenthood doctrines so that in appropriate cases, the doctrines can be used to protect the well-being of children who have formed a parent-child relationship with a parental figure who has not established formal legal parent status. Moreover, in order to most effectively protect LGBT families, the LGBT rights movement, which has long played a key role in promoting the adoption and application of equitable parenthood doctrines, should continue to advocate for these doctrines even as it pursues the equally important goal of increasing access for same-sex couples to formal avenues of establishing legal parent status.

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[275] *See supra* notes 53-71, 233 and accompanying test.

[276] *See supra* notes 53-71 and accompanying text.

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Factors associated with two types of child custody loss among a sample of African American mothers: A novel approach

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Abstract

African American families are overrepresented in the Child Welfare System; however, extant research on this phenomenon has (1) focused mostly on Caucasian or mixed-race samples and (2) has not examined informal custody arrangements alongside official child custody loss. This research addresses these gaps in the literature by examining factors associated with both official and informal child custody loss among a sample of African American mothers. Multinomial regression results show that having ever been incarcerated following a conviction increases the odds of experiencing both types of custody loss relative to no loss. Additionally, mother's experiences of childhood victimization increase the likelihood of informal custody loss relative to no loss, while being older, past year homelessness, number of minor children, being lesbian or bisexual, crack/cocaine use, and more family social support increase the odds of official loss versus no loss. Finally, increases in social support from friends decrease the odds of official loss. Implications are discussed.

Keywords

custody loss; African American; motherhood; substance use; kinship care; child maltreatment

1. Introduction

African American women and their children have long been overrepresented in the child welfare system (CWS). Dorothy Roberts (2008) has referred to the CWS as having a "racial geography." While African American children represent 15% of the nation's children, they account for 45% of the foster care population and are four times as likely as white children to be in foster care (Child Welfare League of America, 2000; United States Department of Health and Human Services, 2006). Although research has examined factors contributing to CWS involvement with multi-race samples, the disproportionate involvement of African American women merits a closer look at this population. Our current knowledge regarding precursors to child custody loss is limited to mothers who lost custody via an official court/CWS mandate. Very little, however, is known about factors associated with custody loss that occurs outside official channels, despite research showing these types of informal

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arrangements are quite common, particularly among African Americans (The Urban Institute, 2003).

Researchers have established that the overrepresentation of African American women and children in the CWS is due in part to structural inequalities (Hill, 2001, 2007; Roberts, 2002), prejudices within the system itself (Ards, Chung, & Myers, 1998; Barth, 2005; Morton, 1999; see Derezotes & Poertner, 2005, for a review), and policy wording that lends itself to differential enforcement based on class and race (Vesneski, 2011). It is, however, necessary to look at specific life events and behaviors that put economically disadvantaged African American women at risk of losing custody of their children in order to design and implement pragmatic interventions that address the needs of these women, children, and families. To address these gaps, the aims of this study are to (1) compare the sociodemographic and other characteristics of predominantly low-income African American mothers who experienced no custody loss, informal custody loss, or official custody loss in the past year, and (2) examine correlates of both official and informal custody loss among this sample.

2. Literature Review

An important first step is reviewing the general prevalence of child maltreatment in the U.S. and examining the characteristics of mothers involved with the CWS. While this study concerns itself with not only mothers who have lost official custody, but also those who have lost custody via informal channels, there is no other available data on the background characteristics of this latter group of women. Further, nearly all of the existing studies sampled white women or women from a variety of racial categories. While race has been examined as an independent variable, researchers have yet to look at within-group differences among African American mothers despite calls for more within-group research (Knight, Roosa, & Umaña-Taylor, 2009). For these reasons, this section draws from the available research on mostly white samples of women with official CWS involvement.

2.1. Child maltreatment in the U.S.

In their review of the prevalence of maltreatment in high income countries, Gilbert and colleagues (2009) found 4.78% of children in the U.S. had been investigated for a maltreatment claim in 2006 and only 1.21% of those claims were substantiated. Official reports, however, seldom demonstrate actual prevalence and in their Adverse Childhood Experiences study of over 17,000 children, the Centers for Disease Control and Prevention (CDC) found that 28.3% of children had experienced physical abuse, 20.7% sexual abuse, 10.6% emotional abuse, 9.9% physical neglect, and 14.8% emotional neglect (CDC, 2016). Additionally, 26.9% reported living in a household where substance abuse occurred (CDC, 2016). Concerning risk of foster care placement, up to 5.91% of U.S. children are ever placed in foster care between birth and age 18. However, it is noteworthy that rates are much higher for African American children at 11.53% (Wildeman & Emanuel, 2014) even though research has established rates of child maltreatment are the same across races (Sedlak & Schultz, 2005).

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2.2. Established precursors to child welfare system involvement

One common precursor to child welfare system involvement is low socioeconomic status, as this system is disproportionately comprised of poor families (Grella, Hser, & Huang, 2006; Lindsey, 1994; Pelton, 1989; Shireman, 2003). Specifically, housing problems caused by poverty place these families at an increased risk of CWS involvement (Culhane, Webb, Grim, Metraux, & Culhane, 2003; Park, Metraux, Brodbar, & Culhane, 2004; Pelton, 2008; Roberts & Nuru-Jeter, 2012; Slack, Holl, McDaniel, Yoo, & Bulger, 2004; Steinbock, 1995). In one study of substance-using parents involved with the CWS, 81% reported experiencing housing difficulties (Marsh, Ryan, Choi, & Testa, 2006). Another study of (mostly white) CWS-involved female primary caregivers found more than half of those whose children had been placed out of home had annual household earnings of less than $10,000 and 38% of them had been homeless (Marcenko, Lyons, & Courtney, 2011). African Americans are four times more likely to live in poverty than other Americans, with a poverty rate of 25.8% (second only to American Indians and Alaska Natives) (Macartney, Bishaw, & Fontenot, 2013). The rate of poverty among single mothers, at 47% (Legal Momentum, 2010), is higher than the general population at 14.5% (U.S. Census Bureau, 2014). Given 73% of African American children are born to unmarried mothers (Wildsmith, Steward-Streng, & Manlove, 2011), there is reason to expect that economic disadvantage may be an even more salient precursor to CWS involvement among this population.

A second correlate of CWS involvement and custody loss is mental health problems. Research indicates the incidence of prior and/or current mental health problems/psychiatric disorders among CWS-involved mothers ranges from 40 to 72% (Burns et al., 2010; Famularo, Kinscherff, & Fenton, 1992; Larrieu, Heller, Smyke, & Zeanah, 2008; Marcenko et al., 2011; Marsh et al., 2006; National Survey of Child & Adolescent Well-Being, 2007; for a review, see Wells & Marcenko, 2011). These may be conservative estimates, given the lack of data on mothers who have informally lost custody. Women with a diagnosis of severe mental illness are at increased risk of losing custody and even having their parental rights permanently terminated (Ackerson, 2003; Jacobsen & Miller, 1998; Nicholson, Biebel, Hinden, Henry, & Stier, 2001) as maternal mental illness may affect parenting ability and often acts as one of many catalysts to child custody issues (Hollingsworth, 2004; Kohl, Jonson-Reid, & Drake, 2011).

Substance use is also associated with CWS involvement and has been extensively examined in prior research. While 5.5% of all women living with a minor child have a history of alcohol or drug abuse (Substance Abuse and Mental Health Services Administration, 2003), this rate jumps to between 50 and 80% among parents involved in the CWS (Curtis & McCullough, 1993; Larrieu et al., 2008; Semidei, Radel, & Nolan, 2001). In fact, the Center on Addiction and Substance Abuse has declared substance use the “chief culprit” in child welfare spending (1999). Substance-using, CWS-involved parents suffer from more severe, and a greater number of, social problems than similarly situated non-using parents and are perhaps the most in need of comprehensive assistance to address these issues. A study of African American children in CWS care found that families with a substance-using parent were significantly more likely to experience poverty, welfare dependence, single parent

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status, and housing difficulties, and to experience several of these concomitantly (Walker, Zangrillo, & Smith, 1991).

A lifetime history of victimization is another oft-studied correlate of CWS involvement. This includes ever being physically or sexually abused, as well as being involved in a past/present domestic violence situation. In a study by Grella and colleagues (2006), 71.3% of CWS-involved mothers reported having ever been physically abused and 50.6% reported sexual abuse. Women with childhood sexual abuse histories are more likely to be involved in the CWS (Marcenko et al., 2011; Noll et al., 2009). Concerning domestic violence, rates among CWS-involved families typically range between 30 and 60% (Edleson & Eisikovits, 1996; Findlater & Kelly, 1999; Marsh et al., 2006); however, when focusing on just mothers, this rate jumps to 80% (Larrieu et al., 2008). The unusually high rate of both childhood and adult victimization among women involved with the CWS is a major public health concern that needs addressing.

Lastly, criminal justice system involvement is also strongly associated with CWS involvement, and maternal incarceration is a key reason for CWS intervention (Ross, Khashu, & Wamsley, 2004). The likelihood that the CWS will remove a child from the mother's home is also much greater when the mother is a single parent because there is no partner left to take care of children (Marcenko et al., 2011). Thus, because rates of single motherhood (Wildsmith et al., 2011) and incarceration (Harrison & Beck, 2005) are disproportionately high for African American women, criminal justice system involvement is an important factor in CWS intervention (Christian, 2009; Lincroft & Borelli, 2011).

Researchers have repeatedly found issues surrounding poverty, mental health, substance use, victimization, and criminal involvement are strongly correlated with CWS involvement and custody loss among white and multi-race samples of women. But how applicable is this model for African American mothers who have lost custody? African American women are a historically (and currently) disadvantaged group and are especially likely to undergo stressful life events compared to women of other races, and to men (Brown & Keith, 2003; Whitley & Green, 2008). Thus it is important to evaluate if these various marginalized statuses are equally important among African American mothers who experience custody issues.

2.3. Potential precursors to child custody issues

Other factors that have not been adequately studied but may contribute to a mother losing custody are the number of minor children she has, her sexual orientation, and her available social support. While intuitively we might expect custody loss to be more common among women with more children in their care, there are no known studies that have directly examined this relationship. Suchman and colleagues (2006) reported that additional children increase demands on financial and emotional resources; thus, it is expected that custody loss will be more common among mothers with a greater number of children.

While several court cases have established that sexual orientation alone cannot be used to deny custody to a parent who is gay, lesbian, or bisexual, no prior studies have examined if being gay/lesbian or bisexual has an independent effect on the odds of losing custody of a

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child (Cordover, 2012; American Psychological Association, 2014). Because members of the LGBTQ community continue to experience discrimination both on a personal and structural level, sexual orientation will be included in these analyses.

A final variable of interest is social support. There is a tremendous literature demonstrating the positive impact social support can have on mental and physical health (see Cohen, Underwood, & Gottlieb, 2000, ch. 1 for a review; Paranjape & Kaslow, 2010). Research has also shown that social support may be particularly important for women, especially women with substance use problems as this increased stress occurs in areas such as "responsibility for children, living alone, low income, low level of education, lack of financial resources, partners who use drugs, more dysfunction and pathology in the family of origin, higher levels of depression and anxiety, and lower levels of self-esteem" (Mondanaro, 1989, p. 76; Reed, 1981). Because the majority of women in this sample are economically disadvantaged, the presence of these stressors is likely a reality for many. This analysis aims to explore if higher levels of social support from family members, friends, and significant others will decrease the odds of child custody loss.

2.4. Informal Custody Loss

Throughout this study, we use the term "informal custody loss" to refer to situations in which a child is living with someone other than the mother – usually a relative – but was not ordered to do so by the CWS. Others have referred to this as *private kinship care*, meaning that the family made the arrangement without CWS involvement (The Urban Institute, 2003). An estimated 1,760,000 children were living in *private* or informal kinship care as of 2003 (The Urban Institute, 2003), and African American children are almost twice as likely as white children to be in kinship care (Hill, 2004). While one in eleven children reside in kinship care at some point during their childhood, the rate is one in five for African American children (The Annie E. Casey Foundation, 2012). Concerning where children live when placed in foster care, more than one in four children live with relatives (Kids Count Data Center, 2010). Furthermore, the U.S. Census (2010) found that among African American females in the U.S. over 29 years of age, 47.6% reported they were responsible for the care of their grandchildren. While they remain overrepresented in both official and informal custody arrangements, the number of African American children in foster care has been on a gradual decline in recent years (U.S. Department of Health & Human Services, 2013; Wildeman & Emanuel, 2014). One potential explanation for this decline is an increasing number of informal custody arrangements in the African American community (Ehrle, Geen, & Clark, 2001), especially among African Americans.

Given the above statistics and the importance that family and community support networks have historically had for African American mothers (for a review, see Harris & Skyles, 2008), it is not surprising that informal kinship custody arrangements are more common among African Americans than other racial groups. The social support network of an African American mother is often tasked with assisting her in child-rearing responsibilities, demonstrated, for example, by the importance of "othermothering" and "kin-work," whereby relatives and friends routinely help one another with basic needs like childcare (Collins, 2000; James, 1993; Stack & Burton, 1994). Because familial and friend support

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play a critical role in African American communities, particularly those characterized by poverty and single motherhood (Collins, 1994, 2000; hooks, 2000; Stack & Burton, 1994), it is likely that informal kinship care arrangements are more common than even the highest estimates, yet they have not been previously studied. The major contributions of the current study are two-fold. First, this study examines the previously un-studied phenomenon of informal custody loss among a sample of predominantly low-income African American mothers. Second, this study contributes to the extant literature by determining if there are substantive differences in the characteristics and experiences of African American mothers who experience informal custody loss compared to those who undergo official custody loss.

3. Methods

3.1. Sample and Data Collection

This analysis used data collected as part of the Black Women in the Study of Epidemics (B-WISE) research project, funded by the National Institute on Drug Abuse. The goal of the B-WISE project was to understand how drug use and criminality were related to health disparities among African American women across criminal justice status and drug use status. Data were collected from 643 African American women who were in prison (n=240), on probation (n=197), or not currently involved with the criminal justice system (n=206). B-WISE staff attempted to recruit 200 African American women from each of the three venues and ultimately came very close, although the probation sample was slightly smaller than planned and women in prison were oversampled. Recruitment varied by venue. Based on a list of African American women eligible for release within the next 60 days provided by prison staff, women were invited to an information session held by BWISE interviewers. Eligible and interested individuals were scheduled for an interview at the three women's prisons in the state. For the probation sample, BWISE interviewers approached African American women on report days in seven Probation Offices with the highest rates of supervision of African Americans to screen for interest and eligibility. The community sample was recruited via newspaper advertisements and flyers posted in zip codes with the largest percentage of African American residents in a southern city. Interested individuals could call the toll-free number for screening. Probationers and community participants were interviewed in private rooms in public settings (e.g., library, university, service agency).

Of the 643 women in the BWISE project, 339 are mothers to at least one biological child under 18 years of age. The analyses in this study were conducted using these 339 women, of which 139 were in prison, 117 were on probation, and 83 were from the community. After obtaining informed consent, data were collected by trained African American female interviewers using laptops outfitted with Computer Assisted Personal Interviewing (CAPI) software. The CAPI collected data were transferred from an SPSS database to Stata, version 12 for analysis. Participants were provided with a $20 incentive for their participation in the 1.5–2 hour interview. To be eligible for participation, women had to (1) self-identify as African American; (2) be at least 18 years old; and (3) be willing to participate in the study. Various recruitment strategies were designed to elicit participation from women in prison, on probation, and those in the community not currently under any type of criminal justice supervision. Study methods are described in greater detail elsewhere (Stevens-Watkins,

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Knighton, Michell, Oser, & Leukefeld, 2013). Procedures were approved by the University's Institutional Review Board and participants were protected by a federal Certificate of Confidentiality.

3.2. Specific Measures

3.2.1. Dependent Variable: Custody Loss—To measure custody loss history, participants were asked where/with whom each child under the age of 18 was living and if the mother had lost official custody of any child in the past year (or year prior to incarceration for the women recruited from prison). It should be noted that 100% of women in the prison sample experienced past year custody loss upon entering prison. A three-category custody loss variable was created. Women who indicated at least one biological child was living with someone other than herself at the time of interview were coded as having lost custody informally. Participants who said they had lost official custody of any minor biological child in the past year were coded as official custody loss (=1). Participants who had experienced both informal and official custody loss were categorized based on the most severe custody issue they reported, conceived of here as a continuum where official custody loss is considered more severe than informal custody loss. For the analyses, informal custody loss and official custody loss formed a multinomial variable using women who had not experienced custody loss as the reference group.

3.2.2. Independent Variables—Age and number of biological children under the age of 18 were continuous variables. Marital status was coded into two categories: married or living as married (=1) and other (single, divorced, widowed=0). Four variables were used to measure socioeconomic status. Both employment in the past six-months and homelessness in the past-year were dichotomous (1=yes; 0=no). Number of years of education completed was coded continuously. Participants were asked to pick from eight income brackets (e.g. "$0 - $4,999", "20,000-$29,999") the one that was closest to their personal income in the past year. Then, to get a better approximation of differences in income, income brackets were coded to the midpoint. Final response categories included: $2,500, $7,500, $12,500, $17,500, $25,000, $35,000, $45,000, $57,500, and $87,500. It should be noted that for the women recruited from prison, time-anchored questions refer to the time prior to their current incarceration.

Sexual orientation was a dichotomous variable based on participant's self-identification (1=gay/lesbian or bisexual; 0=heterosexual). Concerning illicit drug use, participants were asked if they had used a number of drugs at all in the past year or in the year prior to incarceration. After examining the frequency distributions, rates of use for nearly all drug categories were very low (< 8%), with the exception of marijuana, crack, and cocaine. For this reason, the analyses were limited to these drugs. A dichotomous variable was computed combining crack and cocaine use, where any past year crack or cocaine use was coded as "1" (0=none). Past year marijuana use was also dichotomous. To assess criminal involvement, women were asked if they had ever been incarcerated following a conviction after eighteen years of age (1=yes; 0=no).[1]

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The lifetime psychological symptoms scale – modified from the eleven-item version of the Addiction Severity Index *Lite* – CF (McLellan, Cacciola, Carise, & Coyne 1999) – measures common symptoms of mental illness. Participants were asked if they had ever experienced any significant period of psychiatric problems (i.e., lifetime prevalence). Symptoms measured include serious depression, serious anxiety or tension, hallucinations, trouble understanding/concentrating/remembering, trouble controlling violent behavior, serious thoughts of suicide, attempted suicide, and having taken prescribed medication for any psychological/emotional problem. These eight items were coded as a 1 if yes and 0 if no. The scale is calculated by adding the dummy variables and then dividing the sum by the number of non-missing items. The scale has a potential range of 0–1, with higher values indicating a greater number of lifetime psychological symptoms.

To assess symptoms consistent with post-traumatic stress disorder (PTSD) we used the PTSD-MINI, which contains the same criteria as the Diagnostic and Statistical Manual of Mental Disorders (DSM-IV-TR) (American Psychiatric Association, 2000). Participants were asked "Have you ever experienced or witnessed or had to deal with an extremely traumatic event that included actual or threatened death or serious injury to you or someone else?" Individuals who indicated "yes" were asked additional questions surrounding the event(s). Scores were computed using the DSM-IV-TR criteria (for more detailed scoring information, see Sheehan et al., 1998). Individuals who endorsed all the criteria for PTSD were coded as a "1" and all others were coded as zeroes.

Childhood and adult victimization were measured using a modified version of the *Traumatic Life Events Questionnaire* (Kubany et al., 2000; Perry, Harp, & Oser, 2013). Participants were asked the number of times in their childhood they experienced events such as being physically abused, witnessing domestic violence, and having non-consensual sexual contact. Each item was answered using a scale of 0 (never happened) to 6 (happened more than five times). Responses for all three items were summed and scores could range from zero to eighteen. Participants were asked the number of times in adulthood they experienced six events including being a victim of a mugging or robbery involving a weapon, severe physical assault by acquaintance or stranger, intimate partner violence, and non-consensual sexual contact. Each item was answered using a scale of 0 (never happened) to 6 (happened more than five times). Answers for all six items were summed and scores ranged from zero to thirty-six, with higher scores indicating more instances of adult victimization.

Social support was measured using the 12-item, 7-point Likert-type Multidimensional Scale of Perceived Social Support (MSPSS) (Zimet et al., 1988). Scores for the family, friends, and significant other subscales were determined by summing all responses and dividing by the number of items in that subscale to calculate the mean score. Items are worded such that they assess the availability (i.e., presence or absence) of supportive family, friends, and significant other so even individuals with, for example, no significant other, still completed

[1]The authors made the decision to control for criminal involvement based on incarceration following a conviction rather than based on whether the participant was recruited from prison, probation, or the community. The rationale is that being incarcerated at the time of interview perfectly predicts experiencing a custody issue because physical custody of one's children is not possible while incarcerated in this State's Department of Corrections. However, based on the literature it was important to include a measure of criminal activity. This is noted in the study limitations.

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these items. Mean scores ranged from 1 (indicating a low level of support) to 7 (indicating a high level of support). Sample items include “I can talk about my problems with my friends,” “My family really tries to help me,” and “There is a special person who is around when I am in need.” The internal consistency for each subscale was high: family ($\alpha = 0.95$), friends ($\alpha = 0.96$), and significant other ($\alpha = 0.91$).

Multicollinearity diagnostics were run on all of the variables using the “collin” command in Stata to detect relationships between the independent and control variables. All of the variable inflation values (VIF) were less than two, indicating no multicollinearity among the variables in these analyses.

4. Results

Table 1 displays descriptive statistics for all of the women in this study. Of the 339 African American mothers in this sample, the average participant was about 32 two years old with 12 years of education. Fewer than half of the women in our sample (47.4%) were employed full or part-time in the year before the study. This compares with 62.7% of U.S. African American females sixteen and over (U.S. Census Bureau, 2011). Median annual income for women in the sample was approximately $9,900, a quite low value, especially considering these are women with minor children. Over a fifth of women in this study had been homeless sometime in the past year. Overall the women reported having an average of 2.4 biological children under the age of eighteen

Concerning the independent variables of interest, 21.3% of the women in this sample reported being bisexual or gay/lesbian. About 48.6% reported any marijuana use and 32.2% reported any crack/cocaine use in the past year. Over two-thirds of women in this sample (70.8%) reported having ever been incarcerated as an adult following a conviction.

Of the remaining mental health, victimization, and support variables, African American women reported having ever experienced an average of 2.65 (2.65 / 8 = 0.3) out of eight psychological symptoms listed and over 10% endorsed criteria consistent with a diagnosis of PTSD. Participants reported an average of 4.8 traumatic events during childhood, and 7.7 as an adult. Finally, the women in this sample reported relatively high levels of perceived social support from all three sources, with the highest levels of support coming from their significant other (mean=5.9), followed by family (mean=5.2) and friends (mean=4.9), where 5 is mildly agree the support is there.

4.1. Bivariate Analyses

Table 2 shows chi-square analyses and ANOVAs for the three subgroups. Tukey’s Honestly Significant Difference Test was conducted post-hoc to test to determine which groups were significantly different from one another. Rates of marriage, marijuana use and perceived social support from a significant other were similar across women in all three custody groups. On the contrary, the only variable on which each group of women *differed* from both of the others was crack/cocaine use, with 12.2% of women in the no loss group, 30.4% of those who lost informal custody, and 51.0% of those who lost official custody reporting any past year use.

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Women who lost official custody stand out on several other variables. Compared to both women in the no loss and informal loss groups, those who lost official custody had significantly less education, lower rates of employment, less annual personal income, higher rates of past year homelessness, a greater number of minor children, and a greater number of lifetime psychological symptoms (all p<.001). More specifically, while median annual personal income for the other two groups was around $12,000, women who lost official custody reported a median category of $6,600 in past year personal earnings. Concerning homelessness, 36.6% of women who lost official custody were homeless at all in the past year, while the other two groups reported rates of homelessness below 10%, and employment rates among this group of women were more nearly half that of the other groups. The percentage of women endorsing PTSD symptoms for PTSD criteria were more than double for women who lost official custody compared to the other two groups, although this was not statistically significant. Women in the official custody loss group reported the highest rates of homelessness, unemployment, and past year crack/cocaine use, as well as the most lifetime psychological symptoms (p<.001). Women who experienced official loss were also significantly more likely to be bisexual or lesbian compared to those who did not lose custody (31% vs. 8.7%, respectively).

For women who lost custody informally, we see that they differ in several ways from the official loss group - more educated, more likely to be employed, much higher annual income, less likely to be homeless, fewer children, less likely to use crack/cocaine, and fewer psychological symptoms. The informal loss group is similar to those who lost official custody in terms of the rate of incarceration and more experiences of childhood and adulthood victimization than the no loss group. Aside from having higher incarceration, victimization, crack/cocaine use rates, the informal loss group is similar to the no loss group.

In general, women who did not experience any custody loss in the past year differed greatly from those who had experienced either informal or official custody loss. Women in the no loss group were less likely to have ever been incarcerated after a conviction and reported significantly fewer traumatic victimization events in both childhood and adulthood in comparison to women who experienced any type of custody loss (all p<.001).

Lastly, there were a few key variables in which women who experienced official loss differed significantly from women who experienced no loss, but not those in the informal loss group. Women who experienced official custody loss were significantly older, had less available social support from friends, and were over three times more likely to identify as bisexual or lesbian than women who experienced no custody loss (all p<.001).

A correlation matrix was used to examine relationships between all of the study variables (See Table 3). Marital status was subsequently omitted from the multivariate models because it was not significantly associated with either informal or official custody loss.

4.2. Results of Multivariate Analysis

Table 4 presents results of the multinomial logistic regression which was used to calculate the effect of several independent variables on the relative risk of experiencing one of three custody loss outcomes (i.e., no custody loss, informal custody loss, and official custody

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loss). The no custody loss category was chosen as the reference category. Thus, the model first estimated the likelihood of experiencing informal custody loss relative to no custody loss and then estimated the likelihood of experiencing official custody loss as compared to no custody loss. Relative risk ratios are reported. Only two variables reached significance when examining informal loss – criminal involvement and childhood victimization. Specifically, a mother who has a history of incarceration is over eight times as likely to lose informal custody rather than not lose custody, as compared to women with no history of incarceration ($p<.001$). Additionally, for each additional instance of childhood victimization, the risk of experiencing informal loss compared to no loss increases by 11% ($p<.05$).

When looking at official custody loss, several independent variables were significantly associated with official custody loss, when compared to no custody loss. Being older ($p<.01$), having been homeless in the past year ($p<.05$), and having more children ($p<.001$) all significantly increase the risk of experiencing official custody loss relative to no custody loss. Women in our sample who reported being lesbian or bisexual were 4.19 times as likely to lose official custody rather than have no custody loss in comparison to their heterosexual counterparts ($p<.001$). Substance use, criminal involvement, and social support were also significant. Specifically, women who had used crack/cocaine in the past year and had an incarceration history had higher odds of losing official custody rather than not losing custody when compared to women who did not use crack/cocaine and had no incarceration history ($p<.05$ and $p<.001$, respectively). Each unit increase in perceived social support from family members increased the odds of losing official custody versus no custody loss by 26% ($p<.05$), while each unit increase in perceived social support from friends *decreased* the log odds of losing official custody by 22% relative to no custody loss ($p<.05$).

5. Discussion

This study made a novel contribution to the existing literature by describing the prevalence of both informal and official custody loss experienced by understudied predominantly low-income African American mothers, as well as examining the relationship between a variety of independent variables and the likelihood of experiencing informal and official custody loss in the past year. At the bivariate level, women who experienced no loss and those who experienced informal loss were more alike than different on some measures. For example, in comparison to those who lost official custody, women whose children were living with someone else or who didn't experience loss of custody were more educated, less socioeconomically disadvantaged, had fewer children under 18, and fewer lifetime psychological symptoms. This supports the authors' conceptualization of official loss as more severe than informal loss in terms of its correlates and consequences. However, on other measures the informal and official loss groups were similar to each other while being much different from women who did not lose custody in the past year. Women who experienced either type of custody loss were much more likely to have ever been incarcerated following a conviction, and had significantly more traumatic experiences in both childhood and adulthood. These findings are consistent with those of other researchers who have found a number of negative life circumstances to be associated with child welfare system involvement (Burns et al., 2010; Culhane et al., 2003; Grella et al., 2006; Hollingsworth, 2004, 2005; Larrieu et al., 2008; Ross et al., 2004).

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The bivariate findings demonstrate the nuanced nature of a previously unstudied phenomenon. By lumping women together who have experienced *any* type of custody loss, scholars obscure the differences between the custody loss groups as well as the unique paths that lead to each type of loss. Similarly, combining those who have not lost custody with those who have lost custody informally – the justification being that neither has experienced a custody loss that is "on the record" – omits the experiences and very presence of the many mothers who have experienced the blow of being physically separated from their children. Additional research is needed to unravel the unique context in which informal custody loss occurs for African American mothers (e.g., it is temporary, voluntary, frequency of contact with children, etc.).

5.1. Criminal Involvement is Significant for Both Types of Loss

In this analysis, mothers who had ever been incarcerated as an adult following a conviction had increased odds of losing custody both informally and officially. Past research has established criminal involvement as a risk factor for child custody issues (Christian, 2009; Lincroft & Borelli, 2011; Ross, Khashu, & Wamsley, 2004), and for women who are incarcerated for any prolonged length of time (such as many of the women in this sample), some form of custody loss is imminent. Advocates of family reunification should continue to lobby for changes to the Adoption and Safe Families Act of 1997 that incentivizes states for each child adopted out of foster care and shortened the amount of time parents have to fulfill case plans and regain custody before their parental rights are terminated. These time limits disproportionately impact those behind bars, which include a disproportionate number of African American women as compared to women of other racial groups (Mumola, 2000), and make reunification next to impossible.

5.2. The Role of Childhood Victimization in Informal Custody Loss

The only unique variable that increased the odds of informal loss relative to no loss among African American women was having more childhood victimization experiences. This was unexpected given that in many, if not most cases, informal custody arrangements among African Americans involve children going to live with the mother's parents or other relatives (Harris & Skyles, 2008), the same people who are most likely to have abused the mother as a child (Gilbert et al., 2009). One explanation is that the individuals who mistreated the mother as a child are not the same individuals providing care for her children via some informal arrangement. On the other hand, it is possible that mothers facing a number of problems - such as many of the women in this study - are incredibly vulnerable and feel their children are better cared for by the mother's parents and relatives even if there is a history of abuse from these family members.

5.3 Substance Use and the Nuanced Nature of Social Support

The larger national trend in which substance use is one of the leading causes of CWS involvement (CASA, 1999; Larrieu et al., 2008) is supported here as it is significantly associated with official loss but not with informal loss. The finding that less social support from friends is a significant correlate of losing official custody is somewhat surprising. While more detailed information was not available regarding the specific type of social support these women were receiving from friends, perhaps the help these friends are offering

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in the form of financial assistance or emotional support plays an instrumental role in helping these women to maintain custody of their children.

While increases in African American mother's social support from friends was protective against official custody loss, increased familial social support was a risk factor. Researchers have written at length about the importance of supportive community networks for African American mothers throughout history (for a review, see Harris & Skyles, 2008), and the women in this sample provide some evidence of a positive association of social support in the context of child custody issues via the findings regarding friends' social support. Perhaps this is an issue of who has more resources. It's possible that friends of the women in our sample were able to help them with the care of their children either financially or in some other way and thus they were less likely to garner the attention of official CWS authorities. Another explanation is that women whose families supported them during the period when they lost custody officially were likely to rate their family as more supportive. Thus this finding may be due to the inability to establish temporal ordering of social support perceptions in relation to when they lost custody. Because African American women in this study were asked if they had lost official custody at any point in the past year, their perceptions of available social support could be referring to the time frame after they lost custody. Future research should try to establish temporal ordering of these variables to better explain this relationship.

5.4. The Importance of Socioeconomic Status in Official Custody Loss

In this study, women who were older were at a greater risk of losing custody officially. This may be because these women have exhausted all the resources at their disposal for caring for their children, including informal kinship care arrangements. Or, a systematic bias by the CWS may be experienced by these women due to multiple disadvantaged statuses based on their race, gender, class, and age. Also, each additional child under the age of 18 increased the odds of a woman losing official custody. Because the parental and financial burdens increase with each additional child (Suchman et al, 2006), perhaps family members of the women in this sample were also economically disadvantaged and unable to help mothers by caring for their children. This would explain why those with more children were more likely to lose custody via official channels. Concerning crack/cocaine use, this study found that mothers who reported use were more likely to lose custody officially. As discussed earlier, this was anticipated based on prior research demonstrating substance use is the key precursor to CWS involvement.

As expected based on previous research about factors associated with child custody loss via the CWS (Grella et al., 2006; Lindsey, 1994; Marcenko et al., 2011; Marsh et al., 2006; Pelton, 1989; Shireman, 2003), socioeconomic conditions were again significant in this study, but only when severe. Specifically, women who were homeless in the past year were more likely to experience official custody loss than no loss. Several inferences can be made from the finding that women from a lower socioeconomic background are more likely to lose official custody. First, it suggests that the family members/friends of these mothers may be similarly economically disadvantaged and were unable to afford the financial and housing burden associated with caring for the mother's children that might make an informal

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arrangement possible. In contrast, these socioeconomic conditions are not significantly associated with informal loss, perhaps because informal loss is more tenable for women whose supportive network has more economic resources at their disposal. The takeaway from this finding, however, is that removing children from their mother's care for reasons related to income/status is not an appropriate solution to the larger problems plaguing an overburdened child welfare system, nor the problems being faced by children and mothers who are struggling in myriad ways.

5.5. The Importance of Sexual Orientation: An Innovative Contribution to What We Know

A particularly interesting finding in this research was that women who reported being lesbian or bisexual were more likely to lose official custody than heterosexual women. Why might this be? Perhaps there are other factors related to being a sexual minority that explain the increased odds of official custody loss (e.g. socioeconomic factors, criminal justice system involvement, having to care for a higher combined number of children under 18 if both women have primary custody of their kids, etc.). An alternative explanation is that there is a bias at the systems-level that is more likely to label mothers with a non-traditional family unit "unfit." Future research should examine the root causes of why being lesbian or bisexual is predictive of official loss for African American women, specifically. Intersectional frameworks (Collins, 1990; Crenshaw, 1991) assert that making generalizations about an entire group's experiences based on a single feature – for example, race or sexual orientation – conflates the various ways in which an individual's other identities intersect to shape his/her experiences. Researchers agree that the CWS has a history of differential treatment of parents on the basis of race and class. Is there evidence to add sexual orientation to this list? Certainly not based on these results alone, but this significant and intriguing result deserves additional attention and investigation.

5.6. Implications

The results of these analyses demonstrate the need for further research with low income, African American women to determine predictors of different types of custody loss so that appropriate interventions can be designed and implemented. Interventions that target at-risk areas in minority communities have been shown to be effective in reducing the disproportionate number of African American children in the CWS (Kirk & Griffith, 2008; USDHHS, 2011). Low socioeconomic status poses significant challenges for the African American mothers in this sample, and especially for those who have experienced an official child custody issue. While the median annual income category for women who had experienced no loss or informal loss was around $12,000 (still well below the national poverty line), those who lost official custody reported a median personal income of only $6,600 a year. This is an important factor to consider when thinking about this population, as we know that economic difficulties create barriers to a parent's ability to provide adequate housing, healthcare, child care, and food and clothing – all things that are subsequently likely to result in custody issues and placement of the child outside the mother's home (Pelton, 1994). Once a child is no longer with his/her parents, parents face extreme challenges in improving these conditions and fulfilling case plan requirements. Although there is a need for more research on the effectiveness of programs that provide material assistance to families in crisis, extant research suggests that the provision of material,

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economic services to these families can delay removing the child from the home, or prevent it altogether (Chaffin, Bonner & Hill, 2001; Littell & Scheurman, 2002; Pelton, 1994). This type of assistance also shortens the time to parent-child reunification.

Some states have initiated innovative programs to assist families in crisis in substantive ways. For instance, the “Norman Program” (now called “Norman Services”) in Illinois provides eligible families with services such as a Cash Assistance Program and Housing Advocacy Program (Shook & Testa, 1997). Families are eligible to receive this funding for up to twelve months and to use it to purchase food, clothing, furniture, and housing. A cost analysis of this program found that it not only improved unification and reunification of families in crisis, but it saved the Illinois Department of Child and Family services between $1455 and $1798 per family. This is just one example of an alternative to further disenfranchising poor, African American families in the U.S. via the disproportionate involvement of the CWS in their lives.

5.7. Limitations

In addition to the limitations discussed in the previous section, another limitation of this study pertains to the measurement of custody issues. Some women experienced more than one custody issue in the year before the interview. Given the legal ramifications associated with official loss, it was perceived as more severe and thus women who experienced both types of loss were included in the official custody loss group. In addition, mothers who lost informal custody were not asked if this happened of her own volition, or if her child(ren) were removed by a friend or family member under the threat of contacting authorities if the mother refused this arrangement. Future studies should examine the correlates of forceful informal custody arrangements in comparison to those in which the mother is a willing and perhaps even eager participant.

Another limitation was the inability to statistically control for recruitment venue (prison, probation, or community) because being incarcerated perfectly predicts custody loss as women in prison cannot retain physical custody. However, a variable examining incarceration history was included to approximate the effect of criminal involvement on custody loss and the findings offer insight to Knight and colleagues (2009) call for more within-group research.

Finally, the recruitment of African American women from one southern state limits generalizability. However, this study’s strengths offset this limitation. Because this is an understudied population, any research findings that accurately describe the characteristics of African American mothers who experience child custody issues enhance our repository of knowledge about this population.

6. Conclusions

This is the first known study to examine unique correlates of two different types of custody loss, and is especially innovative in its examination of African American mothers who set up informal custody arrangements with their family/friends outside of the CWS. Results of the multinomial logistic regression showed that while a history of adulthood incarceration

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increased the odds of both custody events, there were unique relationships as well. Namely, more childhood victimization increased the odds of informal loss, while being older, having been homeless, having more children, crack/cocaine use, more support from family, and being lesbian or bisexual increased the log odds of official loss. Additionally, more perceived social support from friends decreased the odds of official loss.

These findings suggest the mechanisms that protect against child custody loss may vary based on the type of loss being studied. Mothers experiencing either type of loss are in need of socioeconomic resources to reduce the frequency of homelessness and improve a mother's ability to financially provide for her children. Because of the small sample size and limitations of this research, future efforts should be made to examine predictors of different custody loss events with a much larger, probability based sample of demographically similar women. Interventions aimed at improving reunification rates among African American mothers and their children involved in informal custody arrangements should focus on ensuring that those providing care for a mother's children do not have a history of abusing others; while interventions aimed at mothers who have lost official custody should work to provide substance abuse treatment, education, and job skills training to increase their earning potential and protect against homelessness. Continued research is needed to understand why sexual orientation might independently affect official custody loss. And all advocates for family reunification should work towards improving policies that have a disproportionate negative impact women who are incarcerated. In an overburdened system where African American children have the worst outcomes, priority should be given to intervention strategies aimed at improving parent/child reunification rates, especially within the African American community.

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Highlights

- This study examines predictors of both official and informal child custody loss
- Past incarceration and childhood victimization increase informal custody loss risk
- Factors such as being lesbian/bisexual and crack/cocaine use increase official loss risk

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Table 1

Descriptive Statistics for Full Sample at Baseline (BWISE Mother Sample, n=339)

	Mean / Percent (SD)	Range
Sociodemographics		
Age (years)	32.3 (7.4)	19.0 – 54.0
Education (years)	12.0 (2.1)	5.0 – 20.0
Married[1]	16.1%	
Employed full/part-time	47.4%	
Median personal income (thousands)	9.9 (11.4)	2.5 – 87.5
Homeless	20.4%	
Number of children <18	2.4 (1.4)	1.0 – 8.0
Sexual Orientation		
Bisexual or Lesbian	21.3%	
Illicit Substance Use (past year)		
Marijuana	48.6%	
Crack/Cocaine	32.2%	
Criminal Involvement		
Ever incarcerated after a conviction (as an adult)	70.8%	
Mental Health		
Lifetime psychological symptoms	0.3 (0.3)	0.0 – 1.0
Meets PTSD criteria	10.6%	
Victimization History		
Victimization – childhood	4.8 (5.2)	0.0 – 18.0
Victimization – adulthood	7.7 (7.8)	0.0 – 33.0
Perceived Social Support		
Family	5.2 (1.8)	1.0 – 7.0
Friends	4.9 (1.8)	1.0 – 7.0
Significant Other	5.9 (1.4)	1.0 – 7.0
Custody Loss Events		
Informal Loss	23.3%	
Official Loss	42.8%	

[1]Omitted category is “not currently married (legal or common-law)”

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Table 2

Chi-square Analyses and ANOVAs for Descriptive Statistics Based on Most Severe Custody Issue Experienced at Baseline (n=339)

	No Custody Loss (n=115)	Informal Custody Loss (n=79)	Official Custody Loss (n=145)	Test Statistic (χ^2/F-score)
	Mean/% (SD)	Mean/% (SD)	Mean/% (SD)	
Sociodemographics				
Age (years)[c]	30.4 (7.8)	32.4 (6.8)	33.7 (7.3)	6.6***
Education (years)[a]	12.5 (2.1)	12.3 (2.2)	11.4 (1.8)	11.0***
Married	18.3%	15.2%	15.2%	0.3
Employed full/part-time [a]	60.0%	60.8%	32.4%	13.9***
Median personal income[a]	11.8 (10.8)	12.5 (15.7)	6.6 (7.4)	10.5***
Homeless[a]	7.8%	8.9%	36.6%	23.1***
Number of children <18[a]	2.0 (1.1)	2.2 (1.4)	2.8 (1.6)	11.0***
Sexual Orientation				
Bisexual or Lesbian[c]	8.7%	20.3%	31.0%	10.2***
Illicit Substance Use (past year)				
Marijuana	40.9%	53.2%	53.8%	2.5
Crack/Cocaine[d]	12.2%	30.4%	51.0%	29.2***
Criminal Involvement				
Ever incarcerated after a conviction (as an adult)[b]	38.3%	87.3%	87.6%	59.9***
Mental Health				
Lifetime psychological symptoms [a]	0.2 (0.2)	0.3 (0.3)	0.4 (0.3)	18.8***
Meets PTSD criteria	7.0%	6.3%	15.9%	3.7
Victimization History				
Victimization – childhood[b]	3.3 (4.0)	5.0 (4.8)	5.7 (5.9)	7.8***
Victimization – adulthood[b]	4.4 (5.3)	7.9 (8.3)	10.1 (8.4)	19.0***
Perceived Social Support				
Family	5.4 (1.7)	5.5 (1.8)	4.9 (2.0)	3.1
Friends[c]	5.5 (1.4)	5.0 (1.9)	4.5 (2.0)	10.8***
Significant Other	6.0 (1.1)	5.9 (1.3)	5.7 (1.5)	2.4

*p < 0.05;

**p < 0.01;

***p < 0.001

Note: Superscripts a-d denote Tukey's Honestly Significant Differences test results

[a]Official Loss group significantly differs from both No Loss and Informal Loss group

[b] No Loss group significantly differs from both Custody Loss groups

[c] No Custody Loss and Official Custody Loss groups significantly differ

[d] All three groups significantly differ from one another

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Table 3

Correlation Matrix of All Variables

	1	2	3	4	5	6	7	8	9	10	11	12	13	14	15	16	17	18	19	20
1. Informal Loss	1.00																			
2. Official Loss	−0.48*	1.00																		
3. Age	0.01	0.17*	1.00																	
4. Education	0.10	−0.25*	0.16*	1.00																
5. Married	−0.02	−0.03	0.03	0.10	1.00															
6. Employed	0.14*	−0.28*	−0.11*	0.30*	0.04	1.00														
7. Income	0.13*	−0.24*	0.08	0.46*	0.05	0.34*	1.00													
8. Homeless	−0.16*	0.35*	0.17*	−0.12*	−0.12*	−0.17*	−0.18*	1.00												
9. Children <18	−0.08	0.24*	−0.14*	−0.10	0.06	−0.06	−0.01	0.05	1.00											
10. Bisexual/ Lesbian	−0.01	0.21*	−0.07	−0.09	−0.03	0.02	−0.06	0.10	0.05	1.00										
11. Marijuana	0.04	0.08*	−0.08	−0.01	−0.02	−0.03	−0.09	0.06	0.06	0.17*	1.00									
12. Crack/Cocaine	−0.01	0.34*	0.35*	−0.20*	−0.05	−0.19*	−0.16*	0.26*	0.03	0.15*	0.18*	1.00								
13. Incarcerated	0.20*	0.32*	0.14*	−0.14*	−0.05	−0.11	−0.07	0.16*	0.10	0.20*	0.15*	0.34*	1.00							
14. Psychological symptoms	−0.06	0.30*	0.10	−0.05	0.01	−0.20	−0.14*	0.25*	0.11*	0.14*	0.13*	0.30*	0.24*	1.00						
15. PTSD criteria	−0.08	0.15*	0.04	−0.00	−0.07	−0.01	−0.00	0.14*	0.06	0.08	0.01	0.01	0.14*	0.26*	1.00					
16. Victimization – childhood	0.03	0.17*	−0.04	−0.05	−0.00	−0.12*	−0.09	0.24*	0.05	0.11*	0.07	0.18*	0.09	0.40*	0.25*	1.00				
17. Victimization – adulthood	0.02	0.27*	0.03	0.00	−0.02	−0.12*	−0.14*	0.29*	0.15*	0.13*	0.13*	0.22*	0.25*	0.37*	0.30*	0.50*	1.00			
18. Family SS	0.08	−0.13*	−0.03	0.09*	0.06	0.14*	0.09	−0.19*	−0.07	−0.15*	0.02	−0.10	−0.03	−0.27*	−0.22*	−0.41*	−0.26*	1.00		
19. Friends SS	0.01	−0.22*	−0.03	0.05	0.08	0.11*	−0.12*	−0.13*	−0.02	−0.09	−0.16*	−0.17*	−0.31*	−0.14*	−0.21*	−0.21*	0.38*	1.00		
20. Significant Other SS	0.03	−0.11*	−0.08	0.09	0.16*	0.08	0.07	−0.09	0.04	0.00	−0.01	−0.09	−0.04	−0.22*	−0.23*	−0.19*	−0.19*	0.46*	0.41*	1.00

* $p < 0.05$

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Table 4

Multinomial Logistic Regression Model Estimating the Likelihood of Experiencing Informal and Official Custody Loss

Independent Variable	Type of Custody Loss[a]	
	Informal	Official
Sociodemographics		
Age (years)	1.03 (0.03)	1.06 (0.03)**
Education (years)	0.97 (0.10)	0.84 (0.09)
Employed full/part-time	1.17 (0.44)	0.56 (0.21)
Annual personal income	1.01 (0.02)	0.98 (0.02)
Homeless	0.68 (0.41)	2.86 (1.45)*
Number of children <18	1.17 (0.17)	1.70 (0.24)***
Sexual Orientation		
Bisexual or Lesbian	2.02 (1.03)	4.19 (2.07)***
Illicit Substance Use		
Marijuana	1.02 (0.37)	0.89 (0.32)
Crack/Cocaine	3.76 (2.67)	5.13 (3.56)*
Criminal Involvement		
Ever incarcerated after a conviction	8.20 (3.46)***	4.58 (1.82)***
Mental Health		
Lifetime psychological symptoms	0.99 (0.73)	1.87 (1.36)
Meets PTSD criteria	0.27 (0.19)	0.65 (0.40)
Victimization History		
Victimization – childhood	1.11 (0.05)*	1.06 (0.05)
Victimization – adulthood	1.04 (0.03)	1.04 (0.03)
Perceived Social Support		
Family	1.24 (0.16)	1.26 (0.15)*
Friends	0.84 (0.10)	0.78 (0.09)*
Significant Other	0.94 (0.16)	0.92 (0.15)
Intercept	0.03 (0.05)*	0.11 (0.18)
Model fit	222.50***	
Pseudo R^2	0.31	

[a] No Custody Loss is the reference category

Note:

* $p < 0.05$;

*** $p < 0.001$.

Relative risk ratios are presented. Numbers in parentheses are standard errors.

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Nurturing Parenthood Through the UPA (2017)

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ABSTRACT. Same-sex couples now have the right to marry throughout the country. Douglas NeJaime's insightful article carefully explains how LGBT parent-families remain vulnerable despite this important development. NeJaime demonstrates that while the law recognizes nonbiological parentage, it does so in asymmetrical ways that "reflect[] and perpetuate[] inequality based on gender and sexual orientation." These asymmetries harm the adults and the children in these families, and violate core constitutional mandates.

This Response shows how the recently approved revisions to the Uniform Parentage Act (UPA) — UPA (2017) — address many of the critical gaps in parentage law identified by NeJaime. The UPA (2017) expands the ways in which a nonbiological parent may establish her or his parentage. The Act carries over the longstanding holding-out provision, but revises it so that it applies equally to men and women. The UPA (2017) also adds a new provision on de facto parents, under which someone who has been acting as a parent can legally establish his or her parentage, and expands the classes of people who can establish parentage through the voluntary acknowledgment process. The Act also updates the assisted reproductive technology (ART) provisions to permit individuals of any gender to establish their parentage based on proper consent to the ART procedure.

In addition, the UPA (2017) removes many gender-based distinctions that long have shaped parentage law. In so doing, the UPA (2017) helps states bring their parentage statutes into compliance with the Supreme Court's decisions in Obergefell v. Hodges, Pavan v. Smith, and Sessions v. Morales-Santana. These Supreme Court decisions make clear that family law provisions that discriminate on the basis of gender or sexual orientation may be constitutionally suspect.

By adopting the UPA (2017) and making these changes, states can reform parentage law to more evenhandedly protect all parent-child relationships.

Same-sex couples now have the right to marry throughout the country.[1] Yet despite this important development, LGBT-parent families still often find that their parent-child relationships are not recognized and protected. In *The Nature*

1. Obergefell v. Hodges, 135 S. Ct. 2584, 2608 (2015).

of Parenthood, [2] Douglas NeJaime offers a careful exploration of why parentage law fails to protect LGBT-parent families and how it can be reformed to address those gaps in protection.

NeJaime's article shows how parentage law fails to protect LGBT-parent families by only partially recognizing nonbiological parents. In contemporary discussions of family law, it is often claimed that parentage law seeks merely to identify and recognize biological parents.[3] NeJaime shows that this claim is, at best, incomplete; the law has long recognized some nonbiological parents.[4] However, the law's recognition of nonbiological parentage has been "partial and incomplete."[5] Specifically, NeJaime demonstrates how the law recognizes nonbiological parenthood in asymmetrical ways that "reflect[] and perpetuate[] inequality based on gender and sexual orientation."[6] The marital presumption is one useful example. The marital presumption offers protection for nonbiological parents. In most states today, however, the literal text of the provision refers only to husbands, not wives.[7] It is this type of asymmetry that

2. Douglas NeJaime, *The Nature of Parenthood*, 126 YALE L.J. 2260, 2265-66 (2017). To be sure, it is not just LGBT-parent families who remain vulnerable under existing parentage schemes. Other women who "separate motherhood from biological ties" may also experience difficulties in having their parentage recognized. *Id.* at 2266.

3. *See, e.g.*, Petitioner's Supplemental Brief at 5, McLaughlin v. Jones *ex rel.* Cty. of Pima, 401 P.3d 492 (Ariz. 2017) (No. CV-16-0266-PR), 2017 WL 2874198, at *5 ("To date, the legislature has never extended parentage beyond biology or adoption."). It is not uncommon to encounter inaccurate claims about the past and present state of family law. *See, e.g.*, Courtney G. Joslin, *Marriage, Biology, and Federal Benefits*, 98 IOWA L. REV. 1467, 1483 (2013) [hereinafter Joslin, *Marriage, Biology*] (describing the invocation of such claims). The persistence of the myth of family law localism is another example of a claim that is often made about family law that is likewise inaccurate or at least incomplete. *See, e.g.*, Courtney G. Joslin, *Federalism and Family Status*, 90 IND. L.J. 787, 789 (2015) (exploring the persistence of the myth of family law localism); *see also, e.g.*, Kristin A. Collins, *Federalism's Fallacy: The Early Tradition of Federal Family Law and the Invention of States' Rights*, 26 CARDOZO L. REV. 1761, 1764 (2005) (noting "the standard perception that there is a long-standing tradition of federal non-involvement in domestic relations law and policy"); Jill Elaine Hasday, *The Canon of Family Law*, 57 STAN. L. REV. 825, 870 (2004) (describing and critiquing the claim that "family law is exclusively local"); Judith Resnik, *Reconstructing Equality: Of Justice, Justicia, and the Gender of Jurisdiction*, 14 YALE J.L. & FEMINISM 393, 415 (2002) ("[A]lthough statements that family law 'belongs' to the states are often made, federal statutory regimes govern many facets of family life.").

4. NeJaime, *supra* note 2, at 2272-75.

5. *Id.* at 2268.

6. *Id.*

7. *See, e.g.*, *id.* app. A (noting that only 11 states and the District of Columbia have statutory gender-neutral marital presumptions).

leaves vulnerable LGBT parents and others who "break from traditional norms of gender and sexuality,"[8] even in this post-marriage-equality era.

These asymmetries are cause for concern on a number of levels. First, adults in same-sex relationships are more likely to have their functional parentage relationships unprotected under current parentage law. This is yet another way in which LGBT-parent families continue to be treated unequally under the law. Second, these asymmetries can and often do harm children. If children's relationships with their functional parents are not protected, they may experience "dire consequences."[9] In some states, "children [in these families] can legally be denied any continued relationship with one of the parents and any financial or other support from that parent."[10] In addition, these asymmetries in parentage law may be unconstitutional. Scholars and litigants alike are indebted to NeJaime for sharpening our understanding and appreciation of the inequalities that still pervade parentage law.[11]

After providing this context, NeJaime offers concrete suggestions as to how states could amend their parentage laws to eliminate, or at least minimize, inequality based on gender and sexual orientation.[12] NeJaime gestures to courts as the entities most likely to resolve constitutional defects in parentage rules.[13] But as this Response points out, constitutional oversight can also come from state legislatures. Like courts, legislatures have an obligation to comply with the Constitution. Even without being judicially ordered to do so, legislatures are well situated to proactively reform their parentage statutes to address these sex- and sexual-orientation-based distinctions that continue to permeate parentage laws in many states.

Indeed, efforts have already been made to help state legislatures do just that. The newly revised UPA (2017)[14]—a project of the Uniform Law Commission (ULC)—implements many of the specific reforms that NeJaime recommends.

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8. *Id.* at 2265-66.

9. Sinnott v. Peck, No. 2015-426, 2017 WL 5951846, at *7 (Vt. Dec. 1, 2017).

10. *Id.*

11. The provision of a painstakingly careful and complex picture of history is a hallmark of NeJaime's scholarship. *See, e.g.*, Douglas NeJaime, *Before Marriage: The Unexplored History of Nonmarital Recognition and Its Relationship to Marriage*, 102 CALIF. L. REV. 87, 91 (2014) (exploring the relationship between efforts to recognize nonmarital relationships and marriage); Douglas NeJaime, *Marriage Equality and the New Parenthood*, 129 HARV. L. REV. 1185, 1187 (2016) [hereinafter NeJaime, *Marriage Equality*] (exploring the dynamic relationship between the evolution of parentage law and marriage equality successes).

12. NeJaime, *supra* note 2, at 2266.

13. *Id.* at 2347-59.

14. UNIF. PARENTAGE ACT (UNIF. LAW COMM'N 2017).

First, the UPA (2017) expands the ways in which a nonbiological parent may establish her or his parentage. The Act carries over the holding-out provision, but revises it so that it applies equally to men and women.[15] It also adds a new provision on de facto parents, under which someone who has been acting as a parent can legally establish his or her parentage.[16] Finally, the Act updates the assisted reproductive technology (ART) provisions to permit individuals of any gender to establish their parentage based on proper consent to the ART procedure.[17] All ART provisions of the UPA (2017) apply equally without regard to the sex, sexual orientation, or marital status of the intended parents.[18]

Second, by adopting the UPA (2017), states would bring their parentage statutes into compliance with the Supreme Court's decisions in *Obergefell v. Hodges*,[19] *Pavan v. Smith*,[20] and *Sessions v. Morales-Santana*[21] by removing gender-based distinctions. These Supreme Court decisions make clear that family law provisions that discriminate on the basis of gender or sexual orientation may be constitutionally suspect. The UPA (2017) addresses this potential constitutional infirmity by removing most of the gender distinctions in the Act.[22] As a result, most of the provisions in the Act apply without regard to gender or sexual orientation.

This Response to NeJaime's article has two goals. First, I highlight some of the ways that *The Nature of Parenthood* deepens our understanding of both the past and present law of parentage. NeJaime carefully demonstrates that the law has long recognized nonbiological parentage, but that this recognition is rooted in and perpetuates discriminatory distinctions. Second, I show how the recently approved revisions to the Uniform Parentage Act (UPA) provide a concrete

15. *Id.* § 204(a)(2) cmt.

16. *Id.* § 609.

17. Nonsurrogacy forms of ART are addressed in article 7 of the UPA (2017); surrogacy is addressed in article 8.

18. *See, e.g.*, *id.* § 102(13) ("'Intended parent' means an individual, married or unmarrried, who manifests an intent to be legally bound as a parent of a child conceived by assisted reproduction."); *id.* § 703 ("*An individual who consents* under Section 704 to assisted reproduction by a woman with the intent to be a parent of a child conceived by the assisted reproduction is a parent of the child." (emphasis added)).

19. 135 S. Ct. 2584 (2015).

20. 137 S. Ct. 2075 (2017).

21. 137 S. Ct. 1678 (2017).

22. *See, e.g.*, *Why Your State Should Adopt the Uniform Parentage Act*, UNIFORM L. COMMISSION (2017), http://www.uniformlaws.org/Act.aspx?title=Parentage%20Act%20(2017) [http://perma.cc/X827-Y2ED] ("After these decisions, state parentage laws that treat same-sex couples differently than different-sex couples are likely unconstitutional. By adopting UPA (2017), states can avoid litigation over these issues and uphold constitutional protections.").

way for states to reform their parentage laws to correct many of the inadequacies identified by NeJaime.

In Part I, I provide a brief overview of the important contributions NeJaime makes in *The Nature of Parenthood*. Through a careful review of past and current parenthood law, NeJaime shows how the law of parenthood in many states remains rooted in and reflects gender- and sexual orientation-based distinctions. NeJaime then charts a path that addresses those legal inadequacies. In Part II, I demonstrate how states have the opportunity to put many of those proposals in place now by adopting the UPA (2017). In Part III, I show how implementing those proposals could protect children's wellbeing and eliminate much of the discrimination identified by NeJaime.

I. INEQUALITIES IN PARENTAGE LAW

In recent years, opponents of equality for same-sex couples have suggested that the law properly elevates biological parenthood over other forms of parenthood.[23] This claim was critical to their argument about why it was permissible to exclude same-sex couples from marriage. Same-sex couples could not, the argument continued, fulfill the core purpose of marriage, which was to promote biological parenting.[24] In *The Nature of Parenthood*, NeJaime eloquently illustrates that that narrative is, at best, incomplete. The law does and always has recognized some forms of nonbiological parenthood. The core rule for assigning parenthood to men historically—the marital presumption—"both facilitated parental recognition that departed from biological facts and cut off claims to parental recognition based on biological facts."[25] Conversely, nonmarital biological fathers generally had no parental rights historically.[26] Thus, con-

23. I detail and critique these claims elsewhere. Joslin, *Marriage, Biology*, *supra* note 3, at 1467.

24. *Id.* at 1472 ("Under responsible procreation, same-sex couples are excluded from enjoying the benefits of marriage at the federal level because it just so happens that same-sex relationships cannot fulfill the core reason the federal government extends benefits to married couples in the first place: to foster and promote biological parenting."); *see also* Windsor v. United States, 699 F.3d 169, 199 (2d Cir. 2012) (Straub, J., dissenting), *aff'd*, 133 S. Ct. 3675 (2013) ("DOMA advances the governmental interest in connecting marriage to biological procreation by excluding certain couples who cannot procreate simply by joinder of their different sexual being[s] from the federal benefits of marital status.").

25. NeJaime, *supra* note 2, at 2272.

26. *See id.* at 2274-75; *see also* Martha F. Davis, *Male Coverture: Law and the Illegitimate Family*, 56 RUTGERS L. REV. 73, 81-82 (2003) ("[B]y the late nineteenth century, mothers were generally accorded a formal legal connection to their out-of-wedlock children . . . . But while illegitimate children gained a formal connection to their mothers, non-marital fathers remained free of the legal burdens and benefits of parenthood." (footnote omitted)); Serena Mayeri, *Foundling Fathers: (Non-)Marriage and Parental Rights in the Age of Equality*, 125 YALE L.J.

trary to the assertions of some,[27] the law has recognized and continues to recognize nonbiological parenthood.

However, NeJaime continues, the law recognizes nonbiological parentage in asymmetrical ways. Within marriage, parentage rules reflect and enforce a "gender-differentiated, heterosexual family."[28] For example, in most states, the statutory marital presumption refers only to the "husband" of the woman who gave birth to the child.[29] This reinforces the perception that biology is destiny (and required) for motherhood, but not for fatherhood. Moreover, as a matter of law, some courts have refused to apply this type of gendered marital presumption equally to the female spouse of the woman who gave birth.[30] These

2292, 2295 (2016) ("Traditionally, fathers had few rights or responsibilities to their nonmarital children.").

27. *See, e.g.*, Petitioner's Supplemental Brief at 4-5, McLaughlin v. Jones *ex rel.* Cty. of Pima., 401 P.3d 492 (Ariz. 2017) (No. CV-16-0266-PR), 2017 WL 2874198, at *5 ("To date, the legislature has never extended parentage beyond biology or adoption."); Appellant's Final Reply Brief at 12, Gartner v. Iowa Dep't of Pub. Health, 830 N.W.2d 335 (Iowa 2013) (No. 12-0243) ("'[P]aternity' is defined consistently in Iowa Code as 'origin or descent from a father' or 'male parentage'; 'father' is uniformly defined and understood as 'the male, biological parent of a child.'" (citation omitted)).

28. NeJaime, *supra* note 2, at 2268.

29. *See, e.g.*, MONT. CODE ANN. § 40-6-105(1) (2017) ("A person is presumed to be the natural father of a child if any of the following occur: (a) the person and the child's natural mother are or have been married to each other and the child is born during the marriage or within 300 days after the marriage is terminated by death, annulment, declaration of invalidity, or divorce or after a decree of separation is entered by a court . . . .").

30. *See, e.g.*, Turner v. Steiner, 398 P.3d 110, 113 (Ariz. Ct. App. 2017), *abrogated by McLaughlin*, 401 P.3d 492 ("Because [the] language [of Arizona's marital presumption] is clearly and unambiguously gender-specific to apply to men, the family court erred by applying the presumption of paternity to Oakley."); Paczkowski v. Paczkowski, 10 N.Y.S.3d 270, 271 (N.Y. App. Div. 2015) (holding that the marital presumption of legitimacy could not be applied to a female spouse because "presumption of legitimacy . . . is one of a biological relationship"); *In re* A.E., No. 09-16-00019-CV, 2017 WL 1535101, at *8 (Tex. Ct. App. Apr. 27, 2017), *petition for review pending* ("*Obergefell* did not hold that every state law related to the marital relationship or the parent-child relationship must be 'gender neutral.'").

To be clear, however, other courts have disagreed. *See, e.g.*, *McLaughlin*, 401 P.3d at 498 ("In sum, the presumption of paternity under § 25-814(A)(1) cannot, consistent with the Fourteenth Amendment's Equal Protection and Due Process Clauses, be restricted to only opposite-sex couples. The marital paternity presumption is a benefit of marriage, and following *Pavan* and *Obergefell*, the state cannot deny same-sex spouses the same benefits afforded opposite-sex spouses."); Wendy G-M. v. Erin G-M., 985 N.Y.S.2d 845, 859 (N.Y. Sup. Ct. 2014) (holding that a female spouse was a parent of a child born to her spouse under the marital presumption of legitimacy). In addition, a number of states have amended their marital presumptions to clarify that they must be applied equally to female spouses. *See, e.g.*, CAL. FAM. CODE § 7611(a) (West 2017); D.C. CODE ANN. § 16-909(a-1)(2) (2017); 750 ILL. COMP. STAT. ANN. 46/204(1) (2017); ME. STAT., tit. 19-A, § 1881(1) (2017); N.H. REV. STAT. § 168-B:2(V) (2017); WASH. REV. CODE ANN. § 26.26.116(1)(a) (2017).

rules and decisions make it difficult for women who "separat[e] the biological fact of maternity from the social role of motherhood" to establish parentage.[31] Under these gender-specific parentage rules, the parental relationships of female spouses in same-sex couples and nonbiological mothers in different-sex relationships may be unrecognized and unprotected. Moreover, by anchoring marital parenting around the woman who gave birth, the rules make it difficult for fathers in families without biological mothers to establish parenthood.

In the context of nonmarital families, "biological connection continu[es] to anchor nonmarital parenthood."[32] In most same-sex-parent families, at least one adult lacks a genetic relationship to the child. As a result, gay and lesbian parents are often denied full and equal legal recognition.

