# AN INEQUITABLE MEANS TO AN EQUITABLE END: WHY CURRENT LEGAL PROCESSES AVAILABLE TO NON-BIOLOGICAL, LGBTQ+ PARENTS FAIL TO LIVE UP TO *OBERGEFELL V. HODGES*

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ABSTRACT

*In 2015, the Supreme Court officially recognized same-sex marriage across all fifty states. In the Court's majority opinion, Justice Kennedy characterized marriage as including a "constellation of benefits" that the state affords to married couples. One such benefit includes the right to start a family and have that family be legally recognized. As same-sex couples necessarily must rely on nontraditional means of procreation, such as gestational surrogacy, in vitro fertilization treatments, and the use of sperm donors, one spouse often has a biological connection to the child while the other spouse does not. For these couples, parental recognition requires either undergoing arduous, expensive, and invasive legal processes to cement both spouses' full legal parental status, or leaves the couple in a potentially precarious situation where their legal rights as parents may be challenged. This uncertainty is largely rooted in states' marital presumptions, which decide who is granted automatic legal parenting rights when a child is born within a marital relationship. As a majority of marital presumptions reflect heteronormative assumptions surrounding family, non-biologically same-sex spouses are not afforded automatic recognition of parental rights.*

*This Note examines three ways in which a non-biologically related same-sex spouse may try to gain parental legal rights: second-parent adoption, stepparent adoption, and parentage judgment. Ultimately, this Note argues that, in order for state law to fully uphold the Court's*

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*holding in* Obergefell v. Hodges*, states' application of their marital presumption must not turn on whether or not the parent and child have a biological connection. States can do that by centering their marital presumption around a multi-focal framework that presumes parenthood where a person intends to bring about the birth of their child, functions as that child's parent, and where the resulting parent-child relationship is such that it is in the best interest of the child to be legally recognized as the child of that parent.*

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## INTRODUCTION

> "As the State itself makes marriage all the more precious by the significance it attaches to it, exclusion from that status has the effect of teaching that gays and lesbians are unequal in important respects. It demeans gays and lesbians for the State to lock them out of a central

> institution of the Nation's society. Same-sex couples, too, may aspire to the transcendent purposes of marriage and seek fulfillment in its highest meaning."[1]

While procreation methods have rapidly advanced throughout the last century, the law's recognition of parental rights has not. Currently, all fifty states determine parental rights via a state marital presumption[2]—a civil law that dictates under what circumstances legal parental status is assumed and when it is not.[3] Based in English common law, the presumption has traditionally been used as a means for granting paternal rights to a husband when his wife has a child, thus allowing him to attain full legal parental rights without having to prove paternity or go through the adoption process.[4] However, if a state's marital presumption is biologically determinative,[5] the non-biologically related parent will always ultimately fail to achieve full legal parental status in the eyes of the law, regardless of whether the child was the intentional product of a marital relationship.[6]

These same-sex couples must choose between two options: (1) risk not cementing their legal parental rights over their child, making themselves vulnerable to potential legal conflict should

1. Obergefell v. Hodges, 576 U.S. 644, 670 (2015).

2. Frank J. Bewkes, *Unequal Application of the Marital Presumption of Parentage for Same-Sex Parents*, CTR. FOR AM. PROGRESS (Nov. 25, 2019, 9:03 AM), https://www.americanprogress.org/issues/lgbtq-rights/news/2019/11/25/477923/unequal-application-marital-presumption-parentage-sex-parents/.

3. *See* James J. Vedder & Brittney M. Miller, *Presumptions in Paternity Cases: Who Is the Father in the Eyes of the Law?*, 40 FAM. ADVOC. 26, 27 (2018).

4. *See id.*

5. "Biological determinism" refers to "the idea that most human characteristics, physical and mental, are determined at conception by hereditary factors passed from parent to offspring." Garland Edward Allen, *Biological Determinism*, ENCYC. BRITANNICA, https://www.britannica.com/topic/biological-determinism (Sept. 25, 2018). In the context of the marital presumption, biological determinism mandates that parental status is determined solely on the basis of biological connection between the child and parent. Jana Singer, *Marriage, Biology, and Paternity: The Case for Revitalizing the Marital Presumption*, 65 MD. L. REV. 246, 265 (2006).

6. *See* Christopher YY. v Jessica ZZ., 69 N.Y.S.3d 887, 892–93 (App. Div. 2018).

their parental rights be challenged; or (2) pursue additional legal processes to ensure full legal parental recognition. The process of obtaining full legal parental rights, such as via second-parent adoption or stepparent adoption, is often an arduous, expensive, and invasive process.[7] Additionally, the necessity of undergoing the process itself can be degrading as the person is required to take extra steps in order to be legally recognized as a parent over their own child.[8] For these reasons, same-sex couples face an inherently unfair choice when it comes to legal parental rights over their child.

While legal protections for LGBTQ+ parents seeking full recognition as a parent under the law are insufficient,[9] the Supreme Court has taken affirmative actions to recognize the legal legitimacy of non-traditional families.[10] In 2015, the Court recognized same-sex couples' right to marry and, in affirming this right, characterized marriage as a "constellation of benefits" shared between two consenting adults.[11] Integral to this "constellation of benefits" is a married couple's right to have a legally recognized family, regardless of whether that family comes about via traditional or non-traditional means.[12] However, states with marital presumptions based on traditional notions of marriage fail to fully grant married same-sex couples the constellation of benefits to which they are entitled. Specifically, same-sex spouses who have used innovative procreational means to start a family, thus resulting

7. *See infra* Part III.

8. *See infra* Part III.

9. *See generally Snapshot: LGBTQ Equality by State*, MOVEMENT ADVANCEMENT PROJECT, https://www.lgbtmap.org/equality-maps/ (last visited Nov. 11, 2021) (providing an overview of laws that affect LGBTQ+ individuals in all fifty states, including anti-discrimination laws and laws related to family planning and recognition).

10. *See* Obergefell v. Hodges, 576 U.S. 644, 670 (2015) (holding that same-sex couples have the right to marry); *see generally* Denise A. Skinner & Julie K. Kohler, *Parental Rights in Diverse Family Contexts: Current Legal Developments*, 51 FAM. RELS. 293 (2002) (discussing case law surrounding diverse families).

11. *Obergefell*, 576 U.S. at 646.

12. *See generally* Douglas NeJaime, *Marriage Equality and the New Parenthood*, 129 HARV. L. REV. 1185, 1236–40 (2016) [hereinafter NeJaime, *Marriage Equality*] (detailing the implications of marriage equality on parental recognition).

in only one parent having a biological connection to the child,[13] must grapple with the reality that the non-biological parent's legal parental status over their[14] own child is precarious and may not be recognized under state law.[15]

States can ensure equal parental rights for same-sex couples by restructuring their marital presumption to be non-biologically determinative and instead place emphasis on the social realities of parenting that do not conform to the ideas of a traditional nuclear family. States can implement this restructuring by adopting a multi-factor balancing test that centers the marital presumption around considerations of intent, functionality, and the best interest of the child. Overall, this multi-focal framework allows states to retain their individual policy preferences while ensuring an equitable basis for assigning parental rights in line with the Supreme Court's *Obergefell* decision.[16]

Part I of this Note provides an overview of the constitutional basis of parental rights, focusing on the historical basis of the marital presumption and the implications of the Court's holdings in *Obergefell* and *Pavan v. Smith*. Part II further examines how states implement their marital presumptions. Part III outlines three avenues a non-biologically related same-sex parent may pursue in order to solidify their legal parental rights: second-parent adoption, stepparent adoption, and parental judgment. This Part also explains why each of these

13. An increasing number of same-sex couples choose family-planning methods that result in one spouse being biologically related to the child, while the other lacks biological relation. Such methods include where a lesbian couple undergoes in vitro fertilization using a sperm donor and one of the spouse's eggs or where a gay couple uses the sperm of one spouse and the egg of a donor that is then carried via surrogate. *See Intended Parents: Surrogacy or Adoption? Possible Baby Options for Gay Couples*, SURROGATE.COM, https://surrogate.com/intended-parents/surrogacy-for-lgbt-parents/baby-options-for-gay-couples/ (last visited Nov. 11, 2021).

14. In an effort to be inclusive of all gender identities, this Note will use "they/them/their(s)" pronouns to refer to a singular person of an unspecified gender.

15. *See* Sabra L. Katz-Wise, *Co-Parent Adoption: A Critical Protection for LGBTQ+ Families*, HARV. HEALTH PUBL'G: HARV. HEALTH BLOG (Feb. 25, 2020), https://www.health.harvard.edu/blog/co-parent-adoption-a-critical-protection-for-lgbtq-families-2020022518931.

16. *See* discussion *infra* Part IV.

methods fails to live up to the full constellation of benefits afforded by *Obergefell* despite granting varying levels of legal parental rights. Finally, Part IV proposes a three-factor model upon which states can base their marital presumption. This model grants automatic parental rights to both parents, regardless of biological relation.

## I. BACKGROUND: THE RIGHT TO PARENT & THE RIGHT TO MARRY

The following Section A focuses on the broad, constitutional basis of parental rights and details the Court's evolving jurisprudence regarding the parent-child relationship within the context of marriage equality. Section B then outlines the Court's holding in *Obergefell*, which officially recognized same-sex marriage across all fifty states,[17] and evaluates the extent of marital rights within the context of family planning and parental recognition.

### A. *Parent-Child Relationships as a Fundamental Right*

Modern legal parental rights encompass a parent's right to protect their child's wellbeing.[18] These rights include an array of decision-making privileges that parents have in deciding how to raise their children.[19] Although the scope of parental rights varies by state, parental rights generally include the right to: assume physical custody; make decisions regarding fundamental personal matters, including educational, religious, and medical decision-making; and enter into contracts on the child's behalf.[20]

17. Obergefell v. Hodges, 576 U.S. 644, 675–76 (2015).

18. Jennifer Corbett, *What Are Parental Rights?*, LEGALMATCH, https://www.legalmatch.com/law-library/article/what-are-parental-rights.html (May 18, 2021).

