The Doctrine of Intentional Parenthood

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Introduction

Family laws have become a patchwork of statutes that have been made even more complex with the acceptance of same-sex marriage. In Minnesota, 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 twelfth state to join in the recognition of same-sex unions. The headlines everywhere read, "Love Won."[1] Although, the legislature may have been aiming for equality, the provision that was carved out for same-sex couples to enjoy the benefits of a valid legal marriage was accomplished within the context of all of Minnesota's other laws governing families and children, which are primarily based on biology. In a 1994 case before the Minnesota Court of Appeals,[2] the court noted the possible staleness of biologically based portions of the Parentage Act and encouraged the legislature to amend the

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1. http://howlovewon.com/.
2. *In re* Welfare of C.*M.G.*, 516 N.W.2d 555, 560 n.8 (Minn. Ct. App., 1994).

Act.[3] Unfortunately, to date, it has failed to do so, leaving practitioners to solve the riddles. The various issues related to the rights of LGBTQ parents that are addressed in this Article are cropping up with greater frequency.

Under Minnesota Statute section 517.01, a civil marriage is defined a civil contract between two persons to which the consent of the parties, capable in law of contracting, is essential. Long before Minnesota codified the right of same-sex partners to marry,[4] our state recognized the right of LGBTQ persons and same-sex couples to become parents and raise children.[5] Looking at parentage through the lens of marriage has served as a way to understand and legally recognize the *intent* to parent. By enacting section 517.01, Minnesota attempted put an end to all sex-based distinctions in marriage by choosing to provide for the domestic rights of same-sex couples. In *Obergefell v. Hodges,*[6] Justice Kennedy quoted from Cicero, who wrote, "The first bond of union is that between husband and wife; the next, that between parents and children; then we find the home, with everything in common."[7]

I. The Issue of Defining Parentage

Married or unmarried, heterosexual or same-sex non-biological parents whose children are created through assisted reproductive technologies

3. *Id.*

> 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, Minnesota Statute section 257.55-1(f) (2016), 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 Minnesota Statute section 257.52 and Minnesota Statute section 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.

4. Same-sex marriage has been recognized if performed in other jurisdictions since July 1, 2013, and the state of Minnesota began issuing marriage licenses to same-sex couples on August 1, 2013.

5. The state's only organization solely dedicated 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.

6. 135 S. Ct. at 2584.

7. *See* Cicero, De Officiis 53 (W. Miller transl. 1913); *Obergefell*, 135 S. Ct. at 2613, app. B.

("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, rather, second parents, the principle of parental deference developed in *Troxel* does not apply and is simply irrelevant to cases involving functional parents.[8] In 1980, to promote the public policy of determining parentage, the Minnesota Legislature enacted statutes addressing the establishment of parentage.[9] Under Minnesota Statute section 645.08 subdivision 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.[10] Unfortunately, the U.S. Supreme Court, in its ruling in *Obergefell*,[11] chose to elevate marriage as a privileged classification to the detriment of unconventional and nonmarital families. Prior to *Obergefell,* in 2014, Judge Posner explained in *Baskin v. Bogan*[12] that "family is about raising children and not just about producing them."[13] Accordingly, in *Obergefell*, the government could not contend that marriage "is inapplicable to a couple's adopted children as distinct from biological children."[14] Subsequently, 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 the institution of marriage. In explaining why the fundamental right to marry "appl[ies] with equal force to same-sex couples,"[15] the Court declared that a "basis for protecting the right to marry is that it safeguards children and families."[16] Same-sex

8. 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).]

9. *See id.* § 257.75.

10. *Id.* § 257.53.

11. Obergefell v Hodges*,* 135 S. Ct. 2584, 2604 (2015).

12. Baskin v. Bogan, 766 F.3d 648, 663 (7th Cir. 2014).

13. *Id.*

14. *Id.*; *see also* Latta v. Otter, 771 F.3d 456, 468 (9th Cir. 2014) (rejecting the argument "that a child reared by its biological parents *is* socially preferred and officially encouraged").

15. *Obergefell*, 135 S. Ct. at 2599 (going on to explain that "choices concerning contraception, family relationships, procreation, and childrearing," like marriage, "are protected by the Constitution . . . .") (citing Lawrence v. Texas, 123 S. Ct. 2472, 2481 (2003)).

16. *Id.* at 2600.

couples, the Court continued, "provide loving and nurturing homes to their children, whether biological or adopted."[17] However, while setting aside biology and gender, the Court nevertheless described marriage as "a keystone of our social order."[18] As a result of the Supreme Court's ruling, marriage equality has become a precedent upon which state courts are now attempting to further achieve equality with regard to the recognition of unmarried, intentional parents in the best interests of their children. [19] In order to do this, some courts have decided to view parents who are not married but who are in a marriage-like relationship to be similarly situated with respect to principles of intent and function. These efforts illustrate how marital status had provided an artificial and arbitrary line through which the Supreme Court chose to draw parentage.[20]

Under Minnesota law, in establishing the parent-child relationship, there are exceptions to biology referred to as the presumptions.[21] In fact, section 257.55 creates eight presumptions of paternity. Part a of Subdivision 1 provides standing with respect to presumptions based on marriage. When we refer to the presumptions, we are discussing behaviors or actions that give rise to a presumption (in other words, a presumption is not conclusive and it is not a scientific fact). Under section 257.55 subdivision 2 "Rebuttal," a man presumed the biological father of a child under section 257.55 subdivision 1 may rebut the presumption in an appropriate action "only by clear and convincing evidence."

In Minnesota, therefore, the determination of paternity, on the one hand, is no longer solely an issue of biological fact.[22] That an alleged father is the biological father does not preclude the adjudication of another

17. *Obergefell*, 135 S. Ct. at 2600.

18. *Id.* at 2601.

19. *See, e.g.*, Jenny Wald, *Legitimate Parents: Construing California's Uniform Parentage Act to Protect Children Born into Nontraditional Families*, 6 J. Ctr. 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)).

20. United States v. Windsor, 570 U.S. 744, 764 (2013) ("Congress decided that although state law would determine in general who qualifies as an applicant's spouse, common-law marriages also should be recognized, regardless of any particular State's view on these relationships.") (citing 42 U.S.C. § 1382c(d)(2) (2012)); *Obergefell*, 135 S. Ct. at 2584.

21. Minn. Stat. § 257.55.

22. *In re* Custody of D.T.R., 796 N.W.2d 509 (Minn. Ct. App. 2011) (citing *In re* Welfare of C.M.G., 516 N.W.2d 555 (Minn. Ct. 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, 826–7 (Minn. Ct. App. 1992).

man as the legal father.[23] "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."[24] In *D.T.R.*,[25] the respondent, Reiter, was the presumed father but ultimately determined not to be the biological father of the child.[26] 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.[27] 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.[28] 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.[29]

When there are no competing presumptions, the court has ruled, as in *In Re Custody of Child of Williams v. Carlson*,[30] that "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." In the appellate case of *In re J.M.M. ex rel. Minors*,[31] which concerned the name-change of a minor, the court stated that "[a] man is presumed to be the biological father if . . . he receives the child into his home and holds out the child as his biological child." And in a case regarding the termination of parental rights ("TPR"), *In the Matter of Children of M.T.*,[32] the court ruled that because the man qualified as the presumed parent under Minnesota Statute section 257.55 subdivision 1(d), he was a party to the proceeding as it related to the petition and had standing to exercise his rights as a party. In

23. Minn. Stat. § 257.62-5(c).

24. *In re* Custody of D.T.R., No. A10-1098, 2012 WL 1914058, at *2 (Minn. Ct. App. May 29, 2012) (citing *In re* 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), *rev. denied* (Minn. 1992.); *In re* Paternity of B.J.H., 573 N.W.2d 99, 103 (Minn. App. 1998).

