COVID-19 AND THE URGENCY OF PARENTAGE REFORM

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ABSTRACT

This Article, written for a symposium at Drexel University Thomas R. Kline School of Law, highlights how the COVID-19 pandemic underscores the urgent need to reform outdated parentage laws. It uses Pennsylvania law—the home state of the Kline School of Law—to illustrate how LGBTQ families can be harmed when parentage laws fail to reflect the reality of family life and form today. While LGBTQ-parent families long have contended with laws that failed to contemplate and protect their families, the COVID-19 pandemic has heightened the challenges and stresses they face. The Article closes by describing and elaborating on one reform model—the Uniform Parentage Act of 2017—available to states to guard against these harms.

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INTRODUCTION

Many states—including but certainly not limited to Pennsylvania[1]—continue to have outdated parentage laws on their books.[2] The COVID-19 pandemic further underscores the challenges families face when parentage laws fail to reflect the realities of family life and family form. After identifying and elaborating on the injuries families experience when the law fails to recognize and protect them, this Article then offers a reform model to guard against these outcomes.

Since 2015, same-sex couples in Pennsylvania and throughout the country have had access to marriage.[3] Despite this important development, LGBTQ-parent families and their children remain vulnerable. They remain vulnerable because parentage laws in many states—at least in their literal terms—remain rooted in a "gender-differentiated, heterosexual paradigm"[4] premised on a parenting unit consisting of one mother and one father.[5] For example, more than seven years after the Supreme Court decided *Obergefell v. Hodges*,[6] many states still have gender-specific marital presumptions of

1. This Article was prepared for a symposium at the Drexel University Thomas R. Kline School of Law on Reproductive Injustice: COVID-19, Reproduction, and the Law.

2. *See, e.g.*, Douglas NeJaime, *The Nature of Parenthood*, 126 YALE L.J. 2260, 2264–66 (2017) [hereinafter NeJaime, *Parenthood*] (proposing the need for parentage reforms given the rise in assisted reproductive technologies); *see generally* Susan Hazeldean, *Illegitimate Parents*, 55 U.C. DAVIS L. REV. 1583 (2022) (surveying parentage laws of all fifty states and assessing the ability of both members of unmarried same-sex couples to establish legally recognized relationships to their children).

3. Obergefell v. Hodges, 576 U.S. 644, 675–76 (2015) (holding that state laws limiting marriage to the union of one man and one woman and laws denying recognition of marriages between two people of the same sex are unconstitutional).

4. NeJaime, *Parenthood*, *supra* note 2, at 2267.

5. *See id.* at Appendix A (cataloguing state statutes); *see also* Courtney G. Joslin, *Protecting Children(?): Marriage, Gender, and Assisted Reproductive Technology*, 83 S. CAL. L. REV. 1177, 1185 (2010) [hereinafter Joslin, *Protecting Children*] (noting that, at that time, the assisted reproduction "statutes in most other states likewise use the gendered terms of husband and wife"). While this Article focuses on LGBTQ-parent families, they are far from the only ones inadequately protected under this type of parentage regime. For further exploration of the range of families that may be harmed, see Courtney G. Joslin & Douglas NeJaime, *How Functional Parenthood Functions*, 122 COLUM. L. REV. (forthcoming 2023) (manuscript on file with author).

6. 135 S. Ct. 2584 (2015).

parentage, providing that a "husband" is presumed to be the parent of a child born to his wife,[7] but failing to speak expressly to the status of a wife whose spouse gives birth to a child during their marriage.[8] In some cases, courts concluded that these kinds of gendered statutes do not apply to same-sex parent families.[9]

Rulings like this—that a person who is functioning as a parent is not a legal parent—inflict both emotional and financial harms on children. As a result of these kinds of decisions, children may be abruptly and permanently cut off from someone they view and rely on as a parent.[10] Children may also be denied critical financial benefits and protections through their parents if they lack a legal relationship with those individuals.[11] While LGBTQ-parent families have long contended with laws that failed to contemplate and protect their families, the COVID-19 pandemic heightened the challenges and stresses they face. Fortunately, there are steps states can take to recognize children's families as they exist in fact, and to guard against these harms.

Part I of this Article details the obstacles faced by LGBTQ parents during the COVID-19 pandemic, particularly as it

7. *See, e.g.*, TEX. FAM. CODE ANN. § 160.204(a)(1) (West 2015) ("A man is presumed to be the father of a child if . . . he is married to the mother of the child and the child is born during the marriage.").

8. *See id.* To be sure, as discussed more below, there are strong statutory and constitutional arguments that gendered parentage provisions must be applied equally to women; *see, e.g.*, COURTNEY G. JOSLIN, SHANNON P. MINTER & CATHERINE SAKIMURA, LESBIAN, GAY, BISEXUAL AND TRANSGENDER FAMILY LAW § 3:3 (Thomson West 2021) (discussing arguments); *see also* Douglas NeJaime, *Marriage Equality and the New Parenthood*, 129 HARV. L. REV. 1185, 1246 (2016) ("It would also give meaning to marriage equality, which validated same-sex couples' intentional and functional parent-child relationships. Indeed, same-sex couples have looked to *Obergefell*, the Court's marriage-equality decision, to bolster their claims to the marital presumption."); Leslie Joan Harris, Obergefell*'s Ambiguous Impact on Legal Parentage*, 92 CHI.-KENT L. REV. 55, 70–71 (2017). But, even if a court ultimately agrees with those arguments, the parties may have to spend time and money litigating the matter. In addition, as discussed herein, some courts have rejected these arguments. *See infra* notes 29–32 and accompanying text.

9. *See, e.g.*, *In re* A.E., No. 09-16-00019-CV, 2017 WL 1535101, at *10 (Tex. App. Apr. 27, 2017).

10. *See infra* notes 30–31 and accompanying text.

11. I explore some of the financial harms in more detail elsewhere. *See* Joslin, *Protecting Children*, *supra* note 5, at 1194–98.

relates to their lack of legal recognition as parents. Part II then describes and elaborates on one available reform model—the Uniform Parentage Act of 2017.[12]

I. (LACK OF) FAMILY RECOGNITION IN THE TIME OF COVID

Same-sex couples have been able to marry nationwide since 2015.[13] Despite this important development, over seven years later, parentage laws in many states remain premised on a heterosexual family paradigm consisting of one mother and one father.[14] For example, most states today continue to have gender-specific marital presumptions of parentage.[15] By their literal terms, these statutes extend presumptions of parentage to husbands,[16] but fail to address explicitly the status of a wife whose spouse gave birth to a child during their marriage. These outdated statutes leave families, including LGBTQ-parent families, vulnerable.

While there are strong statutory and constitutional arguments that gendered parentage statutes must be applied equally to same-sex parent families,[17] some courts have resisted this conclusion.[18] Take the case of *In re A.E.*, decided in 2017 by a Texas intermediate court.[19] The case involved a lesbian couple, M.N. and C.W., who married in Connecticut in 2011.[20] During their marriage, they decided to have a child together using

12. *See* UNIF. PARENTAGE ACT (UNIF. L. COMM'N 2017).

13. Obergefell v. Hodges, 576 U.S. 644, 675–76 (2015) (holding that state laws limiting marriage to the union of one man and one woman and laws denying recognition of marriages between two people of the same sex are unconstitutional).