Recent Supreme Court decisions suggest that gender- and sexuality-based parentage rules are not only unjust but also unconstitutional. In *Morales-Santana*, the Court declared that laws, including rules about children, that "grant[] or deny[] benefits 'on the basis of the sex of the qualifying parent' . . . differentiate on the basis of gender, and therefore attract heightened review under the Constitution's equal protection guarantee."[33] In *Obergefell*, the Supreme Court held that same-sex couples must be permitted to marry and that these couples must be extended the rights and obligations of marriage equally.[34] In June 2017, the Supreme Court held in *Pavan*[35] that Arkansas's refusal to list a woman on the birth certificate of a child born to her same-sex spouse was inconsistent with its prior declaration in *Obergefell*. In light of these and other Supreme Court decisions, parentage rules that make distinctions based on sex or sexual orientation may infringe on the fundamental right to marry in violation of the Due Process Clause, or may constitute impermissible discrimination in violation of the Equal Protection Clause, or both.[36] Thus, the Arizona Supreme Court recently held that that state's marital presumption had to be applied equally to a female spouse.[37] As the Arizona Supreme Court ex-

31. NeJaime, *supra* note 2, at 2268.

32. *Id.*

33. Sessions v. Morales-Santana, 137 S. Ct. 1678, 1689 (2017) (quoting Califano v. Westcott, 443 U.S. 76, 84 (1979)).

34. Obergefell v. Hodges, 135 S. Ct. 2584, 2601, 2604-05 (2015) (holding that under the Due Process and Equal Protection Clauses of the Fourteenth Amendment, states must permit same-sex couples to marry and extend to them "the constellation of benefits that the States have linked to marriage").

35. Pavan v. Smith, 137 S. Ct. 2075, 2079 (2017) ("Having made that choice [to list nonbiological male spouses on the birth certificate of a child born to a married couple], Arkansas may not, consistent with *Obergefell*, deny married same-sex couples that recognition.").

36. *See, e.g.*, McLaughlin v. Jones *ex rel.* Cty. Of Pima, 401 P.3d 492, 498 (Ariz. 2017).

37. *Id.*

plained, under Arizona's marital presumption, husbands were recognized as parents even if they were not biological parents. After *Obergefell* and *Pavan*, the court continued, that rule could not "be restricted only to opposite-sex couples."[38]

In addition to raising constitutional concerns, these gender- and sexuality-based asymmetries harm children.[39] When the law fails to recognize and protect functional or social parent-child relationships, children are harmed in a number of ways. Thousands of children have been abruptly cut off from one of the people they looked to and relied upon as a parent.[40] Experience and existing research tells us that this is damaging to children.[41] In addition, children may be denied a range of critical financial protections through that person, including child support and children's social security benefits, just to name two.[42] As I have previously noted, "[W]hether children have adequate financial support, and particularly whether they have access to child support, directly impacts their overall development and well-being."[43] For these reasons, it is important to seriously consider the problems identified by NeJaime.

After identifying the asymmetrical recognition (or nonrecognition, depending on how you view it) of nonbiological parentage, NeJaime begins to chart a path forward for addressing these legal inadequacies.[44] NeJaime's proposals are not quixotic; in fact, they are achievable. Indeed, advocates and state policymakers have an opportunity to put many of these proposals into place *now*. As I show in the next Part, many of NeJaime's proposals have been incorporated into the UPA (2017).

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38. *Id.*

39. For a more comprehensive exploration of the ways children are harmed when their functional parent-child relationships are not recognized and protected, see, for example, Courtney G. Joslin, *Protecting Children(?): Marriage, Gender, and Assisted Reproductive Technology*, 83 S. CAL. L. REV. 1177 (2010) (exploring financial harms); Nancy D. Polikoff, *This Child Does Have Two Mothers: Redefining Parenthood To Meet the Needs of Children in Lesbian-Mother and Other Nontraditional Families*, 78 GEO. L.J. 459, 573 (1990) (exploring emotional harms).

40. For one of the many heartbreaking stories, see Elaine Herscher, *Family Circle for Nancy Springer*, S.F. CHRON. (Aug. 29, 1999) (describing the real-life aftermath of the decision in Nancy S. v. Michele G., 279 Cal. Rptr. 212 (Cal. Ct. App. 1991)).

41. *See, e.g.*, *In re* Custody of C.C.R.S., 892 P.2d 246, 258 (Colo. 1995) (en banc) (noting that disrupting emotional bonds between a child and psychological parents "would likely prove devastating to the child and would result in long-term, adverse psychological effects on the child" (citation omitted)).

42. Joslin, *supra* note 39.

43. *Id.* at 1196.

44. NeJaime, *supra* note 2, at 2332 (introducing the Part that "suggests how the law might better realize egalitarian commitments in parentage, not only with respect to families formed through ART but across the wider swath of families in contemporary society").

II. IMPLEMENTING REFORM—THE UPA (2017)

I served as the Reporter for the UPA (2017).[45] First promulgated in 1973, the UPA is a comprehensive statutory scheme for determining a child's legal parentage.[46] The UPA is a product of the ULC, which "provides states with non-partisan, well-conceived and well-drafted legislation that brings clarity and stability to critical areas of state statutory law."[47] The ULC promulgates state laws on a variety of topics on which uniformity is desirable—from business matters (Uniform Commercial Code), to probate matters (Uniform Probate Code), to child custody jurisdiction (Uniform Child Custody Jurisdiction and Enforcement Act).[48] While the drafters of Uniform Laws often look to state developments for guidance, the goal of the drafting process is not simply to "restate" the existing law.[49] Rather, the goal is to draft "well-conceived and well-drafted" legislation.[50] And often, projects are instituted to help states address newly emerging legal issues[51] or to respond to developments in an area of law.

This latter goal has been particularly evident throughout the history of the UPA. As Harry Krause, the Reporter of the original UPA, explained, states had been slow to reform their parentage laws to eliminate rules that discriminated against nonmarital children. Writing in 1966, Krause explained that "few states have undertaken a comprehensive review of their position on illegitimacy, and sporadic statutes are the common denominator."[52] This lack of action on the

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45. NeJaime served as an Observer on this project.

46. A revision of the UPA was undertaken in the 1990s. After approval by the ULC in 2000, the UPA (2000) underwent additional revision in 2001 and 2002 to respond to concerns raised by the ABA regarding the ways in which the UPA (2000) discriminated against nonmarital children. I participated in the negotiations and the revisions that led to the UPA (2002). For an account of this process, see John J. Sampson, *Preface to the Amendments to the Uniform Parentage Act (2002)*, 37 FAM. L.Q. 1 (2003).

47. *About the ULC*, UNIFORM L. COMMISSION, http://www.uniformlaws.org/Narrative.aspx?title=About%20the%20ULC [http://perma.cc/NF82-H2BZ].

48. Once an Act has been approved by the ULC, states are then encouraged to enact the statutory schemes. *Id.*

49. *Id.*

50. *Id.*

51. A good contemporary example of this is the Uniform Regulation of Virtual Currency Businesses Act, which was approved by the ULC in July 2017. UNIF. REGULATION OF VIRTUAL CURRENCY BUS. ACT (UNIF. LAW COMM'N 2017), http://www.uniformlaws.org/shared/docs/regulation%20of%20virtual%20currencies/2017AM_URVCBA_AsApproved.pdf [http://perma.cc/T8Z7-SYR8].

52. Harry D. Krause, *Bringing the Bastard into the Great Society—A Proposed Uniform Act on Legitimacy*, 44 TEX. L. REV. 829, 831 (1966).

part of state legislatures was concerning, both as a matter of policy and as a matter of law. More and more children were being born outside of marriage, and these children were being treated unequally and unfairly in many states, Krause contended.[53] Moreover, Supreme Court decisions suggested that many then-existing state parentage laws were unconstitutional.[54] The UPA (1973) sought to help states comply with these constitutional mandates and to fulfill what was seen as an important policy goal: eliminating the status of illegitimacy and establishing the principle of equality for all children.[55]

The UPA has been quite influential. Laws in over half the states are now based on variations of the UPA.[56] Approximately nineteen states—ranging from Montana to Kansas to Hawaii to Rhode Island—enacted the UPA (1973) in whole or in significant part.[57] And eleven states—ranging from Alabama to Wyoming to Texas to Maine—enacted the UPA (2002).[58]

The newest revision of the Act—the UPA (2017)—was approved by the ULC in July 2017 and is now available for adoption by the states.[59] Like its pre-

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53. *Id.* at 829.

54. *See, e.g.*, Gomez v. Perez, 409 U.S. 535, 538 (1973) (per curiam) (holding unconstitutional a Texas child support statute that only imposed child support obligations on fathers of legitimate but not "illegitimate" children); Stanley v. Illinois, 405 U.S. 645, 658 (1972) (holding unconstitutional an Illinois custody law that excluded nonmarital fathers of "illegitimate" children from the definition of "parent").

55. *See, e.g.*, UNIF. PARENTAGE ACT prefatory note (UNIF. LAW COMM'N 2002) ("When work on the [1973] Act began, the notion of substantive legal equality of children regardless of the marital status of their parents seemed revolutionary. Even though the Conference had put itself on record in favor of equal rights of support and inheritance in the Paternity Act and the Probate Code, the law of many states continued to differentiate very significantly in the legal treatment of marital and nonmarital children. A series of United States Supreme Court decisions invalidating state inheritance, custody, and tort laws that disadvantaged out-of-wedlock children provided both the impetus and a receptive climate for the Conference to promulgate UPA (1973).").

56. *See id.*

57. *See id.* ("As of December, 2000, UPA (1973) was in effect in 19 states stretching from Delaware to California; in addition, many other states have enacted significant portions of it."); *see also* UNIF. PARENTAGE ACT Refs & Annos (UNIF. LAW COMM'N 1973) (listing state adoptions).

58. *See Legislative Fact Sheet—Parentage Act*, UNIFORM L. COMMISSION, http://www.uniformlaws.org/LegislativeFactSheet.aspx?title=Parentage%20Act [http://perma.cc/HAL9-BXXL] (listing the following states as adopters: Alabama, Delaware, Illinois, Maine, New Mexico, North Dakota, Oklahoma, Texas, Utah, Washington, and Wyoming).

59. The UPA (2017) was approved by the ULC on July 19, 2017. The UPA (2017) is available at UNIF. PARENTAGE ACT (UNIF. LAW COMM'N 2017), http://www.uniformlaws.org/shared/docs/parentage/UPA2017_Final_2017sep22.pdf [http://perma.cc/647K-AUGG]. For a memo describing the key changes implemented by the 2017 revision, see Memorandum from Jamie Pedersen, Chair, Unif. Parentage Act Drafting Comm. & Courtney Joslin, Re-

decessors, the UPA (2017) seeks to help states comply with newly recognized constitutional obligations and to better reflect and address the reality of the modern family.[60] The UPA (2017) implements, in concrete statutory language, many of the important reforms that NeJaime proposes.

Like NeJaime's prescriptions for review, the UPA revision process was guided by two principles. First, the UPA (2017) expands the pathways for recognition of nonbiological parentage.[61] Second, the UPA (2017) seeks to eliminate gender-based distinctions.[62] These changes help states comply with newly recognized constitutional mandates and reflect the emerging appreciation of the value in recognizing and protecting functional parent-child relationships.[63]

A. Recognizing the Social Bonds of Parenthood[64]

A core goal of the UPA (2017) is to further a principle that has animated the UPA since its inception—recognizing and protecting actual parent-child bonds.[65] Often, the people who are parenting a child are the child's biological

porter, Unif. Parentage Act Drafting Comm., to Unif. Law Comm'rs (June 9, 2017), http://www.uniformlaws.org/shared/docs/parentage/2017AM_Parentage_IssuesMemo.pdf [http://perma.cc/67UT-PE6P].

60. *See, e.g.*, Memorandum from Jamie Pedersen, Chair, Study Comm. on Possible Amendments to the Unif. Parentage Act, to Comm. on Scope and Program 1 (Oct. 5, 2015), http://www.uniformlaws.org/shared/docs/parentage/2015oct5_AUPA_Report%20to%20Scope.pdf [http://perma.cc/XG5D-VQU4] ("We believe a drafting committee should be appointed to consider revisions to the UPA in light of developments in constitutional law, innovations at the state legislative level, and changes in American society over the nearly 20 years since the last major revision process began for the UPA.").

61. *See, e.g.*, Memorandum from Courtney Joslin, Reporter, Unif. Parentage Act 2017 Drafting Comm., to Unif. Parentage Act 2017 Drafting Comm. 3-11 (Oct. 5, 2016), http://www.uniformlaws.org/shared/docs/parentage/2016oct_RUPA_Issues%20memo.pdf [http://perma.cc/7776-XPE2] (providing background information related to de facto parentage).

62. *See, e.g.*, Memorandum from Jamie Pedersen, Chair, Study Comm. on Possible Amendments to the Unif. Parentage Act, to Comm. on Scope & Program 3 (June 12, 2015), http://www.uniformlaws.org/shared/docs/parentage/Parentage_StudyCmteFinalReport_2015jun12.pdf [http://perma.cc/MJ9B-B3RD] (noting that in light of developments with regard to marriage equality, "ULC staff have begun the work of reviewing other ULC acts that include gender-specific references to husbands, wives, mothers, and fathers" and urging that the same should be done with the UPA).

63. *See, e.g.*, *Why Your State Should Adopt the Uniform Parentage Act*, *supra* note 22.

64. This, again, is a principle that animates many of the reforms called for by NeJaime. *See* NeJaime, *supra* note 2, at 2338 (advocating for the "[f]uller recognition of the social bonds of parenthood").

65. The UPA (1973) and the UPA (2002) both included marital presumptions. Under both versions of the Act, the marital presumption protected the relationship between a woman's husband and a child born to the woman even if the husband was not the genetic father.

parents. But this is not always the case. The UPA has and continues to take the position that actual parent-child bonds are important to children and that these relationships are worthy of protection, even if the parent and the child are not also connected by biology. As noted above, children may be harmed if the law fails to recognize and protect their actual parent-child relationships. The UPA (2017) furthers this core principle in several ways.

First, the UPA (2017) revises the holding-out provision so that it applies equally without regard to gender.[66] The holding-out provision has been included in the UPA since its first promulgation in 1973. Under the provision, a person can be recognized as a parent based on the individual's *conduct* of living with the child and treating the child as her own.[67] Initially, some courts concluded that the provision could only be used to recognize functional parent-child relationships if those relationships were also based on a biological connection. For example, in *In re Nicholas H.*, a California intermediate appellate court

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UNIF. PARENTAGE ACT § 204(a) (UNIF. LAW COMM'N 2002) ("A man is presumed to be the father of a child if: (1) he and the mother of the child are married to each other and the child is born during the marriage . . . ."); UNIF. PARENTAGE ACT § 4(a) (UNIF. LAW COMM'N 1973) ("A man is presumed to be the natural father of a child if: (1) he and the child's natural mother are or have been married to each other and the child is born during the marriage, or within 300 days after the marriage is terminated by death, annulment, declaration of invalidity, or divorce, or after a decree of separation is entered by a court . . . ."). The UPA (2002) had a particularly strong version of the marital presumption, providing that it became conclusive or irrebuttable after the child's second birthday, and permitting a court to deny a request for genetic testing even within that two-year window. UNIF. PARENTAGE ACT §§ 607, 608 (UNIF. LAW COMM'N 2002).

In addition, both the UPA (1973) and the UPA (2002) allowed an individual to establish parentage based on the individual's conduct of living with the child and functioning as a parent to the child. *Id.* § 204(a)(5) (providing that a man is presumed to be the father of a child if: "for the first two years of the child's life, he resided in the same household with the child and openly held out the child as his own"); UNIF. PARENTAGE ACT § 4(a)(4) (UNIF. LAW COMM'N 1973) (providing that a man is presumed to be a parent if, "while the child is under the age of majority, he receives the child into his home and openly holds out the child as his natural child").

66. UNIF. PARENTAGE ACT § 204(a)(2) (UNIF. LAW COMM'N 2017) ("An *individual* is presumed to be a parent of a child if: . . . (2) the individual resided in the same household with the child for the first two years of the life of the child, including any period of temporary absence, and openly held out the child as the individual's child." (emphasis added)).

67. *Id.* The holding-out provision of the UPA (1973) had no time limitations (other than the requirement that the relationship be developed when the child was still a minor). UNIF. PARENTAGE ACT § 4(a)(4) (UNIF. LAW COMM'N 1973) (providing that a man is presumed to be a parent if, "while the child is under the age of majority, he receives the child into his home and openly holds out the child as his natural child"). In 2002, a new time requirement was added. To be covered under the holding-out provision, the individual had to have functioned as a parent "for the first two years of the child's life." UNIF. PARENTAGE ACT § 204(a)(5) (UNIF. LAW COMM'N 2002). This time requirement from the UPA (2002) was carried over in the most recent revision of the Act.

held that even if the holding-out presumption arose based on the man's conduct of living with the child and treating the child as his own, the presumption was necessarily rebutted by evidence that the man was not the child's biological parent.[68] Over time, however, an increasing number of courts has rejected this limited understanding of the holding-out provision. This was true in the *Nicholas H.* case itself—on appeal, the California Supreme Court concluded that the man could be recognized as a parent under the holding-out provision even though he was not the child's genetic parent.[69] Courts in many other states have likewise concluded that functional, nongenetic parents can be recognized and protected under the holding-out provision.[70]

As noted above, the UPA (2017) continues to include the holding-out provision but takes it a step further by making the provision gender-neutral. Because a woman seeking protection under the provision will rarely be connected to the child by biology,[71] this revision makes it even more clear that the purpose of the provision is to recognize and protect actual parent-child relationships, including relationships that are not biologically based.

Second, the UPA (2017) includes an entirely new method of establishing parentage—the de facto parent provision.[72] Most states today extend some protection to functional, nonbiological parents.[73] Some states do this through a

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68. 110 Cal. Rptr. 2d 126, 141, *rev'd*, 46 P.3d 932 (Cal. 2002), *modified* (July 17, 2002) ("Therefore, under section 7612, the presumption is rebutted by 'clear and convincing' evidence that the man is not the child's natural, biological father.").

69. 46 P.3d at 941.

70. *See, e.g.*, *In re* Parental Responsibilities of A.R.L., 318 P.3d 581, 584-85 (Colo. App. 2013); Partanen v. Gallagher, 59 N.E.3d 1133, 1138-40 (Mass. 2016); *In re* Guardianship of Madelyn B., 98 A.3d 494, 499 (N.H. 2014); Chatterjee v. King, 280 P.3d 283, 292-93 (N.M. 2012).

71. Usually, the woman who is genetically connected to the child is the woman who gave birth to the child. Such a woman is a parent by virtue of having given birth to the child. UNIF. PARENTAGE ACT § 201(1) (UNIF. LAW COMM'N 2017) ("A parent-child relationship is established between an individual and a child if: (1) the individual gives birth to the child [except in situations involving surrogacy] . . . ."). The woman who gave birth to the child, therefore, would not need to invoke the holding-out provision to establish parentage. Sometimes, however, the woman who gave birth to the child is not the child's genetic parent. *See, e.g.*, K.M. v. E.G., 117 P.3d 673 (Cal. 2005) (demonstrating parentage litigation involving twins born to a lesbian couple through ova sharing).

72. UNIF. PARENTAGE ACT § 609 (UNIF. LAW COMM'N 2017). To be clear, some people who qualify as parents under the newly added de facto parent provision might have been protected under other provisions of earlier versions of the UPA. For example, such a person might have been protected under the holding-out provision of the UPA (1973). That said, the UPA (2017) is the first version of the Act to include the term "de facto parent." *See, e.g.*, Memorandum from Courtney Joslin, Reporter, Unif. Parentage Act 2017 Drafting Comm., to Unif. Parentage Act 2017 Drafting Comm., *supra* note 61.

73. *See, e.g.*, Courtney G. Joslin, *Leaving No (Nonmarital) Child Behind*, 48 FAM. L.Q. 495 (2014) (providing an overview of developments in the law).

holding-out provision.[74] But even more states recognize and protect functional parent-child relationships under equitable doctrines.[75] The UPA (2017) incorporates this trend in the law in a particularly robust way. Under section 609, persons alleging themselves to be "de facto parents"—that is, parents in fact—can be recognized as legal parents who stand in parity with any other legal parents, including genetic parents, for all purposes.[76] This new method of establishing parentage based on function is written in gender-neutral terms and applies equally to men and women.[77] In addition, the provision captures and protects relationships that may not be covered by the holding-out provision. The holding-out provision of the UPA (2017) applies only when the individual was residing with and holding the child out as her own from birth. In many cases, however, functional parents come into children's lives at some point after they are born. The de facto parent provision provides a mechanism for recognizing these types of parent-child relationships.

Both the holding-out provision and the de facto parent provision require the development of an actual parent-child bond over time.[78] Thus, a person cannot be recognized as a parent under either provision at the moment of birth. In some situations, this lag in legal recognition can leave a family vulnerable. To be clear, however, there are other provisions of the UPA (2017) under which a biologically unrelated person can be recognized as (or at least presumed to be) a legal parent at or near the moment of birth. This may be possible, for example, under the marital presumption,[79] the voluntary acknowledgment pro-

74. *See supra* notes 68-70 and accompanying text.

75. *See, e.g.*, Joslin, *supra* note 73, at 499-502.

76. UNIF. PARENTAGE ACT § 609 (UNIF. LAW COMM'N 2017). The factors included in section 609 are based on the factors that have been developed by courts under common-law doctrines. In some states, however, individuals recognized under these common-law doctrines do not stand in parity with any other legal parents. *See* Joslin, *supra* note 73, at 500-01.

77. This provision also applies without regard to marital status.

78. *See, e.g.*, UNIF. PARENTAGE ACT § 204(a)(2) (UNIF. LAW COMM'N 2017) (providing that the individual must have "resided in the same household with the child for the first two years of the life of the child . . . and openly held out the child as the individual's child"); *id.* § 609(d)(5) (providing that an individual claiming to be a de facto parent must demonstrate that he or she "established a bonded and dependent relationship with the child which is parental in nature").

79. *Id.* § 204(a)(1). Under the marital presumption, the spouse of the woman who gave birth is presumed to be a parent of the child as soon as the child is born.

cess (which is described below),[80] and the assisted reproduction and surrogacy provisions.[81]

Third, the UPA (2017) expands the classes of people who can establish parentage through state voluntary acknowledgment processes (VAP). State VAP procedures implement a federal directive. To be eligible to receive certain federal funds, states must have in place a simple, administrative process for establishing paternity.[82] Once the procedures have been properly followed, completion of a VAP establishes parentage. Federal law provides that the properly completed VAP has the force of a judgment and must be recognized and respected by all other states.[83] Because the systems in most states only apply to men, they are generally referred to as "voluntary acknowledgments of *paternity*." Moreover, not only are the VAP systems generally limited to men, but most states allow only a man who is alleged to be a genetic father to establish parentage through this process.[84]

Most same-sex parent families, however, include at least one nonbiological parent. As a result, "the biological foundation of VAPs does not repair—but instead exacerbates—burdens experienced by the nonmarital children of same-

80. As explained in more detail below, the voluntary-acknowledgment-of-parentage provisions are included in article 3 of the UPA (2017).

81. Nonsurrogacy forms of assisted reproduction are addressed in article 7 of the UPA (2017) and surrogacy is addressed in article 8. As described in more detail below, articles 7 and 8 have been revised to apply to all intended parents, regardless of sex, sexual orientation, or marital status. Under article 7, if the intended parent consents to the insemination as required, the intended parent is a parent of the child from the moment of birth. *See, e.g.*, *id.* § 703 (providing that an individual who consents to the assisted reproduction "is a parent of the child"). Under article 8, if the agreement complies with the article's requirements, an intended parent of a child born through gestational surrogacy "is a parent of the child." *Id.* § 809(a).

82. *See, e.g.*, 42 U.S.C. § 666(a) (2012) ("In order to satisfy section 654(20)(A) of this title, each State must have in effect laws requiring the use of the following procedures . . . .").

83. *See, e.g.*, Katharine K. Baker, *The DNA Default and Its Discontents: Establishing Modern Parenthood*, 96 B.U. L. REV. 2037, 2049 (2016) (noting that after the rescission period has elapsed, a VAP is treated as a "final legal judgment that can be challenged only on grounds of fraud, duress, and material mistake of fact"); *see also* 42 U.S.C. § 666(a)(5)(C)(iv) (2012) (providing that states must "give full faith and credit to such an affidavit signed in any other State according to its procedures"). As I explain elsewhere, having certainty that one's parentage will be recognized and respected across state lines is vitally important to families. Without a judgment of parentage or an establishment that is treated as a judgment, a person's status as a parent may flicker on and off as one travels from state to state. *See, e.g.*, Courtney G. Joslin, *Travel Insurance: Protecting Lesbian and Gay Parent Families Across State Lines*, 4 HARV. L. & POL'Y REV. 31 (2010).

84. Nevada recently enacted a gender-neutral VAP procedure for children born through assisted reproduction. 2017 Nev. Legis. Serv. Ch. 63 (West).

sex couples."[85] To eliminate unnecessary gender distinctions and provide greater clarity and certainty to nonbiological parents, the UPA (2017) renames these "acknowledgments of *parentage*" and permits a wider group of people to establish parentage through this process. Section 301 provides that in addition to an alleged genetic father, a VAP can also be used to establish the legal parentage of "an intended parent" of a child born through assisted reproduction and of a "presumed parent" (which, most commonly, will be the woman's spouse—male or female).[86]

This revision is an extremely important development. The new groups of people who can establish parentage under this provision are those who would already be considered or presumed to be parents under their relevant state's law. But in the absence of a formal judgment of parentage, other states may not be required to respect and recognize that parent-child status.[87] And we know from existing case law that courts do refuse to recognize the parental status of LGBT parents, even if it was clear that they were considered parents in the state in which their child was born.[88] These problems arise because, absent a judgment of parentage, states often apply their own forum law when adjudicating parentage.[89] And when the person is LGBT, as NeJaime demonstrates, that

85. NeJaime, *supra* note 2, at 2344; *id.* at 2344-45 ("A more egalitarian system would expressly allow VAPs to recognize parents not only on biological but also on social grounds. Voluntary acknowledgements of paternity could become voluntary acknowledgements of parentage and apply to both biological and nonbiological parents, including both men and women." (emphasis omitted)); *see* Joslin, *supra* note 83 (proposing a VAP-like system designed to protect LGBT-parent families); *see also* Leslie Joan Harris, *Voluntary Acknowledgments of Parentage for Same-Sex Couples*, 20 AM. U. J. GENDER SOC. POL'Y & L. 467 (2012).

86. NeJaime calls for a similar reform. NeJaime, *supra* note 2, at 2344 ("The equality principles guiding reform would lead states to open VAPs to same-sex couples in ways that render VAPs explicitly capable of capturing social, and not only biological, grounds for parenthood.").

87. For more detailed explorations of this issue, see Courtney G. Joslin, *Interstate Recognition of Parentage in a Time of Disharmony: Same-Sex Parent Families and Beyond*, 70 OHIO ST. L.J. 563 (2009); Joslin, *supra* note 83.

88. Indeed, some courts have gone so far as to refuse to recognize a judgment recognizing the parentage of an LGBT parent entered by the court of another state. *See, e.g.*, Embry v. Ryan, 11 So.3d 408, 410 (Fla. Dist. Ct. App. 2009) (overruling a trial court decision that had declined to recognize and enforce an out-of-state adoption judgment). It is now clear that where the party had been properly adjudicated to be a parent by the court of another state, that judgment must be given "exacting" full faith and credit in other states. V.L. v. E.L., 136 S. Ct. 1017, 1020, 1022 (2016) (per curiam) (quoting Baker v. Gen. Motors Corp., 522 U.S. 222, 233 (1998)).

89. While states are constitutionally required to recognize and enforce out-of-state judgments, including parentage judgments, it is generally constitutionally permissible for courts to apply their own state's law to an action properly pending before them. *See, e.g.*, Courtney G. Joslin, *Modernizing Divorce Jurisdiction: Same-Sex Couples and Minimum Contacts*, 91 B.U. L.

person may not be considered a parent under the law of many states. This new, expanded VAP procedure helps mitigate some of this uncertainty. As a result, parties would have a means of establishing a final, secure determination of parentage without having to go to court.[90]

Fourth, the UPA (2017) provides greater clarity and direction to courts in deciding which of multiple claimants should be declared a child's parent when genetics and function suggest different results. The UPA requires courts to weigh a range of factors.[91] These factors include: "the length of time during which each individual assumed the role of parent of the child"; "the nature of the relationship between the child and each individual"; and "the harm to the child if the relationship between the child and each individual is not recognized."[92] Critically, almost all of the factors focus on the person's relationship to the child. As such, these rules permit a court to choose social bonds over genetic bonds.[93] Here again, the revision clarifies that parentage need not be based on biological connections and that biological connections are not necessarily more important than other means of establishing parentage.

To be sure, courts have discretion under section 613 when weighing competing claims of parentage. While a court could choose social ties over genetic bonds, it is not required to do so. And it is possible that a court could place significant weight on biology when weighing the respective claims. That said, this new provision makes clear that biology does not necessarily trump social bonds; if that were the case, a best-interests-of-the-child analysis that involves consideration of a range of factors focused on the individuals' relationships with the child would be unnecessary.

REV. 1669, 1718 (2011) ("Modern choice-of-law doctrine recognizes that a state can constitutionally apply its own laws to an action so long as the chosen law has 'a significant contact or significant aggregation of contacts, creating state interests, such that choice of its law is neither arbitrary nor fundamentally unfair.'" (citation omitted)); *see also* Katherine Florey, *State Courts, State Territory, State Power: Reflections on the Extraterritoriality Principle in Choice of Law and Legislation*, 84 NOTRE DAME L. REV. 1057, 1058-59 (2009) (stating that it is likely constitutionally permissible for a court to apply forum law to a case if the court properly has jurisdiction over the action).

90. I previously called for the creation of such a system. Joslin, *supra* note 83, at 43-45.

91. UNIF. PARENTAGE ACT § 613 (UNIF. LAW COMM'N 2017).

92. *Id.*

93. *Id.*

B. Eliminating Gender Distinctions

In addition to the changes described above, the UPA (2017) incorporates additional reforms intended to eliminate many gender distinctions in the rules of parentage.[94]

The UPA (2017) seeks to further the goal of gender equality through its very terminology. The prior versions of the Act distinguished between paternity and maternity and created different mechanisms for establishing each one.[95] Not only did this distinction erect different rules for men and women, but it also reinforced the notion that some inherent difference exists between mothers and fathers. In contrast, the UPA (2017) takes the position that under most of the rules for establishing parentage, an individual's gender is not relevant.[96] Accordingly, the UPA (2017) eliminates many of the gender-based distinctions from the Act and unifies the methods of establishing parentage under a single rubric. The UPA (2017) now lays out the ways in which any individual—male or female—can establish a legally recognized parent-child relationship.[97]

Consistent with this basic principle, throughout the Act, specific means of establishing parentage have been made gender-neutral. In addition to the provisions discussed above, the two articles addressing the parentage of children born through forms of assisted reproduction—article 7 addressing nonsurrogacy forms of ART, and article 8 addressing surrogacy—likewise replace gendered terms with gender-neutral ones. An earlier version of the Act—the UPA (2002)—had addressed the parentage of children born through ART, but its provisions referred only to intended couples consisting of one man and one

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94. As discussed below, the UPA (2017) does not eliminate all distinctions based on gender and biology; it continues to place weight on a woman's gestation of a fetus. *See infra* notes 112-115 and accompanying text.

95. *See, e.g.*, UNIF. PARENTAGE ACT § 201 (UNIF. LAW COMM'N 2002).

96. In addition to revising the Act to replace most gender-specific references with gender-neutral ones, the Act continues to include (as it has since its inception) a provision requiring parentage rules to apply in a gender-neutral manner to the extent practicable. UNIF. PARENTAGE ACT § 107 (UNIF. LAW COMM'N 2017) ("To the extent practicable, a provision of this [act] applicable to a father-child relationship applies to a mother-child relationship and a provision of this [act] applicable to a mother-child relationship applies to a father-child relationship." (alterations in original)); *see also* UNIF. PARENTAGE ACT § 21 (UNIF. LAW COMM'N 1973) ("Any interested party may bring an action to determine the existence or nonexistence of a mother and child relationship. Insofar as practicable, the provisions of this Act applicable to the father and child relationship apply.").

97. UNIF. PARENTAGE ACT § 201 (UNIF. LAW COMM'N 2017); *see also id.* § 201 cmt. Thus, as NeJaime urges, the UPA (2017) moves "away from separate regulations of *maternity and paternity* and instead work[s] toward the general regulation of *parentage*." NeJaime, *supra* note 2, at 2337-38.

woman.[98] Because the provisions were written in gendered terms, some courts refused to apply these gendered statutory provisions equally to same-sex intended parents who had children together through assisted reproduction.[99]

Articles 7 and 8 of the UPA (2017), by contrast, cover all intended parents, without regard to the sex, sexual orientation, or marital status of the intended parents.[100] These changes are consistent with NeJaime's call for "[a] more comprehensive and evenhanded use of consent in the regulation of ART" as a means to "promote equality, based on gender, sexual orientation, and marital status."[101] By replacing gendered language with gender-neutral language, the UPA (2017) promotes equality by opening up additional methods of establishing parentage to all individuals. In doing so, the Act also works to breaks down the persistent legal and social distinctions between mothers and fathers.

The revisions to the assisted reproduction provisions also further the first identified goal of recognizing and protecting social parenthood. As was true under the UPA (2002), the UPA (2017) does not require intended parents of children born through ART or surrogacy to have a genetic connection to the resulting child.[102] Indeed, under articles 7 and 8, parentage is established en-

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98. *See, e.g.*, UNIF. PARENTAGE ACT § 703 (UNIF. LAW COMM'N 2002) ("A man who provides sperm for, or consents to, assisted reproduction by a woman as provided in Section 704 with the intent to be the parent of her child, is a parent of the resulting child.").

99. *See, e.g.*, *In re* A.E., No. 09-16-00019-CV, 2017 WL 1535101, at *10 (Tex. App. Apr. 27, 2017), *petition for review pending* ("Reading the [assisted reproduction statute based on UPA (2002)] as requested by Appellant would affect a substantive change to the respective statutes, and it would materially alter the requirements outlined in subsection (a) and (b) of the ART statute as to husband and wife. The substitution of the word 'spouse' for the words 'husband' and 'wife' would amount to legislating from the bench, which is something that we decline to do.").

100. *See, e.g.*, UNIF. PARENTAGE ACT § 703 (UNIF. LAW COMM'N 2017) ("An individual who consents under Section 704 to assisted reproduction by a woman with the intent to be a parent of a child conceived by the assisted reproduction is a parent of the child."); *see also, e.g.*, *id.* § 102(13) (defining "intended parent" to mean "an individual, married or unmarried, who manifests an intent to be legally bound as a parent of a child conceived by assisted reproduction").

101. NeJaime, *supra* note 2, at 2345. NeJaime relies on my own call for a gender-neutral consent-to-parent rule. Joslin, *supra* note 39, at 1183 (arguing that "the most appropriate solution is to apply the consent = legal parent rule to all children born through alternative insemination, regardless of the marital status, gender, or sexual orientation of the participants").

102. Some states do include such a requirement. For example, in Louisiana, surrogacy is permitted only when the intended parents are a married husband and wife who are using only their own gametes. LA. STAT. ANN. § 40.32(1) (2012 & Supp. 2017) (providing that "'[b]iological parents' means a husband and wife, joined by legal marriage recognized as valid in this state, who provide sperm and egg for in vitro fertilization, performed by a licensed physician, when the resulting fetus is carried and delivered by a surrogate birth parent who is related by blood or affinity to either the husband or wife").

tirely by virtue of conduct.[103] Genetic connection is simply not relevant to establishing the parentage of intended parents under these articles.[104] Thus, an intended mother of a child born through assisted reproduction can be a legal mother even if she lacks a genetic or gestational connection to the resulting child.[105]

The Act also updates the parentage presumptions, including the marital presumption,[106] to remove most gender-based distinctions. All fifty states have a marital presumption.[107] In most states, however, the marital presumption expressly applies only to the *husband* of the woman who gave birth.[108] In such states, some courts have refused to apply their gender-specific marital presumption equally to female spouses.[109] In such jurisdictions, male spouses who are not biological parents are presumed to be legal parents, but similarly situated female spouses are not. This, some courts have concluded, is unconstitu-

103. *See, e.g.*, UNIF. PARENTAGE ACT § 703 (UNIF. LAW COMM'N 2017) ("An individual who consents under Section 704 to assisted reproduction by a woman with the intent to be a parent of a child conceived by the assisted reproduction is a parent of the child."); *id.* § 809(a) ("Except as otherwise provided in subsection (c) or Section 810(b) or 812, on birth of a child conceived by assisted reproduction under a gestational surrogacy agreement, each intended parent is, by operation of law, a parent of the child."); *see also, e.g.*, *id.* § 102(13) (defining "[i]ntended parent" to mean "an individual, married or unmarried, who manifests an intent to be legally bound as a parent of a child conceived by assisted reproduction").

104. Indeed, a new section was added to article 5, addressing genetic testing, that drives this point home. The new section 502(b) states that genetic testing cannot be used to challenge the parentage of an individual who is a parent under articles 7 or 8. This new subsection was added because "parentage of an intended parent under articles 7 and 8 is not premised on a genetic connection." *Id.* § 502 cmt. Therefore, "the lack of genetic connection should not be the basis of a challenge to the individual's parentage." *Id.*

105. *Id.* § 801 (laying out criteria for intended parents through surrogacy).

106. For an earlier consideration of these questions regarding the application of the marital presumption to same-sex couples, see Susan Frelich Appleton, *Presuming Women: Revisiting the Presumption of Legitimacy in the Same-Sex Couples Era*, 86 B.U. L. REV. 227 (2006).

107. *See, e.g.*, LESLIE HARRIS ET AL., FAMILY LAW 865 (4th ed. 2014) ("In all states a child born to a married woman is at least rebuttably presumed to be the child of her husband.").

108. *See, e.g.*, NeJaime, *supra* note 2, app. A (indicating that only 11 states and the District of Columbia have statutory gender-neutral marital presumptions).

109. *See, e.g.*, Turner v. Steiner, 398 P.3d 110, 114 (Ariz. Ct. App. 2017), *abrogated by* McLaughlin v. Jones *ex rel.* Cty. of Pima, 401 P.3d 492, 498 (Ariz. 2017) ("The first flaw is that *Obergefell* does not extend so far as to require the courts to modify statutory schemes relating to same-sex parenting."); *In re* A.E., No. 09-16000019-CV, 2017 WL 1535101, at *8 (Tex. App. Apr. 27, 2017), *petition for review pending* ("Furthermore, we conclude that *Obergefell* does not require this Court to act as the Legislature and re-write the Texas statutes that define who has standing to bring a [suit affecting the parent-child relationship].").

tional.[110] The UPA (2017) addresses this potential constitutional infirmity by making the marital presumption expressly apply equally to both male and female spouses of the woman who gave birth.[111]

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To be clear, the UPA (2017) does not entirely eliminate considerations of gender and biology. The Act still places great weight on gestation. Thus, except in cases involving surrogacy, the woman who gave birth to the child is automatically considered a parent.[112] For this reason, the UPA (2017) does not go as far as NeJaime urges with regard to the marital presumption.[113] Because the woman who gave birth is statutorily defined as a parent, the marital presumption only applies to the spouse of the *woman who gave birth*.[114] It does not apply to the spouse of a man who is a legal parent. The spouse of that man may be able to establish parentage through other means, such as de facto parentage or the holding-out presumption. But he or she is not presumed to be a parent solely by virtue of his or her marriage to a parent.

In addition, the surrogacy provisions place some weight on genetics. While the intended parents need not have a genetic connection to be recognized as parents, article 8 does distinguish between gestational surrogacy and genetic surrogacy (often referred to as "traditional" surrogacy).[115] One may argue that if biology is not destiny, one should treat these forms of surrogacy identically. That is, if biology does not necessarily make one a parent, the surrogacy rules

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110. *See, e.g.*, *McLaughlin*, 401 P.3d at 498 ("In sum, the presumption of paternity under § 25–814(A)(1) cannot, consistent with the Fourteenth Amendment's Equal Protection and Due Process Clauses, be restricted to only opposite-sex couples. The marital paternity presumption is a benefit of marriage, and following *Pavan* and *Obergefell*, the state cannot deny same-sex spouses the same benefits afforded opposite-sex spouses.").

111. UNIF. PARENTAGE ACT § 204(a)(1)(A) (UNIF. LAW COMM'N 2017) ("An individual is presumed to be a parent of a child if: . . . the individual and the woman who gave birth to the child are married to each other and the child is born during the marriage . . . .").

112. *Id.* § 201(1).

113. *See* NeJaime, *supra* note 2, at 2340 (arguing that some variation of the marital presumption should apply to the spouse of a legal father).

114. While NeJaime argues that some variation of the marital presumption should apply to the spouse of a legal father, he agrees that the traditional presumption should not be applied to that scenario. Instead, he proposes a "two-tiered system of marital presumptions." *Id.* A fully gender-neutral marital presumption, he concedes, "may insufficiently protect the rights of women who give birth." *Id.*

115. UNIF. PARENTAGE ACT art. 8 cmt. (UNIF. LAW COMM'N 2017) ("While UPA (2017) continues to permit both types of surrogacy, UPA (2017) imposes additional safeguards or requirements on genetic surrogacy agreements.").

should apply equally, without regard to whether the surrogate is genetically related to the child. Treating these two forms of surrogacy differently, one may argue, unnecessarily re-elevates the importance of genetic connections.

The reality today, however, is that all states that address surrogacy through comprehensive statutory schemes distinguish between the two forms of surrogacy. Most of these states simply refuse to permit and regulate genetic surrogacy expressly.[116] And the few states that explicitly permit genetic surrogacy by comprehensive statutory scheme impose additional requirements on such agreements.[117] While ULC drafting committees seek to advance the law substantively, they also seek to draft laws that can be widely enacted, with the ultimate goal of uniformity throughout the nation. Here, the drafting committee determined that those two goals would be best furthered by the above approach. By including and permitting genetic surrogacy, the committee was providing clear rules and therefore greater clarity and certainty for those who form families through this means. But at the same time, the provisions regarding genetic surrogacy erect additional safeguards, thereby acknowledging and responding to the political reality that state legislators have been more reluctant to enact legislation expressly permitting this form of surrogacy.

III. NURTURING PARENTAGE LAW

If broadly adopted by a significant number of states, the revisions incorporated into the UPA (2017) would go a long way toward both addressing the discrimination that NeJaime identifies and protecting children's wellbeing. Since its first promulgation almost fifty years ago, the UPA has been a critical lever in addressing discrimination in parentage law. By enacting the original

116. Only four jurisdictions expressly permit genetic surrogacy by statute. These jurisdictions are Florida, Maine (for close relatives only), Virginia, and the District of Columbia. *E.g.*, *id.* art. 8 pt. 3 cmt.

117. For example, in Maine, genetic surrogacy arrangements are permissible only if the surrogate is a family member. ME. REV. STAT. ANN. tit. 19-A, § 1931(1)(E) (2017) (providing that the surrogate must "[n]ot have contributed gametes that will ultimately result in an embryo that she will attempt to carry to term, unless the gestational carrier is entering into an agreement with a family member"). In Florida, Virginia, and the District of Columbia, the provisions give a genetic surrogate additional time in which to withdraw her consent. D.C. Code Ann. § 16-411(4) (West 2017) ("In the case of a child born by a traditional surrogate, [the surrogate can withdraw her consent] within 48 hours after the birth of the child."); FLA. STAT. ANN. § 63.213(2)(a) (West 2017) (providing that the surrogate (what Florida calls a "volunteer mother") has the right to rescind her consent "any time within 48 hours after the birth of the child, if the volunteer mother is genetically related to the child"); VA. CODE ANN. § 20-161(B) (West 2017) ("Within 180 days after the last performance of any assisted conception, a surrogate who is also a genetic parent may terminate the agreement by filing written notice with the court.").

1973 version, states began to chip away at longstanding discrimination and unequal treatment of nonmarital children.[118] It would be a tremendously positive step in the lives of children and their families if the most recent revision of the UPA was as successful as its predecessors.

As NeJaime suggests, there are a number of important reasons why states should consider revising their statutes in these ways. First and foremost, these changes help protect children and their families. Under current law in many states, people who children view and rely upon as parents may not be recognized as parents. Failing to recognize those relationships can harm children in very tangible ways.

Moreover, leaving families uncertain about their legal relationships to each other can be emotionally destabilizing. It can result in contentious litigation against an outsider who refuses to recognize and respect the family, such as an insurance company that denies benefits on the ground that they are not legal family members. Or the litigation could arise from within the family, such as upon the breakdown of the family where one person—often the biological parent—argues that the nonbiological parent is not a parent and not entitled to seek contact with the child. Family breakdowns are almost always difficult for children, and placing the child in the middle of acrimonious litigation can make that process even more difficult.

As NeJaime suggests, these families can and often do ask courts to apply gender-specific statutes in gender-neutral ways. But requiring individual families to ask courts to do this on a case-by-case basis places an enormous burden on families. It also places burdens on courts. Thus, in recent years, a number of courts have called upon state legislatures to do their part to update incomplete and outdated parentage regimes.[119] By enacting clear, express statutory provisions, states can provide families with clarity about the rules governing them. This clarity can help avoid unnecessary litigation and reduce the challenges that children face during what are already difficult periods in their lives.

Enacting the UPA (2017) would also help states comply with constitutional mandates of due process and equal protection. If a state permits a husband to be recognized as a legal parent even if he is not a genetic parent, the Constitu-

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118. The UPA (1973) grew out of work by Krause. *See, e.g.*, Krause, *supra* note 52, at 829.

119. *See, e.g.*, McLaughlin v. Jones *ex rel.* Cty. of Pima, 401 P.3d 492, 500-01 (Ariz. 2017) (urging the legislature to act); Sinnott v. Peck, No. 2015-426, 2017 WL 5951846, at *12 (Vt. Dec. 1, 2017) ("We continue to urge the Legislature to take action in this realm, and hope that the study commissioned by the Legislature and cited by the dissent leads to the enactment of statutory revisions that render this decision, and others cited above, obsolete. The global perspective, consideration of extensive empirical evidence, and public input and accountability of the legislative process are better suited than case-by-case adjudications to developing a coherent law of parental status." (citation omitted)).

tion requires the state to make the same protection available to a female spouse.[120] As the Arizona Supreme Court reminded us, these constitutional mandates apply not just to courts—they also apply to state legislatures. And indeed, if the changes come from state legislatures rather than through the courts, the constitutional correction need not occur on a case-by-case basis. "[L]egislative enactments and rulemaking . . . can forestall unnecessary litigation and help ensure that [the] law guarantees same-sex spouses the dignity and equality the Constitution requires—namely, the same benefits afforded couples in opposite-sex marriages."[121] Adoption of the UPA (2017) assists states in fulfilling these constitutional obligations.

If adopted, these advances certainly will benefit and be felt by same-sex married couples and their children. Under the UPA (2017), many more of these married same-sex parents will have legally recognized relationships with their children, and these families will have greater certainty and security regarding their familial relationships as they travel about the country.

Helping states fulfill their constitutional obligation to treat married same-sex couples equally was a key impetus for the revision project. But it is also important not to overlook the fact that the impact of the UPA (2017) will extend beyond the boundaries of the marital family. Consistent with one of the core principles of the original UPA, the UPA (2017) seeks to ensure the equal treatment of nonmarital children as well.[122] As described above, many of the key provisions in the UPA (2017) apply equally not only without regard to gender and sexual orientation, but also marital status. The provisions that apply equally without regard to marital status include almost all of the provisions discussed above: the holding-out provision, the de facto parent provision, the VAP provisions, and the assisted reproduction provisions. The UPA (2017) is, therefore, an example of how marriage equality successes may be leveraged to achieve progress for all families—marital and nonmarital.[123]

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120. *McLaughlin*, 401 P.3d at 498 ("The marital paternity presumption is a benefit of marriage, and following *Pavan* and *Obergefell*, the state cannot deny same-sex spouses the same benefits afforded opposite-sex spouses.").

121. *Id.* at 501.

122. *See* UNIF. PARENTAGE ACT § 2 (UNIF. LAW COMM'N 1973) ("The parent and child relationship extends equally to every child and to every parent, regardless of the marital status of the parents.").

123. In this way, the UPA (2017) is a concrete example of the very dynamic that NeJaime identified in *Marriage Equality and the New Parenthood*: the UPA (2017) "shows how marriage equality can facilitate the expansion of intentional and functional parentage principles across family law—not only inside but also outside marriage, for both same-sex and different-sex couples." NeJaime, *Marriage Equality*, *supra* note 11, at 1190; *see also* Courtney G. Joslin, *The Gay Rights Canon and the Right to Nonmarriage*, 97 B.U. L. REV. 425 (2017) (arguing that the

CONCLUSION

As NeJaime carefully demonstrates in *The Nature of Parenthood*, parentage law in most states continues to "reflect[] and perpetuate[] inequality based on gender and sexual orientation."[124] As a result, the law often leaves LGBT parents and women who separate social parenthood from genetic parenthood inadequately protected under the law. These legal inadequacies harm not only adults, but also the children in these families.

States have the opportunity to reform many of these existing limitations in parentage law by enacting the UPA (2017). The UPA (2017) implements many of the concrete reforms called for by NeJaime. I am hopeful that many states will seize this opportunity to do just that.

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Court's gay rights decisions can support rather than foreclose protections for those living outside of marriage).

124. NeJaime, *supra* note 2, at 2268 (footnote omitted).

NCLR

NATIONAL CENTER FOR LESBIAN RIGHTS

LEGAL RECOGNITION OF LGBT FAMILIES

I. Legal Parent

A legal parent is a person who is legally-recognized as a child's parent and has the legal right to have custody of a child and make decisions about the child's health, education, and well-being. A legal parent is also financially obligated to support the child.

In a number of states, a person who is not a legal parent does not have any legal decision-making authority over a child, even if that person lives with the child and functions as the child's parent. For example, in some states, a person who is not a legal parent may not be able to consent to medical care for the child or even have the authority to approve things like school field trips. In addition, a non-legal parent may have no rights to custody or even visitation with a child should something happen to the legal parent, and may have no ability to claim the child as a dependent for health insurance. In the absence of a will stating otherwise, a child generally has no right to inherit from a person who is not a legal parent or relative.

All legal parents have an equal right to seek custody and make decisions for their children, as well as the responsibility to support their children. A biological parent does not have any more rights than an adoptive parent or other person who is a legal parent. For example, if a lesbian couple has a child together through donor insemination and completes a second parent adoption, both parents are on completely equal legal footing. If the couple were to separate, each would be equally entitled to custody, which a court would determine based on the best interests of the child without giving an automatic advantage to either parent.

When a legally married couple has a child, they are both automatically presumed to be the legal parents of the child. This means that, if they get divorced, they both remain legal parents unless a court terminates one or both of their parental rights. This presumption applies to same-sex parents when children are born to couples who are married or where their state recognizes their civil union or comprehensive domestic partnership at the time the child is born. **Regardless of whether you are married or in a civil union or comprehensive domestic partnership, NCLR always encourages non-biological and non-adoptive parents to get an adoption or parentage judgment, even if you are named on your child's birth certificate.**

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NCLR also always recommends that same-sex parents and transgender parents ensure that other family protection documents are in place, such as medical authorization, guardianship agreements, wills, advanced directives.

II. Second Parent Adoption

A. An Overview

The most common means by which LGBT non-biological parents establish a legal relationship with their children is through what is generally referred to as a "second parent adoption." A second parent adoption is the legal procedure by which a co-parent adopts his or her partner's child without terminating the partner's parental rights, regardless of marital status. As a result of the adoption, the child has two legal parents, and both partners have equal legal status in terms of their relationship to the child.

Additionally, married same-sex couples can use the stepparent adoption procedures that other married couples may use. States that recognize comprehensive domestic partnerships or civil unions also allow couples joined in these legal unions to use the stepparent adoption procedures. These adoptions have the same effect as a second parent adoption, but they may be faster and less expensive than second parent adoptions, depending on where you live.

It is important to recognize, however, that a same-sex partner who plans the birth or adoption of a child with his or her partner is a parent – not a stepparent. Parents should not have to adopt their own children, but it is legally advisable for LGBT parents to get an adoption or parentage judgment to ensure that their parental rights are fully protected in every state.

B. Availability of Second Parent Adoption

As mentioned above, married same-sex couples can use the stepparent adoption procedures available to all married couples. Registered domestic partners or civil union partners can also use similar adoption procedures in states that recognize their relationship status.

In addition, for unmarried couples and couples who are not in a civil union or registered domestic partnership or similar status, a number of states allow them to get a second parent adoption. The following states have a state statute or appellate court decision allowing same-sex couples to get a second parent adoption or co-parent adoption: California[1], Colorado[2], Connecticut[3], District of Columbia[4], Idaho[5], Illinois[6], Indiana[7], Maine[8], Massachusetts[9], New Jersey[10], New York[11], Oklahoma[12], Pennsylvania[13], Vermont[14].

States that have allowed second parent adoptions by unmarried same-sex couples in some counties include Alaska, Delaware, Florida, Georgia, Hawaii, Iowa, Louisiana, Maryland, Minnesota, Oregon, Rhode Island, Texas, Washington, and West Virginia. There undoubtedly

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are counties in other states that have granted second parent adoptions to unmarried same-sex couples.

Until recently, Florida was the only state to categorically prohibit lesbian, gay, and bisexual individuals from adopting, but that state law was held unconstitutional in September 2010.[15] Arkansas previously prohibited anyone cohabiting with an unmarried partner from adopting or being a foster parent, but the Arkansas Supreme Court struck down this statute as unconstitutional.[16]

Appellate courts in Alabama,[17] Kansas,[18] Kentucky,[19] North Carolina,[20] Nebraska,[21] Ohio,[22] and Wisconsin[23] have said that second parent adoptions are not permissible under the adoption statutes in those states either for same-sex or different-sex couples who are not married. However, married same-sex couples can use stepparent adoption procedures in those states.

Utah prohibits anyone cohabiting with an unmarried partner from adopting.[24] Utah also gives a preference to married couples over any single adult in adoptions or foster care placement.[25] Arizona gives a preference to married couples over a single adult in adoption placement.[26] Mississippi has a statute that prohibits "[a]doption by couples of the same gender," but under the Supreme Court ruling, Mississippi must allow same-sex spouses to adopt on equal terms with other married couples.[27] Mississippi recently passed a law that may allow adoption service providers to refuse to place children with lesbian and gay single parents or couples if it would burden the exercise of their religion.[28] There is currently a case pending challenging Nebraska's policy that excludes lesbian and gay parents from being foster or adoptive placements for children in state care.[29]

C. Recognition of Second Parent Adoptions

Adoptions are court orders, which all states are required by the Full Faith and Credit Clause of the federal Constitution to recognize. For this reason, a final adoption by an LGBT parent should be recognized in every state, even if that state's own laws would not have allowed the adoption to take place. Many courts have recognized that adoption decrees are entitled to full faith and credit. For instance, in a 2009 decision, a Florida Court of Appeal held that Florida must recognize a second parent adoption granted to the biological mother's same-sex partner in Washington, and that the adoptive parent is entitled to all the rights and responsibilities of a legal parent under Florida law.[30] Additionally, in 2002, the Nebraska Supreme Court said that Nebraska must recognize a second parent adoption granted in Pennsylvania, even though the adoption would not have been permitted in Nebraska.[31] The federal Tenth Circuit Court of Appeals invalidated an Oklahoma law that refused to recognize adoptions where there were two parents of the same gender, holding that the Full Faith and Credit Clause of the U.S. Constitution required Oklahoma to treat all adoptions in an "even-handed manner."[32] The Fifth Circuit Court of Appeals, however, refused to allow same-sex parents to challenge Louisiana's refusal to issue an amended birth certificate for a child adopted by a same-sex couple based on

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procedural issues, but explained that all states must recognize valid adoptions from other states.[33]

Courts have also recognized that, as a general rule, an adoption that has become final cannot be challenged later by one of the parties to the adoption. For example, the Iowa Supreme Court held that a parent who had consented to a second parent adoption years earlier could not later change her mind and seek to challenge the legality of the adoption.[34] Courts in a number of states, including appellate courts in Florida, Indiana, Kentucky, Minnesota, Texas, and Wisconsin have issued similar decisions.[35] The Texas court found that, in order to give children and adoptive parents finality and stability, Texas statutes prevented an adoption from being attacked for any reason more than six months after it was issued. In one case, the court noted: "The destruction of a parent-child relationship is a traumatic experience that can lead to emotional devastation for all the parties involved, and all reasonable efforts to prevent this outcome must be invoked when there is no indication that the destruction of the existing parent-child relationship is in the best interest of the child."[36] Only one of the many states that has considered this issue, North Carolina, has invalidated a final adoption.[37]

III. Parentage Judgment

Adoption is currently the most common means used by LGBT non-biological parents to establish a legal parental relationship with their child. In many states, non-biological and non-adoptive parents who are recognized by their state law as legal parents also have the option of obtaining a parentage judgment. This is sometimes called a "parentage action," "maternity action," "paternity action," or action under the state's Uniform Parentage Act, known as a "UPA action." It is extremely important for non-biological parents to get a parentage judgment or adoption as soon as possible to ensure that their parental rights will be fully respected in any state if you move or travel. Having your name on the birth certificate does not guarantee protections if your legal rights are challenged in court – only an adoption or parentage judgment can ensure that parental rights will be respected.

A number of states recognize that a non-biological and non-adoptive parent can be a legal parent in some circumstances, even if they are not married to the birth parent. California, New Mexico, Colorado, Kansas, and New Hampshire have appellate decisions recognizing that a woman who has lived with a child and held herself out as a parent can establish her legal parentage under their parentage codes.[38] Delaware recognizes a person who is a *de facto* parent as a legal parent under their parentage statutes.[39] In some states, where a female same-sex couple plans together to conceive and raise a child using a medical procedure to become pregnant, or where a male same-sex couple uses a surrogate to conceive and bear a child, the intended parents can petition the court to declare the non-biological parent to be a legal parent to the child.[40] Appellate courts in Illinois, and a trial court in New Jersey, have held that a woman who consents to her partner's insemination can be a legal parent, even if she is not married to the birth mother,[41] and a few other states have statutes that explicitly provide that

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either a man or a woman who consents to another woman's insemination is a legal parent, regardless of marital status, including New Mexico, Nevada Washington, and the District of Columbia.[42]

Some states, including Indiana,[43] Maine,[44] Nebraska,[45] Pennsylvania,[46] and Washington,[47] have case law recognizing that a non-biological and non-adoptive parent can have all of the rights and responsibilities of parentage based on the following factors: her acceptance of the responsibilities of parentage, living with the child, the legal parent's fostering a parent-child relationship between the child and the non-biological and non-adoptive parent, and the existence of a bonded parent-child relationship.

Parentage judgments can also be obtained when a child is born to a couple who are married, or are in a state that recognizes their civil union or comprehensive domestic partnership. Transgender parents who are not biological parents can also obtain parentage judgments for children born to them and their spouse or partner if they are legally married or in a civil union or comprehensive domestic partnership.

For information about relationship recognition in your state, see NCLR's publication *Marriage, Domestic Partnerships, and Civil Unions: An Overview of Relationship Recognition for Same-Sex Couples in the United States*, available at www.nclrights.org.

IV. Custody/Visitation

Any legal parent has an equal right to seek custody or visitation, regardless of whether they are a biological parent, adoptive parent, or other legal parent. Between legal parents, there is no preference for biological parents in custody cases.

In addition to the states listed in the previous section that allow non-biological and non-adoptive parents to be recognized as legal parents, many states recognize that, where a same-sex partner participated in the caretaking of the child and maintained a parent-like relationship with the child, he or she has standing (meaning the right to go to court) to ask a court for visitation or custody. Such states have recognized this right to seek visitation or custody under an "equitable parent," "parent by estoppel," "*de facto* parent," "psychological parent," or "*in loco parentis*" theory. State courts that have recognized that a non-biological and non-adoptive parent may seek visitation or custody even if they are not a legal parent include: Alaska,[48] Arkansas,[49] Arizona,[50] Colorado,[51] Indiana,[52] Kentucky,[53] Maine,[54] Massachusetts,[55] Minnesota,[56] Mississippi,[57] Montana,[58] Nebraska,[59] New Jersey,[60] New Mexico,[61] North Carolina,[62] North Dakota,[63] Ohio,[64] Oklahoma,[65] Pennsylvania,[66] Rhode Island,[67] South Carolina,[68] Washington,[69] West Virginia,[70] and Wisconsin.[71] Only a small number of states have said that a non-legal parent has no ability to seek custody or visitation with the child of his or her former partner, even when he or she has been an equally contributing caretaker of the child.[72]

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Many states have enacted statutes giving *de facto* parents or persons who have assumed a true parental role in a child's life a right to seek visitation or custody, including Arizona, Colorado, Connecticut, Delaware, Indiana, Kentucky, Maine, Minnesota, Montana, Nevada, Oregon, South Carolina, Texas, and the District of Columbia.[73] For example, the District of Columbia defines *de facto* parents as someone who has taken on the full responsibilities of a parent, held himself or herself out as the child's parent with the permission of the other parent or parents, and either (1) lived with the child since birth or adoption or (2) lived with the child for 10 months out of the last year and formed a "strong emotional bond" with the child with the encouragement of the other parent.[74]

V. Parenting Agreement

Same-sex couples who were not married when their children were born and who live in a state that does not yet permit second parent adoptions or parentage actions may want to draft a parenting agreement. This agreement will not make you a parent, but a number of courts have recognized that parenting agreements permitting another person to have custody or visitation with a child may enforceable in court.[75] These courts have acknowledged the importance of protecting parent-child bonds that have formed with the agreement of the child's legal parent.

A parenting agreement should specify that, although only one of the parents may be recognized as a legal parent, both parents consider themselves to be the parents of their child, with all of the legal rights and responsibilities that come with being a parent. It should explain that the legal parent waives her exclusive right to custody and control of the child and intends to co-parent equally with the other parent. The agreement should include language that clearly states the couple's intention to continue to co-parent even if their relationship is dissolved.

Last updated: September 2016

Endnotes

[1] *Sharon S. v. Superior Court*, 73 P.3d 554 (Cal. 2003).

[2] COLO. REV. STAT. ANN. §§ 19-5-203(1), 19-5-208(5), 19-5-210(1.5), 19-5-211(1.5).

[3] CONN. GEN. STAT. ANN. § 45a-724(a)(3) (providing that "any parent of a minor child may agree in writing with one other person who shares parental responsibility for the child with such parent that the other person shall adopt or join in the adoption of the child").

[4] *M.M.D. v. B.H.M*, 662 A.2d 837 (D.C. 1995).

[5] *In re Adoption of Doe*, No. 41463, 2014 WL 527144 (Idaho Feb. 10, 2014).

[6] *In re Petition of K.M. & D.M.*, 653 N.E.2d 888 (Ill. App. Ct. 1995).

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[7] *In re Adoption of M.M.G.C.*, 785 N.E.2d 267 (Ind. Ct. App. 2003); *In re Adoption of K.S.P.*, 804 N.E.2d 1253 (Ind. Ct. App. 2004). *See also In re Infant Girl W.* 785 N.E.2d 267 (Ind. App. 2006) (same-sex couple may jointly adopt).

[8] *Adoption of M.A.*, 2007 ME 123 (Me. 2007).

[9] *In re Adoption of Tammy*, 619 N.E.2d 315 (Mass. 1993).

[10] *In re the Adoption of Two Children by H.N.R.*, 666 A.2d 535 (N.J. Super. Ct. App. Div. 1995).

[11] *In re Jacob, In re Dana,* 660 N.E.2d 397 (N.Y. 1995).

[12] *Eldredge v. Taylor*, 2014 OK 92 (2014).

[13] *In re Adoption of R.B.F. & R.C.F.*, 803 A.2d 1195 (Pa. 2002).

[14] *In re Adoption of B.L.V.B. & E.L.V.B.*, 628 A.2d 1271 (Vt. 1993); VT. STAT. ANN. tit. 15A, § 1-102(b) (providing that, if family unit consists of parent and parent's partner, partner of parent may adopt child without terminating parent's rights)).

[15] *Fla. Dep't of Children & Families v. X.X.G.*, 45 So.3d 79 (Fla. Ct. App. 2010) (Florida's Third District Court of Appeal held that the ban had no rational basis and violated the equal protection guarantee of the Florida Constitution). This decision is binding on all Florida trial courts. The Florida Department of Children and Families has issued a memorandum instructing its staff to immediately cease questioning prospective adoptive parents about their sexual orientation and not consider sexual orientation as a factor in determining fitness to adopt. The Department's staff are to focus instead on the quality of parenting that adoptive parents would provide, and their commitment to love an adopted child.

[16] *Arkansas Dept. of Human Services v. Cole*, 2011 Ark. 145 (Ark. April 7, 2011) (striking Arkansas Initiative Act 1 (2008) as violating the Arkansas Constitution).