25. *In re* Custody of D.T.R., 796 N.W.2d at 509.

26. *Id.* at 511.

27. *Id*.

28. *Id.*

29. *Id.*at 512 *(*quoting Minn. Stat. § 257.55-2*).*

30. Williams v. Carlson, 701 N.W.2d 274 (Minn. Ct. App. 2005).

31. *In re* J.M.M. *ex rel.* Minors, 890 N.W.2d 750 (Minn. Ct. App. 2017).

32. *In re* Children of M.T., No. A04-64, 2004 Minn. App. LEXIS 973 (Ct. App. Aug. 24, 2004).

Zentz v. Graber,[33] the Minnesota court found that a man had established a presumption of a father-child relationship under section 257.55 subdivision 1(d) by alleging that he received the child into his home and held the child out as his child and was therefore the presumed father regardless of any biological connection. The court further ruled that he did not need to establish the allegations by clear and convincing evidence to gain standing.[34]

Unfortunately, the establishment of parenthood for a hetero father is much different than for a same-sex father. Minnesota's parental presumptions are currently not extended to a same-sex parent—despite underlying facts that prove the same-sex parent's intention to co-create the child and to parent.[35] Married and unmarried same-sex, non-bio parents are required to adopt their own children to establish their parental rights. In contrast, a similarly situated hetero non-bio dad is not be required to adopt his children. To establish his parental rights following the breakup of the parental relationship, he is able to file a paternity action because he is the presumptive parent.

II. Despite *Obergefell*, Marriage Is Not Determinative of LGBTQ Parental Rights

Despite the Supreme Court's ruling in *Obergefell*,[36] marriage is not the decisive solution because the reality is that not all parents (including same-sex co-parents) will choose to marry. Demographic changes in the past twenty-five years have further transformed the elusive concept or definition of a child-parent relationship in the context of the ever-mutable structure of the modern family.

> Some same-sex couples may conceptually prefer private ordering, such as a co-parenting agreement, over public mechanisms like marriage or adoption. Simply put, some couples may elect not to

33. Zentz v. Graber, 760 N.W.2d 1 (Minn. Ct. App. 2009) (discussing interpretation of the MPA and the presumptions of paternity).

34. *Id. See* Richards v. Reiter, No. A10-1098, 2012 WL 1914058 (Minn. App. May 4, 2011) for a discussion on the statutory standard to resolve conflicting presumptions. *See also*, State v. D.E.A., No. A06-2426, 2007 WL 1816471 (Minn. Ct. App. June 26, 2007); Thies v. Kramp, No. A11-1536, 2012 Minn. App. LEXIS 273 (Apr. 2, 2012); Cty. of Dakota v. Blackwell, 809 N.W.2d 226 (Minn. Ct. App. 2011); *In re* J. M. M., 890 N.W.2d 750 (Minn. Ct. App. 2017); M. J. E. B. v. A. L., No. A16-0487, 2016 Minn. App. Unpub. LEXIS 1035 (Nov. 28, 2016).

35. So much thought and planning goes into the creation of a child through ART; in the author's opinion, people who strive this hard to have children, who go through the expense and stress, have self-selected to be the best possible, most stable parents.

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

> organize their rights based on legal models of the traditional nuclear family, which may not properly fit their identities. Some couples may feel that the state's approval of their intimate relationship through marriage is unnecessary and even antithetical to their beliefs.[37]

In such cases, a parent's rights and concomitant obligations with regard to a nonbiological, unadopted child depends on equitable principles.[38]

The ABA Model Act Governing Assisted Reproduction ("ABA Model ART Act"),[39] which was promulgated by the ABA Family Law Section over a decade ago, equally protects the children of married *and* unmarried couples. This is something to strive for. The Model ART 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 Model ART Act are marital-status neutral.[40] Thus, the Model ART Act defines an "intended parent" as "an individual who intends to be legally bound as a Parent of the Child."[41]

In contrast, the American Bar Association ("ABA") Family Law Section's Model Third-Party Child Custody and Visitation Act ("Model Third-Party Act") requires in subsection (b) that "A third party has standing to seek visitation if (1) denial of visitation would be a detriment to the child, and (2) a substantial relationship exists between the child and the third

37. See, e.g., Nancy D. Polikoff, *This Child Does Have Two Mothers: Redefining Parenthood to Meet the Needs of Children in Lesbian-Mother and Other Nontraditional Families*, 78 GEO. L. J. 459, 491–502 (1990) (discussing equitable estoppel and in loco parentis); See, e.g., Margaret S. Osborne, Note, *Legalizing Families: Solutions to Adjudicate Parentage for Lesbian Co-Parents*, 49 VILL. L. REV. 363, 378–85 (2004) (reviewing *de facto* parent and *in loco parentis* doctrines).

38. A growing body of social science reveals the trauma children suffer as a result of separation from a primary attachment figure—such as a de facto parent—regardless of that figure's biological or adoptive ties to the children. *See* Amanda Barfield, Note, *The Intersection of Same-Sex and Stepparent Visitation*, 23 J. L. & POLY 257, 259–260 (2014); Ayelet Blecher-Prigat, *Rethinking Visitation: From a Parental to a Relational Right*, 16 DUKE J. GENDER L. & POLY 1, 7 (2009); Suzanne B. Goldberg, *Family Law Cases as Law Reform Litigation: Unrecognized Parents and the Story of Alison D. v. Virginia M.*, 17 COLUM J. GENDER & L. 307 (2008); Mary Ellen Gill, Note, *Third Party Visitation in New York: Why the Current Standing Statute Is Failing Our Families*, 56 SYRACUSE L. REV. 481, 488–89 (2006); Joseph G. Arsenault, Comment, *"Family" but not "Parent": The Same-Sex Coupling Jurisprudence of the New York Court of Appeals*, 58 ALB L. REV. 813, 834, 836 (1995).

39. On January 29, 2019, the ABA amended its 2008 MODEL ART ACT, available at https://www.americanbar.org/content/dam/aba/publishing/family_law_quarterly/family_flq_artmodelact.authcheckdam.pdf, with a new ABA Model Act Governing Assisted Reproduction [2019] https://www.americanbar.org/content/dam/aba/administrative/family_law/committees/art/resolution-111.pdf.

40. They are also gender- and sexual-orientation neutral.

41. ABA Model Art Act, art. 1, § 102(26) (2019).

party." The advocates of this language believe that it is constitutionally mandated insofar as those factors are designed to reflect the holding of the U.S. Supreme Court in *Troxel*.[42] Fortunately, the majority of courts have not embraced this position. The primary reason for this is because lesbian and transgender parents are not third parties. They are second parents to the children at issue.

As mentioned, because the nonbiological parents are not third parties but, rather, second parents, *Troxel*'s principle of parental deference is inapplicable.[43] *Troxel* is simply irrelevant to cases involving functional parents. For example, 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."[44] 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."[45] In *In re Parentage of L.B.*,[46] the Washington 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."[47] 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"[48] and therefore do not violate the policy of parental deference.

