Who Is a Parent and Who Is a Child in a Same-Sex Family? – Legislative and Judicial Issues for LGBT Families Post-Separation, Part II: the U.S. Perspective

by
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I. Introduction

In the United States laws and practices related to family law issues are generally matters of state, rather than federal, law. Access to federal courts to address issues of parental rights has been limited by what is generally known as the "domestic relations exception" to federal jurisdiction over family law matters.[1] The U.S. Supreme Court has provided some guidance on these matters in a series of cases interpreting the application of rights guaranteed by the U.S. Constitution. In spite of these pronouncements, state courts and legislators are still generally the arbiters of issues related to parental rights. Because the United States is a large and very culturally diverse nation it is not unexpected that many variations exist in the manner in which legal recognition of a continuing relationship between children and non-biologically related adults are determined.[2] Presently the United States is also a very polarized nation, particularly with respect to what might best be described as cultural or social is-

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1 United States v. Windsor, 133 S. Ct. 2675, 2691 (2013) (quoting *In re* Burrus, 136 U.S. 586, 593-94 (1890)).

2 *See* Courtney G. Joslin, *Symposium: Not Equal Yet: Building Upon Foundations Of Relationship Equality: The Perils of Family Law Localism,* 48 U.C. DAVIS L. REV. 623 (2014).

sues, the very bedrock of much of family law.[3] While courts and legislatures have made advances in recognizing and respecting the rights of "non-traditional" families, these advances are continually under attack by those with a desire to define families in a manner that fails to recognize both the changing demographics of the country and the best interests of children.[4]

In the United States, the rights associated with the parent-child relationship emanate primarily from a focus not on children's interests, but on parental rights. The United States remains the only country not to have adopted the UN Convention on the Rights of Children.[5] These parental rights emanate from the common law or constitutional interpretation. Early cases were based on the common law notion of children as property.[6] Later this theory gave way to suggestions that parents should nurture children as part of the public good.[7] While children as property is a concept that courts have rejected, the idea that children belong to their parents continues. This can be most clearly seen in the doctrine of parenthood as exclusive status.[8] This theory limits the rights associated with parenthood to a narrowly defined and numerically limited number of adults.[9] As a general matter, it means that the law recognizes only one set of parents for a child at any one time.[10] It grants these parents rights and

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3 *See, e.g.*, Naomi R. Cahn, *The Moral Complexities of Family Law*, 50 STAN. L. REV. 225(1997).

4 *See, e.g.*, Elizabeth Harris, *Same-Sex Parents Still Face Legal Complications*, N. Y. TIMES, (June 20, 2017), https://www.nytimes.com/2017/06/20/us/gay-pride-lgbtq-same-sex-parents.html

5 Convention on the Rights of Children, United Nations Human Rights, http://www.ohchr.org/EN/ProfessionalInterest/Pages/CRC.aspx (last visited Nov. 2, 2017).

6 *See* Mary Patricia Byrn & Jenni Vainik Ives, *Which Came First the Parent or the Child?,* 62 RUTGERS L. REV. 305, 318-19 (2010).

7 *See* MARY ANN MASON, FROM FATHER'S PROPERTY TO CHILDREN'S RIGHTS: THE HISTORY OF CHILD CUSTODY IN THE UNITED STATES (1994); *See also* Dara E. Purvis, *The Origin of Parental Rights: Labor, Intent, and Fathers*, 41 FLA. ST. U. L. REV. 645 (2014).

8 *See, e.g.,* 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).

9 *Id.*

10 However, California and Maine have amended their laws to allow courts to determine that a child may have more than two parents. CAL. FAM.

responsibilities that belong to no one else. Under this theory, a child's attachment to other caregivers cannot be accommodated because those caregiving adults must compete with the exclusive rights given to the legal parents. Furthermore, these exclusive rights are powerful because they have long been recognized as protected under the U.S. Constitution.[11]

There is a long-standing precedent in the United States for determining parentage based on biology or marriage. The expansion of the notion of who is a parent is the result of a movement from parenthood as defined solely by biology and marriage to one that now encompasses function and intent. Part II of this article will trace these developments. With respect to marriage, the discussion relies on the early unmarried fathers' rights cases to establish that parental rights are not limited to those who are married,[12] it then focuses on cases relying on state laws that established that neither is biology conclusive. Subsequent cases relied on the functional definition of parenthood through the use of de facto parent statutes or case law, the doctrine of parenthood by estoppel, and the recognition of "psychological parents."[13] Most recently courts and legislatures, primarily as the result of advances in assisted reproductive technology (ART) have defined parenthood based on intent. These developments have opened the door for recognition of the right to continue the relationship between children and non-biologically related adults who act as parents. While the identity of these adults may vary, this article will focus primarily on the rights of gay men and lesbi-

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CODE § 7612(c) (West 2016), amended by S.B. 1171, 2016 Cal. Legis. Serv. Ch. 86 (West); ME. REV. STAT. ANN. tit. 19-A, § 1853 (2015) (effective July 1, 2016) ("Consistent with the establishment of parentage under this chapter, a court may determine that a child has more than 2 parents. For the story behind the California legislation, see Joanna Grossman, *California Allows Children to Have More Than Two Parents,* VERDICT, (Oct. 15, 2013), https://verdict.justia.com/2013/10/15/california-allows-children-two-legal-parents.

11 Pierce v. Society of Sisters, 268 U.S. 510 (1925).

12 *See, e.g.,* Lehr v. Robertson, 463 U.S. 248 (1983); Caban v. Mohammed, 441 U.S. 380 (1979); Quilloin v. Walcott, 434 U.S. 246 (1978); Stanley v. Illinois, 405 U.S. 645 (1972).

13 JOSEPH GOLDSTEIN, ANNA FREUD & ALBERT J. SOLNIT, BEYOND THE BEST INTERESTS OF THE CHILD (1973).

ans to continue to act as parents to the children they have raised together with their partners.[14]

Part III of the article more fully fleshes out the most common means of establishing parentage outside of marriage or biology. These include the use of the equitable parenthood doctrines, the Uniform Parentage Act presumptions, second parent adoptions and agreements. Part IV discusses some of the possible implications of the U.S. Supreme Court's decision in *Obergefell v. Hodges*[15] that guaranteed marriage equality for same-sex couples.

II. History of Parentage in the United States

Historically marriage defined parenthood. A child born to a married woman was considered the child of her husband. This marital presumption had its roots in the common law where it was known as was known as Lord Mansfield's rule.[16] The rule existed primarily as a means of protecting both the property of the father and the legitimacy of the child, since at common law a child born outside of the marriage was considered to be a bastard which resulted in significant legal disabilities.[17] This means of defining parentage still exists today at least as a rebuttable presumption in all states.[18] Beginning in the early 1970s the courts began to recognize the rights of biological fathers who were not married to the child's mother. Beginning with *Stanley v. Illinois*[19] the court focused on a biological father's constitutionally protected right to have a legally recognized relationship with his child. Subsequent cases defined the parameters of this right, ultimately concluding that the biological relationship in and of itself

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14 *See generally* Nancy D. Polikoff, *From Third Parties to Parents: The Case of Lesbian Couples and Their Children,* 77 LAW & CONTEMP. PROB. 195 (2014). This article is also available at http://lcp.law.duke.edu/.