14. *See supra* note 5.

15. *See, e.g.*, JOSLIN, ET AL., *supra* note 8, at § 5:22.

16. *See, e.g.*, TEX. FAM. CODE ANN. § 160.204(a)(1) (West 2015) ("A man is presumed to be the father of a child if . . . he is married to the mother of the child and the child is born during the marriage.").

17. *See supra* note 8.

18. *See, e.g.*, *In re* A.E., No. 09-16-00019-CV, 2017 WL 1535101, at *10 (Tex. App. Apr. 27, 2017).

19. *Id.*

20. *Id.* at *1.

assisted reproduction and sperm from an unknown provider.[21] M.N. gave birth to the child during their marriage, although after the parties had ceased living together.[22] About a year and a half after the child's birth, C.W., the nonbirth parent, initiated a divorce and custody action.[23] C.W. was a parent, she argued, because a man in the same circumstances would be considered a parent of a child conceived through assisted reproduction and born during his marriage.[24] The Texas Court of Appeals, however, disagreed.[25] "[S]ubstitut[ing] . . . the word 'spouse' for the words 'husband' and 'wife' [in the parentage statutes]," the court said, "would amount to legislating from the bench, which is something that we decline to do."[26]

To be sure, other courts, including other Texas courts,[27] have reached contrary conclusions.[28] That said, the *A.E.* decision is not the only one to conclude that same-sex parents—including same-sex married parents—are not parents to children they planned for and co-parented. For example, in September 2021, the Idaho Supreme Court held that a woman was not a parent to a child born to her former wife and conceived through assisted reproduction during their marriage, and who she had

21. *Id.*

22. *Id.*

23. *Id*.

24. *Id.* at *3; *see* TEX. FAM. CODE ANN. § 160.204(a)(1) (West 2015) ("A man is presumed to be the father of a child if: he is married to the mother of the child and the child is born during the marriage."); TEX. FAM. CODE ANN. § 160.703 (West 2001) ("If a husband provides sperm for or consents to assisted reproduction by his wife as provided by Section 160.704, he is the father of a resulting child.").

25. *In re A.E.*, 2017 WL 1535101, at *10.

26. *Id.*

27. *See, e.g.*, Treto v. Treto, 622 S.W.3d 397, 402 (Tex. App. 2020) ("Accordingly, it follows that under *Pavan*, we are to give effect to the ancillary benefits of a same–sex marriage, including the determination of maternity for the non–gestational spouse of a child born to the marriage.")*.*

28. *See, e.g.*, Harrison v. Harrison, No. M2020-01140-COA-R3-CV, 2021 WL 4807239, at *5 (Tenn. Ct. App. Oct. 15, 2021) ("Construing Tennessee Code Annotated section 68-3-306 literally, in a non-gender-neutral manner, places it at odds with the United States Supreme Court's holdings in *Obergefell* and *Pavan* because it would deny same-sex married couples the same 'constellation of benefits' that married opposite-sex couples enjoy."); McLaughlin v. Jones, 401 P.3d 492, 498 (Ariz. 2017) ("The marital paternity presumption is a benefit of marriage, and following *Pavan* and *Obergefell*, the state cannot deny same-sex spouses the same benefits afforded opposite-sex spouses.").

parented—sometimes as the sole custodial parent—for over two years.[29]

When a child lacks a legal relationship to a person they view as their parent, their relationship with that person may be abruptly severed. That is what may have happened in the aftermath of the *A.E.* and Idaho decisions,[30] and in many other cases.[31] Many of these children never saw their parent again. As explained by Judge Judith Kaye, former Chief Judge of New York's highest court, the impact of rules failing to recognize and protect parent-child relationships that exist in fact "fall[ ] hardest on the children of those relationships, limiting their opportunity to maintain bonds that may be crucial to their development."[32]

Social science evidence confirms that failure to protect these kinds of relationships can impede child welfare and well-being.[33] For example, in 2019, the National Academies of Science, Engineering, and Medicine explained: "For all children, the single most important factor in promoting positive psychosocial, emotional, and behavioral well-being is having a

29. Gatsby v. Gatsby, 495 P.3d 996, 999–1000 (Idaho 2021) ("We have before us an appeal in a custody case brought by a woman whose same-sex former spouse conceived a child through artificial insemination during their marriage. . . . The district court affirmed the magistrate court's ruling that Appellant Linsay Gatsby ('Linsay') had no parental rights to the child . . . because she conceded that she lacked a biological relationship with the child. . . . [W]e affirm.").

30. *Id.* at 1008 ("Accordingly, we affirm the district court in concluding that the magistrate court did not abuse its discretion by granting Kylee sole legal and physical custody, and denying Linsay any third-party custody or visitation.").

31. *See, e.g.*, Suzanne B. Goldberg, *Family Law Cases as Law Reform Litigation: Unrecognized Parents and the Story of* Alison D. v. Virginia M., 17 COLUM. J. GENDER & L. 307, 308 (2008) (describing a case in which a former same-sex partner was held to be a "'biological stranger' to her son, [and therefore] lacked standing to petition the court for visitation" (quoting Alison D. v. Virginia M., 572 N.E.2d 27, 28 (N.Y. 1991))); *see also* Elaine Herscher, *Family Circle*, SFGATE (Aug. 29, 1999), https://www.sfgate.com/news/article/Family-Circle-For-Nancy-Springer-a-1991-court-2911717.php (describing the aftermath of a similar case out of California); Melanie B. Jacobs, *Micah Has One Mommy and One Legal Stranger: Adjudicating Maternity for Nonbiological Lesbian Coparents*, 50 BUFF. L. REV. 341, 391 (2002).

32. Alison D. v. Virginia M., 572 N.E.2d 27, 30 (N.Y. 1991) (Kaye, C.J., dissenting), *overruled by* Brooke S.B. v. Elizabeth A.C.C., 61 N.E.3d 488 (N.Y. 2016).

33. *See* Joslin, *Protecting Children*, *supra* note 5, at 1194 (discussing "persuasive evidence demonstrating that the provision of adequate family income and financial support 'is essential to child wellbeing'").

strong, secure attachment to their primary caregivers . . . ."[34] When these relationships—genetically-based or not—are not protected, children are harmed. As Dr. Linda Mayes, the Director of the Yale Child Study Center and Professor at the Yale School of Medicine, explains: "Studies have shown that loss of or separation from a psychological parent can have a significant negative impact on children's development."[35] This separation, she continues, "can decrease children's ability to trust others, disrupt child development, and increase children's likelihood of developing behavioral health and substance abuse disorders as adults."[36] Moreover, "a growing body of high-quality, peer-reviewed research suggests that the termination of an attachment relationship is traumatic for a child even where there is no biological or adoptive connection to the parent."[37]

If the person is not recognized as a legal parent, it can also mean that the child is not entitled to a wide range of important benefits and protections through that person. For example, a person who is not a legal parent typically cannot be ordered to provide support for the child.[38] The child may not be entitled to protections like children's social security survivor benefits if that person is injured or killed.[39]

34. NAT'L ACADS. OF SCI., ENG'G, & MED., VIBRANT AND HEALTHY KIDS: ALIGNING SCIENCE, PRACTICE, AND POLICY TO ADVANCE HEALTH EQUITY 240 (Jennifer E. DeVoe, Amy Geller & Yamrot Negussie eds., 2019) (emphasis omitted); *see also* Anne L. Alstott, Anne C. Dailey & Douglas NeJaime, *Psychological Parenthood*, 106 MINN. L. REV. (forthcoming 2022) (manuscript at *8) (on file with authors) (reviewing relevant social science literature).