In the 1977 California case of *Johnson v. Calvert,*[49] an agreement between a married couple and a gestational surrogate fell apart. The ACLU of Southern California in an amicus curiae brief urged the court to recognize both women's parental rights. But the court resisted, explaining that "for any child California law recognizes only one natural mother."[50] In 1998, the California Court of Appeals, in *In re Marriage of Buzzanca*,[51] 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.[52] The trial court had left the child without legal parents, a result

42. Troxel v. Granville, 530 U.S. 57, 65 (2000).
43. *Id*. at 100 (Kennedy, J., dissenting), "[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."
44. Bethany v. Jones, 378 S.W.3d 731, 736 (Ark. 2011).
45. *Id.*
46. *See, e.g., In re* Parentage of L.B., 122 P.3d 161, 178 (Wash. 2005).
47. *Id*. at 179.
48. *Id*.
49. Johnson v. Calvert, 851 P.2d 776, 781 (Cal. 1993).
50. *Id.*
51. 72 Cal. Rptr. 2d 280, 282 (Cal. Ct. App. 1998).
52. *Id.*

that clearly disturbed the reviewing court. In reversing, the appellate court relied on *Johnson* to stress the couple's "*initiating role* as the intended parents in [the child's] conception and birth."[53] The court detached *Johnson's* notion of intent from biology. Identifying the Buzzancas as parents allowed the court not only to grant parental rights but also to impose parental obligations. Eventually, the California courts extended *Johnson*'s intentional parenthood principle to nonbiological, nongenetic parentage. Advocates leveraged *Johnson* and *Buzzanca* by showing that same-sex couples acted like married couples in ways that suggested principles of intent should apply equally—regardless of the formal recognition of the parents' relationship. Accordingly, advocates would draw on marital parenthood to extend intentional and functional parenthood to nonmarital families. By capitalizing on the principles of functional parenthood that emerged from the recognition of unmarried, nonbiological fathers, advocates pointed to same-sex couples' marriage-like relationships to identify and explain their parental intent and conduct.

Under the laws of the state of Minnesota, gestation initially bestows upon the mother of a child all rights and responsibilities.[54] 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. Meanwhile, the "parental presumptions" found in our statutes allow our courts to decide that a biological connection is neither necessary nor sufficient for the court to bestow legal rights and legal duties.[55] This is because we tend to view the more valuable aspects of the parent-child relationship as personal, social, and moral. The presumptions, however, do not entirely discount biology because (we hope) the best interest factors also take into account a child's developing self-identity and the need for a stable environment.[56] Of their own volition (except in cases of rape), individuals choose to be bound by the social contract requiring them to undertake obligations of parenthood.

53. *Id.* at 293.

54. 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).

55. MINN. STAT. § 257.55.

56. Without a legal relationship with the second parent, a child has no right of financial support or inheritance from the nonlegal parent and cannot receive social security, retirement, or state workers' compensation benefits if the nonlegal parent dies or becomes incapacitated. The child may also be ineligible for health or other insurance benefits supplied by the nonlegal parent's employer, and the nonlegal parent could be ineligible for leave under the Family Medical Leave Act if the child became seriously ill. Even in an emergency, the nonlegal parent may not be able to consent to medical treatment or even visit the child in the hospital.

In the context of a husband who consents to the artificial insemination of his wife using an anonymous sperm donor but later denies responsibility for the resulting child, the court, in *People v. Sorenson*,[57] an influential California case for applying the doctrine of equitable estoppel, the court reasoned that:

> [A] reasonable man who, because of his inability to procreate, actively participates and consents to his wife's artificial insemination in the hope that a child will be produced whom they will treat as their own, knows that such behavior carries with it the legal responsibilities of fatherhood and criminal responsibility for nonsupport. One who consents to the production of a child cannot create a temporary relation to be assumed and disclaimed at will, but the arrangement must be of such character as to impose an obligation of supporting those for whom existence he is directly responsible.[58]

In *Laura W.W.*,[59] a New York court found that even though a husband's status as father of a child conceived via artificial donor insemination could not be established, "equity and reason require[d] a finding that an individual who participated in and consented to a procedure intentionally designed to bring a child into the world can be deemed the legal parent of the resulting child."[60] In Wisconsin, the court decided that the husband's consent to artificial insemination by the donor and the wife's agreeing to the procedure constituted an implied contract. "We hold that a husband who, because of his sterile condition, consents to his wife's impregnation, with the understanding that a child will be created whom they will treat as

57. People v. Sorenson, 437 P.2d 495 (Cal. 1968) (applying the doctrine of equitable estoppel to a man who consented to his wife's artificial insemination); *see also*, Dunkin v. Boskey, 98 Cal. Rptr. 2d 44 (Cal. Ct. App. 2000).

58. *Sorenson,* 437 P.2d at 499.

59. Laura W.W. v. Peter W.W., 51 A.D.3d 211 (N.Y. App. Div. 2008). ("I would apply the common-law presumption to the facts of these cases and would hold that where a child is conceived through ADI by one member of a same-sex couple living together, with the knowledge and consent of the other, the child is as a matter of law—at least in the absence of extraordinary circumstances—the child of both.")

60. *Id.* at 215.

their own, has the legal duties and responsibilities of fatherhood, including support."[61] In *Gursky v. Gursky*,[62] the husband's

> declarations and conduct respecting the artificial insemination of his wife by means of a third-party donor . . . implied a promise on his part to furnish support for any offspring resulting from the insemination. This, in the light of the wife's concurrence and submission to artificial insemination, was sufficient to constitute [promissory estoppel or] an implied contract.[63]

That a person has volunteered to support the child, either explicitly or implicitly, by participating in the creation of a child and creating an *in loco parentis* relationship such that he or she makes representations upon which others detrimentally rely creates a support contract regarding intent. Therefore, the obligation that arises out of conduct is the link between the duty of child support of parents who by all other accounts might be legal strangers.[64] "The marital tie is [also] no longer the deciding factor for the duty of support. Active parenting, rather than marriage between the child's parents, is an important factor in deciding who will be deemed a legal parent, and thus whose relationship with the child will be protected."[65]

If a person *has* participated in a child being born, as a result of assisted or collaborative reproduction, then that person is deemed to be a legal parent of the child. That legal parent has assumed by voluntary conduct all the duties of parenthood (this would not apply to cases of rape), and

61. L.M.S. v. S.L.S., 312 N.W.2d 853, 855 (Wis. Ct. App. 1981).

62. Gursky v. Gursky, 242 N.Y.S.2d 406 (N.Y. Sup. Ct. 1963) (the husband's declarations and conduct following wife's artificial insemination constituted an implied contract); *L.M.S.,* 312 N.W.2d at 855 (husband's consent to artificial insemination constituted an implied contract and husband has legal duties and responsibilities of fatherhood); Legg v. Commonwealth of Kentucky, 500 S.W.3d 837 (2016) (in affirming the family court decision, the Kentucky appellate court applied the doctrine of equitable estoppel to prevent a man who had held himself out as the child's father from denying paternity).

63. *Gursky*, 242 N.Y.S.2d at 411. *See also,* R.S. v. R.S., 670 P.2d 923 (Kan. Ct. App. 1988); Renner v. Stanley Co., 240 N.Y.S. 148,149 (1930) ("A promise will be implied where the agreement is instinct with obligation and the implication is supported by the circumstances" and "An agreement may result as a legal inference from the facts and circumstances of the case, although not formally stated in words.") H.M. v. E.T., 851 N.Y.S.2d 58 (N.Y. Fam. Ct. 2007), quoting Karin T. v. Michael T., 484 N.Y.S.2d 780, 784 (N.Y. Fam. Ct., 1985) ("her course of conduct which brought into the world two innocent children.").