15 135 S. Ct. 2584 (2015).

16 *See* HOMER H. CLARK, JR., THE LAW OF DOMESTIC RELATIONS IN THE UNITED STATES 15.7, 104 (2d ed. 1987).

17 *See, e.g.,* Solangel Maldonado, *Illegitimate Harm: Law, Stigma, and Discrimination Against Nonmarital Children,* 63 FLA. L. REV. 345 (2011).

18 June Carbone & Naomi Cahn, *Marriage, Parentage, and Child Support*, 45 FAM. L.Q. 219 (2014).

19 405 U.S. 645 (1972).

was not sufficient to secure parental rights.[20] In *Lehr v. Robertson* the U.S. Supreme Court recognized the significance of the biological connection as offering "the natural father an opportunity that no other man possesses to develop a relationship with his offspring"[21]; however, the Court further required that the father take alternative affirmative steps to accept "some measure of responsibility for the child's future."[22] This later came to be described as the "biology plus" requirement.

Around the same time the Supreme Court also began to ameliorate the harsh consequences of "illegitimacy" for children by striking down state imposed differential treatment of children born within and outside the context of marriage[23] as a violation of the Equal Protection Clause of the U.S. Constitution. This effort was furthered by the Uniform Law Commission's promulgation of the Uniform Parentage Act in 1973. The overriding purpose of the act was stated in section 2: "the parent and child relationship extends equally to every child and every parent, regardless of the marital status of the parent,"[24] thus confirming that marriage was not the exclusive means of obtaining parental rights.

The Uniform Parentage Act (UPA) also opened the door for the recognition of parental rights outside of both marriage and biology. The Act includes a number of presumptions regarding who is the parent of a child. One of these presumptions is known as the "holding out" provision. It provides that one is a presumed father if "he receives the child into his home and openly holds out the child as his natural child."[25] It had been assumed that "natural" meant biological. But in an important case for later recognition of non-biological unmarried parents, a California court relied on the presumption to grant parental status to a man

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20 *See, e.g.,* Elizabeth Buchanan, *The Constitutional Rights of Unwed Fathers Before and After* Lehr v. Robertson, 45 OHIO ST. L.J. 313 (1984).

21 463 U.S. 248, 262 (1983).

22 *Id.*

23 Levy v. Louisiana, 391 U.S. 68 (1968). *See* John C. Gray, Jr. & David Rudovsky, *The Court Acknowledges the Illegitimate:* Levy v. Louisiana *and* Glona v. American Guarantee & Liability Insurance Co., 118 U. PA. L. REV. 1, 15-18 (1969).

24 *See* Uniform Law Commission, Parentage Act Summary, http://www.uniformlaws.org/Act.aspx?title=Parentage%20Act (last visited Nov. 9, 2017).

25 UNIF. PARENTAGE ACT § 4 (4) (1973).

who was neither the child's biological father nor married to the mother. In *In re Nicholas H.*,[26] Thomas, who at all times conceded that he was not the child's biological father, moved in with the child's mother before she gave birth to Nicholas, giving her emotional and financial support through the pregnancy and living with her and Nicholas as a nuclear family for the first four years of Nicholas' life. He later claimed to be Nicholas' father. The California Court of Appeals rejected his claim, finding that the presumption required "natural" to be defined as biological.[27] The California Supreme Court, however, focused not on biology, but on conduct. It found that Thomas had been the child's father in every social and cultural sense and had demonstrated a commitment to continue to raise the child.[28] Thomas's success created an opening for a functional definition of parenthood.

The concept of parenthood based on a relationship to a child was brought to prominence by the work of Joseph Goldstein, Anna Freud, and Albert J. Solnit in their 1973 book entitled, *Beyond the Best Interest of the Child.*[29] They argued for recognition of parental rights for an individual who was the psychological parent of a child. They defined a psychological parent as the "one 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."[30] A psychological parent could be "a biological . . . , adoptive, foster, or common-law . . . parent, or any other person" and "[t]here is no presumption in favor of any of these after the initial assignment at birth."[31] Their work influenced decisions concerning custody and the recognition of parental rights.

In the case of unmarried lesbian partners, decisions granting visitation rights, as opposed to custodial rights, were first recognized on the basis of a psychological relationship to the children that they helped raise. In *In re Custody of S. H.-K.*,[32] a Wisconsin court allowed a lesbian partner to bring an action for visitation

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26 46 P.3d at 932 (Cal. 2002)

27 *Id.* at 937.

28 *Id*. at 935.

29 GOLDSTEIN ET AL., *supra* note 13.

30 *Id*. at 98.

31 *Id.*

32 533 N.W.2d 419 (Wis. 1995).

when the biological parent had "interfered substantially with the [non-biological caregivers] relationship with the child, and the non-biological caregiver had "sought court ordered visitation within a reasonable time after the parent's interference."[33] The court held that to qualify as a person who had standing to petition the court, one had to establish that he or she was entitled to a continued relationship with the child. To do this the petitioner had to prove that: 1) the biological or adoptive parent consented to, and fostered, the petitioner's formation and establishment of a parent-like relationship with the child; 2) the petitioner and the child lived together in the same household; 3) the petitioner assumed obligations of parenthood by taking significant responsibility for the child's care, education, and development including contributions 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 establish with the child a bonded, dependent relationship, parental in nature.[34] While this was a step in the right direction for the recognition of parental rights for non-biological lesbian mothers, it granted them only visitation rights such as those afforded to grandparents and stepparents and fell short of a recognition of their rights as parents. In 2000, however, a New Jersey court, relying on the same factors, acknowledged that a person proving the factors in the case of "a conflict over custody and visitation between the legal parent and a psychological parent, the legal paradigm is that of two legal parents and the standard to be applied is the best interests of the child."[35]

The concept of parenthood by intent was made necessary by advances in ART. In *Johnson v. Calvert*[36] a married couple arranged for a surrogate to carry a child conceived through in vitro fertilization using the husband's sperm and the wife's eggs. The surrogate mother later claimed to be the legal mother of the child. In settling the dispute, the court relied on parentage by intent, granting parental recognition to the biological mother.[37] Later the Uniform Status of Children of Assisted Conception

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33 *Id.* at 421.

34 *Id*.

35 V.C. v M. B. J., 748 A.2d 539, 551-52 (N.J. 2000) (per curiam).

36 851 P.2d 776 (1993).

37 *Id*. at 782.