[17] *In re Adoption of K.R.S.*, 109 So.3d 176 (Ala. Ct. App. 2012) (refusing to allow a same-sex couple who had married in another state to use the stepparent adoption procedures). Previously, some attorneys had obtained second-parent adoptions in some counties.

[18] *Adoption of I.M.*, 48 Kan.App.2d 343 (Kan. Ct. App. 2012).

[19] *S.J.L.S. v. T.L.S.*, 265 S.W.3d 804 (Ct. App. Ky. 2008) (holding that the biological mother could not challenge her partner's adoption of the child more than a year after the adoption was finalized, but noting in dicta that an unmarried couple cannot use the stepparent adoption procedures in Kentucky to establish legal parentage for both partners).

[20] *Boseman v. Jarrell*, 704 S.E.2d 494 (N.C. 2010).

[21] *In re Adoption of Luke*, 640 N.W.2d 374 (Neb. 2002).

[22] *In re Adoption of Doe*, 719 N.E.2d 1071 (Ohio Ct. App. 1998).

[23] *In the Interest of Angel Lace M.*, 516 N.W.2d 678 (Wis. 1994).

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[24] UTAH CODE ANN. § 78B-6-117(3).

[25] UTAH CODE §§ 78A-6-307(19), 78B-6-117 (4).

[26] Ariz. Rev. Stat. § 8-103.

[27] MISS. CODE ANN. § 93-17-3(5).

[28] *See* Mississippi Religious Freedom Restoration Act, Miss. S.B. 2681, 2014 Reg. Sess., effective July 1, 2014.

[29] *Stewart and Stewart v. Heineman*, ACLU Case Summary, available at https://www.aclu.org/lgbt-rights/stewart-and-stewart-v-heineman.

[30] *Embry v. Ryan*, 11 So.3d 408 (Fla. Ct. App. 2009).

[31] *Russell v. Bridgens*, 647 N.W.2d 56 (Neb. 2002).

[32] *Finstuen v. Crutcher*, 496 F.3d 1139 (10th Cir. 2007) (invalidating as unconstitutional 10 OKLA. STAT. § 7502-1.4, which stated: "this state, any of its agencies, or any court of this state shall not recognize an adoption by more than one individual of the same sex from any other state or foreign jurisdiction").

[33] *Adar v. Smith*, 639 F.3d 146 (5th Cir. 2011) (en banc) (holding that Louisiana's policy of refusing to amend birth certificates of children adopted by unmarried couples, could not be challenged in federal court and opining in dicta that Louisiana's practice did not violate full faith and credit).

[34] *Schott v. Schott*, 744 N.W.2d 85 (Iowa 2008).

[35] *In re Adoption of D.P.P.*, No. 5D13-1766, 2014 WL 2109130 (Fla. Dist. Ct. App. May 21, 2014); *In re Christian J.W.*, 803 N.W.2d 869, 337 Wis.2d 91 (Wis. Ct. App. 2011) (unpublished decision); In re *Adoption of T.A.M. and E.J.M.*, 791 N.W.2d 573 (Minn. App. 2010); *S.J.L.S. v. T.L.S.*, 265 S.W.3d 804 (Ct. App. Ky. 2008); *Mariga v. Flint*, 822 N.E.2d 620 (Ind. Ct. App. 2005); *Goodson v. Castellanos*, 214 S.W.3d 741 (Tex. App. 2007), *reh'g overruled* (Mar 01, 2007), *rev. denied* (Feb 22, 2008); *Hobbs v. Van Stavern*, 2006 WL 3095439 (Tex. App. 2006), *rev. denied* (Feb 22, 2008).

[36] *Goodson*, 214 S.W.3d at 749.

[37] *Boseman v. Jarrell,* 704 S.E.2d 494 (N.C. 2010) (holding that a final second parent adoption by the same-sex partner of the biological mother was void).

[38] *Elisa B. v. Superior Court*, 117 P.3d 660 (Cal. 2005) (holding that the same-sex partner of a biological parent can be a presumed parent under California Family Code § 7611(d) where she receives the child into her home and holds the child out as her own); *In re S.N.V.*, 2011 WL 6425562 (Colo. App. 2011); *Chatterjee v. King*, 280 P.3d 283 (N.M. 2012); *Frazier v. Goudschaal*, 296 Kan. 730 (2013); *In re Guardianship of Madelyn B.*, No. 2013-593, 2014 WL 2958752 (N.H. July 2, 2014). Other states have also recognized that paternity statutes apply equally to women. *See Rubano v. DiCenzo*, 759 A.2d 959 (R.I. 2000); *In re Roberto d.B.*, 923 A.2d 115 (Md. 2007).

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[39] DEL. CODE ANN. tit. 13, § 8-201, 2302 (providing that a legal parent includes a "de facto parent" who has a "parent-like relationship" established with the support and consent of the legal parent, has "exercised parental responsibilities," and has "acted in a parental role for a length of time sufficient to have established a bonded and dependent relationship with the child that is parental in nature"). *Smith v. Guest*, No. 252, 2010, 2011 WL 899550 (Del. Mar 14, 2011) (upholding de facto parent statutes and holding that the legislature expressly intended the statutes to apply retroactively).

[40] *See, e.g.*, *St. Mary v. Damon*, 309 P.3d 1027, 1029 (Nev. 2013); *D.M.T. v. T.M.H.*, 129 So.3d 320 (Fla. 2013), rehearing denied; *K.M. v. E.G.*, 117 P.3d 673 (Cal. 2005); *Raftopol v. Ramey*, 12 A.3d 783 (Conn. 2011).

[41] *In re T.P.S.*, 978 N.E.2d 1070 (Ill. Ct. App. 2012). *See also*, *In re Parentage of Robinson*, 383 N.J. Super. 165 (N.J. Ch. Div. 2005) (woman who consented to her same-sex partner's insemination is presumed to be a parent).

[42] Nev. Rev. Stat. 126.670 and 126.680; N.M. Stat. Ann. § 40-11A-703; Was. Rev. Code Ann. § 26.26.710; D.C. Code § 16-909(e)(1).

[43] *King v. S.B.*, 837 N.E.2d 965, 967 (Ind. 2005). *But see A.C. v. N.J.*, 1 N.E.3d 685 (Ind. Ct. App. 2013)

[44] *C.E.W. v. D.E.W.*, 845 A.2d 1146, 1151 (Me. 2004) (once an individual is found to be a de facto parent, a court may award "parental rights and responsibilities to that individual as a parent"). *See also Pitts v. Moore*, 2014 ME 59, No. Yor–12–440 (Me. April 17, 2014), *decision not yet released for publication*.

[45] *Latham v. Schwerdtfeger*, 282 Neb. 121, 802 N.W.2d 66 (Neb. 2011); *Russell v. Bridgens*, 647 N.W.2d 56 (Neb. 2002).

[46] *L.S.K. v. H.A.N.*, 813 A.2d 872, 876 (Pa. Super. Ct. 2002) ("The rights and liabilities arising out of [*in loco parentis* status] are the same as between parent and child.").

[47] *In re Parentage of L.B.*, 122 P.3d 161, 708 (Wash. 2005) ("a de facto parent stands in legal parity with an otherwise legal parent").

[48] *Kinnard v. Kinnard*, 43 P.3d 150 (Alaska 2002).

[49] *Bethany v. Jones*, No. 10-295, 2011 Ark. 67, 2011 WL 553923 (Ark., Feb 17, 2011).

[50] *Thomas v. Thomas*, 203 Ariz. 34, 49 P.3d 306 (Ariz. App. Div. 1,2002).

[51] *In the Interest of E.L.M.C.*, 100 P.3d 546 (Colo. Ct. App. 2004), cert. denied, 2004 WL 2377164 (Colo. 2004), cert. denied sub nom, *Clark v. McLeod*, 545 U.S. 1111 (2005).

[52] *King v. S.B.*, 837 N.E.2d 965 (Ind. 2005).

[53] *Pickelsimmer v. Mullins*, 317 S.W.3d 569 (Ky. 2010).

[54] *C.E.W. v. D.E.W.*, 845 A.2d 1146 (Me. 2004).

[55] *E.N.O. v. L.M.M.*, 711 N.E.2d 886 (Mass. 1999).

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[56] *Soohoo v. Johnson*, 731 N.W.2d 815 (Minn. 2007).

[57] *Logan v. Logan*, 730 So. 2d 1124 (Miss. 1998).

[58] *Kulstad v. Maniaci,* 352 Mont. 513 (Mt. 2009).

[59] *Latham v. Schwerdtfeger*, 282 Neb. 121, 802 N.W.2d 66 (Neb. 2011); *Russell v. Bridgens*, 647 N.W.2d 56 (Neb. 2002).

[60] *V.C. v. J.M.B.*, 748 A.2d 539 (N.J. 2000).

[61] *A.C. v. C.B.*, 829 P.2d 660 (N.M. Ct. App. 1992).

[62] *Mason v. Dwinnell*, 660 S.E.2d 58 (N.C. Ct. App. 2008) (district court properly awarded joint custody to same-sex co-parents because the legal mother "acted in a manner inconsistent with her constitutionally-protected paramount interest"). *But see Estroff v. Chatterjee*, 660 S.E.2d 73 (N.C. Ct. App. 2008) (trial court properly denied lesbian non-legal mother custody because the facts did not support a finding that the legal mother "acted in a manner inconsistent with . . . her constitutionally-protected status as a parent").

[63] *McAllister v. McAllister*, 779 N.W.2d 652, 658 (N.D. 2010).

[64] *In re Bonfield*, 97 Ohio St. 3d 387, 780 N.E.2d 241 (2002); *In re Mullen*, 129 Ohio St. 3d 417, 953 N.E.2d 302 (2011).

[65] *Eldredge v. Taylor*, 339 P.3d 888 (Okla. 2014).

[66] *T.B. v. L.R.M.*, 786 A.2d 913 (Pa. 2001); *J.A.L. v. E.P.H.*, 682 A.2d 1314 (Pa. Super. Ct. 1996); *L.S.K. v. H.A.N.*, 813 A.2d 872 (Pa. Super. Ct. 2002).

[67] *Rubano v. DiCenzo*, 759 A.2d 959 (R.I. 2000).

[68] *Marquez v. Caudill*, 376 S.C. 229, 656 S.E.2d 737 (2008).

[69] *In re Parentage of L.B.*, 122 P.3d 161 (Wash. 2005).

[70] *In re Clifford K.*, 619 S.E.2d 138 (W. Va. 2005).

[71] *In re the Custody of H.S.H.-K.: Holtzman v. Knott*, 533 N.W.2d 419 (Wis. 1995), *cert. denied*, 516 U.S. 975 (1995).

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

[73] *See, e.g.*, ARIZ. REV. STAT. ANN. §§ 25-402, 25-409 (a person who stands *in loco parentis* to a child to seek custody or visitation under certain circumstances); COLO. REV. STAT. ANN. § 14-10-123(1)(c) (establishing standing to seek custody or visitation "[b]y a person other than a parent who has had the physical care of a child for a period of six months or more, if such action is commenced within six months of the termination of such physical care"); CONN. GEN. STAT. ANN. §§46b-56 & 46b-59 (providing that, in a dissolution proceeding, a court may grant reasonable visitation or custody to a person who is not a

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parent); DEL. CODE ANN. tit. 13, § 8-201, 2302 (providing that a legal parent includes a "de facto parent" who has a "parent-like relationship" established with the support and consent of the legal parent, has "exercised parental responsibilities," and has "acted in a parental role for a length of time sufficient to have established a bonded and dependent relationship with the child that is parental in nature"); D.C. CODE §16-831.01 et seq. (providing that a "de facto parent" has standing to seek custody or visitation); IND. CODE ANN. § 31-9-2-35.5 (establishing standing to seek custody or visitation by a "de facto custodian" who "has been the primary caregiver for, and financial support of, a child" for specified periods depending on age of child); KY. REV. STAT. ANN. 403.270(1) (establishing standing to seek custody or visitation by a "de facto custodian" who "has been the primary caregiver for, and financial support of, a child" for specified periods depending on age of child); ME. REV. STAT. ANN. tit. 19-A, § 1653(2) (court may grant reasonable visitation to a third party); MINN. STAT. ANN. § 257C.01 *et seq.* (permitting "de facto custodian" or "interested third party" as defined by statute to seek custody or visitation under specified circumstances); MT. CODE ANN. §§ 40-4-211(4)(b), 40-4-228 (a non-legal parent can seek custody or visitation if it is established by clear and convincing evidence that he or she has a "child-parent" relationship and the legal parent has "engaged in conduct contrary to the child-parent relationship"); NEV. REV. STAT. § 125C.050 (a person who has lived with the child and established a "meaningful relationship" may seek reasonable visitation if a parent has unreasonably restricted visits); OR. REV. STAT. ANN. § 109.119 (establishing standing to seek custody or visitation by a person who, within the previous six months, had physical custody of the child or lived with the child and provided parental care for the child); S.C. CODE ANN. § 63-15-60 (establishing standing to seek custody or visitation to a "de facto custodian" who has been a child's primary caregiver and financial supporter for a specified period of time based on the child's age); TEX. FAM. CODE ANN. § 102.003 (9) (establishing standing to seek custody or visitation by "a person, other than a foster parent, who has had actual care, control, and possession of the child for at least six months ending not more than 90 days preceding the date of the filing of the petition").

[74] D.C. CODE § 16-831.01 states:

> (1) "De facto parent" means an individual:
> (A) Who:
> (i) Lived with the child in the same household at the time of the child's birth or adoption by the child's parent;
> (ii) Has taken on full and permanent responsibilities as the child's parent; and
> (iii) Has held himself or herself out as the child's parent with the agreement of the child's parent or, if there are 2 parents, both parents; or
> (B) Who:
> (i) Has lived with the child in the same household for at least 10 of the 12 months immediately preceding the filing of the complaint or motion for custody;
> (ii) Has formed a strong emotional bond with the child with the encouragement and intent of the child's parent that a parent-child relationship form between the child and the third party;
> (iii) Has taken on full and permanent responsibilities as the child's parent; and
> (iv) Has held himself or herself out as the child's parent with the agreement of the child's parent, or if there are 2 parents, both parents.

[75] *See, e.g.*, *Eldredge v. Taylor*, 339 P.3d 888 (Okla. 2014); *Frazier v. Goudschaal*, 296 Kan. 730 (2013); *In re Bonfield*, 97 Ohio St. 3d 387, 780 N.E.2d 241 (2002); *Rubano v. DiCenzo*, 759 A.2d 959 (R. I. 2000)

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(holding that the former same-sex partner of a child's biological mother was entitled to seek a remedy for the biological mother's alleged violation of the parties' visitation agreement); *In re the Custody of H.S.H.-K.: Holtzman v. Knott*, 533 N.W.2d 419 (Wis. 1995) (holding that courts may "grant visitation apart from [custody and visitation statutes] on the basis of a co-parenting agreement between a biological parent and another when visitation is in a child's best interest"); *A.C. v. C.B.*, 829 P.2d 660 (N.M. Ct. App. 1992), *writ of certiorari denied C.B. v. A. C.*, 827 P.2d 837 (N.M. 1992) (holding that the former same-sex partner of a child's biological mother could seek enforcement of an agreement for shared custody or visitation and the agreement was enforceable, subject to the court's best interest determination); *Morgan v. Kifus*, 2011 WL 1362691 (Va. Ct. App. 2011) [unpublished].

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ARTICLE

MARRIAGE EQUALITY AND THE NEW PARENTHOOD

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MARRIAGE EQUALITY AND THE NEW PARENTHOOD

Douglas NeJaime[*]

Now that same-sex couples have a nationwide right to marry, a new generation of questions about the legal regulation of the family is emerging. While integral to the future of same-sex family formation, these questions also implicate the family law regime more generally. By integrating developments in family law governing different-sex and same-sex couples, biological and nonbiological parents, and marital and nonmarital families, this Article shows how marriage equality was enabled by — and in turn enables — significant shifts in the law's understanding of parenthood.

Using a case study of legal efforts in California from the mid-1980s to the mid-2000s, this Article recovers the role of marriage in early LGBT parenting litigation on behalf of unmarried parents. It shows how that litigation reshaped norms governing marriage and parenthood. In the late twentieth century, the law increasingly recognized (presumptively heterosexual) parents on grounds independent of marriage and biology. As the law protected the rights of unmarried, biological fathers, it also began to recognize married, nonbiological parents, largely in response to families formed through assisted reproductive technologies (ART) and to stepparent families. LGBT advocates leveraged both developments to elaborate a new model of parenthood capable of recognizing their constituents' nonmarital, nonbiological parent-child relationships. Eschewing formal parentage markers — including biology, gender, and marital status — advocates instead built parentage around intentional and functional relationships.

This new model of parenthood is embedded in marriage equality and is extended through a family law regime in which same-sex couples can marry. By uncovering these transformative aspects of marriage equality, this Article challenges some of the historical, normative, and predictive dimensions of prominent critiques of same-sex marriage as conservative and assimilationist. More broadly, it reveals how marriage equality can facilitate the expansion of intentional and functional parenthood for all families, and

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thereby can continue to reduce distinctions between same-sex and different-sex couples, biological and nonbiological parents, and perhaps even marital and nonmarital families.

INTRODUCTION

In *Obergefell v. Hodges*,[1] the U.S. Supreme Court extended the right to marry to same-sex couples nationwide.[2] For many supporters of lesbian, gay, bisexual, and transgender (LGBT)[3] rights, same-sex marriage does not mark a significant change in our legal understanding of the family.[4] In fact, some scholars criticize the same-sex marriage campaign for conforming to, rather than unsettling, dominant conceptions of the family.[5] But in analyzing marriage equality's antecedents and identifying a new generation of issues emerging in marriage equality's wake, this Article provides a different perspective.

By integrating developments in family law governing different-sex and same-sex couples, biological and nonbiological parents, and marital and nonmarital families, this Article shows how marriage equality was enabled by — and in turn enables — significant shifts in the law's understanding of parenthood. More specifically, it argues that the claim to *marriage* both seized on and extended the very model of parenthood forged by LGBT advocates in earlier work on behalf of *unmarried* parents. That model of parenthood is premised on *intentional* and *functional*, rather than biological and gendered, concepts of parentage. In this way, rather than affirming traditional norms governing the family, marriage equality and the model of parenthood it signals are transforming parenthood, marriage, and the relationship between them — for all families.[6]

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[1] 135 S. Ct. 2584 (2015).

[2] *See id.* at 2602, 2608.

[3] I use the term LGBT, the contemporary designation, to reflect the broader goals and effects of the efforts I describe, but I recognize that the developments I cover are focused on sexual orientation and not gender identity.

[4] Indeed, opponents of same-sex marriage have been those most likely to argue that same-sex couples are "redefining marriage." *See, e.g.*, SHERIF GIRGIS, RYAN T. ANDERSON & ROBERT P. GEORGE, WHAT IS MARRIAGE? 7–8 (2012); Matthew J. Franck, *The Beauty of the Country of Marriage*, PUB. DISCOURSE (Oct. 7, 2014), http://www.thepublicdiscourse.com/2014/10/13869 [http://perma.cc/3MRZ-X9W2].

[5] *See infra* section III.A, pp. 1231–36.

[6] Of course, family law includes both adult and parent-child relationships. On the connections between same-sex relationship recognition and broader shifts in family law, see William N. Eskridge Jr., *Family Law Pluralism: The Guided-Choice Regime of Menus, Default Rules, and Override Rules*, 100 GEO. L.J. 1881 (2012), which situates same-sex marriage and nonmarital relationship forms within the shift toward utilitarian norms in family law; and Douglas NeJaime, *Before Marriage: The Unexplored History of Nonmarital Recognition and Its Relationship to Marriage*, 102 CALIF. L. REV. 87 (2014), which documents the ways in which marital norms shaped evolving forms of nonmarital recognition and suggests how such nonmarital recognition constructed same-sex couples' claims to marriage.

Beginning in the late 1960s, marriage and biology became increasingly less important to the recognition of (presumptively heterosexual) parents.[7] Through constitutional and state family law developments, unmarried biological fathers and their nonmarital children gained rights and recognition. While this vindication of unmarried parenthood was premised on biological connections, the law grew in ways that recognized nonbiological parent-child relationships formed within marital families. Nontraditional families — namely, stepparent families and families formed through assisted reproductive technologies (ART)[8] — drove this development inside marriage.[9] Family law increasingly deemed married individuals to be legal parents based not on presumed biological connections to their children, but rather on the deliberate parent-child relationships formed inside the marital family.

Well before marriage equality seemed possible, LGBT advocates leveraged both of these developments — the recognition of unmarried, biological fathers and married, nonbiological parents — to elaborate a new model of parenthood capable of recognizing their constituents' *nonmarital*, *nonbiological* parent-child relationships.[10] To extend nonbiological parentage to unmarried parents, advocates appealed to the marriage-like relationships of unmarried couples. Same-sex couples' adult relationships and the extent to which they evidenced committed family formation and function — in other words, whether they looked marriage-like — became a central way to observe and recognize nonbiological parent-child relationships formed outside marriage.[11] Yet even as LGBT advocates appealed to some traditional norms governing the marital family, they did so to unsettle others. They shifted the focus away from biological, dual-gender parenting and toward new concepts of parental intent and function.[12] Ultimate-

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[7] *See infra* Part I, pp. 1193–96.

[8] The focus here is on the use of third-party genetic material or gestational services. While some commentators limit the term ART to fertility procedures in which gametes are manipulated outside the body, in this Article I adhere to a broader (and more popular) definition that includes alternative insemination under the umbrella of ART.

[9] Of course, stranger adoption historically provided a mode of nonbiological parenthood.

[10] Attention to the relationship between law and mobilization brings into view how work outside marriage shaped contemporary marriage claims, and how more recent marriage advocacy extended insights emerging from that earlier work. For legal scholarship in the law-and-mobilization vein, see JACK M. BALKIN, CONSTITUTIONAL REDEMPTION (2011); William N. Eskridge, Jr., *Some Effects of Identity-Based Social Movements on Constitutional Law in the Twentieth Century*, 100 MICH. L. REV. 2062 (2002); and Reva B. Siegel, *Constitutional Culture, Social Movement Conflict and Constitutional Change: The Case of the De Facto ERA*, 94 CALIF. L. REV. 1323 (2006).

[11] This dynamic resonates with Professor Ariela Dubler's "shadow of marriage" concept. *See* Ariela R. Dubler, *In the Shadow of Marriage: Single Women and the Legal Construction of the Family and the State*, 112 YALE L.J. 1641 (2003).

[12] As other scholars have shown, an intentional and functional approach recognizes actual parent-child relationships and protects children's best interests by shifting the law's focus away

ly, intentional- and functional-parenthood principles would enable recognition of parents not on the basis of biology, gender, sexual orientation, or even marriage, but instead on the basis of actual familial relationships.[13]

This historical perspective is crucial to understanding the contemporary moment. It sheds important new light on the scholarly debate over the meaning and impact of marriage equality, and it suggests a path forward in the post–marriage equality world taking shape.

Debate continues over whether the campaign for marriage equality was counterproductive. Prominent family law and sexuality scholars, who view claims to marriage as conservative and assimilationist, criticize same-sex marriage and advocacy seeking it for failing to challenge dominant conceptions of the family and instead accepting same-sex-

from formal status and toward familial conduct. On how functional parenthood can encompass intentional parenthood, see Richard F. Storrow, *Parenthood by Pure Intention: Assisted Reproduction and the Functional Approach to Parentage*, 53 HASTINGS L.J. 597, 674–75 (2002). For foundational works on intentional parenthood, see John Lawrence Hill, *What Does It Mean to Be a "Parent"? The Claims of Biology as the Basis for Parental Rights*, 66 N.Y.U. L. REV. 353 (1991); and Marjorie Maguire Shultz, *Reproductive Technology and Intent-Based Parenthood: An Opportunity for Gender Neutrality*, 1990 WIS. L. REV. 297. For foundational works on functional parenthood, see Katharine T. Bartlett, *Rethinking Parenthood as an Exclusive Status: The Need for Legal Alternatives When the Premise of the Nuclear Family Has Failed*, 70 VA. L. REV. 879 (1984); Martha Minow, *All in the Family & in All Families: Membership, Loving, and Owing*, 95 W. VA. L. REV. 275 (1992–1993); Martha Minow, *Redefining Families: Who's In and Who's Out?*, 62 U. COLO. L. REV. 269 (1991); and Nancy D. Polikoff, *This Child Does Have Two Mothers: Redefining Parenthood to Meet the Needs of Children in Lesbian-Mother and Other Nontraditional Families*, 78 GEO. L.J. 459 (1990). For more recent influential contributions, see Melissa Murray, *The Networked Family: Reframing the Legal Understanding of Caregiving and Caregivers*, 94 VA. L. REV. 385 (2008); and Laura A. Rosenbury, *Friends with Benefits?*, 106 MICH. L. REV. 189 (2007). The ALI Principles also take a functional approach, recognizing parents by estoppel and de facto parents. *See* PRINCIPLES OF THE LAW OF FAMILY DISSOLUTION: ANALYSIS AND RECOMMENDATIONS § 2.03(1)(b)–(c) (AM. LAW INST. 2002).

[13] Given that same-sex couples with children almost always have at least one nonbiological relationship, a legal regime that values same-sex partners' families prioritizes intentional and functional, rather than biological and gender-differentiated, routes to parentage. (Of course, some female same-sex couples divide gestation and genetics such that one woman is the gestational mother and the other is the genetic mother. Also, some same-sex couples choose donors related to the nonbiological parent, but this connection would not support a legally cognizable parent-child relationship.) Functional parenthood includes within its reach families formed through both ART and procreative sex. While intentional parenthood is most relevant specifically in the context of ART, it can have broader application in a family law regime that values chosen families. *See* Nicholas Bala & Christine Ashbourne, *The Widening Concept of "Parent" in Canada: Step-Parents, Same-Sex Partners, & Parents by ART*, 20 AM. U. J. GENDER SOC. POL'Y & L. 525, 542 (2012) (explaining that under Quebec's parentage regime, "[a] man may contribute to a 'parental project' for a couple who wishes to have a child either by providing semen for artificial insemination, or by means of sexual intercourse" (citing Civil Code of Québec, S.Q. 1991, c 64, art 538.2 (Can.))); *cf.* Katharine K. Baker, *Bargaining or Biology? The History and Future of Paternity Law and Parental Status*, 14 CORNELL J.L. & PUB. POL'Y 1, 61 (2004) (arguing that contract and intent can provide general principles for the parentage regime and would erase distinctions "between 'technologically produced' and 'regularly produced' children, and . . . between straight parents and gay parents").

couple-headed families to the extent that they replicate heterosexual marital norms.[14] Yet this Article reveals how comparisons to married different-sex couples have historically been made — and are made today — not simply for the sake of conformity, but rather to unsettle norms that root parentage in biology, gender, and even marital status. Accordingly, it brings into view a different — and more transformative — account of marriage equality. In doing so, it challenges some of the historical, normative, and predictive dimensions of critiques of same-sex marriage.

More broadly, this Article analyzes marriage equality's impact on the larger body of family law, including emerging issues relating to the law of parenthood governing all families. It specifically shows how marriage equality can facilitate the expansion of intentional and functional parentage principles across family law — not only inside but also outside marriage, for both same-sex and different-sex couples.[15]

Inside the marital family, the logic of parenthood shifts as it accommodates same-sex couples. Consider the marital presumption. Traditionally, a man is presumed to be the biological, and thus legal, father of a child born to his wife. Yet under the same presumption, the nonbiological lesbian[16] co-parent is the mother of a child born during the marriage not because she is assumed to be biologically related to the child, but because she is the *intended* parent of the child and will *function* as the child's parent.[17] Challenges to the marital presumption's application to same-sex couples, which have proliferated in *Obergefell*'s wake, implicate not only sexual-orientation equality, but also the displacement of biological and gendered parentage principles.[18] Such principles bear on regulation of the heterosexual marital family, and are implicated, for example, in disputes over husbands seeking to disestablish paternity.[19]

Marriage equality's impact is not limited to regulation of the marital family.[20] Because marriage equality is premised on a sexual-orientation-equality principle articulated on family-based grounds, states that recognize parentage for unmarried different-sex parents us-

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[14] *See infra* section III.A, pp. 1231–36.

[15] The distinction between inside and outside marriage, or between marital and nonmarital relationships, connotes a formal, legal distinction.

[16] For readability and to reflect popular characterizations of the relevant cases, this Article at times employs the shorthand of "lesbian" and "gay." Nonetheless, I recognize that these usages may be imprecise in regards to bisexual individuals in same-sex couples. On bisexual erasure, see generally Kenji Yoshino, *The Epistemic Contract of Bisexual Erasure*, 52 STAN. L. REV. 353 (2000).

[17] *See infra* Part IV, pp. 1240–49.

[18] *See* Gartner v. Iowa Dep't of Pub. Health, 830 N.W.2d 335 (Iowa 2013).

[19] *See infra* Part IV, pp. 1240–49.

[20] *See infra* Part V, pp. 1249–65.

ing ART may be pushed to include unmarried same-sex parents on the same terms.[21] In fact, legal decisions favoring same-sex marriage can serve as precedents for the recognition of unmarried intended parents.[22] In this way, instead of redrawing parentage through marriage, same-sex marriage has the capacity to further the erosion of the line between marital and nonmarital parental recognition.

These effects are not limited to same-sex couples. Marriage equality may push state family law regimes to accommodate same-sex family formation in ways that yield greater recognition of intentional and functional parentage in all families. For example, surrogacy, which in many states remains controversial and restricted, may gain greater legal acceptance as marriage equality further validates the rights of same-sex couples to form families with children.[23] And with greater acceptance of assisted reproduction may come greater acceptance of nonbiological parenthood. Moreover, the recognition of *multiple* parents may flow from the recognition of same-sex marriage.[24] A parentage regime that fully integrates same-sex couples reduces the salience of biology and gender and instead centers parental conduct, which need not be cabined by a dyadic parental unit, either inside or outside marriage.

By placing marriage equality along a broader horizon of demographic and legal developments decentering traditional notions of marriage and parenting, this Article begins to theorize marriage equality's family law implications.[25] In doing so, it resists both wholesale assessments of marriage equality and a clear dichotomy between marriage and nonmarriage. To be clear, this is not an argument that reservations about same-sex marriage expressed by family law and sexuality scholars are simply unconvincing. Indeed, I share some of

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[21] *See infra* section V.A, pp. 1250–59. For instance, in Florida, a state notoriously hostile to LGBT parents, the state supreme court ruled that the state must give *unmarried* same-sex couples using ART "the same opportunity as [unmarried] heterosexual couples to demonstrate [parental] intent." D.M.T. v. T.M.H., 129 So. 3d 320, 343 (Fla. 2013). The decision, though, was tethered to biology to the extent that the case arose in the context of a genetic mother being denied access to her child after her relationship with the birth mother dissolved. *See id.* at 327.

[22] The *D.M.T.* court invoked the constitutional principles emerging from the U.S. Supreme Court's 2013 decision in *United States v. Windsor*, 133 S. Ct. 2675 (2013), which struck down section 3 of the federal Defense of Marriage Act. *See D.M.T.*, 129 So. 3d at 337.

[23] *See* Douglas NeJaime, Griswold*'s Progeny: Assisted Reproduction, Procreative Liberty, and Sexual Orientation Equality*, 124 YALE L.J.F. 340, 346–48 (2015).

[24] *See infra* section V.B, pp. 1259–65.

[25] For other work in this vein, see CARLOS A. BALL, SAME-SEX MARRIAGE AND CHILDREN (2014); Susan Frelich Appleton, *Presuming Women: Revisiting the Presumption of Legitimacy in the Same-Sex Couples Era*, 86 B.U. L. REV. 227 (2006); Eskridge, *supra* note 6; and Edward Stein, *Marriage or Liberation?: Reflections on Two Strategies in the Struggle for Lesbian and Gay Rights and Relationship Recognition*, 61 RUTGERS L. REV. 567 (2009).

the concerns that other scholars have raised.[26] While this Article's account challenges the view of marriage equality as generally conservative and assimilationist, it leaves largely undisturbed the critique that marriage equality accepts the channeling of benefits to marital families.[27] Nonetheless, the analysis presented here reveals how marriage and nonmarriage have become dynamic, contingent, and mutually constitutive relationships. Ultimately, it suggests how marriage equality may accelerate, rather than stunt, wide-ranging shifts in regulation of the family.

The remainder of this Article proceeds in five Parts. Part I provides a brief summary of national family law developments beginning in the late 1960s related to heterosexual family formation. It shows how, primarily for fathers, the law came to recognize both nonmarital, biological and marital, nonbiological parent-child relationships.

Part II presents a case study of LGBT parenting advocacy in California from the mid-1980s through the mid-2000s, documenting how lawyers representing same-sex parents drew from legal developments in heterosexual family formation to argue for the recognition of nonmarital, nonbiological parents.[28] By focusing on the marriage-like relationships formed by same-sex couples living outside marriage, lawyers constructed an intentional and functional model of parenthood that could accommodate same-sex couples' families. The case study relies on a variety of sources, including case files, briefs, and judicial decisions;[29] lawyers' personal files; state legislation, legislative and administrative materials, and task force reports; organizational materials, conference materials, advocates' contemporaneous statements, and public testimony; and mainstream and LGBT media coverage. It also

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[26] *See* Douglas NeJaime, Windsor*'s Right to Marry*, 123 YALE L.J. ONLINE 219, 247–48 (2013).

[27] While the developments covered suggest that arguments to privatize child support animated earlier claims to *nonmarital* parentage and family recognition, this insight does not necessarily weaken the normative force of criticisms of marriage-equality arguments that relied on the privatization of dependency through marriage.

[28] For methodological reasons, the case study is cabined to one state. Important same-sex parenting developments, some of which have spread across the country, emerged in California, and one of the leading public interest law firms focusing on LGBT family law, the National Center for Lesbian Rights, is based in California. *See infra* Part II, pp. 1196–230. Nonetheless, it is important to recognize that family law varies by state, and California has developed a robust parentage regime with some unique features.

[29] Because these issues involve children, many of the case files were sealed or made confidential. Where possible, I obtained redacted versions of relevant pleadings and decisions. Also, because many of these cases, especially early on, were relatively low-salience events occurring in lower state courts and handled in part by private practitioners, files often have been destroyed, and very little has been organized into formal archives. Therefore, many of the central materials have come from personal files supplied to me by lawyers and are not publicly available.

relies on several interviews with lawyers and lobbyists active during the relevant time period.[30]

Part III connects the legacy of the parenting work documented in Part II's case study to the contemporary push for marriage, showing how marriage equality extends the intentional and functional model of parenthood developed in earlier nonmarital LGBT advocacy. Parts IV and V turn to a world with marriage equality. By examining the marital presumption, Part IV contemplates how, with married same-sex couples, intent and function become more generalizable principles through which to understand parentage in the marital family. Part V then considers how marriage equality can support the further elaboration of intentional and functional parenthood outside marriage, accelerating broader shifts toward more pluralistic family law and blurring the boundary between marital and nonmarital families for both same-sex and different-sex couples.

I. FAMILY LAW REVOLUTIONS: NONMARITAL AND NONBIOLOGICAL PARENTING

This Part highlights some of the constitutional and family law developments relating to heterosexual parental recognition that swept the country in the second half of the twentieth century. This brief examination of developments beginning in the late 1960s shows how marriage and biology began to lose their grip on parenting. Ultimately, the recognition of *nonmarital*, biological fathers and marital, *nonbiological* parents — in the context of heterosexual family formation — presented both opportunities and constraints for those who would represent same-sex parents seeking legal parental status.

A. Nonmarital, Biological Parenthood

Traditionally, marriage defined the scope of state-recognized parenting.[31] But as rates of nonmarital cohabitation and birth rose dramatically over the second half of the twentieth century,[32] developments

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[30] The historical research complements my earlier work on the relationship between marriage and the development of nonmarital relationship recognition beginning in the 1980s. *See* NeJaime, *supra* note 6. There I showed how marital norms anchored LGBT domestic partnership advocacy. *See id.* at 104–53. Those efforts, in turn, influenced the changing meaning of marriage — observable in subsequent same-sex marriage claims — by emphasizing intimate coupling and economic and emotional interdependence. *See id.* at 163–71.

[31] Nonmarital children were *filius nullius* (the child of no one) at common law. *See* MICHAEL GROSSBERG, GOVERNING THE HEARTH 197 (1985). Over time, the law recognized the parent-child relationships of unmarried mothers, but not fathers. *See* Martha F. Davis, *Male Coverture: Law and the Illegitimate Family*, 56 RUTGERS L. REV. 73, 81–82 (2003).

[32] *See* CYNTHIA GRANT BOWMAN, UNMARRIED COUPLES, LAW, AND PUBLIC POLICY 93–97 (2010); NANCY F. COTT, PUBLIC VOWS 202–03 (2000); Grace Ganz Blumberg, *Cohabitation Without Marriage: A Different Perspective*, 28 UCLA L. REV. 1125 (1981).

in constitutional and family law eroded distinctions between marital and nonmarital parenthood. Beginning in 1968, the Supreme Court began to develop a body of equal protection law rejecting state laws that discriminated against "illegitimate," or nonmarital, children.[33] Around the same time, the Court also began to recognize the constitutional parental rights of unmarried fathers.[34] The Court continued to privilege the marital family — both legally and rhetorically — but nonetheless affirmed parent-child relationships outside marriage.[35] Indeed, in protecting an unmarried father's parental rights in *Stanley v. Illinois*,[36] the Court explained that "familial bonds" outside the context of marriage are "often as warm, enduring, and important as those arising within a more formally organized family unit."[37]

The emerging recognition of nonmarital parent-child relationships was limited to biological relationships.[38] Yet while biology provided the basis for nonmarital parental rights, the Court also required parental conduct from unmarried biological fathers. Over the course of several years, the Court arrived at a standard that situated the biological tie as a mere starting point.[39] As it explained in its 1983 *Lehr v. Robertson*[40] decision, "[t]he significance of the biological connection is that it offers the natural father an opportunity that no other male possesses to develop a relationship with his offspring."[41] The father must

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[33] *See, e.g.*, Levy v. Louisiana, 391 U.S. 68, 72 (1968); Glona v. Am. Guarantee & Liab. Ins. Co., 391 U.S. 73, 75–76 (1968). The campaign to remove legal distinctions based on "illegitimacy" gained support from Professor Harry Krause's pioneering work. *See* HARRY D. KRAUSE, ILLEGITIMACY (1971); Harry D. Krause, *Equal Protection for the Illegitimate*, 65 MICH. L. REV. 477 (1967). Nonetheless, the Court continued to allow some legal distinctions between marital and nonmarital children. *See, e.g.*, Labine v. Vincent, 401 U.S. 532, 539 (1971) (allowing distinction in inheritance rights because the law did not create "an insurmountable barrier to [the] illegitimate child").

[34] *See* Stanley v. Illinois, 405 U.S. 645, 649 (1972) (holding that the unmarried father "was entitled to a hearing on his fitness as a parent before his children were taken from him and that, by denying him a hearing and extending it to all other parents whose custody of their children is challenged, the State denied [him] the equal protection of the laws").

[35] Professor Serena Mayeri's insightful historical work shows how the nonmarital birth cases accepted the privileging of marriage and relied on more conservative frames based on harm to children, in the process crowding out more progressive arguments based on sexual liberty and race, class, and gender inequality. *See* Serena Mayeri, Essay, *Marital Supremacy and the Constitution of the Nonmarital Family*, 103 CALIF. L. REV. 1277 (2015).

[36] 405 U.S. 645.

[37] *Id.* at 652.

[38] As Professor Katharine Baker has observed, "[t]he liberal Justices who championed the rights of illegitimate children likely thought they needed to dismantle an archaic, moralistic system that linked legitimate parenthood to marriage, but all they knew to replace that system with was a parenthood regime based on genetic connection." Katharine K. Baker, *Legitimate Families and Equal Protection*, 56 B.C. L. REV. 1647, 1649–50 (2015).

[39] *See, e.g.*, Lehr v. Robertson, 463 U.S. 248 (1983); Lalli v. Lalli, 439 U.S. 259, 269 (1978) (plurality opinion); Quilloin v. Walcott, 434 U.S. 246 (1978).

[40] 463 U.S. 248.

[41] *Id.* at 262.

"grasp[] that opportunity and accept[] some measure of responsibility for the child's future."[42] Securing parental rights, in other words, required a showing of some parental conduct, in addition to the biological connection.

State family law doctrine, including primarily parentage law, shifted in response to the Court's decisions on "illegitimacy" and unmarried fathers. In 1973, the Uniform Law Commission (also known as the National Conference of Commissioners on Uniform State Laws) promulgated the Uniform Parentage Act[43] (UPA), which many states eventually adopted. By supplying a series of presumptions to determine legal parentage, the UPA sought to remove distinctions based on marital birth while also providing ways to recognize the status of — and attach obligations to — unmarried fathers.[44] Although its focus on unmarried fathers' biological connections reflected anxiety over proof of paternity,[45] the model statute also integrated the Court's attention to biology-plus-conduct. One way to show a parent-child relationship — commonly referred to as the "holding out" presumption — required that the father "receives the child into his home and openly holds out the child as his natural child."[46]

B. Marital, Nonbiological Parenthood

The expanding recognition of nonmarital parent-child relationships was driven in part by Supreme Court case law, which itself responded to changes in American family life. At the same time, other developments in family formation patterns drove changes in state family law.

While the UPA and state law revisions focused on the recognition of nonmarital parent-child relationships, family law statutes also began to accommodate the use of ART. Importantly, even as the UPA was driven by the need to break down distinctions based on marital status, its regulation of ART focused specifically on married couples. The UPA addressed married couples' use of artificial insemination, or alternative insemination by donor (AID), by providing: "If, under the supervision of a licensed physician and with the consent of her husband, a wife is inseminated artificially with semen donated by a man not her husband, the husband is treated in law as if he were the natu-

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[42] *Id.*

[43] UNIF. PARENTAGE ACT (UNIF. LAW COMM'N 1973).

[44] *See* Susan Frelich Appleton, *Illegitimacy and Sex, Old and New*, 20 AM. U. J. GENDER SOC. POL'Y & L. 347, 359–60 (2012) (explaining that the UPA can be read to "synthesize the children's equality reading [of the Court's decisions] with the parental identification reading, seeking to provide content for the former by facilitating the identification of a child's second parent").

[45] *See* UNIF. PARENTAGE ACT §§ 11–12. This concern emerged in the Court's decisions, *see* Gomez v. Perez, 409 U.S. 535, 538 (1973) (per curiam), and in Krause's writing, *see* Harry D. Krause, *The Uniform Parentage Act*, 8 FAM. L.Q. 1, 9–11 (1974).

[46] UNIF. PARENTAGE ACT § 4(a)(4).

ral father of a child thereby conceived."[47] The sperm donor, in turn, has no claim to parentage based on his biological connection.[48] Instead, the married couple's intent to use alternative insemination to conceive a child they would raise together is determinative.

As developments in nonmarital families and reproductive technology took hold throughout the 1970s, no-fault divorce also spread across the country.[49] After California initiated a no-fault regime in 1969,[50] the Uniform Law Commission promulgated a Uniform Marriage and Divorce Act that provided a no-fault model.[51] With more divorces came more second marriages. As divorced parents formed blended families — and other unmarried women with children married — stepparents assumed parental roles.[52]

In response to these shifting demographic patterns, stepparent adoption became an increasingly common process — and a means of recognizing nonbiological functional parents within marital families.[53] Adoption ordinarily required the termination of the existing parents' legal rights. Stepparent adoption, however, constituted an exception in which the custodial parent (the stepparent's spouse) retained her parental status.[54]

As the next Part shows, the significant developments outlined here — the legal recognition of both nonmarital, biological parent-child relationships and marital, nonbiological parent-child relationships — formed an important foundation for LGBT parenting advocacy beginning in the 1980s.

II. LGBT PARENTING WORK IN CALIFORNIA, 1984–2005

This Part presents a case study of LGBT parenting efforts in California from the mid-1980s through the mid-2000s — before same-sex

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[47] *Id.* § 5(a).

[48] *Id.* § 5(b). On AID regulation, see Gaia Bernstein, *The Socio-Legal Acceptance of New Technologies: A Close Look at Artificial Insemination*, 77 WASH. L. REV. 1035 (2002).

[49] *See, e.g.*, CONN. GEN. STAT. § 46b–40 (2009) (first enacted 1973); FLA. STAT. § 61.052 (2015) (first enacted 1971); 750 ILL. COMP. STAT. 5 / 401 (2014) (first enacted 1977).

[50] *See* CAL. CIV. CODE § 4506 (West 1969); *see also* REPORT OF THE GOVERNOR'S COMM'N ON THE FAMILY (1966).

[51] UNIF. MARRIAGE & DIVORCE ACT (UNIF. LAW COMM'N 1970).

[52] On stepparents' position in the law, see MARGARET M. MAHONEY, STEPFAMILIES AND THE LAW (1994).

[53] *See id.* at 161. Absent adoption, the stepparent-child relationship is largely understood as derivative of the stepparent's relationship to the legal parent. *See* Margaret M. Mahoney, *Support and Custody Aspects of the Stepparent-Child Relationship*, 70 CORNELL L. REV. 38, 52–53 (1984).

[54] *See, e.g.*, CAL. FAM. CODE §§ 8548, 8600–8622 (West 2013). Stepparent adoption generally requires the consent and relinquishment of parental rights by the noncustodial parent. On stepparent adoption procedures, see Margaret M. Mahoney, *Stepparents as Third Parties in Relation to Their Stepchildren*, 40 FAM. L.Q. 81, 88–97 (2006).

couples could legally marry in the state. The 1980s and 1990s saw what many commentators refer to as the "lesbian baby boom."[55] Particularly in progressive communities, same-sex couples began to form families with children through donor insemination and adoption, and many same-sex couples continued to raise children from previous different-sex relationships. Well before marriage occupied a position on the agendas of mainstream LGBT organizations, advocates sought legal recognition for the parent-child relationships formed in these same-sex-couple-headed families.[56]

By closely analyzing developments in California, the case study uncovers LGBT advocates' contributions to a new model of parenthood, the origins of which can be traced to shifts in heterosexual family formation both inside and outside marriage. The legal recognition of unmarried (presumptively heterosexual) fathers furnished openings for LGBT advocates to pursue parental rights for their constituents. Yet biology created an important divide between unwed fathers and many same-sex co-parents. To decrease the salience of biology, advocates looked to marriage, a domain in which the state increasingly recognized parent-child relationships formed through ART and in stepparent families. There, parental rights flowed to married parents in part because they intended to be parents or functioned as parents, regardless of their biological connections to the children.

Seizing on the recognition of both unmarried, biological fathers and married, nonbiological parents, LGBT advocates made analogies to marital family formation to secure nonmarital parental rights. If marriage demonstrated parental intent and function, marriage-like adult relationships — regardless of the relationships' legal status — could supply evidence to support the extension of those concepts to unmar-

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[55] *See, e.g.*, GEORGE CHAUNCEY, WHY MARRIAGE? 105–11 (2004); *cf.* Jane S. Schacter, *Constructing Families in a Democracy: Courts, Legislatures and Second-Parent Adoption*, 75 CHI.-KENT L. REV. 933, 933 (2000) (citing Sue Anne Pressley & Nancy Andrews, *For Gay Couples, the Nursery Becomes the New Frontier*, WASH. POST, Dec. 20, 1992, at A1) (referring to "gay-by boom").

[56] Many disputes arose in the context of relationship dissolution. LGBT advocates mostly represented the nonbiological co-parent seeking legal recognition, but at times represented the biological parent attempting to impose obligations on the nonbiological co-parent. Lawyers also represented intact same-sex couples seeking to secure legal parental status for the nonbiological co-parent.

These efforts formed the second generation of LGBT parenting cases. First-generation cases, which continued as the second-generation cases gained prominence, featured custody disputes arising out of different-sex marriages in which one parent came out as LGBT. For an analysis that includes both types of parenting disputes, see KIMBERLY D. RICHMAN, COURTING CHANGE (2009); Kimberly Richman, *Lovers, Legal Strangers, and Parents: Negotiating Parental and Sexual Identity in Family Law*, 36 LAW & SOC'Y REV. 285 (2002). On lesbian and gay parenting during the second half of the twentieth century, see DANIEL WINUNWE RIVERS, RADICAL RELATIONS (2013). While most advocacy focused on lesbian mothers, advocacy for gay fathers also existed. *See id.* at 111–38.

ried parents.[57] To the extent nonmarital same-sex-couple-headed families looked and acted like marital families, marriage seemed to constitute an arbitrary line. Critically, analogies to marriage were made in service of a new model of parenthood premised on intentional and functional relationships. This new parenthood minimized the significance of traditional markers of parentage, including biology, gender, sexual orientation, and even marital status.

This Part focuses on California not because it is representative of family law on a national scale, but instead because it was a leading site for LGBT parenting advocacy and provides a rich context in which to trace the evolution of claims to same-sex parental rights. The California-based National Center for Lesbian Rights (NCLR), which Donna Hitchens founded as the Lesbian Rights Project in 1977, became the LGBT movement organization focused primarily on parenting issues.[58] To develop cutting-edge tactics and carry out a careful, incremental strategy, NCLR convened and worked closely with private family law attorneys both in the state and nationwide.[59] In California specifically, other movement organizations, including Lambda Legal and the ACLU, devoted significant and increasing attention to parenting issues — and worked closely with NCLR.

Of course, efforts to achieve LGBT parental rights existed in other states. Since family law is primarily regulated at the state level, significant variation persists across states — even though uniform acts and constitutional principles have produced some consistency.[60] While many states remained hostile to LGBT parents during the era covered in the case study, others began to accommodate families formed by

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[57] To be clear, the reasoning here does not primarily connect the *legal recognition* of same-sex couples' relationships to claims to parentage, but rather focuses on how the presentation of same-sex couples' adult relationships, regardless of their legal status, was critical to securing parental recognition. For an exploration of the relationship between couple recognition and conflict over same-sex parenting, see Nancy D. Polikoff, *Recognizing Partners but Not Parents / Recognizing Parents but Not Partners: Gay and Lesbian Family Law in Europe and the United States*, 17 N.Y.L. SCH. J. HUM. RTS. 711, 738–50 (2000).

[58] NCLR was founded to address family law issues, which were core lesbian concerns that NCLR's founders saw as marginalized by other organizations at the time. Telephone Interview with Roberta Achtenberg, Former Exec. Dir., NCLR (June 11, 2014) (on file with the Harvard Law School Library).

[59] Telephone Interview with Kate Kendell, Exec. Dir., NCLR (July 17, 2014) (on file with the Harvard Law School Library); Telephone Interview with Shannon Minter, Legal Dir., NCLR (June 5, 2014) (on file with the Harvard Law School Library).

[60] For example, in response to the Supreme Court's rulings, the UPA and similar statutes "shift[ed] away from reliance on marital status as a proxy for biological fatherhood." Joanna L. Grossman, *The New Illegitimacy: Tying Parentage to Marital Status for Lesbian Co-Parents*, 20 AM. U. J. GENDER SOC. POL'Y & L. 671, 701 (2012). In 1975, California adopted the UPA. *See* Press Release, Senator Anthony C. Beilenson, Statement on Senate Bill 347 (Oct. 2, 1975) (on file with the Harvard Law School Library); *see also* Johanna Neuman, *Committee Passes Bill Giving Unwed Fathers Custody Rights*, L.A. DAILY J., Aug. 15, 1975, at 1.

same-sex couples — with some doing so on a statewide basis well ahead of California.[61] Even among states that granted rights to LGBT and other nonbiological parents, California took different doctrinal routes than some of its counterparts.[62]

Nonetheless, California emerged as a leader in the development of intentional- and functional-parenthood principles and their application to same-sex parents. The state's accommodation of same-sex parenting through second-parent adoption and the UPA influenced the law in other jurisdictions.[63] California law also shaped other states' regulation of parenthood more generally.[64] Specifically in the domain of ART, California's early recognition of gestational surrogacy as a legitimate way to create parent-child relationships powerfully shifted national attention toward gestational, rather than traditional, surrogacy.[65] Even today, California law on parentage, including LGBT parental rights, continues to influence the law in other states.[66]

While the California case study is structured chronologically, it covers three specific doctrinal areas: de facto parenthood, second-parent adoption, and presumptions of parentage under the state's UPA. Assisted reproduction, by both different-sex and same-sex couples, pervades these three domains.[67] Although the focus is on parent-child re-

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[61] Throughout this Part, I note (often in footnotes) some important developments in other states.

[62] While some states have robust equitable parenthood doctrines, as this Part shows, California uses other mechanisms, such as presumptions of parentage under the UPA, to protect nonmarital, nonbiological relationships.

[63] *See, e.g.*, *In re* Parental Responsibilities of A.R.L., 318 P.3d 581, 587 (Colo. App. 2013) (UPA presumptions); *In re* Adoption of K.S.P., 804 N.E.2d 1253, 1258 (Ind. Ct. App. 2004) (second-parent adoption); Chatterjee v. King, 280 P.3d 283, 289–90 (N.M. 2012) (UPA presumptions).

[64] California's application of parentage presumptions to unmarried, nonbiological fathers has supported the shift away from biology in other states. *See, e.g.*, *In re* A.D., 240 P.3d 488, 491–92 (Colo. App. 2010).

[65] *See* Johnson v. Calvert, 851 P.2d 776, 787 (Cal. 1993). Courts in other states relied on *Johnson* to recognize intended parents. *See, e.g.*, McDonald v. McDonald, 608 N.Y.S.2d 477, 479–80 (App. Div. 1994); *In re* C.K.G., No. M2003-01320-COA-R3-JV, 2004 WL 1402560, at *9 (Tenn. Ct. App. June 22, 2004).

[66] For recent examples, see *St. Mary v. Damon*, 309 P.3d 1027, 1033–34 (Nev. 2013), which allowed for parental recognition of both a genetic mother and a gestational mother in a same-sex relationship); and *In re Guardianship of Madelyn B.*, 98 A.3d 494, 499 (N.H. 2014), which applied the parentage statute's "holding out" presumption to a nonbiological mother in a same-sex relationship).

[67] Even while ART destabilizes biological notions of parenthood, it is often driven, in contrast to adoption, by desires for biological or genetic parenthood. *See* ELIZABETH BARTHOLET, FAMILY BONDS 220–21 (1993). In fact, as Professor Dorothy Roberts has shown, ART may reinscribe the traditional family by privileging men's genetic connections, facilitating family formation by married, different-sex couples, and enforcing racial hierarchy. *See* Dorothy E. Roberts, *Race and the New Reproduction*, 47 HASTINGS L.J. 935, 935–37 (1996). Of course, as Professor Elizabeth Bartholet has argued, even the regulation of adoption historically has been animated by what she calls "'biologism,' the idea that what is 'natural' in the context of the biologic family is what is normal and desirable in the context of adoption." BARTHOLET, *supra*, at 93.

lationships formed in same-sex-couple-headed families, legal responses to heterosexual family formation built the foundation for same-sex parental recognition. Accordingly, the case study includes developments, some of which LGBT advocates participated in shaping, generally relating to California's recognition of nonbiological parents and parents using ART.

A. 1984–1998: Marital Parenthood, Biological Parenthood, and the Precarious Position of Same-Sex Couples

In the 1980s and 1990s, LGBT advocates pursued a range of doctrinal paths as they attempted to persuade courts to provide parental rights to same-sex parents. During this time, the innovative concept of second-parent adoption increasingly offered a path to parental status for intact couples. But in the absence of such adoptions, nonbiological lesbian mothers lacked legal rights to their children. During the 1990s, even as same-sex parents struggled to achieve parental status, California courts began to develop a doctrine of intentional parenthood for married different-sex couples using new forms of reproductive technology. This doctrine eventually would create openings for same-sex couples.

1. Early Efforts on Behalf of Nonbiological Parents in Same-Sex Couples. — With the rise of alternative insemination in the late 1970s and 1980s, the number of lesbian couples starting families skyrocketed.[68] California's Uniform Parentage Act (UPA),[69] adopted in 1975, included the AID provision from the model UPA, recognizing the husband, rather than the sperm donor, as the legal father of the resulting child.[70] Yet while the model act disclaimed parental rights for sperm donors only in situations involving *married* women, California's law went further. It allowed not only married but also *unmarried* women to use AID without fear of sperm donors' parental rights assertions. To avail themselves of these protections, women had to use the assistance of a licensed physician.[71]

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[68] *See* CARLOS A. BALL, THE RIGHT TO BE PARENTS 10 (2012); *see also* LAURA MAMO, QUEERING REPRODUCTION 23–57 (2007) (describing the development of lesbian reproduction through alternative insemination from the 1970s to the 1990s).

[69] The California UPA eventually moved from the Civil Code to the Family Code. *See* 1992 Cal. Stat. 463, 548–49. Because the time period covered in this Article spans this move, I use the subsequent Family Code references in text.

[70] 1975 Cal. Stat. 3197–98 (codified as amended at CAL. FAM. CODE § 7613 (West 2013)). This provision was consistent with a 1968 California Supreme Court decision attaching parental obligations to a husband who consented to his wife's insemination with another man's sperm. *See* People v. Sorensen, 437 P.2d 495, 497–98 (Cal. 1968).

[71] *See* CAL. FAM. CODE § 7613(b). In a case in which a physician was not involved, a California court granted parental status to a sperm donor over the objection of the biological mother. *See* Jhordan C. v. Mary K., 179 Cal. App. 3d 386 (1986). Women in California could avoid that result by using a licensed physician in the process. In addition, the Lesbian Rights Project ad-

Despite opening more space for unmarried women to use AID, the statute retained distinctions based on marriage. For both same-sex and different-sex couples, no parental rights were recognized for the biological mother's unmarried partner.[72] That unmarried partner, in other words, was not analogous to the husband who consents to his wife's insemination and thereby becomes the legal (nonbiological) father.

Without a route to parentage through the UPA's regulation of AID, the nonmarital, nonbiological parent had to hope she could form a legal parent-child relationship through adoption. This, too, presented challenges. Stepparent adoption constituted a carveout from standard adoption procedures — allowing adoption without terminating the parental rights of the existing, custodial parent.[73] Same-sex couples, excluded from marriage, had no recourse to this specific mechanism. Instead, they pursued what they termed second-parent adoptions, which adapted stepparent adoption to protect intentional and functional (nonbiological) parenting in nonmarital families.

In California, second-parent adoption followed traditional adoption routes (rather than stepparent adoption processes), but required the Department of Social Services (DSS) and judges to set additional terms so that the legal parent would retain her rights.[74] Lawyers began to obtain second-parent adoptions for same-sex couples in progressive, urban California counties in the mid-1980s.[75]

Yet this route to parental rights was not without challenges. In 1987, Republican Governor George Deukmejian ordered DSS to adopt a policy against adoption by unmarried couples, including same-sex couples seeking joint and second-parent adoptions.[76] While framed around marital status, the policy emerged in response to a lesbian

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vised using unknown donors as a way to avoid parental claims. *See* DONNA J. HITCHENS, LEGAL ISSUES IN DONOR INSEMINATION 6 (1984 ed.).

[72] *See* CAL. FAM. CODE § 7613(a).

[73] The California Supreme Court sanctioned stepparent adoption in 1925. *See* Marshall v. Marshall, 239 P. 36, 38 (Cal. 1925). The state's adoption statutes included stepparent adoption in 1931, and stepparent adoptions were excluded from some statutory requirements for adoption. *See* 1931 Cal. Stat. 2402–03.

[74] On second-parent adoption's origins, see Nancy D. Polikoff, *Raising Children: Lesbian and Gay Parents Face the Public and the Courts*, *in* CREATING CHANGE 305, 320 (John D'Emilio et al. eds., 2000).

[75] The first such adoption was granted in 1985 in Alaska. NANCY D. POLIKOFF, BEYOND (STRAIGHT AND GAY) MARRIAGE 53 (2008). In California, the first was granted within months of the Alaska adoption. *Id.*; Telephone Interview with Roberta Achtenberg, *supra* note 58; Telephone Interview with Donna Hitchens, Founder, Lesbian Rights Project (July 25, 2014) (on file with the Harvard Law School Library). The first reported trial court opinion in the country emerged in 1991 from the District of Columbia. *See In re* Adoption of Minor (T. & M.), 17 Fam. L. Rep. (BNA) 1523 (D.C. Super. Ct. 1991). For a description of these developments, see Polikoff, *supra* note 57, at 731–32.

[76] *See* Cal. Dep't of Soc. Servs., All County Letter No. 87-80 (June 15, 1987).

mother's second-parent adoption petition and to outrage over a child's death after his placement with a male same-sex couple.[77] Still, despite the DSS policy, many social workers provided favorable reports on same-sex couples seeking adoption, and since no state law expressly precluded adoptions by unmarried couples, some courts continued to grant second-parent adoptions.[78] Consequently, for same-sex couples using AID, second-parent adoption increasingly offered a way for the nonbiological, unmarried mother to create a legal relationship with the child.

But for those couples whose relationships dissolved before second-parent adoption gained traction or who otherwise failed to complete an adoption, the nonbiological mother was a legal stranger to her child. Nancy Springer and Michele Graham-Newlin were one of those couples. While they considered seeking a second-parent adoption *after* the dissolution of their relationship (during a time when they continued to share custody of their two children), they were discouraged from bringing a post-dissolution adoption petition.[79] Because second-parent adoption remained controversial, lawyers thought it best to present courts with intact, model same-sex couples.[80]

Even though lesbian couples had been raising children together for many years and some of them had broken up, disputes testing the application of parentage law in this context did not yield California appellate rulings until the early 1990s.[81] The 1991 decision in Nancy and

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[77] *See* Wendell Ricketts & Roberta Achtenberg, *Adoption and Foster Parenting for Lesbians and Gay Men: Creating New Traditions in Family*, 14 MARRIAGE & FAM. REV. 83, 109 (1989). The adoption petition was that of Donna Hitchens's partner, Nancy Davis. *See* Marie-Amélie George, *Agency Nullification: Defying Bans on Gay and Lesbian Foster and Adoptive Parents*, 52 HARV. C.R.-C.L. L. REV. (forthcoming 2016) (manuscript at 45) (on file with the Harvard Law School Library).

[78] *See* George, *supra* note 77 (manuscript at 46–47); Ricketts & Achtenberg, *supra* note 77, at 110; Telephone Interview with Emily Doskow, Attorney and Mediator (May 20, 2014) (on file with the Harvard Law School Library).

[79] *See* Telephone Interview with Amy Oppenheimer, Attorney, Law Offices of Amy Oppenheimer (May 23, 2014) (on file with the Harvard Law School Library).

[80] *See* NAT'L CTR. FOR LESBIAN RIGHTS, LESBIANS CHOOSING MOTHERHOOD: LEGAL IMPLICATIONS OF DONOR INSEMINATION AND CO-PARENTING 28–29 (Maria Gil de Lamadrid ed., 2d ed. 1991) (explaining the importance of "the longevity of the adult relationship," *id.* at 28, and, in all but a few jurisdictions, the "'white picket fence' standard" for lesbians seeking second-parent adoption, *id.* at 29).

[81] LGBT advocates convinced constituents to avoid precedential rulings and instead to form families with children without forcing the issue in court. Telephone Interview with Roberta Achtenberg, Former Exec. Dir., NCLR (July 7, 2014) (on file with the Harvard Law School Library). To this end, NCLR published pamphlets on lesbian parenting. The 1984 pamphlet, *Legal Issues in Donor Insemination*, included guidance on drafting co-parenting agreements. *See* HITCHENS, *supra* note 71, at 19–21. The hope was that agreements would not only help avoid litigation, but also, if litigation ensued, protect the nonbiological mother by providing evidence of pre-conception intent. Telephone Interview with Donna Hitchens, *supra* note 75.

Michele's case was the most noteworthy and important in the state. In *Nancy S. v. Michele G.*,[82] Roberta Achtenberg of NCLR, Paula Ettelbrick of Lambda Legal,[83] and Bay Area attorneys Amy Oppenheimer and Shannan Wilber represented Michele, the nonbiological mother seeking parental recognition.

Given the UPA's focus on marriage in the alternative insemination context and its emphasis on biology for unmarried parents, the lawyers determined that the statutory parentage framework offered no help.[84] In fact, they conceded that a "natural" parent, the language used in the UPA, meant a "biological" parent such that the UPA "has no bearing on the rights of a non-biological co-parent."[85] Instead, to claim parental rights for Michele, the lawyers relied on equitable and common law theories that could recognize a de facto, or functional, parent.[86] Courts around the country had granted limited rights to individuals who

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Not all disputes avoided the courts. In 1984, a trial judge in Oakland approved visitation rights for a nonbiological mother who had been in a same-sex relationship with the child's biological mother. *See Woman Wins Right to Visits to Child of Lesbian Ex-Lover*, N.Y. TIMES, Nov. 23, 1984, at A27. The couple, Linda Jean Loftin and Mary Elizabeth Flournoy, had "exchanged vows in a church ceremony in 1977" and had listed Loftin "as the father on the child's birth certificate." *Lesbians' Custody Fight on Coast Raises Novel Issues in Family Law*, N.Y. TIMES, Sept. 9, 1984, at 44. For a recounting, see E. Donald Shapiro & Lisa Schultz, Legal Essay, *Single-Sex Families: The Impact of Birth Innovations upon Traditional Family Notions*, 24 J. FAM. L. 271 (1985). The court explained that it had no authority to "proceed under the Family Law Act and . . . the Uniform Parentage Act" and could not "enforce custody or visitation rights pursuant to a private contract between two women." *Id.* at 272 (quoting Reporter's Transcript of Proceedings at 11, Loftin v. Flournoy, No. 569630-7 (Cal. Super. Ct. Sept. 4, 1984)). Yet the court found that Loftin had standing to seek visitation as a "psychological parent." *Id.* at 273 (quoting Reporter's Transcript of Proceedings, *supra*, at 19). Ultimately, the court allowed Loftin to proceed based on "the general custody law of this State that is embedded in statutes and cases although no case or no statute specifically or expressly affords her that right." *Id.* at 274 n.15 (emphasis omitted) (quoting Reporter's Transcript of Proceedings, *supra*, at 21).