19. *Id.*

20. *Id.*; Lauren Wallace, *Child's Best Interest Standard*, LEGALMATCH, https://www.legalmatch.com/law-library/article/childs-best-interest-standard.html (Nov. 21, 2018). In child custody disputes, states typically apply a "best interest of the child" standard, which requires the court to evaluate whether the child's potential living situations are in that child's best interests. *See id.* In coming to a decision, the court may consider: the emotional ties between the child, parent, and siblings; any occurrences of domestic violence in the home; and

Additionally, the Supreme Court recognizes a variety of parental rights as being fundamental under the Fourteenth Amendment's Due Process Clause, including the right "to make decisions concerning the care, custody, and control of their children."[21] In *Meyer v. Nebraska*, the Court first established that parents have a fundamental right to "establish a home and bring up children" and "to control the education of [those children]."[22] Two years later, in *Pierce v. Society of Sisters*, the Court held that a child is not a "mere creature of the State," and affirmed a parent's right to "direct the upbringing and education of children under their control."[23]

Further, the Court has regularly held that history and tradition shape parental rights, explaining in one case that "the Constitution protects the sanctity of the family precisely because the institution of the family is deeply rooted in this Nation's history and tradition."[24] In line with these traditions, the Court has, at times, denied parental rights to biological parents where the relationship between parent and child fail to conform with the nuclear family archetype, such as in the case of *Michael H. v. Gerald D.*, where the Court held that there is no constitutional right for an adulterous biological father to be recognized over a marital father as a legal parent.[25] However, most recently, the Court's plurality opinion in *Troxel v. Granville* noted the "demographic changes of the past century [that]

the child's wishes. *See* FLA. STAT. § 39.810 (2021); DEL. CODE ANN. tit. 13, § 722 (2021); 705 ILL. COMP. STAT. 405/1-3 (2021). However, as the factors that courts consider vary from state to state, what one state views as being within the best interest of a child may differ from that of another. *See* Wallace, *supra*. For example, not all states consider the child's wishes in custody cases, while others will allow for children of a certain age to specify which parent they would like to live with. *See infra* Section IV.C (incorporating a best interest of the child standard within the structure of the marital presumption).

21. Troxel v. Granville, 530 U.S. 57, 66 (2000); *id.* at 65 ("[T]he interest of parents in the care, custody, and control of their children—is perhaps the oldest of the fundamental liberty interests recognized by this Court."); *see also* Quilloin v. Walcott, 434 U.S. 246, 255 (1978) ("We have recognized on numerous occasions that the relationship between parent and child is constitutionally protected.").

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

23. Pierce v. Soc'y of Sisters, 268, U.S. 510, 534–35 (1925).

24. Moore v. City of East Cleveland, 431 U.S. 494, 503 (1977).

25. Michael H. v. Gerald D., 491 U.S. 110, 130 (1989).

make it difficult to speak of an average American family," therefore recognizing the challenges of following a strict, traditions-based fundamental rights framework.[26]

The Court has also grappled with gender roles within parenting rights, specifically addressing whether maternal rights should be favored over paternal ones.[27] In *Stanley v. Illinois*, the Court held that, under the Fourteenth Amendment's Equal Protection Clause, the state cannot deprive an unwed father of his parental rights without first holding a hearing to determine his fitness as a parent.[28] In its holding, the Court invalidated an Illinois law that automatically classified children of unwed parents as wards of the state upon the death of their mother, essentially stripping the father of parental rights based solely on his paternal status.[29] Justice Stewart further highlighted the connection between gender roles and parental rights in *Caban v. Mohammed*.[30] Writing for the dissent, Justice Stewart noted that "[p]arental rights do not spring full-blown from the biological connection between parent and child. . . . The mother carries and bears the child, and in this sense her parental relationship is clear. The validity of the father's parental claims must be gauged by other measures."[31] These cases reveal that, in the eyes of the Court, the role of biology in assigning and recognizing parental rights can vary depending on whether that parent is a biological mother or father. In evaluating these rights, the Court has placed greater weight on maternal connection, citing the act of giving birth alone as

26. *Troxel*, 530 U.S. at 63–64.

27. *See* Stanley v. Illinois, 405 U.S. 645, 658 (1972).

28. *Id.*

29. *Id.* at 658–59. Although the Court's opinion did not explicitly focus on the implications of gender roles within parenting, the Court nonetheless held that a state cannot presume that a father is unfit "solely because it is more convenient to presume [that single, unwed fathers are unfit parents] than to prove." *Id.* at 658. More recently, the North Carolina Supreme Court held that an unwed father who has acknowledged paternity over his child has an equal right to legal custody as the child's mother. Rosero v. Blake, 581 S.E.2d 41, 51 (N.C. 2003) ("A mother's right to the custody of her illegitimate child is no longer superior to that of the child's father.").

30. Caban v. Mohammed, 441 U.S. 380, 397 (1979) (Stewart, J., dissenting).

31. *Id.*

establishing a recognizable parent-child relationship, while failing to afford the same presumption to biological fathers.

### B. *The Right to Marry:* Obergefell *&* Pavan

In 2015, the Supreme Court held in *Obergefell v. Hodges* that the Constitution guarantees same-sex couples the right to be legally married.[32] The Court's majority opinion denied the claim that gender essentialism[33] is paramount to legal recognition of the marriage right and rather held that the Fourteenth Amendment's Due Process and Equal Protection Clauses protect same-sex individuals' right to marry.[34] Despite *Obergefell* extending the right to marry to same-sex couples, and *Pavan* later reaffirming that states must grant marital rights equally to both different- and same-sex couples,[35] state court opinions vary as to whether accompanying marriage rights are guaranteed to these couples post-*Obergefell*.[36] One such accompanying right that remains uncertain is the right to be recognized as a legal parent to one's non-biologically related child.[37]

In 2015, fourteen same-sex couples petitioned the Supreme Court for the right to marry and for their marriages to be given

32. Obergefell v. Hodges, 576 U.S. 644, 681 (2015).

33. Gender essentialism refers to the idea that women and men "act differently and have different options in life because of intrinsic or essential differences between the sexes." Elizabeth Boskey, *Gender Essentialism Theory*, VERYWELL HEALTH, https://www.verywellhealth.com/what-is-gender-essentialism-3132613 (Apr. 11, 2020). In the context of marriage, a gender essentialist view assumes that a successful—or, in a more traditional view, legitimate—marriage requires that one partner be a cisgender male and the other a cisgender female. *See id.*

34. *Obergefell*, 576 U.S. at 671–72.

35. Pavan v. Smith, 137 S. Ct. 2075, 2078–79 (2017).

36. *See generally* SARAH WARBELOW, COURTNAY AVANT & COLIN KUTNEY, HUM. RTS. CAMPAIGN FOUND., 2019 STATE EQUALITY INDEX (2019), https://hrc-prod-requests.s3-us-west-2.amazonaws.com/resources/2019-SEI-Final-Report.pdf (providing a comprehensive outline of laws affecting LGBTQ individuals on a state-by-state basis).

37. *See* Ailsa Chang & Selena Simmons-Duffin, *Same-Sex Spouses Turn to Adoption to Protect Parental Rights*, NPR (Sept. 22, 2017, 4:45 PM), https://www.npr.org/2017/09/22/551814731/same-sex-spouses-turn-to-adoption-to-protect-parental-rights ("In 2015, the Supreme Court ruled that same-sex couples had the right to marry but courts haven't resolved what parental rights flow out of those marriages.").

full recognition across state lines.[38] Writing for the majority, Justice Kennedy focused the Court's analysis on the changing landscape of social and cultural understandings of rights guaranteed under the Constitution.[39] Noting that, while the process of defining these guaranteed rights is partially guided by history and tradition, which had long barred same-sex couples from securing legally recognized marriages, the Court nevertheless emphasized that this history and tradition "do not set its outer boundaries," thus preventing "the past alone to rule the present."[40] Additionally, the Court acknowledged the wide variety of problems same-sex couples face as a result of state-sanctioned marriage bans and noted four principles that serve as the basis for protecting same-sex couples constitutional right to marry: (1) the right to individual autonomy; (2) the fundamental right to a two-person union; (3) the safeguarding of children and families; and (4) marriage as the representation of a "keystone of our social order."[41] Applied to the rights guaranteed under the Due Process and Equal Protection Clauses of the Fourteenth Amendment, the Court held that these four interwoven principles "compel[] the conclusion that same-sex couples may exercise the right to marry."[42]

Integral to the Court's analysis is the recognition that marital rights extend beyond the symbolic recognition of marriage alone.[43] Additionally, Justice Kennedy noted that, where a state confers a marital right to heterosexual couples, that same marital right must be afforded to homosexual couples.[44] While states reserve the right to decide the exact marital benefits that accompany marriage, these benefits generally include "an expanding list of governmental rights, benefits, and

38. *Obergefell*, 576 U.S. at 654–55. In addition to these fourteen couples, two men with deceased same-sex partners were also parties to the suit. *Id.*

39. *See id.* at 664.

40. *Id.*

41. *Id.* at 665–69.

42. *Id.* at 665.

43. *Id.* at 669–70.

44. *Id.* at 670–71.

responsibilities."[45] As failure to confer these benefits would result in the denial of "the constellation of benefits that the States have linked to marriage,"[46] the Court recognized marriage as not just an acknowledgment of a union between two people, but rather as a larger right that encompasses distinct but interrelated rights.[47]

Two years after *Obergefell*, the Court again addressed marital rights within same-sex marriages in *Pavan v. Smith*, this time directly answering the question of whether a state's marital benefits must be extended similarly to both different- and same-sex couples.[48] In *Pavan*, the Court held that, where a state grants different-sex couples the marital right of having both spouse's names on their child's birth certificate, the state must afford that same right to same-sex couples.[49] Citing *Obergefell*'s "commitment to provide same-sex couples 'the constellation of benefits that the States have linked to marriage,'" the Court affirmed that *Obergefell* bars states from differentially applying

45. *Id.* at 670 ("These aspects of marital status include: taxation; inheritance and property rights; rules of intestate succession; spousal privilege in the law of evidence; hospital access; medical decisionmaking [sic] authority; adoption rights; the rights and benefits of survivors; birth and death certificates; professional ethics rules; campaign finance restrictions; workers' compensation benefits; health insurance; and child custody, support, and visitation rules.").

46. *Id.*

47. *Id.* at 669–70.

48. *See* Pavan v. Smith, 137 S. Ct. 2075, 2076–77 (2017). Prior to *Pavan*, debate continued regarding whether *Obergefell* required both same-sex spouses' names to be printed on their child's birth certificate, despite the *Obergefell* Court noting that all of the marital rights afforded to different-sex couples must be equally applied to same-sex couples. *See* Smith v. Pavan, 505 S.W.3d 169, 172 (Ark. 2016). Had a married different-sex couple had a child, both names of the parents would be automatically entered on the birth certificate, but, where a married same-sex couple had a child, Arkansas law prohibited the printing of two same-sex individuals' names on the certificate. *Id.* at 175–76. Prior to the Supreme Court's reversal, the Arkansas Supreme Court upheld this refusal, holding that *Obergefell* did not compel the state to afford the same benefits to same- and different-sex spouses. *Id.* at 178. Specifically, the Arkansas Supreme Court noted that the statute that denied inclusion of both same-sex spouses names on birth certificates "centers on the relationship of the biological mother and the biological father to the child, not on the marital relationship of husband and wife," and therefore did not violate *Obergefell*'s holding that all married couples, regardless of sexual orientation, be treated equally under the law. *Id.* at 172, 178.