64. *See* Kyle C. Velte, *Towards Constitutional Recognition of the Lesbian-Parented Family*, 26 N.Y.U. Rev. L. & Soc. Change 245, 274 (2000).

65. *Id. 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).

is therefore estopped from avoiding the obligations of parenthood. The obligations of parenthood are established under Minnesota Statute section 256.87, whereby the court grants equitable relief, thereby protecting one party from being harmed by another party's voluntary conduct that has induced another party to detrimentally rely on his or her actions.[66] What is important is whether or not the party intended (as evidenced by conduct) to create a child through some form of assisted or collaborative reproduction.

If a person who did *not* participate in the birth of the child held the child out as his or her own child and created an *in loco parentis* relationship with the child, he or she qualifies as an interested third party (under *Soohoo v. Johnson*)[67] and has *standing to petition the court* as a presumptive parent for custody (and therefore also child support, if desired) or simply for visitation in the best interests of the child.

Meanwhile, we do not want to disincentivize stepparents from developing healthy emotional relationships with their stepchildren or from financially supporting them. Therefore, if a stepparent (a man or woman), begins a romantic relationship with a parent who has a child (whose parentage has been legally established), and he or she emotionally and financially supports that child during the relationship, he or she should not be required to pay child support for that child after the breakup of the adult relationship because parentage was (prior to the romantic involvement) established with regard to the child. If stepparents in such situations choose, they may petition the court for visitation if they can establish that they created an *in loco parentis* relationship with the child and (as in the case of *Soohoo*)[68] established third-party standing. In other words, although the establishment of third-party standing or an *in loco parentis* relationship with a child may be enough to allow a person to petition the court for visitation, it would not and should not, without more, require a person who would not otherwise qualify for custody to be obligated to continue paying financial support. The child born of assisted or collaborative reproduction already has two parents who (because they are the initiating and therefore legal parents) should be bound to continue to provide support for the child. A stepparent who has developed an *in loco parentis* relationship with a child may have standing to petition the court for *visitation*, but he or she would not and should not be responsible for continuing to financially support the child unless he or she explicitly agreed to do so in writing. In

66. *See* Pollard v. Southdale Gardens of Edina Condo. Ass'n, 698 N.W.2d 449, 454 (Minn. Ct. App. 2005).

67. 731 N.W.2d 815 (Minn. 2007).

68. *Id.*

other words, if a person was not involved (did not take an *initiating role* in the *creation* of the child), then, although that person may have held the child out as his or her own child,[69] created an *in loco parentis* relationship with the child,[70] and/or qualified as an interested third party,[71] that person is *not* deemed to be a parent as a matter of law and equity. He or she would need to have participated in the creation of the child to be held to be a legal parent for child support purposes.[72]

With regard to the issue of parental deference, combining the "exceptional circumstances" standard with a mandate for showing "grave and weighty" reasons, the Minnesota Supreme Court in 2002 declared that the parental presumption "is overcome by extraordinary circumstances of a grave (or extremely serious) and weighty (or substantial) nature."[73] In the case of *Simmons v. Simmons*,[74] a former stepparent petitioned for visitation rights claiming *in loco parentis* as a basis. The court held that the Minnesota Statute section 257.022 (since renumbered 257C.08) did not "preclude a former stepparent who was *in loco parentis* to the child from asserting a common-law right to visitation . . . ."[75] The court concluded that Minnesota recognized the common law doctrine of *in loco parentis* and that, because the statute did not specifically repeal, restrict, or abridge the doctrine, section 257.022 extended and supplemented the common law.[76]

In *Estep v. Estep,*[77] a Minnesota District Court found extraordinary circumstances of a grave and weighty nature that justified leaving the

69. MINN. STAT. § 257.55, subdivision l(d) states that a man is presumed to be the biological father of a child if "(d) while the child is under the age of majority he receives the child into his home and openly holds out the child as his biological child."

70. Defined as a deep emotional tie creating a parent-child relationship.

71. Upon the court's analysis (under MINN. STAT. § 257C.03; *see Soohoo*, 731 N.W.2d at 815) of the nature of the relationship between the party and the child, including the length of time the child has resided with the party, and the amount of involvement the interested third party has had with the child during the child's lifetime.

72. *See id.*, where the court found that the "other" parent was an interested third party and had standing to request visitation.

73. *In re* Custody of N.A.K., 649 N.W.2d 166, 175 (Minn. 2002). "The grant of custody of a child to someone other than the natural parent should not occur except for compelling reasons, of course the best interest of a child is a compelling consideration. . . ." *In re* Custody of D.M.P., No. A03-1950, 2004 WL 209451, at *2 (Minn. Ct. App. Sept. 21, 2004).

74. Simmons v. Simmons, 486 N.W.2d 788 (Minn. Ct. App., 1992).

75. *Id.*

76. *Id.* at 791; *See also* Brown v. Brown, 412 A.2d 396 (Md. 1980) (Stepparent signed a separation agreement agreeing to support the stepchild. The separation agreement was incorporated in the judgment of divorce. The court would not enforce the agreement using the contempt power of the court, reasoning the obligation for support was not the court's order relating to family support obligation, but was a contract obligation).

77. *In re* I. A. E, No. A12-0775, 2012 LEXIS Minn. Ct. App. 1227 (Dec. 24, 2012).

child with his grandparents. The "extraordinary circumstances" concept of Minnesota Statute section 257C.03 subdivision 7(a)(1)(iii) is rooted in the common law concept of "exceptional circumstances."[78] Combining the "exceptional circumstances" standard with a mandate for showing "grave and weighty reasons," the Minnesota Supreme Court in 2002 declared that the parental presumption (referring to deference) "is overcome by extraordinary circumstances of a grave and weighty nature."[79]

The Minnesota court in *A.L.R. v. Luna*[80] observed that the phrase "extraordinary circumstances" had never been defined by statute or case law. In an effort to find a definition, the court examined the case law that predated section 257C. Most of the prior cases referencing this phrase referred to the abandonment and unfitness of the biological parent. "Only one published case by this court discusses 'extraordinary circumstances,'" the court said. In *In re Kayachith,*[81] according to the court, the right of a parent is presumptively superior to a third person,[82] but if extraordinary circumstances exist, that right "must always yield to the best interests of the child," and "extraordinary circumstances" require at a minimum

78. Among the relevant comments in prior Minnesota Supreme Court cases, the court in Wallin v. Wallin, 187 N.W.2d 261, 264 (1971), employed the word "extraordinary" as synonymous with "exceptional" (recognizing that the best-interests-of-the-child doctrine is superior to a presumptive parental interest).

79. "The grant of custody of a child to someone other than the natural parent should not occur except for compelling reasons, of course the best interest of a child is a compelling consideration." *In re* Custody of D.M.P., No. A03-1950, 2004 WL 209451 (Minn. Ct. App. Sept. 21, 2004); "Because [the grandmother's] eight-and-one-half years of voluntary custodial care is an extraordinary circumstance and because the district court found that D.M.P.'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]." *Id.* at 4.

80. A.L.R. v. Luna, 830 N.W.2d 163 (Minn. Ct. App., 2013).

81. *In re* Kayachith, 683 N.W.2d 325, 327 (Minn. Ct. App. 2004).