[82] 279 Cal. Rptr. 212 (Ct. App. 1991).

[83] Ettelbrick wrote the foundational essay arguing that the LGBT movement should not prioritize marriage. *See* Paula L. Ettelbrick, *Since When Is Marriage a Path to Liberation?*, OUT/LOOK, Fall 1989, at 9, 14–17. For Ettelbrick's perspective on parenting litigation around this time, see Paula L. Ettelbrick, *Who Is a Parent?: The Need to Develop a Lesbian Conscious Family Law*, 10 N.Y.L. SCH. J. HUM. RTS. 513 (1993).

[84] *See* Telephone Interview with Shannan Wilber, Youth Policy Dir., NCLR (June 13, 2014) (on file with the Harvard Law School Library); Telephone Interview with Amy Oppenheimer, *supra* note 79.

[85] Appellant's Opening Brief at 12, Michele G. v. Nancy S., 279 Cal. Rptr. 212 (Ct. App. 1991) (No. A045463). The U.S. Supreme Court had used the term "natural" to refer to biological parents in its unmarried fathers and nonmarital birth cases. *See, e.g.*, Lehr v. Robertson, 463 U.S. 248, 258 (1983); Caban v. Mohammed, 441 U.S. 380, 382 (1979). In addition, the term usually refers to the biological parent in the adoption context. *See, e.g.*, *In re* J.L., 884 A.2d 1072, 1076–77 (D.C. 2005).

[86] *See* Telephone Interview with Shannan Wilber, *supra* note 84.

served in parental roles, even as many of the individuals who successfully made such claims were stepparents.[87]

Even though *Nancy S.* involved an unmarried couple, the relationship between marriage and parenthood shaped arguments on both sides of the case. In order to discredit Michele's claim to functional parenthood, Carol Amyx — a local family law attorney representing Nancy, the biological mother — situated marriage as a formal boundary. She consistently noted that because Michele "is not the stepfather"[88] or "the husband of [the children's] mother," cases involving functional parents in marital families "do not support her claim to parental rights."[89] For Amyx, if marriage lost its gatekeeping function in this context, other legal strangers would threaten the rights of biological parents.[90] Michele's claim would open the door to similar claims by babysitters, nannies, and childcare providers, all of whom can "get very attached."[91] To the press, Amyx declared: "If you want to be really harsh about it, wet nurses don't get parental rights."[92] Under this view, the nonbiological mother was not even a family member; instead, she was a legal stranger with no relationship worthy of the law's protection.

In response, Achtenberg, Ettelbrick, Oppenheimer, and Wilber used the marriage-like relationship between Nancy and Michele as a way to understand the intentional and functional parent-child relationships between Michele and her children. The attorneys explained that Nancy and Michele "regarded themselves, and were regarded by others, as a married couple."[93] In fact, "[i]f the law had permitted it, they would have legally formalized their union."[94] They decided, like other couples, to have children. Their children were given Michele's family name as their last name,[95] and both Nancy and Michele were listed on

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[87] *See* BALL, *supra* note 68, at 91; Polikoff, *supra* note 12, at 497–521. And the concept of a "psychological parent" had gained prominence. *See* JOSEPH GOLDSTEIN, ANNA FREUD & ALBERT J. SOLNIT, BEYOND THE BEST INTERESTS OF THE CHILD 98 (1973); *see also* Robert H. Mnookin, *Child-Custody Adjudication: Judicial Functions in the Face of Indeterminacy*, 39 LAW & CONTEMP. PROBS., Summer 1975, at 226, 248, 282–83.

[88] Respondent's Brief at 24, Nancy S. v. Michele G., 279 Cal. Rptr. 212 (Ct. App. 1991) (No. A045463).

[89] *Id.* at 27.

[90] *See* Telephone Interview with Carol Amyx, Attorney, Law Office of Carol Amyx (June 12, 2014) (on file with the Harvard Law School Library).

[91] Kathleen Hendrix, *A Case of 2 "Moms" Tests Definition of Parenthood*, L.A. TIMES, Aug. 15, 1990, at E1.

[92] *Id.*

[93] Appellant's Opening Brief, *supra* note 85, at 2.

[94] *Id.* at 2–3.

[95] *Id.* at 3–4.

the birth certificates.[96] Their deliberate family formation, in other words, looked very much like that of married couples.[97]

Michele's lawyers suggested that even though the parties could not have had a legal marriage, they had a marriage in practical terms and thus should be treated accordingly. As the attorneys argued: "The parties in this case cannot petition for dissolution of their marriage because, under the current statutory scheme, their marriage cannot be sanctioned by the state."[98] In other words, Nancy and Michele had a marriage, even if not recognized as a legal matter, and they needed the equivalent of a divorce, with the attendant determinations of child custody and visitation.[99] If divorce were available, Michele's standing would not be in question, even though she had no biological connection to the children.[100] Married men enjoyed presumptions of parentage — a conclusive presumption in California[101] — based on marriage to the child's mother.[102] And California courts could order visitation for stepparents upon divorce regardless of whether those stepparents had adopted the children.[103] Marriage (and divorce), Michele's lawyers suggested, provided a lens through which to understand the women's parental intent and conduct and yet furnished no principled basis on which to exclude Michele's parent-child relationships.[104]

Nonetheless, the court prioritized biological and marital parenthood as a formal matter and expressed concern over opening the door to nonparents. Rejecting Michele's claim, the court explained that "expanding the definition of a 'parent' in the manner advocated

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[96] *Id.* On the relationship between marriage law and social norms, see Elizabeth S. Scott, *Social Norms and the Legal Regulation of Marriage*, 86 VA. L. REV. 1901 (2000).

[97] As amicus curiae, the ACLU, including the leaders of its LGBT advocacy arm, staked out the constitutional significance of Michele's parent-child relationship by appealing to the family unit formed by the two women. *See* Brief of Amici Curiae American Civil Liberties Union Foundation, Inc. & American Civil Liberties Union Foundation of Northern California, Inc. at 1, Nancy S. v. Michele G., 279 Cal. Rptr. 212 (Ct. App. 1991) (No. A045463).

[98] Appellant's Opening Brief, *supra* note 85, at 12.

[99] *See* David Margolick, *Lesbian Child-Custody Cases Test Frontiers of Family Law*, N.Y. TIMES, July 4, 1990, at 1 ("[J]udges face the daunting task of handling what amount to divorces involving people who cannot legally marry."); Anne Stroock, *Gay "Divorces" Complicated by Lack of Laws*, S.F. CHRON., May 14, 1990, at A4 ("There are increasing numbers of these long-term relationships, and when they break up, there is no simple divorce.").

[100] *See* NAT'L CTR. FOR LESBIAN RIGHTS, *supra* note 80, at 25–26 ("The necessity of a pending divorce proceeding makes it virtually impossible for lesbian co-parents to use," *id.* at 26, statutes providing "visitation rights for non-biologically related adults," *id.* at 25.).

[101] CAL. EVID. CODE § 621 (West 1990) (conclusive presumption provided husband was not impotent or sterile). The revised form of this presumption is section 7540 of the Family Code. CAL. FAM. CODE § 7540 (West 2013). A rebuttable marital presumption appears in section 7611 of the Family Code. *Id.* § 7611(a).

[102] *See* Michael H. v. Gerald D., 491 U.S. 110 (1989).

[103] CAL. CIV. CODE § 4351.5 (West 1983).

[104] To the press, NCLR's Maria Gil de Lamadrid argued, "[i]f there were marriage [for homosexuals], we would not be before the court." Hendrix, *supra* note 91 (alteration in original).

by [Michele] could expose other natural parents to litigation brought by child-care providers of long standing."[105] Even though Michele had a committed relationship with the biological parent, participated in the decision to have children, and actually raised the children, the court refused to recognize her as a *legal* parent.[106]

Nancy S. was one of a handful of California cases around this time that rejected the claims of nonbiological lesbian co-parents.[107] California courts felt constrained by the lack of legislative recognition for the couple's family relationship. According to the California Court of Appeal in the 1990 *Curiale v. Reagan*[108] decision, the country's first appellate ruling on a custody dispute between a lesbian couple, "[t]he [California] Legislature ha[d] not conferred upon . . . a nonparent *in a same-sex bilateral relationship*[] any right of custody or visitation upon the termination of the relationship."[109] The logic was rooted less in the quality of the parent-child relationship and more in the lack of formal recognition for the adult relationship. In fact, the *Nancy S.* court recognized that its ruling produced a "tragic" result for the children.[110]

Similar results in the California Courts of Appeal appeared toward the end of the decade. In 1997, in *West v. Superior Court*,[111] the nonbiological co-parent argued that "since the *Nancy S.* and *Curiale* decisions were rendered," the court no doubt had become "more keenly aware of non-traditional families" such that it should see the need "to extend the protections afforded to the children of married families to the children developed in loving, nurturing but not as yet legally for-

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105 Nancy S. v. Michele G., 279 Cal. Rptr. 212, 219 (Ct. App. 1991).

106 The court refused to adopt the concept of functional parenthood, *id.* at 219, rejected claims based on doctrines of equitable estoppel, *id.* at 217–19, and *in loco parentis*, *id.* at 217, and found that the de facto parent claim failed because Nancy's custody had not been shown to be detrimental to the children, *id.* at 216–17.

107 *See, e.g.*, Curiale v. Reagan, 272 Cal. Rptr. 520 (Ct. App. 1990); Mindy Ridgway, *Biology Is Destiny? Sonoma Court Rules Only One Mom Allowed*, S.F. BAY TIMES, Feb. 10, 1994, at 6 (discussing case of Prescott and Kerry B.). Amyx also represented the biological mother in *Prescott*.

108 272 Cal. Rptr. 520.

109 *Id.* at 522 (emphasis added).

110 279 Cal. Rptr. at 219. Litigation losses produced heartrending stories of mothers torn from their children. None was more poignant than Michele's. In 1997, Nancy was killed in a car accident in Oklahoma. Her son, Micah, also in the car, was airlifted to a hospital. Michele rushed to Oklahoma. With no recognition as Micah's parent, Michele prepared to litigate to have Micah released to her. The night before her court date, a sympathetic state employee released Micah to her. Ultimately, Michele became both children's legal guardian. *See* Elaine Herscher, *Family Circle*, SFGATE (Aug. 29, 1999, 4:00 AM), http://www.sfgate.com/news/article/Family-Circle-For-Nancy-Springer-a-1991-court-2911717.php [http://perma.cc/9J3F-PMJV].

111 69 Cal. Rptr. 2d 160 (Ct. App. 1997).

malized families[,] in the best interests of the child."[112] Yet once again the court resisted, noting the legislature's continued inaction.[113]

California was not unusual. Even as courts across the country began to impose obligations on unmarried, nonbiological parents in different-sex-couple-headed families,[114] nonbiological mothers in same-sex-couple-headed families were routinely turned away.[115] In rejecting their claims, courts prioritized both marital *and* biological connections. The emphasis on marital parenthood allowed courts to distinguish between same-sex couples and married different-sex couples that included nonbiological parents. The emphasis on biology allowed courts to distinguish between same-sex couples and the paradigmatic unmarried, heterosexual parent — the unwed father at the center of both constitutional litigation and the UPA. Through a commingled focus on marriage and biology, courts drew a sharp sexual orientation–based distinction.

With nonbiological mothers particularly vulnerable upon dissolution of their same-sex relationships, it became increasingly important to secure their parental rights during the relationships. Even as the *Nancy S.* court rejected Michele's attempt to establish her parental status, it suggested that she could have obtained such status by adopting the children.[116] At that time, for intact families formed by same-sex couples, adoption constituted the only way to achieve parental recognition for the nonbiological parent.[117]

Of course, this path continued to pose challenges. The 1987 DSS policy against adoption by unmarried couples remained in effect until

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[112] *Id.* at 162.

[113] *Id.* Again, in 1999, in *Guardianship of Z.C.W.*, the court rejected a nonbiological lesbian coparent's claim to guardianship. 84 Cal. Rptr. 2d 48, 50 (Ct. App. 1999). This guardianship claim attempted to work around *Nancy S.*'s rejection of equitable parenthood. *See* Telephone Interview with Joan Hollinger, John and Elizabeth Boalt Lecturer in Residence (retired), U.C. Berkeley Sch. of Law (Jan. 15, 2015) (on file with the Harvard Law School Library).

[114] *See* Polikoff, *supra* note 12, at 497.

[115] A similar result emerged from New York around the same time as *Nancy S.* *See* Alison D. v. Virginia M., 572 N.E.2d 27 (N.Y. 1991); *see also* Nancy D. Polikoff, *The Impact of* Troxel v. Granville *on Lesbian and Gay Parents*, 32 RUTGERS L.J. 825, 843 (2001) (explaining that in the early 1990s, "legally unrecognized lesbian mothers were usually rebuffed by courts").

Eventually, in some other jurisdictions, functional-parenthood claims proved more successful. *See, e.g.*, V.C. v. M.J.B., 748 A.2d 539, 555 (N.J. 2000); Holtzman v. Knott *(In re* Custody of H.S.H.-K.*)*, 533 N.W.2d 419, 435 (Wis. 1995). On the shift toward recognition of functional parenthood in this context, see *Developments in the Law — The Law of Marriage and Family*, 116 HARV. L. REV. 1996, 2059–64 (2003).

[116] Nancy S. v. Michele G., 279 Cal. Rptr. 212, 219 n.8 (Ct. App. 1991).

[117] In the 1990s, appellate courts in some other jurisdictions approved second-parent adoptions by same-sex couples. *See, e.g.*, *In re* M.M.D. & B.H.M., 662 A.2d 837 (D.C. 1995); Adoption of Tammy, 619 N.E.2d 315 (Mass. 1993); *In re* Jacob, 660 N.E.2d 397 (N.Y. 1995); Adoptions of B.L.V.B. & E.L.V.B., 628 A.2d 1271 (Vt. 1993). Of course, even as some states allowed same-sex couples to seek second-parent adoptions, other states maintained far-reaching bans on lesbian and gay adoption. *See* Polikoff, *supra* note 57, at 734 (discussing restrictions in Florida and Utah).

1994, when DSS announced that decisions would "be made on a case-by-case basis according to the best interest of the child."[118] But in early 1995, Republican Governor Pete Wilson ordered that the new policy be "rescinded" and the 1987 policy "reinstated."[119] At that time, support for restricting adoption by unmarried couples came from social-conservative leaders, who appealed to the importance of dual-gender parenting.[120] The Reverend Louis Sheldon, head of the Orange County–based Traditional Values Coalition, declared: "When [children] see father committed with the paycheck. When they see mother committed with the grocery list. When they see these things, they are learning the socialization process."[121] At stake in the DSS policy was not simply support for marriage, but rather the maintenance of a gender-differentiated, breadwinner/homemaker model of marriage and parenting — one that, by definition, excluded same-sex couples.

Nonetheless, with many at DSS opposed to the policy, social workers often gave judges the evidence, without the official recommendation, to grant the adoption.[122] For their part, judges continued to grant second-parent adoptions to same-sex couples. Accordingly, many nonbiological parents in same-sex relationships attained legal parental status despite a relatively hostile state-law environment.

2. Different-Sex Married Couples and Intentional Parenthood. — During the 1990s, while nonbiological parents in same-sex relation-

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118 Cal. Dep't of Soc. Servs., All-County Letter No. 94-104, at 2 (Dec. 5, 1994).

119 Cal. Dep't of Soc. Servs., All-County Letter No. 95-13 (Mar. 11, 1995); *see* Dan Morain, *Governor Overturns Policy for Adoptions*, L.A. TIMES (Mar. 14, 1995), http://articles.latimes.com/1995-03-14/news/mn-42688_1_unmarried-couples [http://perma.cc/6Y6Q-3236]. Many viewed Wilson's action as an attempt to appeal to "pro-family" conservatives as he contemplated a presidential run. *Id.* Indeed, given the Hawaii marriage litigation, same-sex marriage and parenting had become significant national issues. NeJaime, *supra* note 6, at 106.

120 After the Wilson Administration promulgated draft regulations on the topic, DSS held hearings around the state. *See* David Reyes, *Adoption Proposal Sparks Sharp Debate*, L.A. TIMES (Sept. 6, 1996), http://articles.latimes.com/1996-09-06/news/mn-41066_1_adoption-agencies [http://perma.cc/YSB9-U4QZ]. In response to the proposed regulations, Assembly Member Kevin Murray introduced a bill explicitly authorizing adoption by unmarried couples. Assemb. B. 53, 1997–1998 Leg., Reg. Sess. (Cal. 1996). The bill eventually died. Official California Legislative Information, Complete Bill History: A.B. No. 53, http://www.leginfo.ca.gov/pub/97-98/bill/asm/ab_0051-0100/ab_53_bill_19980202_history.html [http://perma.cc/SQ2U-ADXQ] (noting that the bill died on inactive file Feb. 2, 1998). Wilson's proposed regulations never became final, largely because of the actions of DSS officials opposed to the policy. *See* George, *supra* note 77 (manuscript at 49). But the 1995 letter remained effective until 1999, when, under new Democratic Governor Gray Davis, DSS adopted a policy allowing unmarried couples to be recommended for adoption. Cal. Dep't of Soc. Servs., All County Letter No. 99-100 (Nov. 15, 1999).

121 Reyes, *supra* note 120 (alteration in original).

122 *See Adoption Options for Same-Sex Couples: An Interview with California Adoption Lawyer Emily Doskow*, 20 FAM. ADVOC. 41, 43 (1997); Telephone Interview with Emily Doskow, *supra* note 78. On the role of government social workers in securing parental rights for gays and lesbians, see George, *supra* note 77; Cynthia Godsoe, *Adopting the Gay Family*, 90 TUL. L. REV. 311, 361–62 (2015).

ships struggled to achieve legal parentage and found themselves limited to a controversial adoption process, California courts began to expand parentage principles to address emerging issues in the context of different-sex married couples using ART. The UPA itself remained largely unchanged and therefore regulated only AID. Yet newer forms of ART, including gestational surrogacy, raised novel questions of legal motherhood.[123] California courts began to interpret and apply the UPA in these unforeseen situations by looking to *intent*, essentially adapting the logic of the donor-insemination provision to new scenarios. For these courts, marriage provided a way to uncover intent, and intent provided a way to determine parentage: because the married couple deliberately set the procreative process in motion, they would be deemed the resulting child's legal parents.

Surrogacy became the subject of nationwide debate with the infamous *In re Baby M*[124] case, in which the New Jersey Supreme Court in 1988 found surrogacy agreements unenforceable.[125] In response, states around the country moved to regulate surrogacy.[126] California saw efforts both to allow and to bar surrogacy, but the state failed to enact any surrogacy law.[127] Accordingly, when in 1993 the California Supreme Court confronted a surrogacy dispute, it took up the issue without legislative guidance.[128] Unlike *Baby M*, which involved tradi-

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[123] In 1988, the Uniform Law Commission promulgated the Uniform Status of Children of Assisted Conception Act, which included two alternatives for surrogacy: one provided for regulation of agreements, and the other declared such agreements void. UNIF. STATUS OF CHILDREN OF ASSISTED CONCEPTION ACT at Prefatory Note & § 5 (UNIF. LAW COMM'N 1988).

[124] 537 A.2d 1227 (N.J. 1988).

[125] *Id.* at 1234.

[126] On anti-surrogacy activism, see Elizabeth S. Scott, *Surrogacy and the Politics of Commodification*, LAW & CONTEMP. PROBS., Summer 2009, at 109, 117–20. For influential arguments against the commercialization of surrogacy and the enforceability of surrogacy contracts, see MARTHA A. FIELD, SURROGATE MOTHERHOOD (1988); MARGARET JANE RADIN, CONTESTED COMMODITIES 140–48 (1996); Margaret Jane Radin, *Market-Inalienability*, 100 HARV. L. REV. 1849, 1928–36 (1987).

[127] In 1992, Governor Wilson vetoed a bill that would have allowed and regulated surrogacy agreements. *See* S.B. 937, 1991–1992 Leg., Reg. Sess. (Cal. 1992); Governor's Veto Message to Senate on Senate Bill No. 937 (Sept. 26, 1992), in 4 JOURNAL OF THE SENATE: LEGISLATURE OF THE STATE OF CALIFORNIA 8315 (1992). Before that, Assembly Member Sunny Mojonnier unsuccessfully attempted to ban surrogacy in California. *See* Letter from Sunny Mojonnier, Assemblywoman, to John K. Van de Kamp, Att'y Gen. of Cal., at 1 (Apr. 6, 1988); *id.* at 2 (describing the attached formal petition). In 1990, a legislative committee studying surrogacy suggested, on the recommendation of its expert advisory panel, that "surrogacy contracts [be] void and unenforceable." JOINT LEGIS. COMM. ON SURROGATE PARENTING, COMMERCIAL AND NONCOMMERCIAL SURROGATE PARENTING 13 (Nov. 1990). Earlier, in 1983, DSS had issued an all-county letter concluding that parentage through surrogacy required adoption. *See* Cal. Dep't of Soc. Servs., All-County Letter No. 83-131 (Dec. 30, 1983).

[128] *See* Johnson v. Calvert, 851 P.2d 776 (Cal. 1993).

tional surrogacy, the California Supreme Court addressed gestational surrogacy, where gestation is detached from genetics.[129]

In *Johnson v. Calvert*,[130] an agreement between a married couple and a gestational surrogate fell apart. In the ensuing litigation, Crispina, the genetic mother, along with Mark, her husband and the biological father, claimed to be the legal parents to the exclusion of Anna, the (surrogate) birth mother.[131] Given that the validity of surrogacy agreements remained unclear, Crispina did not rely solely on enforcement of the agreement and instead used her genetic tie as a basis for parentage. Each woman claimed (exclusive) parentage under the UPA based on either her gestational or her genetic connection.[132] For its part, the ACLU of Southern California — in an amicus curiae brief drafted by Jon Davidson, who would eventually move to Lambda Legal — urged the court to recognize both women's parental rights.[133] But the court resisted, explaining that "for any child California law recognizes only one natural mother."[134]

Ultimately, the court rooted parentage in the intended parents, Crispina and Mark.[135] The court attached parentage to the married couple without expressly determining the enforceability of their surrogacy contract, instead merely using the agreement as evidence of intent.[136] Even as the court rested its holding on the continued rele-

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[129] *See id.* at 778.

[130] 851 P.2d 776.

[131] *Id.* at 778.

[132] *Id.* at 779.

[133] Brief *Amicus Curiae* of the American Civil Liberties Union of Southern California at 4, *Johnson*, 851 P.2d 776 (No. S023721) ("*[B]oth* Anna J. and Crispina C. hold maternal rights and responsibilities toward the child who would not have been born had not both women been involved."). LGBT rights organizations did not participate in *Johnson*. The ACLU of Southern California's briefs derived from the organization's women's rights section, but were drafted by Davidson, an attorney with the organization's Lesbian and Gay Rights Project. Davidson was cognizant of the case's potential impact on the families of same-sex couples. *See* Interview with Jon Davidson, Legal Dir., Lambda Legal, in L.A., Cal. (May 12, 2014) (on file with the Harvard Law School Library). In arguing that all three individuals should potentially be considered parents, Davidson appealed to the increase in "'step-parent' and other 'non-traditional' families," Brief *Amicus Curiae* of the American Civil Liberties Union of Southern California at 2, Anna J. v. Mark C., 286 Cal. Rptr. 369 (Ct. App. 1991) (No. G010225), and cited increases in "unmarried cohabitation among both heterosexuals and homosexuals," *id.* at 2 n.3 (quoting Note, *Looking for a Family Resemblance: The Limits of the Functional Approach to the Legal Definition of Family*, 104 HARV. L. REV. 1640, 1640 (1991)).

[134] *Johnson*, 851 P.2d at 781.

[135] *See id.* at 782 ("[S]he who intended to procreate the child — that is, she who intended to bring about the birth of a child that she intended to raise as her own — is the natural mother under California law.").

[136] *See id.* at 783 ("In deciding the issue of maternity under the Act we have felt free to take into account the parties' intentions, as expressed in the surrogacy contract, because in our view the agreement is not, on its face, inconsistent with public policy."). The UPA also specified, in the provisions relating to paternity, that if two or more presumptions arise, "the presumption which

vance of biological or genetic parentage, it articulated a principle of intent that could render biology less important.

Eventually, the California courts extended *Johnson*'s intentional-parenthood principle to nonbiological, nongenetic parentage. In 1998, the California Court of Appeal in *In re Marriage of Buzzanca*[137] determined that a divorcing husband and wife were the parents of a child born through ART to whom neither parent was biologically or genetically related.[138] The couple had used anonymous sperm and egg donors and a gestational surrogate, none of whom claimed parental status.[139] In seeking a divorce after conception but before the child's birth, John Buzzanca disclaimed any parental responsibilities, arguing that he was not the child's father; John also argued that there was no legal basis to render his wife a parent, even though she willingly accepted her parental obligations.[140]

The trial court had left the child without legal parents, a result that clearly disturbed the reviewing court.[141] In reversing, the appellate court relied on *Johnson* to stress the couple's "initiating role as the intended parents in [the child's] conception and birth."[142] To maintain the private welfare function of the family, the court detached *Johnson*'s notion of intent from biology. Identifying the Buzzancas as parents allowed the court not only to grant parental rights but also to impose parental obligations.

Marriage served as a way to understand and legally recognize the intent to parent. The court extended the rationale of the alternative insemination statute, section 7613, to the Buzzancas:

> Just as a husband is deemed to be the lawful father of a child unrelated to him when his wife gives birth after artificial insemination, so should a husband *and* wife be deemed the lawful parents of a child after a surrogate bears a biologically unrelated child on their behalf.[143]

Within the logic of the statute, the biological connection receded in importance because of the marital family inside which the decision to become a parent took place. The statute could be put to gender-neutral use — identifying a father *and* mother — even as it retained its marital-status distinction.

In fact, the court felt compelled to distinguish, based on marriage, John Buzzanca from nonbiological lesbian co-parents. John had com-

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on the facts is founded on the weightier considerations of policy and logic controls." CAL. CIV. CODE § 7004(c) (West 1993) (later CAL. FAM. CODE § 7612(b) (West 2013)).

137 72 Cal. Rptr. 2d 280 (Ct. App. 1998).

138 *Id.* at 282.

139 *See id.*

140 *Id.*

141 *See id.*

142 *Id.* at 293.

143 *Id.* at 282.

pared himself to the mothers who were denied parental rights in the California Courts of Appeal in cases like *Nancy S.* and *West*.[144] Yet, for the *Buzzanca* court, because those cases "involve[d] *non* married couples at the time of the artificial insemination, they are distinguishable."[145] The court was "dealing with a man and woman who were married at the time of conception and signing of the surrogacy agreement, and [was] reasoning from a statute, section 7613, which contemplates parenthood on the part of a married man without biological connection to the child borne by his wife."[146] Even as the court suggested that it was unclear whether section 7613 would apply in the nonmarital context,[147] marriage provided the legal distinction that allowed the result in *Buzzanca* to exist alongside the results in *Nancy S.* and *West*.[148]

Nonetheless, as the next section shows, LGBT advocates would leverage *Johnson* and *Buzzanca* by showing how same-sex couples acted like married couples in ways that suggested principles of intent should apply equally — regardless of the formal recognition of the parents' relationship. Accordingly, advocates would draw on marital parenthood to extend intentional and functional parenthood to nonmarital families.

B. 1999–2003: Securing Rights for Nonmarital, Nonbiological Parents

While lawyers representing same-sex parents continued to pursue second-parent adoptions, they worried about the validity of that mechanism in the event of a challenge in the appellate courts.[149] And setbacks on second-parent adoption in other states drove LGBT advocates to pursue alternative paths to parental rights.[150] Accordingly,

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144 *See* Respondent/Petitioner's Brief, *Buzzanca*, 72 Cal. Rptr. 2d 280 (Nos. G022147, G022157), 1997 WL 33560808, at *7–9.

145 72 Cal. Rptr. 2d at 287 n.11.

146 *Id.*

147 *See id.*

148 While neither NCLR nor Lambda Legal participated in *Buzzanca*, the ACLU of Southern California submitted an amicus brief authored primarily by UCLA professor Seana Shiffrin, in coordination with the ACLU of Southern California's Taylor Flynn and Mark Rosenbaum. That brief focused on the child's interest in parental relationships and support, and also argued that the intentional-parenthood principles from *Johnson* should govern. *See* Brief of Amicus Curiae, *Buzzanca*, 72 Cal. Rptr. 2d 280 (Nos. G022147, G022157) (on file with the Harvard Law School Library).

149 For couples initially turned down, lawyers pursued subsequent petitions with different judges. Advocates hoped that the more adoptions they accumulated, the more reluctant an appellate court would be to disturb those established parent-child relationships. Telephone Interview with Shannon Minter, *supra* note 59.

150 The Wisconsin Supreme Court's decision recognizing a functional-parenthood claim in *Holtzman v. Knott (In re Custody of H.S.H.-K.)*, 533 N.W.2d 419 (Wis. 1995), came after the court rejected second-parent adoption. *See* Georgina G. v. Terry M. (*In re* Angel Lace M.), 516 N.W.2d 678 (Wis. 1994). And the Colorado courts began to grant parentage judgments under the

even as they continued to seek and defend adoptions in California, lawyers began to secure parentage judgments under the UPA. They did so first by relying on the principles of intentional parenthood that emerged from *Johnson* and *Buzzanca*, and then by capitalizing on the principles of functional parenthood that emerged from the recognition of unmarried, nonbiological fathers. Throughout this work, lawyers pointed to same-sex couples' marriage-like relationships to identify and explain their parental intent and conduct.

1. Intentional Parenthood and Same-Sex Couples Under the UPA. — While LGBT advocates had in the early 1990s disclaimed resort to the UPA to establish parental rights for nonbiological lesbian mothers, by the end of the decade they shifted course, finding new promise in the UPA.[151] Lawyers at NCLR, in conjunction with leading private family law practitioners in California organized by NCLR into a group called the Brain Trust, developed arguments for lesbian parentage based on the UPA.[152] The UPA was meant to erase distinctions between marital and nonmarital children and to identify unmarried fathers. In addition, it provided that, "[i]nsofar as practicable, the provisions . . . applicable to the father and child relationship apply" to establishing the mother-child relationship.[153] Based on these features, LGBT advocates claimed that presumptions applicable to *married fathers* should also apply to *unmarried mothers*. Accordingly, they argued that the general principles of intentional parenthood espoused in *Johnson* and *Buzzanca* should apply regardless of marital status, and that section 7613, the alternative insemination statute, should apply in a marital-status- and gender-neutral fashion.

These UPA arguments met with success. As the 1990s closed, the Brain Trust lawyers secured uncontested parentage judgments based on the concept of intentional parenthood.[154] Their first attempts, in 1999, leveraged biological connections to map more neatly onto *Johnson* and to seem in some ways less radical than *Buzzanca*.[155] Deborah Wald, a member of the Brain Trust, filed the first uncontested petition in a "co-maternity" situation, in which one woman was the gestational mother and the other was the genetic mother.[156] She submitted a pro-

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state's UPA after a state appellate court rejected a claim to second-parent adoption. *See* Polikoff, *supra* note 57, at 732–33 (discussing *In re* G.P.A., No. 99-JV-440 (D. Colo. Nov. 10, 1999)).

151 Telephone Interview with Kate Kendell, *supra* note 59.

152 Telephone Interview with Shannon Minter, *supra* note 59; Telephone Interview with Deborah Wald, Attorney, Wald Law Grp. (June 29, 2014) (on file with the Harvard Law School Library).

153 CAL. FAM. CODE § 7650(a) (West 2013).

154 Telephone Interview with Shannon Minter, *supra* note 59.

155 Telephone Interview with Deborah Wald, *supra* note 152.

156 *Id.*

posed order that relied on *Johnson* and *Buzzanca* to support the UPA claim.[157]

In May of 1999, NCLR founder Donna Hitchens, by then a San Francisco Superior Court judge, granted the judgment of parentage — the first of its kind.[158] Signing the order, Judge Hitchens recognized both women as mothers under the UPA:

> [The gestational mother] is a legal parent because she is the birth mother. In addition, she consented to and intended to give birth and raise the child with [the genetic mother]. . . . [The genetic mother] is also a legal parent because of her genetic link to the child, her intention to create this child and to raise the child with [the gestational mother], and her consent to the medical procedures which made it possible.[159]

The reasoning pressed by Wald and accepted by Judge Hitchens leveraged each woman's gestational or genetic connection but also pushed intentional parenthood in a way that could extend to nonbiological mothers. And it grafted the situation onto the logic of section 7613, noting that the genetic mother "consented to the medical procedures."[160] The women were the legal mothers not only because they had a gestational or genetic connection to the child, but also because they intended to have a child and to raise that child together.

After that, LGBT advocates pursued UPA arguments in the more common scenario — on behalf of nonbiological mothers who consented to their unmarried partners' insemination.[161] Advocates pressed this position not only in uncontested UPA actions, but also in settings in which state actors pushed back. They achieved an important victory at the California Board of Equalization, where NCLR represented Helmi Hisserich after she claimed head-of-household filing status on her personal income tax return.[162] The specific issue involved whether Hisserich could identify as her dependent the child she was raising with her registered domestic partner, Tori Patterson; Patterson had conceived the child through donor insemination.[163] NCLR's Shannon

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157 Statement of Decision, *In re* [Genetic Mother and Gestational Mother], No. [redacted] (S.F. Super. Ct. May 25, 1999), *reprinted in* Deborah Wald, Establishing Lesbian Parentage Under the Uniform Parentage Act, Materials For: Advising the Client Who Wants to Have a Child, Lavender Law, Vol. II (Oct. 22–24, 1999) (on file with the Harvard Law School Library).

158 *Id.*; *see also* Telephone Interview with Donna Hitchens, *supra* note 75.

159 Statement of Decision, *supra* note 157, at 6.

160 *See id.* at 4.

161 Telephone Interview with Deborah Wald, *supra* note 152. Wald filed the first of such actions in 1999. *Id.* Wald shared sample pleadings with family law attorneys from across the country at the National LGBT Bar Association's 1999 Lavender Law conference. *See* Memorandum of Points & Authorities in Support of Petition to Establish Parental Relationship (Draft), *in* Wald, *supra* note 157.

162 *See In re* Hisserich, No. 99A-0341, 2000 WL 1880484 (Cal. St. Bd. Equalization Nov. 1, 2000).

163 *Id.* at *1.

Minter argued that Hisserich, the nonbiological parent, was a parent based on the "doctrine of intentional parenthood" embraced in *Johnson* and *Buzzanca*.[164]

In its 2000 decision, the Board of Equalization accepted this position. In doing so, it first noted that Hisserich and Patterson were "unable to marry under California law," but were "registered as domestic partners with the city, county, and state."[165] The Board then focused on the parental intent and conduct seen in the couple's family formation:

> [T]hey maintained a committed relationship for a substantial period of time prior to the decision to have a child; they decided to have a child together with the specific *intent* to rear the child together; they voluntarily and knowingly consented to the artificial insemination of Ms. Patterson with a licensed California sperm bank under the direction of a licensed California physician; appellant further exhibited her *intent* to be Madeline's parent by initiating adoption proceedings following Madeline's birth; and they lived together, *conducted* themselves, and *held themselves out* to the community as a family following the birth of Madeline.[166]

The relationship between Hisserich and Patterson, while of no independent legal force with regard to their child, provided evidence of their intent to co-parent. In other words, their unmarried relationship and their joint decision to have and raise a child within that relationship brought them within the intent-based principles articulated in *Johnson* and *Buzzanca*, which had involved married couples, and section 7613, which applied to husbands and wives.

A vigorous dissent focused on the importance of "either a blood relationship or a specifically defined legal relationship"[167] and impugned the majority for "promot[ing] a public policy that discourages marriage and legal adoption."[168] For the dissenters, recognition of parentage based on marriage-like conduct outside of marriage threatened the centrality of marriage.

2. Functional Parenthood and Nonmarital, Nonbiological Parents Under the UPA. — While section 7613, the alternative insemination statute, attached rights to *married*, nonbiological parents based on intent to parent, a different UPA provision began to attach parental rights to *unmarried*, nonbiological parents based on parental conduct.[169] The UPA's "holding out" provision, section 7611(d), was designed for unmarried, biological fathers. It provided that one is a pre-

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164 *Id.* at *2.

165 *Id.* at *4.

166 *Id.* (emphases added).

167 *Id.* at *6 (dissenting opinion of Chairman Andal & Vice Chairman Parrish).

168 *Id.* at *8.

169 *See* CAL. FAM. CODE § 7611(d) (West 2014) (originally CAL. CIV. CODE § 7004(a)(4) (West 1993)).

sumed father if "he receives the child into his home and openly holds out the child as his *natural* child."[170] While the provision focused on unmarried fathers' parental conduct, it seemed — with the term "natural" — constrained by biology.[171]

A gender-neutral reading of section 7611(d) could help lesbian coparents only if the presumption could capture purely functional, rather than biological, parentage. On this point, a case from dependency court involving a heterosexual, unmarried, nonbiological father offered an important opportunity for LGBT advocates. In *In re Nicholas H.*,[172] Thomas — who at all times admitted that he had no biological connection to Nicholas — claimed to be Nicholas's father, over the objection of Kimberly — Nicholas's mother and Thomas's exgirlfriend.[173] In 2001, the California Court of Appeal rejected Thomas's conduct-based claim to parentage because "the presumption set forth in section 7611 is a presumption that a man is the natural, *biological* father of the child in question."[174] The case then rose to the California Supreme Court.[175]

Thomas's court-appointed lawyer, Frank Free, sought out U.C. Berkeley law professor Joan Hollinger for assistance.[176] Professor Hollinger connected Free with NCLR.[177] While the situation arose in the context of a different-sex relationship, Minter and Wald, acting on behalf of NCLR, stepped in and drafted the briefs on behalf of Thomas, the nonbiological father.[178] From behind the scenes, they pushed concepts at the California Supreme Court that would accrue to the benefit of same-sex parents.[179]

The lawyers stressed the family unit formed by Thomas, Kimberly, and Nicholas. Thomas "moved in" with the mother "before [she] gave

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170 *Id.* (emphasis added).

171 The Revised UPA promulgated by the Uniform Law Commission in 2000 removed the "holding out" provision. *See* UNIF. PARENTAGE ACT (UNIF. LAW COMM'N 2000). Through the work of NCLR attorneys Shannon Minter and Courtney Joslin and U.C. Berkeley professor Joan Hollinger, the 2002 version restored the "holding out" provision. Interview with Courtney Joslin, Professor of Law, U.C. Davis School of Law, in Minneapolis, Minn. (May 29, 2014) (on file with the Harvard Law School Library); *see* UNIF. PARENTAGE ACT § 204 cmt. (UNIF. LAW COMM'N 2002).

172 110 Cal. Rptr. 2d 126 (Ct. App. 2001).

173 *Id.* at 128.

174 *Id.* at 141 (emphasis added).

175 *See In re* Nicholas H., 46 P.3d 932 (Cal. 2002).

176 Telephone Interview with Joan Hollinger, *supra* note 113.

177 *Id.*

178 Telephone Interview with Shannon Minter, *supra* note 59; Telephone Interview with Deborah Wald, *supra* note 152. Hollinger submitted an amicus curiae brief in the case. *See* Brief of Amici Curiae Legal Services for Children & Joan Heifetz Hollinger, Individually & as Director of the Child Advocacy Clinic of the University of California, Berkeley School of Law in Support of the Minor, *Nicholas H.*, 46 P.3d 932 (No. S100490).

179 Telephone Interview with Deborah Wald, *supra* note 152.

birth to Nicholas," "gave [her] emotional and financial support through the rest of the pregnancy," and "[t]hrough most of the first four years of Nicholas's life, the three lived together as a nuclear family."[180] The marriage-like adult relationship and the family formation it evidenced helped to make visible the functional parent-child relationship. While "not biologically linked to the child," Thomas "nevertheless ha[d] been the child's father in every social and cultural sense and ha[d] demonstrated a commitment to continuing to raise the child."[181]

Minter and Wald emphasized the importance of conduct, even in the presence of biological relationships. In fact, they recast cases on unmarried fathers, including the Supreme Court's cases from the 1970s and 1980s, as functional, rather than biological, parentage cases. Biology, they explained, is generally only the basis for, not the realization of, parental rights for unmarried fathers: "[A] man who proves himself through genetic testing to be the biological father has no parental rights unless . . . he '. . . demonstrates a full commitment to his parental responsibilities.'"[182] The lawyers attempted to transform biology (for unmarried parents) from a necessary starting point to an increasingly immaterial feature.

In response, the California Supreme Court, in its 2002 *Nicholas H.* decision, accepted Thomas's claim to parentage under section 7611(d) and held that Thomas's acknowledgement that he was not the biological father did not automatically rebut the parentage presumption.[183] The court sought to validate the strong relationship Nicholas had formed with his nonbiological father and to provide a means of support in the absence of the biological father claiming rights or responsibilities.[184] Accordingly, the meaning of "natural" appeared contingent, capable of describing a functional, rather than biological, parent, especially in service of the privatization of support and the recognition of two legal parents.[185] This marked an important turn from the general understanding that had formed the basis of the UPA and guided years of litigation under the statute.[186]

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[180] Petitioner Thomas G.'s Opening Brief on the Merits at 2, *Nicholas H.*, 46 P.3d 932 (No. S100490) [hereinafter Thomas G.'s Opening Brief].

[181] Petition for Review of Decision of the Court of Appeal First Appellate District at 17, *Nicholas H.*, 46 P.3d 932 (No. S100490).

[182] Thomas G.'s Opening Brief, *supra* note 180, at 32 (quoting Adoption of Kelsey S., 823 P.2d 1216, 1236 (Cal. 1992)).

[183] 46 P.3d at 936.

[184] *See id.* at 937–38.

[185] *See* June Carbone, *From Partners to Parents Revisited: How Will Ideas of Partnership Influence the Emerging Definition of California Parenthood?*, 7 WHITTIER J. CHILD & FAM. ADVOC. 3, 8 (2007).

[186] For two earlier decisions recognizing nonbiological fathers under section 7611(d), see *Brian C. v. Ginger K.*, 92 Cal. Rptr. 2d 294 (Ct. App. 2000); and *Steven W. v. Matthew S.*, 39 Cal. Rptr. 2d 535 (Ct. App. 1995).

While LGBT advocates' uncontested UPA actions included both intent- and conduct-based arguments before *Nicholas H.*,[187] that decision provided substantial new support to advocates' section 7611(d) claims on behalf of lesbian co-parents.[188] Those claims were bolstered by two appellate rulings in non-LGBT scenarios that affirmed the presumption's gender-neutral application.[189]

In *In re Karen C.*,[190] a married couple gave their newborn baby, Karen, to Leticia, who then raised the child as her own.[191] The juvenile court had denied Leticia's claim that a legal mother-child relationship existed, reasoning that "the law does not provide that a woman who is neither a child's birth mother nor a child's genetic mother may be the child's mother."[192] But in 2002, the appellate court vacated that decision. Relying on the UPA's instruction that paternity statutes apply "[i]nsofar as practicable" to mother-child relationships,[193] the court held that "the decision reached in *Nicholas H.* applies with equal force to a woman, as a presumed mother."[194]

A year later, in *In re Salvador M.*,[195] the California Court of Appeal affirmed the principle that the "holding out" presumption can apply to a nonbiological mother. In that case, Monica had raised her much younger half-brother, Salvador, as her own child, after their mother's death.[196] Quoting *Nicholas H.*, the court explained that a "familial relationship . . . resulting from years of living together in a purported parent/child relationship[] is 'considerably more palpable than the biological relationship.'"[197] Not only did the *Karen C.* and *Salvador M.* courts find that the "holding out" presumption can apply to nonbiological mothers, but they did so outside the context of marriage-like relationships. In this way, even as courts routinely rea-

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187 *See* Memorandum of Points & Authorities in Support of Petition to Establish Parental Relationship, *In re* Bio Mom & Non-Bio Mom (Nov. 2000) (redacted version on file with the Harvard Law School Library) (relying on *Steven W.*, 39 Cal. Rptr. 2d 535, and *Brian C.*, 92 Cal. Rptr. 2d 294); *see also* Email from Emily Doskow to author (July 17, 2014, 9:42 AM) (on file with the Harvard Law School Library).

188 Another case, *In re Jesusa V.*, 118 Cal. Rptr. 2d 683 (Ct. App. 2002), *rev'd in part on other grounds*, 85 P.3d 2 (Cal. 2004), also provided support by favoring a stepfather, under section 7611(d), over the biological father.

189 *In re* Salvador M., 4 Cal. Rptr. 3d 705 (Ct. App. 2003); *In re* Karen C., 124 Cal. Rptr. 2d 677 (Ct. App. 2002). Section 7611(d) is now written in gender-neutral terms. *See* CAL. FAM. CODE § 7611(d) (West 2014) ("The presumed parent receives the child into his or her home and openly holds out the child as his or her natural child.").

190 124 Cal. Rptr. 2d 677.

191 *Id.* at 678.

192 *Id.*

193 *Id.* at 680 (alteration in original).

194 *Id.* at 677.

195 4 Cal. Rptr. 3d 705 (Ct. App. 2003).

196 *Id.* at 706.

197 *Id.* at 708 (quoting *In re* Nicholas H., 46 P.3d 932, 938 (Cal. 2002)).

soned in terms of marriage-like relationships, such relationships did not formally cabin the presumption's reach.

LGBT advocates leveraged *Nicholas H.*, *Karen C.*, and *Salvador M.* to secure parentage judgments on behalf of lesbian couples, but they were still navigating uncharted waters. The validity of same-sex couples' UPA judgments and the substantive arguments on which they were based would eventually be challenged in the appellate courts. First, though, LGBT advocates had to defend the second-parent adoption process.

3. Cementing Second-Parent Adoption. — Same-sex couples in California continued to obtain second-parent adoptions throughout the 1990s, even as DSS policy opposed the practice until 1999.[198] Even then, the legal status of second-parent adoption remained unclear, since under the state's adoption laws only stepparents had the explicit ability to adopt without termination of the custodial parent's rights. Accordingly, LGBT advocates were eventually forced to defend second-parent adoption in the appellate courts.

In *Sharon S. v. Superior Court*,[199] the legal mother, Sharon, sought to remove her consent from an adoption petition that she and her same-sex partner, Annette, had filed.[200] The couple had executed an earlier second-parent adoption for their first child, but separated while the adoption petition for their second child was pending.[201] Sharon's attorneys made arguments that bled outside the bounds of the specific adoption at issue, claiming that the second-parent adoption procedure itself was legally unauthorized. The 2001 decision of the California Court of Appeal accepting that argument[202] threatened not only the earlier adoption completed by Sharon and Annette, but also the hundreds of adoptions that had been granted throughout the state up to that point, including some to LGBT advocates themselves.[203]

Just as with the earlier parental rights disputes, the relationship between marriage and parenthood shaped the litigation. Those seeking to block lesbian and gay parental rights drew sharp marital status–based distinctions. Sharon's attorneys argued that a "primary difference between [stepparent adoption] and the instant case is marriage, which is prohibited for lesbian couples."[204] Opposition to second-parent adoption came not only from family law practitioners, but also

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198 *See* Cal. Dep't of Soc. Servs., All County Letter No. 99-100 (Nov. 15, 1999) (rescinding a previous categorical prohibition on recommending such adoptions).

199 73 P.3d 554 (Cal. 2003).

200 *Id.* at 558–59.

201 *Id.*

202 *See* Sharon S. v. Superior Court, 113 Cal. Rptr. 2d 107 (Ct. App. 2001).

203 *See* Telephone Interview with Deborah Wald, *supra* note 152.

204 Answer to Petition for Review at 22, *Sharon S.*, 73 P.3d 554 (No. S102671).

from social-conservative activists aligned against LGBT rights. A group of advocates defending Proposition 22, the 2001 California voter initiative that statutorily banned recognition of same-sex marriage,[205] submitted an amicus curiae brief. It argued that "two women may not legally marry in this state,"[206] but allowing second-parent adoption "would have the practical effect of treating Annette as a 'spouse.'"[207] Through this lens, second-parent adoption (unlawfully) eroded the line between marital and nonmarital parents.

In response, lawyers at the leading LGBT legal organizations, participating as amici curiae and assisting Annette's counsel,[208] embraced a robust model of nonmarital family formation, yet connected nonmarital families to marital families. "Second-parent adoptions," the advocates explained, "follow the same legal path" as stepparent adoptions.[209] Through this lens, same-sex couples merely sought a form of family recognition made available to married couples with nonbiological parents. Given that same-sex couples acted like married couples — indeed, Sharon and Annette "lived together in a committed domestic relationship for more than a decade"[210] — the nonrecognition of second-parent adoption seemed arbitrary. In fact, LGBT advocates argued that to refuse to extend stepparent adoption to unmarried couples "would raise serious constitutional questions" by discriminating against children based on their parents' marital status.[211]

Nonetheless, the analogy to stepparent adoption was complicated by the legislature's recent extension of that mechanism to registered domestic partners, most of whom were same-sex couples.[212] Social-

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[205] CAL. FAM. CODE § 308.5 (West 2004), *invalidated by In re* Marriage Cases, 183 P.3d 384 (Cal. 2008). While the Family Code already included a different-sex marriage requirement, the Proposition responded to developments around same-sex relationship recognition in Hawaii and Vermont. *See* Scott L. Cummings & Douglas NeJaime, *Lawyering for Marriage Equality*, 57 UCLA L. REV. 1235, 1260 (2010).

[206] Amicus Curiae Brief of Proposition 22 Legal Defense & Education Fund in Support of Sharon S. at 7, *Sharon S.*, 73 P.3d 554 (No. S102671) [hereinafter Prop 22 Brief].

[207] *Id.* at 8. As Professor Nancy Polikoff has shown, same-sex couples' adoption rights suffered setbacks across the country as the issue became entangled, for social conservatives, with partnership recognition. *See* Polikoff, *supra* note 57.

[208] Telephone Interview with Shannon Minter, *supra* note 59.

[209] Brief of *Amici Curiae* Children of Lesbians & Gays Everywhere, et al., in Support of Neither Party at 9, *Sharon S.*, 73 P.3d 554 (No. S102671) [hereinafter COLAGE Brief]. Children of Lesbians and Gays Everywhere (COLAGE) grew out of the 1990 conference of Gay and Lesbian Parents Coalition International (GLPCI). The ACLU, Lambda Legal, and NCLR joined the COLAGE brief as parties, and lawyers from those organizations were the attorneys of record.

[210] *Id.* at 4.

[211] *Id.* at 26 n.21.

[212] Assemb. B. 25, 2001–2002 Leg., Third Reading (Cal. 2001); Domestic Partnerships, ch. 893, 2001 Cal. Stat. 5634 §§ 5–8 (amending CAL. FAM. CODE §§ 9000, 9002, 9004, 9005 (West 2013)). Assembly Bill (AB) 25 built on the modest domestic partnership regime established in 1999. *See* Cummings & NeJaime, *supra* note 205, at 1258; *see also* Grace Ganz Blumberg, *The Regulariza-*

conservative advocates opposed both second-parent adoption and the extension of stepparent adoption to domestic partners.[213] For them, both violated Proposition 22 by treating same-sex couples like spouses, thus reducing the significance of marriage and creeping down the path to same-sex marriage.[214]

For their part, LGBT advocates defended both second-parent and stepparent adoption. To support the former, they appealed to robust notions of functional parenthood beyond marriage and domestic partnership. "There are many California children," they argued, "whose functional parents are neither legal spouses nor registered domestic partners. For example, a child may benefit greatly from adoption by a grandmother or aunt who is jointly raising a child with a birth parent who is disabled or terminally ill."[215] Even as second-parent adoption replicated stepparent adoption, it expanded the reach of functional parenthood beyond those in legally recognized, coupled relationships.

In its 2003 *Sharon S.* decision, the California Supreme Court approved the method of second-parent adoption.[216] Crucially, the legislature's extension of stepparent adoption to registered domestic partners supported, rather than undermined, the court's conclusion. In fact, the court explained, stepparent adoption for domestic partners "simply streamlines the adoption process for a subset of those who already were accessing second parent procedures."[217] In embracing second-parent adoption, the court, for the first time, accepted the idea that children could have two legal parents of the same sex.

Even with this important victory, the analogy to stepparent adoption would only do so much work for LGBT advocates. The stepparent family differs from the intentional family initiated by many same-sex couples using alternative insemination.[218] While stepparent adoptions generally recognize subsequent families formed by a legal parent and another adult, second-parent adoptions, as LGBT advo-

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tion of Nonmarital Cohabitation: Rights and Responsibilities in the American Welfare State, 76 NOTRE DAME L. REV. 1265, 1280 (2001).

213 *See* Prop 22 Brief, *supra* note 206, at 1–2.

214 Before passage of AB 25, opponents, pointing specifically to the parental recognition provided by the legislation, registered their disapproval of the "expan[sion of] benefits to domestic partners in such a way as to further blur the lines between those associations and marriage." Letter from Cal. Catholic Conference (June 28, 2001), *quoted in* Assemb. B. 25, 2000–2001 Leg., Third Reading (Cal. 2001). After enactment, the Prop 22 Legal Defense and Education Fund unsuccessfully challenged the law in court. *See* Knight v. Schwarzenegger, Nos. 03AS05284, 03AS07035, 2004 WL 2011407 (Cal. Super. Ct. Sept. 8, 2004).

215 COLAGE Brief, *supra* note 209, at 13.

216 Sharon S. v. Superior Court, 73 P.3d 554 (Cal. 2003).

217 *Id.* at 572.

218 *See* Nancy D. Polikoff, *A Mother Should Not Have to Adopt Her Own Child: Parentage Laws for Children of Lesbian Couples in the Twenty-First Century*, 5 STAN. J. C.R. & C.L. 201, 205–06 (2009).

cates noted in *Sharon S.*, were used to "strengthen families in which two adults have loved and cared for a child, *usually since birth*, and have both functioned in every way as parents."[219] Same-sex co-parents, quite reasonably, resented having to adopt their own children.[220] Accordingly, advocates would continue to pursue other routes, including through the UPA, to secure equal treatment of families formed by same-sex couples. Eventually, their arguments based on the UPA made their way to the California Supreme Court.

C. 2004–2005: Statewide Recognition of Intentional and Functional Parenthood Under the UPA for Same-Sex Couples

In 2004, three lesbian parenting cases — *K.M. v. E.G.*,[221] *Elisa B. v. Superior Court*,[222] and *Kristine H. v. Lisa R.*[223] — made their way simultaneously to the California Supreme Court. The cases, all of which arose out of relationship dissolution, posed related but distinct parentage issues: In *K.M.*, a genetic mother claimed parentage over the objection of her former partner, the gestational mother. In *Elisa B.*, a nonbiological mother denied her parental obligations after the county attempted to seek child support from her. And in *Kristine H.*, a biological mother challenged the validity of a pre-birth judgment naming her and her partner as legal parents of their child. While the court had not reviewed any of the lesbian co-parent cases in the 1990s, it was now set to confront the issue, though through the UPA rather than through equitable theories.

To the court, lawyers urging recognition of same-sex parents appealed to marriage and marriage-like adult relationships to frame same-sex parenting. Yet they did so to secure parental recognition without regard to biology, gender, sexual orientation, or marital (or domestic-partner) status.[224] The court handed down decisions in the cases on the same day in 2005, adopting intentional and functional principles of parenthood to recognize the rights of same-sex parents under the UPA.

1. "Co-Maternity." — K.M. provided her ova, which were fertilized with sperm from an anonymous donor, and the resulting embryos

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[219] COLAGE Brief, *supra* note 209, at 1 (emphasis added).

[220] *See* Telephone Interview with Deborah Wald, *supra* note 152.

[221] 117 P.3d 673 (Cal. 2005).

[222] 117 P.3d 660 (Cal. 2005).

[223] 117 P.3d 690 (Cal. 2005).

[224] By this time, same-sex marriage was at the center of legislation and litigation in California. In 2004, the state courts began considering the constitutionality of the statutory restriction on same-sex marriage. *See* Cummings & NeJaime, *supra* note 205, at 1281–83. In 2005, the legislature passed a marriage-equality bill, which Governor Arnold Schwarzenegger vetoed. *See id.* at 1290.

were implanted in her partner, E.G.[225] Upon dissolution of their relationship, E.G. argued that she intended to be the sole parent of the children, relying in part on an anonymous-donor form purporting to waive parental rights and signed by K.M. at the facility that handled the procedure.[226] K.M., however, claimed that she intended to co-parent the children and that in fact the women had been co-parenting the children since their birth.[227] Accordingly, K.M. made claims both to intent-based parentage (pursuant to case law and section 7613), and to conduct-based parentage (under section 7611(d)).[228]

Once again, the relationship between marriage and parenthood shaped each side's arguments. San Francisco family law attorney Jill Hersh, who had handled earlier lesbian co-parenting matters,[229] represented K.M. Hersh and her colleagues found support in *Johnson*, the 1993 gestational surrogacy decision, despite its rejection of dual motherhood. There, Hersh argued, "the intent of the genetic parents was *presumed* from the fact that they were a married couple living together in a committed relationship."[230] She cast committed married and unmarried couples as similarly situated: both represented "unitary famil[ies]" worthy of the law's protection.[231]

Inundating the courts with evidence of the couple's "ordinariness,"[232] Hersh emphasized K.M. and E.G.'s committed relationship to show parental intent.[233] She explained that the relationship was "marked by repeated acts of love and commitment to each other that included a 'marriage' ceremony after the children were born where

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[225] To protect the women's privacy, I follow the practice of the appellate courts and use only the women's initials.

[226] *K.M.*, 117 P.3d at 675–76.

[227] Appellant's Opening Brief at 66, K.M. v. E.G., 13 Cal. Rptr. 3d 136 (Ct. App. 2004) (No. A101754).

[228] Because K.M. had not made public her genetic connection to the children, her section 7611(d) claim relied on cases like *Nicholas H.* to claim parentage regardless of whether she held the children out as her biological children. *See id.* at 27–28.

[229] Telephone Interview with Jill Hersh, Attorney, Hersh FamilyLaw Practice (June 27, 2014) (on file with the Harvard Law School Library).

[230] Appellant's Opening Brief on the Merits at 44, *K.M.*, 117 P.3d 673 (No. S125643).

[231] *Id.* Even *Michael H. v. Gerald D.*, 491 U.S. 110 (1989), which made the rights of the married, nonbiological father superior to the rights of the unmarried, biological father, was used to support K.M., the unmarried, genetic mother:

> Under *Michael H.*, a unitary family formed by the relationship of two unmarried persons, like K.M. and E.G., deserves similar recognition and protection.
>
> Following *Michael H.* and *Johnson*, the intent of K.M. and E.G. to have a family together is implied by the nature of their long term relationship as domestic partners.

Appellant's Opening Brief on the Merits, *supra* note 230, at 44–45.

[232] Telephone Interview with Jill Hersh, *supra* note 229.

[233] *See* Appellant's Petition for Review at 8, *K.M.*, 117 P.3d 673 (No. S125643) ("K.M. and E.G. lived together in a committed lesbian relationship for a period of seven years . . . . For more than six of those years they were registered as domestic partners with the City and County of San Francisco.").

they exchanged rings, the celebration of their anniversaries, and [municipal] registration as domestic partners for six and a half years."[234]

In response, E.G.'s attorneys minimized the adult relationship to discredit the parent-child relationship. The women, they asserted, did not evidence the commitment of a married couple but instead "registered as domestic partners . . . to qualify K.M. for a gym membership."[235] Invoking the prospect of claims by other nonparents, a lawyer for E.G. warned that "endless confusion would ensue if . . . [a]ny step parent, partner, informal or otherwise, grandparent, other relative, or friend could assert being a full parent because of the relationship he or she developed with a child while living with the parent, taking care of the child, stepping in, aiding."[236]

Responding to this line of argument, Hersh implicitly recalled the 1990s cases, like *Nancy S.*, suggesting that "to have the specter raised of nannies, grandparents, and babysitters and other interested but unattached people . . . is like an argument from some other decade and some other time."[237] Returning to the adult relationship, Hersh explained that the "evidence creates a very overwhelming picture of a two-parent, two-child family who operated and functioned in every way familiar to us."[238] E.G. and her attorney, she argued, "minimized entirely [the couple's] relationship"[239] — "the intimacy and the deep love they shared for each other and their marriage"[240] — because to acknowledge that would undermine E.G.'s claim to sole parentage.

For Hersh and her colleagues, the purpose of emphasizing the adult relationship was not that legal parentage sprung from the relationship, but rather that the relationship evidenced intent to parent:

> [T]he parties were living together in a committed relationship that antedated the children's conception; the parties were registered as domestic partners with the City and County of San Francisco; the parties *intended* "to remain together as a couple" after the birth of the children; the parties *intended* "to provide together a stable and nurturing home for the children" . . . .[241]

In fact, Hersh urged a "legal standard" for determining parentage that relied on, among other things, "[t]he intent of the parties implied by

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[234] Appellant's Reply Brief at 11, K.M. v. E.G., 13 Cal. Rptr. 3d 136 (Ct. App. 2004) (No. A101754).

[235] Respondent's Answer Brief on the Merits at 3, *K.M.*, 117 P.3d 673 (No. S125643).

[236] Trial Transcript at 806, [K.M.] v. [E.G.], No. CIV020777 (Marin Cty. Super. Ct. Feb. 14, 2002).

[237] *Id.* at 808–09.

[238] *Id.* at 811.

[239] *Id.*

[240] *Id.* at 812.

[241] Appellant's Petition for Review, *supra* note 233, at 19–20 (emphasis added).

the type of relationship they have to each other."[242] Indeed, she argued: "If these same facts arose between a husband and wife during a divorce proceeding in which both parties were the genetic and gestational parents of these children, there would not be any valid dispute over parentage."[243] On this view, K.M. and E.G. were both the legal parents, as evidenced by their marriage-like relationship. Even as marriage provided a way to understand parental intent and conduct, marital status furnished an artificial and arbitrary line through which to draw parentage. Marital and nonmarital families were essentially similarly situated with respect to principles of intent and function.

The lawyers also argued that women and men, and same-sex and different-sex couples, were similarly situated regarding intentional and functional parenthood. While the court in *Johnson* had expressed resistance to notions of dual motherhood, K.M.'s attorneys supported dual motherhood with constitutional arguments rooted in equality: "Because the only distinction between K.M. and similarly situated males (in whose favor the ['holding out'] presumption has been applied) is her gender, she has been denied equal protection based upon an impermissible classification."[244] Supporting K.M. as amicus curiae, NCLR attorneys Minter and Courtney Joslin argued that "[f]ailure to apply [intent- and conduct-based parentage] equally would . . . discriminate against parents on the basis of their gender and sexual orientation, in violation of the equal protection guarantees in the state and federal Constitutions."[245] Claims to intentional and functional parentage under the UPA constituted claims to equality. The advocates urged the court to apply antidiscrimination principles to family law, in order to provide equal recognition and support to families formed by same-sex couples.

In 2005, the California Supreme Court ruled in K.M.'s favor, and in doing so both distinguished its decision in *Johnson* and relied on that decision for support.[246] While the marriage in *Johnson* was crucial, its importance resided in the way that it pointed toward intent. Here, too, the couple "intended to produce a child that would be raised in their own home."[247] For support, the court emphasized that it was dealing with "a lesbian couple who registered as domestic partners."[248] Their registration had no explicit relationship to parental rights, but it

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[242] Appellant's Reply Brief, *supra* note 234, at 4.

[243] *Id.* at 11.

[244] Appellant's Opening Brief, *supra* note 227, at 30.

[245] Letter of Amici Curiae in Support of Petition for Review at 6, *K.M.*, 117 P.3d 673 (No. S125643).

[246] *See K.M.*, 117 P.3d 673, *passim* (discussing *Johnson* throughout).

[247] *Id.* at 679.

[248] *Id.* at 678 n.3.

provided evidence of a family unit with intentional parent-child relationships.[249] The court even pointed to the couple's private marital commitment — "E.G. asked K.M. to marry her, and on Christmas Day, the couple exchanged rings"[250] — despite the fact that their relationship could not qualify for legal marital status.

