

Presumptions, Legal Fictions, and the Current State of the Law Following *Obergefell*

The fundamental **right to parent** under the Fourteenth Amendment is outlined in the United States Supreme Court's decision in *Troxel v. Granville*.¹ The plurality opinion in *Troxel* defined a fit parent as **someone who "adequately cares for his or her children."** While "parents and families have fundamental liberty interests in preserving" intimate family-like bonds, "so, too, do children have these interests" which must also inform the definition of "parent," a term so central to the life of a child.

The Evolution of the definition of Marriage:

"Marriage, so far as its validity in law is concerned, is a civil contract, to which the consent of the parties, capable in law of contracting, is essential. ..."
Minn. Stat. §517.01 (1941)

"Marriage, so far as its validity in law is concerned, is a civil contract between a man and a woman, to which the consent of the parties, capable in law of contracting, is essential ..."
Minn. Stat. §517.01 (1977)

Although our state's laws should apply equally to all people regardless of their classification in a protected class, the issue of equal rights for members of the LGBTQ community came into focus with the issue of the right of LGBTQ people to marry.

On August 1, 2013, Minnesota became the 12th State to recognize same-sex marriage:

"A civil marriage, so far as its validity in law is concerned, is a civil contract between two persons, to which the consent of the parties, capable in law of contracting, is essential..."
Minn. Stat. §517.01 (August 1, 2013)

I believe the legislature was aiming for equality with the enactment of this revised statute; it was enacted within the context of decades of caselaw and statutes that do not support these families. Many couples who create a child (through ART² or surrogacy) - at least one of the parties is without a biological tie to the child. And, within the context of our narrow statutory definition of 'Parent' (biology/adoption), this is a big problem. [This is not just an LGBTQ issue.]

Unmarried Parents

The Supreme Court has repeatedly struck down as unconstitutional state laws that burdened or disadvantaged children born to unmarried parents, or based on other the circumstances of their birth.³

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Interestingly, long before Minnesota codified the right of same-sex partners to marry, our state recognized the right of LGBTQ persons and same-sex couples to become parents and raise children and therefore form families.

Children:

The state's only organization solely dedicated to finding families for Minnesota's children, the Minnesota Adoption Resource Network (through the Department of Human Services) has allowed same-sex partners to adopt in identical fashion to singles and opposite-sex partners for many years.

<https://www.mnadopt.org/>

In 2015, in its ruling in *Obergefell*, the U.S. Supreme Court pointed toward results that value functional and intentional parenthood over biological and genetic connections.

The U.S. Supreme Court

In its ruling in *Obergefell* the U.S. Supreme Court declared the right to form families and rear children by same-sex couples to be a fundamental human right.⁴

Obergefell v Hodges, 135 S Ct 2584 (2015).

The Supreme Court has also concluded that the relationship of love and duty in a recognized family unit is an interest in liberty entitled to constitutional protection.⁵

Lehr v. Robertson, 463 U.S. 248, 258, 103 S.Ct. 2985, 77 L.Ed.2d 614 (1983).

In *Obergefell* the Court decided same-sex people have the right to marry. Unfortunately, in its ruling, the Court elevated marriage to a privileged classification in contrast to unconventional and nonmarital families. However, it also pronounced that “choices concerning contraception, family relationships, procreation, and childrearing’ are protected by the Constitution.”⁶

Parent and Child Relationship Defined:

The “parent and child relationship” means the legal relationship existing between a child and the child's **biological** or **adoptive** parents incident to which the law confers or imposes rights, privileges, duties, and obligations.⁷

Minn. Stat. §257.52

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This is Who We Are

Close to half of the U.S. population believes that nonmarital cohabitation is bad for society, and nearly three-quarters of American adults believe that single parenting is bad for society.⁸ But the reality is that a very large and ever-growing slice of the U.S. population lives in these very family forms. The number of nonmarital cohabiting couples has increased by more than 1500% since 1960.⁹ Today, over 40% of all children are born to unmarried women. The nonmarital families who are the targets of this moral disapproval are disproportionately likely to be nonwhite, lower income, and less educated.¹⁰ Individuals who marry and stay married are disproportionately likely to be white and more affluent.¹¹ The truth is reliance on formal family status has profound racial and class implications. According to a 2010 Pew Study, 50 years ago there was virtually no difference by socio-economic status in the proclivity to marry: 76% of college graduates and 72% of adults who did not attend college were married in 1960. By 2008, that small gap had widened to a chasm: 64% of college graduates were married, compared with just 48% of those with a high school diploma or less.¹² Using marriage as a prerequisite for critical legal remedies and protections has a disproportionately negative effect not only on LGBT people but also on lower-income people and people of color.

