OFFICIAL PUBLICATION OF THE MINNESOTA STATE BAR ASSOCIATION

VOLUME LXXV NUMBER X
NOVEMBER 2018
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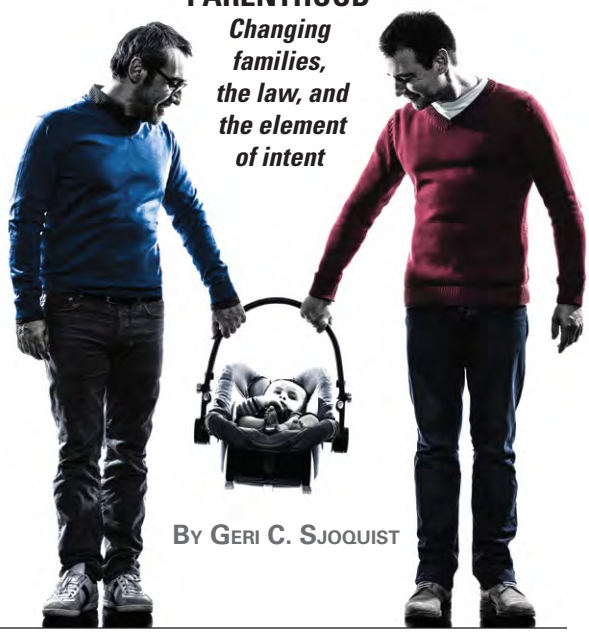

DEFINING PARENTHOOD

Changing families, the law, and the element of intent

The definition of the "average" Minnesota family upon which decades of case law and statutes are based is often not applicable to current-day family units.

By Geri C. Sjoquist

Long before Minnesota codified the right of same-sex partners to marry,[1] our state began recognizing the right of LGBT persons and same-sex couples to become parents and raise children.[2] By enacting Minn. Stat. §517.01, Minnesota attempted to put an end to all gender-based distinctions in marriage by choosing to provide for the domestic rights of same-sex couples. Looking at parentage through the lens of marriage has served as a way to understand and legally recognize the intent to parent.

Unfortunately, the definition of the "average" Minnesota family upon which decades of case law and statutes are based is often not applicable to current-day family units. 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."[3] Children have an essential, constitutionally protected interest in preserving the emotional attachments they develop with adult parent figures from shared daily life.[4]

In *SooHoo v. Johnson* (2007)[5] the Minnesota Supreme Court stated that the state's interest as *parens patriae* in the welfare of the child and in promoting relationships among recognized family units is compelling. In *LaChapelle v. Mitten* (2000),[6] a sperm donor commenced paternity proceedings after the child's mother and her partner refused to allow him to continue to have visitation with the child. The court ruled that the child could maintain a relationship with her (biological) mom and her mother's former lesbian partner (as her "emotional" parent), and with the sperm donor as her biological father.[7]

Although the Minnesota Legislature may have been aiming for equality, our "marriage equality" statute was enacted in the context of all of our state's other laws governing families and children, and those laws are based primarily on biology. Interestingly though, 24 years ago, the court noted the possible staleness of biologically based portions of the Parentage Act and encouraged the Legislature to amend the statutes.[8] Unfortunately, to date, they have failed to do so—leaving practitioners to solve the inevitable riddles as they arise.

Beyond biology

While many practitioners may still think that the determination of parenthood is a simple matter, resolved by a DNA test, the determination of paternity in Minnesota is no longer solely an issue of biological fact.[9] That an alleged father is the biological father does not preclude the adjudication of another man as the legal father.[10] "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."[11] In the 2012 case *In re Custody of D.T.R.*,[12] the respondent, Reiter, was the presumed father but ultimately determined not to be the biological father of the child. Holding that biology is not conclusive in adjudicating parentage, the *D.T.R.* court found the parent/child relationship between the child and Reiter to be in the child's best interests. The court found that Reiter had spent five and a half years forging a deep and loving father-son relationship and noted that Reiter had provided emotional, physical, and financial support throughout the child's life. In sum, the appellate court upheld the district court's application of the statutory standard in determining that, under the circumstances present, "weightier considerations of policy and logic," favored adjudicating Reiter as D.T.R.'s father even though he was not the biological father.

To promote the public policy of determining parentage, the Minnesota Legislature enacted statutes in 1980 addressing the establishment of parentage.[13] Under Minn. Stat. §645.08(2), the application of Minnesota law must be gender-neutral. Additionally, the Legislature declared that the parent-child relationship may exist regardless of the marital status of the parents.[14] In establishing the parent-child relationship, Minnesota law articulates factors that serve to create a "presumption of paternity,"[15] but courts may nonetheless decide that a biological connection is neither necessary nor sufficient for the court to bestow legal rights and legal duties.