Nonetheless, the court did not definitively settle the question of intent. Because each woman could claim parentage under the UPA based on birth or genetics and because K.M. did "not claim to be the twins' mother *instead of* E.G., but *in addition to* E.G.," the court did not, as it had in *Johnson*, need to use intent to break a tie.[251]

LGBT advocates had worried about the significance of biology in the case, fearing that an undue focus on K.M.'s genetic claim to parentage would run against the parental status of nonbiological lesbian co-parents, including in the other cases before the court.[252] They hoped that, just as Wald's initial "co-maternity" UPA petition in 1999 built the foundation for application of intentional and functional parenthood to nonbiological co-parents, a focus on intent and conduct in *K.M.* could support recognition of the nonbiological co-parents in *Elisa B.* and *Kristine H.*[253] Ultimately, even though the *K.M.* court placed great weight on gestation and genetics, it announced a result that, contrary to *Johnson*, allowed a child conceived through ART to have two "natural" mothers pursuant to the UPA — an important precedent for other same-sex parenting cases.[254]

2. "Holding Out." — Legal parentage for the nonbiological mother in *Elisa B.* could not rest on birth or genetics and thus would have to be credited under a theory — either intent-based parentage under case law and section 7613 or conduct-based parentage under section 7611(d) — that the *K.M.* decision left unresolved. Unlike the conventional posture in the 1990s, where nonbiological mothers sought parental rights, in *Elisa B.*, the nonbiological mother *sought to avoid* parental obligations to the children she had been raising with her partner, Emily. In a sign of how legal treatment of same-sex parenting had shifted even as the government maintained its commitment to privatizing support, the county had attempted to collect support from the

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[249] *See id.* at 680.

[250] *Id.* at 676.

[251] *Id.* at 681. In fact, as the dissent pointed out, the court cast aside the trial court's determination that K.M. did not intend to be a parent and that E.G. intended to be the sole parent. *Id.* at 686 (Werdegar, J., dissenting).

[252] *See* Telephone Interview with Shannon Minter, *supra* note 59. While K.M. had made a claim under section 7611(d) that did not turn on her biological connection to the children, the court did not reach that argument.

[253] *See id.*

[254] *K.M.*, 117 P.3d at 681.

nonbiological mother when, after dissolution of the relationship, the biological mother sought government aid.[255]

As it had in earlier conflicts, same-sex couples' exclusion from marriage provided a way to argue against the parental recognition of nonbiological lesbian mothers. Seeking to avoid parental responsibilities, Elisa and her lawyers claimed that finding her to be a legal parent would "legitimize, as spouses, a same-sex relationship which is illegitimate as a form of marriage."[256] For support, they cited the 1990s lesbian co-parent cases and invoked the familiar slippery slope, arguing: "If Elisa is determined to be a 'parent' or otherwise financially responsible for children who are not biologically related or adopted, then it will open a floodgate of litigation on all types of . . . caretakers [and] cohabitators . . . ."[257] Their argument was supported by the social-conservative organization Liberty Counsel, which filed an amicus curiae brief on behalf of a biological mother whom it was representing against her former partner in the lower courts.[258] Liberty Counsel, which was simultaneously challenging the domestic partnership regime as a violation of the voter initiative banning same-sex marriage,[259] urged the court to root parentage exclusively in the formal markers of marriage, biology, and adoption.[260]

In response, NCLR attorneys, who represented Emily — the biological mother asserting that her former partner was also a legal parent — focused on the marriage-like, adult relationship as a way to understand the formation of the parent-child relationship. "Elisa and Emily," they explained, "were in a committed relationship for more than six years[,] . . . had a commitment ceremony, exchanged rings, . . . pooled their finances[, and] . . . decided to have children together."[261] NCLR's separate amicus curiae brief with Lambda Legal, filed across all three cases, drew attention to the families deliberately formed by the same-sex couples in each case. Each "couple[] maintained a committed, cohabiting relationship of at least six years. Each couple planned together for pregnancy . . . . [A]ll three were financially interdependent. Each bought their home together. All three presented

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[255] *See* Elisa B. v. Superior Court, 117 P.3d 660, 662–64 (Cal. 2005).

[256] Consolidated Answer Brief on the Merits at 39, *Elisa B.*, 117 P.3d 660 (No. S125912).

[257] *Id.* at 48.

[258] *See* Amicus Curiae Brief of Kristina Sica in Support of Appellant at 1–2, 13–16, Kristine H. v. Lisa R., 117 P.3d 690 (Cal. 2005) (No. S126945).

[259] *See* Campaign for Cal. Families v. Schwarzenegger, No. C048303, 2006 WL 205118 (Cal. Ct. App. Jan. 27, 2006). The California courts upheld the domestic partnership law. Knight v. Superior Court, 26 Cal. Rptr. 3d 687, 689–90 (Ct. App. 2005); Knight v. Schwarzenegger, Nos. 03AS05284, 03AS07035, 2004 WL 2011407, at *1 (Cal. Super. Ct. Sept. 8, 2004).

[260] *See* Amicus Curiae Brief of Kristina Sica in Support of Appellant, *supra* note 258, at 7–12.

[261] Opening Brief of Real Party in Interest Emily B. at 7, *Elisa B.*, 117 P.3d 660 (No. S125912) (internal citations omitted).

themselves publicly as intact families during the time the couples lived together."[262] The family units formed by the same-sex couples provided evidence of their intent to co-parent and demonstrated parental conduct. All three could come within a reading of section 7613 that did not draw distinctions based on gender, sexual orientation, or marital status, and a reading of section 7611(d) that did not draw distinctions based on gender, sexual orientation, or biology.[263]

Again, NCLR's Minter and Joslin used constitutional equality principles to support their position. They claimed that refusing to find Elisa to be a legal parent "is inconsistent with the UPA's goal of providing equality for nonmarital children and with the equal protection guarantees of the California and federal constitutions."[264] The various precedents based on intent and conduct in the heterosexual context provided the building blocks for this equality-based argument:

> [U]nder any form of equal protection analysis, . . . [i]t is patently irrational to recognize as legal parents: (1) a wife who consents to the insemination of a gestational surrogate by her husband, as in *Johnson*; (2) a wife and a husband who consent to the insemination of a gestational surrogate using a donated egg and donated sperm, as in *Buzzanca*; (3) a man who holds himself out as a child's father, but is neither married to the child's mother nor biologically related to the child, as in *Nicholas H.*; and (4) a woman who holds herself out as a child's mother, but is neither married to the child's father nor biologically related to the child, as in *Karen C.*, but to deny legal parentage to a lesbian who consented to her partner's artificial insemination with the *intention* of parenting the resulting children and who subsequently assumed parental responsibility for the children and *held herself out* as their parent to the world.[265]

On this account, the key family law cases in California, while decided under the UPA, formed a line of evolving constitutional principles. Their recognition of intentional and functional parentage regardless of marital status, biology, or gender should, on a reading consistent with sexual-orientation equality, apply to same-sex-couple-headed families.

Ultimately, in a decision issued alongside *K.M.*, the California Supreme Court held Elisa to be a legal parent under section 7611(d),

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[262] Brief of *Amici Curiae* Children of Lesbians & Gays Everywhere, et al., in Support of Lisa Ann R., Real Party in Interest at 8–9, *Kristine H.*, 117 P.3d 690 (No. S126945).

[263] *See id.* at 3–4. Despite *Nicholas H.*, a case decided in the dependency context, biology proved a sticking point. Lawyers representing the parties seeking to preclude rights and obligations for the nonbiological mothers sought to use the unmarried fathers cases — and the UPA's response to those cases — in their favor. *See* Consolidated Answer Brief on the Merits, *supra* note 256, at 36 ("[N]atural . . . means biological."). In response, the LGBT rights lawyers argued: "[T]he term 'natural parent' in the UPA simply means legal parent, regardless of that person's biological connection to the child." Opening Brief of Real Party in Interest Emily B., *supra* note 261, at 27.

[264] Opening Brief of Real Party in Interest Emily B., *supra* note 261, at 14.

[265] *Id.* at 38 (emphasis added).

finding that Elisa held the children out as her own.[266] The marriage-like adult relationship, to which the court referred at length, offered a way to conceptualize the family unit — even though the couple was unmarried.[267] Moreover, while the court did not formally decide the case on the basis of section 7613, it credited the analogy; Elisa was like "a husband who consented to the artificial insemination of his wife using an anonymous sperm donor."[268] Furthermore, the court cast aside the earlier lesbian co-parent cases, explaining that *Nancy S.*, *Curiale*, and *West* "did not have the benefit of [the *Nicholas H.* line of] authority and did not consider the applicability of [the UPA's 'holding out' presumption]."[269] The claims to parental rights rejected in the 1990s now prevailed in a different doctrinal form. Quoting *Salvador M.*, the court explained that "[t]he paternity presumptions are driven, not by biological paternity, but by the state's interest in the welfare of the child and the integrity of the family."[270] Parental conduct, rather than biology, was paramount.[271]

In the third lesbian parenting decision handed down that day, *Kristine H.*, the court ruled that the biological mother was estopped from contesting the stipulated judgment of joint legal parentage.[272] Accordingly, it left intact the parentage of the nonbiological co-parent. Ultimately, with its trio of decisions, the California Supreme Court embraced intentional and functional parenthood as it recognized unmarried same-sex parents.

* * *

This Part's case study documented the elaboration of an intentional and functional model of parenthood that straddled the line between marital and nonmarital families. While the recognition of unmarried fathers that began in the late 1960s opened space for LGBT advocates to pursue rights for unmarried parents, biology constituted a decisive distinction between the paradigmatic unmarried father and many

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[266] *See Elisa B.*, 117 P.3d at 670.

[267] *See id.* at 663 ("They introduced each other to friends as their 'partner,' exchanged rings, opened a joint bank account, and believed they were in a committed relationship. Elisa and Emily discussed having children and decided that they both wished to give birth. Because Elisa earned more than twice as much money as Emily, they decided that Emily 'would be the stay-at-home mother' and Elisa 'would be the primary breadwinner for the family.' At a sperm bank, they chose a donor they both would use so the children would 'be biological brothers and sisters.'").

[268] *Id.* at 670.

[269] *Id.* at 672.

[270] *Id.* at 668 (quoting *In re* Salvador M., 4 Cal. Rptr. 3d 705, 708 (Ct. App. 2003)).

[271] The focus on function over biology allowed for the privatization of support within a two-parent family. *See* Melissa Murray, *Family Law's Doctrines*, 163 U. PA. L. REV. 1985, 2017 (2015).

[272] Kristine H. v. Lisa R., 117 P.3d 690, 696 (Cal. 2005).

same-sex co-parents. Marriage, however, offered potential for the vindication of nonbiological parenthood. As the state came to grips with families formed through ART and stepparent families, the law increasingly recognized married parents who intended to parent or functioned as parents, even without a biological connection to their children.

To leverage the recognition of both unmarried, biological fathers and married, nonbiological parents, beginning in the 1980s LGBT advocates relied on analogies to marital family formation and parenting. They argued that if same-sex couples acted like married couples — by deliberately forming families through ART and developing nonbiological parent-child relationships — then they deserved parental recognition, even if outside of marriage, on the same terms. Crucially, the analogy to marriage was made to advance more inclusive parentage principles.[273] The new model of intentional and functional parenthood forged by LGBT advocates had the capacity to render formal markers such as biology, gender, sexual orientation, and even marital status less salient to parentage. Moreover, while strategically shaped with reference to marriage-like, adult relationships, the parentage doctrine that emerged did not expressly require any such relationship.[274]

III. MARRIAGE (EQUALITY) AND PARENTHOOD

The case study in Part II traces how earlier LGBT family law advocacy contributed to the development of new and expansive parentage principles outside the formal space of marriage. This Part explores how those principles relate to marriage equality. Digging deeper into the conceptual moves bound up in the acceptance of same-sex couples' claims to marriage yields a fuller understanding of how marriage equality extends insights emerging from earlier LGBT family law work.[275]

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[273] Legitimate concerns can be raised about a doctrine that looks in part to the intimate relationship that the biological parent formed with the individual claiming parentage. Such a doctrine may threaten the parental rights of women; for example, former boyfriends may assert claims to parental status, and may do so merely to harass the mother. *Cf.* Carbone, *supra* note 185, at 6 (identifying open questions regarding the extent to which a mother's partners would be presumed to have paternity given recent California cases).

[274] *See, e.g.*, *Salvador M.*, 4 Cal. Rptr. 3d 705; *In re* Karen C., 124 Cal. Rptr. 2d 677 (Ct. App. 2002); *In re* Kiana A., 113 Cal. Rptr. 2d 669 (Ct. App. 2001).

[275] Other scholars have considered how same-sex marriage may reshape gender in the family, in ways that are related to but distinct from the arguments presented here. *See, e.g.*, Mary Anne Case, Commentary, *Couples and Coupling in the Public Sphere: A Comment on the Legal History of Litigating for Lesbian and Gay Rights*, 79 VA. L. REV. 1643, 1665–66 (1993); Barbara J. Cox, *Marriage Equality Is Both Feminist and Progressive*, 17 RICH. J.L. & PUB. INT. 707, 715–16 (2014); Nan D. Hunter, *Introduction: The Future Impact of Same-Sex Marriage: More Questions than Answers*, 100 GEO. L.J. 1855, 1864–65 (2012); Nan D. Hunter, *Marriage, Law, and Gender: A Feminist Inquiry*, 1 LAW & SEXUALITY 9, 17 (1991); Suzanne A. Kim, *Skeptical Marriage Equal-*

The marriage claim made explicit an often-overlooked argument common in advocacy on behalf of unmarried parents — that marriage-like adult relationships provide a way to understand and identify parent-child relationships. Of course, this is a fairly conventional vision that derives parentage from adults' intimate coupled relationships. Yet by stressing same-sex couples' assimilation to some marital and parental norms, the marriage-equality claim continued to unsettle others. The relevant basis for comparison — how exactly same-sex couples are like married different-sex couples — has implications for our understanding of a family law regime that includes both same-sex and different-sex couples. More specifically, marriage equality pushes against biological procreation and gender differentiation and instead centers on intentional and functional parenthood. Accordingly, contrary to the claims of some marriage critics and family law and sexuality scholars, this account suggests more continuity between earlier nonmarital LGBT work — of the kind documented in Part II — and more recent marriage-centered work. Through this lens, marriage equality may facilitate, rather than disrupt, the new model of parenthood built in earlier nonmarital work.

A. How Marriage Matters

Prominent family law and sexuality scholars have articulated powerful critiques of same-sex marriage, with specific attention to child-centered justifications. These scholars resist same-sex marriage as a positive development from a family law, rather than a civil rights, perspective.[276] On this view, bestowing rights and recognition based on marriage compels same-sex couples to conform to conventional norms of the heterosexual marital family and accepts marriage as the primary location for family formation and recognition.[277] More specifically, understanding marriage as a solution to same-sex couples' lack of family recognition and parent-child protections validates the notion that rights should depend on adult relationship recognition rather than track actual dependency relationships formed in a range of family set-

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ity, 34 HARV. J.L. & GENDER 37, 70–71 (2011); Deborah A. Widiss, *Changing the Marriage Equation*, 89 WASH. U. L. REV. 721, 771–92 (2012); William N. Eskridge, Jr., *A Social Constructionist Critique of Posner's* Sex and Reason*: Steps Toward a Gaylegal Agenda*, 102 YALE L.J. 333, 356 (1992) (book review).

[276] *See, e.g.*, POLIKOFF, *supra* note 75, at 84 (distinguishing family law objectives from "equal civil rights for gay men and lesbians").

[277] *See, e.g.*, Katherine Franke, *Dignifying Rights: A Comment on Jeremy Waldron's* Dignity, Rights, and Responsibilities, 43 ARIZ. ST. L.J. 1177, 1197 (2011) (book review) ("I am concerned that an opportunity has been lost in the same-sex marriage cases to expand the social and legal ideal of family beyond a fairly traditional model.").

tings.[278] Accordingly, same-sex marriage affirms the privileged position of marriage and uses form, rather than function, to allocate parental rights.[279] Through this lens, marriage equality accepts, rather than challenges, dominant conceptions of the family, and thereby runs against a family-pluralism agenda that values unconventional and nonmarital families.[280]

These scholars challenge not only the substantive family law arguments for same-sex marriage, but also the rhetorical framing on family-based terms. The marriage claim, Professor Melissa Murray argues, relies on "contrasting [same-sex couples'] conformity with marriage's norms of respectability and discipline with the deviance of those who could marry and do not."[281] Putting it more strongly, Professor Katherine Franke asserts that some same-sex marriage arguments portray "the non-married parent . . . as a site of pathology, stigma, and injury to children."[282] On this account, as Murray explains, "the marriage equality movement[] . . . implicitly affirms the inherent worthiness of marriage relative to the alternative (nonmarriage) and the goal of locating reproduction in marriage."[283]

This scholarly position often includes a historical component, embracing earlier LGBT family law work on behalf of *unmarried* same-sex parents and contrasting that work with more recent marriage-centered efforts. Through this lens, same-sex marriage advocacy turned its back on the progressive family-pluralism agenda that historically characterized the LGBT movement.[284] According to Professor Nancy Polikoff:

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[278] *See* Rosenbury, *supra* note 12, at 198 ("[A]cknowledgment that state constructions and recognition of marriage privilege some family forms over others has caused some family law scholars to question whether advocating for same-sex marriage is wise . . . ."); *see also* Nancy D. Polikoff, *Ending Marriage as We Know It*, 32 HOFSTRA L. REV. 201, 203 (2003) (arguing that linking family-based rights and benefits to marriage "is not optimal family policy").

[279] *See* Nancy D. Polikoff, *Law that Values All Families: Beyond (Straight and Gay) Marriage*, 22 J. AM. ACAD. MATRIM. LAW. 85, 87 (2009).

[280] *See, e.g.*, Franke, *supra* note 277, at 1183; Melissa Murray, *What's So New About the New Illegitimacy?*, 20 AM. U. J. GENDER SOC. POL'Y & L. 387, 419, 432 (2012); Dean Spade, *Under the Cover of Gay Rights*, 37 N.Y.U. REV. L. & SOC. CHANGE 79, 84 (2013); Dean Spade & Craig Willse, *I Still Think Marriage Is the Wrong Goal*, *in* AGAINST EQUALITY: QUEER CRITIQUES OF GAY MARRIAGE 19, 20 (Ryan Conrad ed., 2010).

[281] Murray, *supra* note 280, at 423.

[282] Katherine M. Franke, *The Politics of Same-Sex Marriage Politics*, 15 COLUM. J. GENDER & L. 236, 242 (2006).

[283] Murray, *supra* note 280, at 419.

[284] *See* Kaaryn Gustafson, *Breaking Vows: Marriage Promotion, the New Patriarchy, and the Retreat from Egalitarianism*, 5 STAN. J. C.R. & C.L. 269, 300–01 (2009); Nancy D. Polikoff, *For the Sake of All Children: Opponents and Supporters of Same-Sex Marriage Both Miss the Mark*, 8 N.Y.C. L. REV. 573, 590 (2005). Pluralistic family law is associated with the use of function, rather than form, to recognize family relationships — thus valuing the "families we choose." KATH WESTON, FAMILIES WE CHOOSE 107 (1991).

> While advocates for lesbian and gay parents once saw themselves as part of a larger movement to promote respect, nondiscrimination, and recognition of diverse family forms, some now appear to embrace a privileged position for marriage. They thus abandon a longstanding commitment to defining and evaluating families based on function rather than form, distancing themselves from single-parent and divorced families, extended families, and other stigmatized childrearing units.[285]

This historical claim draws a sharp contrast between work that accepts and work that rejects marriage as a model of family formation and recognition. According to Professor John D'Emilio, "[i]n the 1980's and early 1990's, imaginative queer activists invented such things as 'domestic partnership' and 'second-parent adoption'" — nonmarital innovations — "as ways of recognizing the plethora of family arrangements that exist throughout the United States."[286] But more recently, they abandoned that agenda in the name of marriage.[287] As Professor Kaaryn Gustafson describes it, rather than continue to pursue nonmarital avenues, the movement "focused on marriage . . . , reinforcing rather than re-envisioning notions of family."[288] In this way, a historical perspective is used to support a broader normative position oriented against marriage.

The case study in Part II sheds new light on some of these historical and normative claims, showing that the scholarly critique of marriage often overstates the marginalization of marriage in the past and thereby misapprehends some of marriage's contemporary implications.[289] As the case study reveals, LGBT advocates' acceptance of marriage as a model of family formation and their corresponding attempt to locate same-sex couples with children in close proximity to marital families are not new. Historically, marital norms made legible same-sex couples' nonmarital parent-child relationships.

The focus on marriage-like adult relationships to expand the scope of parental recognition is not only familiar from an LGBT perspective. It is also consistent with other progressive, nonmarital family law reforms, specifically the recognition of unmarried, biological fathers and nonmarital children. Some scholars contrast those developments, viewed as positive family law shifts, with contemporary LGBT advo-

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[285] Polikoff, *supra* note 284, at 590; *see also* Murray, *supra* note 280, at 433 (arguing that LGBT advocates historically fought for the recognition of "*chosen* families" by "develop[ing] alternative family forms and structures").

[286] John D'Emilio, Essay, *The Marriage Fight Is Setting Us Back*, GAY & LESBIAN REV., Nov.–Dec. 2006, at 10, 11.

[287] *See id.* at 10.

[288] Gustafson, *supra* note 284, at 300.

[289] The historical premises have been subject to minimal scrutiny. For work challenging these premises, see NeJaime, *supra* note 6, at 114–49, 160–63; and William N. Eskridge, Jr., *A History of Same-Sex Marriage*, 79 VA. L. REV. 1419, 1489 (1993).

cacy, viewed, to some extent, as a regressive turn.[290] The cases on unmarried fathers, however, were not only constrained by the emphasis on biology, but were also disciplined by the marriage-like relationships of the biological parents. As Professor Janet Dolgin has argued:

> [T]he cases make sense only if the apparently sufficient requirement for effecting legal paternity — that a father effect a social relationship with his biological child — is read as code for the requirement that he effect that relationship *within the context of family*, most easily identified in cases in which the father has established a marriage or marriage-like relationship, with the child's mother.[291]

Indeed, Murray's analysis of those cases demonstrates that the father's relationship with the child's mother served as a way to understand and ultimately judge his relationship to the child.[292] If the father, in Murray's words, "behaved like a *husband*," he exhibited the conduct demanded by the U.S. Supreme Court to accord parental rights.[293] Moreover, as Murray has shown, similar tendencies emerge in the nonmarital-birth cases, where the Court validated the claims of children raised in the context of marriage-like, biological families.[294]

In the cases on unmarried fathers and nonmarital children, the adult, horizontal relationship — and its proximity to the marital model — supplied a way for the Court to identify parent-child relationships worthy of protection. When viewed in conjunction with earlier LGBT efforts, it becomes clear that even the expansion of rights to unmarried parents and the erosion of distinctions based on marital status have been, across time and contexts, shaped by notions of the marital family and a focus on intimate adult relationships.[295]

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[290] *See* Grossman, *supra* note 60, at 673 (contrasting "the entanglement of legitimacy and parentage for children of lesbian co-parents" with the "law of unwed fatherhood," which "reflect[s] sound reasoning about the best way to serve the needs of children and the adults who raise them"); Deborah A. Widiss, *Non-Marital Families and (or After?) Marriage Equality*, 42 FLA. ST. U. L. REV. 547, 555 (2015) ("The language put forward by advocates, and ultimately adopted by the Court in *Windsor*, regarding non-marital families is deeply in tension with efforts made a generation ago to lessen the importance — both symbolic and substantive — of whether a child was born to a legal marriage.").

[291] Janet L. Dolgin, *Just a Gene: Judicial Assumptions About Parenthood*, 40 UCLA L. REV. 637, 650 (1993) (footnote omitted).

[292] *See* Murray, *supra* note 280, at 399–412; *accord* Appleton, *supra* note 44, at 359; Susan E. Dalton, *From Presumed Fathers to Lesbian Mothers: Sex Discrimination and the Legal Construction of Parenthood*, 9 MICH. J. GENDER & L. 261, 273 (2003).

[293] Murray, *supra* note 280, at 402; *see also* Alice Ristroph & Melissa Murray, *Disestablishing the Family*, 119 YALE L.J. 1236, 1253 (2010).

[294] *See* Murray, *supra* note 280, at 397; *cf.* Mayeri, *supra* note 35.

[295] *Cf.* June Carbone, *The Legal Definition of Parenthood: Uncertainty at the Core of Family Identity*, 65 LA. L. REV. 1295, 1338–39 (2005) (discussing the importance of a "committed relationship" between adults to the concept of parenthood by estoppel). For critiques of this trend as assimilationist in earlier lesbian co-parent cases, see Ruthann Robson, *Making Mothers: Lesbian Legal Theory & the Judicial Construction of Lesbian Mothers*, 22 WOMEN'S RTS. L. REP. 15, 32–

Part II's case study brings into view *why* the marriage-like adult relationship has mattered in these contexts: it indicated intentional and functional parent-child relationships. In earlier LGBT work, the adult relationship was deployed in service of parenthood concepts that could accommodate same-sex parents and legally recognize the relationships they either were forming or had formed with their children. Indeed, LGBT advocates even reframed the cases on unmarried fathers, which otherwise presented an obstacle to the recognition of *nonbiological*, unmarried parents, to focus on conduct over biology as the key to parentage.

In this sense, both assimilationist and anti-assimilationist impulses motivated work on behalf of unmarried same-sex parents. Advocates stressed unmarried same-sex parents' reflection of marital norms as a way to broaden the application of emerging forms of nonbiological marital parenting. Assimilation to *some* norms — particularly those emphasizing coupled commitment and interdependence — provided a vehicle for challenging *others* — namely biological, dual-gender parenting, both inside and outside of marriage. In this way, claims premised on sameness stressed comparisons that actually marginalized traditional markers of parentage.[296]

By disturbing a central historical premise of the critique of marriage equality, the case study also challenges some of its normative dimensions. Drawing a stark distinction between marriage and nonmarriage as both a historical and theoretical matter, scholarly critics at times both overestimate the progressive dimensions of nonmarital family recognition and neglect progressive family law possibilities offered by marriage equality.[297] They assume that the contemporary rhetoric of marital family formation buttresses a traditional family form.

While these scholars raise significant and plausible concerns, the case study points toward an alternative reading that suggests how marriage equality may continue, rather than cut against, developments in the family. In marriage-equality litigation, same-sex couples with children were the paradigmatic plaintiffs, cast as model partners and parents.[298] Even unmarried, their lives mapped onto the idealized fea-

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33 (2000); and Julie Shapiro, *A Lesbian-Centered Critique of Second-Parent Adoptions*, 14 BERKELEY WOMEN'S L.J. 17, 35 (1999).

[296] The model of parenthood this Article uncovers is expansive along some dimensions, but it nonetheless derives parentage in large part from intimate coupled adult relationships. For a broader paradigm shift focused on vertical, rather than horizontal, relationships, see generally MARTHA ALBERTSON FINEMAN, THE NEUTERED MOTHER, THE SEXUAL FAMILY AND OTHER TWENTIETH CENTURY TRAGEDIES (1995).

[297] *See, e.g.*, Franke, *supra* note 277, at 1197.

[298] *See* Murray, *supra* note 280, at 423 ("[T]hese same-sex couples are not only 'perfect plaintiffs,' they are also perfect parents." (footnote omitted)).

tures of marital families.[299] Yet these same-sex couples' families were premised on a model of parenthood that called into question traditional norms rooted in biological procreation and dual-gender parenting. By claiming similarity to different-sex married couples in marriage-equality efforts, LGBT advocates drew comparisons that contributed to reshaped notions of marriage and parenting. As an examination of marriage-equality jurisprudence reveals, same-sex couples' adherence to some norms enables the destabilization of others, ultimately in service of a more expansive vision of parenthood.

B. Through Marriage Equality

By explicating the stakes in same-sex marriage jurisprudence, we can observe the continuity between the model of parenthood elaborated in the earlier nonmarital work documented in Part II and the more recent reasoning about marriage equality. More specifically, we can see how marriage equality was partly enabled by — and in turn enables — intentional and functional concepts of parenthood forged in earlier *nonmarital* advocacy. As courts focused on same-sex couples with children to justify marriage equality, they appealed to — and validated — features that historically defined marginal — even stigmatized — family formation, and minimized traditional conceptions of parenting.

Over the many years of litigation leading up to *Obergefell*, child-centered arguments constituted the central justification for those defending same-sex marriage bans.[300] For opponents of same-sex marriage, marriage embodies "optimal childrearing," which occurs when a married mother and father raise their biological children.[301] Procreative sex and dual-gender childrearing are seen as essential components of marital parenting and points of distinction with same-sex couples.

LGBT advocates responded with child-centered arguments of their own.[302] Same-sex couples, they argued, are similarly situated to

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[299] *See* Melissa Murray, *Marriage as Punishment*, 112 COLUM. L. REV. 1, 59 (2012).

[300] *See generally* BALL, *supra* note 25, at 37–81.

[301] *See, e.g.*, Amici Curiae Brief of Robert P. George, Sherif Girgis, & Ryan T. Anderson in Support of Hollingsworth & Bipartisan Legal Advisory Group Addressing the Merits & Supporting Reversal at 20, Hollingsworth v. Perry, 133 S. Ct. 2652 (2013) (No. 12-144), and United States v. Windsor, 133 S. Ct. 2675 (2013) (No. 12-307). For a historical critique of arguments privileging biological parenting, see Courtney G. Joslin, *Marriage, Biology, and Federal Benefits*, 98 IOWA L. REV. 1467 (2013).

[302] *See, e.g.*, First Amended Complaint for Declaratory & Injunctive Relief at 4, Baskin v. Bogan, 12 F. Supp. 3d 1144 (S.D. Ind. 2014) (No. 1:14-cv-00355) ("[T]he State denies the child Plaintiffs and other children of same-sex couples equal access to dignity, legitimacy, protections, benefits, support, and security conferred on children of married parents under state and federal law."); *see also* BALL, *supra* note 25, at 111–28.

different-sex couples specifically with regard to parenting.[303] The commonality emerges not from biology or gender, but from functional and intentional relationships. Just like different-sex couples, same-sex couples have and raise children together.[304]

In considering same-sex couples' claims, courts faced a choice between competing models of parenthood — one prioritizing biological, dual-gender childrearing, and the other focusing on chosen, functional families. In accepting same-sex couples' claims, courts validated the latter model, and thereby centered a model of parenthood that includes same-sex-couple-headed families. Crucially, to the extent marriage is related to parenting, it is seen as premised not on procreation, biology, gender, or sexual orientation, but rather on the very model of parenthood elaborated by advocates to achieve parental recognition *outside of marriage*.[305]

Indeed, in making claims to marriage equality, LGBT advocates devoted significant attention to showing how same-sex couples constructed nonmarital families that resembled and functioned like the families formed by married different-sex couples.[306] The marital-status distinction between these families thus appeared arbitrary. Accordingly, the model of marital parenthood centered in marriage-equality decisions both accommodates same-sex parenting and appears largely indistinct from nonmarital (coupled) parenthood.

Given the focus on California in Part II, that state's shift to same-sex marriage provides a useful illustration. In 2008, years after the California Supreme Court validated same-sex parenting outside marriage, it struck down the state's statutory ban on same-sex marriage.[307] In doing so, the court minimized the once-salient difference between same-sex and different-sex couples — that "only a man and a woman can produce children biologically with one another."[308] Instead, the court focused on the similarity between same-sex and different-sex couples as parents: "[A] stable two-parent family relationship, supported by the state's official recognition and protection, is equally as important for the numerous children in California who are being raised by same-sex couples as for those children being raised by opposite-sex

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[303] *See, e.g.*, Complaint for Declaratory & Injunctive Relief at 42, Whitewood v. Wolf, 992 F. Supp. 2d 410 (M.D. Pa. 2014) (No. 1:13-cv-1861).

[304] *See, e.g.*, Memorandum in Support of Plaintiffs' Motion for Summary Judgment at 29, *Baskin*, 12 F. Supp. 3d 1144 (No. 1:14-cv-00355).

[305] *See* Perry v. Schwarzenegger, 704 F. Supp. 2d 921, 935 (N.D. Cal. 2010) ("[A]dopted children or children conceived using sperm or egg donors are just as likely to be well-adjusted as children raised by their biological parents.").

[306] *See* NeJaime, *supra* note 26, at 241.

[307] *In re* Marriage Cases, 183 P.3d 384 (Cal. 2008). The decision was overturned by voters' passage of Proposition 8.

[308] *Id.* at 430.

couples . . . ."[309] The court stressed the commonality between families headed by same-sex and different-sex couples and oriented these families toward marriage in the same way.

If same-sex couples are deemed similarly situated to different-sex couples for purposes of marital parenthood, the specific basis of similarity becomes important to understanding the meaning of marital parenthood generally. Crucially, they are similarly situated along axes that have historically defined *nontraditional* modes of family formation. Again, developments from California illustrate. In its 2010 decision striking down Proposition 8 (California's constitutional ban on same-sex marriage), the federal district court reasoned: "California law permits and encourages gays and lesbians to become parents through adoption . . . or assistive reproductive technology."[310] Affirming the district court on narrower grounds, the Ninth Circuit explained that, "in California, the parentage statutes place a premium on the 'social relationship,' not the 'biological relationship,' between a parent and a child."[311] With same-sex marriage, the functional and intentional principles of parenthood centered by nontraditional families become the governing principles for an understanding of parenting that includes both same-sex and different-sex couples.

This dynamic is not limited to cases from California. It emerges even more clearly in the most recent same-sex marriage decisions leading up to the Supreme Court's 2015 decision in *Obergefell v. Hodges*. In accepting same-sex couples' claims to marriage, federal appellate courts rejected biological and gendered limitations on the model of parenting served by marriage. Dismissing the argument that the purpose of marriage "is to encourage child-rearing environments where parents care for their biological children in tandem," the Seventh Circuit asked: "Why the qualifier 'biological'?"[312] Writing for the court, Judge Posner explained that "family is about raising children and not just about producing them."[313] Accordingly, the government could not contend that marriage "is inapplicable to a couple's adopted as distinct from biological children."[314] The court elevated functional parenting over procreative sex, gender, and biology.

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[309] *Id.* at 433.

[310] *Perry*, 704 F. Supp. 2d at 968.

[311] Perry v. Brown, 671 F.3d 1052, 1087 (9th Cir. 2012), *vacated*, Hollingsworth v. Perry, 133 S. Ct. 2652 (2013). Because the Supreme Court ultimately ruled that the proponents of Proposition 8 lacked standing to appeal the district court's decision, the district court decision became the definitive ruling in the case. *Perry*, 133 S. Ct. at 2668.

[312] Baskin v. Bogan, 766 F.3d 648, 663 (7th Cir. 2014).

[313] *Id.*

[314] *Id.*; *see also* Latta v. Otter, 771 F.3d 456, 468 (9th Cir. 2014) (rejecting the argument "that a child reared by its biological parents *is* socially preferred and officially encouraged").

Courts also resisted differentiating between intentional parenting — framed by opponents of same-sex marriage as specific to same-sex couples — and "natural" parenting[315] — framed as a distinctive feature of both heterosexuality and marriage.[316] Defenders of Virginia's marriage ban, for instance, argued that, because same-sex couples "bring children into their relationship[s] only through intentional choice and pre-planned action," they do not need marriage in the way different-sex couples do.[317] This "responsible procreation" argument about the instrumental nature of marriage located same-sex couples' family formation outside of marriage's core purpose, with marriage channeling heterosexual sex and accidental procreation into stable family units.[318] In this way, child-centered arguments against same-sex marriage integrated recognition of intentional parenthood — that is, accepted state-recognized same-sex parenting — but distinguished that model of parenthood from marriage.[319] By rejecting this argument, courts signaled acceptance of intentional parenting as a component of marital parenting.[320] They resisted distinctions between biological procreation and assisted reproduction — and thus between paradigmatic different-sex and same-sex family formation.

Finally, in *Obergefell*, the Court grounded same-sex couples' right to marry partly in same-sex parenting. In explaining why the fundamental right to marry "appl[ies] with equal force to same-sex cou-

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[315] *See, e.g.*, Janna Darnelle, *Breaking the Silence: Redefining Marriage Hurts Women Like Me — and Our Children*, PUB. DISCOURSE (Sept. 22, 2014), http://www.thepublicdiscourse.com/2014/09/13692 [http://perma.cc/DCF4-F636] ("There is not one gay family that exists in this world that was created naturally."); John Finnis, *The Profound Injustice of Judge Posner on Marriage*, PUB. DISCOURSE (Oct. 9, 2014), http://www.thepublicdiscourse.com/2014/10/13896 [http://perma.cc/W9ZB-BRMZ] ("For Posner, . . . 'parents' just means the people who are raising the child. So both (1) optimality in child-raising and its necessary condition, (2) biological parenthood, have dropped out, along with (3) sexual intercourse, the only possible cause of (2).").

[316] *See* Bostic v. Schaefer, 760 F.3d 352, 382 (4th Cir. 2014). On these concepts, see Courtney Megan Cahill, *The Genuine Article: A Subversive Economic Perspective on the Law's Procreationist Vision of Marriage*, 64 WASH. & LEE L. REV. 393, 456 (2007).

[317] *Bostic*, 760 F.3d at 382 (alteration in original) (quoting Appellant McQuigg's Opening Brief at 43, *Bostic*, 760 F.3d 352 (Nos. 14-1167, 14-1169, 14-1173), 2014 WL 1262842); *see also Latta*, 771 F.3d at 471 (describing the argument by those defending Idaho's marriage ban that "marriage's stabilizing and unifying force is unnecessary for same-sex couples, because they always choose to conceive or adopt a child").

[318] *See generally* Douglas NeJaime, *Marriage, Biology, and Gender*, 98 IOWA L. REV. BULL. 83 (2013); Edward Stein, *The "Accidental Procreation" Argument for Withholding Legal Recognition for Same-Sex Relationships*, 84 CHI.-KENT L. REV. 403 (2009).

[319] *Cf.* Reva B. Siegel, *The Supreme Court, 2012 Term — Foreword: Equality Divided*, 127 HARV. L. REV. 1, 83–84, 83 n.422 (2013) (showing shifts in argumentation in same-sex marriage opposition).

[320] *See Latta*, 771 F.3d at 472 ("[I]f Idaho and Nevada want to increase the percentage of children being raised by their two *biological* parents, they might do better to ban assisted reproduction using donor sperm or eggs, gestational surrogacy, and adoption, by both opposite-sex and same-sex couples, as well as by single people. Neither state does.").

ples,"[321] the Court declared that a "basis for protecting the right to marry is that it safeguards children and families."[322] Same-sex couples, the Court continued, "provide loving and nurturing homes to their children, whether biological or adopted."[323] Not only were "hundreds of thousands of children . . . being raised by [same-sex] couples," but many states had themselves facilitated same-sex couples' formation of adoptive parent-child relationships outside of marriage.[324] This, for the Court, "provide[d] powerful confirmation from the law itself that gays and lesbians can create loving, supportive families."[325]

For purposes of a model of marriage that takes childrearing as "a central premise,"[326] the Court conceptualized same-sex and different-sex couples as similarly situated. Accordingly, the Court affirmed a model of marital parenthood that hinged on neither biology nor gender. Indeed, Chief Justice Roberts's dissent highlighted the model rejected by the majority. Because "[p]rocreation occurs through sexual relations between a man and a woman," the Chief Justice claimed, the state has an interest in channeling different-sex relationships into marriage "for the good of children and society."[327] But, as he observed, the Court set aside this "traditional, biologically rooted" understanding of marriage.[328] Instead, the Court connected the childrearing dimensions of marriage to same-sex couples' *non*traditional, *non*biological parent-child bonds.

Ultimately, marriage equality routes intentional and functional concepts of parenthood — concepts leveraged in earlier efforts to recognize unmarried same-sex parents — into an LGBT-inclusive model of marriage, pushing intentional and functional parenthood from the margins to the mainstream. With marriage equality now a nationwide reality, the next two Parts analyze its capacity to support the growth of intentional and functional parenthood both inside and outside marriage, for both same-sex and different-sex couples.

IV. MARITAL PARENTHOOD AFTER MARRIAGE EQUALITY

Intentional- and functional-parenthood concepts have significant roots in marriage, yet were framed as exceptions to the traditional operation of marital parentage. As Part II has demonstrated, partly be-

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[321] Obergefell v. Hodges, 135 S. Ct. 2584, 2599 (2015).

[322] *Id.* at 2600.

[323] *Id.*

[324] *Id.* On the impact of LGBT adoption on marriage-equality decisions, see Godsoe, *supra* note 122, at 369–71.

[325] *Obergefell*, 135 S. Ct. at 2600.

[326] *Id.*

[327] *Id.* at 2613 (Roberts, C.J., dissenting).

[328] *Id.* at 2614.

cause of LGBT work, these concepts received extensive elaboration outside of marriage, where biological ties had been central. Now, with same-sex couples included in marriage, intentional- and functional-parenthood principles will begin to shape marital parenthood generally. Through an examination of the marital presumption,[329] this Part shows how concepts that had long served as mere exceptions to the general rule now furnish the logic on which to understand marital parenthood.

Traditionally, a child born to a married woman was deemed a child of the marriage, and therefore her husband was presumed to be the child's biological, and thus legal, parent.[330] For married lesbian couples, the nonbiological parent now relies on the marital presumption to assert parental status based on her marriage to the biological parent.

Family law scholars who have expressed skepticism of parenting-based arguments for marriage equality also have criticized the focus on marriage-based claims to parentage. Polikoff warns that the tendency to "view[] parentage through a marriage equality lens"[331] "revives the discredited distinction between 'legitimate' and 'illegitimate' children" — producing what she terms "the new 'illegitimacy.'"[332] Going further, Professor Joanna Grossman questions the basis on which a marital presumption of parentage, premised on an assumed biological connection, would apply to same-sex couples; instead, she urges a stronger de facto parentage doctrine in order to separate the question of marriage from parentage and shift the locus of inquiry away from adult relationships and toward parent-child relationships.[333]

This critique overlooks commonalities between claims based on the marital presumption and earlier claims to parentage, like those documented in Part II. The marital parentage claims rely on the explicit, official marital relationship, rather than the "not as yet legally formalized,"[334] marriage-like relationship. The same logic that, in large part, was used to support the recognition of same-sex parents in nonmarital families becomes a way to understand the key provision attaching parental rights inside the marital family. As Professor Susan Appleton suggests, for married same-sex couples, the presumption rests on the

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[329] This is often referred to as the presumption of legitimacy. *See generally, e.g.*, Appleton, *supra* note 25.

[330] *See, e.g.*, CAL. FAM. CODE §§ 7540, 7611(a) (West 2014).

[331] Nancy D. Polikoff, *The New "Illegitimacy": Winning Backward in the Protection of the Children of Lesbian Couples*, 20 AM. U. J. GENDER SOC. POL'Y & L. 721, 737 (2012).

[332] *Id.* at 722.

[333] *See generally* Grossman, *supra* note 60 ("The partner's functional role in parent-like activities over a period of time . . . would seem a much better indicator of consent to share the role of parent than whether the couple said vows to each other at some point." *Id.* at 719–20.).

[334] West v. Superior Court, 69 Cal. Rptr. 2d 160, 162 (Ct. App. 1997).

partners' agreement regarding their parental roles vis-à-vis the child.[335]

While the marital presumption always had the capacity to embody functional parenthood,[336] it often did so by masking, rather than owning, biological reality.[337] Even when the mother's husband was not the biological father, the law could act on the fiction that he was.[338] But with same-sex couples, where there can be no mistake about biological fact, the marital presumption is detached from notions of biology on a wholesale basis.[339] With same-sex marriage, the presumption makes sense only because it provides an indication of intent and "holding out" — the very concepts elaborated on behalf of unmarried same-sex parents in earlier advocacy.

Application of the marital presumption to same-sex couples is clear in some states, including California.[340] But other states have resisted.[341] Because the presumption contemplates biological parenthood or

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[335] *See* Appleton, *supra* note 25, at 285–86 ("[T]he presumption today reflects the belief that someone legally connected to the woman bearing the child likely planned for the child, demonstrated a willingness to assume responsibility, or provided support (emotional and/or economic) during the pregnancy . . . ." (footnote omitted)).

[336] *See* Michael H. v. Gerald D., 491 U.S. 110 (1989); *see also* Carbone, *supra* note 295, at 1305 ("The marital presumption has long balanced a presumption of biology with the need to secure functional family relationships.").

[337] *See* Niccol Kording, *Nature v. Nurture: Children Left Fatherless and Family-less When Nature Prevails in Paternity Actions*, 65 U. PITT. L. REV. 811, 818 (2004).

[338] Research shows that for men with "high paternity confidence," which in the relevant studies includes exclusively or primarily men in married couples, biological nonpaternity rates are between 1.7% and 3.3%. *See* Kermyt G. Anderson, *How Well Does Paternity Confidence Match Actual Paternity? Evidence from Worldwide Nonpaternity Rates*, 47 CURRENT ANTHROPOLOGY 513, 516 (2006).

[339] *See* Appleton, *supra* note 25, at 230 ("As applied to same-sex couples, of course, the presumption and its variants always diverge from genetic parentage and always produce what might be considered fictional or socially constructed results.").

[340] In fact, California's legislature has made section 7611's marital presumption explicitly gender neutral. CAL. FAM. CODE § 7611 (West 2013) ("A person is presumed to be the natural parent of a child if . . . [t]he presumed parent and the child's natural mother are or have been married to each other and the child is born during the marriage . . . ."). The conclusive marital presumption, though, has remained gender specific. *Id.* § 7540 ("[T]he child of a wife cohabiting with her husband, who is not impotent or sterile, is conclusively presumed to be a child of the marriage.").

[341] Telephone Interview with Cathy Sakimura, Deputy Dir. & Family Law Dir., NCLR (Aug. 15, 2014) (on file with the Harvard Law School Library) (reporting cases in Maryland and New York). Some of the cases that arose before *Obergefell* settled without appeal. *Id.* Others produced troubling doctrinal pronouncements, though in factually complex and distinguishable circumstances. *See* Q.M. v. B.C., 995 N.Y.S.2d 470, 474 (Fam. Ct. 2014) ("[W]hile [the marriage-equality law] requires same-sex married couples to be treated the same as all other married couples, it does not preclude differentiation based on essential biology."); Jann P. v. Jamie P., N.Y.L.J. 1202664390754, at *3–4 (Fam. Ct. June 30, 2014) ("[B]ecause there is no dispute in this case that the petitioner is not a biological parent of the child, the presumption of legitimacy has no application." (citation omitted)).

can be rebutted by biological evidence under certain circumstances,[342] some government actors deem it inapplicable to a same-sex spouse who is clearly not the biological parent. They reject the presumption even when no party is contesting its application — for instance, when the couple used an anonymous sperm donor and both women agree on the nonbiological mother's parental status.[343] Today, then, the marital presumption has become a site of conflict over the extent to which marriage equality advances an intentional and functional model of parenthood.

In the wake of *Obergefell*, disputes over the marital presumption have proliferated. Many of these disputes involve birth certificates, which constitute evidence of parentage.[344] In Arkansas, same-sex couples filed suit to challenge the state's "refusal to apply the presumption of parenthood to the spouse of the birth mother" and thus its refusal to list both spouses on the birth certificates of children conceived through donor insemination.[345] Similar challenges have emerged in Florida.[346] A Florida statute provides that, "[i]f the mother is married at the time of birth, the name of the husband shall be entered on the birth certifi-

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342 The most common situations involve an alleged biological father asserting paternity, a husband or ex-husband denying paternity, or a mother denying the paternity of her husband or ex-husband. But states differ dramatically on who can challenge the marital presumption and under what circumstances. For a more extensive discussion of these situations and the divergent approaches states have taken, see Theresa Glennon, *Somebody's Child: Evaluating the Erosion of the Marital Presumption of Paternity*, 102 W. VA. L. REV. 547, 571–85 (2000).

343 *See infra* notes 345–346.

344 Many states include a marital presumption in both their parentage statutes and their vital-records and birth-registration regulations, while some states include a marital presumption only in their parentage statutes. *Compare* GA. CODE ANN. § 19-7-20 (2015) (parentage), *and* GA. CODE ANN. § 31-10-9 (2012) (birth registration), *with* IND. CODE § 31-14-7-1(1)(a) (1998) (parentage). Even if states allow the nonbiological mother to be listed on the birth certificate, this does not resolve questions regarding the conditions under which her parentage can later be challenged.

345 Complaint for Declaratory & Injunctive Relief at 9, Pavan v. Smith, No. 60CV-15-3153 (Ark. Cir. Ct. July 13, 2015). The couples claimed that the state's refusal to apply the marital presumption "solely on the basis of their status as a same-sex married couple . . . [was] in clear violation of their right to Equal Protection under the federal and state constitutions." *Id.* The circuit court ordered the state to issue birth certificates identifying both spouses as parents. The order applied both to the plaintiff same-sex couples and to other similarly situated same-sex couples in Arkansas. *See* Pavan v. Smith, No. 60CV-15-3153, at 10 (Ark. Cir. Ct. Dec. 1, 2015) (memorandum opinion). Before this Article went to publication, the Arkansas Supreme Court stayed the circuit court's order pending appeal, but noted that the plaintiff couples had received the birth certificates they sought. *See* Smith v. Pavan, No. CV-15-988, at 1–3 (Ark. Dec. 10, 2015) (petition for emergency stay granted in part and denied in part; motion for expansion of page limit granted) (per curiam).

346 *See* Complaint & Jury Demand for Declaratory & Injunctive Relief, Chin v. Armstrong, No. 4:15-cv-00399 (N.D. Fla. Aug. 13, 2015); Verified Petition for Dissolution of Marriage with Minor Children, *In re* Marriage of Karen Lynskey-Lake & Deborah Lynskey-Lake, No. FMCE1100065 (Fla. Cir. Ct. Sept. 4, 2015).

cate as the father of the child,"[347] but the state has refused to apply this statutory provision to married lesbian couples.

Some states maintain marital presumptions that explicitly use the terms "natural" or "biological"[348] but rarely inquire into biological connections in different-sex couples. In Indiana, same-sex couples have challenged the state's refusal to apply such a presumption to the nonbiological mother in a same-sex couple.[349] Even though the relevant statute provides that "[a] man is presumed to be a child's *biological* father if . . . the man and the child's biological mother are or have been married to each other,"[350] the plaintiffs contend that "a man is granted the presumption of parenthood by virtue of the fact that he is married to the biological mother of the child, regardless of whether the husband is biologically related to the child."[351] Indeed, the complaint cites donor insemination as an example of this nonbiological application.[352]

As these disputes reveal, the conceptual underpinnings of donor-insemination regulation, which premises marital parentage on intent and conduct, may become generalizable through marriage equality. Previously, donor insemination constituted an exception to the normal operation of presumptions. Many states, including California, maintain a separate provision setting out intent-based rules for married couples using donor insemination.[353] The assumption, of course, is

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347 FLA. STAT. § 382.013(2)(a) (2015).

348 *See, e.g.*, COLO. REV. STAT. § 19-4-105(1)(a) (2015); MICH. COMP. LAWS § 700.2114(1)(a) (2013); MO. REV. STAT. § 210.822.1(1) (2000); MONT. CODE ANN. § 40-6-105(1)(a) (2015); NEV. REV. STAT. § 126.051(1)(a) (2013); OHIO REV. CODE ANN. § 3111.03(A)(1) (LexisNexis 2015); WIS. STAT. § 891.41(1) (2014).

349 *See* Second Amended Complaint for Declaratory & Injunctive Relief at 4–5, Henderson v. Adams, No. 1:15-CV-220 (S.D. Ind. June 4, 2015).

350 IND. CODE § 31-14-7-1 (1998) (emphasis added).

351 Second Amended Complaint for Declaratory & Injunctive Relief, *supra* note 349, at 5.

352 *See id.* In Wisconsin, a married same-sex couple who had a child through anonymous donor insemination sought a determination of parentage by urging a gender-neutral application of both the marital presumption, which refers to "the natural father," WIS. STAT. § 891.41, and the AID statute, which refers to "the husband of the mother," *id.* § 891.40. *See In re* P.L.L.-R, No. 2015AP219, 2015 WL 6701332, ¶ 4 (Wis. Ct. App. Nov. 4, 2015). The couple's petition was denied on procedural grounds. *See id.* ¶ 14 ("Because the attorney general was never served and afforded an opportunity to be heard, the circuit court was without competency to hear the matter and appropriately dismissed it."). Meanwhile, in a case wherein plaintiffs sought birth certificates listing both women in a same-sex marriage as parents, a federal district court in Wisconsin denied class certification to "lesbian married couples and any children of the couples," reasoning that subclasses of couples exist because only some couples conceived through AID and only some of the couples who conceived through AID complied with the relevant statute. Torres v. Rhoades, No. 15-cv-288, 2015 BL 419460, at *1–3 (W.D. Wis. Dec. 21, 2015).

353 In some states, the application of these statutes to married same-sex couples having children through AID is clear. *See, e.g.*, Della Corte v. Ramirez, 961 N.E.2d 601, 603 (Mass. App. Ct. 2012). California's legislature even amended its statute to adopt gender-neutral language. CAL. FAM. CODE § 7613(a) (West 2013) ("If, under the supervision of a licensed physician and surgeon

that donor insemination makes the biological reality explicit in ways that complicate application of the marital presumption and point toward a competing claim by the sperm donor. For those states that nonetheless route donor insemination through the general marital presumption, the biological reality for most different-sex couples can remain hidden.[354] With same-sex marriage, however, the logic of alternative insemination informs the logic of the marital presumption more generally, such that the presumption effectively becomes a de facto donor-insemination statute.

In states that remain hostile to LGBT equality, resistance to application of the marital presumption to same-sex couples surely represents further enactment of anti-LGBT sentiment.[355] Yet the refusal to

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and with the consent of her spouse, a woman conceives through assisted reproduction with semen donated by a man not her husband, the spouse is treated in law as if he or she were the natural parent of a child thereby conceived.").

But in other states this issue has provoked litigation, and same-sex couples have relied on *Obergefell* to argue for equal treatment. *See, e.g.*, Declaration of Christa A. Gonser at 2, Marie v. Mosier, No. 14-cv-2518 (D. Kan. Oct. 5, 2015) ("By refusing to treat my same-sex marriage the same as an opposite-sex marriage with respect to children conceived by my spouse through artificial insemination, [Kansas] has refused to recognize my marriage on equal terms with opposite-sex marriages as required by *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015)."). In this vein, a federal district court ordered Utah to issue a birth certificate with both women's names on it, ruling that in light of *Obergefell* the state had to apply the AID statute equally to same-sex and different-sex married couples. *See* Roe v. Patton, No. 2:15-cv-00253, 2015 WL 4476734, at *3 (D. Utah July 22, 2015) (holding that based on *Obergefell* the state cannot "extend the benefits of the assisted-reproduction statutes to male spouses in opposite-sex couples but not for female spouses in same-sex couples").

While denying the relevance of *Obergefell*, Kansas officials have agreed to issue birth certificates that list both same-sex parents. *See* Defendants' Objection & Response to Plaintiffs' Additional Submissions at 3–4, Marie v. Mosier, No. 14-cv-2518 (D. Kan. Oct. 12, 2015). That concession came after a state court ordered the state to apply its Assisted Conception statutes to same-sex couples, such that when a lesbian couple has a child through donor insemination both women are listed on the birth certificate. *See In re* Parentage of L.D.S., No. 2015-DM-000892, at 3–4 (Kan. Dist. Ct. Sept. 16, 2015) (emergency order determining parentage).

354 Many states do not have statutes specifically regulating donor insemination. *See* Christina M. Eastman, Comment, *Statutory Regulation of Legal Parentage in Cases of Artificial Insemination by Donor: A New Frontier of Gender Discrimination*, 41 MCGEORGE L. REV. 371, 383 (2010). In those states, the ordinary marital presumption is the exclusive method by which the husband who is not biologically related to the child is presumed a legal parent. Even in states with AID statutes, if married couples fail to comply — for instance, they might fail to use the assistance of a licensed physician and might engage in at-home insemination — the marital presumption would still provide a presumption of parentage to the husband.

355 The Iowa Family Policy Center (now called The Family Leader), which opposes same-sex marriage, argued in Iowa that applying the presumption to same-sex couples "would bring about a sea-change in legal parentage," Final Brief of the Iowa Family Policy Center as Amicus Curiae in Support of Appellant at 12, Gartner v. Iowa Dep't of Pub. Health, 830 N.W.2d 335 (Iowa 2013) (No. 12-0243), by rejecting rules "mean[t] to connect children to their biological parents," *id.* at 11. On the organization and its opposition to same-sex marriage, see Shane Vander Hart, *Iowa Family Policy Center ACTION Is Now the Family Leader with Bob Vander Plaats as President/CEO*, DES MOINES REG. (Nov. 21, 2010, 4:41 PM), http://blogs.desmoinesregister.com/dmr/index.php/2010/11/21/iowa-family-policy-center-action-is-now-the-family-leader-with-bob-vander-plaats-as

apply the marital presumption to same-sex couples can be understood not merely as continuing resistance to LGBT equality, but also as an attempt to recenter biology as a dominant marker of parentage and to maintain the primacy of gendered notions of parenting.[356]

Government resistance to the marital presumption's application to lesbian couples runs counter both to the significant developments in the law of parenthood documented in Part II and to the principles animating marriage equality elaborated in Part III. Application of the marital presumption to nonbiological mothers in same-sex marriages would ratify developments in parentage law, which witnessed the extensive recognition of married, nonbiological parents. It would also give meaning to marriage equality, which validated same-sex couples' intentional and functional parent-child relationships. Indeed, same-sex couples have looked to *Obergefell*, the Court's marriage-equality decision, to bolster their claims to the marital presumption. For example, same-sex couples in Florida, represented by NCLR, have argued that because *Obergefell* compels the state to "provide married same-sex couples with the full 'constellation of benefits' associated with marriage 'on the same terms and conditions as opposite-sex couples,'" both women must be listed on the child's birth certificate.[357]

An important pre-*Obergefell* case, which provides guidance on the application of the marital presumption to nonbiological mothers in same-sex marriages, makes clear the impact of marriage equality on the logic of parentage. *Gartner v. Iowa Department of Public Health*[358] arose after the Iowa Supreme Court required the state to allow same-sex couples to marry.[359] Iowa officials subsequently used the marital presumption as the basis for refusing to list the nonbiological mother, who was married to the biological mother, on the birth certificate of the child the couple had through anonymous donor insemina-

-presidentceo/article [http://perma.cc/3VS9-6WVU]; and *Issues We Are Focused On*, FAM. LEADER, http://www.thefamilyleader.com/issues-we-focus-on [http://perma.cc/9234-8434] ("We believe marriage is a permanent, lifelong commitment between a man and a woman.").

356 Motherhood continues to represent the primary parent-child relationship, and fatherhood is conceptualized as derivative of the mother's relationship. *See* Dolgin, *supra* note 291, at 644. Given this gendered nature of the presumption, the inclusion of same-sex couples might exert further pressure on the operation of the presumption. The policies animating the presumption when applied to same-sex couples — such as the desire to identify the parents who intended to have and support the child — apply to both women and men. *See* Appleton, *supra* note 25, at 260. Accordingly, in a marriage-equality regime, one could imagine a gender-neutral marital presumption. For objections to de-gendering motherhood, see FINEMAN, *supra* note 296.

357 Complaint & Jury Demand for Declaratory & Injunctive Relief at 9, Chin v. Armstrong, No. 4:15-cv-00399 (N.D. Fla. Aug. 13, 2015) (first quoting *Obergefell*, 135 S. Ct. at 2601; then quoting *id.* at 2605); *see also* Plaintiffs' Motion for Summary Judgment & Incorporated Memorandum of Law at 7–20, *Chin*, No. 4:15-cv-00399 (N.D. Fla. Dec. 9, 2015).

358 830 N.W.2d 335 (Iowa 2013).

359 *See id.* at 341.

tion.[360] The birth-certificate regulations included a marital presumption of parentage, providing: "If the mother was married at the time of conception, birth, or at any time during the period between conception and birth, the name of the husband shall be entered on the certificate as the father of the child . . . ."[361] The State defended its treatment of married same-sex couples by arguing that the "system for registration of births in Iowa . . . recognizes the biological and 'gendered' roles of 'mother' and 'father,' grounded in the biological fact that a child has one biological mother and one biological father . . . ."[362] Even as same-sex marriage took hold, biology and gender continued to structure the state's vision of parenthood.

In ordering equal application of the marital presumption to lesbian couples, the Iowa Supreme Court extended the logic by which it justified marriage equality years earlier to the question of parentage.[363] Focusing on intent and function over biology and gender, the court explained that, "with respect to the government's purpose of identifying a child as part of their family . . . , married lesbian couples are similarly situated to spouses and parents in an opposite-sex marriage."[364] Donor insemination provided the lens through which to specifically understand same-sex and different-sex couples as similarly situated for purposes of the marital presumption. Iowa does not separately provide for donor insemination, and thus a husband who consents to his wife's insemination with donor sperm is the presumed father by virtue of the marital presumption. Yet the State treated "married lesbian couples who conceive through artificial insemination using an anonymous sperm donor differently than married opposite-sex couples who conceive a child in the same manner."[365]

Donor insemination made clear that the birth certificate, and the marital presumption on which it relied, had come to reflect intentional and functional notions of parenthood. With a married different-sex couple using donor insemination, the State "is not aware the couple conceived the child by an anonymous sperm donor" and the "birth certificate reflects the male spouse as the father."[366] The same-sex couple, by contrast, makes the biological reality knowable and public, and thus explicitly disturbs the biological assumptions of the presumption.

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[360] *See id.* at 341–42.

[361] IOWA CODE § 144.13(2) (2007), *invalidated by Gartner*, 830 N.W.2d 335. Again, a birth certificate is merely evidence of parentage. For the marital presumption in Iowa's parentage statutes, see *id.* § 252A.3.

[362] *Gartner*, 830 N.W.2d at 342 (second omission in original) (quoting Appellant's Final Brief & Request for Oral Argument at 35, *Gartner*, 830 N.W.2d 335 (June 25, 2012) (No. 12-0243)).

[363] *See id.* at 351–53 (relying on Varnum v. Brien, 763 N.W.2d 862, 878–906 (Iowa 2009)).

[364] *Id.* at 351.

[365] *Id.* at 352.

[366] *Id.*

The differential treatment of different-sex and same-sex couples, the court concluded, was based not on the government's legitimate goals but instead on "stereotype or prejudice."[367] In other words, the State's judgment reflected continued resistance to family forms that unambiguously depart from traditional patterns rooted in biology and gender — patterns clearly disrupted by same-sex parenting.[368]

Applying the marital presumption to same-sex couples is important not only from a sexual-orientation-equality perspective, but also from a more general family law perspective. The push and pull between biology and function continues to play out in disputes involving different-sex parents.[369] In fact, in some states, biology has gained prominence in the context of married different-sex couples in which the husband seeks to disestablish paternity.[370] Even when a man has served as a father for a substantial period of time, some courts have allowed the introduction of genetic evidence to terminate his parental obligations.[371] These types of disputes arise at divorce, when, at a particularly unsettling time for children, courts may terminate an established parent-child relationship.[372]

Paternity disestablishment is troubling from the perspective of a model of parenthood that values functional relationships and children's best interests,[373] and it should be seen as connected to conflicts over the application of the marital presumption to same-sex couples. If the marital presumption applies to lesbian mothers in a way that is

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[367] *Id.* at 353.

[368] *Cf.* Cary Franklin, *Marrying Liberty and Equality: The New Jurisprudence of Gay Rights*, 100 VA. L. REV. 817, 889 (2014) (identifying an antistereotyping principle in constitutional sexual-orientation law).

[369] *See* JUNE CARBONE & NAOMI CAHN, MARRIAGE MARKETS 106 (2014) (noting family law's disagreement "on the starting point — biology (and thus sex) or function (and thus assumption of a parental role)"); *see also* June Carbone & Naomi Cahn, *The Past, Present and Future of the Marital Presumption*, *in* THE INTERNATIONAL SURVEY OF FAMILY LAW 387 (Bill Atkin ed., 2013 ed.) (discussing different approaches by states in conflicts between husbands and biological fathers); James G. Dwyer, *A Taxonomy of Children's Existing Rights in State Decision Making About Their Relationships*, 11 WM. & MARY BILL RTS. J. 845, 872 (2003) ("[S]ome paternity presumptions appear to serve not so much as predictors of who will be a good father for a child, but rather simply as indications of who is the biological father.").

[370] *See* Melanie B. Jacobs, *When Daddy Doesn't Want to Be Daddy Anymore: An Argument Against Paternity Fraud Claims*, 16 YALE J.L. & FEMINISM 193, 194–95 (2004); *see also* June Carbone & Naomi Cahn, *Which Ties Bind? Redefining the Parent-Child Relationship in an Age of Genetic Certainty*, 11 WM. & MARY BILL RTS. J. 1011, 1050–66 (2003); David D. Meyer, *Parenthood in a Time of Transition: Tensions Between Legal, Biological, and Social Conceptions of Parenthood*, 54 AM. J. COMP. L. 125, 137–38 (2006).