82. *See also In re* Custody of N.A.K., 649 N.W.2d 166, 177 (Minn. 2002).

that the child have a substantial relationship with the potential third-party custodian.[83]

Additionally, Minnesota Statute section 257C.08 subdivision 4 states that "[t]he court shall consider the reasonable preference of the child if the court considers the child to be of sufficient age to express a preference."[84] Because section 257C.08 subdivision 4 limits the class of individuals who may be granted third-party rights to those who have a longstanding parent-child relationship with the child and prohibits the district court from granting parent-like rights if it is not in the child's best interest or if it interferes with the custodial parent's relationship, it may also be concluded that the court's interpretation is narrowly drawn to include the state's compelling interest in protecting the general welfare of children by preserving the relationships of recognized family units.[85]

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83. *Kayachith*, 683 N.W.2d at 327.

> Chapter 257C presumes that a relationship exists between a petitioner seeking custody of a child and the child whose custody is being sought: In addition to alleging that a petitioner is an "interested third party" or other person able to seek custody under Chapter 257C, a petition for custody filed under Chapter 257C "must state and allege" both the "relationship of the petitioner to each child for whom custody is sought" and "the length of time each child has resided with the petitioner." MINN. STAT. § 257C.03, subd. 2(a)(4), (8) (2002). Similarly, in addressing an "interested third party's" petition, the district court "must" consider, among other things, "the amount of involvement the interested third party had with the child during the parent's absence or during the child's lifetime" and "whether a sibling of the child is already in the care of the interested third party." MINN. STAT., § 257C.03, subd. 7(b)(1), (7). Thus, the portions of Chapter 257C applicable to cases involving "interested third parties" require a petition for custody to detail the existing relationship between the petitioner and the child, and contemplate both that the petitioner-child relationship may have existed for the entirety of the child's life, and that the child's siblings, as well as the child him or herself, may be living with the petitioner. For these reasons, whatever the precise definition of the "extraordinary circumstances" that qualify a person as an "interested third party," at a minimum, those circumstances include a substantial relationship between the petitioner and the child that exists when the petitioner petitions for custody.

Id.

84. Since the end of the nineteenth century, the Minnesota Supreme Court has recognized that a young child's best interests are "paramount to the claims of either parent." State *ex rel. Flint v. Flint,* 65 N.W. 272, 273 (Minn. 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*, 187 N.W.2d 261.

85. *In re* Custody of H.S.H.-K., 533 N.W.2d 419, 435–36 (Wis. 1995) (giving weight to evidence that the legal parent consented to and fostered a parent-like relationship between the partner and the child, that the nonlegal parent assumed obligations of parenthood, and that the length of time the partner spent with the child was sufficient to establish "a bonded, dependent relationship parental in nature.").

III. LGBTQ Parents and the Social Contract for Care of Children

Most people would not consider their family's close relationship to be a type of contract. However, the way in which we treat one another and the responsibilities we take on within the confines of a family, although unspoken and unwritten, constitute the basis or foundation of our American jurisprudence. In this country and in every state, we as a society have agreed to certain principles, structures, or institutions as basic and fundamental. Just as spouses take on special obligations to one another and acquire certain rights with respect to each other via marriage, in other instances, one may acquire particular rights and obligations by choice or voluntary consent. Likewise, when an individual voluntarily undertakes the parental role by causing an innocent child to be born, that individual acquires parental rights and obligations as part of the social contract. In the case of procreation, the child needs care. To fail to provide care is to allow harmful consequences to occur. Since the agent is causally responsible for the existence of a child in need of care, the agent is morally responsible under the basic fundamental principles of our society to provide it.[86]

Because changes in our society have reconfigured the different collections of persons who now consider themselves a family, the rights and obligations of parenthood should no longer be grounded in biology or marriage. Rather, the rights and obligations of parents should be viewed as an agreement (or contract) embedded in and derived from the structure of our civil society.[87] Such an unwritten agreement gives rise to the rights and responsibilities of parenthood through a presumed and unspoken arrangement between the prospective parent(s) and the community. Individuals who consent to take on the daunting task of becoming a parent are thereby bound by the obligations of the implicit social contract to care for and provide for the children brought into existence.[88]

It is widely presumed (in so far as American society takes it for granted) that parents are the first legal obligors with respect to the support of their own children. Blackstone concluded that the duty of support was the parents' moral duty because it was "an obligation . . . laid on them

86. *See also*, Mark Vopat, *Contractarianism and Children*, 17 PUB. AFF. Q. 49, 49–63 (2003) (argues that parental obligations are grounded in a social contract between parents and the state).

87. *See* Obergefell v. Hodges, 135 S. Ct. 2584, 2601 (2015) (describing marriage as "a keystone of our social order."

88. Moreover, the state of Minnesota has decided that children have a right to be supported and cared for that may not be bargained away by their caretakers. McNattin v. McNattin, 450 N.W.2d 169, 172 (Minn. Ct. App. 1990).

not only by nature herself, but by their own proper act in bringing them into the world."[89] Support as a moral duty eventually evolved into a legal duty. Today, both parents are equally responsible for the support of their children. Every jurisdiction has legislation imposing the duty of support on parents for their minor children. The general policy underlying the duty of support is that parents, and not the taxpayers, should be responsible for the support of their children. It is, after all, by their own conduct that the child is born.[90] Without the means to reproduce their own biological children, lesbian, gay, and transgender couples rely on the principle of intent to establish their families. There are distinct differences between parents of a child created by accident during heterosexual intercourse and the parents of a child born through ART processes. For example, typically a great amount of thought and often significant financial outlay occurs in ART situations. The conscious decision to parent that corresponds with the process of ART is evidence that the parties intended to create a family.

Disregarding coparent-child relationships does not promote the best interests of the child because deep, meaningful, emotional bonds between a child and his or her coparent can be irreparably severed. A legal parent could essentially cut off a coparent from seeing their child, or a coparent could renounce her responsibilities as a parent and refuse to support (or even acknowledge) their child. While same-sex coparents should be allowed to privately order their lives, the courts should take notice of agreements between coparents as evidence of their intent.[91] In most jurisdictions, there is no need for the parents to be married, and only paternity or maternity (filiation) need to be demonstrated for a child support obligation to be found by a competent court. The financial support of a child may also operate through the principle of estoppel where a de facto parent is *in loco parentis* for a sufficient time to establish a permanent parental relationship with the child or children.

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89. William Blackstone, Commentaries on the Laws of England 447 (Cooley 3d ed. 1884).

90. *See* Elisa B. v. Superior Court of El Dorado Cty., 117 P.3d 660 (Cal. 2005) (quotation marks omitted) ("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."); *see also 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 . . . .")

91. *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, 293 (2005) (citing Palmore v. Sidoti, 466 U.S. 429, 434 (1984)).