35. Letter from Linda C. Mayes, Dir., Yale Child Study Ctr., to the Members of the Connecticut Joint Committee on Judiciary (Mar. 7, 2020), https://www.cga.ct.gov/2020/juddata/tmy/2020HB-05178-R000306-Mayes,%20MD,%20Linda,%20Director-Yale%20Child%20Study%20Center-TMY.PDF.

36. *Id.*

37. Alstott et al., *supra* note 34, at *10.

38. *See, e.g.*, *In re* A.M.K., 2013 WI App 128U, ¶ 9, 351 Wis.2d 223, 838 N.W.2d 865 ("We agree with the parties' apparent stipulation that there is no statutory basis upon which a court may order a non-parent to pay child support to the biological parent."); *see also* Joslin, *Protecting Children*, *supra* note 5, at 1209–17.

39. *See* Joslin, *Protecting Children*, *supra* note 5, at 1209–17. During my time in practice, I represented a parent whose children were initially denied children's social security benefits after the death of their nonbiological parent. Fortunately, this decision was later reversed.

To be clear, LGBTQ-parent families have faced these challenges for decades;[40] uncertainty about same-sex partners' status regarding a child born into and parented in the context of that relationship is not new.[41] That said, the COVID-19 pandemic has further compounded the challenges and stresses these families face. Take the experience of Elana and Denise, a married same-sex couple in Rhode Island with two children. Elana is an emergency room doctor, and Denise also works in health care.[42] Because the children were born during their marriage, Elana and Denise believed they both were legal parents of their children.[43] And Rhode Island parentage law, like that in all other states,[44] included a marital presumption.[45] At that time (and until January 1, 2021), the presumption was expressly gendered—presuming a *man's* parentage.[46] Elana and

40. *See, e.g.*, Alison D. v. Virginia M., 572 N.E.2d 27, 28 (N.Y. 1991) (holding that a former same-sex partner who jointly participated in the decision to have a child conceived through assisted reproduction and who thereafter co-parented that child for five years was "not a parent within the meaning of" New York family law), *overruled by* Brooke S.B. v. Elizabeth A.C.C., 61 N.E.3d 488 (N.Y. 2016); Nancy S. v. Michele G., 279 Cal. Rptr. 212, 214 (Cal. App. 1991) (holding that a former same-sex partner who jointly participated in the decision to have children conceived through assisted reproduction and who thereafter co-parented the children for approximately 8 and 4 years, respectively, was not a parent), *overruled by* Elisa B. v. Superior Ct., 117 P.3d 660 (Cal. 2005); *see also* Nancy D. Polikoff, *This Child Does Have Two Mothers: Redefining Parenthood to Meet the Needs of Children in Lesbian-Mother and Other Nontraditional Families*, 78 GEO. L.J. 459, 471 (1990).

41. *See* sources cited *supra* note 40. For an exploration of the evolution of the law in this area, see Courtney G. Joslin, *Leaving No (Nonmarital) Child Behind*, 48 FAM. L.Q. 495, 495 (2014) [hereinafter Joslin, *Leaving No Child Behind*]; Courtney G. Joslin, *The Legal Parentage of Children Born to Same-Sex Couples: Developments in the Law*, 39 FAM. L.Q. 683, 690 (2005) [hereinafter Joslin, *Legal Parentage*].

42. *See* Elana Hayasaka, *My Turn: Elana Hayasaka: Legal Security for All Families in a Crisis*, PROVIDENCE J. (May 8, 2020, 4:16 PM), https://www.providencejournal.com/story/opinion/2020/05/08/my-turn-elana-hayasaka-legal-security-for-all-families-in-crisis/1227025007/.

43. For more information about Denise and Elana, see *Denise and Elana*, GLAD, https://www.glad.org/denise-and-elana/ (last visited Apr. 6, 2022).

44. Courtney G. Joslin, *Marriage, Biology, and Federal Benefits*, 98 IOWA L. REV. 1467, 1491 (2013).

45. R.I. GEN. LAWS § 15-8-3(a)(1) (repealed 2021).

46. For example, until January 1, 2021, Rhode Island's marital presumption provided: "A man is presumed to be the natural father of a child if: . . . He and the child's natural mother are or have been married to each other and the child is born during the marriage." *Id.* In 2000, the Rhode Island Supreme Court held that a paternity provision could be applied equally to a woman. Rubano v. DiCenzo, 759 A.2d 959, 970–71 (R.I. 2000). In this decision, the court relied in part on a statutory provision directing that "[i]nsofar as far as practicable," the "provisions

Denise along with other same-sex spouses hoped and believed, though, that that rule would be applied equally to them. The Supreme Court's decision in *Obergefell* declared that same-sex married couples must be accorded the same "constellation of benefits" that were extended to different-sex spouses.[47] In addition, two decades earlier, the Rhode Island Supreme Court ruled that gendered parentage provisions could and should be applied equally to women.[48] Nonetheless, in the absence of parentage rules that expressly covered their family, Elana and other nonbiological same-sex parents continued to be apprehensive about their status.[49] Moreover, even if Elana was recognized as a legal parent by her home state of Rhode Island, in the absence of a judgment confirming their parentage or something with the force of a judgment, she would not be assured that her parental status would travel with her as she crossed state lines.[50]

COVID-19 heightened these concerns. As a frontline worker, Elana contracted COVID-19 early on.[51] As Elana worried about her own health, about the health of her spouse, and about the health of their two children, she had the added worry about whether she, as a nonbirth parent, would have the right to make medical decisions for their children if Denise became unable to do so.[52] Or, in the worst case scenario, if the family's primary breadwinner Elana passed away, the family would have to worry about whether their children would have access to

of this chapter applicable to the father and child relationship" apply to determine "a mother and child relationship." *Id.* at 966, 980 (citing R.I. GEN. LAWS § 15-8-26 (repealed 2021)). There still are, however, no published Rhode Island decisions applying the previously gendered marital presumption equally to a female spouse. As of January 1, 2021, Rhode Island's marital presumption expressly applies to any spouse, of any gender. R.I. GEN. LAWS § 15-8.1-704 (2022).

47. Obergefell v. Hodges, 135 S. Ct. 2584, 2590 (2015).

48. *See Rubano*, 759 A.2d at 970–71.

49. *See* Hayasaka, *supra* note 42.

50. *See Denise and Elana*, *supra* note 43; *see also* Courtney G. Joslin, *Travel Insurance: Protecting Lesbian and Gay Parent Families Across State Lines*, 4 HARV. L. & POL'Y REV. 31, 31 (2010); Steve Sanders, *Interstate Recognition of Parent-Child Relationships: The Limits of the State Interests Paradigm and the Role of Due Process*, 2011 U. CHI. LEGAL F. 233, 233 (2011).