Act as part of the Uniform Parentage Act would focus clearly on intent as a means of establishing parentage.[38]

The cases and theories described above form just a backdrop for continuing discussion of the struggles of non-biological gay and lesbian caregivers who seek recognition of rights based on parentage.[39] The next section will focus more specifically on the current methods being utilized to accomplish this goal.

III. Theories and Methods Relied on in Overcoming the Barrier to Parental Recognition of Non-Biological Caregivers

A. *Legislation*

Some states recognize de facto parents by statute and give that parent rights similar to those of the biological or legal parent.[40] This is true in the District of Columbia,[41] Hawaii,[42] Indiana,[43] Minnesota,[44] Montana,[45] Oregon,[46] and Texas.[47]

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38 *See* Uniform Law Commission, *supra* note 24.

39 *See generally* Douglas NeJaime, *Marriage Equality and the New Parenthood*, 129 HARV. L. REV. 1185 (2016).

40 *See* KY. REV. STAT. § 403.270(1)(a) (2004).

41 D.C. CODE § 16-831.01- 13 (2009).

42 HAW. REV. STAT. § 571-46(a)(2) (2013) (providing that custody may be provided to a nonlegal parent "whenever the award serves the best interest of the child" and that "[a]ny person who has had de facto custody of the child in a stable and wholesome home and is a fit and proper person shall be entitled prima facie to an award of custody").

43 IND. CODE §§ 31-17-2-8.5(d), 31-14-13-2.5 (d) (1999) (providing that if the court finds that there is a de facto custodian who has provided both primary caregiving and financial support for the child, "[t]he court shall award custody of the child to the child's de facto custodian if the court determines that it is in the best interests of the child").

44 MINN. STAT. § 257C.04 (2002) (providing that a de facto custodian is entitled to seek custody, and that, in assessing a custody request by a de facto custodian, "[t]he court must not give preference to a party over the de facto custodian or interested third party solely because the party is a parent of the child").

45 MONT. CODE ANN. § 40-4-228 (West 2009).

46 OR. REV. STAT. § 109.119 (1985) (providing that a court may grant custody or visitation to a nonlegal parent who "has established emotional ties creating a child-parent relationship or an ongoing personal relationship" with the child).

However, at least with respect to one state law, the definition of de facto parent is extremely narrow and puts the petitioner in direct competition with a parent because the de facto parent must have "*been the primary caregiver for, and financial supporter of, a child who has resided with the child*"[48] for a specified period of time (depending on the child's age). This requirement, reflecting the parenthood as exclusive status doctrine, forecloses many joint custodians from obtaining parental rights.

The 2017 UPA adopts the concept of de facto parent but places limits on its application to address the concerns that expanding parental rights to nonbiological caregivers would result in undesirable interference with parental rights. The Act provides that the relationship established between the de facto parent and the child must have been with the consent of the parent. Other requirements include a minimum amount of time during which the child resided with the de facto parent with the de facto parent holding out the child as his or her own.[49]

B. *The Equitable Remedies*

Because they generally do not enjoy the designation of legal parent, which generally flows either from marriage, biology, or adoption, caregivers have often had to seek equitable relief. Numerous characterizations, including equitable parent, de facto parent, and psychological parent, have been used.[50]

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47 TEX. FAM. CODE ANN. § 102.003(9) (West 2011) (providing that a court can award custody or visitation to "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").

48 KY. REV. STAT. § 403.270(1)(a).

49 The UPA provisions also provide protections for those who without their consent could be burdened with the obligations of a parent such as child support by providing that only an alleged de facto parent can file a petition for recognition as such. Finally, probate concerns are addressed by requiring that an action to establish legal parentage as a de facto parent must be begun before the child reaches the age of 18.

50 For a listing of states that have recognized that a non-biological and non-adoptive parent may seek visitation or custody even if they are not the legal parents, see National Center for Lesbian Rights, Legal Recognition of LGBT Families, http://www.nclrights.org/wp-content/uploads/2013/07/Legal_Recognition_of_LGBT_Families.pdf (last updated 2016).

In *In re Parentage of L.B.,*[51] the court held that because the UPA and Washington's current statutes did not address the situation where a lesbian couple decided to conceive a child through artificial insemination and raise the child jointly, the availability of potential redress for the non-biological mother's request for co-parenting did not preclude other remedies. The court held that:

> reason and common sense support recognizing the existence of *de facto* parents and according them the rights and responsibilities which attach to parents in this state. We adapt our common law today to fill the interstices that our current legislative enactment fails to cover in a manner consistent with our laws and stated legislative policy.[52]

The court laid out the following requirements for recognition as a de facto parent: (1) the natural or legal parent consented to and fostered the parent-like relationship; (2) the petitioner and the child lived together in the same household; (3) the petitioner assumed obligations of parenthood 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.[53] The court also held that a de facto parent stands in legal parity with an otherwise legal parent and courts are authorized to consider an award of parental rights and responsibilities based on its determination of the best interest of the child.[54]

The psychological parent doctrine focuses on the child and her psychological bond with an adult, and the effects on the child if that bond is suddenly severed. This doctrine puts the focus on the best interests of the child, not on the legal relationships between the respective parent figure or figures and the child. In *Evans v. McTaggert*[55] the court defined a psychological parent as:

> one who on a day-to-day basis, through interaction, companionship, interplay, and mutuality, fulfills the child's psychological needs for an adult. This adult becomes an essential focus of the child's life, for he is not only the source of the fulfillment of the child's physical needs, but also the source of the child's emotional and psychological needs. The wanted child is the one who is loved, valued, appreciated, and viewed

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51 122 P.3d 161 (Wash. Ct. App. 2005).

52 *Id*. at 707 (emphasis in original).

53 *Id*. at 708.

54 *Id*. at 710.

55 88 P.3d 1078 (Alaska 2004).

> as an essential person by the adult who cares for him. This relationship may exist between a child and an adult; it depends not upon the category into which the adult falls – biological, adoptive, foster, or common law – but upon the quality and mutuality of the interaction.[56]

In *KAF v. DLM and FD*,[57] KAF and FD were domestic partners who together decided to have a child. KAF gave birth to Arthur. The couple eventually ended their relationship, but the parties still consented to FD adopting Arthur. KAF then began a relationship with DM, the parties moved in together, became domestic partners, and lived as a family. KAF and DM ended their relationship, but DM continued to see Arthur on a weekly basis for overnight visits. KAF, over time, terminated the overnights and withheld Arthur from DM. DM filed for visitation under the psychological parent doctrine. KAF and FD argued in the trial court that since FD did not consent to DM creating a parent-like relationship with Arthur, she could not prevail. The trial court agreed and dismissed the case. On appeal, the appellate court reversed, finding that both legal parents did not have to give consent; it was enough for one legal parent to give consent to fostering the parent-child relationship between Arthur and DM. The court cited a previous holding in in *Sorrentino v. Family & Children's Society of Elizabeth*[58] for the proposition that prior holdings did not establish that "the right of custody over child by a non-forsaking parent is necessarily inviolable as against a showing of the probability of serious harm to the child if such custody was awarded."[59] The *KAF* court continued: "Plainly understood, this statement by the Court emphasizes that the transcendent importance of preventing harm to a child weighs more heavily in the balance then the fundamental custody rights of a non-forsaking parent."[60]

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56 *Id.* at 1082, *quoting* Carter v. Brodrick, 644 P.2d 850, 853 n.2 (Alaska 1982). The doctrine was also described in *VC v. MJB*, 748 A.2d 539, 550 (N.J. 2000) ("At the heart of the psychological parent cases is recognition that children have a strong interest in maintaining the ties that connect them to adults who love and provide for them. That interest, for constitutional as well as social purposes, lies in the emotional bonds that develop between family members as a result of shared daily life").