49. *Pavan*, 137 S. Ct. at 2076–77.

state marital rights to similarly situated different- and same-sex married couples.[50]

## II. LEGAL PARENTAL RIGHTS VIA THE MARITAL PRESUMPTION

*Obergefell* and *Pavan* represent an integral step toward achieving LGBTQ+ equality in the context of family and family planning. As noted by the Court in *Obergefell*, the right to marry encompasses rights that extend far beyond the legal recognition of a union between two consenting adults.[51] One such integral right associated with marriage is the right to parent and the right to be legally recognized as a parent.[52] However, for same-sex couples that conceive via nontraditional means, such as through assisted reproductive technologies (ART)[53] or a surrogate, resulting in only one biologically related spouse and child, the right to be legally recognized as a parent is fraught with legal uncertainty.[54] This uncertainty is largely rooted in the marital presumption, which serves a vital role in the legal framework of parental rights dating back to the nation's founding.[55]

Based in English common law and rooted in biological connection, the traditional marital presumption dictated that "a husband is presumed to be the legal father of any child born to or conceived by his wife during the marriage."[56] Through the marital presumption, biology was held as the ultimate

50. *Id.*

51. *Obergefell*, 576 U.S. at 670.

52. *See* McLaughlin v. Jones, 401 P.3d 492, 497 (Ariz. 2017) ("Legal parent status is, undoubtedly, a benefit of marriage.").

53. Primarily used in response to infertility, ART includes a variety of complex treatments and procedures performed with the goal of achieving pregnancy. *Assisted Reproductive Technology (ART)*, EUNICE KENNEDY SHRIVER NAT'L INST. OF CHILD HEALTH & HUM. DEV., https://www.nichd.nih.gov/health/topics/infertility/conditioninfo/treatments/art (last visited Sept. 12, 2021). Popular ART methods of reproduction include in vitro fertilization, intrauterine insemination, and third-party assisted ART. *Id.*

54. *See* discussion *infra* Part III.

55. Jessica Feinberg, *Restructuring Rebuttal of the Marital Presumption for the Modern Era*, 104 MINN. L. REV. 243, 243 (2019).

56. *Id.*

determinative factor used to assign legal parental rights to a husband and wife.[57] It was possible to rebut this presumption by showing either that the husband did not have physical access to his wife at the time of conception, that the husband was sterile or impotent, or that the wife engaged in adultery.[58] However, the presumption was generally difficult to challenge and ultimately rebut.[59]

Scientific advancements and cultural changes regarding the understandings of marriage have challenged the traditional marital presumption in recent years.[60] Throughout the late twentieth century, as recognition of nontraditional families grew, biological connection between married spouses and their child became less important in affording legal parental rights.[61] These nontraditional families, which include families with stepparents and children born via ART, challenged the long-held belief that parenthood requires a mother and father, both of whom must have a biological connection to their child.[62]

57. *See id.* at 249; Melanie B. Jacobs, *Parental Parity: Intentional Parenthood's Promise*, 64 BUFF. L. REV. 465, 478 (2016) (noting that, in most cases, a wife's husband is the biological father of a child conceived during the marriage).

58. Feinberg, *supra* note 55, at 243.

59. *Id.* Part of the difficulty in rebutting the paternity presumption stemmed from the limited kinds of evidence that a court would consider. Mary Louise Fellows, *A Feminist Interpretation of the Law of Legitimacy*, 7 TEX. J. WOMEN & L. 195, 200 (1998) (noting that, historically, the paternity presumption could only be rebutted by showing "that . . . procreation by the husband was impossible"). Further, under what came to be known as Lord Mansfield's Rule, a mother and her legal husband at the time of the child's conception were barred from testifying that the child was not the biological child of the husband. Goodright v. Moss, (1777) 98 Eng. Rep. 1257, 1258 (KB). Today, in the few states that still follow a form of the rule, many courts nonetheless allow for husband and wife to testify that the husband did not have access to the wife in order to rebut the presumption of legitimacy. *See* Serafin v. Serafin, 258 N.W.2d 461, 463 (Mich. 1977) (quoting *In re* Wright's Estate, 211 N.W. 746, 748–49 (Mich. 1927)) ("We are likewise no longer convinced that refusal to admit and consider the parent's testimony of nonaccess, 'works for the peace and quiet of the family.'").

60. *See, e.g.*, WASH. REV. CODE § 26.26A.115 (2021) (applying the state's marital presumption to both same- and different-sex couples in requiring only that the mother or father of the child are married, and the child is born during that marriage).

61. *See* NeJaime, *Marriage Equality*, *supra* note 12, at 1192–96. Beginning in the early 1970s, the Court recognized the parental rights of unmarried fathers. *See* Stanley v. Illinois, 405 U.S. 645, 658 (1972). Shortly after, in 1973, the recognition of legal parental rights to unmarried fathers was codified in the newly enacted Uniform Parentage Act. UNIF. PARENTAGE ACT (UNIF. LAW COMM'N 1973).

62. NeJaime, *Marriage Equality*, *supra* note 12, at 1188.

Combined with new scientific advancements that allow for DNA testing, biology as a basis for determining parenthood evolved slowly to include a more nuanced understanding of assigning and recognizing parental rights.[63]

Marriage equality has challenged not only the traditional norms surrounding marriage itself, but also the idea that biology is what separates a parent from a non-parent.[64] This changing landscape underlying sociopolitical understandings of the institution of marriage has also shifted away from the view that parents must be a heterosexual married couple and has rather centered parental legal rights around a functional parental framework.[65] Notably, because the right to marry is rooted in heteronormative[66] conventions surrounding family, same-sex couples who marry must "assimilat[e] to some marital and parental norms," while also challenging other long held beliefs concerning marriage and accompanying parental rights.[67] As noted by Professor Douglas NeJaime, the

63. Feinberg, *supra* note 55, at 251–52.

64. *See* NeJaime, *Marriage Equality*, *supra* note 12, at 1231.

65. *See* DEL. CODE ANN. tit. 13, § 8-201(c) (2020) (providing that de facto parental status is established where a person has the consent of the child's parent, who "fostered a parent-like relationship between the child and the de facto parent," has undertaken parental responsibility over the child, and "[h]as acted in a parental role for a length of time sufficient to have established a bonded and dependent relationship with the child that is parental in nature").

66. Heteronormativity is defined as "of, relating to, or based on the attitude that heterosexuality is the only normal and natural expression of sexuality." *Heteronormative*, MERRIAM-WEBSTER, https://www.merriam-webster.com/dictionary/heteronormative (last visited Sept. 12, 2021).

67. NeJaime, *Marriage Equality*, *supra* note 12, at 1231. The issue of "queer assimilation" has long been discussed, debated, and contested within the LGBTQ+ community. As explained by one researcher:

> The issue of assimilation has long been a source of disagreement within the LGBTQ+ community. At the core of the issue are the competing needs for safety/acceptance and full recognition of a distinct identity from the normative mainstream. Queer politics seeks to create a space and a community with the intention of challenging heteronormative and patriarchal institutions, in order to gain acceptance for the LGBTQ+ community as a community with distinct, equally valid values and priorities as the heteronormative/patriarchal mainstream. Queer politics emerges as a non-assimilationist school of thought, which allows for critique of the hegemonic qualities of mainstream cultural values, and various ways in which they can be damaging to LGBTQ+ individuals.

introduction of same-sex couples into the sphere of legal marriage resulted in two competing models of parenthood.[68] One model touts biology, and therefore different-sex spouses, as a determinative factor of parenthood while the second emphasizes "chosen, functional families."[69] In rejecting a biology-determinative approach to establishing parental rights, and thus allowing for the presumption that both spouses are parents of their child regardless of biological connection, courts allow for same-sex couples to attain the same parental rights as similarly situated different-sex couples.[70]

Today, every state and the District of Columbia utilizes the marital presumption in one form or another.[71] On a constitutional level, courts have recognized that, post-*Obergefell*, the marital presumption is a benefit of marriage that states cannot deny to same-sex couples.[72] Some states, such as New York, base the presumption on the best interests of the child rather than on biology.[73] In the *Matter of Christopher YY. v. Jessica ZZ.*, a New York state court held that the state's marital presumption recognizes children born to same-sex couples and conceived via artificial insemination.[74] In structuring the marital

Laura Mendez, *Queer Assimilation*, LOCUS: SETON HALL J. UNDERGRADUATE RSCH. Oct. 2018, at 1, 1.

68. NeJaime, *Marriage Equality*, *supra* note 12, at 1237.

69. *Id.* The Supreme Court previously recognized that biology does not trump parental rights in other avenues of law in holding that awarding visitation rights to grandparents over the objections of the children's parents infringes upon the parents' "right to make decisions concerning the care, custody and control [of the children]." Troxel v. Granville, 530 U.S. 57, 72 (2000).

70. *See* NeJaime, *Marriage Equality*, *supra* note 12, at 1237, 1240 ("Ultimately, marriage equality routes intentional and functional concepts of parenthood—concepts leveraged in earlier efforts to recognize unmarried same-sex parents—into an LGBT-inclusive model of marriage, pushing intentional and functional parenthood from the margins to the mainstream."). However, if a state only establishes parentage via a showing of biological connection, both same-sex spouses will never both be afforded automatic parental rights. *See id.*

71. Feinberg, *supra* note 55, at 252, 268, nn. 116–17.

72. *See* McLaughlin v. Jones, 401 P.3d 492, 498 (Ariz. 2017). Specifically, denial of the marital presumption to same-sex couples would infringe upon both Due Process and Equal Protection rights under the Fourteenth Amendment. *Id.*

73. Christopher YY. v Jessica ZZ., 69 N.Y.S.3d 887, 890 (App. Div. 2018).

74. *Id.* at 891.

presumption, the court held that the best interests of the child must be analyzed before considering the biological connections between the child and petitioner.[75] By centering the state's marital presumption around the best interest of the child standard, the court ultimately held that, where two women are married and have a child, both women "are entitled to the presumption of legitimacy afforded to a child born to a marriage."[76] The court reasoned that "[i]f we were to conclude otherwise, children born to same-gender couples would be denied the benefit of this presumption without a compelling justification."[77] Additionally, denying the presumption would also go against the best interest of the child as it would interrupt "an already recognized and operative parent-child relationship."[78]

In other states, the marital presumption relies on intent and function rather than biology.[79] For example, California utilizes intent-based rules in assessing parental rights of married couples who conceive using donor insemination.[80] In Arizona, the state supreme court held that the state's marital presumption extends to include a presumption of parenthood to both married spouses, regardless of their sex.[81] Additionally, the Arizona court held that this presumption is based not on biological connection, but rather on the intent of the two spouses to have a child, such as where two married women plan for one wife to be artificially inseminated, sign a joint parenting agreement, and both take on parenting responsibilities following the child's birth.[82] The Arizona court did not base its decision on the state's then-controlling statute, which applied

75. *Id.* at 890.

76. *Id.* at 890–91.

77. *Id.* at 893.

78. *Id.* at 897 (quoting Shondel J. v. Mark D., 853 N.E.2d 610, 613 (N.Y. 2006)).

79. *See, e.g.*, CAL. FAM. CODE § 7611 (Deering 2021).

80. *Id.* Under California's intent-based rule, a presumption of parenthood can be established where "[t]he presumed parent receives the child into their home and openly holds out the child as their natural child." *Id.* § 7611(d).

