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# Obergefell's Impact on Functional Families

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Throughout the 1960s and the 1970s many state and federal courts rendered judicial decisions that enhanced status protections for an array of racial minorities, women, putative fathers, and single adults.[1] For the most part, these

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1. *See, e.g.*, Eisenstadt v. Baird, 405 U.S. 438, 454–55 (1972) (holding that a Massachusetts statute allowing married people to get contraceptives but prohibiting single people to get contraceptives was unconstitutional, in violation of the equal protection clause); Stanley v. Illinois, 405 U.S. 645, 657–59 (1972) (holding that the Due Process Clause required the state to provide all parents with a hearing on their parental fitness before removing children from their custody); Heart of Atlanta Motel, Inc. v. United States, 379 U.S. 241, 258–59 (1964) (finding that Congress had

protections were based on revitalized notions of individual liberty, equal protection, or newly discovered privacy rights. The engines for change were discovered in constitutional guarantees, sometimes state but most often federal, such as guarantees under the Due Process Clause, the Equal Protection Clause, or a combination of both. A smattering of judicial decisions involved the discovered constitutional guarantee of privacy, based on a penumbra involving five separate and specific constitutional rights.[2] And in a few instances, state courts utilized equitable remedies such as estoppel or quantum meruit to overturn long-standing public policies that had grown moribund with the evolution of a more pluralistic, mobile, and increasingly technological society. Courts during this period of time often admitted that their decisions were guided by public reality, not public policy. The reality about which courts wrote was the existence of many cohabiting nonmarital adults, prompting courts to provide protection for vulnerable adults and children so as to safeguard the reasonable expectations of one or both parties upon the cessation of the cohabitation.

Overall, the second half of the twentieth century witnessed the growth of private ordering among competent and consenting adults. This development marked a departure from traditional "form family" structures premised upon marriage, statutory adoption, or consanguinity. Form families had been the bedrock beneath society, the structure that provided access to income, inheritance, and inclusivity in the past. Nonetheless, increasingly, adult same and opposite-sex partners were cohabiting, working toward common economic goals, and many were having children through intercourse or through scientific breakthroughs available through assisted reproductive technology. All of these cohabiting adult partners were aware of the advantages associated with form status arrangements, but they chose instead to create what would be termed "functional families," relying upon their individuality and ingenuity instead of societal apparatus.[3]

The expansion of functional families complemented newly-invented media offerings such as music, television, and cinema. Media contributed to community building, complementing adult individual decision making. Pop culture opened horizons to what was possible and supported choices within an intangible community. Increasingly, the parameters of an adult were freed from parochial confines and exposed to a broader taste of an undiscovered society that offered more freedom of individual choice. In addition, decision freedom was enabled by enhanced employment opportunities, such as individual access to

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the authority to prohibit racial discrimination in public accommodations under the Commerce Clause).

2. *See* Roe v. Wade, 410 U.S. 113, 152 (1972) ("[T]he Court has recognized that a right of personal privacy, or a guarantee of certain areas or zones of privacy, does exist under the Constitution."); Griswold v. Connecticut, 381 U.S. 479, 484–85 (1965) (establishing the existence of constitutional "zones of privacy" evinced by the "specific guarantees in the bill of rights").

3. *See* J. Herbie Difonzo & Ruth C. Stern, *The Winding Road from Form to Function: A Brief History of Contemporary Marriage*, 21 J. AM. ACAD. MATRIM. LAW. 1, 2, 25–28 (2008).

birth control, scientific assisted reproductive technology, acceptability of third-party child care, and enhanced medical care. Freed of societal restraints, adults in American society asked themselves, "Why not?" and embarked on quests to find fulfillment in relationships that functioned well for themselves.

Courts and a few legislatures struggled to establish restitutive structures when functional relationships became dysfunctional, resulting in financial disparity between the former partners. Stripped of the familiar status entitlements of statutory or common law marriage, courts struggled to establish equitable enforcement of individualized oral arrangements through slippery toeholds such as equitable estoppel, promissory estoppel, or quantum meruit. Precarious at best, functional families most often resulted from oral agreements between the parties. Yet to be enforceable in law, these agreements had to reach the level of clear and convincing evidence.[4] Only the most prudent and prescient of couples could meet this evidentiary test. Courts, and perhaps individuals involved, viewed financial loss as commensurate with the vagaries of functional families, any economic risk voluntarily assumed by an adult partner at the start or during the relationship. But this was not always the case, and the burden was especially difficult for same-sex functional families. Their employers, localities, and state of residence increasingly struggled with the disparate treatment afforded to same-sex couples in terms of public perception, medical insurance, bereavement exemptions, and housing accommodations.