51. Hayasaka, *supra* note 42.

52. *Id.*

critical benefits intended to help children in the event of the death of or injury to a parent.[53] And, of course, Elana was not alone. While contending with the many challenges caused by the pandemic, same-sex parent families in states around the country have grappled with similar fears about the legal recognition of their families.[54]

Stephanie Ocasio-Gonzalez, an LGBTQ parent from Connecticut who also works in the health care industry, testified in 2021 in support of parentage reform legislation in Connecticut.[55] She wrote in her testimony: "If we were to move and something were to happen to me, Denise[, my same-sex spouse,] might have no legal rights to care for either of our children. If . . . [our children got hurt], [Denise] might not be able to visit them in the hospital or make medical decisions for them."[56]

Unfortunately, Elana's and Stephanie's fears that they or their spouses may become seriously ill or possibly die as a result of COVID-19 are not unfounded. Recent studies show that over 120,000 children in the United States faced this very reality during the pandemic—the death of a primary caretaker.[57] This translates to approximately 1 in 500 children in the United

53. *See id.* One example is children's social security benefits. As the Social Security Administration explains: "The loss of the family wage earner can be devastating both emotionally and financially. Social Security helps by providing income for the families of workers who die." SOCIAL SECURITY ADMINISTRATION, PUB. NO. 05-10084, SURVIVORS BENEFITS 1 (June 2019), https://www.ssa.gov/pubs/EN-05-10084.pdf.

54. *See* Hayasaka, *supra* note 42.

55. Letter from Stephanie Ocasio-Gonzalez regarding Raised Bill No. 6321 (March 6, 2021), https://www.cga.ct.gov/2021/juddata/tmy/2021HB-06321-R000308-Ocasio-Gonzalez,%20Stephanie-TMY.PDF.

56. *Id.*

57. Press Release, Nat'l Insts. of Health, More than 140,000 U.S. Children Lost a Primary or Secondary Caregiver Due to the COVID-19 Pandemic (Oct. 7, 2021), https://www.nih.gov/news-events/news-releases/more-140000-us-children-lost-primary-or-secondary-caregiver-due-covid-19-pandemic ("The study authors estimate that 120,630 children in the U.S. lost a primary caregiver, (a parent or grandparent responsible for providing housing, basic needs and care) due to COVID-19-associated death.").

States.[58] Many more children have experienced the serious illness of a caretaker.[59]

The loss of a parent can be devastating for a child. When the law does not recognize this person—or, alternatively, the surviving parent—as a parent, the emotional and financial consequences are magnified. If the adult who dies was a person whom the child viewed as a parent but whom the law did not, the child might lose not only a critical attachment figure, but they also may be denied access to benefits intended to ease the families' burden in this time of crisis.[60] If the deceased person was the legal parent, the surviving functional parent might experience difficulties in getting their relationship recognized[61]—a stress that no family wants to contend with in those circumstances.

II. MODEL FOR REFORM

Fortunately, there are ongoing efforts to minimize the gap between the law and the realities of families. This Article discusses one of them—the Uniform Parentage Act or the UPA of 2017 ("UPA (2017)").[62] I served as the reporter for this project[63] and I continue to contribute to efforts to enact the UPA (2017) in states around the country.

58. *Id.* ("Overall, the study shows that approximately 1 out of 500 children in the United States has experienced COVID-19-associated orphanhood or death of a grandparent caregiver.").

59. Between August 1, 2020, and October 24, 2021, over three million people in the United States had been hospitalized with confirmed COVID. *COVID Data Tracker*, CTRS. FOR DISEASE CONTROL & PREVENTION, (Apr. 6, 2022) https://covid.cdc.gov/covid-data-tracker/#new-hospital-admissions.

60. *See supra* notes 38–39 and accompanying text; *see also* Joslin, *Legal Parentage*, *supra* note 41, at 690.

61. For a story about a particularly poignant such case, see Herscher, *supra* note 31.

62. *See* UNIF. PARENTAGE ACT (UNIF. L. COMM'N 2017). The UPA (2017) is a product of the Uniform Law Commission (ULC). More information about the UPA (2017) is available at *Parentage Act*, UNIF. L. COMM'N, https://www.uniformlaws.org/committees/community-home?CommunityKey=c4f37d2d-4d20-4be0-8256-22dd73af068f (Apr. 3, 2022). For a summary of the important changes in the Act, see Courtney G. Joslin, *Preface to the UPA (2017)*, 52 FAM. L.Q. 437 (2018) [hereinafter Joslin, *Preface*].

63. *See* Joslin, *Preface*, *supra* note 62, at 437.

This Part briefly highlights four major changes in the UPA (2017). First, the Act eliminates unnecessary gender distinctions.[64] Second, the Act expands the methods by which a nonbiological parent can establish their parentage.[65] Third, the Act updates the assisted reproduction provisions to better reflect developments in family form, law, and practice.[66] And, finally, the Act expands the administrative process for establishing parentage.[67]

A. *Eliminating Gendered Terminology*

A key goal of the 2017 revision process was to ensure that the Act provides equal protection to the children of same-sex couples.[68] This revision process started with the basics—terminology.[69] Prior iterations of the Act laid out distinct means of establishing paternity on the one hand, and maternity on the other.[70] In contrast, the UPA (2017) consolidates all the methods under a single umbrella provision that applies equally, without regard to gender.[71] In other words, there is a single provision setting forth a list of methods by which "an individual" can establish their parentage.[72]

Consistent with this basic principle, throughout the Act, specific means of establishing parentage were made expressly gender neutral.[73] This is true, for example, of what is typically

64. *See infra* Section II.A.

65. *See infra* Section II.B.

66. *See infra* Section II.C.

67. *See infra* Section II.D.

68. UNIF. PARENTAGE ACT, PREFATORY NOTE (UNIF. L. COMM'N 2017) ("First, UPA (2017) seeks to ensure the equal treatment of children born to same-sex couples.").

69. *See, e.g.*, Courtney G. Joslin, *Nurturing Parenthood Through the UPA (2017)*, 127 YALE L.J. FORUM 589, 606 (2018) [Hereinafter Joslin, *Nurturing Parenthood*].

70. *See, e.g.*, UNIF. PARENTAGE ACT § 201(a) (UNIF. L. COMM'N 2002) (setting forth bases for establishing "[t]he mother-child relationship"); *id.* § 201(b) (setting forth bases for establishing "[t]he father-child relationship").

71. UNIF. PARENTAGE ACT § 201(a) (UNIF. L. COMM'N 2017).

72. *Id.*

73. UNIF. PARENTAGE ACT art. III (UNIF. L. COMM'N 2002).

called the "marital presumption" of parentage.[74] In earlier versions of the Act and still today in many states, the marital presumption is written in gendered terms, applying, at least literally, only to the husband of the woman who gave birth.[75] For example, the marital presumption from the UPA (2002) provided: "A man is presumed to be the father of a child if: (1) he and the mother of the child are married to each other and the child is born during the marriage."[76] The UPA (2017) revises the marital presumption so that it applies equally to any spouse, without regard to gender.[77]

B. *Expanding Protections for Nonbiological Parents*

Replacing gendered terminology with gender-neutral terminology is an important step. But alone, this change is insufficient to adequately protect same-sex parent families. This

74. *See, e.g.*, NeJaime, *Parenthood*, *supra* note 2, at 2266 ("Pursuant to the marital presumption (also known as the presumption of legitimacy), when a married woman gave birth to a child, the law recognized her husband as the child's father."). All fifty states today retain some version of the marital presumption. LESLIE HARRIS, JUNE R. CARBONE & LEE E. TEITELBAUM, FAMILY LAW 865 (4th ed. 2014) ("In all states a child born to a married woman is at least rebuttably presumed to be the child of her husband."); June Carbone & Naomi Cahn, *Marriage, Parentage, and Child Support*, 45 FAM. L.Q. 219, 223 (2011) ("All states continue to recognize at least a rebuttable presumption that a child born within marriage is the child of the husband, and many limit the circumstances in which it can be rebutted." (footnote omitted)). For more information about the marital presumption and its evolution in the United States, see for example, NeJaime, *Parenthood*, *supra* note 2, at 2272–74.