Rules of Construction¹³

When necessary to implement rights and responsibilities of spouses or parents in a same-sex marriage, “including those laws that establish parentage presumptions,” gender-specific terminology “must be construed in a neutral manner to refer to a person of either gender.”

Minn. Stat. §517.201, subd. 2

The equal protection guarantees prevent the government from making distinctions among people when applying the law unless the distinction serves a legitimate governmental interest.

R.B. v. C.S., 536 N.W.2d 634, 637 (Minn.App.1995).

Gestation initially bestows upon the Mother of a Child all Rights and Responsibilities.

“The biological mother of a child born to a mother who was not married to the child's father when the child was born and was not married to the child's father when the child was conceived has sole custody of the child until paternity has been established.”

Minn. Stat. §257.541, subd. 1.

Critics reply that this is objectionably counterintuitive, insofar as it is inconsistent with the belief that mothers and fathers have equal rights and obligations regarding their children.

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What about Gestation without DNA?

And, without a doubt, technological advances can make these cases difficult. For example, in a situation where a lesbian couple chooses to use the eggs of one of the parties and an anonymous sperm donor to create the child, by having the other party carry the baby in her womb and give birth to the child. The party who carries the fetus to term is still without a biological (or DNA) connection despite having also been, in a sense, the biological mother.

[Likewise, it was recently reported that one of the technological breakthroughs in 2018 includes artificial embryos. [https://www.technologyreview.com/lists/technologies/2018/.](https://www.technologyreview.com/lists/technologies/2018/)]

Paternity: Establishing Parentage for Males

Biology/Genetic Testing
Artificial Insemination
Surrogacy
Paternity actions
Recognition of Parentage (ROP)
Marriage
Adoption
Presumptions

In all fifty states, a husband is presumed to be the legal parent of a child born to his wife.¹⁴ In addition, either by case law or through explicit separate statutory provisions, most states, including Minnesota, treat a husband who consents to his wife's insemination as the legal parent of the resulting child.¹⁵

Default rule for establishing parentage is a biological relationship between the parent and a child

Notable exceptions to this rule:

Presumptions
Physician-assisted artificial insemination

Did the legislature intend that same-sex marriage would be another exception?

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The Presumptions Regarding Paternity¹⁶

A man is presumed to be the biological father of a child born during or shortly after his marriage to the biological mother.¹⁷

Minn. Stat. §257.55, subd. 1(a)

The Holding Out Statute:

A man [or woman] is presumed to be the biological father [or mother] of a child if: ... (d) while the child is under the age of majority, he [or she] receives the child into his [or her] home and openly holds out the child as his [or her] biological child.

Minn. Stat. § 257.55, subd. 1(d).

If there are two conflicting presumptions - “the presumption which on the facts is founded on the weightier considerations of policy and logic”

Minn. Stat. §257.55, subd. 2

“When the Parentage Act was first adopted in 1980, it was assumed that the effort was to find the biological father and then to adjudicate that person the legal father. The precision with which the biological father can now be identified and the recognition of other considerations have since made the search something more than a search for a biological father.”¹⁸

Our presumptions allow the Court to do an analysis of the facts of the situation – **a review of the intent and conduct** of the putative father to determine whether or not he is a presumptive parent – has he created an *in loco parentis* relationship with the child? Has he created and developed deep emotional ties with the child? Has he held the child out to the community as his own biological child? (This allows a man who is unmarried and not biologically connected to the child to file a complaint alleging Paternity based on (for example) the Holding Out Statute. This does not apply to women. ¹⁹)

Children Have Rights Too

“Children have a core, constitutionally protected interest in preserving the emotional attachments they develop with adult parent figures from shared daily life.”

Smith v. Org. of Foster Families for Equality & Reform, 431 U.S. 816, 854 (1977).

A state, in its role as *parens patriae*, has a compelling interest in promoting relationships among those in recognized family units (for example, the relationship between a child and someone *in loco parentis* to that child) in order to protect the general welfare of children.

See, e.g., London Guar. & Accident Co. v. Smith, 242 Minn. 211, 217, 64 N.W.2d 781, 785 (1954)

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The Presumptions: A Biological Connection Not Necessary or Sufficient

The parental presumptions found in our statutes allow our courts to recognize that a biological connection is neither necessary nor even sufficient at times for the court to confer legal rights and legal duties.²⁰

Birth Certificates:

Married female couples' names can both be entered on the birth certificate.
Pavan v. Smith, 582 U.S. ___ (2017); *Strickland v. Day*, ___ So.3d ___ (2018)

But: because men cannot give birth, it is not so clear. A hospital/birthing center will typically not place the names of male spouses on the child's birth certificate without a court order.