[371] *See, e.g.*, Gantt v. Gantt, 716 So. 2d 846, 846 (Fla. Dist. Ct. App. 1998); NPA v. WBA, 380 S.E.2d 178, 180 (Va. Ct. App. 1989); *see also* Elizabeth Bartholet, *Guiding Principles for Picking Parents*, 27 HARV. WOMEN'S L.J. 323, 324–25 (2004).

[372] *See* Glennon, *supra* note 342, at 559, 596.

[373] *See* Bartholet, *supra* note 371, at 324 ("Once a child-parent relationship has been created, we should not let it be destroyed simply because there is no DNA match.").

relatively insulated from rebuttal by genetic evidence, then it may similarly apply to husbands who have been serving as (nonbiological) fathers. Of course, competing claims by biological fathers present an additional consideration. Still, it is important to see that part of what is at stake in paternity disestablishment is a model of parenthood that values parent-child relationships regardless of biology.[374] Family law developments over the past several decades, culminating in many ways in the Court's recognition of marriage equality in *Obergefell*, point toward results in both the same-sex and different-sex contexts that value functional and intentional parenthood over biological and genetic connections.

V. NONMARITAL PARENTHOOD AFTER MARRIAGE EQUALITY

Marriage equality validates a model of parenthood that, while having significant roots in marital family formation, was elaborated by LGBT advocates to reach nonmarital families. Yet there is certainly cause for concern that, going forward, marriage equality will lead courts and legislatures to limit nonmarital paths to legal parentage for nonbiological parents.[375] Even aside from issues explicitly involving same-sex couples, many states continue to discriminate in parentage based on marital status.[376] In some ways, *Obergefell*, which describes marriage as "a keystone of our social order,"[377] exacerbates these concerns.[378] The Court envisions nonmarital life, including nonmarital

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[374] *See* Kording, *supra* note 337, at 840 (explaining how "biology trump laws," or paternity disestablishment provisions, "classify all but intact marriages as unprotected families, subject to paternity challenges based on nature over nurture" such that a man "can challenge [his paternity under] the marital presumption at the time of divorce or within a certain time period, usually two to four years after the child's birth").

[375] *See* Courtney G. Joslin, *Leaving No (Nonmarital) Child Behind*, 48 FAM. L.Q. 495, 495–96 (2014).

[376] *See* Judith F. Daar, *Accessing Reproductive Technologies: Invisible Barriers, Indelible Harms*, 23 BERKELEY J. GENDER L. & JUST. 18, 46 (2008); Courtney G. Joslin, *Protecting Children(?): Marriage, Gender, and Assisted Reproductive Technology*, 83 S. CAL. L. REV. 1177, 1179 (2010); Kimberly M. Mutcherson, *Transformative Reproduction*, 16 J. GENDER RACE & JUST. 187, 230 (2013). For illustrative statutes, see ARK. CODE ANN. § 9-10-201 (2015) (donor-insemination statute applicable to married couples); IDAHO CODE § 39-5405(3) (2015) (same); and UTAH CODE ANN. § 78B-6-117(3) (West 2012) ("A child may not be adopted by a person who is cohabiting in a relationship that is not a legally valid and binding marriage under the laws of this state.").

[377] Obergefell v. Hodges, 135 S. Ct. 2584, 2601 (2015).

[378] *See* Melissa Murray, Obergefell v. Hodges *and the New Marriage Inequality*, 104 CALIF. L. REV. (forthcoming 2016) (manuscript at 3) ("*Obergefell* builds the case for equal access to marriage on the premise that marriage is the most profound, dignified, and fundamental institution into which individuals may enter. Alternatives to marriage . . . are by comparison, undignified, less profound, and less valuable."). For other scholarly commentary offering a critique of *Obergefell*'s privileging of marriage, see Leonore Carpenter & David S. Cohen, *A Union Unlike Any Other:* Obergefell *and the Doctrine of Marital Superiority*, 104 GEO. L.J. ONLINE 124, 124 (2015); and Clare Huntington, Obergefell*'s Conservativism: Reifying Familial Fronts*, 84 FORDHAM L. REV.

childrearing, as inferior. Citing *United States v. Windsor*,[379] the Court's 2013 decision striking down section 3 of the Defense of Marriage Act, the *Obergefell* Court reasoned: "Without the recognition, stability, and predictability marriage offers, [same-sex couples'] children suffer the stigma of knowing their families are somehow lesser. They also suffer the significant material costs of being raised by unmarried parents, relegated through no fault of their own to a more difficult and uncertain family life."[380]

Despite the Court's rhetorical insistence on the priority of marriage in *Windsor* and *Obergefell*, this Part suggests an overlooked alternative path that could emerge with marriage equality. By affirming the equal worth of same-sex couples' family formation and by mainstreaming same-sex parenting, marriage equality can function as an important precedent for the growth of intentional and functional parenthood for all families, not only inside but also outside marriage. Perhaps paradoxically, then, marriage equality may further blur, rather than just redraw, the line between marital and nonmarital parental recognition.

A. Same-Sex Family Formation and Nonmarital Parenthood

It is important to contextualize same-sex marriage within broader legal and demographic developments decentering marriage. Marriage equality is intervening on a national scale at a time when marriage no longer organizes family life for a growing segment of the American population.[381] Marriage itself has become a marker of privilege.[382] Those who marry (and stay married) are more likely to be white, relatively educated, and relatively high-income.[383] Early data suggest that at least some of these demographic patterns may also exist among

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23, 28 (2015). For a perspective that criticizes *Obergefell*'s privileging of marriage and yet sees potential in the decision for the constitutional rights of nonmarital families, see Courtney G. Joslin, The Gay Rights Canon and Non-Marriage (Oct. 9, 2015) (unpublished manuscript) (on file with the Harvard Law School Library); and compare with Laurence H. Tribe, *Equal Dignity: Speaking Its Name*, 129 HARV. L. REV. F. 16, 31–32 (2015) ("*Neither* limiting marriage to opposite-sex couples *nor* excluding the unmarried from the circle of those whose autonomy the law respects is consistent with the commitment to equal dignity that lies at the heart of *Obergefell*.").

379 133 S. Ct. 2675 (2013).

380 *Obergefell*, 135 S. Ct. at 2600 (citing *Windsor*, 133 S. Ct. at 2694–95). *Windsor* has also been criticized for its privileging of marriage. *See, e.g.*, Widiss, *supra* note 290, at 549, 552.

381 *See* Wendy Wang & Kim Parker, *Record Share of Americans Have Never Married: As Values, Economics and Gender Patterns Change*, PEW RES. CTR. (Sept. 24, 2014), http://www.pewsocialtrends.org/2014/09/24/record-share-of-americans-have-never-married [http://perma.cc/JMC3-HWV5]; *see also* Clare Huntington, *Postmarital Family Law: A Legal Structure for Nonmarital Families*, 67 STAN. L. REV. 167, 168 (2015) ("[M]arriage [is] no longer at the center of family life for increasingly large swaths of the American public.").

382 *See* Linda C. McClain, *The Other Marriage Equality Problem*, 93 B.U. L. REV. 921, 924 (2013) (describing "the class-based marriage divide" as "the 'other marriage equality problem'").

383 *See* CARBONE & CAHN, *supra* note 369, at 3–5.

same-sex couples.[384] At this point, there are not significant racial differences between married and unmarried same-sex couples,[385] though racial minorities in same-sex couples are more likely than their white counterparts to be raising children.[386] But there are significant economic disparities: married same-sex couples, including those with children, have higher median household incomes than their unmarried counterparts.[387]

Family law and sexuality scholars have pointed out how child-centered arguments for marriage equality accept, rather than challenge, the connection between marital family formation and parental rights in ways that cut against broader family law interventions benefitting all families.[388] This is a significant concern. Indeed, in the states in which same-sex couples are most likely to be raising children, family law regimes are the least pluralistic.[389] While marriage will offer a route to parentage for some same-sex parents, if couples do not marry, the nonbiological parent may remain a legal outsider. (And since many of these couples are raising children from previous different-sex relationships,[390] marriage itself may offer little relief to the

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[384] *See* GARY J. GATES, WILLIAMS INST., DEMOGRAPHICS OF MARRIED AND UNMARRIED SAME-SEX COUPLES (2015), http://williamsinstitute.law.ucla.edu/wp-content/uploads/Demographics-Same-Sex-Couples-ACS2013-March-2015.pdf [http://perma.cc/PAN5-U7D7].

[385] *See id.* at 4–5.

[386] *See* ANGELIKI KASTANIS & BIANCA D.M. WILSON, WILLIAMS INST., RACE/ETHNICITY, GENDER AND SOCIOECONOMIC WELLBEING OF INDIVIDUALS IN SAME-SEX COUPLES 2 (2014), https://escholarship.org/uc/item/71j7n35t [http://perma.cc/URW5-6ZAU].

[387] *See* GATES, *supra* note 384, at 4–5, 7. The disparity between same-sex married and unmarried couples, however, is less than that between different-sex married and unmarried couples. *See id.* at 5, 7.

[388] *See* POLIKOFF, *supra* note 75, at 100–09; Franke, *supra* note 277, at 1196–97.

[389] Because same-sex couples are most commonly raising children from previous different-sex relationships, states with less welcoming environments for LGBT people tend to be those with the highest rates of same-sex parenting. Dr. Gary Gates has found that Arkansas, Kansas, Mississippi, North Dakota, Oklahoma, South Dakota, and Wyoming are among the states with the highest rates of childrearing among same-sex couples. *See* GARY J. GATES, WILLIAMS INST., LGBT PARENTING IN THE UNITED STATES 4 (2013), http://williamsinstitute.law.ucla.edu/wp-content/uploads/LGBT-Parenting.pdf [http://perma.cc/2HSP-HYSN]. These states have had relatively harsh laws governing same-sex family formation. For example, Mississippi, which at this point has the highest proportion of same-sex couples raising children, maintains a ban, currently being challenged, on adoption by same-sex couples. *See* Complaint for Declaratory & Injunctive Relief, Campaign for S. Equal. v. Miss. Dep't of Human Servs., No. 3:15-cv-578 (S.D. Miss. Aug. 12, 2015) (challenging MISS. CODE ANN. § 93-17-3(5) (2007)).

[390] While parenting of children from previous different-sex relationships historically has been the most common form of same-sex parenting, the rise of intentional families continues to shift these demographics. *See* Mignon R. Moore & Michael Stambolis-Ruhstorfer, *LGBT Sexuality and Families at the Start of the Twenty-First Century*, 39 ANN. REV. SOC. 491, 495 (2013); Gary J. Gates, *Adoption Equality Is Not a Sure Thing*, CONTEXTS (July 7, 2015), http://contexts.org/blog/adoption-equality-is-not-a-sure-thing [http://perma.cc/7PZU-3876] [hereinafter Gates, *Adoption Equality*]. In fact, the percentage of same-sex couples raising children has declined in recent

nonbiological parent, given that the noncustodial parent could withhold consent to the stepparent adoption.)

Even in states that have offered nonmarital, nonbiological routes to parenthood, the rights of nonbiological parents in same-sex relationships may come to depend on marriage.[391] Courts that may otherwise have used equitable theories to recognize such parents may find that for nonbiological parents who had the opportunity to legally marry a child's biological parent, their choice not to do so undermines their claim to parental rights. Indications of how formal statuses might erode other parentage doctrines had emerged even before *Obergefell*.[392] And since *Obergefell*, some courts have situated marriage as the newly available solution to same-sex couples' parentage problems while denying parental rights to unmarried, nonbiological mothers.[393]

As these cases illustrate and as scholars have persuasively argued, access to marriage may limit other paths to parental recognition and may reduce incentives to achieve laws that recognize unmarried, nonbiological parents.[394] Clearly, marriage equality will not provide a comprehensive solution to family law problems for same-sex couples[395] — just as second-parent adoption before it did not solve same-sex couples' parentage problems. And marriage equality may lead to setbacks in parentage law in some jurisdictions. California — the focal

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years. *See* GARY J. GATES, WILLIAMS INST., SAME-SEX AND DIFFERENT-SEX COUPLES IN THE AMERICAN COMMUNITY SURVEY: 2005–2011, at 5 (2013), http://williamsinstitute.law.ucla.edu/wp-content/uploads/ACS-2013.pdf [http://perma.cc/8ZL3-XK9X]. And this decline is due in part to the fact that lesbian and gay individuals are coming out earlier and thus are less likely to have had different-sex relationships that produced children. *See* Gates, *Adoption Equality*, *supra*.

391 *See* Joslin, *supra* note 375, at 495–96; Polikoff, *supra* note 331, at 728–29.

392 *See, e.g.*, A.H. v. M.P., 857 N.E.2d 1061, 1065, 1074 n.17 (Mass. 2006) (stating that failure to legally adopt a child may be relevant to whether a party is considered a parent based on equitable principles). A recent case from Oregon provides further illustration. The Oregon Court of Appeals had held that the donor-insemination statute, recognizing the woman's husband as the father, unconstitutionally discriminated based on sexual orientation and therefore must apply to unmarried lesbian couples. Shineovich & Kemp, 214 P.3d 29 (Or. Ct. App. 2009). But more recently the court of appeals held that the statute "applies to unmarried same-sex couples who have a child through artificial insemination [only] if the partner of the biological parent consented to the insemination *and* the couple would have chosen to marry had that choice been available to them." *In re* Madrone, 350 P.3d 495, 496 (Or. Ct. App. 2015).

393 *See, e.g.*, Conover v. Conover, 120 A.3d 874, 883 (Md. Ct. Spec. App. 2015) ("The couple could have married before Jaxon was born, but did not.").

394 *See, e.g.*, Joslin, *supra* note 375; Polikoff, *supra* note 331. Here, functional and intentional parenthood, to the extent they are distinct, may cut in different directions, given that decisions limiting parental recognition under equitable theories have arisen in the context of functional parenting claims, regardless of the method of reproduction. *See, e.g.*, LP v. LF, 338 P.3d 908 (Wyo. 2014) (denying claim to de facto parentage in different-sex context).

395 Still, some courts frame marriage equality in this way. *See, e.g.*, DeBoer v. Snyder, 973 F. Supp. 2d 757, 760 (E.D. Mich. 2014).

point of Part II — features some expansive laws, but impediments to more robust parental recognition exist in many other states.

Yet while the focus on marriage might suggest a renewed effort to redraw parentage through marriage, there are other indications that marriage equality has the capacity to contribute to more pluralistic family law and to accelerate the slippage between marital and nonmarital parentage, both in California and in other, less progressive jurisdictions. Ultimately, at this moment when the meaning and implications of marriage equality are contingent and contested, there is potential for same-sex marriage to yield more robust recognition for *some* unmarried parents.

In the way that marriage equality has been articulated — in California, in other states, and in the Court's decisions — it signals sexual-orientation equality specifically on family-based terms. Accordingly, it presents a challenge to family law regulations that continue to draw distinctions between families formed by different-sex and same-sex couples. Marriage equality's impact on this front will likely expand over time. Now that same-sex marriage has intervened on a national scale, the family-based LGBT equality that had been occurring on a piecemeal basis with significant geographical variation can become a more robust and generally applicable norm.

Family-based LGBT equality may be particularly significant to the status of assisted reproduction, which is central to same-sex family formation. Marriage equality may further normalize various forms of ART for all families. Surrogacy, for instance, continues to be heavily restricted as a legal matter.[396] But as states embrace same-sex family formation, they may increasingly accommodate the mechanisms commonly used by same-sex couples to have children.[397]

Consider developments in New York after the state enacted marriage equality. An openly gay state senator, who had a child with his husband through surrogacy in California, introduced a bill to lift the state's commercial-surrogacy ban.[398] The bill, which was supported

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[396] Some jurisdictions continue to prohibit commercial surrogacy. *See, e.g.*, D.C. CODE § 16-402 (2013); MICH. COMP. LAWS § 722.855 (2013); N.Y. DOM. REL. LAW § 122 (McKinney 2010).

[397] *See* NeJaime, *supra* note 23. *But cf.* Martha A. Field, *Compensated Surrogacy*, 89 WASH. L. REV. 1155, 1169 (2014) ("[E]ven a full-fledged constitutional right to gay marriage would not importantly affect the case for surrogacy . . . ."). On the relationship between nonenforcement of surrogacy agreements and the marginalization of same-sex family formation, see Kaiponanea T. Matsumura, *Public Policing of Intimate Agreements*, 25 YALE J.L. & FEMINISM 159, 197 (2013).

[398] *See* Glenn Blain, *EXCLUSIVE: Gay Rights Advocates Fight to Lift Ban on Paying Surrogate Moms*, N.Y. DAILY NEWS (Jan. 15, 2014, 6:33 PM), http://www.nydailynews.com/news/politics/push-nys-ban-paying-surrogate-moms-article-1.1581165; Anemona Hartocollis, *And Surrogacy Makes 3: In New York, a Push for Compensated Surrogacy*, N.Y. TIMES (Feb. 19, 2014), http://www.nytimes.com/2014/02/20/fashion/In-New-York-Some-Couples-Push-for-Legalization-of-Compensated-Surrogacy.html.

by New York's leading LGBT legislative-advocacy organization,[399] would have allowed compensated gestational surrogacy and would have furnished mechanisms by which "intended parents" could secure parentage judgments.[400] "Intended parents" would have included spouses, unmarried "intimate partners," and single individuals.[401] While male same-sex couples would have gained an important route to parenthood with the bill, single parents and different-sex couples also engage in assisted reproduction, including surrogacy, and would have benefited from wider availability and recognition.[402] The bill did not pass, but efforts to reform New York's surrogacy laws are gaining momentum.[403]

Growing acceptance of ART may in turn yield greater recognition of nonbiological parents. The New York surrogacy bill would have provided routes to parentage not only for intended parents using ART, but also for functional parents generally. Seeking to expand New York's relatively restrictive functional-parenthood doctrine,[404] the bill sought to offer parentage judgments to those who "formed a parent-child bond" and "performed parental functions for the child to a significant degree."[405] Recalling the logic of earlier nonmarital parenting cases, the provision would have applied only to those who had been an "intimate partner" of the child's parent.[406] While nonbiological parenting is more common among same-sex couples, it arises in a variety of families. The benefits of an expanded functional-parenthood doctrine

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399 At the end of 2015, however, the Empire State Pride Agenda announced plans "to conclude major operations." *Empire State Pride Agenda Announces Plans to Conclude Major Operations in 2016*, EMPIRE STATE PRIDE AGENDA (Dec. 12, 2015), http://www.prideagenda.org/news/2015-12-12-empire-state-pride-agenda-announces-plans-conclude-major-operations-2016 [http://perma.cc/9EAK-VBBQ].

400 S.B. 04617, 2013–2014 Reg. Sess. §§ 581-201–206 (N.Y. 2013).

401 *See id.* § 581-404.

402 Greater acceptance of ART and mechanisms to determine parentage arising out of ART may produce more pluralistic family law. *See* Matsumura, *supra* note 397, at 203–04.

403 In fact, Governor Andrew Cuomo has asked the Task Force on Life and the Law to explore lifting the ban. *See* Carl Campanile, *Cuomo Might Lift Surrogate-Mom Ban, a Priority for Gay-Rights Advocates*, N.Y. POST (Oct. 19, 2015, 12:13 PM), http://nypost.com/2015/10/19/cuomo-might-lift-ban-on-commercial-surrogates-a-priority-for-gay-rights-advocates [http://perma.cc/7NYT-TLV3].

404 *See* Debra H. v. Janice R., 930 N.E.2d 184, 192 (N.Y. 2010) (adhering to a "bright-line rule" for parentage rather than adopting a "complicated and nonobjective test for determining so-called functional or de facto parentage"); Alison D. v. Virginia M., 572 N.E.2d 27, 28–29 (N.Y. 1991) (denying the applicability of "parent" within the meaning of New York law to a woman who was not the biological mother but had been a functional parent of the child while in a relationship with the biological mother).

405 S.B. 04617 at §§ 581-601(B)(3)–(B)(4).

406 *Id.* § 581-601(C). Though, in the adoption context, the New York courts have not limited "intimate partners" to those in cohabiting or sexual relationships. *See In re* Adoption of G., 978 N.Y.S.2d 622, 629 (Sur. Ct. 2013).

would accrue to parents and children in families headed by both same-sex and different-sex couples.

Of course, there will be continued resistance to both ART and nonbiological parentage.[407] In fact, the regulation of ART has become an increasingly high-profile topic of family law debate,[408] and much of the discussion focuses on the significance of genetic bonds. Marriage equality bears on this debate. It casts serious doubt not only on specific efforts to limit opportunities for same-sex couples to form families, but also on broader attempts to marginalize intentional and functional parenthood and redraw parental status through biology and gender — for all parents.

In the specific domain of same-sex parenting, marriage equality may push state family law regimes that increasingly have accommodated ART toward gender and sexual-orientation neutrality in ways that extend intentional and functional parentage outside marriage. Even as many states have resisted recognition of same-sex parents, they have gradually come to grips with unmarried heterosexual parents. The 1970s saw states alter family law principles to recognize unmarried, biological fathers and their children. While many statutes continue to discriminate against unmarried individuals in the regulation of ART and parentage,[409] states are increasingly recognizing the parental status of unmarried different-sex couples using ART to have children. Now, marriage equality can become a precedent on which to

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[407] David Blankenhorn's Institute for American Values, for example, is working to restrict ART. In doing so, the Institute's researchers prioritize biological and gendered notions of parenting. *See* ELIZABETH MARQUARDT, ONE PARENT OR FIVE: A GLOBAL LOOK AT TODAY'S NEW INTENTIONAL FAMILIES 25 (2011); ELIZABETH MARQUARDT, NORVAL D. GLENN & KAREN CLARK, MY DADDY'S NAME IS DONOR (2010). Anti-ART efforts have continued — and seemingly intensified — in *Obergefell*'s wake. *See, e.g.*, Melissa Moschella, *To Whom Do Children Belong? How Same-Sex Marriage Threatens Parental Rights*, PUB. DISCOURSE (Oct. 5, 2015), http://www.thepublicdiscourse.com/2015/10/15407 [http://perma.cc/AE3N-325H]; Christopher White, *Surrogacy and Same-Sex Marriage: A Tale of Two Countries*, PUB. DISCOURSE (July 21, 2015), http://www.thepublicdiscourse.com/2015/07/15362 [http://perma.cc/97Q6-QLXT].

[408] *Compare* NAOMI CAHN, THE NEW KINSHIP (2013) (arguing for a new legal framework for ART that is grounded in family law and focuses on relationships and the child's best interests), Naomi Cahn, *The New Kinship*, 100 GEO. L.J. 367 (2012), *and* Marsha Garrison, *Law Making for Baby Making: An Interpretive Approach to the Determination of Legal Parentage*, 113 HARV. L. REV. 835 (2000) (arguing that sexual and technological conception should be governed by the same legal regime), *with* Courtney Megan Cahill, *The Oedipus Hex: Regulating Family After Marriage Equality*, 49 U.C. DAVIS L. REV. 183 (2015) (contending that reproductive regulation that is justified by the "incest taboo" is problematic both normatively and constitutionally), I. Glenn Cohen, *Rethinking Sperm-Donor Anonymity: Of Changed Selves, Nonidentity, and One-Night Stands*, 100 GEO. L.J. 431 (2012) (critiquing Professor Naomi Cahn's support for mandatory sperm-donor registries), *and* Martha M. Ertman, *What's Wrong with a Parenthood Market? A New and Improved Theory of Commodification*, 82 N.C. L. REV. 1 (2003) (arguing for a relatively unregulated parenthood market in the context of alternative insemination).

[409] *See* Joslin, *supra* note 375, at 509.

achieve sexual-orientation equality with regard to the recognition of unmarried, intentional parents.

Consider *D.M.T. v. T.M.H.*,[410] decided by the Florida Supreme Court after the U.S. Supreme Court's decision in *Windsor*. The Florida state government historically had defended a legal regime hostile to LGBT parents.[411] It enforced a ban on lesbian and gay adoption, enacted during Anita Bryant's 1977 "Save Our Children" campaign, until a 2010 state appellate decision struck it down.[412] Yet Florida increasingly had recognized unmarried, intentional *different-sex* parents using reproductive technology. Its family code provides that egg and sperm donors relinquish their claims to parental rights, except in circumstances where they are part of a "commissioning couple";[413] the law defines "commissioning couple" as "the intended mother and father."[414]

In 2013, the Florida Supreme Court considered whether unmarried "commissioning couples" could be limited to different-sex couples.[415] The court evaluated a "co-maternity" situation and needed to decide whether the genetic mother, who had been in a relationship with the birth mother, would be deemed a mere donor whose rights were relinquished. The case, essentially Florida's version of *K.M. v. E.G.*, was decided not on the basis of state parentage law but instead on constitutional grounds.[416] The court invoked *Windsor*, noting that while that decision involved a separate issue (recognition of same-sex couples' marriages), it nonetheless recognized the constitutional interests of same-sex couples in ways that shaped the considerations in the instant case.[417] This move is especially noteworthy given that *Windsor*, like *Obergefell*, employed rhetoric that privileged marriage and marginalized nonmarital families.[418] Despite its focus on the marital family —

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410 129 So. 3d 320 (Fla. 2013).

411 *See* Lofton v. Sec'y of Dep't of Children & Family Servs., 358 F.3d 804, 806–07 (11th Cir. 2004).

412 *See* Fla. Dep't of Children & Families v. Adoption of X.X.G., 45 So. 3d 79, 92 (Fla. Dist. Ct. App. 2010). The legislature did not formally repeal the ban until 2015. H.B. 7013, 117th Leg., Reg. Sess. (Fla. 2015).

413 FLA. STAT. § 742.14 (2015).

414 *Id.* § 742.13(2).

415 *D.M.T.*, 129 So. 3d. 320. NCLR, Lambda Legal, and the ACLU participated as amici curiae. *See Amicus Curiae* Brief of American Academy of Assisted Reproductive Technology Attorneys in Support of Respondent, *D.M.T.*, 129 So. 3d 320 (No. SC12-261) [hereinafter AAARTA Brief] (filed by NCLR); Brief of *Amici Curiae* American Civil Liberties Union Foundation, American Civil Liberties Union of Florida, & Lambda Legal in Support of Appellee, *D.M.T.*, 129 So. 3d. 320 (No. SC12-261).

416 *D.M.T.*, 129 So. 3d at 328.

417 *See id.* at 337.

418 Indeed, the *Windsor* Court reasoned that the denial of federal marital recognition to same-sex couples "humiliates tens of thousands of children now being raised by same-sex couples" and "makes it even more difficult for the children to understand the integrity and closeness of their

and married parents specifically — *Windsor*, to the Florida Supreme Court, signified sexual-orientation equality in family law more broadly.

Ultimately, the court found that "the State does not have a legitimate interest in precluding same-sex couples from being given the same opportunity as heterosexual couples to demonstrate [parental] *intent*."[419] Nonetheless, because the case featured "co-maternity," the specific holding related to the mother's biological status. Indeed, the court stressed that, like an unmarried, biological father seeking parental rights, the genetic mother grasped the opportunity afforded by her biological connection, and thus demonstrated the requisite parental conduct to qualify for parental status.[420] Moreover, the court emphasized that membership in the commissioning couple did not independently give rise to a claim to parentage.[421]

Still, the logic, as NCLR urged in the case,[422] should ultimately apply to nonbiological mothers in same-sex couples using ART. Even as the court stressed the mother's genetic connection to the child, it consistently appealed to notions of intent and emphasized the importance of legally recognizing the child's two parents.[423] Moreover, the court quoted NCLR's amicus curiae brief in explaining that ART "'help[s] intended parents who are otherwise unable to have children of their own create a family,' and [is] used by 'opposite-sex married couples . . . , same-sex couples, unmarried heterosexual couples, and single individuals who seek the opportunity to become parents.'"[424] Indeed, the court explained that even as "the 'law is being tested as . . . new techniques [of assisted reproduction] become more commonplace and accepted,' . . . courts must ensure that the constitutional rights of those individuals who *intended* to be parents to the child are protected."[425]

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own family and its concord with other families in their community and in their daily lives." United States v. Windsor, 133 S. Ct. 2675, 2694 (2013).

419 *D.M.T.*, 129 So. 3d at 343 (emphasis added).

420 *Id.* at 337–39.

421 *See id.* at 342 ("[S]ections 742.13 and 742.14 do not create a statutory basis for an individual who would not otherwise have parental rights to claim those rights."). The court explained that the statute at issue allows a member of the commissioning couple "to preserve his or her interest in the child conceived through assisted reproductive technology" but that "that individual becomes a parent only if he or she has some legal basis to be recognized as a parent." *Id.* In doing so, the court referred to both biological and nonbiological routes to legal parentage. *See id.* (citing FLA. STAT. § 742.11 (2015) (Florida's AID statute)).

422 *See* AAARTA Brief, *supra* note 415, at 20.

423 *D.M.T.*, 129 So. 3d at 344.

424 *Id.* at 340 n.7 (third alteration in original) (quoting AAARTA Brief, *supra* note 415, at 3).

425 *Id.* (first and second alterations in original) (emphasis added) (citation omitted) (quoting *In re* Roberto d.B., 923 A.2d 115, 117 (Md. 2007)). At least one Florida court, however, has distinguished *D.M.T.* in denying parental rights to a nonbiological mother whose same-sex partner had children through donor insemination. *See* Russell v. Pasik, No. 2D14-5540, 2015 WL 5947198, at *3 (Fla. Dist. Ct. App. Oct. 14, 2015) ("When, as in the present case, there is not a biological con-

Given that Florida had come to grips with unmarried different-sex couples' use of reproductive technology, it could not, within a family law regime disciplined by a sexual-orientation-equality principle, withhold intent-based routes to parentage from unmarried same-sex couples. Just as *Buzzanca* followed from *Johnson* in California, future decisions may further untether the intent-based principle in *D.M.T.* from biology.[426] In a family law system in which intent and function govern over biology and gender, same-sex and different-sex couples are similarly situated, both inside and outside marriage. And in a world in which marriage equality is accepted — the post-*Obergefell* world — sexual-orientation nondiscrimination becomes a more universal norm.

Just as the Florida Supreme Court found support in *Windsor*, future courts may appeal to the broader principles of liberty and equality announced in *Obergefell*. That is, even as *Obergefell* privileged marriage, its reasoning may support broader LGBT rights in the family law context. An opinion from a Missouri case involving an unmarried, nonbiological lesbian mother suggests one potential path: "While *Obergefell* addresses the right to marry, it also pronounced that 'choices concerning contraception, family relationships, procreation, and childrearing' are protected by the Constitution."[427] Accordingly, the opinion reasoned: "[I]n light of the decision in *Obergefell*, . . . it is unclear which statutory schemes can be deemed adequate . . . as they relate to parentage . . . of children born to same-sex couples, whether *married or not*."[428] Indeed, in observing that "[i]t is the children of same-sex couples who will be most severely affected by being limited in their opportunity to maintain bonds with a party who is not a biological parent but who has . . . 'functionally behaved as the children's second parent,'"[429] the opinion evinced an appreciation for how resistance to nonbiological parentage in both marital and nonmarital families reflects and produces LGBT inequality.[430] Importantly, it

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nection between petitioner and child and it is a nonparent that is seeking to establish legal rights to a child, there is no clear constitutional interest in being a parent.").

426 *But see Russell*, 2015 WL 5947198, at *2–4.

427 McGaw v. McGaw, 468 S.W.3d 435, 454 (Mo. Ct. App. 2015) (Clayton, J., concurring in part and dissenting in part) (quoting Obergefell v. Hodges, 135 S. Ct. 2584, 2599 (2015)). The Missouri Court of Appeals rejected equitable claims to parenthood but affirmed the nonbiological mother's right to assert claims to custody and visitation in an independent statutory action. *Id.* at 448–49 (majority opinion).

428 *Id.* at 453 (Clayton, J., concurring in part and dissenting in part) (emphasis added).

429 *Id.* at 452.

430 Similarly, in a pre-*Obergefell* decision from New York holding that the family court had jurisdiction over a biological mother's petition for child support from the nonbiological mother, a concurring opinion explained that "it seems intuitive[] that all people, male and female, gay and straight, should be treated the same way. Yet it is an inescapable fact that gay and straight couples face different situations . . . as a matter of biology." H.M. v. E.T., 930 N.E.2d 206, 211 (N.Y. 2010) (Smith, J., concurring).

suggested that, as a constitutional matter, *Obergefell* calls such inequality into question.

B. Blurring Marriage and Nonmarriage

The developments in Florida are consistent with the broader trajectory within which marriage equality fits — a trajectory in which recognition of same-sex parents followed from, and in turn furthered, the erosion of parental distinctions based on biology, gender, and marital status. As Part II's case study demonstrates, recognition of nonbiological (presumptively heterosexual) parents inside marriage justified the recognition of parents, including same-sex parents, outside marriage. Eventually, same-sex couples gained access to marriage based on the principles that supported the recognition of their nonmarital parent-child relationships. Now, with marriage equality, principles of intentional and functional parenthood may expand in ways that span marital and nonmarital families, for both same-sex and different-sex couples.

Consideration of opposition to earlier advances in LGBT family law underscores this reading. In California, social-conservative advocates fought not only same-sex marriage, but also developments that muddied distinctions between marriage and nonmarriage, including second-parent adoption, recognition of nonbiological co-parenting, and domestic partnership.[431] At stake was the primacy of marriage and its relationship to childrearing. These social-conservative activists saw what many scholars miss today: the entrance of same-sex couples into marriage followed partly from the decreasing salience of marriage, rather than its continued centrality.

The same logic that supported recognition of parentage inside marriage applied to the recognition of parentage outside marriage, such that the line between marriage and nonmarriage for purposes of parentage had been drained of some significance. Same-sex couples' marriage claims extended that logic to remove the formal marital-status distinction. In fact, when LGBT advocates litigated marriage claims in California, they appealed to marriage's unique status partly because the rights bestowed by marriage had been achieved through

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In contrast, in affirming the denial of parental rights to a nonbiological mother in a same-sex relationship, a Maryland court failed to grapple with the incidence of nonbiological parentage in same-sex couples, simply reasoning that "there is no gender discrimination or sexual orientation discrimination because all non-biological, non-adoptive parents face the same hurdle, no matter what sex or sexual orientation they are." Conover v. Conover, 120 A.3d 874, 883 (Md. Ct. Spec. App. 2015). A concurring opinion, though, pointed out that "the definitions of parenthood tied to marriage, biology or formal adoption don't map neatly onto same-sex relationships." *Id.* at 887 (Nazarian, J., concurring).

431 *See supra* sections II.B–C, pp. 1212–30.

nonmarital mechanisms.[432] If unmarried same-sex couples enjoyed rights traditionally routed through marriage, including parentage, then their claims to marriage had to emphasize expressive, more than tangible, harm.

On this account, marriage reiterates more generally applicable intentional- and functional-parenthood principles. It thereby constitutes part of a broader — though incomplete — family law regime that centers on chosen, functional families and recognizes parent-child relationships in ways not limited by biology, gender, sexual orientation, or marital status.

Contextualizing the current moment within a longer trajectory reinforces this understanding. In the 2000s, the California Supreme Court consistently saw the recognition of same-sex couples' parental rights as supporting, rather than rendering unnecessary or unwise, the expansion of parental rights through other means.[433] While the legislature had extended stepparent adoption to same-sex couples through the domestic partnership regime, the court did not view that development as a reason to restrict second-parent adoption.[434] Instead, domestic partnership advanced sexual-orientation-equality principles that also animated second-parent adoption.[435] More importantly, second-parent adoption served a broader array of functional parent-child relationships that the state sought to protect.[436]

Again in 2005, when the California Supreme Court handled three groundbreaking same-sex parenting cases, it did so after the legislature passed a new domestic partnership law, which provided that the rights of registered domestic partners with regard to the children of either of them would be the same as the rights of spouses.[437] The court expressly considered whether same-sex couples' parental rights should be routed exclusively through the new law.[438] LGBT advocates, as they had with second-parent adoption, distinguished domestic partnership and stressed the interests of children in families, formed by both same-sex and different-sex couples, lacking formal state-law status.[439] Per-

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[432] *See* Douglas NeJaime, *Framing (In)Equality for Same-Sex Couples*, 60 UCLA L. REV. DISCOURSE 184, 196–99 (2013).

[433] *See, e.g.*, Elisa B. v. Superior Court, 117 P.3d 660, 666 (Cal. 2005).

[434] *See, e.g.*, Sharon S. v. Superior Court, 73 P.3d 554, 565 (Cal. 2003).

[435] *See Elisa B.*, 117 P.3d at 666.

[436] *See supra* section II.B, pp. 1212–22.

[437] CAL. FAM. CODE § 297.5(d) (West 2004). For a family law perspective on the domestic partnership law, see generally Grace Ganz Blumberg, *Legal Recognition of Same-Sex Conjugal Relationships: The 2003 California Domestic Partner Rights and Responsibilities Act in Comparative Civil Rights and Family Law Perspective*, 51 UCLA L. REV. 1555 (2004).

[438] *See* Kristine H. v. Lisa R., No. S126945, 2004 Cal. LEXIS 9106 (Sept. 22, 2004).

[439] *See* Opening Brief of Real Party in Interest Emily B. at 24–25, *Elisa B.*, 117 P.3d 660 (No. S125912) ("[E]ven after [the new domestic partnership law] goes into effect, children will continue

suaded, the court viewed the domestic partnership law as justifying, rather than limiting, the extension of parental rights to a larger population of parents.[440] The interests advanced by the formal regime — sexual-orientation equality and protection of children's best interests — pushed toward more, not less, recognition of parent-child relationships. Existing routes to parentage justified additional routes to parentage.[441]

Most importantly, same-sex marriage has not redrawn the scope of parental rights in California. Since same-sex couples gained access to marriage, second-parent adoption, parental presumptions outside marriage, and the domestic partnership regime have remained. Indeed, the California courts have continued to apply the "holding out" presumption, against the objections of social-conservative advocates, to unmarried and unregistered nonbiological lesbian co-parents.[442] And the state legislature revised the family code to make both the marital presumption and the "holding out" presumption in section 7611 explicitly gender neutral.[443]

In fact, the legislature has continued to expand intentional- and functional-parenthood principles to both married and unmarried parents. In 2015, it passed a bill, which the governor signed and which NCLR had co-sponsored,[444] revising section 7613 to remedy some of the inequities that the earlier lesbian parenting cases — those cases that came before marriage equality — had exposed.[445] Section 7613 now applies to unmarried same-sex and different-sex couples, thereby recognizing nonbiological intended parents regardless of marital status. If, "with the [written] consent of another intended parent," a woman conceives with donor sperm or egg, "that intended parent is treated in law as if he or she were the natural parent of a child thereby conceived."[446] Of course, in earlier litigation, including in *Elisa B.*, LGBT advocates had pressed an interpretation of the donor-insemination statute that would apply to unmarried couples. But it was not until after marriage equality that the legislature made section 7613 marital-status neutral. The legislature also addressed the problem presented

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to be born to same-sex couples who do not register as domestic partners as well as to heterosexual couples who do not marry.").

440 *See Elisa B.*, 117 P.3d at 666 ("We perceive no reason why both parents of a child cannot be women. That result now is possible under the current version of the domestic partnership statutes.").

441 *See supra* section II.C, pp. 1222–30.

442 *See, e.g.,* Charisma R. v. Kristina S., 96 Cal. Rptr. 3d 26, 41 (Ct. App. 2009).

443 *See* S.B. 1306, 2013–2014 Leg., Reg. Sess. (Cal. 2014).

444 *See* Summary & History, Legislation: California Assembly Bill 960, NAT'L CTR. FOR LESBIAN RIGHTS, http://www.nclrights.org/cases-and-policy/policy-and-legislation/legislation-california-assembly-bill-960 [http://perma.cc/35JG-4KYB].

445 *See* Assemb. B. 960, 2015–2016 Leg., Reg. Sess. (Cal. 2015).

446 *Id.* sec. 1, § 7613(a).

by the requirement of physician assistance. Now, involvement of a doctor or sperm bank is not necessary to preclude a donor's claim to parentage.[447] Finally, the new law provides guidance on egg donation. It includes provisions that ratify the *K.M.* decision by treating a woman who donates ova for use in assisted reproduction by her "spouse or *nonmarital partner*" as a legal parent.[448] As this important legislation demonstrates, a regime that includes same-sex couples having children both inside and outside marriage mainstreams assisted reproduction and nonbiological parentage in ways that support the expanded recognition of intentional and functional parenthood in both marital and nonmarital families.

Of course, family law varies by state, and California has a particularly robust parentage regime. Nonetheless, at this moment when the meanings and implications of marriage equality are contested and contingent, developments from California suggest how recognition of same-sex couples' parental rights through marriage can run with, rather than against, recognition of nonmarital parental rights based on intent and function.[449] In an indication of national shifts in this direction after *Obergefell*, the Uniform Law Commission has begun the process of drafting a revised UPA to address parentage issues related to same-sex couples. Professor Courtney Joslin, who was a seminal figure in the earlier parenting advocacy on behalf of unmarried parents and is a prominent scholar on nonmarital parentage, has been designated the official reporter.[450] Again, my point is not to suggest that marriage equality does not, in significant ways, accept the line between marriage and nonmarriage.[451] Indeed, critical rights and benefits continue to be

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[447] *See id.* sec. 1, § 7613(b)(2) ("If the semen is not provided to a licensed physician and surgeon or a licensed sperm bank . . . , the donor of semen for use in assisted reproduction by a woman other than the donor's spouse is treated in law as if he were not the natural parent of a child thereby conceived if either of the following are met: (A) The donor and the woman agreed in a writing signed prior to conception that the donor would not be a parent. (B) A court finds by clear and convincing evidence that the child was conceived through assisted reproduction and that, prior to the conception of the child, the woman and the donor had an oral agreement that the donor would not be a parent.").

[448] *Id.* sec. 1, § 7613(c) (emphasis added).

[449] Oregon lawmakers are considering legislation to make the state's parentage laws gender neutral. Importantly, the draft legislation would not only make the donor-insemination statute apply to same-sex spouses, but would also expand its application to unmarried couples. *See* H.B. 3231, 2015 Leg., Reg. Sess. § 3(1) (Or. 2015), https://olis.leg.state.or.us/liz/2015R1/Downloads/MeasureDocument/HB3231 [http://perma.cc/FGZ6-FPYL] ("A person who consents in writing to the artificial insemination of a woman, with the intent to be the parent of the woman's child, is conclusively established as a parent of the child.").

[450] *See* Email from Courtney Joslin, Professor of Law, U.C. Davis Sch. of Law, to author (Dec. 2, 2015, 3:37 PM) (on file with the Harvard Law School Library).

[451] *See* Douglas NeJaime, *Marriage and Non-Marriage After* Windsor, *in* CIVIL RIGHTS LITIGATION AND ATTORNEY FEES ANNUAL HANDBOOK 417, 428–33 (Steven Saltzman & Cheryl I. Harris eds., 2013).

routed through marriage.[452] Rather, it is to say that along other dimensions — here, parenthood — marriage equality has the potential to facilitate continued erosion of that line for all families.

As we have seen in California, same-sex couples' inclusion in marriage has driven and justified the expansion of parental recognition based on intent and function, and, in doing so, has further decentered a model of parenthood bounded by biology, gender, sexual orientation, and marital status. Importantly, parentage principles that accommodate same-sex parenting even challenge limitations on the number of legal parents a child can have. For example, in response to a dispute involving a married same-sex couple, California enacted a multiple-parent law, thus moving parentage beyond the dyadic unit.[453] *In re M.C.*[454] featured three individuals with claims to parental status: a biological mother, her same-sex spouse, and the biological father with whom the biological mother had a sexual relationship.[455] After the appellate court in 2011 found that the child could have only two legal parents under the UPA,[456] the legislature responded with a multiple-parent bill, co-sponsored by NCLR.[457] Now, a court can find more than two legal parents if not doing so would be detrimental to the child.[458] The court would then allocate custody and visitation based on the child's best interests.[459]

Often — and more commonly than the situation above — same-sex couples with children envision continuing parental roles for individuals who, though outside the primary coupled relationship, have biological connections to those children — likely through sperm or ova dona-

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[452] *See* Murray, *supra* note 280, at 433; Polikoff, *supra* note 284, at 585.

[453] S.B. 274, 2013–2014 Leg., Reg. Sess. (Cal. 2013).

[454] 123 Cal. Rptr. 3d 856 (Ct. App. 2011).

[455] *Id.* at 861.

[456] *Id.* at 876–77.

[457] The first attempt, SB 1476, was vetoed by Governor Edmund "Jerry" Brown, Jr. Jim Sanders, *Jerry Brown Vetoes Bill Allowing More Than Two Parents*, SACRAMENTO BEE: CAPITOL ALERT (Sept. 30, 2012, 1:22 PM), http://blogs.sacbee.com/capitolalertlatest/2012/09/jerry-brown-vetoes-bill-allowing-more-than-two-parents.html [http://perma.cc/52MH-KJ39]. A year later, Brown signed a revised version. Christopher Cadelago, *Jerry Brown Signs California Bill Allowing More Than Two Parents*, SACRAMENTO BEE: CAPITOL ALERT (Oct. 4, 2013, 5:47 PM), http://blogs.sacbee.com/capitolalertlatest/2013/10/jerry-brown-signs-bill-allowing-more-than-two-parents-in-calif.html [http://perma.cc/EYA2-PNRX]. On NCLR's support, see Michelle Garcia, *Calif.: Brown Vetoes Multiparent Protection Law*, THE ADVOC. (Oct. 1, 2012, 3:41 PM), http://www.advocate.com/politics/2012/10/01/california-governor-brown-vetoes-multiparent-protection-law [http://perma.cc/FJ4X-YJ95].

[458] CAL. FAM. CODE § 7612(c) (West 2013).

[459] CAL. FAM. CODE § 3040(d) (West 2004). The multiparent concept extends principles of functional parenthood. *See* Bartlett, *supra* note 12, at 944 (explaining that "nonexclusive parenthood permits recognition of de facto parenting relationships"); *see also* Katharine K. Baker, *Bionormativity and the Construction of Parenthood*, 42 GA. L. REV. 649, 713 (2008) (arguing that "recognizing functional, non-exclusive parenthood undermines all of the core qualities associated with biological parenthood").

tion or through surrogacy.[460] In this way, same-sex couples may intentionally create family arrangements in which the child has more than two individuals performing parental roles.[461]

By pushing these arrangements *from within marital families*, same-sex couples may destabilize powerful norms dictating exclusive, married parenthood, for both same-sex and different-sex couples.[462] For instance, while in an earlier era the nonbiological mother in a same-sex relationship could be deemed a legal stranger even as the sperm donor became a legal father,[463] with same-sex marriage the nonbiological mother would enjoy a presumption of parentage (subject to the challenges explained *supra* Part IV). Accordingly, in cases where the parties have deliberately created a parental role for the biological father, his legal status could supplement, rather than supersede, that of the nonbiological mother. While courts operating under a two-parent limitation may simply exclude the biological father (which of course may be the best result regardless of any limitation), California courts can now recognize three parent-child relationships in appropriate situations.[464] By destabilizing norms around biological, gendered parenting, married same-sex couples may pressure the common assumption that a child has only two parents[465] and, at the same time, may validate parents who are not in coupled relationships.

Of course, the multiple-parenthood concept does not depend on marriage. In some states that prohibited same-sex marriage, courts nonetheless recognized multiple parents in limited situations.[466] And families formed by same-sex and different-sex couples, both in and out of marriage, may feature multiple parents. Indeed, while same-sex marriage produced the scenario that led to California's multiple-parent law, the law's recognition is not limited to situations arising out of

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460 BALL, *supra* note 68, at 129–34; *see also* MAMO, *supra* note 68, at 90–92; JUDITH STACEY, UNHITCHED: LOVE, MARRIAGE, AND FAMILY VALUES FROM WEST HOLLYWOOD TO WESTERN CHINA 74–79 (2011).

461 Professor William Eskridge labels such arrangements "polyparenting." Eskridge, *supra* note 6, at 1975. On the complexities posed by the potential legal recognition of families in which more than two adults fill familial, including parental, functions, see Elizabeth S. Scott & Robert E. Scott, *From Contract to Status: Collaboration and the Evolution of Novel Family Relationships*, 115 COLUM. L. REV. 293, 371–73 (2015).

462 *See* Stu Marvel, *The Evolution of Plural Parentage: Applying Vulnerability Theory to Polygamy and Same-Sex Marriage*, 64 EMORY L.J. 2047, 2084–86 (2015) (linking same-sex marriage and parenting to recognition of multiple parentage).

463 *See, e.g.*, Thomas S. v. Robin Y., 618 N.Y.S.2d 356 (App. Div. 1994); Jhordan C. v. Mary K., 179 Cal. App. 3d 386, 394 (1986).

464 CAL. FAM. CODE § 7612(c) (West 2013).

465 *See* Paula L. Ettelbrick, Speech, *Our Common Humanity: Vermont's Leading Role in Forging a New Basis for Family Recognition*, 2 GEO. J. GENDER & L. 135, 142 (2000).

466 *See, e.g.*, Jacob v. Shultz-Jacob, 923 A.2d 473 (Pa. Super. Ct. 2007) (recognizing that three individuals — a biological mother, a nonbiological mother, and an involved sperm donor — may have parental rights and obligations).

marriage or same-sex family formation. The parents, for example, may be three unmarried, heterosexual individuals.[467]

This is part of the point. By challenging norms once considered core to marriage and parenthood and instead reinforcing a model of parenthood that derives parentage from intent and function, families formed by same-sex couples continue to destabilize norms that constrict familial possibilities *for all families*, both in and out of marriage. Ultimately, the blurring of norms governing marital and nonmarital families, which of course relates to broader legal and demographic trends,[468] may continue through — and grow out of — marriage equality.

CONCLUSION

The Supreme Court's decision in *Obergefell* resolved the question of whether same-sex couples have access to marriage. But it opened up new questions about what such access means for a body of family law that regulates same-sex and different-sex couples, biological and nonbiological parents, and marital and nonmarital families. Rather than accept wholesale assessments that view same-sex couples' inclusion in marriage as rendering them "like straights,"[469] the account presented here focuses on the particular grounds that justify such inclusion. By carefully attending to the dimensions along which same-sex couples are conceived as similarly situated to their different-sex counterparts, this Article shows how an appeal to some marital norms has allowed same-sex couples to unsettle and reshape others.[470]

In early LGBT parenting litigation on behalf of unmarried parents, advocates drew on their constituents' marriage-like relationships, but they did so to elaborate a new model of intentional and functional parenthood. Recent claims to marriage equality implicated these same

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[467] Troublingly, anecdotal evidence in California suggests that the law has been invoked in the context of nonmarital families involving different-sex relationships, where the state looks for two potential fathers — a functional father and a biological father — as sources of child support. Interview with Cathy Sakimura, *supra* note 341; Interview with Diane Goodman, Dir., Law & Mediation Office of Diane M. Goodman, APC, in Encino, Cal. (July 10, 2014) (on file with the Harvard Law School Library). It becomes clear, once again, that government actors can deploy expansive parentage laws to privatize support.

[468] *See* Andrew J. Cherlin, *The Deinstitutionalization of American Marriage*, 66 J. MARRIAGE & FAM. 848, 858–59 (2004).

[469] *See* Spade, *supra* note 280, at 84; *see also* Marc Spindelman, *Homosexuality's Horizon*, 54 EMORY L.J. 1361, 1374 (2005).

[470] This account resonates with Professor Martha Minow's influential treatment of difference and the law. As Minow finds: "Strategies for remaking difference include challenging and transforming the unstated norm used for comparisons, taking the perspective of the traditionally excluded or marginal group, disentangling equality from its attachment to a norm that has the effect of unthinking exclusion, and treating everyone as though he or she were different." MARTHA MINOW, MAKING ALL THE DIFFERENCE 16 (1990).

principles. Same-sex couples who sought access to marriage sidelined biological and gendered notions of parentage and instead centered intent and function. This perspective brings into view marriage equality's power to facilitate, rather than undermine, the growth of transformative parentage concepts across family law. In fact, by validating the model of parenthood central to same-sex family formation, marriage equality can provide a precedent on which to justify the expansion of that model not only inside but also outside marriage, for both same-sex and different-sex relationships.

ARTICLE: Whither the Functional Parent?: REVISITING EQUITABLE PARENTHOOD DOCTRINES IN LIGHT OF SAME-SEX PARENTS' INCREASED ACCESS TO OBTAINING FORMAL LEGAL PARENT STATUS

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Text

[*55] INTRODUCTION

Until relatively recently, the law did not provide avenues through which both members of a same-sex couple could gain recognition as the parents of the children they were raising together. Instead, generally only the member of the same-sex couple who was the child's biological parent was recognized as the child's legal parent, and the nonbiological parent was considered a legal stranger to the child. [1] Historically, nonbiological parents in same-sex relationships could not gain legal parent status because the traditional avenues for establishing legal parent status in the United States have been based upon biology, marriage, and adoption. [2] Since joint biological parenthood was not an option for same-sex couples and for most of the nation's history members of same-sex couples could not marry each other or adopt each other's legal children, the traditional avenues for establishing legal parent status excluded nonbiological parents raising children in same-sex relationships. [3] As a result, if upon the dissolution of the **[*56]** relationship between the "formal legal parent" [4] and the nonbiological parent, the formal legal parent restricted or terminated the nonbiological parent's access to the child, the nonbiological parent generally was left

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[1] Jessica Feinberg, *Consideration of Genetic Connections in Child Custody Disputes Between Same-Sex Parents: Fair or Foul?*, 81 MO. L. REV. 331, 334, 348 (2016).

[2] Pamela Laufer-Ukeles & Ayelet Becher-Prigat, *Between Function and Form: Towards a Differentiated Model of Functional Parenthood*. 20 GEO. MASON L. REV. 419, 428 (2013).

[3] *See infra* notes 22-28 and accompanying text.

[4] For purposes of this article, the term lormal legal parent" will refer to individuals the law concludes or presumes are legal parents as a result of status-based indicators such as, for example, biology, marriage, and adoption.

without legal recourse. [5] In such situations, courts usually denied nonbiological parents any rights to custody or visitation, which effectively ended the relationship between a child and an individual who had functioned, oftentimes since birth, as the child's parent. [6]

In an effort to avoid the harsh results stemming from the application of the traditional avenues of establishing legal parent status to nonbiological parents raising children in same-sex relationships, a number of courts and legislatures adopted doctrines to grant visitation or custody rights under certain circumstances to individuals who had functioned as a child's parent, but who were unable to attain formal legal parent status under existing law. [7] Common titles for such doctrines include "de facto parentage, psychological parent, in loco parentis, [and] parent by estoppel." [8] While the doctrines differ by jurisdiction, they commonly provide visitation- or custody-related rights to individuals who, with the legal parent's consent or encouragement., have lived with the child and have functioned as the child's parent by forming a parent-like bond with the child and assuming the obligations of parenthood. [9] This article will refer to such doctrines collectively as "equitable parenthood doctrines."

Over the years, at least eighteen states have adopted equitable parenthood doctrines that grant child custody or visitation rights in certain circumstances to individuals who are not formal legal parents, but who have functioned in a parental role to a child (functional parents). [10] Proponents of equitable parenthood doctrines stress the essential role that such doctrines play in promoting the well-being and best interests of **[*57]** children, who may suffer significant short- and long-term harm when the relationship they share with an individual whom they view as a parent is severed. [11] Proponents also stress the strict requirements that must be satisfied in order for an individual to qunlify under these doctrines, which generally limit application of the doctrine to truly compelling cases involving individuals who have functioned, with the formal legal parent's consent, as a parent to the child. [12] Conversely, opponents of equitable parenthood doctrines maintain that the standards employed in such doctrines are complicated, non-objective, fact-intensive and lead to unpredictable results, and claim that the adoption of such doctrines results in litigation that is costly, lengthy; and contentious. [13] Other opponents have stressed the belief that by granting functional parents custody and visitation rights over the wishes of formal legal parents, the doctrines infringe on legal parents' fundamental rights to direct the care, custody, and control of their children. [14] Despite the differing views regarding equitable parenthood doctrines, the number of jurisdictions that have adopted

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[5] Feinberg, *supra* note 1, at 348.

[6] *Id.*

[7] *See infra* Section 1.8.1.

[8] Joanna L. Grossman, *The New Elegitimacy: Tying Parentage to Marital Status for Lesbian Co-Parents*, 20 AM. U. J. GENDER SOC. Pon' & L 671, 677 (2012); *see* also Laufer-Ulteles & Blecher-Prigat *supra* note 2, at 446 (-Thus, although achieving functional parental status requires meeting a significant set of criteria, once the conditions are met, many jurisdictions treat functional parental figures as replacements for and equivalent to formal parents.").

[9] *See infra* notes 83-85 and accompanying text.

[10] Steven W. Fitschen & Eric A. DeGrofC *Is it Time for the Court to Accept the* O.F.F.E.R.1: *Applying* Smith v. Organization of Foster Families for Equality and Reform *to Promote Clarity, Consistency, and Federalism in the World of De Facto Parenthood*, 24 S. CAL. INTERDISC. L.J. 419, 427 (2015)

[11] *See infra* notes 53-71 and accompanying text.

[12] *See infra* notes 112-115 and accompanying text.

[13] *See infra* note 118 and accompanying text.

[14] *See infra* note 117 and accompanying text.

such doctrines that provide visitation- or custody-related rights to functional parents in same-sex relationships has increased significantly over the past thirty or so years. [15]

Recent developments in laws governing same-sex parentage, however, have created new questions regarding the future of equitable parenthood doctrines. More specifically, as a result of the nationwide legalization of same-sex marriage in 2015 and the increasing number of jurisdictions recognizing second parent adoption in recent years, a growing number of marriage- and adoption-based avenues to establishing formal legal parent status are now available to nonbiological parents raising children within same-sex relationships. [16] Due to the fact that it was, in significant part, the historical denial of avenues to establishing formal legal parent status for nonbiological parents raising children within same-sex relationships that led many courts and legislatures to adopt equitable parenthood doctrines, these same entities may conclude that now that such parents have access to formal avenues to establishing legal parent status, equity no longer requires application or adoption of equitable parenthood doctrines. In fact, in cases involving same-sex parents, several courts have already cited as a justification for declining to **[*58]** adopt or apply equitable parenthood doctrines the availability of a formal avenue through which the individual seeking parental rights could have established legal parent status. [17]

This article argues that courts and legislatures should continue to adopt and apply equitable parenthood doctrines, despite the increasing availability to nonbiological parents raising children within same-sex relationships of formal avenues to establishing legal parent status. As an initial matter, the current avenues to establishing formal legal parent status for nonbiological parents raising children within same-sex relationships generally require marriage, adoption, or both. [18] Importantly, there are many reasons for why same-sex parents may not pursue these marriage- or adoption-based avenues that are completely unrelated to the relationship between the parents or between the parents and their children. Moreover, excluding equitable parenthood doctrines due to the availability to same-sex couples of marriage- or adoption-based avenues for establishing legal parent status would further exacerbate the law's discriminatory treatment of same-sex parents and disproportionately harm same-sex couples and their children. This is because, unlike same-sex couples, different-sex couples raising children have access to a variety of avenues to establishing legal parent status that require neither marriage nor adoption. [19] Moreover, even if in the future same-sex parents receive greater access to the formal avenues of establishing legal parent status available to different-sex parents, equitable parenthood doctrines will still serve an important function. There will always be couples who, despite jointly raising their children, are unable or unwilling for various reasons to take the steps necessary to establish formal **[*59]** legal parent status for the functional parent, and it is both unfair and unwise to punish children so harshly for the actions of their parents. A legal approach that categorically refuses to

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[15] *See infra* note 84 and accompanying text.

[16] *See infra* Section II.A.

[17] A.H. v. M.P., 857 N.E.2d 1061, 1065, 1073-74 (Mass. 2006) (refusing to apply an equitable parenthood doctrine despite the fact that the plaintiff had planned with the defendant for the child's birth, attended prenatal activities, helped care for the child for the first year and a half of the child's life, and was referred to as "Mama" by the child, and stating that "[i]n this jurisdiction, same-sex couples, like heterosexual couples, are free to adopt the children of their partners"); Debra H. v. Janice R., 930 N.E.2d 184, 189, 194 (N.Y. 2010) (refusing to apply an equitable parenthood doctrine despite the fact that the plaintiff served as a loving and caring parental figate during the first two and a half years of the child's life and stating that "the right of second-parent adoption … furnishes the biological and adoptive parents of children--and, importantly, those children themselves--with a simple and understandable rule by which to guide their relationships and order their lives"), *abrogated by* Brooke S.B. v. Elizabeth A.C.C., 61 N.E.3d 488 (N.Y2Ol6hTitchenalv. Dexter, 693 A.2d 684 683-87 (Vt. 1997) (refusing to apply an equitable parenthood doctrine despite the fact that the plaintiff had held herself out as the child's parent and had provided the majority of care for the child from the time of the child's birth until the child was three and a half years old, and explaining that nonbiological parents in same-sex relationships have the ability to protect their interests through adoption).

[18] *See infra* Section II.A.

[19] See *infra* Section II.B.1.

provide rights to functional parents is an approach that fails to promote one of family law's most essential goals: protecting the best of interests of children.

The article is organized in the following manner: Part I provides a historical overview of the legal treatment of same-sex parents raising children together and traces the development of equitable parenthood doctrines. Part II identifies and examines the avenues to establishing formal legal parent status that have been extended to same-sex couples in recent years as well as those avenues available to different-sex couples that have not yet been extended to same-sex couples. Part III evaluates whether under current law governing the recognition of parent-child relationships there is a continuing need for equitable parenthood doctrines, and argues that there are compelling reasons for legislatures and courts to continue to adopt and apply equitable parenthood doctrines despite the recent expansion to same-sex couples of various avenues to establishing formal legal parent status. Part IV first evaluates whether recognition of equitable parenthood doctrines will be necessary if, in the future, same-sex parents gain greater access to the formal avenues to establishing legal parent status enjoyed by different-sex parents. After answering this question in the affirmative, Part IV concludes by exploring the role that the LGBT rights movement should play with regard to the maintenance and promotion of equitable parenthood doctrines.

I. THE LAW's TREATMENT OF SAME-SEX PARENTS AND THE DEVELOPMENT OF EQUITABLE PARENTHOOD DOCTRINES

A. The Troubled History of the Legal Treatment of Same-Sex Parents and the Need for Equitable Parenthood Doctrines

Historically, the primary bases for bestowing upon an individual the status of legal parent have included "biology, adoption, [and] marriage." [20] As a result, the laws governing the granting of legal parent status had harsh results for same-sex couples raising children, leaving such couples without the ability to establish both members as the legal parents of the children **[*60]** they were raising. [21] With regard to biology as a basis for bestowing legal parent status, it has functioned by providing legal parent status for women based upon giving birth and for men based upon genetic fatherhood. [22] Since in female same-sex couples only one member can give birth to the child and in male same-sex couples only one member can be the child's genetic father, generally biology only has provided the basis for granting legal parent status to one member of a same-sex couple. [23] With regard to marriage as a basis for providing legal parent status, under the longstanding marital presumption of paternity, the law presumes that the husband of a woman who conceives or gives birth to a child during the marriage is the legal father of the child. [24] The historical exclusion of same-sex couples from the institution of marriage meant that same-sex couples could not establish legal parent status through marriage-based parentage laws. [25] Finally, with regard to adoption as a basis for providing legal parenthood, for most of the nation's history adoption laws across the country did not allow an individual to adopt the legal child of his or her nonmalital partner (thereby excluding

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[20] Laufer-Ulteles & Blecher-Prigat, *supra* note 2, at 428.

[21] See *supra* note 5 and accompanying text.

[22] Feinberg, *supra* note 1, at 340.

[23] *Id.* at 348.

[24] *Id.* at 340-41.

[25] The first state to legalize same-sex marriage was Massachusetts, which did so in 2003. *Same-Sex Marriage, State by State*, PEW RES. CTR. (June 28, 2015), http://www.pewforum.org/2015/06/28/same-sex-marriage-state-by-state/ [https://perma.cc/5FWF-FFLC].

same-sex couples who, until recently, were excluded from the institution of marriage) and did not allow for joint adoption by same-sex partners. [26]

Taken together, the historical legal landscape governing the bases for establishing legal parenthood frequently left same-sex couples raising children in the difficult situation wherein only one member of the couple, the member who was the biological or adoptive parent of the child, formally was recognized as the child's legal parent. In situations in which the parents' relationship dissolved and the formal legal parent restricted or terminated the functional parent's access to the child, the functional parent was often viewed by the court as a legal stranger and denied standing to seek child custody or visitation. [27] Many of these cases involved denying any rights to **[*61]** maintain contact with the child to individuals who had. planned for the child, functioned as the child's parent from the time of the child's birth, and/or formed incredibly strong bonds with the child. [28]

As societal acceptance of same-sex relationships grew over the years, the number of same-sex couples raising children increased and cases involving the custody of their children became more frequent. Leading LGBT rights organizations such as the National Center for Lesbian Rights (NCLR), Lambda Legal Defense and Education Fund, Inc. (Lambda Legal), and Gay & Lesbian Advocates & Defenders (GLAD), [29] consistently played important roles in these cases, representing functional parents or submitting amicus briefs on behalf of functional parents. [30] In case

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[26] *Timeline & Victories*, NAT'L CTR. FOR LESBIAN RIGHTS, http://www.nclrights.org/about-us/mission-history/timeline-of-victories/ [https://perma.cc/W68C-CQDF] ("1986--NCLR represents Annie Affleck and Rebecca Smith as they become one of the first same-sex couples to jointly adopt in the U.S. 1987--NCLR wins one of the first second-parent adoption cases in the country and begins promoting second-parent adoption as a legal strategy for protecting same-sex parent families").