75. *See, e.g.*, UNIF. PARENTAGE ACT § 204(a)(1) (UNIF. L. COMM'N 2002). There are strong statutory and constitutional arguments that these gendered provisions must be applied equally to same-sex parent families. *See supra* note 8. Many courts have agreed, *see* cases cited *supra* notes 27–28, but others have not. *See, e.g.*, *In re* A.E., No. 09-16-00019-CV, 2017 WL 1535101 (Tex. App. Apr. 27, 2017).

76. UNIF. PARENTAGE ACT § 204(a)(1) (UNIF. L. COMM'N 2002). Most states today continue to have gendered marital presumptions in place. *See* NeJaime, *Parenthood*, *supra* note 2, at Appendix A.

77. UNIF. PARENTAGE ACT § 204(a)(1)(A) (UNIF. L. COMM'N 2017) ("An individual is presumed to be a parent of a child if: . . . the individual and the woman who gave birth to the child are married to each other and the child is born during the marriage, whether the marriage is or could be declared invalid[.]"). The marital presumption in the UPA (2017) does, however, continue to use the gendered phrase "woman who gave birth" and requires one of the spouses to have given birth for the presumption to apply. *Id.* For more discussion of this decision, see Joslin, *Preface*, *supra* note 62, at 449. Some states have replaced this phrase with a gender neutral one. *See, e.g.*, 15 R.I. GEN. LAWS ANN. § 15-8.1-401 (using "individual who gave birth").

is true because, in at least some states, parentage rules are premised on a model of reproductive biology and thus presume that both parties are biologically related to the child.[78] But almost all LGBTQ-parent families "include at least one nonbiological parent."[79] To adequately protect these families, the rules must also allow for the recognition and protection of nonbiological parents, in both marital and nonmarital families.[80] The UPA offers a number of routes by which to do so.

Proof of a biological connection is still a means by which one can establish parentage.[81] But, again, the UPA sets forth other ways too, including by demonstrating that the person functioned as a parent to the child.[82] For example, a person (of any gender) is entitled to a presumption of parentage if they have lived with the child since birth and held the child out as their child for the required period.[83] This is the so-called "holding out" presumption.[84] The UPA (2017) also includes a way to protect the relationships between children and parents who enter their lives *at some point after the child's birth*. This is through a new provision—the de facto parent

78. *See* NeJaime, *Parenthood*, *supra* note 2, at 2315 ("Same-sex couples, who are not similarly situated to different-sex couples with respect to biological parenthood, remain particularly vulnerable in a nonmarital parentage regime organized around biological connection.").

79. Joslin, *Nurturing Parenthood*, *supra* note 69, at 603.

80. Douglas NeJaime, *The Story of* Brooke S.B. v. Elizabeth A.C.C.*: Parental Recognition in the Age of LGBT Equality* 256, *in* REPRODUCTIVE RIGHTS AND JUSTICE STORIES 256 (2019) ("[T]o treat same-sex couples as truly belonging, the state must move away from a parentage regime designed around the heterosexual family and thus designed around biological relationships." (footnote omitted)).

81. *See* UNIF. PARENTAGE ACT § 607 (UNIF. L. COMM'N 2017) ("Adjudicating Parentage of Child with Alleged Genetic Parent").

82. *See* UNIF. PARENTAGE ACT § 204(a)(2) (UNIF. L. COMM'N 2017). For a more comprehensive exploration of how different states protect "functional parents," see Joslin & NeJaime, *supra* note 5.

83. Under the new, revised holding out presumption, *any individual*—regardless of gender, sexual orientation, or marital status—is presumed to be a parent if they "resided in the same household with the child for the first two years of the life of the child . . . and openly held out the child as the individual's child." UNIF. PARENTAGE ACT § 204(a)(2) (UNIF. L. COMM'N 2017).

84. And, as is true with the other presumption, the UPA (2017) makes this presumption expressly gender neutral, applying equally to any individual, of any gender, who engages in the required conduct. *See id.*

provision.[85] This provision reflects but also expands the common law developments in many states, including the commonwealth of Pennsylvania.[86] It reflects these developments in that it protects relationships between people who are functioning as parents to children but lack marital or genetic ties to them. It expands these common law developments by providing that such persons are treated as full, legal parents, rather than assigning them some lesser, often ambiguous status.[87]

C. *Updating Assisted Reproduction Provisions*

The UPA (2017) also expands and updates the rules applicable to children conceived through assisted reproduction. Increasing numbers of families—same-sex and different-sex—use assisted reproduction to have children.[88] In a very small number of states, including the commonwealth of Pennsylvania, there are simply *no statutes at all* addressing the parentage of such children born using assisted reproduction.[89]

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

86. *See, e.g.*, Jones v. Jones, 884 A.2d 915 (Pa. Super. Ct. 2005); J.A.L. v. E.P.H., 682 A.2d 1314, 1320 (Pa. Super. Ct. 1996); *see also* Joslin, *Leaving No Child Behind*, *supra* note 41, at 504.

87. *See* Joslin, *Leaving No Child Behind*, *supra* note 41, at 495; Joslin & NeJaime, *supra* note 5.

88. While not directly identifying the number of families formed through assisted reproduction, a recent Pew Research Center study reported that "[a] third of U.S. adults say they have used fertility treatments or know someone who has." Gretchen Livingston, *A Third of U.S. Adults Say They Have Used Fertility Treatments or Know Someone Who Has*, PEW RSCH. CTR. (July 17, 2018), https://www.pewresearch.org/fact-tank/2018/07/17/a-third-of-u-s-adults-say-they-have-used-fertility-treatments-or-know-someone-who-has/. A different study recently reported that "[i]n recent years, nearly half a million U.S. women have used donor insemination." Rachel Arocho, Elizabeth B. Lozano & Carolyn T. Halpern, *Estimates of Donated Sperm Use in the United States: National Survey of Family Growth 1995-2017*, 112 FERTILITY & STERILITY 718, 718 (Oct. 2019), https://www.ncbi.nlm.nih.gov/pmc/articles/PMC6765402/. Even this is likely an undercount, as there is no "mandated record keeping regarding donated gametes in the United States." *Id.* at 719.