Married male couples' status is based on the marital status of the gestational carrier. If she is married, her husband will be listed as the father.

Proposition: If one male spouse produces evidence that he is the bio parent should his male spouse be afforded the marital presumption of parenthood?

Married or unmarried, heterosexual or same-sex non-biological parents whose children are created through ART or surrogacy are not third parties. They are second parents to the children at issue. Because the nonbiological parents are not third parties, but second parents, the principle of parental deference developed in *Troxel* does not apply and is simply irrelevant to cases involving functional parents.²¹

Artificial insemination

“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 biological father of a child thereby conceived. The husband's consent must be in writing and signed by him and his wife.”

Minn. Stat. §257.56

In contrast, currently, the non-bio spouse in a same-sex relationship must adopt the child as though they were an outside third party. Under a gender-neutral framework, this statute should also now apply to the wife of a woman who undergoes artificial insemination. And, accordingly, if the general principles of intentional parenthood apply regardless of marital status, then Minn. Stat. § 257.56, subd.1 should apply in a marital-status- and gender-neutral fashion.

“The United States Supreme Court has firmly held that, in family life, individuals should be allowed to direct their families' own destinies and that prejudice is not a valid reason for disallowing that autonomy.”

Loving v. Virginia, 388 U.S. 1, 11-12 (1967)

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The ABA Model Act Governing Assisted Reproductive Technology (the Act),²² equally protects the children of married *and* unmarried couples. The Act recognizes that *all* children need stability and legal protections, regardless of the marital status of their parents. All of the parentage provisions of the Act are marital-status neutral and gender and sexual orientation neutral.

The Act defines an “intended parent” as “any person who consents to assisted reproduction with the intent to parent the resulting child is the legal parent of that child ... to be legally bound as the parent of a child resulting from assisted or collaborative reproduction. All intended parents are the same” in recognition of the fact that “that person’s conduct has resulted in the birth of a child.”

Surrogacy²³

There is no Minnesota statute or case that specifically recognizes or provides any guidance with regard to those persons who are creating children through surrogacy.

Therefore, the Parentage Act definition of mother/father rules

Same-sex male spouses must use surrogacy

Recognition of Parentage (ROP)

Allows for unmarried parents of a child to establish paternity by signing a document at or near the birth of the child voluntarily acknowledging parentage of the child.²⁴

Minn. Stat. §257.75

*Does not apply to same-sex married couples*²⁵ because they must swear under oath that they are the biological parent (i.e. they must be able to attest to a scientific fact to sign the document).²⁶

Adoption – a Legal Fiction, a Legal Obstacle

Under the current legal framework in Minnesota which emphasizes biology, it is impossible without **marriage or adoption** for both current or former partners of a same-sex couple to have standing since only one is typically biologically related to the child.²⁷

In *Obergefell*, the Supreme Court emphasized the stigma suffered by the hundreds of thousands of children who are presently being raised by same-sex couples **as a result of fixing biology as the key to parental rights.**

Obergefell, 135 S Ct at 2600-2608

“Parents are not screened for the procreation of their own children; they are screened for the adoption of other people’s children.” This qualification and probation process is strikingly different from the state’s approach to conferring legal parent status on biological parents, which entails no pre-qualification process or post-placement review but rather accepts all comers and sends new parents off on their own without monitoring.

In re Marriage of Buzzanca, 72 Cal. Rptr. 2d 280 (Ct. App. 1998).

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Bills Attempted in 2014 -

Senate SF 2627, Sen. Pappas and Latz:

- Proposed amendments to section 257.56
- Providing protection to “intended parents” in both artificial insemination, assisted reproduction, and gestational surrogacy arrangements
- Included duty to support provision

House:

H.F. 291, Rep. Simon and Holberg:

- Would apply the Parentage Act provisions relating to paternity to determinations of maternity
- Re mother’s right to custody – changes “biological” mother to “birth” mother
- Adds a presumption to 257.55 for “intended parents” when pregnancy initiated by means other than sexual intercourse and all presumptive parents entered into written agreement

2017:

Congress: Every Child Deserves a Family Act; S. 1303

Congress: Every Child Deserves a Family Act; S. 2640

Minnesota: The Gestational Carrier Act HF2593 (introduced by attorney Steve Snyder)

Uniform Parentage Act (by National Conference of Commissioners of Uniform State Laws)

2018:

Minnesota: “Logan’s Law” regarding Minn. Stat. §257.56; introduced by Nicolette Graf

UPA

Minnesota: Amendments to the MN Rules of Juvenile Procedure and MN Rules of Adoption Procedure.
Filed November 13, 2018 by the MN Supreme Court Advisory Committee on the Rules of
Juvenile Protection, Adoption, and Guardian ad Litem Procedure.