The element of intent

Under the laws of the state of Minnesota, gestation initially bestows upon the mother of a child all rights and responsibilities.[16] Since in many same-sex intimate relationships one of the parties will be without a biological connection to the child, the court must then decide how to evaluate and determine the rights and duties of these mothers and fathers since DNA tests will be irrelevant in proving the paternity (or maternity) of the putative parents.[17] Without the means to reproduce their own biological children, in many cases lesbian, gay, and transgender couples must rely on the principle of intent to establish their families.

Through the lens of intent, a person who has participated in the creation of a child by means of assisted or collaborative reproduction should therefore be deemed a legal parent of the child,[18] and should also be estopped from avoiding the obligations of parenthood. (In other legal scenarios, the law recognizes the accountability of a person who has acted in such a way as to induce another party to detrimentally rely on their actions.[19]) On the other hand, if a person did not take an initiating role in the creation of a child, but has held the child out as their own and created an *in loco parentis* relationship with the child, then that person, under *SooHoo,* should have standing to petition the court as a presumptive parent for visitation, in the best interests of the child. "Active parenting… is an important factor in deciding who will be deemed a parent, and thus whose relationship with the child will be protected."[20]

Since the end of the 19th century, the Minnesota Supreme Court has recognized that a young child's best interests are "paramount to the claims of either parent."[21] In *In re Kayachith* (2004),[22] the court of appeals 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;" and "extraordinary circumstances" require at a minimum that the child have a substantial relationship with the potential third-party custodian.

Same-sex parents however, 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 by the U.S. Supreme Court in *Troxel v. Granville* does not apply.[23] Yet even though Minnesota allows both same-sex parents to be listed on the birth certificate,[24] it is still the case that

when same-sex couples have children together through assisted reproduction, only one of the parties is considered a legal parent of the child unless or until they complete a second-parent adoption. The children in question are therefore left vulnerable and at risk of being abruptly cut off from one of the only parents they have ever known.[25] Although embracing second-parent adoptions has allowed the court to accept the idea that children can have two legal parents of the same sex, it nevertheless has placed the non-biological parent in a sort of second-class parental status.[26] Same-sex co-parents, quite reasonably, have resented having to adopt their own children.

Requiring a same-sex parent to adopt their own child to be legally recognized as a parent disparages their choices and diminishes their parenthood.

Requiring a same-sex parent to adopt their own child to be legally recognized as a parent disparages their choices and diminishes their parenthood. The rules must be applied equally to all parents regardless of gender or marital status because all children's relationships with people whom they view as their parents, regardless of marital status, deserve to be protected.[27] Indeed, such a result is constitutionally required: Laws that deny protections to children born to same-sex unmarried parents are subject to heightened constitutional scrutiny and are presumptively unconstitutional.[28] It is not as though family law issues are so trivial that it would make sense to apply some lower analytical standard. Indeed, family law cases are often ones in which important constitutionally protected interests—intimate relationships between adults, or a parent's relationship with a child—are at stake.

To put it another way, any failure to apply intent- and conduct-based parentage standards equally across the spectrum discriminates against parents on the basis of their gender and sexual orientation in violation of the equal protection guarantees of the state and federal constitutions, based on an impermissible classification.

Functional equivalency

The Arkansas Supreme Court distinguished a case involving a functional parent from a grandparent visitation case because it "concerns a person who, in all practical respects, was a parent."[29] Thus, the Court continued, "any argument that [the functional parent] cannot seek visitation because to do so would interfere with [the legal parent's] right to parent is unavailing." In *In re Parentage of L.B.*,[30] the Washington Supreme 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 do not violate the policy of parental deference.

The U.S. Supreme Court complicated matters in its ruling in *Obergefell v. Hodges*[31] by choosing to elevate marriage as a privileged classification in contrast to unconventional and nonmarital families. Justice Kennedy quoted from Cicero, who wrote, "The first bond of society is marriage; next children; and then the family."[32] The Court chose to focus on functional parenting over procreative sex, gender, and biology. At the same time, unfortunately, the Court chose to ground same-sex couples' protections and right to parent and form families within the context of marriage.[33] In explaining why the fundamental right to marry "appl[ies] with equal force to same-sex couples," the Court noted that same-sex couples also "provide loving and nurturing homes to their children, whether biological or adopted."[34] Unfortunately, however, while setting aside biology and gender, the Court nevertheless described marriage as "a keystone of our social order." Marital status therefore provided an artificial and arbitrary line through which the Supreme Court chose to draw parentage.[35] In order to comply with this standard, some courts have decided to view parents who are not married but in a marriage-like relationship to be similarly situated with respect to principles of intent and function.[36]