81. McLaughlin v. Jones, 401 P.3d 492, 501 (Ariz. 2017).

82. *Id.*

the marital presumption only to males who have a child with their wives.[83] The Arizona court instead reasoned that *Obergefell*'s holding extends "the same terms and conditions" of marriage to both different- and same-sex spouses, and failure to do so impedes on same-sex spouses' rights under the Fourteenth Amendment.[84]

States that have moved from a biology-based presumption to an intentional- or functional-based presumption reveal the flaws in biologically determinative marital presumptions. For example, New York previously deemed non-biologically related parents as third parties to their children, meaning that non-biologically related parents lacked full legal parental rights.[85] In *Paczkowski v. Paczkowski*, a non-genetically related spouse in a same-sex couple petitioned the court for parental rights over the child that she and her then-wife had planned for and intentionally brought into their marriage.[86] Following a traditional, biology-based marital presumption, the court held that the non-biological mother could not bring her claim as she was not genetically related and therefore lacked standing to petition the court for custody over a child to which she was a third party.[87]

The holding in *Paczkowski* conflicts with the language of *Obergefell*, which encourages a more nuanced understanding of marital rights in stating that denial of these rights results in "an instability many opposite-sex couples would deem intolerable in their own lives."[88] As part of the constellation of marital

83. *Id.* at 496; *see generally* ARIZ. REV. STAT. ANN. § 25-814 (2021), *invalidated by McLaughlin*, 401 P.3d at 501.

84. *McLaughlin*, 401 P.3d at 496 (quoting Obergefell v. Hodges, 576 U.S. 644, 675–76 (2015)).

85. *See* Paczkowski v. Paczkowski, 10 N.Y.S.3d 270, 271 (App. Div. 2015); Q.M. v. B.C., 995 N.Y.S.2d 470, 473 (Fam. Ct. 2014). While New York does apply a best interest of the child standard in child custody cases, the standard itself prioritizes keeping children with their biological parents. *See* N.Y. SOC. SERV. LAW § 384-b(1)(a)(ii) (Consol. 2021) ("[I]t is generally desirable for the child to remain with or be returned to the birth parent because the child's need for a normal family life will usually best be met in the home of its birth parent . . . .").

86. *Paczkowski*, 10 N.Y.S.3d at 271.

87. *Id.*

88. *Obergefell*, 576 U.S. at 670.

rights, a state's failure to adapt its marital presumption to the needs of same-sex couples represents the exact kind of exclusion that *Obergefell* admonishes.[89] In 2017, in *In re Maria-Irene D.*, a New York appellate court implicitly overruled *Paczkowski* in holding that, where a same-sex married couple jointly executes a surrogacy agreement with the intent to have a child together, both spouses are presumed parents over that child regardless of biological connection.[90] This holding represents the first time that New York has applied its marital presumption to a child born to same-sex parents via surrogacy[91] and has been followed by passage of the Child-Parent Security Act (CPSA).[92] Passed in April 2020, the Act legalizes gestational surrogacy[93] and also provides a roadmap for how parents who have utilized ART to have children can attain full parental rights.[94] Under the CPSA, both partners who have used a third party to conceive their child can be recognized as parents over

89. *Id.* ("As the State itself makes marriage all the more precious by the significance it attaches to it, exclusion from that status has the effect of teaching that gays and lesbians are unequal in important respects.").

90. *In re* Maria-Irene D., 61 N.Y.S.3d 221, 223 (App. Div. 2017). In the case, the spouses in question separated following the birth of their child. *Id.* at 222. Sometime later, the biological father attempted to facilitate an adoption that would make his new partner his legal co-parent of the child. *Id.*

91. *Id.* at 223; *see* Bewkes, *supra* note 2. Before *In re Maria-Irene D.*, there had been at least a few instances when New York courts found it appropriate to apply the marital presumption to same-sex parents, but these were limited to cases involving lesbian couples who conceived via artificial insemination. *See* Counihan v. Bishop, 974 N.Y.S.2d 137, 139 (App. Div. 2013); Wendy G-M. v. Erin G-M., 985 N.Y.S.2d 845, 859 (Sup. Ct. 2014). This was largely due to the fact that, in such cases, "the child is generally fathered by an anonymous sperm donor and there is no legal father," thus making the female same-sex couple akin to a heterosexual couple utilizing artificial insemination via anonymous donor in the same manner. Q.M. v. B.C., 995 N.Y.S.2d 470, 474 (Fam. Ct. 2014).

92. N.Y. FAM. CT. ACT §§ 581-101-704 (McKinney 2021).

93. *Id.* § 581-101. "Gestational surrogacy" refers to the complex process of creating an embryo via in vitro fertilization using either the eggs from the intended mother (which are then combined with sperm from a sperm donor) or the sperm from the intended father (which is then combined with eggs from an egg donor). *Providing Surrogacy Solutions for the LGBT Community*, 3 SISTERS SURROGACY, https://www.3sisterssurrogacy.com/lgbt/ (last visited Aug. 30, 2021). Next, that embryo is transferred into the uterus of the gestational surrogate, who will carry it until completion of the pregnancy. *Id.*

94. N.Y. FAM. COURT ACT § 581-303; *see The Child-Parent Security Act: Gestational Surrogacy Agreements, Acknowledgment of Parentage and Orders of Parentage*, DEP'T OF HEALTH, N.Y. STATE, https://www.health.ny.gov/vital_records/child_parent_security_act/ (Feb. 2021).

that child from the moment of the child's birth without need for further legal action, such as second-parent adoption.[95] Ultimately, New York's evolution from a biological-determinative marital presumption to one that recognizes intent reflects the necessary steps that states must take in order to ensure that state marital presumptions conform with *Obergefell*'s promise of equitable recognition of marital rights.

## III. WHEN THE MARITAL PRESUMPTION FAILS: EXTRA STEPS TO ENSURE LEGAL PARENTAL RIGHTS

When a parent is not recognized as a legal parent to their child, they are denied the fundamental right to have a say in ensuring the wellbeing of that child.[96] In most states, a parent without official legal rights cannot perform basic parenting duties, such as signing a field trip permission slip, and is also barred from acting in more critical roles, such as making medical decisions on the child's behalf.[97] This lack of legal recognition can be especially harmful to those who have been parenting their child for years, only to then find out that they are a stranger to their child in the eyes of the law and therefore have no legal say in critical caregiving decisions.[98] A lack of legal recognition can also inflict harm on the parent-child relationship, such as where the court denies a parent custody over a child that they have parented but is nonetheless denied

95. N.Y. FAM. CT. ACT § 581-203(d); *see infra* Section IV.A (explaining intent-based marital presumption).

96. *See supra* Section I.A and Part II.

97. NAT'L CTR. FOR LESBIAN RTS., LEGAL RECOGNITION OF LGBT FAMILIES 1 (2019), https://www.nclrights.org/wp-content/uploads/2013/07/Legal_Recognition_of_LGBT_Families.pdf [hereinafter NCLR, LEGAL RECOGNITION OF LGBT FAMILIES].

98. *See* Douglas NeJaime, *The Nature of Parenthood*, 126 YALE L.J. 2260, 2316 (2017) [hereinafter NeJaime, *The Nature of Parenthood*] ("Within the contemporary parentage regime, those who have believe they are parents on social grounds, including those who have been parenting their children for many years, may be denied parental status."); *see also* discussion *infra* Part III (providing further analysis of the harms inflicted when a parent must adopt their children in order to gain legal parental rights).

legal rights due to a lack of genetic relationship with the child.[99] In these instances, the parent is denied a relationship with the child and the child with the parent, thus undermining the wellbeing of both parties.[100]

As of 2021, a majority of state courts have not considered whether their respective state's marital presumption ensures that same-sex parents who have children born into their marriage are both considered legal parents, regardless of biological connection.[101] In each of the states that have considered the issue in their highest state court, the court has held that their marital presumption applies equally to different- and same-sex couples, and, in certain states, the legislature has also subsequently amended their marital presumption statutes to include gender-neutral language.[102] However, some lower state courts have declined to expand their marital presumption laws to include non-biologically related parents, and such laws continue to stand in states such as Louisiana.[103] As a result of this lack of uniformity in state law's application of the marital presumption, a spouse who is not biologically related to their child must take extra steps in order to gain the affirmative right to be recognized as a legal parent.[104] Additionally, even if one

99. Such a situation arose in *Russell v. Pasik*, where a Florida appellate court held that an unmarried lesbian couple, who had each used the same sperm donor to conceive and have two children, only had legal parentage rights over the children that they themselves were biologically related to, thus denying both women parental rights over two of their children. Russell v. Pasik, 178 So. 3d 55, 60–61 (Fla. 2d Dist. Ct. App. 2015).

100. *See* discussion *infra* Part III.

101. Anna Burke, Zachary Hughbanks, Therese Kilbane Myers, Caroline Neville & Harry Samuels, *Child Custody, Visitation & Termination of Parental Rights*, 21 GEO. J. GENDER & L. 201, 227–28 (2020).

102. *Id.*

103. *See* LA. CIV. CODE ANN. art. 196 (2021) ("A man may, by authentic act, acknowledge a child not filiated to another man. The acknowledgment creates a presumption that the man who acknowledges the child is the father. The presumption can be invoked only on behalf of the child. Except as otherwise provided in custody, visitation, and child support cases, the acknowledgment does not create a presumption in favor of the man who acknowledges the child.").

104. Several LGBT-focused non-profit and advocacy groups, including the National Center for Lesbian Rights, the Forum for Equality, and the Family Equality Council, strongly encourage same-sex couples who have children to pursue additional legal proceedings in order to ensure that both spouses have full legal parental status, even if the non-biologically related

state's parental presumption does recognize the legal parental rights of non-biologically related parents, these individuals still face uncertainty of their legal parental status should they move out of state or travel across state lines.[105] Three common paths that non-biological parents pursue in order to ensure that they are legally recognized as a parent are second-parent adoption, stepparent adoption, and parentage judgments.

### A. *Second-Parent Adoption*

Often touted as one of the best ways to ensure that both same-sex parents have full legal parental rights, second-parent adoption allows for two parents to obtain legal parental rights regardless of their same-sex status.[106] Second-parent adoption is a "legal procedure by which a co-parent adopts [their] partner's child without terminating the partner's parental rights," thereby granting the child two legal parents with equal legal

parent is married to the biologically related parent. *See* NCLR, LEGAL RECOGNITION OF LGBT FAMILIES, *supra* note 97, at 1–2 ("Regardless of whether you are married or in a civil union or comprehensive domestic partnership, NCLR always encourages non-biological and non-adoptive parents to get an adoption or parentage judgment, even if you are named on your child's birth certificate."); SARAHJANE GUIDRY, F. FOR EQUAL. & DENISE BROGAN-KATOR, FAM. EQUAL. COUNCIL, LOUISIANA LGBTQ FAMILY LAW: A RESOURCE GUIDE FOR LGBTQ-HEADED FAMILIES LIVING IN LOUISIANA 9 (2017), https://www.familyequality.org/wp-content/uploads/2018/06/Louisiana-LGBTQ-Family-Law-Guide-WEB.pdf ("An adoption decree is the single best irrefutable and undeniable proof of parentage. We strongly recommend that same-sex couples with children ALWAYS get an adoption decree that recognizes both parents as legal parents, even if you are married and appear on the birth certificate."); *Same-Sex Parenting–Birth Certificate FAQs*, ACLU OF PA. 1 (2016), https://www.aclupa.org/sites/default/files/field_documents/same-sex_parenting_birth_certificate_faqs.pdf ("Until the law in [ART] is more settled, all couples (same-sex or different-sex) who conceive using donors should still do an adoption in order to guarantee full legal recognition for both parents–even if you're married, and even if you're both on the birth certificate.").