Interstate Federal Law

Full Faith and Credit for Same-Sex Marriages; requires states to recognize the orders of another state.
U.S. Constitution; Fourteenth Amendment via *Obergefell*

UIFSA says that a party whose parentage of a child has been previously determined may not plead nonparentage as a defense to a proceeding under UIFSA. Sec. 315

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In Summary

Babies are created and families are formed in myriad ways. A person may establish a parent-child relationship through:

Marriage (presumptions)

 Unmarried (Marriage-like Relationships)

 Single Parents

Biology (heterosexual sex)

Adoption

Cultural Marriages & Cultural Adoptions (Ramsey County Atty John Choi; Equitable Adoption)

 Native Americans – customary adoptions

Assisted Reproductive Technology (Physician v The Turkey Baster method)

Paternity and ROP's

Surrogacy

Presumptions

Stepparents (Visitations Rights – *SooHoo?* Parental Deference issue)

While we all know that there is not always remedy for every ill under the law, yet - with regard to children, the rights of children, the rights of children to form secure attachments with the people they view as their parents, and the rights of children to have those relationships respected and acknowledged – we need to find a remedy, it is imperative that we craft a solution that works for the majority of families in Minnesota.

Children have a right to have access to all of the many benefits and privileges bestowed upon children when their relationship with their parents are legally recognized, including inheritance rights, coverage under health insurance, social security benefits, tax benefits, medical consent, in addition to financial support.

It is time for us – regardless of whether or not we agree or approve of these family structures – to acknowledge and deal with the families that actually exist in our state.

Therefore, I propose that even while we continue to debate and wrestle over the details of how to deal with all of the various family forms, I believe that the quandaries involved in establishing the parent-child relationship can be quickly and easily by defining a Parent as follows:

In addition to marriage presumptions, biology, best interest's, and adoption, "a Parent shall be defined as any person who intends to create a child through assisted or collaborative reproduction. All intended parents are the same in recognition of the fact that their conduct resulted in the birth of a child."

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Interesting Cases:

In re Welfare of C.M.G., 516 N.W.2d 555, 560 n.8 (Minn. App. 1994) (applying the best interest of the child standard in determining whether a blood test should be conducted to establish paternity and holding that “[w]here competing presumptions of paternity exist; deciding the determination of paternity is no longer solely an issue of biological fact; suggesting that basing parent and child relationships solely on biology, in some contexts, is not the proper objective).

In Minnesota, the court in *Soofoo* initially determined that Soohoo had standing to seek custody. But later after an evidentiary hearing dismissed the custody petition, because she could not overcome the parental deference because Johnson opposed her having contact with the children. The Court awarded visitation under Minn. Stat. §257C.08, subd. 4(2), after finding that Soohoo had, (1), resided with the children for more than two years, (2) that Soohoo was *in loco parentis* with the children, and that (3) Soohoo and the children had developed emotional ties creating a parent-child relationship. *Soofoo v. Johnson*, 731 N.W.2d 815 (Minn. 2007). There are unpublished opinions from the Court of Appeals in which that court states that “extraordinary circumstances” do not require that the biological parent present a danger to the children. See *In re the Guardianship of T.E., A.E., S.M., and H.M.*, 2005 WL 1869651 (Minn. App. Aug. 9, 2005); *In re the Custody of D.M.P.*, 2004 WL 2094501 (Minn. App. Sep. 21, 2004). While these cases do not serve as precedent, they do serve as examples of how courts have interpreted the third factor when required to address it directly.

In an unpublished opinion, *In re Custody of D.M.P.*, No. A03-1950 (MN 9/21/2004) (MN 2004), the court ruled that “the right of a parent is presumptively superior to a third person, but if extraordinary circumstances exist, that right “must always yield to the best interests of the child.”

In re Custody of N.A.K., 649 N.W.2d 166, 177 (Minn. 2002). “The grant of custody of a child to someone other than the natural parent should not occur except for compelling reasons, AND of course the best interest of a child is a compelling consideration. ... Because [the grandmother’s] eight-and-one-half years of voluntary custodial care is an extraordinary circumstance and because the district court found that the child’s best interests are served by his remaining in [grandmother’s] custody, the district court, on this record, abused its discretion by transferring custody to [the mother].”

A.L.S., by Guardian ad Litem, J.P. vs. EAG, vs. RWS, et al, A10-443 (Minn. App., filed October 26, 2010): In a case concerning a surrogacy situation, the court found that the biological mother and the biological father were the parents of the child. However, the court did not reverse the award of custody to both men/partners.