Same-sex adults entered into functional families as did their opposite-sex neighbors. However, it was not exactly the same because same-sex couples were legally prohibited from entering into the legal status of marriage.[5] Plus, they were often subjected to discriminatory practices and even criminal prosecutions.[6] Initially, and especially in the early 1980s, commensurate with the AIDS epidemic, same-sex couples were concerned about health care insurance for partners, plus any other business benefits afforded married couples. The concurrent tide of judicial decisions involving equal protection and due process guarantees precipitated an evolving public awareness of the inequality of treatment of same-sex couples. Awareness prompted sporadic legislative enactment of newly invented domestic partnerships, evolving into

4. *See, e.g.*, *In re* Guardianship of Chamberlin, 118 A.3d 229, 233–34, 242 (Me. 2015) (reversing and remanding a probate court's holding that a grandmother who had lived with her grandchild and the child's mother for several years before the mother had died was the de facto guardian because the probate court did not apply a standard of clear and convincing evidence).

5. *See, e.g.*, OHIO CONST. art. XV, § 11 ("Only a union between one man and one woman may be a marriage valid in or recognized by this state."); MICH. COMP. LAWS § 551.1 (1996) ("Marriage is inherently a unique relationship between a man and a woman.").

6. *See, e.g.*, Lawrence v. Texas, 539 U.S. 558, 562 (2003) ("The question before the Court is the validity of a Texas statute making it a crime for two persons of the same sex to engage in certain intimate sexual conduct."); Bowers v. Hardwick, 478 U.S. 186, 187–88 (1986) ("In August 1982, respondent Hardwick . . . was charged with violating the Georgia statute criminalizing sodomy by committing that act with another adult male in the bedroom of [Hardwick's] home.").

reciprocal beneficiaries and finally, prior to same-sex marriage, civil unions.[7] Incrementally, a patchwork of nontransferable state economic benefits pertinent only to same-sex couples arose across the country.[8] Some cities and states provided protection and benefits to same-sex couples, while others did not. Interstate Full Faith and Credit was inapplicable, but the process had begun, a process that would eventually lead to providing economic protections and benefits similar to marriage. Very few anticipated where equality would develop, but there was no turning back.

Efforts by states to provide a modicum of financial protection and associated benefits to adult functional families were restrained, in part, because of the core premise of functional families: individual freedom. Functionality lacked objective parameters historically associated with marriage. Although courts and legislatures may have been restrained regarding financial protection afforded to functional family adults, they showed no restraint when seeking to protect the children of these functional adults. Many of these families were, and are, having children. Today's statistics are a product of the decades that have passed: More than forty percent of children born in America today are born to unmarried parents and only half of all cohabiting adults in America are currently married.[9] While many children are born to single parents, others are part of the two-person unmarried cohabiting functional family paradigm. What is the status of these children? Parental status is more easily established when a couple is married and a court may rely upon a status-conferring device such as the Uniform Parentage Act (UPA). But without marriage, courts struggle to establish parenthood, child support, state and federal benefits, custody and visitation, and adoption.

Supreme Court decisions occurring during the period of the ascendancy of functional families sought to protect nonmarital children from discrimination and to protect the paternal rights of men seeking to establish parenthood.[10] How should paternity be established? Traditionally, paternity was established through state paternity statutes, based in whole or part on the UPA, which offered

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7. *See generally* Courtney Thomas-Dusing, Note, *The Marriage Alternative: Civil Unions, Domestic Partnerships, or Designated Beneficiary Agreements*, 17 J. GENDER RACE AND JUST. 163, 174 (2014) (stating that states enacted a variety of legal protections for same-sex couples, including domestic partnerships, civil unions, and beneficiary registries).

8. *See generally Civil Union and Domestic Partnership Statutes*, NAT'L CONFERENCE OF STATE LEGISLATORS, http://www.ncsl.org/research/human-services/civil-unions-and-domestic-partnership-statutes.aspx (last updated Nov. 18, 2014).