105. *See* STACY D. HEARD, LEXISNEXIS PRACTICE GUIDE: WASHINGTON FAMILY LAW § 13.10 (2021) ("The presumptions of parentage available to same-sex couples under Washington law may not be portable to other states and jurisdictions. Parties are strongly advised to complete a 'second-parent' adoption to ensure that both parents will be afforded legal status as the child's parents in all jurisdictions.").

106. *See* Kathy Brodsky, *What's a Second Parent Adoption?*, FAM. EQUAL. (May 2, 2019), https://www.familyequality.org/2019/05/02/whats-a-second-parent-adoption/.

status.[107] According to the National Center for Lesbian Rights, second-parent adoption is "[t]he most common means by which LGBT non-biological parents establish a legal relationship with their children."[108] Further, second-parent adoption is available to all married couples in the United States, regardless of sexual orientation, and recognized in every state under the Full Faith and Credit Clause of the Constitution.[109] Through a second-parent adoption, both parents are granted the full rights of parenthood, meaning that "[b]oth parents . . . have equal responsibility and say in the child's medical care, academic and educational needs, extra-curricular activities, and cultural and religious upbringing. Any challenge to [the parent's] relationship with the child is eradicated."[110]

While second-parent adoption is a valuable tool to protect legal parental rights,[111] the process can be intrusive, time consuming, and expensive.[112] The process varies from state to state but generally follows a similar pattern with similar requirements.[113] Usually, an applicant must submit a variety of

107. NCLR, LEGAL RECOGNITION OF LGBT FAMILIES, *supra* note 97, at 2. Second-parent adoption originated in the 1980s in response to non-biologically related parents within same-sex couples not having their parental status recognized by courts. *See, e.g.*, *In re* M.M.D., 662 A.2d 837, 862 (D.C. 1995) (holding that "unmarried couples living together in a committed personal relationship, whether of the same sex or of opposite sexes, are eligible to 'petition the court for a decree of adoption,'" and, if one parent already has full parental rights, that parent can retain those rights alongside the prospective adoptive parent). *But see In re* Angel Lace M., 516 N.W.2d 678, 683, (Wis. 1994) (holding that "a minor is not eligible for adoption unless the rights of both of her parents have been terminated").

108. NCLR, LEGAL RECOGNITION OF LGBT FAMILIES, *supra* note 97, at 2.

109. *Id.* at 3; U.S. CONST. art. IV, § 1. Second-parent adoption is not currently available to couples who are not: (1) married, (2) in a civil union, or (3) in a domestic partnership. NAT'L CTR. FOR LESBIAN RTS., ADOPTION BY LGBT PARENTS 2 (2020), https://www.nclrights.org/wp-content/uploads/2013/07/2PA_state_list.pdf. These states include Alabama, Arizona, Kansas, Kentucky, Mississippi, Nebraska, North Carolina, Ohio, Utah, and Wisconsin. *Id.*

110. Brodsky, *supra* note 106.

111. *See* Austin Ledzian, *Guide to Second-Parent Adoption for LGBTQ+ Couples*, NATALIST (June 12, 2020), https://natalist.medium.com/guide-to-second-parent-adoption-for-lgbtq-couples-21286b7203b5 ("Almost all LGBTQ+ parents should go through second-parent adoption, whether you're planning to have biological children or adopt.").

112. NeJaime, *The Nature of Parenthood*, *supra* note 98, at 2317.

113. *See generally Second-Parent Adoption Laws*, MOVEMENT ADVANCEMENT PROJECT, https://www.lgbtmap.org/equality-maps/second_parent_adoption_laws (last visited Nov. 11,

personal documents to the court, such as financial verification records, and must also acquire reference letters attesting to their parental abilities.[114] Additionally, applicants usually must undergo a background check, which can include fingerprinting, a review of full driving records, and further additional FBI investigations.[115] Some jurisdictions go further to also require applicants to submit additional written materials, such as in Indiana, where applicants must "write an autobiography [that] discuss[es] their parenting philosophy."[116]

In addition to requiring the submittal of these personal documents, applicants must also undergo a state-mandated home study.[117] The home study involves a social worker visiting the home of the applicant and assessing whether "the child's physical, psychological, emotional, social, academic and financial needs are being met."[118] Ensuring that the needs of the child are met may also require the applicant to prove that they are medically stable, thus requiring the applicant to also undergo a medical examination and attain a physician's letter attesting to the applicant's health.[119] In a study conducted by NPR, individuals who had attained second-parent adoptions described the process as "'humiliating,' 'absurd,' [and] 'frustrating.'"[120] One woman criticized the process, noting its inherent inequality: "'It was hard to not compare our experience to the experience of straight couples who . . . get pregnant without even planning it, and nobody really questions

2021) (providing a graphical overview of second-parent adoption laws throughout the United States).

114. Brodsky, *supra* note 106.

115. NeJaime, *The Nature of Parenthood*, *supra* note 98, at 2317; Chang & Simmons-Duffin, *supra* note 37.

116. Henderson v. Adams, 209 F. Supp. 3d 1059, 1065 (S.D. Ind. 2016).

117. Brodsky, *supra* note 106.

118. *Id.*

119. *Id.*; Chang & Simmons-Duffin, *supra* note 37 (stating that the adoption process "involve[s] a physical, blood work, TB test, and fingerprinting").

120. Chang & Simmons-Duffin, *supra* note 37.

whether or not they are fit parents . . . . It just felt really unfair.'"[121]

The entirety of the second-parent adoption process, from the filing of the adoption petition to the final hearing before the court, takes, on average, between six and nine months.[122] Additionally, the process can cost thousands of dollars, such as in Washington, D.C. where the process can cost around $3,500[123] or in Indiana where costs can exceed $4,000.[124] This cost-prohibitive model bars parents at middle and lower socioeconomic levels from obtaining full parental rights, regardless of their desire to be a recognized legal parent to their child.[125]

Compounding the intrusive and expensive nature of second-parent adoption, the name itself—"second" parent—carries with it negative implications. In an interview with *HuffPost*, Lora Liegel wrote the following about her experience adopting her son via second-parent adoption:

> Still, I couldn't get that term—"second parent"—out of my head. In a heterosexual relationship, parents just get to be called mom and dad—there is no "first" or "second." Not only was I

121. *Id.* In some states, when a sperm donor is used, second-parent adoption requires the adopter to first confirm that the donor does not wish to assert their parental rights. *See* Julie Moreau, *Changes to State Parenting Laws Help Fill Gaps for Same-Sex Couples*, NBC NEWS (Aug. 1, 2020, 4:30 AM), https://www.nbcnews.com/feature/nbc-out/changes-state-parenting-laws-help-fill-gaps-same-sex-couples-n1235517. For example, a Rhode Island woman reported having to put an ad in a newspaper asking if the anonymous sperm donor used to conceive her child wanted to claim parental rights before being able to proceed with the adoption. *Id.*

122. Anthony M. Brown, *Second Parent Adoption and Step Parent Adoption*, TIME FOR FAMS., https://timeforfamilies.com/services-2/second-parent-adoption/ (last visited Nov. 11, 2021).

123. Chang & Simmons-Duffin, *supra* note 37.

124. NeJaime, *The Nature of Parenthood*, *supra* note 98, at 2317. The cost of second-parent or stepparent adoption can range from $250 to $3,000 depending on state requirements. *Average Adoption Costs in the United States*, FAM. EQUAL., https://www.familyequality.org/resources/average-adoption-costs-in-the-united-states/ (last visited Nov. 11, 2021). However, on average, second-parent adoptions cost between $2,000 and $3,000. *How Much Does Adoption Cost?*, HUM. RTS. CAMPAIGN, https://www.hrc.org/resources/how-much-does-adoption-cost (last visited Nov. 11, 2021).

125. *See* Katz-Wise, *supra* note 15 ("[Second-parent adoption] may not be financially feasible for some families.").

> considered "second," but I was being forced to navigate a complicated, confusing, and expensive legal system to be seen as a legitimate parent, something I already was. I felt like I was being told that I was lesser than—that I was unequal—and it made me furious . . . .[126]

Despite these burdens placed on couples seeking a second-parent adoption, the process remains a valuable—and potentially necessary—tool for same-sex couples looking to cement their legal parental rights, as it affords approved applicants full legal parental status on par with the child's biological parent.[127] While other methods of securing legal parental status are available, second-parent adoption continues to be one of the most effective ways to ensure that legal parenting rights are afforded to both parents in a same-sex relationship.[128] Ultimately, second-parent adoption offers parents the comfort and security of knowing that their individual rights as parents will be upheld should they face legal challenges.[129]

126. Lora Liegel, *I Had to Get a Second Parent Adoption and There's a Ridiculous Reason Why*, HUFFPOST PERS. (Aug. 15, 2018, 8:31 AM), https://www.huffpost.com/entry/second-parent-adoption-gay_n_5b719b05e4b0530743cbe1c2. While "traditional" forms of adoption (where a couple adopts a child to which neither parent is biologically related) include many of the same personal, legal, and financial hurdles that second-parent adopters also face, second-parent adoption is unique in requiring a parent go through the arduous adoption process in order for the parent to adopt a child that they already consider their own. *See generally* David Dodge, *What to Know Before Adopting a Child*, N.Y. TIMES (Apr. 18, 2020), https://www.nytimes.com/2020/04/18/parenting/guides/adopting-a-child.html (describing three paths to adoption and their accompanying complexities). Unlike second-parent adopters, traditional adoptions do not usually include a parent adopting a child that they planned for and had a role in conceiving. *Id.* Rather, traditional adopters generally do not play a part in the planning and conception of their child and only come into the child's life either after conception or birth. *Id.*

127. *See supra* note 104 and accompanying text.

128. *See Parenting | Second Parent Adoption | Vermont*, GLAD LEGAL ADVOCS. & DEFS., https://www.glad.org/overview/second-parent-adoption/vermont/ (last visited Nov. 11, 2021).