57 96 A.3d 975 (N.J. Super. Ct. App. Div. 2014).

58 72 N.J. 127 (1978).

59 *Id.* at 132.

60 96 A.3d at 982.

Similarly, some courts have identified individuals who have been acting "in loco parentis" or in other words the person who has been treated as a parent by the child and has formed a meaningful parental relationship with the child for a substantial period of time. Again, these provisions reflect a more child focused approach as they relate to an individual who is seen as a parent from the child's point of view. Unfortunately focusing on psychological bonds means it will be harder to show the necessary connection for very young children, especially infants. This approach is also envisioned in the ALI Principles.[61] Those who advocate for this approach focus on the child's right to continue a meaningful relationship. Capturing the sentiment, Marty Guggenheim, a well-known child advocate has stated:

> There is hardly anything unfair in saying to a parent who voluntarily invited someone else to share parenting and to develop a significant parent-child relationship with his or her children that the parent must allow the logical consequences of that choice to play themselves out. It is wrong both for parents and children to encourage the disruption of significant bonds for the sole reason that the biological parent prefers such a disruption.[62]

In *Latham v. Schwerdtfeger*,[63] Teri Latham and Susan Schwerdtfeger were in a relationship from 1985 until 2006. After discussing having a child, Schwerdtfeger became pregnant by in vitro fertilization. In January 2001, Schwerdtfeger gave birth to P.S. Latham, Schwerdtfeger, and the minor child lived together from 2001 until 2006, when the parties separated and Latham moved out of the home. Latham continued to have visitation with P.S. until 2009. Visitation was thereafter reduced for reasons in dispute. Latham sought rights relying on the doctrine of in loco parentis. The court held that a person standing in loco parentis to a child is one who has put himself or herself in the situation of a lawful parent by assuming the obligations incident to the parental relationship, without going through the formalities necessary for a legal adoption, and the rights, duties, and liabilities of such person are the same as those of the lawful

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61 PRINCIPLES OF THE LAW OF FAMILY DISSOLUTION: ANALYSIS AND RECOMMENDATIONS § 2.03 (2002).

62 MARTIN GUGGENHEIM, WHAT'S WRONG WITH CHILDREN'S RIGHTS 22 (2005).

63 802 N.W.2d 66 (Neb. 2011).

parent.[64] Factors the court suggested are considerations when deciding if one qualifies include: decisions to conceive, living with the child for a length of time, parental duties undertaken, involvement after separation and financial support. The court further relied on what might be considered an estoppel theory stating that "a biological parent's rights do not extend to erasing a relationship between her partner and her child which she voluntarily created and actively fostered simply because after the parties separation she regretted having done so."[65]

Similarly in *Ramey v. Sutton*,[66] the court acknowledged the rights of a non-biological parent in a same-sex relationship who has acted in loco parentis where the couple, prior to *Obergefell*, (1) were unable to marry legally; (2) engaged in intentional family planning to have a child and to co-parent; and (3) the biological parent acquiesced and encouraged the same sex partner's parental role following the birth of the child.[67] The court had previously held that when persons assume the status and obligations of a parent without formal adoption they stand in loco parentis to the child and, as such, may be awarded custody even against the biological parent.[68]

In *Bethany v. Jones*,[69] the court held that the biological mother's argument that there was nothing in Arkansas law that allowed her former same-sex partner, Jones, to seek visitation with the child born to her during their relationship was irrelevant because in loco parentis is concerned with the relationship between the individual and the child. The court focused on the facts that the non-biological caregiver was a stay at home mom for over three year with the child, the child called her "mommy," the child thought of Jones' parents as grandparents and the party's intentions were always to co-parent, until the biological mother unilaterally determined she no longer wanted Jones to parent. Having determined that Jones stood in loco parentis, the court then had to determine if it was in the child's best interest to recognize Jones as a parent. Relying on the finding that a parent-

64 *Id*. at 72 (quoting Weinand v. Weinand, 477 N.W.2d 1, 76 (2000)).

65 *Id*. at 76 (quoting T.B. v. L.R.M., 786 A.2d 913, 919 (2001)).

66 362 P.3d 217 (Okla. 2015).

67 *Id*. at 221.

68 *Id*.

69 378 S.W 3d 731 (Ark. 2011).

child relationship had been deeply established, the court said that it was clearly in the child's best interest to recognize Jones as a parent. The court also rejected the argument that recognizing the in loco parentis doctrine would result in an unlimited number of individuals requesting parental rights by noting that the doctrine required that the biological parent intended for a parent-child relationship to be formed. States that have held that individuals who acted as parents may seek not only visitation, but also custody include Alaska,[70] Kentucky,[71] Montana,[72] North Carolina,[73] Ohio,[74] Pennsylvania,[75] South Carolina,[76] and West Virginia.[77]

Many courts however, still refuse to recognize the rights of non-biological caregivers using equitable principles. For instance, in *Doty-Perez v. Doty-Perez*,[78] an Arizona court refused to provide a remedy in a case where lesbian partners agreed to adopt four children but due to existing law only one of the partners was legally eligible to do so. After their separation, the court refused to recognize the rights of the non-adopting partner citing a previous Arizona case[79] that rejected the granting of parental rights on the basis of the de facto parent doctrine. In Michigan the Court of Appeals ruled against a lesbian non-biological mother who sought to be recognized as an equitable parent. The court in

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70 Kinnard v. Kinnard, 43 P.3d 150 (Alaska 2002).

71 *See, e.g.,* Mullins v. Picklesimer, 317 S.W.3d 569 (Ky. 2010) (holding that a former same-sex partner may seek custody when the legal parent waived her right to exclusive custody).

72 *See, e.g.,* Kulstad v. Maniaci, 220 P.3d 595 (Mont. 2009) (concluding that an adoptive mother's former same-sex partner was entitled to seek custody of the two children they jointly raised).