9. U.S. DEP'T OF HEALTH AND HUMAN SERVS., CTR. FOR DISEASE CONTROL AND PREVENTION, BIRTHS: FINAL DATA FOR 2014 2 (Dec. 2015), https://www.cdc.gov/nchs/data/nvsr/nvsr64/nvsr64_12.pdf.

10. *See* Solangel Maldonado, *Illegitimate Harm: Law, Stigma, and Discrimination Against Nonmarital Children*, 63 FLA. L. REV. 345, 351 (2011) ("Nonmarital children's legal status has improved significantly in the last forty years as a result of numerous Supreme Court decisions striking down discriminatory laws on equal protection grounds.").

presumptions of paternity.[11] But these presumptions were in almost all instances premised upon a valid marriage, a status inconsistent with functional families. Only gradually did the presumption of paternity include the basis of a man receiving a child into his home and openly holding the child as his own natural child. For same-sex couples, marriage was unavailable until 2015, and bringing a child into a same-sex home had to address the rights of the biological parents who conceived the child.[12] Some relief was provided through state legislation enacted to provide a status similar to marriage, such as a civil union or reciprocal beneficiaries.[13] But these status arrangements varied according to the laws of each state, and there was neither reciprocity nor Full Faith and Credit to guarantee enforcement among all the states. In spite of the legal obstacles, same-sex couples were having children, some through adoption and, increasingly, some through advances in assisted reproductive technology and surrogacy contracts.

Assisted by a series of Supreme Court decisions, states developed a heightened awareness of parenthood. By the beginning of the twentieth century, statutes were introduced to make uniform rules pertaining to the establishment of paternity. But these nascent efforts were futile. Eventually, in 1973, the National Conference of Commissioners on Uniform State Laws proposed a uniform law that was titled the Uniform Parentage Act. This landmark legislation assembled approaches to paternity in use by the various states. A significant feature of the 1973 Act is its creation of a presumptive basis of parentage.[14] For example, a person is presumed to be a parent because of a name on a birth certificate or continuous cohabitation with the biological parent of the child.[15] The presumption of paternity was most easily established through marriage of a man and a woman and the woman gives birth to a child. The child could have no genetic connection with the husband, but the presumption of paternity resulted from the marriage of the mother and her husband.

The UPA created an understandable means of establishing parentage. From this status flowed protection for a putative father, but it also provided for the best interest of any child by easily creating obligations of support, inheritance, and

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11. *Parentage Act Summary*, UNIF. LAW COMM'N, http://www.uniformlaws.org/ActSummary.aspx?title=Parentage%20Act (last visited Oct. 19, 2016).

12. *See* Obergefell v. Hodges, 135 S. Ct. 2584, 2604–05 (2015) (holding that same-sex couples may not be deprived of the fundamental right to marry); Nancy S. v. Michele G., 279 Cal. Rptr. 212, 216 (Ct. App. 1991) ("[T]he courts and our Legislature have chosen to place paramount importance on the relationship between the natural . . . parent and the child."); *see, e.g.*, Alison D. v. Virginia M., 572 N.E.2d 27, 29 (N.Y. 1991), *overruled by* Brooke S.B. v. Elizabeth A.C.C., 28 N.Y.3d 1 (2016) (holding that petitioner had no right to visitation of the child she helped raise with her same-sex partner because it would "limit or diminish the right of the . . . biological parent").

13. *See, e.g.*, VT. STAT. ANN. tit. 15, §§ 1202–1204 (2016) (recognizing the right of same-sex couples to enter into a civil union and providing them with the same benefits and protections given to heterosexual couples in a civil marriage).

14. UNIF. PARENTAGE ACT § 4 (UNIF. LAW COMM'N 1973).

15. *Id.*

family permanence. Gradually, science advanced and the necessity of establishing parentage through facile presumptions such as marriage became less preferable. Genetic testing provided certainty of parentage whereby presumptions established under the UPA provided only that, presumptions. Estoppel, so as to protect the child's established identity with a parent, then developed. Standing to use genetic test results and the best interest of the child became standards by which presumptions were maintained in spite of the reality of genetic testing.