In *Elisa B.*,[92] the nonbiological mother sought to avoid parental obligations to the twins she had been raising with her partner. The court focused on the marriage-like, adult relationship as a way to understand the formation of the parent-child relationship that had developed during the six years the parties had lived together as a family. The California court found that the family unit formed by the same-sex couple provided evidence of their intent to co-parent and demonstrated parental conduct. The court found that the couple acted in all respects as a family and that a person who uses reproductive technology is accountable as a de facto legal parent for the support of the child.[93] The California court found that Elisa B. was obligated to support the twins under the doctrine of equitable estoppel.[94] The court found that the partner agreed to have the children with the respondent and the partner relied on the respondent's promise to raise and support the children.[95] The court stated that refusing to find Elisa to be a legal parent "is inconsistent with the UPA's goal of providing equality for nonmarital children with the equal protection guarantees of the California and federal constitutions."[96]

In a similar case pending as of this writing before the Supreme Court of the State of Hawai'i,[97] Lambda Legal urged the court to uphold a lower court ruling that, just like different-sex spouses, same-sex spouses must be treated as the presumed parents of children born during their marriage, with equal rights and equal responsibilities, including legal parentage and child support. Senior Attorney Peter Renn said,

> Equal rights come with equal responsibilities. Like other married couples, same-sex spouses can walk away from each other but not from their obligations to their children . . . . Families are formed in different ways but the same rule applies: when a married couple decides to bring a child into this world, that child has two legal parents, regardless of their gender. A non-biological parent can't invoke biology as a shield to evade parental responsibilities, just as a biological parent can't wield biology as a sword to cut off a

92. *Elisa B.*, 117 P.3d at 660.
93. *Id.* at 115.
94. *Id.*
95. *Id.*
96. *Id.*
97. *Supreme Court of Hawai'i Hears Parenting Case Testing Marriage Equality Ruling*, LAMBDA LEGAL (Dec. 14, 2017), https://www.lambdalegal.org/news/ha_20171214_hawaii-parenting-case.

> non-biological parent's rights . . . [T]here is no skim-milk marriage; marriage is marriage—for everyone.[98]

In what is considered to be a landmark decision, New York's highest court held that a person need not have a biological or adoptive relationship with a child to be considered a parent, overturning precedent by ruling that "the definition of 'parent' established by this court 25 years ago in *Alison D.* has become unworkable when applied to increasingly varied familial relationships."[99] It further held that "where a partner shows by clear and convincing evidence that the parties agreed to conceive a child and to raise the child together, the nonbiological, nonadoptive partner has standing to seek visitation and custody."[100]

Through the line of cases culminating in *Obergefell*,[101] lesbian, gay, bisexual, and transgender people finally became entitled to dignity and equality. These decisions represent incredible successes for the LGBTQ rights movement. Some who support LGBTQ equality, however, argue that these victories came at a great cost: the entrenchment of the privileged supremacy of marriage and the marital family.[102] Although it has surely lessened over time, bias against those living in nonmarital families continues to be widespread.[103] 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.[104] 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 more than 1,500 percent since 1960.[105] Today, over 40 percent 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.[106] Individuals who marry and stay married are disproportionately likely to be white and more affluent.[107]

98. *Id.*
99. Brooke S.B. v. Elizabeth A.C.C., 61 N.E.3d 488 (N.Y. 2016) (citing *In re* Alison D. v Virginia M., 572 N.E.2d 27 (1991)).
100. *Id.*
101. *Obergefell*, 135 S. Ct. at 2584.
102. Courtney G. Joslin, *The Gay Rights Canon and the Right to Nonmarriage*, 97 B.U. L. Rev. 425 (2017) (a progressive rereading of *Obergefell* that supports, rather than forecloses, the extension of constitutional protection to those living outside marriage).
103. Courtney G. Joslin, *Leaving No (Nonmarital) Child Behind*, 48 Fam. L.Q. 495 (2014)
104. *Id.*
105. *Id.*
106. Courtney G. Joslin, *Marital Status Discrimination 2.0*, 90 B.U. L. Rev. 805 (2015).
107. *Id.*

The truth is that reliance on formal family status has profound racial and class implications. According to a 2010 Pew Study, fifty years ago there was virtually no difference by socio-economic status in the proclivity to marry: 76 percent of college graduates and 72 percent of adults who did not attend college were married in 1960. By 2008, that small gap had widened to a chasm: 64 percent of college graduates were married, compared with just 48 percent of those who had attained an educational level of high school or less.[108] Using marriage as a prerequisite for critical legal remedies and protections has a disproportionately negative effect not only on LGBTQ people but also on lower-income people and people of color.

In many same-sex intimate relationships, one of the parties will be without a biological connection to the child, and a court must decide how to evaluate and determine the rights and duties of these mothers and fathers because there will be no DNA test available to prove the paternity (or maternity) of these putative parents. Jurisdictions across the country are having to grapple with how to fashion and update their statutes in the context of all of their other long-standing statutes regarding the formation of a family and the rights of children born to persons whose life situations may not meet the standard definition of the "average" American family, upon which decades of case law and statues are based. While "parents and families have fundamental liberty interests in preserving" such 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.[109] Children also have an essential, constitutionally protected interest in preserving the emotional attachments they develop with adult parent figures from shared daily life.[110]

A married man whose wife gives birth to a child is presumed the father of that child under Minnesota statutes regardless of biology. If a couple adopts a child, the child's birth certificate is legally changed to the names of the new legal parents. Our laws have created legal fictions to accommodate some of the realities of modern parenthood. 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 in a gestational mother with no biological

108. Pew Research Center, The Decline of Marriage and the Rise of New Families 21, 64 (Nov. 18, 2010), https://www.pewsocialtrends.org/2010/11/18/the-decline-of-marriage-and-rise-of-new-families/.

109. Troxel v. Granville, 530 U.S. 57, 88–89 (2000).

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

link to the child she gives birth to.[111] In other words, a woman who carries a fetus to term may still be without a biological (or DNA) connection despite having been, in a sense, the biological mother.

In the Mississippi case of *Strickland v. Day*,[112] the court stated, "[t]oday's ruling by the Mississippi Supreme Court adheres to the U.S. Supreme Court's 2015 marriage ruling in *Obergefell v. Hodges* by calling for greater respect for the families formed by same-sex couples and their recognition as full-fledged parents of their children. The Court reversed the trial court's ruling that Strickland was a non-parent and named her on her son's birth certificate as a parent." In the U.S. Supreme Court decision in *Pavan v. Smith*,[113] a case from Arkansas in which two same-sex married couples fought for both parents in each couple to be listed on the Department of Health birth certificates, the families were ultimately allowed to receive birth certificates amended to include both female parents.

IV. Minnesota's Second-Parent Adoption Requirement Creates a Second-Class Parental Status

Even though Minnesota allows both same-sex parents to be listed on the birth certificate,[114] 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 a second-parent adoption. These children, therefore, are left vulnerable. Hundreds, if not thousands, of children are at risk of being abruptly cut off from one of the only parents they have ever known.[115] Although embracing second-parent adoptions has allowed the Minnesota courts to accept the idea that children can have two legal

111. Also, along the line of technological advances, it was recently reported that one of the breakthroughs in 2018 was artificial embryos. Erin Winick et al., *10 Breakthrough Technologies 2018*, MIT Tech. Rev., https://www.technologyreview.com/lists/technologies/2018/ (last visited July 10, 2019).

112. Strickland v. Day, 239 So.3d 486 (2018).

113. 137 S. Ct. 2075 (2017).

114. Minnesota Department of Health, https://www.health.state.mn.us/people/vitalrecords/amend.html. www.health.state.mn.us/divs/chs/osr/birthreg/bregmanual.pdf; *see* Pavan v. Smith, 137 S. Ct. 2075, 2078 (2017). (The Supreme Court held that Arkansas's 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.")