129. *Id.*

### B. *Stepparent Adoption*

Similar in effect to second-parent adoption, stepparent adoption describes the process where a non-biologically related parent adopts their child, therefore affording them full legal parental rights.[130] However, unlike second-parent adoption, the word "stepparent" inherently implies that the adopting parent is a secondary parent, despite the adopter's intentional co-planning of conception not fitting into the traditional stepparent definition.[131] Nonetheless, stepparent adoption may be a preferred alternative for those seeking a faster, potentially less costly process than that of a second-parent adoption.[132] Additionally, for the seven states that do not allow for second-parent adoption for non-married couples,[133] stepparent adoption may prove to be a necessary substitute as stepparent adoption is currently available in all states to both same- and different-sex parents.[134] It has also steadily increased in popularity over the last century as non-traditional marriages, including those of different-sex couples who divorce and remarry, have increased throughout the country.[135]

130. NCLR, LEGAL RECOGNITION OF LGBT FAMILIES, *supra* note 97, at 2.

131. *Id.* A stepparent is defined as "a parent who is married to the father or mother of a child, but who is not that child's own father or mother . . . ." *Step-Parent*, CAMBRIDGE DICTIONARY, https://dictionary.cambridge.org/us/dictionary/english/step-parent (last visited Nov. 11, 2021).

132. NCLR, LEGAL RECOGNITION OF LGBT FAMILIES, *supra* note 97, at 2. Unlike other forms of adoption, stepparent adoption often does not require a home study and can be completed without legal representation. CHILD WELFARE INFO. GATEWAY & CHILDS. BUREAU, FACTSHEETS FOR FAMILIES: STEPPARENT ADOPTION 2 (2013), https://www.childwelfare.gov/pubPDFs/f_step.pdf [hereinafter STEPPARENT ADOPTION]. Rather, many states require the adopting parent to gain consent of the custodial parent and pass a criminal background check. *Id.* While stepparent adoption in most states can cost between $700 and $3,500, if the adopter is in a state that does not require a home study, the adopter will not have to pay the $500–$800 home study fee. Trina Kraus, *How Much Does Stepchild Adoption Cost?*, STEPPARENTADOPTION.COM (Jan. 26, 2018), https://stepparentadoption.com/much-stepchild-adoption-cost/.

133. NCLR, LEGAL RECOGNITION OF LGBT FAMILIES, *supra* note 97, at 3. These states are Alabama, Kansas, Kentucky, North Carolina, Nebraska, Ohio, and Wisconsin. *Id.*

134. *See* STEPPARENT ADOPTION, *supra* note 132, at 3.

135. NCLR, LEGAL RECOGNITION OF LGBT FAMILIES, *supra* note 97, at 2.

### C. *Parentage Judgment*

Certain states also allow for recognition of parental rights via parentage judgments.[136] To get a parentage judgment, the parent files a parentage case with a local court and the judge then can grant legal parental rights under either statutory law or via equitable relief.[137] Statutory law includes the Uniform Parentage Act (UPA), a statutory scheme used to establish a child's legal parentage.[138] Originally published in 1973, the UPA was established as a parental rights framework "to help states comply" with Supreme Court decisions that held that discrimination against nonmarital children was unconstitutional.[139] Today, all states have adopted the UPA in varying forms.[140]

In its most recent 2017 revision, the UPA was updated to be more inclusive to same-sex couples seeking parental rights.[141] Part of this revision included implementing gender-neutral terminology in reference to couples in an effort to recognize that the Act applies equally to both different- and same-sex couples.[142] Under the UPA, there is a presumption of parentage if: (1) the person petitioning for rights and the mother were married during the birth of the child; or (2) the person petitioning for rights lived with the child for at least two years and "openly held out the child as the individual's child."[143] Additionally, the revised UPA expands protections for

136. *Id.* at 4.

137. *See id.* at 4–5.

138. Courtney G. Joslin, *Nurturing Parenthood Through the UPA (2017)*, 127 YALE L.J.F. 589, 597 (2018).

139. *Id.* at 598.

140. Travis Peeler, *What Is the Uniform Parentage Act ("UPA")?*, LEGALMATCH, https://www.legalmatch.com/law-library/article/uniform-parentage-act-and-paternity.html (June 1, 2020).

141. Joslin, *supra* note 138, at 592.

142. *Id.*

143. UNIF. PARENTAGE ACT § 204(a)(1)–(2) (UNIF. L. COMM'N 2017). What constitutes "openly held out" varies by jurisdiction. *See, e.g.*, Estate of Britel, 186 Cal. Rptr. 3d 321, 334 (Ct. App. 2015) (holding that a biological parent does not openly hold out their child where the parent "never made an unconcealed affirmative representation of his paternity in open view").

nonbiological parents, such as through its new de facto parent provision.[144] Under this provision, a nonbiological parent is considered a de facto parent if they can prove, by clear and convincing evidence, seven factors, which include proof that the individual and the child have lived together, that the individual acts as a caretaker to the child, and that the individual and the child have a bonded relationship.[145] Currently, the District of Columbia,[146] Hawaii,[147] Indiana,[148] Minnesota,[149] Montana,[150] Oregon,[151] and Texas[152] all have statutes that recognize de facto parental status.

Courts can also grant parentage judgments under a theory of equitable relief.[153] In some jurisdictions, courts grant equitable relief when the individual is found to be acting "*in loco parentis*," meaning that the person has acted in the place of or instead of a parent.[154] In Oklahoma, the state supreme court recently held that, under *Obergefell*'s assertion that children born into same-sex relationships should not "suffer the stigma of knowing their families are somehow lesser,"[155] a non-biological parent in a same-sex relationship is considered a parent *in loco parentis* if they have: (1) acted with the intent to parent; (2) acted in a parental role for a sufficient amount of time to establish a meaningful relationship with the child; and (3) lived in the same

144. UNIF. PARENTAGE ACT § 609 (UNIF. L. COMM'N 2017).

145. *Id.* § 609(d).

146. D.C. CODE § 16-831.01 (2021).

147. HAW. REV. STAT. § 571-46(a)(2) (2021).

148. IND. CODE § 31-14-13-2.5(d) (2021).

149. MINN. STAT. § 257C.04(c) (2021).

150. MONT. CODE ANN. §§ 40-4-211(4)(b), (6)(a)–(c), 40-4-228(1), (2)(b) (2021).

151. OR. REV. STAT. § 109.119(10)(a) (2021).

152. TEX. FAM. CODE ANN. § 102.003(a)(9) (West 2021).

153. *Equitable Relief*, CORNELL L. SCH.: LEGAL INFO. INST., https://www.law.cornell.edu/wex/equitable_relief (Nov. 2020) ("Equitable relief is distinguished from remedies for legal actions in that, instead of seeking merely monetary damages, the plaintiff is seeking that the court compels the defendant to perform a certain act or refrain from a certain act.").

154. *In Loco Parentis*, CORNELL L. SCH.: LEGAL INFO. INST., https://www.law.cornell.edu/wex/in_loco_parentis (last visited Nov. 11, 2021).

155. Schnedler v. Lee, 445 P.3d 238, 244 (Okla. 2019) (quoting Obergefell v. Hodges, 576 U.S. 644, 646 (2015)).

residence as the child "for a significant period while holding out the child as his or her own."[156] In Arkansas, the state supreme court has held that a person acts *in loco parentis* where the individual and child have lived in the same home for a number of years, formed a significant emotional relationship, and where it is in the best interest of the child for the individual to be recognized as a parent.[157]

Many states, however, still do not grant parental rights to non-biologically related parents under equitable remedies, including Arizona[158] and Michigan.[159] Additionally, those recognized as equitable parents may not be afforded full parental rights depending on the jurisdiction and may be rather limited to custody or visitation rights.[160]

Other forms of equitable relief include equitable parent doctrine,[161] parent by estoppel,[162] and *in loco parentis* theory,[163] all of which describe a court's recognition that a non-biological

156. *Id.*

157. Bethany v. Jones, 378 S.W.3d 731, 738 (Ark. 2011).

158. *See* Doty-Perez v. Doty-Perez, 388 P.3d 9, 14 (Ariz. Ct. App. 2016) ("[E]xcept in the case of biology, the only legal mechanism that may establish legal parenting status and attach the associated rights and obligations is an order of adoption.").

159. *See* Mabry v. Mabry, 882 N.W.2d 539, 541 (Mich. 2016) (holding that a non-biologically related former partner of a child's biological parent does not have standing to bring a custody action, even where the former partners had intended for the child to be raised by both partners as equal parents).

160. *See, e.g.*, Mary Kay Kisthardt & Richard A. Roane, *Who Is a Parent and Who Is a Child in a Same-Sex Family? – Legislative and Judicial Issues for LGBT Families Post-Separation, Part II: The U.S. Perspective*, 30 J. AM. ACAD. MATRIM. LAWS. 55, 69 (2017).

161. First established in *Atkinson v. Atkinson*, the equitable parent doctrine allows courts to grant parental rights to a non-biologically related spouse based on that spouse's relationship with the child. *See* 408 N.W.2d 516, 519 (Mich. Ct. App. 1987) (holding that a husband who is not biologically related to his wife's child can gain parental rights where the husband and child have established a parent-child relationship, the husband wants to obtain parental rights, and the husband is willing to pay child support).

162. Traditionally referred to as "paternity by estoppel," this doctrine "prevents a *legal parent* from denying parental status to a person who has acted as a parent in specified ways." Sarah H. Ramsey, *Constructing Parenthood for Stepparents: Parents by Estoppel and De Facto Parents Under the American Law Institute's Principles of the Law of Family Dissolution*, 8 DUKE J. GENDER L. & POL'Y 285, 291 (2001).

163. For example, in Pennsylvania, a person who acts *in loco parentis* has legal parity with the child's biological parent within custody disputes. *See* L.S.K. v. H.A.N., 813 A.2d 872, 876 (Pa. Super. Ct. 2002) ("The rights and liabilities arising out of [a parent who has acted *in loco parentis* to a child] are the same as between parent and child.").

parent has standing to seek parental rights in court.[164] Currently, a majority of states have at least one form of equitable relief available for non-biological parents seeking parental rights.[165] However, a minority of states, including Utah[166] and Missouri,[167] have held that "a non-legal parent has no ability to seek custody or visitation with the child of his or her former partner, even when he or she has been an equally contributing caretaker of the child."[168] Overall, these forms of equitable relief vary greatly in their availability across states and in the degree of parental rights granted, therefore making them largely equitable only in name.

## IV. RESTRUCTURING THE MARITAL PRESUMPTION POST-*OBERGEFELL*

As a doctrine dating back to the early 1700s, the marital presumption is based on heteronormative traditions that assume marriage exists solely between a man and a woman.[169] As such, the traditional presumption only affords parental rights where biological relation between parent and child is assumed—where a court can, with relative confidence, conclude that a child was birthed by the wife and biologically fathered by the husband.[170] However, absent explicit amendment, same-sex couples are at risk of being denied the privilege of assumed parenthood where a married couple intends for, plans for, and takes the step to bring a child into the

164. NCLR, LEGAL RECOGNITION OF LGBT FAMILIES, *supra* note 97, at 5.

165. *See id.* at 5–6.

166. *See* Jones v. Barlow, 154 P.3d 808, 819 (Utah 2007) ("[W]e decline to adopt a de facto parent doctrine because it would be an improper usurpation of legislative authority and would contradict both common law principles and Utah statutory law.").