Science continued to broaden the means by which a person could become a parent through assisted reproductive technology. Current technological advances permit persons and couples to cryopreserve sperm, eggs, and embryos for future use; continuing advances promise a future when a child could have multiple persons with parental genetic connections. The National Conference of Commissioners on Uniform State Laws struggled to address scientific advances, proposing revisions to the UPA in 2000 and then again in 2002. One of these revisions allows "consent" to bring about parentage.[16] That is, whenever a man gives consent to assisted reproduction by a woman that results in the birth of a child, that child is presumed to be the child of the man. Other than residing in the same household as a child and holding the child out as his own for the first two years of the child's life, marriage is required to bring about parentage of a child. Sadly, none of these means of establishing paternity conveniently accommodated the functional lives of same-sex couples.

Same-sex couples commonly participate in assisted reproduction or adoption to have a child. Male couples often entered into surrogacy contracts in states that permitted them, the sperm of one of the men being used for conception. Among female couples, one of the parties is artificially inseminated with donor sperm. But in both cases the same-sex couple intends to raise the child together as joint parents. Nonetheless, often the relationship ends and the party with a genetic link to the child prohibits the nonbiological party from visitation, prompting a suit for custody or visitation. Often, because the nonbiological party lacks a statutorily defined parent connection with the child, parental status can be denied and the child loses the opportunity to receive financial support or parental companionship from this genetic-stranger-party. Concomitantly, the genetically absent former partner loses the companionship and child-rearing opportunities provided by the child. These cases abound. Most often the nongenetic party accompanied a partner through the assisted reproductive procedure, the birth of the child, and the adults made an oral agreement to raise a child together, and served for a period of time in a parental role for the resulting child, both economically and socially.

Courts increasingly addressed this factual anomaly and some began to fashion equitable remedies since state parentage statutes offered no remedies. Critics argued that establishing parentage was better left to the legislature, not the

16. *Id.* § 201(b)(5) (amended 2002).

courts, and many commentators bemoaned the nebulous grounds for these equitable remedies, as well as the costly and lengthy process their application required.[17] Courts applying equity looked to oral and written agreements between the parties, estoppel due to the passage of time, and the best interests of the children involved. Among the equitable remedies utilized or considered by courts were doctrines such as extraordinary circumstances, the child's detrimental reliance, equitable estoppel, de facto parenthood, or the more subjective term psychological parent.[18] Some of these equitable remedies were even codified by a few state legislatures, providing a more objective standard in that particular state.[19] But while many states embraced these devices for what they were—equitable remedies meant to complement statutory parenthood established through marriage—other states rejected them outright as judicial fabrications, intrusions into the prerogative of the state legislature to create the status of parent. Critics argued that paternity is established by statute, and it is the prerogative of the legislature to draft and enact statutes.

Paternity status matters to adults raising a child together. The materiality of parentage was heightened in 2000 with the *Troxel v. Granville*[20] decision. In this landmark decision, the U.S. Supreme Court firmly established the fundamental right of a parent to raise his or her child, specifically in reference to restricting or withholding visitation sought by any nonparent.[21] Only clear and convincing evidence may rebut a parent's fundamental authority to do what the parent concludes is in the best interest of the child.[22] Then, in 2015, the Court made it decidedly easier for same-sex couples to achieve parental status. In the *Obergefell v. Hodges*[23] decision, the Court ruled that the Fourteenth Amendment requires states to license marriages between two people of the same sex and, in addition, to recognize any marriage between two people of the same sex when that marriage was fully licensed and performed in another state.[24] The Court's decision brought to fruition intermediary economic status protections codified as domestic partnerships, reciprocal beneficiaries, and civil unions. These nonmarital status arrangements provided same-sex couples a patchwork of financial protection dotted across the nation.[25] Now they were no longer

17. *See* Jennifer Sroka, Note, *A Mother Yesterday, But Not Today: Deficiencies of the Uniform Parentage Act for Non-biological Parents in Same-Sex Relationships*, 47 VAL. U. L. REV. 537, 544–47 (2013) (illustrating the difficulty of determining parentage rights in same-sex couples through the use of equitable remedies).

18. *See, e.g.*, *id.* at 539.

19. *Id.* at 556.

20. 530 U.S. 57 (2000).

21. *Id.* at 72.

22. *Id.* at 70 (citing R.I. GEN. LAWS § 15-5-24.3(a)(2)(v) (Supp. 1999)).

23. 135 S. Ct. 2584 (2015).

24. *Id.* at 2607.