In *Larson v. Schmidt*, 400 N.W.2d 131 (Minn. App. 1987), the court states: “We hold that a man who is the undisputed biological father of a child satisfies the requirement in Sec. 257.55, subd. 1(d), of “receiv[ing] the child into his home” to the extent possible under the particular circumstances of the case. Satisfaction of this flexible requirement, along with the other requirements of subdivision 1(d), operates to raise the presumption of fatherhood for other purposes of the Act.” Further, the court ruled that “while these circumstances are not ideal, they are sufficient to meet the threshold requirements for the presumption of fatherhood under Sec. 257.55, subd. 1(d), which must be liberally construed to give effect to the statute’s remedial and humanitarian purpose.” *Id.*

Spaeth v. Warren, 478 N.W.2d 319 (Minn.Ct.App.1991) involved a challenge to a summary judgment order granted in favor of the undisputed father in a paternity action. There, the trial court did not join the child or the child's mother’s husband as a party and it did not consider the best interest of the child in its determination. *Id.* at 321-22. The mother of the child and her current husband appealed arguing that the trial court should have applied the best interest of the child standard before making a judgment of paternity. The appellate court rejected this argument and affirmed the trial court ruling, reasoning that “[a] child’s best interests simply are irrelevant to the biological determination.” *Id.* at 323. (*Spaeth* did not involve a challenge to a legal judgment of

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paternity, nor did it involve a challenge to a presumption of paternity. Where there are conflicting presumptions of paternity, Minnesota courts, consistent with a significant majority of courts throughout the country, have clearly distinguished the holding in *Spaeth* and consistently applied the best interest of the child standard.)

State v. D.E.A., No. A06-2426 (Minn. App. 6/26/2007) (Minn. App. 2007); In this case, the district court listed the undisputed facts as findings to support its conclusion. Those undisputed facts include that (1) child has been raised by mother and defendant to believe that defendant is her biological and legal father; (2) mother and defendant "have gone to great lengths to ensure that this belief is maintained"; (3) defendant's extended family and child's siblings believe that he is the child's biological and legal father; (4) child has a strong attachment to defendant; (5) defendant has provided child "with a stable and loving environment for over ten years"; and (6) defendant wants to continue having a relationship with the child and is willing and financially able to support child.

Richards v. Reiter (In re D.T.R.) (Minn. App. 2012) (unpublished); conflicting presumptions;

Thies v. Kramp (Minn. App. 2012) (unpublished) (concerned the vacation of a ROP, and the presumption of paternity created by Minn. Stat. § 257.55 subd. 1(d) (holding the child out as his own))

As this Court noted in *Monroe v. Monroe*: "Significant to the best interest determination is the desirability, from the child's perspective, of establishing that the man that is the only father the child has ever known ... and who has acknowledged the child, is, in fact, not the child's father. The effect of that determination is not only to establish that the person who the child regarded as her father, is, in fact, not her father but also to establish that she has no known father." 329 Md. at 773, 621 A.2d at 905.

"[T]he genetic testing presumption is not more important than the other presumptions; it is one of several that must be considered in light of the fundamental purpose of chapter 584." *Witso v. Overby*, 627 N.W.2d 63, 69 (Minn. Jun 7, 2001).

Cnty. of Dakota v. Blackwell, 809 N.W.2d 226 (Minn. App. 2011) (Minn. Stat. § 257.60 (2010) requires that all presumptive fathers and alleged biological fathers be joined in an action brought under the Minnesota Parentage Act.)

In re J. M. M. ex rel. Minors (Minn. App. 2017); *M. J. E. B. v. A. L.* (Minn. App., 2016) (unpublished). Minn. Stat. § 259.10, subd. 1, does not require an applicant-parent to provide notice of a name-change application filed on behalf of a minor child to a biological parent who does not have a legally recognized relationship with the child under the Minnesota Parentage Act, Minn. Stat. §§ 257.51-.74 (2016).

In re Parentage of Robinson, 890 A.2d 1036, 1038 (N.J. Super. Ct. App. Div. 2005) ("Arguably, the benefits to a child of having two legal parents are numerous and would certainly include economic security...").

In the Matter of Brooke S.B. v Elizabeth A.C.C. (28 NY3d 1). The Court in *Brooke* provides that, in pertinent part, "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 New York State's Domestic Relations Law §70." (id. at 14.)