89. *See Assisted Reproduction and Parental Recognition Laws*, MOVEMENT ADVANCEMENT PROJECT (MAP) (June 2, 2021), lgbtmap.org/img/maps/citations-assisted-reproduction.pdf. This lack of clear guidance creates uncertainties for the child, the intended parents, and for any gamete providers. Indeed, in 2007, an intermediate Pennsylvania court held that a sperm donor *who both parties intended to be just a donor* was responsible to support the resulting child. Ferguson v. McKiernan, 855 A.2d 121, 124 (Pa. Super. Ct. 2004) ("Due to the fact the contract between appellee and appellant bargained away a legal right not held by either of them, however, but belonging to the subject children, the contract was not enforceable."), *rev'd*, 940 A.2d 1236 (Pa.

More commonly, there are relevant statutes governing assisted reproduction, but, at least by their literal language, they protect only children born to married different-sex couples.[90]

The UPA (2017) expands and updates the rules. The UPA recognizes and protects the parentage of all intended parents, regardless of sex, sexual orientation, or marital status.[91] The Act also sets forth clear rules about the status of people who provide

2007). To be sure, this opinion was overruled on appeal based on the particular facts in the case. That said, gamete donors in Pennsylvania still donate at their peril; the existing case law suggests that a donor might—depending on the circumstances—be held to be a parent even if that was contrary to the parties' original intentions. *Ferguson*, 940 A.2d 1236, 1248 (Pa. 2007) ("Under these peculiar circumstances, and in considering as we must the broader implications of issuing a precedent of tremendous consequence to untold numbers of Pennsylvanians, we can discern no tenable basis to uphold the trial court's support order.").

90. *See, e.g.*, MINN. STAT. ANN. § 257.56 (West 1980) ("If, under the supervision of a licensed physician and with the consent of her husband, a wife is inseminated artificially with semen donated by a man not her husband, the husband is treated in law as if he were the biological father of a child thereby conceived. The husband's consent must be in writing and signed by him and his wife. The consent must be retained by the physician for at least four years after the confirmation of a pregnancy that occurs during the process of artificial insemination."). There are strong statutory and constitutional arguments that any such provisions must be applied equally to *married same-sex couples*. *See, e.g.*, Roe v. Patton, No. 2:15-cv-00253-DB, 2015 WL 4476734, at *3 (D. Utah July 22, 2015) ("May Defendants extend the benefits of the assisted-reproduction statutes to male spouses in opposite-sex couples but not for female spouses in same-sex couples? As discussed below, the court concludes that Plaintiffs are highly likely to succeed in their claim that such differential treatment is unconstitutional."). Courts have been less receptive, however, to claims that such statutes must be applied equally to children born to *unmarried couples*. *See, e.g.*, T.F. v. B.L., 813 N.E.2d 1244, 1253 (Mass. 2004) ("G.L. c. 46, § 4B, provides that, if the spouse of a woman who undergoes artificial insemination consents to the procedure, that spouse is considered the legitimate parent of a resulting child, and is thus obligated to pay child support. But the Legislature has not addressed the situation, present in this case, where a nonmarital cohabitant consents to such a procedure.").

91. *See, e.g.*, UNIF. PARENTAGE ACT § 703 (UNIF. L. COMM'N 2017) ("An individual who consents under Section 704 to assisted reproduction by a woman with the intent to be a parent of a child conceived by the assisted reproduction is a parent of the child."). Section 704 also—importantly—permits a court to find consent in the absence of written consent. *Id.* § 704(b). *In re A.E.* and *Gatsby*, discussed earlier, are two of the many recent examples of why the elimination of rigid procedural requirements is so important. *See* Gatsby v. Gatsby, 495 P.3d 996, 1005 (Idaho 2021) (concluding that a same-sex spouse was not a parent under the assisted reproduction provision because "there were numerous provisions of the AIA, outlined above, that were completely disregarded by the parties."). The surrogacy provisions also apply equally to all intended parents, without regard to the sex, sexual orientation, or marital status of the intended parents. *See* § 809 (providing that, with respect to gestational surrogacy agreements, "each intended parent is, by operation of law, a parent of the child"); *id.* § 102(13) (defining "intended parent" to mean "an individual, married or unmarried, who manifests an intent to be legally bound as a parent of a child conceived by assisted reproduction").

gametes[92] or who act as a surrogate.[93] In sum, the UPA (2017) creates and expands the routes by which a person, LGBTQ or non-LGBTQ, can establish themselves to be a legal parent—through marriage, through function, or through consent. Protecting and securing these parent-child relationships that exist in fact is critically important to children's well-being.[94]

D. *Expanding the Administrative Means of Establishing Parentage*

This takes us to the fourth important reform—the expansion of the streamlined administrative process for establishing parentage. This process is often referred to as voluntary acknowledgments of parentage, or VAPs.[95] All fifty states have a VAP process in place.[96] If the parties properly complete these designated forms that are distributed at all hospitals and birthing centers in the United States, the completed forms legally establish the parties' parentage. As federal law puts it—state procedures must provide that a "signed"

92. People who provide gametes without a mutual intent to be a parent are not parents under the Act. UNIF. PARENTAGE ACT § 702; *see also id.* at § 502(b)(2) ("Genetic testing may not be used . . . to establish the parentage of an individual who is a donor.").

93. UNIF. PARENTAGE ACT § 809(b) (UNIF. L. COMM'N 2017). People who act as gestational parents pursuant to a compliant agreement are not parents under the Act. *Id.* ("Except as otherwise provided . . . , neither a gestational surrogate nor the surrogate's spouse or former spouse, if any, is a parent of the child."). People acting as genetic surrogates have until 72 hours after the birth of the child to withdraw their consent to the agreement. *Id.* § 814(a)(2) ("A genetic surrogate who is a party to the agreement may withdraw consent to the agreement any time before 72 hours after the birth of the child conceived by assisted reproduction under the agreement.").

94. *See supra* notes 29–33 and accompanying text.

95. While all states have acknowledgment procedures, they do not all use the same phrase to describe this process. Some states, like California, call it a voluntary declaration of parentage. *See, e.g.*, *Parentage (Paternity)*, CAL. CTS.: JUD. BRANCH OF CAL., https://www.courts.ca.gov/selfhelp-parentage.htm?rdeLocaleAttr=en (last visited Apr. 5, 2022).

96. *See, e.g.*, Tianna N. Gibbs, *Paper Courts and Parental Rights: Balancing Access, Agency, and Due Process*, 54 HARV. C.R.-C.L. L. REV. 549, 571 (2019) ("In every state and the District of Columbia, . . . [an unmarried] woman and [a] man can establish the man's paternity by signing a form to voluntarily acknowledge that the man is the child's biological father. This form is commonly referred to as a voluntary acknowledgment of paternity (VAP)." (footnotes omitted)).

acknowledgment is "considered a legal finding" of parentage.[97] Thus, for example, Pennsylvania's form states that a completed VAP form is "conclusive evidence of paternity" even without approval of or an order from a court.[98] Moreover, federal statutory law further declares that all states must "give full faith and credit to such an affidavit signed in any other State according to its procedures."[99] This means that parties who use this process have certainty that their parental status will be respected not just in their home state, but in all states as they move about the country.[100]

In most states, however, this process is only available to men who are alleging themselves to be the child's genetic parent.[101] This is true, for example, in Pennsylvania.[102] The current Pennsylvania form is called the "Acknowledgment of Paternity" and it includes spaces only for the "birth mother" and the "birth father" to sign.[103]

In other words, in most states, men who have bases for asserting legal parentage have access to this important, simple administrative process for obtaining a binding determination of parentage,[104] but women do not.[105] To remedy this inequality, the UPA (2017) expands the classes of people who can establish

97. 42 U.S.C. § 666(a)(5)(D)(ii).