73 *See, e.g.,* Mason v. Dwinnell, 660 S.E.2d 58 (N.C. Ct. App. 2008) (affirming the trial court order granting joint legal and physical custody to former same-sex partner).

74 *See, e.g., In re* Bonfield, 780 N.E.2d 241 (Ohio 2002) (holding that the trial court had jurisdiction to grant shared custody to same-sex coparent even though she was not a legal parent).

75 *See, e.g.,* Jones v. Jones, 884 A.2d 915 (Pa. Super. Ct. 2005) (affirming the trial court order granting primary physical custody of the children to their equitable parent).

76 Marquez v. Caudill, 656 S.E.2d 737 (S.C. 2008).

77 *In re* Clifford K., 619 S.E.2d 138 (W. Va. 2005).

78 388 P.3d 9 (Ariz. Ct. App. 2016).

79 Egan v. Fridlund-Horne, 211 P.3d 1213 (Ariz. Ct. App. 2009).

Mabry v Mabry[80] did so after concluding that the doctrine was limited to married couples.[81] This would affect same-sex couples who were unconstitutionally prohibited from marrying, separated before the Supreme Court's decision in *Obergefell*, and have a custody dispute.[82]

It is also important to recognize that even if an individual is recognized as an equitable parent, the rights afforded are sometimes limited to custody and visitation and not necessarily coexistent with those of the other legal parent. For example, a child may not be entitled to support from a de facto parent or for Social Security benefits through an equitable but not legal parent.[83]

Fortunately. many courts are holding that functional parents stand in parity with the legal parent. In addition to Washington[84] and Nebraska,[85] courts in Arkansas,[86] Maine,[87] New Jersey,[88]

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80 882 N.W.2d 239 (Mich. Ct. App. 2016).

81 Previous decisions by Michigan courts have been consistent in limiting the use of the doctrine to couples who were married. *See* Stankevich v. Milliron, 882 N.W.2d 194 (Mich. Ct. App 2015)(holding that if the petitioner could establish that a marriage had taken place in Canada she could seek equitable parenthood); Lake v Putnam, 2016 Mich App. LEXIS 1297 (a third person i.e., "a person other than the parent," will not have standing to initiate a child custody proceeding unless they fall within the specific circumstances in the Child Custody Act, MCL 722.26b or 722.26c(1)(b), a third party may not gain standing by asserting the equitable-parent doctrine if the third party and the natural parents were not married at the time the child was born or conceived"); Kolailat v. McKennett, 2015 Mich. App. LEXIS 2415 (2015) (unpublished opinion)(relying on the Supreme Court's decision in *Van v. Zahorik*, 597 N.W. 2d 15, 20 (1999) "[b]y its terms, [the equitable parent] doctrine applies, upon divorce, with respect to a child born or conceived during the marriage." Thus, where a child is not conceived or born within a marital relationship, the equitable parent doctrine is not applicable.).

82 *See generally* Frank Aiello, *Would've, Could've, Should've: Custodial Standing of Non-Biological Same-Sex Parents for Children Born Before Marriage Equality*, 24 AM. U.J. GENDER SOC. POL'Y & L. 469 (2016).

83 Courtney G Joslin, *Protecting Children: Marriage, Gender, and Assisted Reproductive Technology*, 83 S. CAL. L. REV.1177 (2010).

84 *In re* L.B. 122 P.3d 161; *see also supra* notes 51-54 and accompanying text.

85 *Latham*, 802 N.W.2d 66; *see also supra* notes 63-65 and accompanying text.

86 Bethany v. Jones, 378 S.W.3d 731, 738 (Ark. 2011) ("Having determined that Jones stood in loco parentis, the question then becomes whether it is in E.B.'s best interest for Jones to have visitation rights, as that is the polestar consideration.").

and Pennsylvania[89] have also so held. Delaware extends these rights by statute.[90] Other states have accomplished the same goal by vesting parents (married or otherwise) who form a family using ART, with rights as a legal parent.[91]

C. *Parenthood by Estoppel*

Courts have applied the doctrine of equitable estoppel to prevent a parent from denying the parental status of a co-parent. The ALI's Principles of the Law of Family Dissolution use estoppel to afford parental status to co-parents. Section 2.03(b)(iii) defines a "parent by estoppel" as one who

> lived with the child since the child's birth, holding out and accepting full and permanent responsibilities as parent, as part of a prior co-parenting agreement with the child's legal parent (or, if there are two legal parents, both parents) to raise a child together each with full parental rights and responsibilities, when the court finds that recognition of the individual as a parent is in the child's best interests.[92]

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87 C.E.W. v. D.E.W., 845 A.2d 1146, 1151 (Me. 2004) ("[W]hen an individual's status as a de facto parent . . . has been so determined . . . the court may consider an award of parental rights and responsibilities to that individual as a parent . . . based upon a determination of the child's best interests.").

88 Although the court stated in *V.C. v. M.J.B.* that the default rule should award primary custody to the legal parent over the equitable parent, the decision nonetheless suggested that an award of custody to the equitable parent may be appropriate in some cases. 748 A.2d 539, 555 (N.J. 2000). ("Once a third party has been determined to be a psychological parent to a child, under the previously described standards, he or she stands in parity with the legal parent.").

89 Peters v. Costello, 891 A.2d 705, 710 (Pa. 2005) ("The rights and liabilities arising out of an in loco parentis relations are, as the words imply, exactly the same as between parent and child.").

90 13 DEL. CODE ANN. tit. 13, § 8-201(c) (2013) (providing that a person is a "de facto parent" when that person: "(1) Has had the support and consent of the child's parent or parents who fostered the formation and establishment of a parent-like relationship between the child and the de facto parent; (2) Has exercised parental responsibility for the child. . .; and (3) 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").

91 *See* Courtney G. Joslin, *Symposium on Same-sex Marriage, Marital Dissolution, and Related Issues, Leaving No(Nonmarital) Children Behind*, 48 FAM. L.Q. 495, 505 (2014).

92 PRINCIPLES OF THE LAW OF FAMILY DISSOLUTION: ANALYSIS AND RECOMMENDATIONS § 2.03 (2002).

In a recent New York case, the court refused the biological mother's request to deny her previous partner's request for parental rights with respect to the child they intended to raise together when the biological mother sought child support from the petitioner on the grounds that she was a "parent."[93] However, the parent by estoppel argument has been rejected by other courts as inconsistent with state law.[94]

D. *Agreements Made with the Biological Parent*

One of the most promising methods for recognizing the parental rights of non-biological parents is through agreement with the biological parent. This option avoids the constitutional objection rooted in *Troxel v. Granville*[95] often relied upon by biological parents. Many courts have found that a biological parent's acquiescence in shared parenting later limits their *Troxel* rights. Representative cases include *Frazier v. Goudschaal*.[96] The factual setting is a common one. Two women who were in a relationship for a very long time decided to have a child, and used artificial insemination to conceive two children throughout their relationship. The relationship ended and the rights of the non-biological parent slowly dwindled. What made the situation unusual was that a parenting agreement between the women had been entered into before the birth of each of the children. The non-biological mother, Frazier, brought the action to seek enforcement of the co-parenting agreement and the biological mom, Goudschaal, argued that the court did not have jurisdiction to hear her claim since it was not a divorce claim between a man and a woman, and did not involve grandparents or stepparents. The court first determined that the under the Kansas version of the UPA, a woman can have standing to establish the existence of a mother-and-child relationship.[97] The court then held that

93 Estrellita A. v Jennifer L.D., 49 N.E.3d 1210 (N.Y. 2016).

94 *See, e.g.,* McGaw v. McGaw, 468 S.W.3d 435 (Mo. Ct. App. 2015).