Partanen v. Gallagher, 475, Mass. 632, 59 N.E.2d 1133 (2016). Could Partanen establish that she was the children's "presumed parent" by alleging that the children were born to her and Gallagher, were jointly received into their home, and were openly held out as the couple's children, where it is known that Partanen has no biological relationship to the children? Referencing *Hunter v. Rose*, 463, Mass. 488, 975 N.E.2d 857 (2012), the court held that children born to one same-sex spouse are legal children of both spouses, even where one is not biologically related to the children. The Massachusetts court said that had the children been born to a married

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couple, using artificial reproductive technology, they would have had two legal parents to provide them with financial and emotional support. *Id.* at 493. Going on, the Massachusetts court declined to read into the Massachusetts statute any provision that would leave children born to unmarried couples, using the same reproductive technology, with only one parent. The *Hunter* court also applied another parenting presumption from Massachusetts as follows: That a man is presumed to be a father if the child was born to the marriage to the mother. This presumption was applied by the *Partanen* court to a child born to two married women, one of whom had no biological relationship to the child. The *Partanen* court found that a biological connection is not a *sine qua non* to the establishment of parentage under the Massachusetts statute. *Partanen* at 639. The California case of *Elisa B. v. Superior Court*, found, in “the circumstances that [former member of same-sex couple pursuing parentage claim] has no genetic connection to the twins does not... mean that she did not hold out the twins as her... children” and that she is not their presumed parent.” *Partanen* at 1142, (quoting *Elisa B. v. Superior Court*, 37 Cal.4th 108, 117 P.3d 660 (2005)).

Elisa B. v Superior Court of El Dorado Cnty., 117 P.3d 660, 669 (Cal. 2005) (It is in a child’s best interest, and it is a “compelling state interest,” for a child to have “two parents, rather than one, as a source of both emotional and financial support, especially when the obligation to support the child would otherwise fall to the public.”)

In 1998, the California Court of Appeals in *In re Marriage of Buzzanca*²⁸ 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. The trial court then left the child without legal parents, a result that clearly irritated the reviewing court. In reversing, the appellate court stressed the couple’s “initiating role as the intended parents in [the child’s] conception and birth.”

Colorado courts have held that you can have both a biological mother and a presumptive mother who has held the child out as her own. *In re Parental Responsibilities of A.R.L.*, 318 P.3d 581, 587 (Colo. App. 2013). This holding followed a handful of other jurisdictions that interpreted the presumptions of parentage found in the UPA to be applicable to same-sex couples as well as heterosexual couples.

California has addressed the issue legislatively, providing that a child can have more than two legal parents under the UPA: a sperm donor, the person who gave birth to the child, and a person who held the child out as his or her own. CAL. FAM. CODE §7613(b).

In *Jhordan C. v. Mary K.*, 179 Cal. App. 3d 386, 224 Cal. Rptr. 530 (1986) (semen donor granted parental visitation rights because statute preventing that outcome did not apply; facts of alleged agreement not to exercise parental rights were disputed); *C.M. v. C.C.*, 152 N.J. Super. 160, 377 A.2d 821 (1977) (semen donor granted parental visitation rights on basis that best interests of child; facts of agreement were disputed). The concern in both instances seemed to be that the child must have at least one father (despite the intention of the single mother), and since the woman was unmarried, no man other than the donor was available to play that role.

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¹ *Troxel v. Granville*, 530 U.S. 57 (2000).

² Assisted Reproductive Technology (ART)

³ See, e.g., *Trimble v. Gordon*, 430 U.S. 762 (1977). *Weber v. Aetna Cas. & Surety Co.*, 406 U.S. 164 (1972); *Levy v. Louisiana*, 391 U.S. 68 (1968); *Plyler v. Doe*, 457 U.S. 202 (1982); *R---- v. R----*, 431 S.W.2d 152, 154 (Mo. banc 1968).

⁴ “The fundamental liberties protected by the Fourteenth Amendment extend to certain personal choices central to individual dignity and autonomy, including intimate choices defining personal identity and beliefs. Marriage is a centerpiece of social order and fundamental under the Constitution; it draws meaning from related rights of childrearing, procreation, and education. The marriage laws at issue harm and humiliate the children of same-sex couples; burden the liberty of same-sex couples; and abridge central precepts of equality.” *Obergefell*, Id.; See *Duncan v. Louisiana*, 391 U.S. 145, 147–149, 88 S.Ct. 1444, 20 L.Ed.2d 491 (1968). In addition, these liberties extend to certain personal choices central to individual dignity and autonomy, including intimate choices that define personal identity and beliefs. See, e.g., *Eisenstadt v. Baird*, 405 U.S. 438, 453, 92 S.Ct. 1029, 31 L.Ed.2d 349 (1972); *Griswold v. Connecticut*, 381 U.S. 479, 484–486, 85 S.Ct. 1678, 14 L.Ed.2d 510 (1965).