In *Debra H. v Janice R.*,[37] the Court of Appeals of New York decided "we will no longer engage in the deft legal maneuvering" necessary to read fairness into an unnecessarily restrictive definition of "'parent' that sets too high a bar for reaching a child's best interest" and does not take into account equitable principles. Disregarding co-parent/child relationships does not promote the best interests of the child. A legal parent could essentially cut off a co-parent from seeing a child, or a co-parent could renounce their responsibilities as a parent and refuse to support (or even acknowledge) their child.[38] Deep, meaningful emotional bonds between a child and his or her co-parent can be irreparably sundered. While same-sex co-parents should be allowed to privately order their lives, the courts should take notice of agreements between co-parents, and their resulting conduct, as evidence of their intent to parent.[39] ▲

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Notes

[1] Same-sex marriage has been recognized if performed in other jurisdictions since 7/1/2013. The state of Minnesota began issuing marriage licenses to same-sex couples on 8/1/2013; Minn. Stat. §517.01.

[2] The state's only organization dedicated solely to finding families for Minnesota's children, Minnesota Adoption Resource Network, allows same-sex partners to adopt in identical fashion to singles and opposite-sex partners.

[3] *Troxel v. Granville*, 530 U.S. 57, 88-89 (2000).

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

[5] *SooHoo v. Johnson*, 731 N.W.2d 815 (Minn. 2007).

[6] 607 N.W.2d 151 (Minn. 2000).

[7] Despite his biological connection to the child, he was not awarded custody but visitation only.

[8] *In re Matter of Welfare of* C.M.G., 516 N.W.2d 555 (Minn. App., 1994). "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 has since made the search something more than a search for a biological father. This is demonstrated by the fact that when the Legislature added the presumption established under the genetic test presumption, Minn. Stat. Sec. 257.55, subd. 1(f), it did not make that presumption conclusive, but rather treated it simply as the sixth presumption. Thus, though "policy and logic" may originally have been directed at how to measure the likelihood of biological parenthood, it now has a different objective. We note that sections Minn. Stat. §257.52 and Minn. Stat. §257.54 still define parent-child relationships in a biologically restrictive (and circular) fashion.… Accordingly, we believe that the Legislature should remove these traces of the original lodestar of the parentage act—that is, biological."

[9] *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., 516 N.W.2d 555 (Minn. App., 1994) (suggesting that basing parent and child relationships solely on biology, in some contexts, is not the proper objective); *Kelly v. Cataldo,* 488 N.W.2d 822, 826-27 (Minn. App. 1992), *review denied* (Minn. 9/15/1992.)

[10] Minn. Stat. §257.62, subd. 5(c).

[11] *D.T.R., supra*, at *2; *In re Paternity of B.JH.*, 573 N.W.2d 99, I03 (Minn. App. 1998).

[12] *Id.*

[13] Minn. Stat. §257.75.

[14] Minn. Stat. §257.53.

[15] Minn. Stat. §257.55.

[16] The parent and child relationship between a child and the child's biological mother "may be established by proof of her having given birth to the child." Minn. Stat. §257.54(a).

[17] Without a doubt, technological advancements are making the determination of parenthood even more complicated. For example, it is now possible for a woman to be impregnated by an anonymous sperm donor and another woman's egg, thus resulting is a gestational mother with no biological link to the child to whom she gives birth. In other words, a woman who carries a fetus to term may still lack a genetic connection to the child despite having been, in a sense, the biological mother.

[18] Under the ABA's Model ART Act, "any person who consents to assisted reproduction with the intent to parent the resulting child is the legal parent of that child. All intended parents are the same, regardless of their marital status, in recognition of the principle that regardless of the person's marital status, that person's conduct has resulted in the birth of a child." *https://www.americanbar.org/content/dam/aba/publishing/family_law_quarterly/family_flq_artmodelact.authcheckdam.pdf*

[19] S*ee, Pollard v. Southdale Gardens of Edina Condo. Assn.*, 698 N.W.2d 449, 454 (Minn. Ct. App. 2005).

[20] *SooHoo, supra*, Velte; See *Kristine H. v. Lisa R.*, 117 P.3d 690 (Cal. 2005) (the court did not allow the biological parent to curtail or dissolve a parental bond that she fostered and encouraged simply because the adult relationship had ended).

[21] *State ex rel. Flint v. Flint,* 63 Minn. 187, 189, 65 N.W. 272, 273 (1895) (observing that, despite father's right to custody as against the mother under a statute then in effect, "the primary object of all courts, at least in America, is to secure the welfare of the child, and not the special claims of one or the other parent"); *see Wallin, supra,* note 46, at 264-65.

[22] 683 N.W.2d 325, 327 (Minn.App.2004); *See also, In re Custody of N.A.K.,* 649 N.W.2d 166, 177 (Minn. 2002).