95 530 U.S. 57 (2000) (plurality opinion). In *Troxell,* the plurality held that the decision of a fit parent regarding access to her children must be given special weight and not overruled without the presence of "special factors." *See* Nancy D. Polikoff, *The Impact of* Troxel v. Granville *on Lesbian and Gay Parents*, 32 RUTGERS L.J. 825, 835-38 (2001).

96 295 P.3d 542, 559 (Kan. 2013).

97 *See infra* notes 136-137 and accompanying text.

since Goudschaal had signed the co-parenting agreement she had exercised her parental constitutionally protected rights, which in this case she had chosen to share. The court also gave great weight to the fact that the children would then be raised with two parents and not just a single mother. The holding essentially put Frazier on equal footing with Goudschaal with respect to parental rights.

In *In the matter of Brooke S.B. v Elizabeth A.C.C.,*[98] an unmarried same-sex couple agreed to have a child together and entered into a "pre-conception agreement" to conceive and raise the child together. The court ruled that where the non-biological parent can show by clear and convincing evidence that the parties entered into such a pre-conception agreement, the non-biological parent has standing to seek custody and parenting time.[99]

E. *Third Party Custody Statues*

Virtually all states have third party custody statutes that recognize circumstances in which a person not necessarily acting in a parental role may nevertheless obtain custody of a child. The significant limitation of this approach is that some states require a finding that the biological parent is unfit. There are cases, however, where the courts have allowed a non-biological caregiver to use this approach. For instance, in *McGaw v. McGaw,*[100] the parties, a lesbian couple with twins born using artificial insemination later separated and entered into a joint parenting agreement through mediation. When the biological mother cut off visitation rights, the other parent sued.

The court held that the non-biological mother failed to state a claim for breach of contract, and was unable to obtain custody under either the in loco parentis doctrine or the doctrine of equitable parentage because Missouri does not recognize either. The

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98 61 N.E.3d 488 (N.Y. App. Div. 2016).

99 The case is also notable because it overruled the long-standing position in New York State, articulated in *Matter of Alison D. v Virginia M.*, 77 N.Y.2d 651 (1991), 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. In *Matter of Brooke S.B. v Elizabeth A.C.C.*, 61 N.E.3d 488 (N.Y. 2016), the court held that the pre-conception agreement to conceive entered into by the parties conferred standing as a parent for the non-biological nonadoptive, nonmarital partner.

100 468 S.W.3d 435 (Mo. Ct. App. 2015).

court denied her equitable relief on the grounds that she had an adequate statutory remedy using the third party custody statute.[101] It should be noted, however, that this remedy is inadequate because the third party custody statutes do not give one recognition as a parent.[102]

F. *The Uniform Parentage Act Presumptions*

1. *The "holding out" provision*

As mentioned earlier, the Uniform Parentage Act adopted in some form by many states provides for numerous circumstances under which a person is presumed to be a parent of a child. For instance, a man is a presumptive father of a child if he receives the child into the home and openly holds the child out as his natural child. California has held that this presumption applies to maternity as well. In *Elisa B*. v. *Superior Court*,[103] the court held that although the children could not have three parents (this was subsequently changed in California by legislation[104]), the children could have two mothers, one because of biology and the other because of the aforementioned presumption.

Similarly, in *Chatterjee v. King,*[105] the New Mexico court also found that this provision based on the purpose of the UPA and public policy that encourages the support of two parents regardless of their gender. The court further found that limiting the provision to men would be discriminatory. California has also extended the "holding out" provision to find that a non-biological mother was a parent.[106]

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101 *Id.* at 443.

102 *See* Ruthann Robson, *Solomon's Dilemma: Exploring Parental Rights: Third Parties and the Third Sex: Child Custody and Lesbian Legal Theory*, 26 CONN. L. REV. 1377 (1994).

103 117 P.3d 660 (Cal. 2005). *See* Stefan H. Black*, A Step Forward: Lesbian Parentage After* Elisa B. v. Superior Court, 17 GEO. MASON U. CIV. RTS. L.J. 237 (2006).

104 CAL. FAM. CODE § 7612 (c) (West 2016).

105 280 P.3d 283 (N.M. 2012).

106 S.Y. v. S.B., 201 Cal. App. 4th 1023, 134 Cal. Rptr. 3d 1 (2011).

2. *The marital presumption*

One of the most significant outcomes of the *Obergefell* decision was the extension of the UPA's marital presumption to same-sex couples. The 2017 UPA addresses some of these issues by amending provisions so that they apply equally to same-sex couples. In essence, the language is now gender-neutral, allowing for a broader interpretation of *Obergefell*. The language of the 2017 Act which is intended to "remove . . . unnecessary distinctions based on gender" uses the term "parent" as opposed to "mother" or "father" and replaces "maternity" and "paternity" with a focus on "parentage."[107] It considers birth as only one, as opposed to the only, indicia of parentage, and focuses on intent as opposed solely to genetics.

One important provision of the original UPA was the authorization of a procedure to allow parentage to be established by an acknowledgment filed with an administrative agency. The revised UPA includes a provision for some nonbiological parents to avail themselves of this procedure. It is anticipated that this will be of benefit to unmarried same-sex couples who will be able to establish parentage for the nonbiological partner.[108] The provision that incorporates parentage by intent when using assisted reproductive technology has also been amended so that it now reads: "an individual who consents to assisted reproduction by a woman with the intent to be a parent of a child conceived by assisted reproduction is a parent of the child."[109] At least six states have already made changes to their laws to protect the rights of same-sex couples with respect to parentage issues.[110]

The decision in *Obergefell* also provided the basis for an Arizona court to extend the rights afforded opposite-sex married couples to same-sex married couples with respect to parentage.

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107 National Conference of Commissioners on Uniform State Laws, Unif. Parentage Act (2016), http://www.uniformlaws.org/shared/docs/parentage/2016AM_AmendedParentage_Draft.pdf

108 For an argument supporting this process, see Julia Saladino, *Is a Second Mommy a Good Enough Second Parent? Why Voluntary Acknowledgments of Paternity Should Be Available to Lesbian Co-Parents,* 7 MOD. AM. (2011).