25. *See Same-Sex Couples*, SOC. SEC. ADMIN., https://www.ssa.gov/people/same-sexcouples/ (last visited Nov. 29, 2016) (explaining the Social Security Administration recognizes civil unions and domestic partnerships for purposes of deciding claims to Social Security benefits, Medicare,

needed to protect the economic interests of same-sex functional families. Nonetheless, *Obergefell* did more than provide financial security for couples. It provides an objective standard by which same-sex couples can marry and enjoy the objective statutory formulations of state parentage acts. This raises the question of whether *Obergefell* makes obsolete the equitable remedies adopted to protect the parental interests of nonbiological persons raising children.

This Article raises an issue that will be resolved in the decades to come. The issue is whether the nation-wide availability of same-sex marriage resulting from *Obergefell*, and the presumption of parenthood status that comes with marriage, will challenge the necessity of equitable remedies previously used to determine parenthood status before marriage was available. Just as marriage made domestic partnerships, reciprocal beneficiaries, and civil unions unnecessary, is it time to discard those equitable remedies—de facto parenthood, psychological parents, and coparenting agreements—as relics of a past age? For multiple reasons these equitable remedies have been employed by courts and legislatures to establish parenthood since the 1960s and 1970s; but has the time come to put aside these equity devices and rely instead on the opportunity now extended to all to participate in the status of marriage? Has the *Obergefell* decision inaugurated a change in perspective, one that no longer needs equitable remedies to provide protective status to unmarried adults since marriage equality provides equality for all?

To address *Obergefell*'s impact on functional parents, it is necessary to address the rationale underlying functional families, the history, and the current status. There are two aspects to this family paradigm: the protection of economic interests and the protection of children. Then this Article will address the litigious evolution of parental status, discussing cases that crafted the equitable remedies used to enforce oral parenting plans that were discarded upon the cessation of the adult functional relationship. Likewise, this Article will discuss statutory proposals meant to provide objective parental status—efforts promulgated by the American Law Institute (ALI) or individual states enacting similar de facto parenthood qualifications. Finally, this Article will analyze *Obergefell*'s impact on these parental status accommodations.

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and eligibility and payment amount for Supplemental Security Income); *see also* Carlsmith Ball, LLP, *Hawaii State Legislature Passes Bills That May Create Administrative Burdens*, 1 NO. 12 PAC. EMP. L. LETTER 5 (1997); GLAD, DOMESTIC PARTNERSHIP BENEFITS: OVERVIEW (2014), http://www.glad.org/uploads/docs/publications/domestic-partnership-overview.pdf. Many states have domestic partnership laws, extending traditional marital benefits to same-sex couples, while Hawaii and Vermont have enacted laws extending certain benefits to same-sex couples as "reciprocal beneficiaries." *See* Saskia Kim & Drew Liebert, *A Primer on Civil Unions*, ASSEMBLY JUDICIARY COMM., CAL. STATE LEGISLATURE (2001), http://ajud.assembly.ca.gov/sites/ajud.assembly.ca.gov/files/reports/1001%20backgroundpaper.pdf (showing that in California, a partner in a civil union shall have all the same rights, protections, benefits, and responsibilities as those granted to a spouse in a civil marriage).

## I. THE EVOLUTION OF THE FUNCTIONAL FAMILY

### *A. Nonmarital Adult Couples*

#### *1.* Marvin v. Marvin *and Its Progeny*

Statistics reveal that in the United States during the last forty years the number of *married* couples with their own children *decreased* from 40.3% to 20.9% of all families and that there was a 41% *increase* in *unmarried* partner households.[26] The increasing number of nonmarital adult households has continued in the United States for decades, corresponding with trends throughout the world. The U.S. Supreme Court, in 2000, noted the diversity in American families, commenting in a landmark decision involving the fundamental rights of parents that "[t]he demographic changes of the past century make it difficult to speak of an average American family. The composition of families varies greatly from household to household."[27]

Earlier, in 1976, the California Supreme Court took note of the numerical increase in the diversity and the number of unmarried households and issued an opinion that would revolutionize the approach taken towards nonmarital, intimate couples in general, and specifically, the economic consequences of the dissolution of these couples. In *Marvin*,[28] the highest court of California ruled that "[t]he courts should enforce express contracts between nonmarital partners except to the extent that the contract is explicitly founded on the consideration of meretricious sexual services."[29] And in the absence of an express contract between the unmarried partners, courts should "inquire into the conduct of the parties to determine whether that conduct demonstrates an implied contract, agreement of partnership or joint venture, or some other tacit understanding between the parties."[30] And in the absence of an implied contract, the court sanctioned the use of alternative remedies, such as "the doctrine of quantum meruit, or equitable remedies such as constructive or resulting trusts . . . ."[31]