167. *See* White v. White, 293 S.W.3d 1, 21–22 (Mo. Ct. App. 2009) (holding that the plaintiff did not have standing to petition the court for custody rights over the child that she and her former partner had jointly decided the partner would conceive and raise together as a family).

168. NCLR, LEGAL RECOGNITION OF LGBT FAMILIES, *supra* note 97, at 6.

169. *See* Theresa Glennon, *Somebody's Child: Evaluating the Erosion of the Marital Presumption of Paternity*, 102 W. VA. L. REV. 547, 562 (2000).

170. *See id.* at 587–88.

family as a product of that marriage.[171] This exclusion directly contradicts *Obergefell*'s promise that marriage is a fundamental right and that all benefits of marriage—including the benefit to have and parent children with proper legal recognition—must be afforded equally to different- and same-sex couples.[172]

Additionally, while other means of attaining full parental legal status are available, such as through second-parent adoption, stepparent adoption, and parentage judgments, these ends served do not justify their means because same-sex couples must take extra steps to solidify rights automatically conferred to similarly situated different-sex couples.[173] A state that fails to amend its marital presumption to include relationships outside of heteronormative traditions effectively denies a non-biologically related same-sex parent the fundamental right to be recognized as a legal parent over their own children. In this way, states with traditional heteronormative marital presumptions fail to live up to *Obergefell*'s promise of conferring all of the "profound benefits" of marriage allotted to different-sex couples equally to same-sex couples.[174] To live up to *Obergefell*'s promise, states must restructure the presumption in two ways: first, legal parental status must be presumed where a child is the product of a marital relationship; and second, ensuring that this presumption cannot be rebutted solely on the basis of biological connection.

As of 2021, the marital presumption of each state varies.[175] These variations reflect an array of differing policy objectives, which in turn influence the ways state courts apply their state's

171. *See id.* at 604.

172. Obergefell v. Hodges, 576 U.S. 644, 669–70 (2015).

173. *See* Katz-Wise, *supra* note 15.

174. *Obergefell*, 576 U.S. at 668.

175. *See* discussion *supra* Part III.

law.[176] In some states, such as Texas[177] and Iowa,[178] parenthood is largely defined by biological connection. While same-sex couples in these states are afforded the marital presumption where they have a child as a product of their marriage, this presumption is rebuttable should the child's biological parent seek sole legal parental rights, therefore stripping the non-biologically related parent of legal rights.[179] The ease with which a same-sex spouse can be stripped of these rights posits parenthood as being grounded in the biological connection between parent and child, while also elevating the status of a biological parent over a functional one.[180] The need to restructure the marital presumption is greatest in states that continue to define the presumption according to biological connection because preserving biological familial units does not comport with the recognized sanctity of non-traditional same-sex parents established in *Obergefell*.[181]

While some states prioritize biological connection in the formulation of their marital presumption, others, such as Utah,[182] Louisiana,[183] and Michigan,[184] emphasize the importance of marriage. In these state courts' application of the presumption, marriage is a paramount consideration of

176. June Carbone & Naomi Cahn, *Marriage and the Marital Presumption Post*-Obergefell, 84 UMKC L. REV. 663, 664 (2016).

177. *See, e.g.*, *ex rel.* J.W.T., 872 S.W.2d 189, 198 (Tex. 1994) (holding that a biological father of an illegitimate child has standing to bring suit to establish paternity).

178. *See, e.g.*, Callender v. Skiles, 591 N.W.2d 182, 191–92 (Iowa 1999) (holding that Iowa state law requires biological fathers have standing to bring a claim to establish paternity).

179. Carbone & Cahn, *supra* note 176, at 665.

180. *See id.* at 665–66.

181. *See* Obergefell v. Hodges, 576 U.S. 644, 669–70 (2015).

182. *See, e.g.*, Pearson v. Pearson, 182 P.3d 353, 356 (Utah 2008) (noting the state's underlying policy objectives "of encouraging the marital father to stay married to the child's mother" within parental rights claims).

183. *See, e.g.*, Tannehill v. Tannehill, 261 So. 2d 619, 621–22 (La. 1972) (noting that, as of 1972, the state had "never allowed a disavowal of paternity," and that "the presumption of paternity in Louisiana has been rigorously applied").

184. *See, e.g.*, Fam. Indep. Agency v. Jefferson (*In re* K.H.), 677 N.W.2d 800, 806 (Mich. 2004) (quoting People v. Case, 171 Mich 282, 284 (Mich. 1912)) (stating that the marital presumption "is one of the strongest presumptions in the law").

whether the presumption should be allowed to be rebutted.[185] The courts are then less likely to grant a petition for a rebuttal of the presumption where it undermines the institution of marriage, such as where a child has been born into a marriage and a non-spouse seeks to petition for legal parental rights.[186] Other states, including California and Massachusetts, base their marital presumption on neither biology nor marriage, and rather take a functional approach.[187] This approach prioritizes preservation of parent-child relationships where a person has acted as a functional parent to a child, therefore creating a parent-child bond that, if broken, would cause long-term hardships to both the child and parent.[188]

This Note proposes that states adopt a multi-factor marital presumption that confers marital rights equally to similarly situated different- and same-sex parents that aligns with *Obergefell*'s holding. This approach rejects biological connection as the penultimate determinate in conferring parental rights. Rather, this proposed framework views familial units through a social lens that prioritizes intent, the establishment of a functional parent, and the best interest of the child, all of which combine to form a list of three distinct but interconnected factors that function as an inclusive basis for state marital presumptions that recognizes and respects the sanctity of both traditional and non-traditional families.

### A. *Intent*

Under an intent-based marital presumption, parentage is presumed where a person or couple intended to "bring about the birth of a child that [they] intended to raise as [their] own."[189] Simply put, this approach requires the court to ask

185. *See Pearson*, 182 P.3d at 356; *Tannehill*, 261 So. 2d at 621–22; *Jefferson*, 677 N.W.2d at 806.

186. Carbone & Cahn, *supra* note 176, at 666.

187. *Id.*

188. *See* discussion *supra* Part III.

189. Johnson v. Calvert, 851 P.2d 777, 782 (Cal. 1993). Where a plaintiff brings a claim for legal parental rights in a state that follows an intent-based marital presumption, the claim can

whether "at the critical point in time, did the individual who gave birth and their spouse mutually intend for the spouse to be a parent of the child?"[190] As this question warrants a yes or no answer, an intent-based marital presumption benefits from ease of administration for both the couple and the court.[191] For the spouse seeking parental rights, intent can be demonstrated via parental agreements and other records that indicate an intent to co-parent the child.[192] Another advantage of this approach includes fairness considerations as both parents' mutual reliance on the promise of parenthood is honored.[193] Finally, intent also serves to promote the best interests of the child as those that demonstrate intent to fulfill parental duties have been shown to correlate with positive overall outcomes for both parent and child.[194]

An intent-based marital presumption ensures that, should two married women intend to have and raise a child together, both women retain parental rights should the women later separate.[195] This situation was presented in the case of *McLaughlin v. Jones*, where the Arizona Supreme Court held that, where two women are married and one is inseminated via an anonymous sperm donor, and where the two women sign a co-parenting agreement prior to the birth of the child, both women have demonstrated their intent to parent.[196] This intent then protects the non-biologically related mother should she and her wife separate and the biologically related mother seeks to rebut her former partner's presumption of parentage.[197] In *McLaughlin*, the court ultimately held that this demonstrated intent to parent, combined with reliance on this intent following

be rebutted by a showing that the spouses lacked mutual intent for both spouses to be the child's legal parent. *See id.*

190. Feinberg, *supra* note 55, at 273.

191. *Id.*

192. *Id.*

193. *Id.*

194. *Id.*

195. *See* McLaughlin v. Jones, 401 P.3d 492, 501 (Ariz. 2017).

196. *Id.* at 501–02.

197. *Id.* at 502.

the establishment of a parent-child bond between the non-biologically related parent and child, was sufficient to deny the biological mother's petition for sole parental rights following her separation from the non-biologically related mother.[198]

### B. *Functional Parent Doctrine*

While there is no single definition of what constitutes a functional parent, legal scholar Angela Ruffini has defined a functional parent as a person who "functions . . . as [a] parent and provides emotional, physical, and financial support that a child may need and also provides for the child's day-to-day activities, educational needs, medical care, guidance, physical accompaniment, and any similar task."[199] In practice, a function-based marital presumption assumes parental status where a married couple has a child and either parent then fulfills these parental functions, therefore allowing a court to grant full legal parental rights regardless of biological connection.[200] Under a function-based framework, a state upholds its interest in preserving family unity by ensuring that functional parents retain legal recognition of the role that they play in their child's life.[201] The preservation of family unity often serves the best interests of the family as a whole; studies have shown that maintaining familial bonds between children and their functional parents is in the best interest of the child, with one 2007 study showing that removal of children from their families can result in long-term trauma.[202]

198. *Id.* at 501.

199. Angela Ruffini, *Who's Your Daddy?: The Marital Presumption of Legitimacy in the Modern World and Its Application to Same-Sex Couples*, 55 FAM. CT. REV. 307, 315 (2017).

200. *See id.*

201. *See* CHILD WELFARE INFO. GATEWAY & CHILDS. BUREAU, DETERMINING THE BEST INTERESTS OF THE CHILD 2 (2020); Ruffini, *supra* note 199, at 309.

202. AUDITS DIV., OR. SEC'Y OF STATE, OREGON CAN MORE EFFECTIVELY USE FAMILY SERVICES TO LIMIT FOSTER CARE AND KEEP CHILDREN SAFELY AT HOME 7 (2020) ("A 2007 study found [that] children assigned to CPS investigators with relatively high removal rates were more likely to be placed in foster care, and had higher delinquency rates, teen birth rates, and lower earnings than similar children assigned to investigators with low removal rates."); *see generally*

To rebut the presumption of parenthood based on function, a petitioner would have to show that his or her spouse did not adequately perform these parental functions and therefore should not be an assumed parent of the child.[203] As of 2021, several states have included equitable parenthood doctrines in their parental rights jurisprudence, with eighteen states allowing for the grant of either custody or visitation rights to those who, while not legally a parent, function as one to the child.[204] Additionally, both Montana[205] and Connecticut[206] rely on functionality principles in assessing petitions for marital presumption rebuttals in the context of both same- and different-sex couples. The Montana Supreme Court has held that a wife cannot rebut the marital presumption where she has a child within marriage and leads her husband to believe that he is the father of the child, thus resulting in the husband performing parental functions.[207] The Superior Court of Connecticut has similarly held that "[a] plaintiff . . . may rely upon equitable principles [of parental function] in an effort to preclude the defendant from rebutting the marital presumption and asserting that the plaintiff is not the minor child's legal parent."[208] Finally, in the District of Columbia, the law dictates that a petitioner can rebut the presumption of parentage in a same-sex relationship if the spouse has not "[held] herself out as a parent of the child," and therefore has not functioned as that child's parent.[209]

For same-sex couples, the focus on parental functionality serves to recognize the realities of parental roles in non-traditional families. To be a parent, a person's responsibility

Shanta Trivedi, *The Harm of Child Removal*, 43 N.Y.U. REV. L. & SOC. CHANGE 523 (2019) (providing a comprehensive analysis of the role of harm removal in child welfare decisions).