109 Uniform Law Commission, Parentage Act 2017, Annual Meeting Issues Memo, http://www.uniformlaws.org/shared/docs/parentage/2017AM_Parentage_IssuesMemo.pdf.

110 *Id.* (citing California, Illinois, Maine, Nevada, New Hampshire, and Washington).

Suzan McLaughlin and Kimberly McLaughlin were a married lesbian couple who had a child using artificial insemination with an anonymous donor in 2011. The parties separated in 2013 and Kimberly stopped allowing Suzan to see their child. Suzan filed the original action to be recognized as a parent in 2013. In April 2016, the trial court ruled that Suzan is a legal parent under Arizona law. The Arizona Court of Appeals affirmed the trial court's opinion.[111] In 2017 the Arizona Supreme Court ruled that Suzan is a legal parent, explaining that it would be inconsistent with *Obergefell* to conclude that same-sex couples can legally marry but states can then deny them the same benefits of marriage afforded opposite-sex couples.[112]

3. *Establishing maternity*

In *Frazier v. Goudschaal*,[113] the Kansas Supreme Court held that under the Kansas Parentage Act, a woman "can make a colorable claim to being a presumptive mother of a child without claiming to be the biological or adoptive mother"[114] and therefore can claim standing to establish the existence of a mother-and-child relationship because the Act states that "any interested party may bring an action to determine the existence or nonexistence of a mother and child relationship."[115] The court found that she was an interested party because of her interactions and co-parenting agreement and therefore had standing to bring her case. It further held that the Kansas Parentage Act is gender neutral, so two parents can be of the same sex and a child can have two mothers.

In *In re Parental Responsibilities of A.R.L.*,[116] the women, Limberis and Havens began living together in 2000, and were in a relationship for several years before deciding to have a child. Havens attempted artificial insemination once, but was unsuccessful. A friend, Marc Bolt, agreed to inseminate her through intercourse. The couple cared for the child together, and eventually the relationship ended and Limberis brought this action to

111 McLaughlin v. Jones, 382 P.3d 118 (Ariz. App. 2016)
112 McLaughlin v. Jones, 401 P.3d 492 (Ariz. 2017).
113 295 P.3d 542 (Kan. 2013).
114 *Id.* at 553.
115 *Id.*
116 318 P.3d 581 (Colo. App.2013).

establish a parent-child relationship under the UPA. The court first held that under the Colorado Uniform Parentage Act a child may have two mothers – a biological mother and a presumptive mother. Because the Act is not gender specific, Havens then argued that because Bolt was the father, the child would then have three legal parents which was not permitted under Colorado law. The court held based on the facts that Bolt was at most, an alleged father, no other statutory presumptions applied to make him a legal father, and even if he were a presumed father, that presumption is rebuttable.[117] The fact that the child was conceived during intercourse was irrelevant because the UPA presumptions do not address conception.

G. *Second Parent Adoption*

A second-parent adoption allows a partner in an unmarried relationship, whether heterosexual or same sex, to adopt the other partner's biological or legal child. This is the most secure method of obtaining parental rights for the non-biological caregiver because under United States law, an adoption of a child conclusively establishes parenthood. In addition an adoption decree entered in one state must be recognized by other states under the Full Faith and Credit Clause of the U.S. Constitution.[118] Most states' statutes related to adoption are silent on whether the same-sex unmarried partner of a child may proceed with a second parent adoption. But many states have a state statute or appellate court decision allowing same-sex couples to get a second parent adoption or co-parent adoption. These include: California,[119] Colorado,[120] Connecticut,[121] District of Columbia,[122] Idaho,[123] Illinois,[124] Indiana,[125] Maine,[126] Massachu-

117 *Id.* at 585.

118 V.L. v. E. L., 136 S. Ct. 1017 (2016)

119 Sharon S. v. Superior Ct., 73 P.3d 554 (Cal. 2003).

120 COLO. REV. STAT. ANN. §§ 19-5-203(1), 19-5-208(5), 19-5-210(1.5), 19-5-211(1.5) (2016).

121 CONN. GEN. STAT. ANN. § 45a-724(a)(3) (2016) (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").

122 M.M.D. v. B.H.M, 662 A.2d 837 (D.C. 1995).

123 *In re* Adoption of Doe, No. 41463, 2014 WL 527144 (Idaho Feb. 10, 2014).

setts,[127] New Jersey,[128] New York,[129] Oklahoma,[130] Pennsylvania,[131] and Vermont.[132]

H. *Birth Certificate - Birth Records for Children of Same-Sex Couples Pre-Marriage*

A further controversy has surfaced in the United States with respect to attempts to gain recognition as a child's parents by placing the non-biological parent's name on the birth certificate. For instance in *Smith v. Pavan*,[133] three married female couples filed suit against the director of the Arkansas Department of Health (ADH), seeking a declaration that the refusal to issue birth certificates with the names of both spouses on the birth certificates of their respective minor children violated their equal protection and due process rights. The circuit court ordered the state defendant to issue three amended birth certificates naming both spouses. The Arkansas Supreme Court reversed, holding that while *Obergefell* found that the right to marry was a fundamental right that must be extended to same-sex couples, that right does not necessarily extend to the issuing of birth certificates. The U.S. Supreme Court reversed that ruling in a per curium opinion with three justices dissenting.[134] It should be noted that the ruling addresses only the issue of birth certificates and does not determine legal parentage rights.

The fact that having one's name placed on a birth certificate does not create a finding of legal parentage was emphasized in *In*

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124 *In re* Petition of K.M. & D.M., 653 N.E.2d 888 (Ill. App. Ct. 1995).

125 *In re* Adoption of K.S.P., 804 N.E.2d 1253 (Ind. Ct. App. 2004); *In re* Adoption of M.M.G.C., 785 N.E.2d 267 (Ind. Ct. App. 2003). *See also In re* Infant Girl W. 785 N.E.2d 267 (Ind. Ct. App. 2006) (same-sex couple may jointly adopt).

126 Adoption of M.A., 930 A.2d 1088 (Me. 2007).

127 *In re* Adoption of Tammy, 619 N.E.2d 315 (Mass. 1993).

128 *In re* the Adoption of Two Children by H.N.R., 666 A.2d 535 (N.J. Super. Ct. App. Div. 1995).

129 *In re* Jacob, *In re* Dana, 660 N.E.2d 397 (N.Y. 1995).

130 Eldredge v. Taylor, 339 P.3d 888 (Okla. 2014).

131 *In re* Adoption of R.B.F. & R.C.F., 803 A.2d 1195 (Pa. 2002).

132 VT. STAT. ANN. tit. 15A, § 1-102(b) (2017); *In re* Adoption of B.L.V.B. & E.L.V.B., 628 A.2d 1271 (Vt. 1993).

133 505 S.W.3d 169 (Ark. 2016).