115. *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, 293 S.W.3d 1 (Mo. Ct. App. 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).

parents of the same sex, it nevertheless has placed the nonbiological parent into a sort of second-class parental status. Same-sex co-parents, quite reasonably, have resented having to adopt their own children. Requiring same-sex parents to adopt their own child to be legally recognized as parents, instead of allowing them to enjoy the same legal treatment as opposite-sex couples, disparages their choices and diminishes their parenthood. The rules must be applied equally to all parents regardless of gender or marital status because the interest in certainty for the children involved "is extremely strong in this area; and society's interest in assuring, to the extent possible, that each child begins life with two parents is not less so" because that policy underlies the common-law presumption of legitimacy, which is "one of the strongest and most persuasive known to the law."[116] All children's relationships with people they view as their parents, regardless of marital status, deserve to be protected.[117] 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.[118] 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 are at stake—intimate relationships between adults or a parent's relationship with his or her child. Failure to apply intent- and conduct-based parentage 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.

116. In the Matter of HM v. ET, 930 N.E.2d 206 (N.Y. 2010), quoting In the Matter of Findlay, 253 N.Y. 1, 7 (1930); *see also* Michael H. v Gerald D., 491 U.S. 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"). *See also* Debra H. v. Janice R., 931 N.E.2d 184 (N.Y. 2010) (Smith, J., concurring) ("The policy has been adopted as a matter of statute in particular circumstances . . . and, . . . has been adapted as a matter of common law to protect children born by ADI. . . . I would apply the common-law presumption to the facts of these cases and would hold that where a child is conceived through ADI by one member of a same-sex couple living together, with the knowledge and consent of the other, the child is as a matter of law—at least in the absence of extraordinary circumstances—the child of both.").

117. In *Lawrence v. Texas*, 539 U.S. 558, 578 (2003), the Supreme Court established that adult intimate relationships—even nonmarital ones—are entitled to some level of constitutional protection. *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).

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

In Massachusetts, in *Partanen v. Gallagher*,[119] the court declined to read into the statute any provision that would leave children born to unmarried couples, using the same reproductive technology, with only one parent. The court held that children born to one same-sex spouse are legal children of both spouses, even where one spouse is not biologically related to the children. Further, the *Partanen* court found that a biological connection is not a *sine qua non* to the establishment of parentage under the Massachusetts statute. The court framed the issues as follows: "The question in this case is not whether courts may impose a second parent onto a single parent family, but whether this was, in fact, a single parent family in the first place. Partanen's allegation is that, from the beginning, the children had two parents, both of whom were jointly involved in the children's lives."[120] As a result of the ruling of the court in this case, *an entire class of parents* previously cut out of involvement and decision-making in their children's lives now have access to the full range of protections of legal parentage. Most importantly, the case highlights the great diversity of families, where legal parentage can arise from marriage, adoption, and genetic ties, as well as through conduct.

In Minnesota, paternity can be established by court order or by the parents voluntarily executing a recognition of parentage ("ROP") document.[121] Under the ROP statute, individuals cannot sign ROPs (as currently written) unless they 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).[122] Meanwhile, in all fifty states, a husband is presumed to be the legal parent of a child born to his wife.[123] In addition, either by case law

119. *Partanen v. Gallagher,* 59 N.E.2d 1133 (2016), referencing *Hunter v. Rose,* 975 N.E.2d 857 (Mass. 2012).

120. *Partanen,* 59 N.E.2d. at 1139.

121. "Recognition of Parentage," MINN. STAT. § 257.75, subd. 1. An ROP gives the father a basis for bringing an action to establish custody, etc., under MINN. STAT. § 257.541 subd. 3 (2017). 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. Further, an ROP provides a basis for the mother (or the county) to bring a support claim.

122. MINN. STAT. § 257.75 was enacted so that Minnesota could comply with federal IV-D program requirements that a biological parent have a quick and 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. *See* U.S. DEP'T OF HEALTH & HUMAN SERVICES, OFFICE OF FEDERAL CHILD SUPPORT, ESSENTIALS FOR ATTORNEYS IN CHILD ENFORCEMENT ch. 8 (3rd ed. 2000), https://www.acf.hhs.gov/sites/default/files/programs/css/essentials_for_attorneys_ch08.pdf.

123. *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.")

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.[124] Prior to the enactment of these statutes, various courts across the country prevented fathers from asserting nonpaternity by applying the doctrine of equitable estoppel based on the father's consent to the procedure and the wife's reliance to her detriment in the wake of an attempt to disclaim paternity.[125] Under a gender-neutral framework, these statutes 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 Minnesota Statute section 257.56 subdivision 1 should apply in a marital-status-neutral 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."[126]

In May of 1999, in a "co-maternity" situation in which one woman was the gestational mother and the other was the genetic mother, the California court granted the judgment of parentage—the first of its kind.[127] The facts of this California case were unique in that one mother donated the eggs and, after their fertilization by a presumably anonymous donor, the other mother carried the fetus to term. The court decided that, while gestation is one means of establishing legal parentage, gestation is insufficient on its own. Rather than focusing on the biological composition of the child, the court applied an intent-based test derived in principle from cases involving surrogate mothers. In consideration of the equitable interests, the court found that both mothers intended to raise the child as their own and thus both were legally recognized parents. In *Karen T. v Michael T.*,[128] a New York court applied the equitable estoppel doctrine to hold a lesbian partner

124. Minn. Stat. § 257.56, subds. 1, 2 (2017). *But cf. In re* Matter of Welfare of C.M.G., 516 N.W.2d 555 (Minn. Ct. App. 1994); *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. For obvious reasons, however, the presumption based on consent to insemination is not rebuttable by evidence of lack of genetic connection. In other words, the lack of a genetic tie cannot rebut the presumption of parentage when the parentage presumption is not based on a genetic tie.)

125. *In re* J.M.M. *ex rel.* Minors, 890 N.W.2d at 750.

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

127. *See* Audra Elizabeth Laabs, *Lesbian ART*, 19 L. & Ineq. 65, 73 n.61 (2001) (citing to a case in California in which a judge determined that both partners in a lesbian couple could be recognized as parents because they both intended to parent the child).

128. Karen T. v Michael T, 484 N.Y.S.2d 780 (N.Y. Fam. Ct. 1985).

of a woman responsible for the support of the woman's two children where the lesbian partner had agreed to the children's conception by artificially inseminating their mother. The court stated that "her course of conduct . . . brought into the world two innocent children."[129]

Equitable parents[130] and legal parents are indistinguishable from the perspective of the child. In *Soohoo v Johnson*,[131] the Minnesota court awarded visitation after finding that Soohoo had resided with the children for more than two years, that Soohoo was *in loco parentis*, and that Soohoo and the children had developed deep emotional ties creating a parent-child relationship.[132] And, although the court did not find that the children had been abused or neglected by their natural parent, the court nevertheless found that the other parent was an interested third party. The court in *Soohoo* also 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.[133] In *LaChapelle v. Mitten*,[134] 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 mom and her mother's former lesbian partner (as her "emotional" parent) and with the sperm donor as her biological father. Despite his biological connection to the child, he was awarded, not custody, but visitation only.

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129. *Id.* at 784. In *In re* Shondel J. v Mark D., 7 N.Y.3d 320 (2006), the New York court held that it had "inherent equity powers and authority pursuant to [the state's statute] to determine who is a parent and what will serve the child's best interests."

130. "Equitable parent" is also referred to in other jurisdictions as the "initiating" parent, the "emotional" parent, the intended parent, or the psychological parent.