[27] Feinberg, *supra* note I, at 348; Courtney G. Joslin, *Leaving No (Nonmarital) Child Behind*, 48 FAN. L.Q. 495, 497-98 (2014).

[28] Feinberg, *supra* note 1, at 348; Joslin, *supra* note 27, at 498 ("As a result, hundreds, if not thousands, of children were abruptly cut off from one of the only parents they ever knew.").

[29] In February of 2016, the organization changed its name to GLBTQ Legal Advocates & Defenders. Janson Wu, *The Generations of a Name*, GLAD (Feb. 23, 2016), http://www.glad.org/post/the-generations-of-a-name [http://perma.cc/N6PB-FLUU].

[30] *See, e.g.*, Reply Brief of Petitioner A.B., *In re* Visitation with C.B.L., 723 N.E.2d 316 (Ill. App. Ct. 1999) (No. 1-98-2011), 1999 WL 33741226; Brief of Amicus Curiae Lambda Legal Defense & Educ. Fund, Inc., In re Parentage of A.B., 837 N.E.2d 965, (Ind. 2005) (No. 53S01-0511-JV-606, http://www.lambdalegal.org/site/default/files/legal-docs/downloads/in-re-parentage-of-ab_in_20050112_amicus-lambda-lagal.pdf [https://perma.cc./D8HL-SYLZ] (in support of the petitioner); Brief of Amici Curiae Am. Civil Liberties Union et al., inSupport of Plaintiff-Appellee, Frazier v. Gaudschaal, 295 P.3d 542 (Kan. 2013) (No. 103,487), 2010 WL 3406816; Brief of Appellee C.E.W., C.E.W. v. D.E.W., 845 A.2d 1146 (Me. 2004) (No. CUM-02-534), 2002 WL 32949148 (in support of the petitioner); Brief of Amicus Curiae Lambda Legal Def. & Educ. Fund, Inc., Conover v. Conover, 141 A.3d 31 (Md. 2016) (No. 79), https://freestate-justice.org/wp-content/uploads/2016/02/Conover-2016.02.25-Amicus-Brief-of-Lambda-Legal.pdf [https://perma.cc/9NF5-2B6M] (in support of the petitioner); Brief of Amicus Curiae Nat']Ctr. for Lesbian Rights et al., Janice M. v. Margaret K., 948 A.2d 73 (Md. 2008) (No. 122), 2007 WL 1336442 (in support of the respondent/cross-petitioner); Appellants' Brief, White v. White, 293 S.W.3d 1 (Mo. Ct. App. 2009) (No. WD69580), 2008 WL 4143932; Brief of Amicus Curiae Nat'l Ctr. for Lesbian Rights in Support of Plaintiff-Appellant, Latham v. Schwerdtfeger, 802 N.W.2d 66 (Neb. Ct. App. 2011) (No. S-10-742), 2010 WL 4892503; Brief of Amici Curiae Nat'l Ctr. for Lesbian Rights et al., Debra H. v. Janice R., 930 N.E.2d 184 (N.Y. 2010) (No. 106569/08), http://www.lambdalegal.org/in-court/legal-doc/debra-h_ny_20100504_lgbt-groups-amicus [http://perrma.cc/WYS6-D88L] (in support of petitioner); Brief of Amicus Curiae Nat'l Ctr. of Lesbian Rights inSupport of Appellant Michele Hobbs, In re Mullen, 953 N.E.2d 302 (Ohio 2011) (No. 2010-02625), 2010 WL 9012297; Brief of Amicus Curiae Lambda Legal Def. & Educ. Fund, Inc. et al., on Behalf of Appellants, In re Bonfield, 780 N.E.2d 241 (Ohio 2002) (No. 2001-0625), 2001 WL 34555949; Brief for Appellant, T.B. v. L.R.M., 874 A.2d 34 (Pa. Super. Ct. 2005) (No. 1241 WDA 2004), 2004 WL 3317890; Brief of Amid Curiae Gay & Lesbian Advocates & Defenders et al., Rubano v. DiCenzo, 759 A.2d 959 (R.I. 2000) (No. 97-604-A), 1997 WL 33808968 (in support of the petitioner); Amicus BriefeLesbian & Gay Rights Project of the Am. Civil Liberties Union et al., In re Parentage of L.B., 122 P.3d 161 (Wash. 2005) (No. 75626-1), 2003 WL 23875746 (in support of the petitioner); Amici Curiae Brief of Nat'l Ctr. for Lesbian Rights et at., In re Parentage of L.B., 122 P.3d 161 (Wash. 2005) (Nos. 75628-1 & 52151-9-1), 2005 WL 723841 (in support of the appellant/respondent); Brief of

after case over the years, these leading LGBT **[*62]** rights organizations argued forcefully for the application of equitable parenthood doctrines to protect the rights and well-being of children and their functional parents, [31] and the arguments in favor of protecting the relationships between children and their functional parents have garnered substantial success. [32] Troubled by the prospect of completely severing the relationship between a child and an adult who had functioned as the child's parent, courts and legislatures in some jurisdictions began to adopt equitable parenthood doctrines to grant custody-and visitation-related parental rights to individuals who had functioned as parents but who lacked legal parent status. [33]

In its influential 1995 decision *In re Custody of H.S.H.-K.*, [34] the Wisconsin Supreme Court rendered one of the earliest decisions granting custody or visitation rights to a functional same-sex parent [35] and established what has since become the most widely adopted test for determining whether an individual qualifies for relief under states' equitable parenthood doctrines [36] The case involved a same-sex couple, Ms. Knott and Ms. Holtzman, who together planned for the conception of their child via donor insemination of Ms. Knott. [37] The couple "attended obstetrical visits and childbirth classes together[,] . . ., [and] [Ms.] Holtzman was present during labor and delivery." [38] The child was given a last name that combined Ms. Holtzman and Ms. Knott's last names. [39] Following the child's birth, "[Ms.] Holtzman provided the primary financial support for [Ms.] Knott, herself and the child and both women shared child-care responsibilities." [40] The couple had co-parented the child together in this manner for four years by the time their relationship ended. [41] Approximately eight months after the couple's relationship ended, Ms. Knott cut off all contact **[*63]** between Ms. Holtzman and the child, and Ms. Holtzman subsequently filed for custody and visitation. [42]

Although the guardian ad litem reported to the trial court that the child believed Ms. Holtzman was his parent and wished to spend time with her, and the court found that Ms. Holtzman had "devoted herself to the child," [43] it

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Amicus Curiae Nat'l Ctr. of Lesbian Rights, Sinnott v. Peck, No. 2015-426 (Vt. Argued May 24, 2016) (No. 2015-426), 2015 WL 10007643; Amicus Brief of Nat'l Ctr. for Lesbian Rights, In re Custody of H.S.H-K, 533 N.W.2d 419 (Wis. 1995) (No. 1993AP2911), 1994 WL 17084701 (in support of the petitioner).

[31] *See supra* note 30 (compiling briefs from leading LGBT rights organizations arguing in favor of the application of equitable parenthood doctrines).

[32] *See infra* Section I.B.1.

[33] Rebecca Aviel, *A New Formalism for Family Law*, 55 WM. & MARY L. REV. 2003, 2053 (2014) ("To avoid the kind of injustices described above and the manifest harm to the children involved, courts have been increasingly responsive to claims that someone who has functioned as a parent should have some legally protectable rights that overcome the objection of the legal parent, even when the statutory scheme makes no such provision.").

[34] In re Custody of H.S.H.-K., 533 N.W.2d 419 (Wis. 1995).

[35] Kimberly D. Richman, *(When) Are Rights Wrong? Rights Discourses and Indeterminacy in Gay and Lesbian Parents' Custody Cases*, 30 L. & SOC. INQUIRY 137, 151 (2005).

[36] Grossman, *supra* note 8, at 677-79.

[37] *In re* Custody of H.S.H.-K, 533 N.W.2d at 421.

[38] *Id.*

[39] Id. at 422.

[40] *Id.*

[41] Id. at 421-22.

[42] Id. at 422.

[43] *Id.*

nonetheless reluctantly granted summary judgment in favor of Ms. Knott. [44] The trial court explained that the relevant custody and visitation laws did not recognize the relationship "between a child and a parent's nontraditional partner." [45] The trial court stressed that by ignoring the trauma experienced by children upon the termination of their relationship with a parent-like figure, the law failed to promote the best interests of children. [46] The trial court urged the legislature "to reexamine the law in light of the realities of modern society." [47]

On appeal, the Wisconsin Supreme Court held that despite the fact that none of the existing child custody or visitation statutes directly applied to Ms. Holtzman's situation, the court nonetheless had equitable power to hear her claim for visitation if she could prove that she shares a "parent-like relationship with the and that a significant triggering event justifies state intervention in the child's relationship with a biological or adoptive parent." [48] The court developed a multipart test to determine whether it was within the court's equitable power to hear a petition for visitation. [49] The first part of the test requires the petitioner to prove each of the following four elements:

> (1) that the biological or adoptive parent consented to, and fostered, the petitioner's formation and establishment of a parent-like relationship with the child; (2) that the petitioner and the child lived together in the same household; (3) that the petitioner assumed obligations of parenthood by taking significant responsibility for the child's care, education and development, including contributing towards the child's support, without expectation of dial compensation; and (4) that the petitioner has been in a parental role for a length of time sufficient to have established with the child a bonded, dependent relationship parental in nature. [50]

The second part of the test requires the petitioner to demonstrate that a "triggering event" has occurred that "justif[ies] state intervention in the child's relationship with a **[*64]** biological or adoptive parent" by proving that the legal parent "interfered substantially with the petitioner's parent-like relationship with the child, and that the petitioner sought court ordered visitation within a reasonable time after the parent's interfarence." [51] If the petitioner is able to satisfy the test; the petitioner has standing to seek visitation, which the court will award if it determines that such visitation is in the best interests of the child. [52]

Although its decision in *In re Custody of H.S.H.-K.* played an essential role in the development of equitable parenthood doctrines, the Wisconsin Supreme Court was far from the first entity to recognize the importance of relationships between children and individuals who function as their parents. In their 1973 book *Beyond the Best Interests of the Child*, which focused on child placement, hill psychoanalysts Anna Freud, Joseph Goldstein, and Albert Solnit set forth the psychological parent concept. [53] As set forth, this concept emphasized the importance of maintaining continuity in the relationship between a bald and a person who had developed a psychological

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[44] *Id.*

[45] *Id.*

[46] *Id.*

[47] *Id.*

[48] Id. at 421.

[49] *Id.*

[50] *Id.* (footnotes omitted).

[51] *Id.*

[52] *Id.*

[53] *See generally* JOSEPH GOLDSTEIN ET AL., BEYOND THE BEST INTERESTS OF THE CHILD 17-20 (1973).

parenting relationship with that child. [54] A psychological parent was defined not by formal markers such as biology, marriage, or adoption, but instead as a person who "on a continuing, day-to-day basis, through interaction, companionship, interplay, and mutuality, fulfills the child's psychological needs for a parent, as well as the child's physical needs." [55] *Beyond the Best Interests of the Child* highlighted the significant harm to the child that could occur if the child's relationship with a psychological parent was disrupted. [56] Although not without controversy, the theories developed in *Beyond the Best Interests of the Child* have had a significant and enduring influence on the law's approach to resolving issues relating to the placement of children. [57] For example, in custody disputes between legal parents, "[t]he continuity of functional caregiving is central . . . [and] the primary caregiver is regularly considered the preferred custodial **[*65]** parent." [58] Notably, over one thousand child custody cases have cited *Beyond the Best Interests of the Child*. [59]

Subsequent research has provided further support for the claims made in *Beyond the Best Interests of the Child* regarding the importance of the relationship between a child and an individual who functions as the child's parent. For example, subsequent research has found that attachment relationships between children and adults form through an adult's conduct as a parental figure, not through his or her status as a legal parent. [60] Specifically, attachment relationships form through an adult's "provision of physical and emotional care, continuity or consistency in the child's life and emotional investment in the child." [61] Importantly, there are a variety of ways in which the attachment relationships formed between children and the adults in their lives who function as parents are critical to children's well-being and development. These relationships "serve to protect the child's development, forming the building blocks for the emerging sense of emotional security, the ability to cope with stress, and an increased self-awareness." [62] "Secure attachment relationships lead[] to the [child's] 'development of awareness, social competence, conscience, emotional growth and emotional regulation.'" [63] Moreover, research in the fields of neurology and psychology indicates that the primary environmental factor that shapes brain development during the time of maximum growth is a child's attachment reiationships. [64]

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[54] *See id.* at 31-34, 99-100.

[55] *Id.* at 98.

[56] *See id.* at 31-34.

[57] June Carbone, *Child Custody and the Best Interests of Children--A Review of* From Father's Property to Children's Rights: The History of Child Custody in the United States, 29 FAM. L.Q. 721, 735 (1995) (book review) ("[O]ver the last thirty years, the single most influential work on the interests of children is Goldstein, Freud, and Solnit's concept of the 'psychological parent' with whom the child has emotionally bonded.").

[58] Laufer-Ukeles & Blecher-Prigat, *supra* note 2, at 430.

[59] DOUGLAS E. ABRAMS ET AL., CONTEMPORARY FAMILY LAW 806 (4th ed. 2015).

[60] Linda D. Elrod, *A Child's Perspective of Defining a Parent: The Case for Intended Parenthood*, 25 BYU J. PUB. L. 245, 249-50 (2011).

[61] Id. at 249.

[62] Id. at 250.

[63] *Id.* (quoting NAT'L RES. COUNCIL, & INST. OF MED., FROM NEURONS TO NEIGHBORHOODS: THE SCIENCE OF EARLY CHILDHOOD DEVELOPMENT 234, 226, 265 (Jack P. Shonkoff & Deborah A. Phillips eds. 2000)).

[64] Brief of Amici Curiae Nat'l Ass'n of Soc. Workers et al., in Support of Petitioner-Appellant Debra H.'s Appeal at 11, Debra H. v. Janice R. 930 N.E.2d 184 (N.Y. 2010) (No. 106569/08), http://www.lambdalegal.org/in-court/legal-docs/debra-h_ny_20100504_brief-of-nasw-amici [https://perma-cc/2LZU-XCQX].

If the relationship between a child and an adult with whom he or she has formed an attachment relationship is disrupted, it can be very detrimental to the overall well-being of the child. [65] The disruption of attachment relationships can cause significant both short- and long-term psychological and emotional harm to children. [66] For example, when the relationship between **[*66]** an infant or toddler and psychological parent is disrupted, the child suffers anxiety and separation distress, and may have difficulty trusting the individuals with whom they form relationships in the future. [67] In addition, the disruption of an attachment relationship may cause children to regress in various areas of development. [68] Disruption of attachment relationships during childhood also can lead to "aggression, fearful relationships, academic problems in school and . . . elevated psychopathology," [69] and disruption experienced during childhood may continue to affect an individual even during adulthood. [70] Overall, "[o]nce an adult has lived with and cared for a child for an extended period of time and become that child's psychological parent, removing that "parent' from the child's life results in emotional distress in the child and a setback of ongoing development " [71] Recognizing the extensive research highlighting the importance of relationships between children and the individuals who function as their parents, a number of jurisdictions have adopted equitable parenthood doctrines.

B. The Current State of Equitable Parenthood Doctrines

1. Jurisdictions That Have Adopted Equitable Parenthood Doctrines

Following the Wisconsin Supreme Court's decision in *In re Custody of H.S.H.-K*, a number of other jurisdictions adopted equitable parenthood doctrines through judicial or legislative action. At least eighteen states have now adopted equitable parenthood doctrines that grant child custody or visitation rights in certain circumstances to individuals who have functioned in a parental role to a child. [72] Though many of the equitable parenthood doctrines share core similarities with the **[*67]** one adopted in *In re Custody of H.S.H.-K.*, the doctrines in existence today are not uniform in name or substance across jurisdictions. Among the jurisdictions that have adopted equitable parenthood doctrines, various titles have been given. The most common titles include "de facto parentage, psychological parent, in loco parentis, [and] parent by estoppel." [73] Jurisdictions also differ with regard

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[65] *Id.* at 18.

[66] Frank J. Dyer, *Termination of Parental Rights in Light of Attachment Theory: The Case of Kaylee*, 10 PSYCHOL. PUB. POL'Y & L. 5, 11 (2004) ("In sum, there are numerous empirical findings that provide a solid research basis for predictions of long-term harm associated with disrupted attachment and loss of a child's central parental love objects."); Elrod, *supra* note 60. at 250-51 ("Continuity of the parent-child relationship is essential to the child's overall well-being. When an attachment relationship is severed by one parent dropping out of a child's life, the child suffers emotional and psychological harm. Disrupting attachments can turn a securely attached child into an insecure one."); Rebecca L. Scharf, *Psychological Parentage*, Trawl, *and the Best Interests of the Child*. 13 GEO.J. GENDER & L. 615, 634-35 (2012).

[67] GOLDETEIN ET AL., *supra* note 53, at 33.

[68] *See id.* at 33-34.

[69] Brief of Amici Curiae Nat'l Asen of Soc. Workers et al., *supra* note 64, at 18 (omission in original) (quoting Ana H. Marty et al., *Supporting Secure Parent-Child Attachments: The Role of the Non-Parental Caregiver*, 175 EARLY CHILD DEV. & CARE 271, 274 (2005)).

[70] GOLDSTEIN ET AL., *supra* note 53, at 34.

[71] Scharf, *supra* note 66, at 634.

[72] Fitschen & DeGroff, *supra* note 10, at 427-28.

[73] Grossman, *supra* note 8, at 677; Laufer-Ukeles & Blecher-Prigat, *supra* note 2, at 446 ("Thus, although achieving functional parental status requires meeting a significant set of criteria, once the conditions are met, many jurisdictions treat functional parental figures as replacements for and equivalent to formal parents.").

to whether individuals who would otherwise satisfy the requirements of the relevant doctrine can be recognized in situations in which the child already has two formal legal parents. [74] In addition, the position occupied by individuals who qualify under these doctrines for purposes of determining custody and visitation rights varies significantly depending on the jurisdiction. [75] More specifically, in a few jurisdictions, individuals who qualify under these doctrines are treated as equal to legal parents for purposes of both custody and visitation determinations. [76] In at least one jurisdiction, a **[*68]** qualifying individual is treated as equal to a legal parent for purposes of visitation determinations, but not custody determinations. [77] In a significant number of jurisdictions qualifying individuals are merely given standing to seek visitation and/or custody, [78] and must meet higher burdens (the language of which differ by jurisdiction) than legal parent [79] in order to obtain such rights. [80] Finally, the elements

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[74] COURTNEY JOSLIN ET AL, LESBIAN, GAY, BISEXUAL & TRANSGENDER FAMILY LAW § 7:14 (2016).

[75] *See* Grossman, *supra* note 8, at 677.

[76] *See, e.g.*, Pitts v. Moore, 90 A.3d 1169, 1181 (Me. 2014) ("A determination that a person is a de facto parent means that he or she is a parent on equal footing with a biological or adoptive parent, that is to say, with the same opportunity for parental rights and responsibilities."); Latham v. Schwerdtfeger, 802 N.W.2d 66, 72 (Neb. 2011) ("[T]he rights, duties, and liabilities of la person *in loco parentis*] are the same as those of the lawful parent."); T.B. v. L.R.M., 786 A.2d 013, 916-17 (Pa. 2001) (stating that in seeking child custody and visitation, "[t]he rights and liabilities arising out of an *in loco parentis* relationship are, as the words imply, exactly the same as between parent and child"); In re Parentage of L.B., 122 P.3d 161, 177 (Wash. 2005) ("We thus hold that henceforth in Washington, a *de facto* parent stands in legal parity with an otherwise legal parent, whether biological, adoptive, or otherwise?). Whether the Establishment of a Parent-Child Relationship Under Delaware's de facto Parent Law Entitles Gabrielle to Child's Benefits on the Earnings Record of the Number Holder, Kathy. PR 01005.009 Delaware (Soc. Sec. Admin. July 10, 2012), https://secure.ssa.gov/poms.nsf/Inx/1501005009https://perma.cc/M5VC-MLDJ] ("According toSection 8-201 of Title 13 of the Delaware Code, there is no legal difference between the parent-child relationship of a natural mother/father and child, an adoptive mother/father and child, and a de facto parent and child."); see also Conover v. Conover, 146 A.3d 433, 463 (Md. 2016) ("We hold that de facto parents have standing to contest custody or visitation and need not show parental unfitness or exceptional circumstances before a trial court can apply a best interests of the child analysis."). See Grossman, *supra* note 8, at 677 ("In a few states, once a third party has established de facto or psychological parent status, she stands in parity to a legal parent."). In two of these jurisdictions, Delaware and Maine, parents who qualify under the relevant equitable parenthood doctrines are designated by statute as legal parents. JOSLIN ET AL., *supra* note 74, § 7:14; DEL. CODE. ANN. tit. 13, §§ 8-201, 8-203 (2016); ME. REV. STAT. ANN. tit. 19-a, §§ 1851, 1891 (2016) (establishing that an adjudication of de facto parentage is one way to establish legal parentage). Although the New Jersey Supreme Court stated that psychological parents "stand[] in parity" with genetic parents, it also stated that if all else is equal in applying the best interests of the child standard, custody should be given to the legal parent, meaning that psychological parents do not actually stand in parity to legal parents for purposes of custody. V.C. v. M.J.B., 748 A.2d 539, 554 (N.J. 2000).

[77] *See, e.g.,* V.C., 748 A.2d at 554 ("[U]nder ordinary circumstances when the evidence concerning the child's best interests (as between a legal parent and psychological parent) is in equipoise, custody will he awarded to the legal parent. Visitation, however, will be the presumptive rule, subject to the considerations set forth in *N.J.S.A.* 9:2-4, as would be the case if two natural parents were in conflict"); *see also* Laufer-Ukeles & Blecher-Prigat *supra* note 2, at 449 ("In fact, courts applying functional parenthood have in practice followed Ethel presumption [that a functional parent is entitled to visitation but not custody] despite conceptually equalizing parenthood."); *see also* Grossman, *supra* note 8, at 677.

[78] "In two jurisdictions, [Arkansas and Wisconsin,] courts have held that a *de facto* parent may seek visitation, but not custody." JOSLIN ET AL., *supra* note 74, § 7:9.

[79] The standard generally governing custody determinations between fit legal parents is the "best interests of the child" standard. HoNum a CLARK, JR. & ANN LAQUER ESTIN, DOMESTIC RELATIONS: CASES AND PROBLEMS ON DOMESTIC RELATIONS 958 (7th ed. 2005) (citations omitted). With regard to visitation, however, the prevailing approach is that a fit legal parent is entitled to visitation unless the court determines that visitation would be significantly harmful to the child's well-being. ABRAMS ET AL., *supra* note 59, at 915; CLARK & ESTIN, *supra*, at 982-83; ROBERT E. OLIPHANT & NANCY VER STEEGH, FAMILY, LAW: EXAMPLES AND EXPLANATIONS 180 (3rd ed. 2010); UNIF. MARRIAGE & DIVORCE ACT § 407 (NAT'L CONFERENCE OF COMM'RS ON UNIF. STATE LAWS, amended 1973).

that a petitioner must meet in order to qualify under these doctrines also differ somewhat by jurisdiction. [81] All of the doctrines, however, seek to promote the best interests of children by providing visitation- or custody-related rights to individuals who, under specified circumstances, have functioned as a child's parent. While cases applying equitable **[*69]** parenthood doctrines in the context of same-sex parenting arrangements have received the most attention from legal scholars and commentators, individuals who have functioned as parents within the context of different-sex relationships may also seek relief under these doctrines. [82]

The most widely adopted test for determining whether an individual qualifies for relief under a state's equitable parenthood doctrine is the one articulated in *In re Custody of H.S.H.-K.* [83] Many jurisdictions have adopted identical or very similar tests. [84] While not every jurisdiction has adopted a test identical to the one set forth in *In re*

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[80] *See, e.g.*, Kinnard v. Kinnard, 43 P.3d 150, 154 (Ala. 2002) (holding in a custody dispute with a psychological parent, a legal parent should receive custody "unless the trial court determines that the parent is unfit, has abandoned the child, or that the welfare of the child requires that a non-parent receive custody."); Egan v. Fridlund-Horne, 211 P.3d 1213, 1222, 1224 (Ariz. Ct. App. 2009) (holding that in order to obtain visitation, a person who stands in loco parentis must "rebut[] [the] presumption that a fit parent's decision to deny or limit visitation is in the child's best interests," while a legal parent is entitled to visitation "unless the court finds that it would seriously endanger the child's" well-being); A.C. v. N.J., 1 N.E.3d 685, 694 n.6 (Ind. Ct. App. 2013) ("Even assuming Partner is a de facto custodian, she was still required to overcome the presumption in favor of Mother as the natural parent."); McAllister v. McAllister, 779 N.W.2d 652, 658 (N.D. 2010) ("When a psychological parent and a natural parent each seek a court-ordered award of custody, the natural parent's paramount right to custody prevails unless the court finds it in the child's best interests to award custody to the psychological parent to prevent serious harm or detriment to the welfare of the child." (quoting Cox v. Cox., 613 N.W.2d 516, 521-22 (N.D. 2000)); Middleton v. Johnson, 633 8.E.2d 162, 171-72 (EC. Ct. App. 2006) (stating that a person who qualifies as a psychological parent is entitled to visitation only if he or she is able to prove that "compelling circumstances" exist and providing as an example of compelling circumstances a situation where denying visitation would cause significant harm to the child).

[81] See *infra* notes 83-111 and accompanying text.

[82] In fact, the common requirements of the equitable parenthood doctrines contain gender neutral language. *See infra* notes 83-85 and accompanying text.

[83] Brief of Amici Curiae Nat'l Ctr. for Lesbian Rights et al., *supra* note 30. This test requires the petitioner to prove that: (1) the legal parent fostered and consented to the petitioner forming a parent-like relationship to the child; (2) the petitioner lived in a household with the child; (3) the petitioner "assumed obligations of parenthood by taking significant responsibility for the child's care, education and development, including contributing towards the child's support, without expectation of financial compensation;" and (4) "the petitioner has been in a parental role for a length of time sufficient to have established with the child a bonded, dependent relationship parental in nature." In re Custody of H.S.H.-K., 533 N.W.2d 419, 421 (Wis. 1995).

[84] In re K.H., 773 S.E.2d 20, 25 n.7 (W. Va. 2015) ("The general legal principles associated with the psychological parent concept were addressed in a 1995 Wisconsin case, and the criteria enumerated in that four-element test have now become incorporated within the definitions of the psychological parent doctrine utilized by most reviewing courts."). Courts in Maryland, New Jersey, Rhode Island, South Carolina, and Washington have adopted the test articulated in *In re Custody of H.S.H-K. See* Conover v. Conover, 146 A.3d 433, 439 (Md. 2016); V.C. v. M.J.B., 748 A.2d 539, 551 (N.J. 2000); Rubano v. Dicenzo, 759 A2d 959, 974 (R.I. 2000) (adopting the approach of V.C., 748 A.2d 539, which adopted the approach of In re H.S.H-K, 533 N.W.2d 419): Middleton v. Johnson, 633 S.E.2d 162, 168 (S.C. Ct. App. 2006); In re Parentage of L.S., 122 P.3d 161. 176 (Wash. 2005). Very similarly approaches have been adopted in a number of other jurisdictions. *See, e.g.*, E.N.O. v. L.M.M., 711 N.E.2d 886, 891 (Mass. 1999) (defining a de facto parent as "one who has no biological relation to the child, but has participated in the child's life as a member of the child's family. The de facto parent resides with the child and, with the consent and encouragement of the legal parent, performs a share of caretaking functions at least as great as the legal parent. The de facto parent shapes the child's daily routine, addresses his developmental needs, disciplines the child, provides for his education and medical care, and serves as a moral guide." (internal citations omitted)); T.B. v. L.R.M., 788 A.2d 913, 916-20 (Pa. 2001) (explaining that "[t]he status of *in loco parentis* embodies two ideas; first, the assumption of a parental status, and, second, the discharge of parental duties" applies "where the child has established strong psychological bonds with a person who, although not a biological parent, has lived with the child and provided care, nurture, and affection, assuming in the child's eye a stature like that of a parent," and involves situations where the legal parent has consented to and encouraged the petitioner to assume parental status); *In re* K.H., 773. S.E.2d 20, 26 (W. Va. 2015) (explaining that "[a] psychological parent is a person who, on a

Custody of H.S.H.-K., the **[*70]** four elements included in the test, in one form or another, represent the elements that appear most frequently in the eligibility requirements of equitable parenthood doctrines. [85]

With regard to the first element, many states' equitable parenthood doctrines require that the petitioner demonstrate that the child's legal parent consented to or encouraged the formation of a parent-like relationship between the petitioner and the child. [86] This requirement is viewed as important for a variety of reasons. As an initial matter, the consent requirement seeks to avoid judicial infringement on a legal parent's fundamental right to make decisions regarding the care and custody of her child by requiring that the legal parent consents to or encourages, as reflected by her words or conduct, the formation of a parent-like relationship between the petitioner and the child. [87] This requirement is essential because it places the legal parent in control and provides her with complete power to maintain a "zone of privacy" around her child and herself. [88] However, this requirement also recognizes that if a legal parent "wishes to maintain that zone of privacy she cannot invite a third party to function as a parent to her child and cannot cede over to that third party parental authority the exercise of which may create a profound bond with the child." [89] The consent requirement seeks to ensure that the rights of legal parents to determine who functions in a parental role to their children are respected and shields legal parents from intrusive and burdensome custody and visitation claims from individuals who did not have the legal parent's consent to form a parent-like relationship with the child. [90]

[*71] The second element commonly included within equitable parenthood doctrines is that the petitioner resided in a household with the child. [91] While a few states specifically indicate a minimum amount of time for which the

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continuing day-to-day basis, through interaction, companionship, interplay, and mutuality, fulfills a child's psychological and physical needs for a parent and provides for the child's emotional and financial support . . . [and that] Nile resulting relationship between the psychological parent and the child must be of substantial, not temporary, duration and must have begun with the consent and encouragement of the chi ea legal parent or guardian . . . [and that] . . . [i]n the cases in which this Court has determined a person to be a psychological parent to a child, that person typically has resided in the child's household and interacted with the child on a daily basis").

[85] *See infra* notes 86, 91, 98.

[86] Katharine T. Bartlett, *Prioritizing Past Caretaking in Child-Custody Decisionmaking*, 77 L. & CONTEMP. PROBS. 29, 62 (2014) ("Contemporary definitions of de facto parent typically depend, as do the ALI Principles, on, a prior, residential, caretaking relationship with the child, developed with the consent or acquiescence of the parent."). *See, e.g.*, DEL. CODE ANN. tit. 13, § 8-201(c) (2009); Pitts v. Moore. 90 A.3d 1169, 1179-80 (Me. 2014); Conover, 146 A.3d at 439-40; *E.N.O.*, 711 N.E.24 at 892; V.C., 748 A.2d at 551; T.B., 786 A.2d at 918-19; Rubano, 759 A.2d at 974; Middleton, 633 S.E.2d at 168; In re Parentage of L.B., 122 P.3d at 176; In re K.H., 773 S.E.2d at 25-28; In re Custody of H.S.H.-K., 533 N.W.2d at 421. Even when not stated specifically in the definition of the equitable parenthood status, courts often consider whether the legal parent consented to the formation of the relationship. See, e.g., Latham v. Schwerdtfeger, 802 N.W.2d 66, 76 (Neb. 2011).

[87] Rubano, 759 A.2d at 974; In re Custody of H.S.H-K., 533 N.W.2d at 436 ("This exercise of equitable power protects parental autonomy and constitutional rights by requiring that the parent-like relationship develop only with the consent and assistance of the biological or adoptive parent.").

[88] V.C., 748 A.2d at 552.

[89] *Id.*

[90] Brief of Amici Curie Family Law Acads. in Support of Petitioner-Appellant at 8-10, Debra H. v. Janice R., 61 A.D.3d 460 (N.Y. App. Div. 2009) (No. 106569/08), http://www.lambdalegal.org/sites/default/files/2009-11-16_fam_law_academics_amicus_br.pdf [https://perma.cc/K2CE-ANR9].

[91] Bartlett, *supra* note 86, at 62 ("Contemporary definitions of de facto parent typically depend, as do the ALI *Principles*, on, a prior, residential, caretaking relationship with the child, developed with the consent or acquiescence of the parent."). *See, e.g.,* Pitts, 90 A.3d at 1179-80; Conover, 146 A.3d at 439-40; V.C., 748 A.2d at 551; T.B., 786 A.2d at 917; Rubano, 759 A.2d at 974; Middleton, 633 S.E.2d at 168; *In re Parentage of L.B.*, 122 P.34 at 176; In re Custody of H.S.H.-K, 533 N.W.2d at 420.

petitioner must have resided with the child, [92] others do not. [93] When this element is considered with the other elements, however, it becomes clear that the amount of time the petitioner resided with the child must have been sufficient for the petitioner and child to have been able to form a parent-child bond. [94] This requirement is viewed as important because it "provides an additional indicator that the [petitioner] has established a genuine familial relationship with the child," the abrupt termination of which likely would harm the child. [95] In addition, the satisfaction of this requirement provides evidence of both the legal parent's consent to the formation of the relationship between the petitioner and child and the commitment of the legal parent and petitioner to mutually provide care for the child. [96] Moreover, this requirement seeks to further protect the **[*72]** rights of the legal parent by significantly restricting the class of individuals who can make equitable parenthood claims. [97]

The final two common elements of equitable parenthood doctrines, which relate to the petitioner assuming the obligations of parenthood and forming a parent-child bond with the child, are generally viewed as the most important [98] and appear in some form in most equitable parenthood doctrines. [99] The requirement that the petitioner "assumed obligations of parenthood by taking significant responsibility for the child's care, education and development, including contributing towards the child's support, without expectation of financial, compensation," is viewed as important for a number of reasons. [100] As an initial matter, the requirement significantly restricts the class of individuals who are eligible to make claims under the doctrine by excluding anyone who has cared for or

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[92] *See, e.g.*, D.C. CODE § 16-831.01(1) (2016) (defining de facto parent as "an individual . . . [w]ho[] . . . [l]ived with the child in the same household [since] the child's birth or adoption," or "for at least [ten] of the [twelve] months preceding the" petition for de facto parent status); IND. CODE § 31-9-2-35.5 (2016) (setting forth requirements for how long a petitioner has to have resided with the child in order to be a de facto parent); ALI PRINCIPLES OF THE LAW OF FAMILY DISSOLUTION: ANALYSIS AND RECOMMENDATIONS § 2.03 (AM. LAW INST. 2002) (requiring that an individual reside "with the child for at least two years" in order to be considered a de facto parent). To be a de facto custodian under Kentucky law, the primary caregiver for, and financial supporter of, a child who has resided with the person for a period of six (6) months or more if the child is under three (3) years of age." If the child is over three years of age, the de facto custodian must have resided with the child for one year. KY. REV. STAT. § 403.270(1)(a) (West 2016). In addition, courts have interpreted the Kentucky de facto parent statute to preclude recognition as de facto parents of individuals who raised the child along with the legal parent. *See* B.F. v. T.D., 194 S.W.3d 310, 310-12 (Ky. 2006) (holding that a partner who lived with the mother and the mother's adopted child as a family did not have standing to seek custody because the child was in the physical custody of the legal parent).

[93] *See, e.g.,* Pitts, 90 A.3d at 1179-80; Conover, 146 A.3d at 439-40; E.N.O. v. L.M.M., 711 N.E.2d 886, 892 (Mass. 1999); V.C., 748 A.2d at 551; T.B., 786 A.2d at 918-19; Rubano, 759 A.2d at 974; Middleton, 633 S.E.2d at 168; In re Parentage of L.B., 122 P.3d at 176; In re Custody of H.S.H.-K, 533 N.W.2d at 421.

[94] Brief of Amici Curie Family Law Acads, in Support of Petitioner-Appellant, supra note 90, at 10.

[95] Brief of Amici Curiae Nat'l Ctr. for Lesbian Rights et al., *supra* note 30, at 21.

[96] *Id.*; Brief of Amid Curie Family Law Acads. in Support of Petitioner-Appellant, *supra* note 90, at 20, n.7.

[97] Middleton, 633 S.E.2d at 169.

[98] V.C., 748 A.2d at 551 ("[M]ost important, a parent-child bond must be forged."); Middleton, 633 S.E.2d at 169 ("The last two prongs are the most important because they ensure both that the psychological parent assumed the responsibilities of parenthood and that there exists a parent-child bond between the psychological parent and child.").

[99] *See* In re E.L.M.C., 100 P.3d 546, 559 (Colo. App. 2004) ("Who may be deemed a psychological parent for the purposes of seeking and receiving an award of parental responsibilities has been variously defined. Common to these definitions is a relationship with deep emotional bonds such that the child recognizes the person, independent of the legal form of the relationship, as a parent from whom they receive daily guidance and nurturance."). *See, e.g.*, DEL. CODE ANN. tit. 13, § 8-201(c) (2016); Kinnard v. Kinnard, 43 P.3d 150, 154 (Ala. 2002); Conover v. Conover, 146 A.3d 433, 453 (Md. 2016); V.C., 748 A.2d at 551; McAllister v. McAllister, 779 N.W.2d 852, 658 (N.D. 2010); T.B. v. L.R.M., 786 A.2d 913, 914, 916-20 (Pa. 2001); Rubano v. Dicenzo, 759 A.2d 959, 967 (R.I. 2000); Middleton, 633 S.E.2d at 168; In re Parentage of L.B., 122 P.3d 161, 176 (Wash. 2006); In re K.H., 773 S.E.2d 20, 24 (W. Va. 2015); In re Custody of H.S.H.-K., 533 N.W.2d 419, 421 (Wis. 1995).

[100] In re Custody of H.S.H-K., 533 N.W.2d at 421.

supported the child "with[] the expectation of financial compensation." [101] More importantly, it seeks to ensure that the petitioner actually functioned as the child's parent, [102] limiting eligibility "to those adults who have served literally as one of the child's de facto parents." [103] The provision of financial support is not determinative in assessing whether an individual has functioned as a child's parent and assumed the obligations of parenthood. [104] Instead, the inquiry focuses more broadly on the nature and quality of the petitioner's parenting actions and the child's response to those actions. [105]

[*73] The requirement that "the petitioner has been in a parental role for a length of time sufficient to have established with the child a bonded, dependent relationship parental in. nature" is viewed as essential for a variety of reasons, not the least of which is that protecting the well-being of children is one of family law's most critical goals. [106] The requirement is directly related to the child development research, described above, regarding children and the adults with whom they form attachment relationships. [107] More specifically, if a functional parent and child have formed a parent-child bond, then severing that relationship can have significant harmful effects on the child's short- and long-term well-being. [108] Thus, at the heart of this requirement is a deep concern for the well-being of children who have developed parent-child bonds with adults who are not their legal parents and who are facing disruption of that relationship. [109] Testimony from experts such as child psychologists, psychiatrists, and social workers regarding the existence and strength of the parent-child bond generally is necessary fim a court to determine whether the petitioner has satisfied this requirement. [110] The development of a parent-child bond between the child and the petitioner is emphasized heavily in court decisions applying equitable parenthood doctrines because it has long been considered the duty of courts to protect children from harm, and this requirement is the one most clearly linked to the well-being of the children involved. [111]

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[101] *Id.; see also* Rubano, 759 A.2d at 974 ("[A] relationship based on payment by the legal parent to the third party will not qualify." (quoting V.C., 748 A.2d at 552)).

[102] Brief of Amici Curie Family Law Amide, in Support of Petitioner-Appellant, *supra* note 90, at 20.

[103] Rubano, 759 A.2d at 974.

[104] V.C., 748 A.2d at 553.

[105] *Id.*

[106] In re Custody of H.S.H-K., 533 N.W.2d 419, 421 (Wis. 1995); Jane C. Murphy, *Rules, Responsibility and Commitment to Children: The New Language of Morality in Family Law*, 60 U. PITT. L. REV. 1111, 1180-81 (1999) (identifying the "protect[ion] of children" as the "central moral goal of family law").

[107] *See supra* notes 53-71 and accompanying text; see also In re Marriage of Martin, 42 P.3d 75, 77-78 (Cola. App. 2002) (citing the work of Freud, Goldstein, and Solnit for the proposition that "[t]he psychological parent is someone other than a biological parent who develops a parent-child relationship with a child through day-to-day interaction, companionship, and caring for the child . . . [and] once this bond forms, many psychologists believe that breaking up the relationship would be harmful to a child's emotional development" (citing JOSEPH GOLDSTEIN ET AL., THE BEST INTERESTS OF THE CHILD: THE LEAST DETRIMENTAL ALTERNATIVE 11-13, 104, 105 (1996)).

[108] *See supra* notes 56, 85-71; *see also* Brief of Amici Curie Nat'l Ctr. far Lesbian Rights, et al., *supra* note 30, at 24; Brief of Amid Curiae Nat'l Ass'n of Soc. Workers, et al., in Support of Petitioner-Appellant Debra H's Appeal, *supra* note 64 at 10.

[109] In re E.L.M.C., 100 P.3d 546, 561 (Colo. App. 2004) (citing a number of cases for the proposition that "[t]his deep concern about emotional harm to the child as a result of separation from a psychological parent is echoed by other jurisdictions").

[110] V.C. v. M.J.B., 748 A.2d 539, 553 (N.J. 2000).

[111] *See* Mary L. Bonauto, et al., *Equity Actions Filed by De Facto Parents, in* PATERNITY AND THE LAW OF PARENTAGE IN MASSACHUSETTS § 12.2.2(a) (2d ed. 2009) (describing "[Massachusetts'] longstanding parent; patriae powers, in which the state has a duty to promote the welfare of children.").

Overall, proponents of equitable parenthood doctrines argue that the common elements in determining eligibility set **[*74]** an appropriately high threshold. [112] More specifically, the common elements severely restrict the class of individuals who qualify as equitable parents by "protect[ing] the legal parent against claims by neighbors, caretakers, baby sitters, fannies, au pairs, nonparental relatives, and family friends." [113] Only individuals who have resided in the same household as the child and who have, with the consent and encouragement of the child's legal parent, taken on the obligations of parenthood in a manner that results in the formation of a parent-child bond are eligible for relief under the common elements of the equitable parenthood doctrines. Proponents argue that these elements strike the appropriate balance by respecting the rights of legal parents while serving the essential function of protecting from harm children who form parent-child bonds with non-legal parents. [114] As one court stated, "emotional harm to a young child is intrinsic in the termination or significant curtailment of the child's relationship with a psychological parent under any definition of that term." [115] It is precisely this harm that equitable parenthood doctrines seek to prevent.

2. Jurisdictions That Have Declined to Adopt Equitable Parenthood Doctrines

To date, in several jurisdictions courts that have ruled on the issue have expressly declined to adopt equitable parenthood doctrines that provide rights relating to visitation or custody to functional parents over the wishes of formal legal parents. As an initial matter, in declining to adopt equitable parenthood doctrines not expressly provided for by state statute, a number of courts have cited a lack of judicial authority or, similarly, the better position of the legislature, to adopt and define these doctrines. [116] Another common reason courts have given for **[*75]** rejecting these doctrines relates to the belief that by granting functional parents visitation- or custody-related rights over the wishes of formal legal parents, the doctrines infringe on the fundamental rights of formal legal parents to direct the care, custody, and control of their children. [117] In addition, a number of courts have declined to adopt such doctrines on the grounds that the standards employed in the doctrines are complicated, nonobjective,

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[112] Conover v. Conover, 146 A.3d 433, 447 (Md. 2016) ("As other courts adopting this test have recognized, these factors set forth a high bar for establishing de facto parent status . . . ."); Brief of Amid Curiae Nat'l Ctr. for Lesbian Rights et al., *supra* note 30, at 23.

[113] In re E.L.M.C., 100 P.3d at 546.

[114] *See supra* notes 88-90 and accompanying text.

[115] In re E.L.M.C., 100 P.3d at 561; Middleton v. Johnson, 633 S.E.2d 162, 169 (S.C. Ct. App. 2006) (stating that "inherent in the bond between child and psychological parent is the risk of emotional harm to the child should the relationship be curtailed or terminated" (quoting *In re E.L.M.C.*, 100 P.M at 560)).

[116] *See, e.g.,* In re Parentage of Scarlett Z.-D., 28 N.E.3d 776, 790 (Ill. 2015) (declining to adopt a functional parent doctrine because "[t]he very difficulty of [the] policy considerations [surrounding recognition of functional parenthood], and the legislature's superior institutional competence to pursue this debate, suggest that legislative and not judicial solutions are preferable"); Debra H. v. Janice IL, 930 N.E.2d 184, 193 (N.Y. 2010) ("[A]ny change in the meaning of 'parent' under our law should come by way of legislative enactment . . . ."), *abrogated by* Brooke S.B. v. Elizabeth A.C.C., 61 N.E.3d 488 (N.Y. 2016); Jones v. Barlow, 154 P.34 808, 817 *(Utah* 2007) (declining to "overstep its bounds and invade the purview of the legislature" by adopting an equitable parent doctrine); Titchenal v. Dexter, 693 A.2d 682, 689 (Vt. 1997) (reasoning that "[g]iven the complex social and practical ramifications of expanding the classes of persons entitled to assert parental rights by seeking custody or visitation, the Legislature is better equipped to deal with the problem"); LP v. LF, 338 P.34 908, 919-20 (Wy. 2014) ("[W]hen we review the involvement of our legislature in the parent-child relationship, we do not find a gap of sufficient size to permit us to adopt the de facto parent doctrine. . . . We. . . defer[] to the Wyoming Legislature to recognize and define that relationship if it wishes to do so."); *see also In re* No. 04-14--00108-CV, 2015 WL 1120913, at *7 (Tex. App. Mar. 1 I, 2015) ([W]e need not discuss the elements of the psychological parent doctrine because we are confined to examining standing within the statutory framework of the Family Cede? (citing In re H.G., 267 S.W.2d 120, 123-24 (Tex. Ct. App. 2008))); Stadter v. Siperko, 661 S.E.2d 494,498-99 (Va. App. 2008) (declining to "implement--by judicial flat--a visitation doctrine of *de facto* or psychological parent in the Commonwealth").

[117] Janice M. v. Margaret K., 948 A.24 73, 78-87 (Md. 2008), overruled by Conover v. Conover, 146 A.3d 433 (Md. 2016); Debra H., 930 N.E.2d at 193; Jones, 154 P.3d at 816, 818.

fact intensive, and lead to unpredictable results. These courts have stressed that the adoption of such doctrines would result in litigation that is costly, lengthy, and contentious. [118] Similarly, some courts have maintained that formal methods of establishing parental status for a nonbiological parent raising a child within a same-sex relationship, such as adoption, provide a straightforward, bright-line approach to parental determinations that is superior in promoting certainty and stability for parents and their children. [119] Notably, several courts have cited the availability of second parent adoption in the jurisdiction in support of decisions declining to adopt equitable parenthood doctrines. [120]

[*76] II. DEVELOPMENTS IN ACCESS TO AVENUES TO ESTABLISHING FORMAL LEGAL PARENT STATUS FOR NONBIOLOGICAL PARENTS IN SAME-SEX RELATIONSHIPS

A. Avenues of Establishing Formal Legal Parenthood Currently Available to Nonbiological Parents in Same-Sex Relationships

1. Marriage

Today, many of the avenues available for establishing formal legal parenthood are based upon marriage. Until relatively recently, same-sex couples were not able to marry in any jurisdiction in the United States, and thus all of the marriage-based avenues for establishing legal parenthood were simply unavailable to same-sex couples. In 2004, however, Massachusetts became the first state to legalize same-sex marriage. [121] Between 2004 and 2015, same-sex marriage expanded rapidly throughout the United States, culminating with the Supreme Court's decision in *Obergefell v. Hodges*, which held that the remaining state bans on same-sex marriage were unconstitutional and resulted in the recognition of same-sex marriage in every U.S. jurisdiction. [122] This decision has given same-sex couples access to avenues to establishing formal parenthood that were previously unavailable to them.

a. The Marital Presumption of Paternity

The marital presumption of paternity, under which a husband is presumed by law to be the father of a child conceived by or born to his wife during the marriage, is "a longstanding legal presumption in the United States" that still exists in some form in every state. [123] Pursuant to *Obergefell*, in which the Court explicitly stated that states

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[118] *Debra H.*, 930 N.E.241 at 192; Jones, 154 P.3d at 816; Titchenal, 693 A.2d at 687.

[119] *See, e.g.,* Debra H., 930 N.E.2d at 192-96.

[120] A.H. v. M.P., 857 N.E.2d 1061, 1073-74 (Mass. 2006) (stating that "[i]n this jurisdiction, same-sex couples, like heterosexual couples, are free to adopt the children of their partners," and refusing to apply an equitable parenthood doctrine in a situation in which the plaintiff had planned with the defendant for the child's birth, helped care for the child for the first year and a half of his life, and was referred to as "Mama" try the child.); Debra H., 930 N.E.2d at 194 (stating that "the right of second-parent adoption . . . furnishes the biological and adoptive parents of children--awl importantly, those children themselves--with a simple and understandable rule by which to guide their relationships and order their lives[,]" and refusing to apply an equitable parenthood doctrine despite the fact that the plaintiff had served as a loving and caring parental figure during the first two and a half years of the child's life); Titchenal, 693 A.2d at 683-87 (refusing to apply an equitable parenthood doctrine despite the fact that the plaintiff had held herself out as the child's parent and had provided the majority of care for the child from the child's birth until the child was three and a half years old, and stressing that nonbiological parents in same-sex relationships can protect themselves through adoption).

[121] *Looking Back at the Legalization of Gay Marriage in Mass.*, BOS. GLOBE (June 26, 2015), https://www.bostonglobe.com/metro/2015/06/26/looking-back-legalization-gay-marriage-mass/uhCeyrSeJtWty9tSUde1PI/story.html [https://perma.cc/UP7L-L5NS].

[122] Obergefell v. Hodges, 135 S. Ct. 2584, 2608 (2015).

[123] Feinberg, *supra* note 1, at 341.

may not "bar same-sex couples from marriage on the same terms as accorded to couples of the opposite sex," [124] the marital presumption of paternity should apply to both different- and same-sex spouses of women who give **[*77]** birth. [125] Significantly, most, though not all, of the courts that have ruled on the issue thus far have concluded that the marital presumption of paternity applies to the same-sex spouse of a woman who gives birth to or conceives a child during the marriage. [126] However, due to the lack of court decisions in many states regarding the applicability of the marital presumption to same-sex couples, the absence of uniform results among court decisions addressing the issue, and the uncertainty regarding whether the presumption, even if extended to female same-sex couples, also would apply to married male same-sex couples, [127] LGBT rights experts continue to strongly recommend that married same-sex couples who conceive a child during the marriage seek **[*78]** adoption or a parentage judgment to ensure that the nonbiological parent is recognized as a legal parent across jurisdictions. [128]

b. Consent to a Spouse's Use of Assisted Reproductive Technology

Under statutory or common law rules in most jurisdictions, a husband who consents to his wife's use of assisted reproductive technology (ART) with the intent to be the resulting child's parent is presumed or conclusively

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[124] Obergefell, 135 S. Ct. at 2607.

[125] COURTNEY JOSLIN ET AL., LESBIAN, GAY, BISEXUAL & TRANSGENDER FAMILY LAW § 5:22 (2016) ("After *Obergefell v. Hodges*, there is no question that all marriage-based parentage rules--including the marital presumption--must be applied equally to same-sex spouses (although some states may initially resist this proposition)." (footnote omitted)). This reading of Obergefell is further supported by the Supreme Court's recent decision in *Pavan v. Smith*, in which the Court held that under Obergefell, Arkansas could not refuse to list the name of a birth mother's female spouse on the child's birth certificate when state law generally required the name of birth mothers' male spouses to appear on birth certificates. Pavan v. Smith, 137 S. Ct. 2075, 2079 (2017). However. Pavan concerned only birth certificates, not the presumption of parentage itself, and generally "a birth certificate is merely prima facie evidence of the information stated within." JOSLIN ET AL., supra note 74, § 5:24.

[126] *See, e.g.*, Bane v. Pasternak, No. HHBFA124030541S, 2015 WL 600973, at *10 (Conn. Super. Ct. Jan. 16. 2015) ("[T]his court finds that the protections of Connecticut's common-law presumption of legitimacy apply equally to children of same-sex and opposite-sex married couples and that the marital presumption applies equally to same-sex and opposite-sex marriages."); Gartner v. Iowa Dep't of Pub. Health, 830 N.W.2d 335, 340-41 (Iowa 2013) (holding that due to its language excluding married female same-sex couples, the existing marital presumption statute was unconstitutional and striking down the portion of the statute containing the exclusionary language); *see also* Kerry Abrams & R. Kent Piacenti, *Immigration's Family Values*, 100 VA. L REV. 629, 709 (2014) ("Most states that recognize same-sex marriages, for example, also extend the marital presumption of paternity to gay and lesbian couples, even though in many of these instances there is no chance that the marital parent is also the genetic parent"); cf. Miller-Jenkins v. Miller-Jenkins, 912 A.2d 951, 970-71 (Vt. 2006) (holding that because civil unions granted same-sex couples all of the rights and obligations of marriage, the marital presumption of paternity applied to same-sex couples who had entered into civil unions). *But see* In re Paczkowski v. Paczkowski, 128 A.D.3d 968, 969 (N.Y. App. Div. 2015) (holding that the statutory marital presumptions of paternity did not apply to the wife of woman who conceived a child during the marriage, "since the presumption of legitimacy [the statutes] create is one of a biological relationship, not of legal status, and, as the nongestational spouse in a same-sex marriage, there is no possibility that [the wife] is the child's biological parent" (citations omitted)). The cases generally involved female same-sex couples, and it is unclear whether courts will be willing to apply the presumption to male same-sex couples, who require a surrogate in order to conceive a child via ART. See Susan Frelich Appleton, *Presuming Women: Revisiting the Presumption of Legitimacy in the Same-Sex Couples Era*, 86 B.U. L. REV. 227, 260-61 (2006); Alexandra Eisman, *The Extension of the Presumption of Legitimacy to Same-Sex Couples in New York*, 19 CARDOZO J.L. & GENDER 579, 593-95 (2013).

[127] *See* Appleton, supra note 126, at 260-31; Eisman, *supra* note 126, at 593-95.

[128] *See, e.g.*, NAT'L CT& FOR LESBIAN RIGHTS, LEGAL RECOGNITION OF LGBT FAMILIES (2016), http://www.nclrights.org/wp-content/uploads/2013/07/Legal_Recopition_of_LGBT_Families.pdf (2018) [https://perma.cc/Y5PM-7PDX] ("Regardless of whether you are married or in a civil union or comprehensive domestic partnership, NCLR always encourages non-biological and non-adoptive parents to get an adoption or parentage judgment even if you are named on your child's birth certificate.").

determined to be the child's second legal parent, regardless of whether he is the biological father. [129] Among these jurisdictions, some require that the consent be in writing and/or that the procedure be performed by or under the supervision of a physician, while others do not. [130] Pursuant to *Obergefell*, these laws should apply to both different- and same-sex spouses who consent to their wife's use of ART with the intent to be the resulting child's parent. [131] Although only a handful of courts have ruled on the issue, those that have addressed it thus far have held that the ART parentage rules, even if set forth in terms that reference married different-sex couples, are equally applicable to married same- and different-sex couples. [132] Again, even in jurisdictions that have adopted marriage-based parentage rules in the ART context, due to the lack of court decisions in many states regarding the applicability of these rules to same-sex couples and the uncertainty regarding whether such rules encompass married male same-sex couples even if they are extended to **[*79]** female same-sex couples, [133] LGBT rights experts continue to forcefully recommend that married same-sex couples who conceive a child during the marriage seek adoption or parentage judgments to ensure that the nonbiological parent is recognized as a legal parent across jurisdictions. [134]

While in most jurisdictions the ART parentage provisions are limited to married couples, ten jurisdictions have expanded the rules to encompass unmarried couples such that a man who consents to a woman's use of ART with the intent to be the resulting child's parent is considered the child's formal legal parent. [135] In six of these ten jurisdictions, the language of the ART parentage provisions encompasses unmarried same-sex couples as well as unmarried different-sex couples. [136] A recent decision by New York's highest court in a case involving an

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[129] JOSLIN ET AL., *supra* note 74, § 3:3.

[130] *Id.*

[131] *Id.* ("After the decision in *Obergefell v. Hodges* requiting that states permit and recognize marriages between same-sox spouses on the 'same terms and conditions' as for different-sex spouses, these rules must be applied equally to same-sex couples who have children through assisted reproduction during their marriage." (footnote omitted)).

[132] *See, e.g.*, Della Corte v. Ramirez, 961 N.E.2d 801, 602-03 (Mass. App. Ct. 2012); Wendy G-M. v. Erin G-M, 45 Misc. 3d 574, 582 (N.Y. Sup. Ct. 2014); Roe v. Patton, No. 2:15-cv-00253-DE, 2015 WL 4476734, at *4 (D. Utah July 22, 2015); *see also* Shineovich and Kemp, 214 P.3d 29, 40 (Or. Ct. App. 2009) (holding, in a decision before the state had legalized same-sex marriage, that the marriage-based ART-provisions extended to female same-sex couples in domestic partnerships bemuse under state law domestic partners were entitled to all of the rights and protections provided to married couples); Douglas NeJaime, *Marriage Equality and the New Parenthood*, 129 HARV. L. REV. 1185, 1244, n.353 (citing In re Parentage of L.D.S., No. 2015-DM-000892, at 3-4 (Kan. Dist. Ct. Sept. 18, 2015)).

[133] Even among jurisdictions that have adopted statutory language to include same-sex couples under the ART-based parentage provisions, the language often refers to any person who consents to a woman's use of ART, which makes the applicability to male same-sex couples uncertain. *See, e.g.*, CAL. FAM. CODE § 7613(a) (West 2017) ("If a woman conceives through assisted reproduction with semen or ova or both donated by a donor not her spouse, with the consent of another intended parent, that intended parent is treated in law as if he or she were the natural parent of a child thereby conceived."); D.C. CODES 16-909(e)(1) (2017) ("A person who consents to the artificial insemination of a woman . . . with the intent to be the parent of her child, is conclusively established as a parent of the resulting child."); ME. REV. STAT. ANN. tit. 19-A, § 1923(2016)("[A] person who consents to assisted reproduction by a woman . . . with the intent to be the parent of a resulting child is a parent of the resulting child."); NEV. REV. STAT. § 126.670 (2016) ("A person who provides gametes for, or consents to assisted reproduction by a woman, as provided in NRS 126.680, with the intent to be a parent of her child is a parent of the resulting child.").

[134] *See, e.g.*, JOSLIN ET AL, *supra* note 74, § 3:4; NAT'L CTR. FOR LESBLAN RIGHTS, supra note 128, at 1 ("Regardless of whether you are married or in a civil union or comprehensive domestic partnership. NCLR always encourages non-biological and non-adoptive parents to get an adoption or parentage judgment, even if you are named on your child's birth certificate.").

[135] JOSLIN ET AL., *supra* note 74. § 3:3.

[136] *Id.*

unmarried same-sex couple adopted a slightly different approach, providing standing as a parent for purposes of custody and visitation actions, as opposed to formal legal parent status, to a petitioner who "proves by clear and convincing evidence that he or she has agreed with the biological parent of the child to conceive and raise the child as co-parents." [137]

c. Stepparent Adoption

All states have stepparent adoption processes through which the spouse of a child's formal legal parent can adopt the **[*80]** child without terminating the legal parent's rights as long as the child does not already have a second legally recognized parent or the rights of the second legally recognized parent are terminated. [138] As a result of the nationwide legalization of same-sex marriage, married same-sex couples in every state should be able to avail themselves of stepparent adoption procedures. [139] Many states treat stepparent adoptions differently than other types of adoptions, waiving or authorizing judicial waiver of requirements for costly and intrusive steps like home studies and financial accountings for stepparent adoptions. [140] This differential treatment is based on the justification that stepparent adoptions are distinct because typically the child already will have been living with the stepparent, and thus the process is simply formalizing an already existing parent-child relationship and does not disrupt the child's living situation. [141] In addition, "the concerns about unlawful payments to birth parents or intermediaries which are expressed about other types of adoptions are arguably not present in stepparent adoptions." [142] Even in jurisdictions that waive requirements such as financial accountings and home studies, the stepparent adoption procedure can nonetheless be costly and complicated. Many individuals require the assistance of an attorney to navigate the process and thus incur attorney's fees, and the procedure often requires, *inter alia*, submitting various documents, paying court fees, appearing in court, and submitting to a background check. [143]

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[137] Brooke S.B. v. Elizabeth A.C.C., 61 N.E.3d 488,501 (N.Y. 2016) ("[W]e stress that this decision addresses only the ability of a person to establish standing as a parent to petition for custody or visitation . . . .").

[138] Mark Strasser, *Courts, Legislatures, and Second-Parent Adoption: On Judicial Deference, Specious Reasoning, and the Beet Interests of the Child*, 66 TENN. L REV. 1019, 1026 (1999); JOSLIN ET AL., *supra* note 74, § 5:3.

[139] JOSLIN ET AL., *supra* note 74, § 5:3; NAT'L CTR. FOR LESBIAN RIGHTS, supra note 128, at 1.

[140] UNIF. ADOPTION ACT § 4-111 (NAT'L CONFERENCE OF COMM'RS ON UNIF. STATE LAWS 1994) ("At present, most States do not requite an evaluation or home-study when a stepparent seeks to adopt a stepchild. Even in States where a home-study is ostensibly required, the court usually has the discretion to waive the requirement"); THOMAS A. JACOBS, CHILDREN AND THE LAW: RIGHTS AND OBLIGATIONS § 4:5 (2017 ed.) ("Most states waive the requirement for a homestudy . . . [and] [f]ormal accounting procedures are generally waived in a stepparent adoption . . . ." (footnote omitted)); Margaret M. Mahoney. *Stepparents as Third Parties in Relation to Their Stepchildren*, 40 FAM. L.Q. 81.94 n.51 (2006); W. Bradford Wilcox & Robin Fretwell Wilson, *Bringing Up Baby: Adoption, Marriage, and the Best Interests of the Child*, 14 WM. & MARY BILL RTS. J. 883, 885 n.6 (2006).

[141] UNIF. ADOPTION ACT § 4 cmt. (NAT'L CONFERENCE OF COMM'R ON UNIF. STATE LAWS 1994).

[142] *Id.*

[143] *See, e.g.*, Roe v. Patton, No. 2:15-cv-00253-DB, 2015 WL 4476734, at *2 (C.D. Utah, July 22, 2015) ("To complete a step-parent adoption, [the petitioners] would have to file a Petition to Adopt a Minor Stepchild in Utah State Court and pay a filing fee of 8360. [The stepparent] would also have to submit to a background check by the Utah Bureau of Criminal Identification and the Utah Division of Child and Family Services. Once the adoption petition is submitted, [the petitioners] would have to wait for a judge to schedule a hearing on their adoption petition, and they would then have to appear in person at the hearing to a get the judge's approval for [the petitioner] to adopt [the child]"); *see also* CHILD WELFARE INFO. GATEWAY, STEPPARENT ADOPTION 2-4 (2013), http://www.childwelfare.gov/pubpdfs/f_step.pdf [https://perma.cc//TZB8-TJSV] (providing a broad overview of stepparent adoption); SUPERIOR COURT OF CALIFORNIA, CTY. OF SACRAMENTO, STEPPARENT ADOPTION 1-3(2017), https://www.saccourt-ca.gov/family/docs/fl-stepparent-adoption.pdf (describing the requirements for a stepparent adoption in California); Stepparent Adoption is Permanent, OHIO STATE BAR ASS'N (Dec. 22, 2015), https://www.ohiobar.org/forpublic/resources/lawyoucanuse/pages/lawyoucanuse-204.aspx [https://perma.cc/A566-E7BC] (describing the Ohio stepparent adoption process).

[*81] 2. Second Parent Adoption

Second parent adoption is currently available statewide in at least thirteen states and the District of Columbia, and is available in certain counties in at least another fourteen jurisdictions. [144] Second parent adoption is similar to stepparent adoption in that the partner of a child's formal legal parent is able to adopt the child without the formal legal parent's rights being terminated, but differs from stepparent adoption in that unmarried couples can utilize the procedure. [145] The first jurisdictions to grant second parent adoptions did so "in the mid-1980s." [146] Since same-sex couples could not marry until recently, for many years second parent adoption represented the primary manner through which both members of same-sex couples could gain recognition as the formal legal parents of the biological child of one of the partners. [147]

Like stepparent adoption, second parent adoption usually requires, *inter alia*, hiring an attorney, paying court fees, executing various documents, submitting to background checks, and appearing in court. [148] Notably, however, the second parent adoption process is often more costly, [149] intrusive, [150] and **[*82]** lengthy [151] than the stepparent adoption process. [152] For example, unlike for stepparent adoptions, home studies, which can be intrusive and costly and can prolong the adoption process, are generally required for second parent adoptions (although some states grant courts discretion to waive the home study requirement). [153] Second parent adoptions cost between $ 2,000 and $ 3,000 on average [154] and, depending on the jurisdiction, can cost upwards of $ 5,000. [155] Until the

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144 NAT'L CTR. FOR LESBIAN RIGHTS, supra note 128, at 2.