[23] *Troxel v. Granville,* 530 U.S. 57 (2000). "[A] fit parent's right vis-à-vis a complete stranger is one thing; her right vis-à-vis another parent or a de facto parent may be another." (quoting *Troxel,* at 100-01) (Kennedy, J., dissenting).

[24] Minnesota Department of Health *www.health.state.mn.us/divs/chs/osr/birthreg/bregmanual.pdf*; See, *Pavan v. Smith*, 137 S. Ct. 2075 - Supreme Court 2017 (the Supreme Court held that Arkansas' refusal to list both same-sex spouses on a child's birth certificate was unconstitutional, because the certificate was "more than a mere marker of biological relationships.")

[25] *See, e.g.,* Melanie B. Jacobs, *Micah Has One Mommy and One Legal Stranger: Adjudicating Maternity for Nonbiological Lesbian Co-parents*, 50 Buff. L. Rev. 341, 345 (2002) (noting that children born into planned lesbian parent families are "routinely separated from a lesbian co-parent who has nurtured and loved them because [the co-parent] is not a legal parent and has little legal recourse to protect her parental relationship"). *See also White v. White*, 293S.W.3d 1 (Mo. 2009) (holding that the birth mother's same-sex partner, who had co-parented their children from birth for over four years, had no standing to seek custody or visitation).

[26] *See*, *In the Matter of HM v. ET*, 930 N.E.2d 206, 14 N.Y.3d 521, 904 N.Y.S.2d 285 (NY Court of Appeals 2010), quoting *In the Matter of Findlay*, 253 NY 1, 7 [1930, Cardozo, Ch. J.]; see also *Michael H. v Gerald D.*, 491 US 110, 125 (1989) (the strength of the presumption derives from "an aversion to declaring children illegitimate... thereby depriving them of rights of inheritance and succession … and likely making them wards of the state").

[27] In *Lawrence v. Texas*, the Supreme Court established that adult intimate relationships—even nonmarital ones—are entitled to some level of constitutional protection. 539 U.S. 558, 578 (2003); *See*, *Gomez v. Perez*, 409 U.S. 535 (1973) (holding that state law denying nonmarital children the right to paternal child support violates Equal Protection).

[28] *See, e.g.,* Clark v. Jeter, 486 U.S. 456, 461 (1988); Trimble v. Gordon, 430 U.S. 762 (1977).

[29] *Bethany v. Jones*, 378 S.W.3d 731, 736 (Ark. 2011).

[30] *In re Parentage of L.B.*, 122 P.3d 161, 178 (Wash. 2005).

[31] *Obergefell v Hodges,* 135 S Ct 2584 (2015).

[32] *Id.* at 2594.

[33] Joslin, Courtney G., *The Gay Rights Canon and the Right to Nonmarriage* (5/26/2017). 97 Boston University Law Review 425 (2017). Available at SSRN: *https://ssrn.com/abstract=2975463* (A rereading of *Obergefell*. This progressive rereading supports, rather than forecloses, the extension of constitutional protection to those living outside marriage.)

[34] *Obergefell, supra,* at 2599 (explaining that "choices concerning contraception, family relationships, procreation, and childrearing," like marriage, are protected by Constitution quoting *Griswold v. Connecticut,* 381 U.S., at 485, 85 S.Ct. 1678)).

[35] *United States v. Windsor*, 133 S. Ct. 2675, 2690 (2013) ("Congress decided that although state law would determine in general who qualifies as an applicant's spouse, commonlaw marriages also should be recognized, regardless of any particular State's view on these relationships.") (citing 42 U.S.C. §1382c(d)(2)).

[36] *See, e.g.*, Jenny Wald, *Legitimate Parents: Construing California's Uniform Parentage Act to Protect Children Born into Nontraditional Families*, 6 J. Center Fam. Child. & Cts. 139, 141 (2005) ("The original intent of the UPA was to guarantee the equal rights of all children by ensuring their financial support from both parents and by protecting their emotional and physical needs derived from existing social relationships with their parents.") (citing Harry G. Krause, *Illegitimacy: Law and Social Policy* 25-28 (1971)).

[37] 14 NY3d 576 (2010).

[38] *See, H.M. v. E.T.,* 2007 NY Slip Op 51711(U) (N.Y. Fam. Ct. 2007), quoting *Karin T. v. Michael T.*, 484 N.Y.S.2d 780, 784, 127 Misc.2d 14, 17 (N. Y. Fam. Ct., 1985) ("her course of conduct… brought into the world two innocent children.").

[39] See Rachel E. Shoaf, Note, Two Mothers and Their Child: A Look at the Uncertain Status of Nonbiological Lesbian Mothers Under Contemporary Law, 12 Wm. & Mary J. Women & L. 267 (2005) (citing *Palmore v. Sidoti*, 466 U.S. 429, 434 (1984)).