203. Feinberg, *supra* note 55, at 262.

204. *Id.* at 264–65.

205. *See In re* Marriage of K.E.V., 883 P.2d 1246, 1252–53 (Mont. 1994).

206. *See, e.g.*, Barse v. Pasternak, No. HHBFA124030541S, 2015 Conn. Super. LEXIS 142, at *14 (Conn. Super. Ct. Jan. 16, 2015).

207. *In re Marriage of K.E.V.*, 883 P.2d at 1252.

208. *Barse*, 2015 Conn. Super. LEXIS 142, at *44.

209. D.C. CODE § 16-909(b)(2) (2021).

extends past mere genetic contribution; rather, a parent is someone who takes on an additional myriad of parental responsibilities and directly cares for, influences, and watches over their child, while simultaneously holding out that child as their own. Under this view of parenthood, those that are the presumed parent of their child within both their household and community are protected from outside claims of parental rights.

### C. *Best Interest of the Child*

Unlike custody determinations, parental rights traditionally turn on parental interests and, while the best interests of the child are considered, this consideration is not alone dispositive.[210] However, as both the parent and child are profoundly impacted by parental rights decisions, it is essential that the needs, wants, and overall well-being of the child are considered equally to that of the parent. As noted by professor Elizabeth Bartholet, the law must "place greater emphasis on parental responsibilities and children's rights to receive responsible parenting" to ensure that parental interests do not overshadow those of the child.[211] Further, differing definitions of what constitutes the best interest of the child can lead to potentially inequitable results.[212] While aspects of the best interest of the child considerations may overlap with the functional parent doctrine,[213] these additional considerations do not detract from the overall foundation of the marital

210. NeJaime, *The Nature of Parenthood*, *supra* note 98, at 2269.

211. Elizabeth Bartholet, *Guiding Principles for Picking Parents*, 27 HARV. WOMEN'S L.J. 323, 337 (2004).

212. For example, in *Michael H. v. Gerald D.*, the plurality opinion held that an adulterous biological father does not have a fundamental right to be recognized as a legal father over the marital father. 491 U.S. 110, 124 (1989); *see id.* at 131 ("When the husband or wife contests the legitimacy of their child, the stability of the marriage has already been shaken. In contrast, allowing a claim of illegitimacy to be pressed by the child–or, more accurately, by a court-appointed guardian ad litem–may well disrupt an otherwise peaceful union.").

213. *See* discussion *supra* Section IV.B.

presumption as, at its core, the presumption greatly affects both parent and child.

As of 2021, the definition of what constitutes a child's best interest varies from state to state and can include a multitude of factors to be considered by the court.[214] However, despite potential differences in doctrine, many states overlap in their ultimate goals and the guiding principles that underlie the court's decision-making process.[215] Among these shared principles is an emphasis on: preserving familial integrity that gives preference to not removing a child from his or her family home if possible; ensuring that the health and safety needs of the child are and can continue to be met; and offering assurance that, should a child be removed from their home, that child will be then placed in the hands of a competent adult who can take care of the child's needs.[216] Additionally, common factors under which the best interests of the child are evaluated include: emotional ties between parent, child, and other household members; the parent's ability to provide for the child's basic needs, including being able to provide shelter, food, and medical care; and the mental and physical wellbeing of both parent and child.[217] Finally, a minority of states also require that the court consider the wishes of the child, so long as the child is of an appropriate age and level of maturity to be able to voice their preference.[218]

The inclusion of a best interest of the child standard into marital presumption jurisprudence is not novel. As of 2017, the UPA allows for a rebuttal of parentage where the parentage of

214. *See* CHILD WELFARE INFO. GATEWAY & CHILDS. BUREAU, *supra* note 201, at 30. For example, factors that Oregon courts consider: "(a) The emotional ties between the child and other family members; (b) The interest of the parties in and attitude toward the child; (c) The desirability of continuing an existing relationship; (d) The abuse of one parent by the other; (e) The preference of the primary caregiver of the child . . . ; and (f) The willingness and ability of each parent to facilitate and encourage a close and continuing relationship between the other parent and the child." OR. REV. STAT. § 107.137(1) (2020).

215. CHILD WELFARE INFO. GATEWAY & CHILDS. BUREAU, *supra* note 201, at 2.

216. *Id.*

217. *Id.* at 2–3.

218. *See id.* at 4.

an individual is challenged within two years of the child's birth based solely on the best interest of the child.[219] Additionally, New York applied a version of the state's best interest of the child standard in *Matter of Christopher YY v. Jessica ZZ*, holding that a child born via artificial insemination within the marital relationship of two women is the legal child of both women.[220] The court also concluded that this presumption could not be rebutted where the sperm donor sought parental rights as it was not within the best interest of the child.[221] Specifically, the court considered whether the child "would suffer irreparable loss of status, destruction of [her] family image, or other harm to [her] physical or emotional well-being" should the proceeding move forward.[222] Based on these considerations, the court ultimately held that the bonded relationship between the mothers and the child did not "warrant a finding that the child has an interest in knowing the identity of, or having a legal or familial relationship with, the man who donated sperm that enabled the mother's conception."[223]

### D. *Integration of a Multi-Factor Marital Presumption*

Adoption of the three standards into a state's marital presumption can be done via a factor-based analysis. The proposed model statute reads as follows:

> Where a married couple has a child during the course of their marriage—whether that child be conceived via assisted reproductive technology (ART), surrogacy, or otherwise—and only one spouse is biologically related to the child, the non-biologically related spouse is a presumed parent where:

219. *See* UNIF. PARENTAGE ACT § 608(c)(3) (UNIF. L. COMM'N 2017).

220. *See* Christopher YY. v Jessica ZZ., 69 N.Y.S.3d 887, 891, 895 (App. Div. 2018).

221. *See id.* at 898–99.

222. *Id.* at 898 (quoting Starla D. v. Jeremy E., 95 A.D.3d 1605 (N.Y. App. Div. 2012)).

223. *Id.*

> (a) Prior to the child's birth, both spouses indicated intent to co-parent the child;[224]
>
> (b) Following the child's birth, the spouse has acted as a functional parent;[225] or
>
> (c) Recognition of parental rights is in the best interest of the child.

Under this analysis, states can implement a balancing test that weighs each of the three factors—intent, functional parent, and the best interest of the child—against one another.[226] Additionally, integrating all three foundational principles into a single framework allows states to retain decision-making authority over which policy goals it chooses to elevate. For example, intent and functional parent standards are both based on ideas surrounding conscious acceptance of parental responsibilities, therefore highlighting the importance of granting parental status to those who knowingly and willingly assume a parental role.[227] The best interest of the child and functional parent standards both seek to ensure that the child's wide array of needs—physical, emotional, and otherwise—are currently and will continue to be met.[228] This overlap ensures that states are all working within a framework that recognizes the legal rights of non-traditional families while also allowing that state to apply the balance of factors in accordance with legislative policy goals.[229]

224. A person indicates an intent to co-parent by showing that they planned for and intended to bring about the conception of the child.

225. A person acts as a functional parent when they directly care for, influence, and watch over the child and openly hold out the child as their own.

226. *See* discussion *supra* Sections IV.A–C.

227. *See* discussion *supra* Sections IV.A–B.

228. *See* discussion *supra* Sections IV.B–C.

229. This approach is not without its limitations. As noted by Professor Douglas NeJaime, using marriage as a prerequisite to establish parental rights is inherently limiting to those who either cannot or chose to not marry. NeJaime, *Marriage Equality*, *supra* note 12, at 1232 ("[S]ame-sex marriage affirms the privileged position of marriage and uses form, rather than function, to allocate parental rights. Through this lens, marriage equality accepts, rather than challenges, dominant conceptions of the family . . . ."). However limiting, working within a marriage-centric framework is necessary in order to ensure that same-sex spouses have access to all of

## CONCLUSION

Same-sex married couples who seek to start a family have unique legal needs. Despite the achievement of marriage equality in 2015, these couples still face legal uncertainties that have the potential to be disastrous within the context of parent-child relationships. The following hypothetical by Dr. Sabra L. Katz-Wise illustrates the risks that LGBTQ+ families face should they not take additional legal actions to affirm their full legal parental rights:

> A married same-gender female couple has a baby using sperm from a donor. Both mothers are listed as parents on their child's birth certificate because they are married to one another. When the child is 5 years old, the family is traveling in another US state and there is a car accident. The gestational mother and child are both hurt. While the gestational mother is in surgery and unable to give consent, time-sensitive medical decisions must be made about their child. In the state the family is visiting, the nongestational mother's legal relationship to her child is questioned, because she did not give birth to the child and that state does not honor a birth certificate with two mothers listed as the parents. Because the hospital questions the nongestational mother's right to consent for her child's treatment, the doctors decide the course of treatment.[230]

To ensure that full legal equality is granted to same-sex couples and that parents are not left in a situation where they are barred from legally making decisions regarding their child's

the benefits afforded by *Obergefell*. *See* 576 U.S. 644, 681 (2015). Additionally, the proposed model statute does not undermine the rights of non-married same-sex partners. Rather, legal recognition of same-sex relationships—married or unmarried—promotes state recognition of equal rights for all LGBTQ+ individuals.

230. Katz-Wise, *supra* note 15.

wellbeing, the law must grant and protect same-sex couples' right to attain full legal parental status over their children.[231] While same-sex couples can choose to pursue numerous avenues to solidify their full legal parental rights,[232] these processes reflect antiquated ideas regarding family and parent-child relationships and are rooted in heteronormative family values. Regardless of whether parents are able to gain full parental legal status through one of these legal avenues, the need to undertake additional steps in order to gain a legally recognized parent-child relationship still fails to afford same-sex parents with "the constellation of benefits […] linked to marriage."[233] Because these processes essentially require a parent to ask the state to recognize their parent-child relationship as legitimate—a process under which similarly situated different-sex couples rarely, if ever, find themselves in—states' failure to grant automatic legal parenting rights to same-sex spouses whose child is a product of that relationship have not upheld a critical tenant of *Obergefell*.[234]

To rectify these inequities, the law must adapt to the changing family landscape. States can adapt by updating their marital presumption laws to presume parenthood where a person intends to bring about the birth of their child, functions as that child's parent, and where the resulting parent-child relationship is such that it is in the best interest of the child to be legally recognized as the child of that parent.[235] Without these changes, same-sex parents are left in a legal limbo that compels them to undertake expensive, arduous, and invasive legal proceedings in order to secure the rights to which they were entitled all along.

231. *See id.*

232. *See* discussion *supra* Part III (discussing three such avenues: second-parent adoption, stepparent adoption, and parentage judgments).

233. *Obergefell*, 576 U.S. at 669–70.

234. *See* discussion *supra* Section I.B.

235. *See* discussion *supra* Sections IV.A–C.