145 *Id.*; JOSLIN ET AL., *supra* note 74, § 5:2.

146 *Id.*

147 *Id.*

148 *See. e.g.*, STATE OF COLORADO JUDICIAL DEPT, INSTRUCTIONS FOR SECOND PARENT ADOPTION, http://www.courts.state.co.us/Forms/PDF/JDF%20495%20Second%20Parent%20Adoption%20InstructionsR7+17.pdf [https://perma.cc/Y763-UL4B] (providing instructions ET obtaining a second parent adoption in Colorado).

149 For instance, in California the maximum cost of a home study for a second parent adoption is $ 700, while "the cost of a home investigation for an independent adoption is $ 4,500." JOSLIN ET AL., *supra* note 74, § 5:2.

150 Catherine Connolly, *The Voice of the Petitioner: The Experiences of Gay and Lesbian Parents in Successful Second-Parent Adoption Proceedings*, 36 L. & SOC'Y REV. 325, 334(2002) (comparing stepparent adoptions to second parent adoptions and stating that "[t]he legal process for stepparents to adopt the children of their new spouse is often much more relaxed and usually does not require a full home study").

151 NAT'S CTR. FOR LESBIAN RIGHTS, supra note 128, at 2 (Stepparent "adoptions have the same effect as a second parent adoption, but they may be faster and less expensive than second parent adoptions, depending on where you live?).

152 JOSLIN ET AL., *supra* note 74, § 5:2; Richard F. Storrow, *Rescuing Children from the Marriage Movement: The Case Against Marital Status Discrimination in Adoption and Assisted Reproduction*, 39 U.C. DAVIS 14. REV. 305, 343-44 (2006).

153 JOSLIN ET AL., *supra* note 74, § 5:19; Alexander Newman, *Same-Sex Parenting Among a Patchwork of Laws: An Analysis of New York Same-Sex Parents' Options for Gaining Legal Parental Status*, 2016 CARDOZO L. REV. DE NOVO 77, 85 (2016) ("Stepparent adoptions are often preferable to second-parent adoptions, in part bemuse they frequently are less costly: second-parent adoptions can require expensive home studies before the adoption is approved, whereas stepparent adoptions do not.").

154 *How Much Does Adoption Cost?*, HUMAN RTS. CAMPAIGN http://www.hrc.org/resources/how-much-does-adoption-cost [https://perma.cc/2TVF-LRE2].

155 Blake Ellis, *Adoption Tax Credit for Same-Sex Couples*, CNN MONEY (Feb. 25, 2013, 10:48 AM), http://money.cnn.com/2013/02/25/pf/taxes/same-sex-adoption/ [https://perma-cc/7N3W-U94V].

adoption process is completed and the adoption decree is granted, the adopting parent generally is considered a legal stranger to the child. [156]

B. Avenues for Establishing Legal Parent Status That Generally Have not yet Been Extended to Same-Sex Parents

1. Formal Avenues for Establishing Legal Parent Status That Generally Have not yet Been Extended to Same-Sex Parents

a. Voluntary Acknowledgements of Paternity

The voluntary acknowledgement of paternity (VAP) is the most common avenue through which unmarried fathers establish legal paternity of their children. [157] A VAP is a document that identifies a man as a child's father and is signed by both the child's mother and the man identified as the child's **[*83]** father. [158] The document establishes legal paternity. [159] VAPs are usually signed at the hospital at the time of birth or shortly thereafter. [160] Under federal law, states must make VAPs available to unmarried parents in order to receive welfare funding. [161] Consequently, VAPs are available to unmarried couples in every state. [162] Importantly, "[w]hile the federal legislation contemplated that VAPs would be used simply to establish paternity, usually for the sake of collecting child support, empirical evidence indicates that unmarried parents are using VAPs for another purpose: to identify themselves as a child's co-parents and to memorialize that relationship." [163]

Federal law mandates that state VAP procedures meet a number of requirements. For example, all public and private birthing hospitals as well as birth records offices in the state must offer VAPs. [164] With regard to birthing hospitals specifically, they "must provide voluntary paternity establishment services focusing on the period immediately before and after the birth of a child born out-of-wedlock." [165] In addition, birthing hospitals and birth records offices must have staff trained to advise unmarried parents regarding VAPs, [166] and "each party must be given oral and written notice of the alternatives to, legal consequences of and rights and responsibilities arising from

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[156] Nancy D. Polikoff, *A Mother Should Not Have to Adopt Her Own Child: Parentage Laws for Children of Lesbian Couples in the Twenty-first Century*, 5 STAN. J. C.R. & C.L. 201, 207 (2009).

[157] Leslie Joan Harris, *The New "Illegitimacy": Revisiting Why Parentage Should Not Depend on Marriage: Voluntary Acknowledgments of Parentage for Same-Sex Couples*, 20 AM. U. J. GENDER SOC. POL'Y & L. 487, 469 (2012).

[158] *Id.* at 475.

[159] *Id.; see also* DEP'T OF HEALTH & HUM. SERV., OFF. OF INSPECTOR GEN., OFF. OF EVALUATIONS AND INSPECTIONS, OEI-06-98-00053, PATERNITY ESTABLISHMENT: USE OF VOLUNTARY PATERNITY ACKNOWLEDGMENTS 1 (2000), https://oig.hhs.gov/oei/reports/oei-06-98-00053.pdf [https://perma.cc/HLJ8-3S8G] [hereinafter OFFICE OF THE INSPECTOR GENERAL].

[160] *Child Support 101.2: Establishing Paternity*, NAT'L CONF. ST. LEGIS., (Mar. 19, 2014), http://www.ncsl.org/research/human-services/enforcement-eatablishing-paternity.aspx [https://perma.cd49ZU-VSMN] [hereinafter Child Support 101.2] ("Most often, voluntary paternity acknowledgment is completed in the hospital within days of the child's birth."); Harris,*supra* note 157, at 476 n.36.

[161] Harris, *supra* note 157, at 475.

[162] *Id.; see also* OFFICE OF THE INSPECTOR GENERAL, *supra* note 159, at i.

[163] Harris, *supra* note 157, at 476-77.

[164] 45 C.F.R. §§ 303.5(g)(1)(i)(ii) (2016); Harris, *supra* note 157. at 476.

[165] 45 C.F.R. § 303.5(g)(1)(i).

[166] *Child Support* 101.2., *supra* note 160.

the signed acknowledgment." [167] The state cannot require a man to submit to genetic testing before signing a VAP, although in some states either the VAP or the accompanying instructions indicate that only biological fathers should sign. [168] Either the mother or the putative father may rescind the VAP until either sixty days have passed or there has been "an administrative or judicial proceeding relating to the **[*84]** child," whichever is earlier. [169] Importantly, a VAP that is not rescinded within sixty days, must be "considered a legal finding of paternity." [170] Moreover, states must give full faith and credit to out-of-state VAPs that comply with federal law and the law of the issuing state. [171]

After sixty days have passed, VAPs "can only be challenged on the grounds of fraud, duress, or material mistake of fact." [172] The most frequent challenges to VAPs following the sixty-day rescission period involve claims that the man identified in the VAP is not the child's biological father and allegations of either fraudulent conduct by the mother in misleading the father or mistake of material fact. [173] Most states that have ruled on the issue have allowed challenges to VAPs based upon DNA testing, though test results indicating that the man identified in the VAP is not the child's biological factor do not always result in rescission of the VAP. [174] For example, courts in some states require evidence of fraud or mistake beyond the test results, allow for rescission on this basis only if it is in the best interests of the child, or use theories of equitable estoppel to prevent rescission on this basis in certain situations. [175]

Although at least one scholar has set forth a comprehensive proposal to expand the use of VAPs to same-sex parents, to date same-sex parents generally have not been able to utilize VAPs to establish legal parent status. [176] Due to the fact that in situations involving same-sex parents the parent identified in the VAP would often lack genetic ties to the child, VAP procedures across the United States would need to be restructured so that representations regarding genetic ties were not a part of the execution process and genetics-based claims could not be grounds for rescission. In addition, standards likely would need to be set forth regarding the applicable procedure to be followed when the child's second biological parent is not a member of the couple seeking to execute the VAP, but is known to the couple. [177] The lack of availability of VAPs to same-sex couples farther reflects the substantial differences that continue to exist with regard to the ease with which different- and same-sex **[*86]** couples are able to establish both members of the couple as the formal legal parents of their children.

b. Procedures That Establish Legal Paternity for Unmarried Men Based upon Biology

In addition to VAPs, other avenues exist to establish the legal paternity of unmarried men. In situations in which paternity establishment has not been completed through a VAP, interested parties, such as the mother, the putative

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[167] Harris, *supra* note 157, at 476 (citing 42 U.S.C. § 666(a)(5)(i) (2012)); *see also* 45 C.F.R. § 303.5(g)(2)(i); OFFICE OF THE INSPECTOR GENERAL, *supra* note 159, at 1.

[168] Feinberg, *supra* note 1, at 343-44.

[169] 42 U.S.C. § 686(a)(5)(D)(ii): OFFICE OF THE INSPECTOR GENERAL, *supra* note 159, at 1.

[170] 42 U.S.C. § 666 (a)(5)(D)(ii), (E).

[171] Harris, *supra* note 157, at 476.

[172] *Id.*

[173] *Id.* at 479.

[174] *Id.* at 479-80.

[175] *Id.* at 480.

[176] *See* generally Harris, supra note 157.

[177] *Id.* at 487.

father, or a child support agency, commonly pursue legal proceedings to establish the putative father's paternity. Establishing a putative father's paternity through legal proceedings generally involves genetic testing demonstrating that the putative father is the child's biological father. [178] Notably, federal law governing child support requires that all states adopt:

> [p]rocedures under which the State is required, in a contested paternity case (unless otherwise barred by State law) to require the child and all other parties . . . to submit to genetic tests upon the request of any such party, if the request is supported by a sworn statement by the party . . . alleging paternity, and setting forth facts establishing a reasonable possibility of the requisite sexual contact between the parties; or . . . denying paternity, and setting forth facts establishing a reasonable possibility of the nonexistence asexual contact between the parties. [179]

Furthermore, federal child support law also requires states to adopt standards that create a conclusive or rebuttable presumption of paternity based upon genetic testing results demonstrating that the putative father is the child's biological father. [180] Due to the genetics-based nature of establishing paternity through these legal proceedings and the reality that in same-sex relationships it is usually the nonbiological parent who lacks legal parent status, this avenue of establishing legal parent status generally is unavailable to same-sex couples.

[*86] 2. Function-Based Avenues for Establishing Legal Parent Status That Generally Have not yet Been Extended to Same-Sex Parents: "Holding Out" Presumptions

A number of states have statutory provisions that set forth "holding out" presumptions. [181] Holding out presumptions can be traced to a 1973 Uniform Parentage Act (UPA) provision which stated that a man is entitled to a presumption of paternity if "while the child is under the age of majority, he receives the child into his home and openly holds out the child as his natural child." [182] While a number of states continue to employ holding out presumptions that contain language similar to that of the 1973 UPA, nine states have adopted variations of the holding out provision set forth in the 2002 UPA, which "has a durational requirement, providing that the person must have lived with and held out the child [] as his own for the first two years of the child's life." [183] Because the language of holding out presumptions generally requires that an individual hold the child out as his "natural" or "own" child, the applicability of these provisions to a nonbiological parent in a same-sex relationship with the child's biological parent is uncertain. [184]

In 2005, the Supreme Court of California held that the state's holding out presumption, which provided a presumption of paternity to a man who "receives the child into his home and openly holds out the child as his natural child," applied to a woman in a same-sex relationship with the child's biological mother. [185] The California

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[178] Marilyn Ray Smith & Paula M. Carey, *Paternity Challenges to Children Born During a Marriage, in* PATERNITY AND THE LAW OF PARENTAGE IN MASSACHUSETTS § 8.1 (2d ed. 2009) ("Contested [paternity] matters usually involve compelling the putative father to submit to genetic tests . . . .").

[179] 42 U.S.C. § 666(a)(5)(B)(i) (2012).

[180] *Id.* at § 666(a)(5)(G).

[181] JOSLIN ET AL., *supra* note 74, § 5:22.

[182] UNIF. PARENTAGE ACT § 4(a)(4) (1973).

[183] JOSLIN ET AL., *supra* note 74, § 5:22.

[184] NeJaime, *supra* note 132, at 1215-16 ("The UPA's 'holding out' provision, section 7611(d), was designed for unmarried, biological fathers. It provided that one is a presumed father if be receives the child into his home and openly holds out the child as his *natural* child.' While the provision focused on unmarried fathers' parental conduct, it seemed--with the term 'natural'--constrained by biology," (emphasis in original) (quoting CAL. PAM. CODE § 7611(d) (West 2014))).

[185] *See* Elisa B. v. Superior Court, 117 P.3d 660, 664, 670, 672 (Cal. 2005) (quoting CAL. FAM. CODE § 7611(d) (West 2014)).

legislature recently amended the holding out presumption to make it gender neutral. [186] This avenue for establishing legal parent status, however, is one of the newer avenues, and to date very few court decisions in other jurisdictions have ruled on the applicability of holding out presumptions to **[*87]** same-sex parents. [187] Like the equitable parenthood doctrines discussed above, this avenue for establishing parental rights is not available immediately at the time of birth and requires the petitioner to prove that he or she engaged in certain conduct relating to the child. [188]

III. EVALUATING THE CURRENT NEED FOR CONTINUED LEGAL RECOGNITION OF EQUITABLE PARENTHOOD DOCTRINES

In cases involving same-sex parents, even though it remains far more difficult for same-sex couples to establish both members as formal legal parents as compared to their different-sex counterparts, it will be tempting for judges to refuse to apply equitable parenthood doctrines on the grounds that there were avenues available through which the functional parent could have obtained formal legal parent status, and thus equity does not require application of the doctrine. [189] This will likely be especially true in jurisdictions in which the establishment of formal legal parent status for functional parents in same-sex relationships is available through various marriage-based avenues, second parent adoption, or a combination of these avenues. [190] In addition, in jurisdictions that provide same-sex couples with various marriage- or adoption-based avenues through which the functional parent can obtain formal legal parent status, opponents of equitable parenthood doctrines likely will argue that the failure of the couple to pursue these avenues demonstrates a lack of consent on the part of the formal legal parent to the functional parent forming a parent-like relationship with the child, and that application of an equitable parenthood **[*88]** doctrine is therefore inappropriate. [191] These arguments, however, are ultimately unpersuasive, and it would be a mistake for courts and legislatures to decline to apply or establish equitable parenthood doctrines on the grounds that marriage or adoption-based avenues to establishing legal parent status for functional parents in same-sex relationships exist in the jurisdiction.

This Part will proceed as follows: it first addresses the implications for same-sex parents of courts and legislatures declining to adopt or apply equitable parenthood doctrines based upon the availability of marriage-based avenues to establishing formal legal parent status in the relevant jurisdiction. It then addresses the implications for same-sex parents of courts and legislatures declining to adopt or apply equitable parenthood doctrines due to the availability of second parent adoption as an avenue to establishing formal legal parent status in the relevant jurisdiction. Finally, the Part concludes by exploring whether declining to apply equitable parenthood doctrines on the basis of

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[186] NeJaime, *supra* note 132. at 1261.

[187] JOSLIN ET AL., *supra* note 74, § 522. The Supreme Judicial Court of Massachusetts recently held that the state's holding-out presumption applies to same-sex couples. Partanen v. Gallagher, 59 N.E.3d 1133, 1142 (Mass. 2016).

[188] *See supra* Section I.B.

[189] *See, e.g.*, A.H. v. M.P., 857 N.E.2d 1061, 1073-74 (Mass. 2006); Debra H. v. Janice R., 930 N.E.2d 184, 193 (N.Y. 2010) (citing the availability of second parent adoption in support of decision declining to apply an equitable parenthood doctrine), *abrogated by* Brooke S.B. v. Elizabeth A.C.C., 61 N.E.3d 488 (N.Y. 2016); Titchenal v. Dexter, 693 A.2d 682, 689 (Vt. 1997); NeJaime, *supra* note 132, at 1252 ("Courts that may otherwise have used equitable theories to recognize such parents may find that for nonbiological parents who had the opportunity to legally many a child's biological parent, their choice not to do so undermines their claim to parental rights."); Nancy Polikoff, *The New "Illegitimacy": Winning Backward in the Protection of the Children of Lesbian Couples*, 20 AM. U. J. GENDER SOC. POL'Y & L. 721, 728 (2012) ('The existence of marriage--or an equivalent formal status--makes it easier to implement bright line rules about legal consequences. This ease means that judges and legislators, satisfied that marriage is a good enough dividing line, will be less likely to engage in the messier business of achieving justice.").

[190] *See supra* note 189 and accompanying text.

[191] *See supra* notes 115-116 and accompanying text.

the availability to same-sex couples of marriage- and adoption-based avenues of establishing formal legal parent status will farther the best interests of children.

A. The Preclusion of Equitable Parenthood Doctrines Based Upon Current Avenues for Establishing Legal Parent Status for Same-Sex Parents That Require Marriage

1. Marriage-Based Presumptions of Parentage

With regard to the question of whether the extension of marriage-based presumptions of parentage to married same-sex couples should preclude application of equitable parenthood doctrines, it is important to note at the outset that most jurisdictions have not ruled on whether their existing marriage-based presumptions of parentage actually extend to married same-sex couples. [192] Moreover, those jurisdictions that have ruled on the issue have not all reached the same result. [193] Importantly, even in jurisdictions that have extended marriage-based presumptions of parentage to married same-sex couples, because such presumptions typically remain gendered in that they have as their starting point a woman who gives birth to or conceives a child while married, it is far from clear that the extensions encompass male same-sex couples. [194] Indeed, the **[*89]** court decisions extending marriage-based presumptions of parentage to same-sex couples have arisen in the context of female same-sex couples. [195] Thus, abandoning equitable parenthood doctrines based upon statutes or judicial decisions that on their face extend marriage-based presumptions of parentage to same-sex couples but do not explicitly address the application of such presumptions to male same-sex couples, would be deeply unfair to male same-sex couples. Even for female same-sex couples, however, the availability of marriage-based presumptions of parentage should not exclude application of equitable parenthood doctrines. The potential arguments in favor of requiring a formal legal parent and a functional parent to marry in order for the functional parent to obtain legal recognition of his or her relationship with the couple's child are unpersuasive, and this type of approach to establishing the rights of same-sex parents is both discriminatory and deeply flawed.

Potential arguments for excluding equitable parenthood doctrines based upon the availability to same-sex couples of marriage-based presumptions of parentage likely will arise from the underlying idea that marriage to a child's formal legal parent is a superior basis for establishing parental rights because the decision to marry is uniquely reflective or predictive of certain spousal understandings and conduct relating to children born or conceived during the marriage. [196] a For example, one possibility is that the decision to marry signifies an individual's consent to her spouse serving as a parent to any child born to or conceived by that individual during the marriage. [197] A related possibility is that the decision to marry demonstrates an individual's willingness to assume the obligations of parenthood for any child born to or conceived by his or her spouse during the marriage. [198] Another possibility rests on an assumption that a married individual will form a meaningful parent-child bond with any child born to or

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[192] *See supra* notes 126-127 and accompanying text.

[193] *See supra* note 126 and accompanying text.

[194] Appleton, *supra* note 126, at 260-65.

[195] *See id.* at 265.

[196] *See supra* notes 103-105 and accompanying text; *infra* notes 197-199 and accompanying text.

[197] *See* Joanna L. Grossman. *Parentage Without Gender*, 17 CARDOZO J. CONFLICT RESOL., 717, 740 (2016) ("Second, the biological mother's consent to marry is sometimes treated as consent to share parental rights of any children born during the union. Recall the ruling in *Debra H.*, in which the New York Court of Appeals held that marriage to a child's mother is the only way other than adoption through which a lesbian co-parent can gain parental status. The court based its ruling squarely on the notion of consent. While Janice M., the biological mother, had the power to exclude other adults from her child's life, she gave up that power by entering into a civil union with Debra H. while pregnant and inviting her to assume a parental role." (footnote omitted)).

[198] NeJaime, *supra* note 132, at 1242.

conceived **[*90]** by his or her spouse during the marriage. [199] These arguments for requiring same-sex parents to marry in order for the functional parent to receive legal recognition of his or her relationship with the couple's child, however, are ultimately unpersuasive.

There are many reasons for why couples choose to remain unmarried, and a decision to remain unmarried may say nothing about whether the formal legal parent has consented to the functional parent serving as a parent to the child, the functional parent has assumed the obligations of parenthood, or a meaningful parent-child bond exists between the child and functional parent. [200] Couples may remain unmarried for many reasons, including, *inter alia*, that they do not feel that they are in a stable enough economic position to marry; [201] they wish to avoid the financial consequences accompanying marriage; [202] they are opposed to marriage due to its patriarchal, racist, and discriminatory history and the related societal expectations that still often accompany marriage; [203] or they simply prefer to exist in a relationship that does not include the state as a member. [204] Marriage is simply an ineffective proxy for the determination of questions relating to the formal legal parent's consent, the functional parent's assumption of parental obligations, or the formation of meaningful parent-child bonds between the child and functional parent. Importantly, instead of using an imprecise proxy such as marriage to determine these important questions relating to consent, the assumption of parental obligations, and the formation of meaningful parent-child bonds, the common elements of the equitable parenthood doctrines actually require courts to directly investigate and answer these questions. [205]

[*91] Moreover, excluding equitable parenthood doctrines based upon the availability to same-sex couples of marriage- based presumptions of parentage, and essentially requiring same-sex parents to marry in order for the functional parent to receive parental rights, is discriminatory against same-sex couples and their children. As discussed above, different-sex couples do not need to marry in order for both members to receive parental rights--a variety of avenues to establishing formal legal parent status are available to unmarried different- sex parents. [206] The law recognizes the value of the relationships between unmarried different-sex parents and their children and the importance of providing children with two legally recognized parents. In fact, the establishment of formal legal parent status for unmarried different-sex parents has become an essential goal of family law, and consequently the

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[199] *See* Grossman, *supra* note 197, at 739-40.

[200] *See infra* notes 201-204.

[201] Meg Murphy, *NowUKnow: Why Millennia's Refuse to Get Married*, BENTLEY U., http://www.bentley.edu/impact/articles/nowuknow-why-millennials-refuse-get-married [https://perma.cc/S25X-T2BK]; Wendy Wang & Kim Parker,*Record Share of Americans Have Never Married: As Values, Economics, and Gender Patterns Change*, PEW RES CRT., (Sept. 24, 2014), http://www.pewsocialtrends.org/2014/09/24/record-share-of-americans-have-never-married/ [https://perma.ccW9X-57XR] ("For young adults who want to get married, financial security is a significant hurdle. Compared with their older counterparts, young adults who have never been married are more likely to cite financial security as the main reason for not being currently married.").

[202] *Marriage v. Cohabitation*, FINDLAW, http://family.findlaw.com/living-together/marriage-vs-cohabitation.html [https://perma.cc/74M5-42PW].

[203] Jessica R. Feinberg, *The Survival of Nonmarital Relationship Statuses in the Same-Sex Marriage Era: A Proposal*, 87 TEMP. L. REV. 45, 61-62 (2014).

[204] Keith Ablow, *Let's Make a New Way to Get Married and Get the State Out of the Matrimony Business*, Fox NEWS (Dec. 21, 2011), http://www.foxnews.com/opinion/2011/12/21/lets-make-new-way-to-get-married-and-get-state-out-matrimony-business.html [https://perma.cc/C63P-ELJ7].

[205] *See* Grossman, *supra* note 8, at 719-20 ("The partner's functional role in parent-like activities over a period of time--particularly if the partner was involved in the decision to conceive a child in the first place--would seem a much better indicator of consent to share the role of parent than whether the couple said vows to each other at some point?).

[206] *See supra* Section II.B.

law provides straightforward and uncomplicated procedures for unmarried different-sex parents to obtain formal legal parent status. [207]

Any argument that attempts to justify requiring only same-sex couples to marry in order to receive parental rights by pointing to the greater likelihood that both members of a different-sex couple are biologically related to their child, is unconvincing. Jurisdictions that have extended marriage-based presumptions of parentage to same-sex couples necessarily recognize that biological connections should not be a prerequisite to receiving parental rights, and that children of same-sex parents, like children of different-sex parents, benefit significantly from having two legally recognized parents. Furthermore, the most common avenue for establishing parental rights for unmarried men in different-sex relationships, the VAP, by law does not require proof of a biological connection between the child and the man identified through the VAP as the father. [208] Excluding equitable parenthood doctrines based upon the availability to same-sex couples of marriage-based presumptions of parentage and requiring same-sex parents to marry in order for both parents to receive parental rights is unjustifiable discrimination against same-sex couples and their children.

There are also significant class- and race-based implications of declining to apply equitable parenthood doctrines on the basis of the availability to same-sex couples of marriage-based **[*92]** presumptions of parentage. Today, "[m]arriage itself has become a marker of privilege [and] [t]hose who marry . . . are more likely to be white, relatively educated, and relatively high-income." [209] Consequently, denying rights to functional parents based solely on their decision to remain unmarried would disproportionately harm less privileged parents. Moreover, same-sex couples that include at least one member who is African American or Latino are more likely to be raising children than same-sex couples in which both members are white, and the average income of same-sex couples raising children is substantially lower than the average income of same-sex couples as a broader population. [210] As a result, "if trends regarding marriage . . . by same-sex couples follow more general trends, the members of the LGB community who are statistically *most* likely to be raising children are also statistically *least* likely to marry . . . ." [211] This demonstrates the necessity of maintaining equitable parenthood doctrines to protect parents raising children within same-sex relationships regardless of the extension to same-sex couples of marriage-based avenues to establishing formal legal parent status.

2. Stepparent Adoption

In jurisdictions that do not extend marital presumptions of parentage to married same-sex couples, courts may nonetheless decline to adopt or apply equitable parenthood doctrines on the basis that equity does not require the application of such doctrines because the nonbiological parent could have undertaken a stepparent adoption in order to obtain formal legal parent status. As an initial matter, an individual who wishes to undertake a stepparent adoption must first marry the child's formal legal parent. [212] Although same-sex marriage is now available in every U.S. jurisdiction, for the reasons discussed in the previous subsection, the availability to same-sex couples of avenues for establishing formal legal parent status that require marriage should not preclude recognition of equitable parenthood doctrines. [213] Moreover, there are a number of additional compelling reasons for why the

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[207] *See supra* Section II.11.

[208] *See supra* note 168 and accompanying text.

[209] NeJaime, *supra* note 132, at 1250 (footnote omitted).

[210] Deborah A. Widiss, *Non-Marital Families and (or After?) Marriage Equality*, 42 FLA. ST. U. L. REV. 547, 568 (2015).

[211] *Id.* (emphasis in original).

[212] *See supra* note 138 and accompanying text.

[213] *see supra* Section 111.A 1.

availability to **[*93]** same-sex couples of stepparent adoption should not lead courts to decline to adopt or apply equitable parenthood doctrines.

As detailed above, stepparent adoption is a substantial undertaking. [214] Even in jurisdictions that waive some of the more intrusive and time-consuming requirements such as financial accountings and home studies, the procedure can nonetheless be costly and complicated. [215] Many individuals require the assistance of an attorney to navigate the process and consequently incur attorney's fees, and the procedure often requires, *inter alia*, filing a number of documents, paying court fees, appearing in court, and submitting to a background check. [216] Requiring stepparent adoption in addition to marriage in order for nonbiological parents raising children within same-sex relationships to obtain parental rights would disproportionately harm low-income same-sex parents and their children, and would further exacerbate the differences in the cost and difficulty of obtaining parental rights for same- and different-sex parents. [217] Consequently, the arguments against precluding recognition of equitable parenthood doctrines based upon the availability of stepparent adoption are even more compelling than the arguments against precluding recognition of equitable parenthood doctrines based upon the availability of marriage-based presumptions of parentage.

B. The Preclusion of Equitable Parenthood Doctrines Based Upon the Availability of Second Parent Adoption

As an initial matter, second parent adoption, in which the non-marital partner of a child's formal legal parent is able to adopt the bild without the formal legal parent's rights being terminated, is not available in all jurisdictions. [218] For the reasons discussed in the previous subsections, the need for equitable parenthood doctrines is clear in jurisdictions in which marriage provides the only avenue through which nonbiological parents raising children within same-sex relationships can obtain parental rights. [219] In jurisdictions that do recognize second parent adoption, it will be tempting for courts and legislatures to decline to adopt or apply equitable parenthood **[*94]** doctrines on the grounds that equity does not require the application of such doctrines because the individual who is now seeking parental rights could have obtained formal legal parent status through second parent adoption. In fact, a few courts have already used the availability of second parent adoption procedures in their jurisdictions in support of decisions declining to adopt or apply equitable parenthood doctrines. [220] Although a decision to pursue second parent adoption arguably addresses questions of the legal parent's consent to the formation of a parent-child relationship between the functional parent and the child and the functional parent's assumption of the obligations of parenthood more directly than a decision to marry, it nonetheless would be both unwise and unfair for courts and legislatures to refuse to apply or adopt equitable parenthood doctrines on the basis of the availability of second parent adoption.

Second parent adoption is a complicated process that requires substantial resources, and the failure to undertake a second parent adoption may have nothing to do with whether the legal parent has consented to the formation of parent-child relationship between the child and functional parent or whether the functional parent has assumed the obligations of parenthood. [221] Like stepparent adoption, second parent adoption usually requires, *inter alia*, hiring

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[214] *See supra* Section II.A.3.a.

[215] *See supra* note 143.

[216] *See supra* note 143.

[217] This is because different-sex parents are able to obtain parental rights through avenues that require neither marriage nor adoption. *See supra* Section II.S.

[218] *See supra* note 144 and accompanying text.

[219] *See supra* Sections III.A.1-2.

[220] *See supra* note 120.

[221] Polikoff, *supra* note 189. at 73.3-34 ("There are numerous reasons why couples do not go this route. It is time consuming and expensive, it requires a lawyer, it subjects the family to court scrutiny, and it cannot start until after the child's birth, leaving

an attorney, paying court fees, executing various documents, submitting to background checks, and appearing in court. [222] Moreover, as discussed above, the second parent adoption process is often even more costly, intrusive, and/or lengthy than the stepparent adoption process. [223] For example, unlike for stepparent adoptions, home studies, which can be both intrusive and costly and can prolong the adoption process, are generally required for second parent adoptions (although some states grant courts discretion to waive the home study requirement). [224] Second parent adoptions cost **[*95]** between $ 2,000 and $ 3,000 on average, [225] and, depending on the jurisdiction, can cost upwards of $ 5,000. [226]

Overall, as Nancy Polikoff has explained, the second parent adoption process "is time consuming and expensive, it requires a lawyer, it subjects the family to court scrutiny, and . . . [c]ouples may be unfamiliar with such procedures, may lack resources to pursue them, and may not understand the ramifications of not completing them.." [227] A couple's failure to undergo the second parent adoption process is clearly an ineffective proxy for a lack of consent on the part of the formal legal parent or a lack of the assumption of the obligations of parenthood on behalf of the functional parent, and thus it should not preclude application of the equitable parenthood doctrines. Importantly, the common elements of the equitable parenthood doctrines directly address the questions of the legal parent's consent and the functional parent's assumption of the obligations of parenthood. [228] Thus, it is within the application of the equitable parenthood doctrines that courts can most effectively analyze the issues of the formal parent's consent and the functional parent's assumption of parental obligations, including whether the failure to obtain a second parent adoption was in any way related to these issues. [229] Finally, just like excluding equitable parenthood doctrines due to the availability of marriage-based avenues for establishing formal legal parent status would disproportionately harm same-sex couples and their children, so too would excluding equitable parenthood doctrines on the basis of the availability of second parent adoption. This is because unlike same-sex couples, different-sex couples have access to a variety of avenues to establishing parental rights that require neither adoption nor marriage. [230]

[*96] *C. The Effects on the Best Interests of Children if Equitable Parenthood Doctrines are Eschewed Based on the Availability to Same-Sex Couples of Marriage- and Adoption-Based Avenues to Establishing Formal Legal Parent Status*

As discussed in the previous two subsections, there exist many compelling reasons for maintaining equitable parenthood doctrines even when marriage- and adoption-based avenues of establishing formal legal parent status

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the relationship unrecognized for months or longer until a final adoption decree is signed. Couples may be unfamiliar with such procedures, may lack resources to pursue them. and may not understand the ramifications of not completing them.").

[222] *See supra* notes 140,148 and accompanying text.

[223] *See supra* notes 152-153.

[224] JOSLIN ET AL., *supra* note 74, § 5:19; Newman. *supra* note 153, at 85. ("Stepparent adoptions are often preferable to second-parent adoptions, in part because they frequently are less costly: second-parent adoptions can require expensive home studies before the adoption is approved, whereas stepparent adoptions do not.").

[225] HUMAN RIGHTS CAMPAIGN, supra note 154.

[226] Ellis, *supra* note 155.

[227] Polikofr, *supra* note 189, at 733-34.

[228] *See supra* Section I.B.

[229] This is the approach taken by the ALJ Principles with regard to its "parent by estoppel" doctrine. The comment accompanying the doctrine indicates that the failure to adopt should not preclude application of the doctrine, but may be relevant to the question of agreement between the parties to co-parent. ALJ PRINCIPLES OF THE LAW OF FAMILY DISSOLUTION: ANALYSIS AND RECOMMENDATIONS § 2.03 ant. b.(iii) (AM. LAW INST. 2002).

[230] *See supra* Section 11.B.

are available to same-sex couples. What is perhaps the most compelling reason, however, is that eschewing equitable parenthood doctrines due to the availability of marriage and adoption-based avenues for establishing formal legal parent status does not further the best interests of children. An approach that determines parental rights based exclusively upon formal steps such as marrying a child's formal legal parent or undertaking an adoption, and categorically refuses to provide rights to informal parents regardless of the degree to which they have functioned as a child's parent, is an approach that runs counter to the promotion of children's best interests. [231] As scholar Carlos Ball has correctly noted,

> [O]ver- and under-inelusivity results from the application of a rule that uses the existence of biological or adoptive links between the adult and the or ofa legal relationship between the two adults, as a necessary pie-condition for the granting of parentage status. The rule is overinclusive because it affords legal protections to children even in circumstances in which the adults in question play no meaningful roles in their lives. And it is underinclusive because it denies protections to children who have established parent-child bonds with individuals who are unable to meet the courts' bright-line rules aimed at promoting certainty. [232]

A significant body of research indicates that children form strong bonds with parental figures regardless of the existence of biological or adoptive ties. [233] Disrupting relationships between **[*97]** children and the individuals who they view as parents can have significantly harmful short- and long-term effects on children. [234] It is unfair to punish children due to the failure or inability of their parents to take the steps necessary to obtain formal legal parent status for the functional parent. [235] Precluding the recognition of equitable parenthood doctrines based upon the availability to same-sex parents of marriage- and adoption-based avenues to establishing formal legal parent status, means there will be more children who, "through no fault of their own, miss out on the legal, financial, and emotional benefits of having a second parent." [236] As one judge stated, in these situations, "Mlle child is helpless with the most to lose." [237] Moreover, since there is a positive correlation between income level and marriage rates and the adoption process requires substantial resources, it is the already disadvantaged children of lower-income parents who will most often be denied the substantial benefits of maintaining a relationship with an individual who has functioned as their parent and with whom they have formed a parent-child bond. [238]

IV. THE FUTURE OF EQUITABLE PARENTHOOD DOCTRINES

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[231] J. Herbie DiFonzo & Ruth C. Stern, *Breaking the Mold and Picking up the Pieces: Rights of Parenthood and Parentage in Nontraditional Families*, 51 FAM. CT. REV, 104, 108 (2013) ("[T]he insistence that same-sex partners follow specific and lengthy legal procedures in order to verify their right to parent the children they view as their own will ultimately hurt the children of these families. These children will be ripped from a relationship with one of the parents who was raising them ...").

[232] Carlos Ball, *Rendering Children Illegitimate in Former Partner Parenting Cases: Hiding Behind the Facade of Certainty*, 20 AM. U.J. GENDER SOC. POLY & L 623. 667 (2012).

[233] *See supra* notes 53-71 and accompanying text; *see also* Ball, *supra* note 282, at 666 ("Most children understand, from a very young age, who their parents are. Indeed, that understanding is in place well before they comprehend the legal implications of biological and adoptive links. Young children, therefore, do not make distinctions between their legal and non-legal parents.").

[234] *See supra* notes 53-71 and accompanying text.

[235] Polikoff, *supra* note 189, at 723 ("[C]hildren should not suffer because their parents do not marry.").

[236] Ball, *supra* note 232, at 663.

[237] Chatterjee v. King, 253 P.3d 915, 929 (N.M. Ct. App. 2010) (Vigil, J., dissenting).

[238] *See supra* notes 209, 225-226 and accompanying text; *see also* Michael Greenstone & Allen Looney, *The Marriage Gap: The Impact of Economic & Technological Change on Marriage Rates*, BROOKINGS (Feb. 3, 2012), https://www.brookings.edu/blog/jobs/2012/02/03/the-marriage-gap-the-impact-of-economic-and-technological-change-on-marriage-rates/ [https://perma.cc/43LJ-JEHS].

A. The Continuing Need for Equitable Parenthood Doctrines Even if Same-Sex Couples Receive Greater Access to the Avenues of Obtaining Formal Legal Parent Status Available to Different-Sex Couples

It is possible that in the future, methods of establishing formal legal parent status that require neither marriage nor adoption will be extended to same-sex parents. For example, perhaps states will extend the use of VAPs to same-sex couples or more states will enact statutes that extend formal legal parent status to an individual who consents to a partner's use of ART with the intent to parent the child, regardless of marital status or gender. If it becomes easier for members of same-sex couples to obtain formal legal parent status in efficient, low-cost manners, the argument that equity requires the provision of **[*98]** parental rights to functional parents will weaken. Moreover, in disputes between formal legal parents and functional parents, the increased availability to same-sex couples of straightforward, lost-cost avenues of establishing formal legal parent status will strengthen the argument that the formal legal parent did not actually consent to the functional parent forming a parent-like relationship with the child. In fact, in such situations the formal legal parent will likely argue that the couple's failure to pursue available efficient, low-cost manners of establishing formal legal parent status for the functional parent directly reflects a lack of consent on the part of the formal legal parent to the functional parent forming a parent-like relationship with the child, and thus that application of equitable parenthood doctrines is inappropriate.

Even in a potential future where the more efficient, low-cost avenues to establishing legal parent status are available to same-sex parents, however, there will continue to be some situations in which equity requires the application of equitable parenthood doctrines. As an initial matter, the more efficient, low-cost avenues to establishing legal parent status such as VAPs and consent to a partner's use of ART [239] generally will be of little help to a functional parent who enters the lives of the legal parent and his or her child at some point after the child is born. [240] For these individuals, adoption, which in some jurisdictions requires marriage as a prerequisite, may be the only option available for obtaining formal legal parent status. As discussed in detail above, there are many reasons for why a couple may not pursue adoption. [241] These reasons may have nothing to do with the legal parent's consent, the functional parent's assumption of parental obligations, or the bond between the child and functional parent, and thus equitable parenthood doctrines serve an essential function even when adoption is available in the jurisdiction. [242] Moreover, even functional parents who pursue adoption lack formal recognition as legal parents until the lengthy adoption process is completed, and **[*99]** therefore such parents may require the protection provided by equitable parenthood doctrines. [243]

Another reason that equitable parenthood doctrines should remain--even if there is an expansion to same-sex couples of more efficient, low-cost avenues to establishing formal legal parent status--is that there have been situations where legal parents have, by their words and actions, consented to and encouraged the formation of a parent-like relationship between the functional parent and child, but who have used manipulation to obstruct the

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[239] It is important to note, however, that for couples who would like to use ART without the involvement of a physician, the consent to a spouse's use of an ART avenue would not qualify as a low-cost or efficient option if the governing statute required, as a number currently do, that the procedure be performed by or under the supervision of a physician. *See supra* note 130 and accompanying text.

[240] While VAPs can be signed following discharge from the hospital, most are signed in the hospital or birthing center because that is where these documents are presented to the birth parent. *See supra* notes 160-164 and accompanying text. In addition, the language of many VAPs instructs that only men who believe that they are the child's biological father should sign, and thus it would not be applicable to a parent who entered the picture after the child's birth. *See supra* note 168.

[241] *See supra* Section III.B.

[242] *See infra* Section IV.B

[243] *See supra* note 156 and accompanying text.

functional parent from establishing formal legal parent status [244] For example, in the case of *Debra H. v. Janice R.*, according to the court, the nonbiological parent, Debra, "served as a loving and caring parental figure during the first [two and a half] years of the child's life," until she and the child's biological mother, Janice, separated. [245] At first, Janice allowed Debra to see the child multiple times each week and to speak with the child over the phone each day, but Janice subsequently limited the amount of time Debra spent with the child and eventually terminated all communication between Debra and the child. [246] According to Debra, who had not obtained a second parent adoption even though second parent adoption was available in the jurisdiction, Janice had convinced Debra that they did not need to pursue this formal means of establishing legal parent status, stating "We don't need an adoption. *You are his parent. I'm a lawyer*. I know the court system. We don't want the courts to get involved . . . ." [247] Debra also claimed Janice told Debra that she "would never take [the child] away from her." [248] While manipulating a functional parent in this manner will be more difficult if a variety of efficient, low-cost avenues to obtaining parenthood for same-sex couples are available, it will still be possible. This will be particularly true in situations where the functional parent enters the picture sometime after **[*100]** the child's birth when efficient, low-cost avenues to obtaining legal parent status are less likely to be available. [249]

Additional reasons for maintaining equitable parenthood doctrines despite the expansion to same-sex couples of more efficient, low-cost avenues to establishing formal legal parent status include that there are some individuals who will decline to take steps to establish formal legal parent status due to fear or mistrust of the government or a desire to exclude the state from their home life to the largest extent possible. [250] This may be particularly likely among groups of individuals who have faced discrimination and mistreatment at the hands of the government or legal system in the past. Moreover, for anyone who is not the child's birth mother or her spouse at the time of the child's birth, there likely will always be steps required to obtain formal legal parent status and there will always be some parents who are simply unaware of these steps. This will be true even if the required procedures are efficient and low-cost.

Overall, even if the existing formal avenues to establishing legal parent status or their equivalent are expanded to same-sex couples, there will always be individuals who, for one reason or another, cannot or do not take the steps required to obtain legal parent status through the available formal avenues. For some of these families, the reasons for not pursuing formal legal parent status for the functional parent will be completely unrelated to the consent of the formal legal parent, the assumption of the obligations of parenthood by the functional parent, and the bond between the functional parent and child. In these situations, equitable parenthood doctrines play an essential role in protecting the well-being of children and the important relationships formed between children and their functional parents. Notably, in a number of cases courts have used equitable parenthood doctrines to grant rights to a

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[244] *See* Grossman, *supra* note 8, at 703-04 (explaining that without the equitable parenthood doctrines, "the biological mother alone can decide whether to Permit her female partner to adopt, whether to enter into a marriage or civil union that might result in joint parentage, or whether to consent to shared custody or visitation after a break-up. Yet the couple's decision as to which partner will bear the child may rest on considerations--such as fertility, age, and health--that have nothing to do with which of the two would be a better parent, let alone the *only* parent." (emphasis in original)).

[245] Debra H. v. Janice R., 877 N.Y.S.2d 259, 260 (App. Div. 2009), *rev'd* 930 N.E.2d 184 (N.Y. 2010), *abrogated by* Brooke S.B. v. Elizabeth A.C.C., 61 N.E.3d 488 (N.Y. 2016).

[246] Debra H., 930 N.E.2d at 186.

[247] Verified Petition at P 31, Debra H. v. Janice ft, No. 106569/08, 2008 WL 7675822 (N.Y. Sup. Oct. 2, 2008) (No. 0810656908), 2008 WL 7471048 (emphasis in original).

[248] Debra H., 2008 WL 7675822, at *4.

[249] *See supra* notes 239-240 and accompanying text.

[250] *See supra* note 204 and accompanying text.

functional parent who is involved in a different-sex relationship with the child's formal legal parent. [251] The application of equitable parenthood doctrines in cases involving different-sex parents provides forceful support for the notion that there will be situations in which application of these doctrines is necessary to protect children and their functional parents even if the avenues of obtaining formal legal parent status currently **[*101]** available to different-sex couples are expanded to same-sex couples. Moreover, the decline in marriage among different-sex couples and rise in births outside of marriage over the past several decades have increased the number of children who do not have two formal legal parents and have made it more likely that a significant number of children being raised within different-sex relationships will have a functional parent-child relationship with an individual who has not obtained formal legal parent status. [252] Consequently, abandoning these doctrines will harm not only families that include same-sex parents, but also will harm different-sex parents and their children. Importantly, equitable parenthood doctrines do not seek to supplant, and have not supplanted, formal avenues to establishing legal parent status. [253] Instead, the equitable parenthood doctrines simply serve to provide a safety net for compelling cases involving parents who have, for whatever reason, fallen through the gaps in the avenues of establishing formal legal parent status. [254]

While the availability to functional parents of efficient, low-cost avenues to establishing formal legal parent status should not preclude application of equitable parenthood doctrines, the availability of such avenues may factor into the application of the doctrines. As discussed above, the vast majority of equitable parenthood doctrines include as an element that the formal legal parent consented to or encouraged the formation of a parent-like relationship between the functional parent and the child. [255] A couple's failure to obtain formal legal parent status for the functional parent despite the availability of low-cost, efficient avenues to obtaining such status could be something courts weigh in relevant situations in assessing the consent element of the jurisdiction's equitable **[*102]** parenthood doctrine. [256] In appropriate situations, the failure to obtain formal legal parent status despite the availability of efficient, low-cost avenues might also factor into the analysis of whether the functional parent assumed the obligations of parenthood, which is another common element of equitable parenthood doctrines. [257] The result may be that the availability of various low cost, efficient avenues to establishing formal legal parent

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[251] *See, e.g.*, Kinnard v. Kinnard, 43 P.3d 150 (Ala. 2002); McAllister v. McAllister, 779 N.W.2d 652 (N.D. 2010); Michael L v. Hilary W.-S., No. 947CV2002, 2002 32140828 (Pa. Commw. Ct. Nov. 25, 2002); Middleton v. Johnson, 633 8.E.2d 162 (S.C. Ct. App. 2006); Michaelholt v. Holt, 315 P.3d 470 (Wash. 2013).

[252] *See* Jeffery A. Parness, *Dangers in De Facto Parenthood*, 37 U. ARK. LITTLE ROCK L. REV. 26,28 (2014) (*[T]here has been a significant rise in unwed mothers, who at birth or thereafter, choose to raise their children with new intimate partners or with family members, like grandparents. These mothers' children have no fathers listed on their birth certificates and biological fathers who fail to ever attain parental childcare status." (footnotes omitted)); *see also* Laufer-Ukeles & Blecher-Prigat, *supra* note 2, at 435.

[253] *See supra* Part II (discussing formal avenues to establishing legal parent status).

[254] Ball, *supra* note 232, at 667-68 ("The application of the doctrine, in other words, does not prevent courts from using biology, adoption, and the entering into legally-recognized relationships as means through which to grant parentage status. Instead, the doctrine serves as an alternative means of acquiring that status, one that recognizes the diversity of American families at the beginning of the twenty-first century without jeopardizing the ability of the majority of individuals to be recognized as parents through the application of bright-line rules.").

[255] Suzanne B. Goldberg, et al., *Family Law Scholarship Goes to Court: Functional Parenthood and the Case of* Debra H. v. Janice It, 20 COLUM. J. GENDER & L. 348,363 (2011).

[256] This is the approach taken by the ALI, which states that the failure to adopt should be considered in evaluating whether the parties agreed that the informal parent would take on a parental role. Deborah L. Forman, *Same-Sex Partners: Strangers, Third Parties, or Parents? The Changing Legal Landscape and the Struggle For Parental Equality*, 40 FAM. L.Q. 23, 46 (2006) ("However, the ALI comments to its section on Parenthood by Estoppel' provide that failure to adopt, when it is an available option, relates merely to whether an agreement existed that the partner would assume a parental role.").

[257] *See supra* notes 98-99 and accompanying text.

status makes it more difficult for functional parents to obtain relief through equitable parenthood doctrines. This result is preferable to entirely eliminating equitable parenthood doctrines. Considering that protecting the best interests of children is a fundamental goal of family law, the law should not create a situation where parental rights for an individual who has functioned as a child's parent depend entirely on whether that individual has undertaken the formal steps necessary to obtain legal parent status. [258] To completely abandon the equitable parenthood doctrines based solely on the grounds that formal avenues to establishing legal parent status were available would mean that actually functioning as a parent is a largely unimportant consideration in determining an individual's eligibility for parental rights--a curious approach for an area of the law that purports to place children's best interests at the forefront of its goals.

Finally, while in the coming years same-sex couples will likely edge closer to different-sex couples with regard to access to low-cost, efficient avenues to establishing formal legal parent status, it is unlikely that the ability of same-sex parents to establish formal legal parent status will ever truly be equal in all respects to the ability of different-sex parents to establish formal legal parent status. This is due in significant part to the law's longstanding and continued emphasis on biology in **[*103]** determining formal legal parent status. [259] Consequently, even if in the future same-sex couples gain greater access to low-cost, efficient avenues to establishing formal legal parent status, it is likely that abandoning equitable parenthood doctrines will still disproportionately harm same-sex parents and their children. [260] Overall, equitable parenthood doctrines will continue to play an essential role in protecting LGBT parents and their children regardless of whether same-sex couples gain greater access to avenues of establishing formal legal parent status. The promotion of equitable parenthood doctrines should therefore remain a significant goal of the LGBT rights movement even as the movement continues to pursue greater access to low-cost, efficient avenues to establishing formal legal parent status.

B. The Role of the LGBT Rights Movement in Maintaining and Promoting Equitable Parenthood Doctrines

1. Clarifying the Goals of the Movement

On a broad scale, the LGBT rights movement is reaching a point where it must decide if its ultimate relationship recognition goals simply relate to attaining equal access to formal relationship statuses or if there is something more that the movement is seeking. Specifically, the movement needs to determine whether changing laws relating to marriage, parentage, and other issues is important beyond just the reform that creates greater equality in access to the existing formal relationship statuses. The LGBT rights movement has been stunningly successful on a number of fronts in obtaining greater access to formal relationship statuses for LGBT individuals. [261] To stop at mere equality of access to existing formal relationship statuses, however, would be to leave underdeveloped one of the most impressive accomplishments of the LGBT rights movement to date: challenging law and society to think

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[258] Forman, *supra* note 256, at 46 ("If we look at these cases from the children's perspective, it becomes clearer that whether the partner adopted or not, the completion of a formal adoption seems beside the paint, especially if she functioned as a parent and developed the resulting psychological attachment with the child."); Ball, *supra* note 232, at 860-81 ("It is unlikely that a child under these circumstances will consider [a functional parent who has not obtained legal parent status] to be any leas of a parent--especially if she served in that capacity for an extended period of time.").

[259] *See* Neclaime, *supra* note 132, at 1258-59.

[260] *Id.* at 1258-59 ("Indeed, in observing that lilt is the children of same-sex couples who will be most severely affected by being limited in their opportunity to maintain bonds with a party who is not a biological parent but who has . . . functionally behaved as the children's second parent, the opinion evinced an appreciation for how resistance to nonbiological parentage in both marital and nonmarital families reflects and produces LGBT inequality. Importantly, it suggested that, as a constitutional matter, *Obergefell* calls such inequality into question." (omission and alteration in original) (footnote omitted) (quoting MeGaw v. McGaw, 468 S.W.3d 435, 454 (Mo. Ct. App. 2015))).

[261] This is reflected by the nationwide recognition of same-sex marriage as well as the advancements in access to formal avenues to obtaining legal parent status for same-sex parents discussed in Section II. A.

differently about **[*104]** how family is defined so that important relationships, regardless of their form, are supported and protected.

In terms of the more narrow issue of the LGBT rights movement's goals with regard to parental rights, the movement has been a major force in furthering legal developments that provide parental rights to nonbiological parents raising children within same-sex relationships. One of the most consequential ways it has done this is through the promotion of equitable parenthood doctrines--the LGBT rights movement has played an essential role in advancing these doctrines in jurisdictions throughout the United States. [262] Recently, however, much of the movement's focus has shifted to advocating for the expansion to same-sex couples of existing avenues to obtaining formal legal parent status. There is no doubt that some of this shift stems from the achievement of marriage equality, which opened the door to the application of marriage-based avenues to establishing formal legal parent status to same-sex couples. [263] The movement must now decide whether the promotion of equitable parenthood doctrines will remain a significant part of its focus, or whether instead it will focus more exclusively on obtaining greater access to formal avenues to obtaining legal parent status. In answering this question, the movement should identify and examine any worthy goals furthered by equitable parenthood doctrines and assess whether these goals would be furthered as effectively through increased access for same-sex couples to avenues of establishing formal legal parent status. This will allow the movement to determine whether the promotion of equitable parenthood remains an important and worthy endeavor even as the movement pursues increased access to avenues of establishing formal legal parent status.

One possibility is that the sole worthy goal furthered by equitable parenthood doctrines relates to protecting the rights and interests of individuals in same-sex relationships who have functioned as parents but lack biological ties to their children. If this were the case, one may argue that because the need for equitable parenthood doctrines stemmed from the historical exclusion of nonbiological parents raising Hid= within same- sex relationships from avenues of establishing formal legal parent status, the recent success the movement has had in expanding access to avenues to establishing formal legal parent status for such parents renders equitable parenthood doctrines **[*105]** unnecessary. [264] Even if the sole worthy goal furthered by equitable parenthood doctrines related to protecting the interests of nonbiological parents in same-sex relationships, these doctrines would continue to be necessary to promote this goal regardless of the expansion to same-sex couples of formal avenues to establishing legal parent status. As discussed above, there have been, and there will continue to be, nonbiological parents raising children in same-sex relationships who are unable to use the available formal avenues to establish legal parent status despite increases in access to such avenues for same-sex couples. [265] Consequently, the existence of equitable parenthood doctrines is essential to protecting the rights and interests of these nonbiological parents raising children in same-sex relationships despite increased availability to same-sex couples of formal avenues to establishing legal parent status. [266]

Protecting the rights of nonbiological parents in same-sex relationships, however, is far from the only important goal furthered by equitable parenthood doctrines. The LGBT rights movement must be careful not to overlook what it has long identified as a core purpose of equitable parenthood doctrines: furthering the well-being of children by protecting the relationships formed between children and the individuals in their lives who have functioned as their parents. [267] The arguments set forth by leading LGBT rights organizations, scholars, and attorneys over the last

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[262] *See supra* note 30 and accompanying text.

[263] *See* Polikoff, *supra* note 180, at 721-23

[264] *See supra* Section II.A.

[265] *See supra* Section IV.A.

[266] *See supra* Section IV.A.

[267] *See supra* note 30 (compiling briefs submitted by leading LGBT rights organizations arguing in favor of the application of equitable parenthood doctrines).

several decades in support of the adoption and application of equitable parenthood doctrines have stressed the idea that these doctrines are essential because research indicates children can suffer great harm when their relationship with a parental figure is disrupted, regardless of whether that parental figure is a formal legal parent. [268] To abandon the promotion of these doctrines as a result of the expansion to same-sex couples of avenues to establishing formal legal parent status would be to ignore the arguments made over the years by leading LGBT rights advocates and to render those arguments seemingly disingenuous.

[*108] More importantly, since it is inevitable that, despite the expansion to same-sex couples of formal avenues to establishing legal parent status, situations will continue to arise in which individuals who have formed parent-like bonds with their children could not or did not take the steps necessary to establish formal legal parent status, equitable parenthood doctrines will remain essential in protecting the well-being and best interests of children. [269] Moreover, due to the law's historical reliance on biology in determining legal parent status and the continuing discrimination against same-sex parents with regard to access to formal avenues of establishing legal parent status, it likely will long remain the case that the equitable parenthood doctrines will most frequently serve to protect children within LGBT families. [270] Overall, if protecting the well-being of children, especially children being raised by same-sex parents, is a goal that the LGBT rights movement wishes to continue to promote, the advancement of equitable parenthood doctrines should remain a focus of the movement, regardless of how successful it is in obtaining greater access to formal avenues of establishing legal parent status.

2. Advocating for Increased Access for Same-Sex Couples to Formal Avenues of Establishing Legal Parent Status Without Leaving Functional Parents Behind

While the LGBT rights movement should continue to promote equitable parenthood doctrines, it should also continue to advocate for the expansion to same-sex parents of formal avenues to establishing legal parent status. Obtaining formal legal parent status is important for parents as well as their children for a number of reasons. Even in states that have adopted equitable parenthood doctrines, most do not treat equitable parents as equal to legal parents for purposes of custody and visitation. [271] In addition, while a wide variety of **[*107]** legal rights and obligations attach to formal legal parent-child relationships, "[i]t remains unclear in many states whether equitable parents have [any] rights or obligations outside the context of child custody and visitation." [272] Moreover, application of equitable parenthood doctrines is complicated and intrusive for the parties and their children, and relying on these doctrines to secure parental rights is a risky endeavor. Having the parent in question identified as

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[268] *See, e.g.*, Amici Curiae Brief of Natl Ctr. for Lesbian Rights et al. supra note 30 ("[T]here is a compelling interest in protecting the child from the 'emotional harm… intrinsic in the termination or significant curtailment of the child's relationship with a psychological parent under any definition of that term." (Omission in original) (quoting In re E.LM.C 100 P.3d 646, 561 (Colo. App. 2004))); *see also supra* notes 60-71 and accompanying test

[269] *See supra* Section IV.A.

[270] *See supra* note 239 and accompanying text.

[271] Feinberg, *supra* note 1. at 353-54 (discussing the approach of a number of jurisdictions in which equitable parents are treated as inferior to legal parents in determining custody and visitation rights); Laufer-Ukeles & Blecher-Prigat, *supra* note 2, at 449 ("Thus, although the V.C. court initially equated functional and formal parenthood and indicated that once functional parenthood is assigned that person is a parent for all intents and purposes, it later said there should be a presumptive rule that functional parents (as opposed to formal parents) will receive visitation as opposed to full custody. In fact, courts applying functional parenthood have in practice followed this presumption despite conceptually equalizing parenthood.").

[272] Joslin, *supra* note 27, at 502-03 ("For example, a child may not be entitled to children's Social Security benefits through her functional but nonlegal parent. The child may also not be entitled to child support through her functional but nonlegal parent. Additionally, a de facto parent may not have standing to oppose an adoption by a third person." (footnotes omitted)).

early as possible as a legal parent with all of the attendant rights and obligations is undoubtedly in the best interests of the children involved. [273]

Expanding formal avenues of establishing legal parent status to same-sex parents, while important, will only be effective if same-sex parents actually take advantage of such avenues. Unfortunately, some parents underestimate the importance of obtaining legal parent status or mistakenly believe that functioning as a parent will be enough to result in legal protection of their relationship with the child. Consequently, conveying the idea that obtaining legal parent status is of vital importance in securing parental rights should be a key goal of the LGBT rights movement and the movement should educate same-sex parents regarding the steps necessary to establish formal legal parent status, encourage them to take such steps, and assist them in doing so. However, the movement's message with regard to establishing formal legal parent status needs to be set forth in a way that, while effectively and forcefully highlighting the importance of obtaining formal legal parent status, does not denigrate functional parents.

Specifically, the message should stress that while functional parents are as important to their children's lives as formal parents and deserve equal respect, the reality is that the law places great weight on the establishment of formal legal parent status. The message should convey that establishing formal legal parent status provides rights and protections that are essential not only to functional parents, but also to their children, and that failure to obtain formal legal parent status can result in both children and their functional parents being unjustly denied many of these important rights and protections. **[*108]** Moreover, because many people prefer not to plan for or consider the potential demise of their romantic relationships, the message should stress that the rights and protections accompanying formal legal parent-child relationships are important for children and parents within both intact and non-intact families. [274] Overall, the message should celebrate functional parents while simultaneously encouraging them to become formal parents by stressing that it is the fact that functional parents are so important to the lives of their children that makes it essential that they take the steps necessary for them to obtain formal legal parent status.

Finally, it is important to understand that no amount of messaging from the movement regarding the importance of obtaining formal legal parent status will be enough to help same-sex parents who lack the resources to pursue the available avenues of establishing formal legal parent status. It is therefore essential that the movement commit to providing assistance to same-sex parents in obtaining formal legal parent status. Equally essential, however, is that the movement recognize that it is inevitable that there will be functional parents who could not or did not obtain formal legal parent status and, as a result of this recognition, continue to advocate forcefully for the adoption and application of equitable parenthood doctrines. It is this that is the most important action the movement can take to avoid denigrating functional parents while it continues to pursue increased access to avenues of establishing formal legal parent status.

CONCLUSION

As same-sex parents gain increasing access to formal avenues of establishing legal parent status, the future of equitable parenthood doctrines is uncertain. It will be tempting for courts and legislatures to abandon equitable parenthood doctrines in favor of exclusive reliance on formal avenues to establishing legal parent status. This is in part because the relatively straightforward, bright-line approach to establishing legal parent status that inheres in the formal avenues allows courts to make parentage determinations more efficiently and without having to undertake any significant inquiry into the **[*109]** dynamics of the relationships between the parties or the child and party seeking parental rights. In contrast, application of equitable parenthood doctrines requires courts to examine very closely facts relating to the dynamics of the relationships at issue and to undertake complicated analyses

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[273] Aviel, *supra* note 33, at 2065-66 ("Professor Elizabeth Bartholet has similarly argued that children do better when parental authority is concentrated in two clearly identified parents who enjoy that status from the time of the child's birth."); *see also* Laufer-Ukeles & Blecher-Prigat, *supra* note 2, at 464-65.

[274] For example, whether within the contest of intact or non-intact families, children may not be able to claim Social Security benefits based upon a functional parent-child relationship, and a de facto parent may not have the right to make medical or educational decisions for the child. Joslin, supra note 27, at 502; JOSLIN ET AL., supra note 74, § 7:1.

regarding the consent of the formal legal parent, the assumption of the obligations of parenthood by the functional parent, and the bond between the functional parent and child. In addition, due to the fact that it was, in significant part, the historical denial to same-sex parents of avenues to establishing formal parent status that led many courts and legislatures to adopt equitable parenthood doctrines, these entities may now conclude that the increasing expansion to same-sex parents of formal avenues to establishing legal parent status renders such doctrines unnecessary.

To abandon equitable parenthood doctrines, however, would be a mistake. As an initial matter, the current formal avenues available to same-sex couples for establishing legal parent status are based primarily upon marriage and adoption. Couples may be unable or unwilling to pursue marriage- and adoption-based avenues to establishing formal legal parent status for a wide variety of reasons, and the failure to pursue these avenues may indicate nothing about the functional parent's relationship with the child or the understanding between the functional parent and the formal legal parent regarding that relationship. In addition, excluding equitable parenthood doctrines due to the availability of marriage- or adoption-based avenues for establishing formal legal parent status would disproportionately harm same-sex couples and their children--unlike same-sex couples, different-sex couples have access to a variety of formal avenues to establishing legal parent status that require neither marriage nor adoption. Moreover, equitable parenthood doctrines should not be abandoned even if most of the existing formal avenues of establishing legal parent status or their equivalent are expanded to same-sex couples. There will always be parents who, for whatever reason, are unable or unwilling to take the formal steps necessary to establish legal parent status, and a legal approach that categorically refuses to provide rights to functional parents is an approach to parental rights that fails to promote children's best interests.

For family law to most effectively advance what is perhaps its most essential goal, protecting the best interests of children, it must continue to adopt and apply equitable parenthood doctrines even as formal avenues to establishing **[*110]** legal parent status increasingly are expanded to same-sex couples. Research demonstrates conclusively that children form strong bonds with parental figures regardless of the existence of biological or adoptive ties. [275] The disruption of the relationships between functional parents and their children can lead to significantly harmful short- and long-term effects for the children involved. [276] As a result, it is essential to maintain equitable parenthood doctrines so that in appropriate cases, the doctrines can be used to protect the well-being of children who have formed a parent-child relationship with a parental figure who has not established formal legal parent status. Moreover, in order to most effectively protect LGBT families, the LGBT rights movement, which has long played a key role in promoting the adoption and application of equitable parenthood doctrines, should continue to advocate for these doctrines even as it pursues the equally important goal of increasing access for same-sex couples to formal avenues of establishing legal parent status.

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[275] *See supra* notes 53-71, 233 and accompanying test.

[276] *See supra* notes 53-71 and accompanying text.