⁵ See, *Soochow v. Johnson*, 731 N.W.2d 815 (Minn. 2007); Also, in 1993, the Hawaii Supreme Court held Hawaii’s law restricting marriage to opposite-sex couples constituted a classification on the basis of sex and was therefore subject to strict scrutiny under the Hawaii Constitution. *Baehr v. Lewin*, 74 Haw. 530, 852 P.2d 44 (1993); The equal protection guarantees prevent the government from making distinctions among people when applying the law unless the distinction serves a legitimate governmental interest. *R.B. v. C.S.*, 536 N.W.2d 634, 637 (Minn.App.1995). In Minnesota, custody decisions are based on the best interests of the child. The focus in applying the best-interests standard is *on the child*, not the parents, and therefore the standard applies equally to all parents. See, *Carlson v. Carlson*, 8 Kan.App.2d 564, 661 P.2d 833, 836 (1983) (rejecting mother’s argument that a residency restriction in the custody decree is a violation of equal protection because a similar restriction was not placed on father, because the best-interests-of-the-child standard applies to both parents).

⁶ *McGaw v. McGaw*, 468 S.W.3d 435, 454 (Mo. Ct. App. 2015) (Clayton, J., concurring in part and dissenting in part) (quoting *Obergefell*, *supra*, at 2599). 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).

⁷ In a 1994 case before the Appellate court, the court noted the possible staleness of biologically based portions of the Parentage Act and encouraged the legislature to amend the Act. *Matter of Welfare of C.M.G.*, 516 N.W.2d 555 (Minn. App., 1994).

⁸ Joslin, Courtney G., *Leaving No (Nonmarital) Child Behind* (2014), 48 Family Law Quarterly 495 (2014); UC Davis Legal Studies Research Paper No. 414. Available at SSRN: <https://ssrn.com/abstract=2546380>

⁹ *Id.*

¹⁰ Joslin, Courtney G., *Marital Status Discrimination 2.0* (September 30, 2015). 90 Boston University Law Review 805 (2015); UC Davis Legal Studies Research Paper No. 460. Available at SSRN: <https://ssrn.com/abstract=2667743>

¹¹ *Id.*

¹² Pew Research Center, *The Decline of Marriage and the Rise of New Families* 21, 64 (Nov. 18, 2010), available at <http://www.pewsocialtrends.org/files/2010/11/pew-social-trends-2010-families.pdf>

¹³ Religious exemption allows organizations to refuse to perform civil marriages in violation of their beliefs. Minn. Stat. §517.201, subd. 1.

¹⁴ The purpose of the “marital presumption” was to look past the biology of parenthood to protect marriage, family and child. See, June Carbone & Naomi Cahn, *Marriage, Parentage, and Child Support*, 45 Fam. L.Q. 219, 223 (2011) (“All states continue to recognize at least a rebuttable presumption that a child born within marriage is the child of the husband and may limit the circumstances in which it can be rebutted.”)

¹⁵ Minn. Stat. § 257.56, subs. 1, 2. *But cf. In re Matter of Welfare of C.M.G.*, *supra*, note 69; See also, Courtney G. Joslin, *Protecting Children(?): Marriage, Gender, and Assisted Reproductive Technology*, 83 S. Cal. L. Rev. 1177, 1184–86 (2010) (In some states, the general marital presumption can be rebutted by evidence that the man is not the child’s genetic father. The presumption based on consent to insemination is not rebuttable by evidence of lack of genetic connection.)

¹⁶ The purpose of the “marital presumption” was to look past the biology of parenthood to protect marriage, family and child. In *In Re Custody of Child of Williams v. Carlson*, 701 NW 2d 274 (Minn. Court of Appeals 2005) (because no other man is presumed to be the child’s father, [respondent’s] presumption of paternity under [section 257.55, subd. 1(d)] is conclusive). Also see, *Zentz v. Graber*, 760 N.W.2d 1 (Minn. App., 2009) a man established a presumption of a father/child relationship under Minn. Stat. § 257.55, subd. 1(d), by alleging that he received the child into his home and held the child

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out as his child and was therefore the presumed father regardless of any biological connection. The court further ruled that he need not establish the allegations by clear and convincing evidence to gain standing.

¹⁷ Minn. Stat. 257.55 stated in gender neutral terms: A person is presumed to be the biological parent of a child if: the person and the child's biological parent are or have been married to each other and the child is born during the marriage, or within 280 days after the marriage is terminated ...

¹⁸ *Matter of Welfare of C.M.G.*, 516 N.W.2d 555 (Minn. App., 1994).