98. *Acknowledgement of Paternity*, PA. DEP'T OF HUM. SERVS., http://services.dpw.state.pa.us/oimpolicymanuals/ma/PA_CS_0611.pdf (Aug. 2015) [hereinafter *Pennsylvania VAP form*].

99. 42 U.S.C. § 666(a)(5)(C)(iv).

100. *See id.* This process has dramatically increased the establishment of parentage for nonmarital children. Families who utilize this process are provided with security about their status, and their children are ensured access to a range of important protections. However, for a thoughtful exploration of some concerns about this process when acknowledgments are not "tru[thfully,] knowing[ly], and voluntar[ily]" signed, *see* Gibbs, *supra* note 96, at 576.

101. *See* Douglas NeJaime, *Who Is a Parent?*, AM. BAR ASS'N (May 10, 2021), https://www.americanbar.org/groups/family_law/publications/family-advocate/2021/spring/who-a-parent/.

102. *See Pennsylvania VAP form*, *supra* note 98, at 3.

103. *See id.*

104. *See id.*

105. *See, e.g.*, JOSLIN, MINTER & SAKIMURA, *supra* note 8, at § 5:22. Only eleven states currently allow or soon will allow women to use the acknowledgment process. *See id.*; *see also FAQ: Voluntary Acknowledgment of Parentage (VAP)*, GLAD, https://www.glad.org/voluntary-acknowledgment-of-parentage/ (last visited Aug. 17, 2022).

parentage through this VAP process to include women who have bases for asserting their parentage under the Act.[106] Such women include same-sex spouses and same-sex intended parents.[107]

This is maybe one of the most important changes in the Act. In many (although still not all) states, same-sex parent families, including nonmarital same-sex parent families, can obtain certainty and security about their family status through an adoption.[108] This is true in Pennsylvania.[109] But, adoptions cost money; there are court fees, often attorneys' fees, maybe home study fees.[110] In the end, the total costs may run in the many thousands of dollars.[111] For many people, this means that that process—even in those jurisdictions where it is technically available—is not practically available. Moreover, even for those

106. *See* UNIF. PARENTAGE ACT § 301 (UNIF. L. COMM'N 2017). Because extension of these rules to women is new and unfamiliar, some states and state official may resist recognizing acknowledgments signed by women. For this reason, women who establish their parentage through the acknowledgment process may also want to complete adoptions or obtain other types of judgments confirming their parentage to avoid the possibility of such challenges. *See, e.g.*, JOSLIN, ET AL., *supra* note 8, at § 5:22.

107. *See id.*

108. Today, all same-sex married couples can utilize the stepparent adoption procedure. *See* JOSLIN, MINTER & SAKIMURA, *supra* note 8, at § 5:2. But, second parent adoptions by an *unmarried* partner are *not* available in all states. *See Adoption by LGBT Parents*, NAT'L CTR. FOR LESBIAN RTS., https://www.nclrights.org/wp-content/uploads/2013/07/2PA_state_list.pdf (June 2020). The National Center for Lesbian Rights reports that second parent adoptions by unmarried partners are available statewide in fifteen states and the District of Columbia, and in the parts of fourteen additional states. *See id*. In some states and in some circumstances, LGBTQ parents might also be able to bring a parentage action in which they ask a court to issue an order declaring their status as a legal parent under the law of the state. *See* David Dodge, *Legal Basics for L.G.B.T.Q. Parents*, N.Y. TIMES (Apr. 17, 2020), https://www.nytimes.com/article/legal-basics-for-lgbtq-parents.html. As is true with adoptions, however, there are fees associated with this process, and it may be difficult to accomplish without the assistance of a lawyer. *See id*.

109. *In re* Adoption of R.B.F., 803 A.2d 1195, 1202–03 (Pa. 2002).

110. *See, e.g.*, Jessica Feinberg, *A Logical Step Forward: Extending Voluntary Acknowledgments of Parentage to Female Same-Sex Couples*, 30 YALE J.L. & FEMINISM 99, 112 (2019) ("Like stepparent adoption, the second parent adoption process usually requires the couple to hire an attorney, appear in court, pay court fees, execute various documents, and submit to background checks.").

111. In California, the cost of the home study conducted by public agencies alone costs $4,500. CAL. FAM. CODE § 8810(a)(1) (2008) (providing that the petitioner for an independent adoption "shall pay . . . four thousand five hundred dollars ($4,500)" for the "cost of investigating the adoption petition").

families who have or can gather the necessary funds, in the best-case scenario, the adoption can be completed when the child is one or two years old.[112] In the early days of the pandemic, completing an adoption might not even have been possible, as courts closed down, and social workers were unavailable to complete home studies.[113] Even today—in 2022—many courts continue to have backlogs, and adoptions often are not considered prioritized or "essential" cases.[114]

In contrast to an adoption, the VAP administrative process is typically free.[115] No lawyers are needed to complete a VAP.[116] No court appearance is needed.[117] Indeed, federal law expressly prohibits states from requiring (or even permitting) "judicial

112. The adoption petition cannot be filed until after the child has been born. For families adjusting to caring for a newborn child, it often takes them some time to begin the adoption process. Once the process has been initiated, it may take many months for it to conclude. *See, e.g.*, *Frequently Asked Questions About Adoption*, CAL. DEP'T OF SOC. SERVS., https://www.cdss.ca.gov/adoptions (last visited Apr. 5, 2022) (noting that for independent adoptions, the state department or agency has 180 days, or about six months, from receipt of the filed petition and "50 percent of the adoption fee" to "investigate the proposed adoption").

113. *See, e.g.*, Melissa Russo & Hilary Weissman, *NYC Family Court in Crisis, New Report Says*, NBC N.Y., https://www.nbcnewyork.com/investigations/nyc-family-court-in-crisis-new-report-says/3532144/ (Feb. 4, 2022, 12:19 PM) (discussing report finding that "the vast majority of families 'had virtually no access' to the court[s]" during the pandemic and noting that the "Family Court chose only to deal with cases they deemed 'essential'" which included cases involving "serious allegations of child abuse . . . , juvenile delinquency cases in which a young person could face jail, and requests for orders of protection," and that other cases, "includ[ing] custody, visitation and child support cases" were "put on hold for a year").

114. *See, e.g.*, *id.*; *see also* Lyle Moran, *Court Backlogs Have Increased by an Average of One-Third During the Pandemic, New Report Finds*, AM. BAR ASS'N J. (Aug. 31, 2021, 12:57 PM), https://www.abajournal.com/news/article/many-state-and-local-courts-have-seen-case-backlogs-rise-during-the-pandemic-new-report-finds ("The average case backlog for state and local courts across the United States increased by about one-third amid the COVID-19 pandemic . . . ."). I thank Sara Katz for flagging this point.

115. DIV. OF CHILD SUPPORT SERVS., VOLUNTARY ACKNOWLEDGEMENT OF PATERNITY 1 (2016), https://www.dhss.delaware.gov/dcss/files/VAP_brochure_ENGLISH_revised_122016.pdf.