134 Pavan v. Smith, 137 S. Ct. 2075 (2017).

re T.J.S.,[135] where the husband and wife applied for a declaration of parentage and a pre-birth order directing that their names be listed on the birth certificate of the biological child of the husband and an anonymous ovum donor carried to term by a gestational carrier. After initially granting the application, the court, granted the Bureau of Vital Statistics and Registration's motion to vacate the portion of the pre-birth order directing the wife to be listed as the child's mother on birth certificate. The couple appealed and the appellate court held that held that the New Jersey Parentage Act provides for a declaration of maternity only to a biologically- or gestationally-related female and that the wife did not have a fundamental right under the state Constitution to create a legal parental relationship to the child at birth.[136] It further held in response to a claim that recognition of parental status for an infertile husband but not an infertile wife violates equal protection principles, "that nothing in our Constitution or law provides that an adult - male or female - with no biological or gestational connection to a child has a fundamental right to create parentage by the most expeditious or convenient method possible."[137]

The court held the legislature, in recognizing genetic link, birth, and adoption as acceptable means of establishing parenthood, had not preferred one spouse over the other because of gender. Where both spouses are infertile, the law treats them identically by requiring adoption as the singular means of attaining parenthood. Thus the complained of disparate treatment is not grounded in gendered constructions of parenthood but in actual reproductive and biological differences, necessitating in the case of an infertile wife, the introduction of a birth mother whom the law cloaks with superior protection. As support, the court cited the state's valid interest in making identification of the father easier when the child is born during the marriage for child support purposes.[138] Furthermore, the court noted that "a birth certificate simply records the fact of parentage as reported by others; it neither constitutes a legal finding of

135 16 A.3d 386 (N.J. Super. Ct. App. Div. 2011).

136 *Id*. at 397.

137 *Id.* at 398.

138 *Id.* at 398 (citing Fazilat v. Feldstein, 180 N.J. 74 (2004)).

parentage nor independently creates or terminates parental rights."[139]

Similarly, in *D.G. v K.S.*,[140] the biological father and his same-sex spouse filed a complaint, seeking legal and physical custody of the child, parenting time, and a declaration that the father's spouse, whose name was on the birth certificate, was the child's psychological and legal parent. The biological mother filed a counterclaim, seeking to establish a legal custodial relationship between the parties, with physical custody vested in her. The court held that the same-sex spouse of the biological father was the child's psychological parent, but could not be found to be the child's legal parent.[141] The court said it did not have the jurisdiction to create a new recognition of legal parentage other than that which already existed, genetic contribution, adoption, or gestational primacy, and the spouse did not contribute genetically to or act as a gestational carrier of the child, nor had he moved for adoption. The fact that the child bore the spouse's last name held no weight in the determination of legal parentage. The court did find that the biological father and his same-sex spouse and biological mother were entitled to joint legal and joint physical custody and prohibited the mother from relocating with the child to a different state.[142]

Fortunately, same-sex married couples in other jurisdictions have been more successful in having birth certificates accurately reflect both partners as parents on birth certificates. In *Carson v. Heigel*,[143] Jacqueline and Casey Carson who legally married in South Carolina sued in federal court when the state refused to list Casey as the non-biological mother of the couple's twins as a second parent. The judge found for the couple, recognizing that listing a birth mother's spouse as her child's second parent is one of the terms and conditions of civil marriage in South Carolina and that after the decision in *Obergefell* the state cannot deny benefits of marriage to same-sex couples. Similar

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139 16 A.3d at 390.

140 133 A.3d 703 (N.J. Super. Ct. Ch. Div. 2015).

141 *Id*. at 726.

142 *Id.* at 725.

143 No. 3:16-0045-MGL (U.S. Dist. Ct. S.C, Feb. 15, 2017), http://www.lambdalegal.org/sites/default/files/legal-docs/downloads/carson_nc_20170215_opinion.pdf.

rulings can be found in Florida,[144] Nebraska,[145] Iowa,[146] North Carolina,[147] and Wisconsin.[148]

IV. The Post–*Obergefell* Unintended Consequences

While the battle for marriage equality in the United States has been won, full equality for same-sex parents has not yet been fully realized. Not all same-sex couples will choose to marry and therefore efforts to protect all children's relationships with the caregivers they view as parents will continue. Some commentators warn that because marriage is now available to same-sex couples that judges and legislators will revert to policies that link parental status to marriage.[149] In many states an unmarried partner who plans conception of a child through assisted reproduction and acts as a parent may nevertheless still be denied status as a legal parent absent an adoption proceeding which some argue should not be necessary.[150]

A further example of tensions that still exist surround the ABA Family Law Section's Model Third-party Child Custody and Visitation. Act.[151] Some commentators have raised concerns that under the Act, equitable parents do not stand in parity with

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144 Brenner v. Scott, Case Nos. 4:14cv107-RH/CAS, 4:14cv138-RH/CAS, 2016 WL 356 1754 (N.D. Fla. Mar. 30, 2016).

145 Waters v. Ricketts, 159 F. Supp. 3d 992 (D. Neb. 2016).

146 Gartner v. Iowa Dep't of Pub. Health, 830 N.W.2d 335 (Iowa 2013).

147 Weiss v Brajer, No. 5:15-cv-656-BR (E.D. N.C 2016) (dismissed as a result of settlement); *See Same-sex Couple Persuades NC to Change Birth Certificate Policy*, NEWS & OBSERVER (Nov. 15, 2006), http://www.newsobserver.com/news/politics-government/article114960868.html.

148 Torres v. Seemeyer, 207 F. Supp. 3d 905 (W.D. Wis. 2016).

149 *See* Joanna L. Grossman, *The New Illegitimacy: Tying Parentage to Marital Status for Lesbian Coparents*, 20 AM. U. J. GENDER SOC. POL'Y & L. 671 (2102); Nancy D. Polikoff, *The New Illegitimacy: Winning Backwards in the Protection of Children of Lesbian Couples,* 20 AM. U. J. GENDER SOC. POL'Y & L. 721 (2012).

150 See*, e.g.,* 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, 215-16 (2009).

151 The ABA Family Law Section's Model Third Party Child Custody and Visitation Act (Model Third Party Act) is available as an appendix to the following article: *Jeff Atkinson, Shifts in the Law regarding the rights of Third Parties to Seek visitation and Custody of Children*, 47 FAM. L.Q. 1 (2013).

legal parents, making the Act less protective of functional parents' rights.[152]

V. Conclusion

The law with respect to parentage continues to evolve in the United States. Much progress has been made in the quest to protect the important relationships between children and those they view as their parents. However, the polarization of the country around issues surrounding families created by same-gender couples continue to threaten full recognition.

152 Joslin, *supra* note 83.