¹⁹ *In re the Custody of: N.S.V., L.J.V., E.T.V., Terri Ann Bischoff, Appellant, vs. Linda J. Vetter, Respondent*, currently pending before the Appellate court. "Let us assume, for the sake of argument, that Petitioner were male rather than female. ... there would be a presumption in favor of parentage because Petitioner has held herself out (or for the purposes of our hypothetical, held himself out) as the parent of the child. ... Minnesota Statutes Section 257C.08, subd. 4 directs the Court to consider whether: (1) visitation rights would be in the best interests of the child; (2) Petitioner and child had established emotional ties creating a parent and child relationship; and (3) visitation rights would not interfere with the relationship between the custodial parent and the child. And *Soohee v. Johnson*, 731 N.W.2d 815 (Minn. 2007), directs the Court to remain mindful that the amount of visitation to be awarded to the third party must be balanced against the biological parent's fundamental right to parent their child without interference from the other party."

²⁰ *In re Custody of D.T.R.*, No. A10-1098, 2012 WL 1914058, at *2 (Minn. Ct. App. May 29, 2012) (citing *In re Matter of Welfare of C.M.G.*, *supra*); A district court's paternity adjudication will be affirmed if it is based on the facts of the case and is supported by policy and logic. *In re Custody of D.T.R.*, at *2; See also, *In re Paternity of B.J.H.*, 573 N.W.2d 99, 103 (Minn. App. 1998).

²¹ The Arkansas Supreme Court explained that a case involving a functional parent is different from a grandparent visitation case because it "concerns a person who, in all practical respects, was a parent." Thus, the court continued, "any argument that [the functional parent] cannot seek visitation because to do so would interfere with [legal parent's] right to parent is unavailing." *Bethany v. Jones*, 378 S.W.3d 731, 736 (Ark. 2011).

The Washington state court held that "the state is not interfering on behalf of a third party in an insular family but is enforcing the rights and obligations of parenthood." The court held that "the rights and responsibilities which we recognize as attaching to de facto parents do not infringe on the fundamental liberty interest of the other legal parent in the family unit" and therefore does not violate the policy of parental deference. *In re Parentage of L.B.*, 122 P.3d 161, 178 (Wash. 2005).

²² The Model ART Act is available at:

https://www.americanbar.org/content/dam/aba/publishing/family_law_quarterly/family_flq_artmodelact.authcheckdam.pdf

²³ Choice of Law: In an unpublished decision. *In re Baby Boy. A.*, No. A07-452, 2007 WL 4304448, at *3-8 (Minn. App. Dec. 11, 2007)., Court upheld parental rights of bio father and denied parental rights to the surrogate mother. Court honored the terms of the surrogacy contract but applied Illinois law which was stated as controlling law in the contract. Under Illinois law, a surrogacy contract is valid.

Custody not Parentage: same sex couple entered into an agreement whereby one of the men's sperm was used to impregnate the woman surrogate. After child's birth, a ROP was signed by the surrogate and the sperm donor. Agreement was - surrogate would terminate her parental rights and consent to an adoption. She changed her mind, revoked the ROP and sued the sperm donor for parentage. Trial court established both men as legal fathers and the surrogate was not declared a parent BUT the appellate court reversed the trial court based on the Parentage Act. Decision: Both the biological mother and the biological father were the parents of the child. However, the court did not reverse the award of custody to both men. *A.L.S. by guardian ad litem J.P. v E.A.G. v R.W.S.*, No. A-10-443. 2010 WL 4181449 (Minn. Ct. App. Oct 26, 2010).

²⁴ <http://www.startribune.com/for-same-sex-couples-a-new-path-to-legal-parenthood/501109291/>

²⁵ An ROP gives a biological father a basis for bringing an action to establish custody, etc., under Minn. Stat. § 257.541, subd. 3. It does not establish any such rights. A separate court action is required to request a court order establishing the father's custody, parenting time and access.

²⁶ Minn. Stat. § 257.75 was enacted so that Minnesota could comply with federal IV-D program requirements that a biological parent should have a quick/easy way to acknowledge parentage. This form, therefore, would not apply to a same-sex situation where one of the parents does not have a biological connection to the child – although, under the federal IV-D program requirements, the states are allowed to revise and draft their own documents. From the Office of Federal Child Support: https://www.acf.hhs.gov/sites/default/files/programs/css/essentials_for_attorneys_ch08.pdf.

²⁷ Same-sex persons who are forced to adopt their own children find their personal values and most intimate behaviors subject to intense scrutiny and bureaucratic regulation. Many of these parents feel resentful about the very intrusive and costly home studies. They find that they must prove their fitness to parent on the basis of criteria that arguably has little to do with their actual capacity to be loving and competent parents.

²⁸ 72 Cal. Rptr. 2d 280 (Ct. App. 1998).