116. *See id.* Indeed, prior to the development of the acknowledgment process for men, many fathers did not establish their parentage due to similar barriers. Gibbs, *supra* note 96, at 573 ("As a result, multiple barriers—principally funds to pay for counsel and court fees—prevented many unmarried fathers from establishing paternity, and their biological children were considered 'fatherless.'").

117. DIV. OF CHILD SUPPORT SERVS., VOLUNTARY ACKNOWLEDGEMENT OF PATERNITY 1 (2016), https://www.dhss.delaware.gov/dcss/files/VAP_brochure_ENGLISH_revised_122016.pdf.

or administrative proceedings" to "ratify an unchallenged acknowledgment."[118] In the overwhelming number of cases, the forms are filled out at the child's birth while the parties are still at the hospital.[119] This means that the child's parentage can be established within days or weeks of the child's birth.[120]

Expanding access to this process—a process that is free, easily accessible, and does not require lawyers or courts—is particularly important for same-sex parent families.[121] Contrary to persistent stereotypes that LGBTQ people are wealthy and white,[122] same-sex parent families are disproportionately likely to experience poverty.[123] Indeed, LGBTQ co-parents are "twice as likely as comparable non-LGBT individuals to report household incomes near the poverty threshold

118. 42 U.S.C. § 666(a)(5)(E).

119. *See* Gibbs, *supra* note 96, at 572 ("Although a VAP can be completed at a designated state agency, the form is most commonly executed at the hospital within 72 hours of the child's birth." (footnote omitted)); *see also id.* at n.133 ("As many as six out of seven paternities are established in the hospital for nonmarital births (about 85%)."); Leslie Joan Harris, *Voluntary Acknowledgments of Parentage for Same-Sex Couples*, 20 AM. U. J. GENDER, SOC. POL'Y & L. 467, 477 (2012) ("Most of these parents sign VAP forms soon after birth.").

120. Under the UPA (2017), for example, the VAP becomes effective "on the birth of the child or the filing of the document with the [state agency maintaining birth records], whichever occurs later." UNIF. PARENTAGE ACT § 304(c) (UNIF. L. COMM'N 2017).

121. *See* Gibbs, *supra* note 96, at 573; *infra* note 123 and accompanying text.

122. *See, e.g.*, Catherine P. Sakimura, *Beyond the Myth of Affluence: The Intersection of LGBTQ Family Law and Poverty*, 33 J. AM. ACAD. MATRIM. LAWS. 137, 137 (2020) ("Contrary to persistent myths, most LGBTQ people are not white and affluent.").

123. *See id.* ("Indeed, LGBTQ people, especially parents, disproportionately live in poverty, and LGBTQ people of color are more likely to be raising children."); *see also* Gary J. Gates, *LGBT Parenting in the United States*, WILLIAMS INST. 1 (Feb. 2013), https://williamsinstitute.law.ucla.edu/wp-content/uploads/LGBT-Parenting-US-Feb-2013.pdf [hereinafter *LGBT Parenting*] ("The median annual household income of same-sex couples with children under age 18 in the home is lower than comparable different-sex couples ($63,900 versus $74,000, respectively)."); *Id.* at 5 ("[S]ingle LGBT adults raising children are three times more likely than comparable non-LGBT individuals to report household incomes near the poverty threshold (less than $12,000 per year)."). *See also* Courtney G. Joslin & Catherine Sakimura, *Fractured Families: LGBTQ People and the Family Regulation System*, CALIF. L. REV. ONLINE (forthcoming 2022) (discussing data).

(less than $24,000 per year.)."[124] LGBTQ parents are also disproportionately likely to be people of color.[125]

A right in theory means little if it is not available in practice. And this is no less true in this context. Thus, even for those families who technically have access to adoption or other types of court procedures to establish their parentage, that is of little consolation to those (many) families who cannot access those procedures in practice.

CONCLUSION

The pandemic has brought into stark relief the stress, uncertainty, and harm that can befall families when they are denied the basic protection of family security—a protection that many different-sex families take for granted. Fortunately, this model is available to help states fill gaps in their laws to better protect all of their families. As of early 2022, six states have enacted the UPA (2017).[126] In 2021, legislatures in a few other states, including Pennsylvania and Massachusetts, considered similar legislation.[127]

The need for reform is particularly acute in some jurisdictions. To return to where we began, consider Pennsylvania's laws. The Commonwealth's very short, barebones parentage scheme is based on a different uniform law—the Uniform Blood Test to Establish Paternity Act.[128] This Act was promulgated almost seventy years ago—in 1952.[129] This Act was superseded, that is replaced, by the Uniform Law

124. *LGBT Parenting*, *supra* note 123, at 5.

125. *See id.* at 4 ("Parenting is more prevalent among racial and ethnic minorities who are part of a same sex couples. An estimated 41% of non-White women in same-sex couples have children under age 18 in the home as do 20% of comparable non-White men.").

126. *See Parentage Act: Map*, UNIF. L. COMM'N, https://www.uniformlaws.org/committees/community-home?CommunityKey=c4f37d2d-4d20-4be0-8256-22dd73af068f (last visited Mar. 7, 2022).

127. *See* H.B. 115, 2021 Gen. Assemb., Reg. Sess. (Pa. 2021); S. 1133, 2021 Leg., 192nd Sess. (Mass. 2021).

128. *See* 128 HANDBOOK OF THE NATIONAL CONFERENCE OF COMMISSIONERS ON UNIFORM STATE LAWS AND PROCEEDINGS OF THE ANNUAL CONFERENCE MEETING 505, 557 (2019).

129. *Id.*

Commission almost fifty years ago, in 1973, by the first iteration of Uniform Parentage Act.[130] In addition, as noted above, Pennsylvania is one of the very few states in the country to lack any statutes governing the parentage of children conceived through assisted reproduction. Pennsylvania is not alone in this respect. There are other states with parentage schemes that are decades old, schemes that provide limited guidance in a range of circumstances, including with respect to children conceived through assisted reproduction.[131] Where this is true—where there are limited, out-of-date, or non-inclusive provisions—LGBTQ and non-LGBTQ parents and, even more importantly, their children are in very precarious circumstances. By updating their statutes, states can affirm and protect all their children and families.[132]

130. *Id.*

131. For example, the Massachusetts parentage statutes were enacted about 35 years ago, and contain just one barebones provision on assisted reproduction. This remains true even though Massachusetts has the highest rate of birth of children born using assisted reproduction in the country. *See, e.g.*, Letter from Courtney Joslin regarding Massachusetts Parentage Act (Nov. 3, 2021) (on file with author).

132. Other states that have enacted the UPA (2017) include: California, Colorado, Connecticut, Rhode Island, Vermont, Maine, and Washington. *Parentage Act: Map*, *supra* note 126. New York has enacted parts of the UPA (2017), including an expanded VAP process. *New York Parenting Legislation*, NAT'L CTR. FOR LESBIAN RTS., https://www.nclrights.org/our-work/legislation-policy/new-york-parenting-legislation/ (last visited Apr. 23, 2022) ("Finally, the law also allows intended parents using assisted reproduction to obtain documentation proving they are a parent for free by filling out forms available at every hospital by expanding the Acknowledgement of Paternity process, which is currently only open to unmarried genetic fathers.").