131. 731 N.W.2d at 815.

132. *See also In re* Custody of H.S.H.-K., 533 N.W.2d at 435–36 (giving weight to evidence that the legal parent consented to and fostered a parent-like relationship between the partner and the child, that the nonlegal parent assumed obligations of parenthood, and that the length of time the partner spent with the child was sufficient to establish "a bonded, dependent relationship parental in nature.").

133. The court holds immense power in its determining the best interests of a child standard. The doctrine of *parens patriae* recognizes that "states may intrude on parental rights in order to protect the general interest in [a] youth's well-being." *Soohoo v. Johnson*, 731 N.W.2d at 822 (internal quotations omitted) (citing Prince v. Massachusetts, 321 U.S. 158, 166 (1944)). For example, the court will step in and terminate a parent's parental rights if it deems the child to be in need of protection or services (CHIPS) to protect the child. *Id*. The Court explained in *Prince* that the state, as *parens patriate,* may restrict the parent's control by requiring school attendance, regulating or prohibiting the child's labor, and in many other ways. "[T]he state has a wide range of power for limiting parental freedom and authority in things affecting the child's welfare."

134. LaChapelle v. Mitten, 607 N.W.2d 151 (Minn. 2000).

In *Matter of Brooke S.B. v Elizabeth A.C.C.*, the New York Court of Appeals decided that it would "no longer engage in the 'deft legal maneuvering' necessary to read fairness into an overly-restrictive definition of 'parent' that sets too high a bar for reaching a child's best interest and does not take into account equitable principles."[135] In *T.B. v. L.R.M.*,[136] a Pennsylvania court rebuffed the litigant's challenge to the common law doctrine of *in loco parentis* as interfering with her parental rights. The court held that the child's best interest in maintaining a parental relationship may trump the parent's constitutional right to autonomy. The 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."[137] Likewise, a nonbiological parent standing *in loco parentis* must not be allowed to disavow her obligations simply because of her nonbiological status.

While *Obergefell*[138] addressed the right to marry, it also pronounced that "'choices concerning contraception, family relationships, procreation, and childrearing' are protected by the Constitution."[139] In his dissent, Chief Justice Roberts observed that the Court had now set aside the "traditional, biologically rooted" understanding of marriage.[140] The Court also held that the core of the parent-child relationship protected by the Due Process Clause derives neither from biology nor legal status but rather from the emotional bonds that develop between family members as a result of a shared daily life.[141] The Court stated that freedom from governmental interference with family relationships and child rearing is

135. 28 N.Y. 3d 1, 26 (2016), http://courts.state.ny.us/Reporter/3dseries/2016/2016_05903.htm, quoting Debra H. v. Janice R.,14 N.Y.3d 576, 606–608 (2010) (Ciparick, J., concurring).

136. 753 A.2d 873 (Pa. Super. Ct. 2000).

137. *Id.* at 919 (quoting J.A.L. v P.P.H., 682 A.2d 1314, 1322 (Pa. Super. Ct. 1996)).

138. *Obergefell*, 135 S. Ct. at 2584.

139. McGaw v. McGaw, 468 S.W.3d 435, 454 (Mo. Ct. App. 2015) (Clayton, J., concurring in part and dissenting in part) (quoting *Obergefell,* 135 S. Ct. at 2599). In its majority opinion, 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.

140. *Obergefell*, 135 S. Ct. at 2614.

141. Lehr v. Robertson, 463 U.S. 248, 261 (1983) (Parental rights do not spring full-blown from the biological connection between the parent and child. They require relationships more enduring) (quoting Caban v. Mohammed, 441 U.S. 380, 397 (1979) (Stewart, J., dissenting)); Griffith v. Pell, 881 So.2d 184, 186 (Miss. 2004) (finding that a biological father does not have any paternity rights where "he fails to establish that he has had a substantial relationship with the child"). *See also In re* P.C., 62 S.W.3d 600, 603 (Mo. Ct. App. 2001).

a fundamental, basic liberty.[142] Biology alone is neither necessary nor sufficient to establish a constitutionally protected familial relationship. The case of *Quillion v. Walcott*[143] stands for the proposition that "biology alone is not determinative of legal parenthood." The Court recognized that a relationship between a child and an adult who has acted as a parent is constitutionally protected.[144] Needless to say, there is no legal basis for any assertion that the law favors biological parentage over the decisions of unmarried couples—both opposite-sex and same-sex—to adopt children or conceive children through assisted reproduction.[145]

V. Conclusion

The importance of intent and conduct, even in the presence of biological relationships, cannot be overemphasized. In fact, cases regarding unmarried fathers, including the Supreme Court's cases from the 1970s and 1980s, should be recast as functional, rather than biological, parentage cases. Biology is generally only the basis for, not the realization of, parental rights for unmarried fathers: "[A] man who proves himself through genetic testing to be the biological father has no parental rights unless . . . he . . . demonstrates a full commitment to his parental responsibilities."[146] Because all children's relationships with people they view as their parents, regardless of marital status, deserve to be protected, it is time that biology is relegated to the background as an inconsequential feature or consideration, rather than a starting point.[147] Indeed, such a result is constitutionally required. Laws that deny protections to children born to unmarried parents are subject to

142. Meyer v. Nebraska, 262 U.S. 390, 399, 401 (1923).

143. Quillion v. Walcott, 434 U.S. 246, 256 (1977).

144. *Prince v. Massachusetts*, 321 U.S. at 159, 164.

145. Courtney G. Joslin et al., *Amicus Brief of Family and Child Welfare Law Professors on the Merits of United States v. Windsor*, UC Davis Legal Studies Research Paper No. 329; B.U. School of Law, Public Law Research Paper No. 13-12.

146. Petition for Review of Decision of the Court of Appeal First Appellate District at 17; *see Nicholas H.,* 46 P.3d 932 (Cal. 2002) (No. S100490).

147. In *In re* Salvador M., 4 Cal. Rptr. 3d 705 (Cal. Ct. App. 2003), the court explained that a "familial relationship . . . resulting from years of living together in a purported parent/child relationship is 'considerably more palpable than the biological relationship.'" *Id.* at 708 (quoting *In re* Nicholas H., 46 P 3d 932, 938 (Cal. 2002)) (Not only did the court find that the "holding out" presumption can apply to nonbiological mothers, but it did so outside the context of a marriage-like relationship.) The New Mexico Supreme Court and a Colorado appellate court both held that unmarried women could be legal parents under the "holding out" provision of their parentage statutes in, respectively, Chatterjee v. King, 280 P.3d 283 (N.M. 2012) and *In re* Parental Responsibilities of A.R.L., 318 P.2d 581 (Colo. App. 2013).

heightened constitutional scrutiny and are presumptively unconstitutional.[148] It is time—in fact it is long overdue—for the Minnesota legislature and the courts to begin structuring their rulings based on the "doctrine of intentional parenthood" instead of, as the Minnesota Court of Appeals stated in *In re Welfare of C.M.G.*, the "original lodestar of the parentage act—that is, biolog[y]."[149]

148. Pew Research Center, The Decline of Marriage and the Rise of New Families 21, 64 (Nov. 18, 2010), https://www.pewsocialtrends.org/2010/11/18/the-decline-of-marriage-and-rise-of-new-families/.

149. *In re* Welfare of C.M.G, 516 N.W.2d. 555 (Minn. Ct. App., 1994).