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26. JONATHAN VESPA ET AL., U.S. CENSUS BUREAU, AMERICA'S FAMILIES AND LIVING ARRANGEMENTS: 2012 5 (2013); DAPHNE LOFQUIST ET AL., U.S. CENSUS BUREAU, HOUSEHOLDS AND FAMILIES: 2010 3 (2012); *see also Unmarried and Single Americans Week Sept. 20–26, 2015*, U.S. CENSUS BUREAU, http://www.census.gov/newsroom/facts-for-features/2015/cb15-ff19.html (Sept. 15, 2015) (reporting that there were seven million unmarried partner households in 2013 and that of this number 573,530 were same-sex households).

27. Troxel v. Granville, 120 S. Ct. 2054, 2060 (2000) (holding that the Fourteenth Amendment's Due Process Clause guarantees a parent a fundamental right to raise his or her child).

28. Marvin v. Marvin, 557 P.2d 106 (Cal. 1976). For commentary, see, for example, Kaiponanea T. Matsumura, *Public Policing of Intimate Agreements*, 25 YALE J.L. & FEMINISM 159 (2013).

29. *Marvin*, 557 P.2d at 110.

30. *Id.*

31. *Id.* The court reiterated its support for equitable remedies later in the opinion. *Id.* at 123 n.25–26.

The court in *Marvin* began its opinion with an acknowledgement that "[d]uring the past 15 years, there has been a substantial increase in the number of couples living together without marrying."[32] The court further observed the economic consequences of these partnerships when one of the parties dies or the partnership otherwise dissolves. How should property acquired during the partnership be divided and concomitantly, should there be an order of financial support? The facts in *Marvin* are common to many similar disputes, opposite-sex and same-sex. Plaintiff alleged that she lived with defendant, Lee Marvin, from October 1964 through May 1970 and fulfilled her responsibilities resulting from a promise by the defendant to take care of her, which she alleged he made prior to their cohabitation.[33] She further alleged that the defendant orally promised that while they lived together they would combine their efforts and earnings and share any property accumulated.[34] Defendant was an actor and plaintiff surrendered her career as an entertainer and singer to devote her time to defendant as a companion, homemaker, housekeeper, and cook.[35] In return, defendant agreed "to provide for all of plaintiff's financial support and needs for the rest of her life."[36]

During their nearly seven years together "the parties as a result of their efforts and earnings acquired in defendant's name substantial real and personal property, including motion picture rights worth over $1 million."[37] The relationship ended when defendant, Lee Marvin, compelled plaintiff to leave the household, subsequently providing support for her for a little more than a year but then refused to contribute anything further. Plaintiff filed suit against defendant to determine her contract and property rights and to impose a constructive trust upon one-half of the property acquired during the nonmarital relationship.[38] After a trial on these issues, the trial court ruled in favor of the defendant and plaintiff appealed.[39] The hurdle that plaintiff faced at trial was the defendant's reliance upon the "supposed 'immoral' character" of the relationship and that any "enforcement of the contract would violate public policy."[40] But the appellate court failed to find any pattern in past California decisions that would bar enforcement of nonmarital agreements not expressly founded upon illicit sexual services.[41] Instead, in a seminal decision, the

32. *Id.* at 109 (relying upon 1970 census figures indicating that at the time there were perhaps eight times as many couples living together without being married as cohabited ten years before).

33. *Id.* at 110.

34. *Id.*

35. *Id.*

36. *Id.*

37. *Id.*

38. *Id.* at 110–11.

39. *Id.* at 111.

40. *Id.* at 112.

41. *Id.* at 113. The court stated: "The principle that a contract between nonmarital partners will be enforced unless expressly and inseparably based upon an illicit consideration of sexual

appellate court ruled that "adults who voluntarily live together and engage in sexual relations are . . . as competent as any other persons to contract respecting their earnings and property rights."[42] Furthermore, to deny relief when there is an agreement between the parties permits one party to "retain a disproportionate amount of the property."[43]

The *Marvin* court did not attempt to fit the nonmarital relationship into any pre-established form relationship, such as common law marriage or putative spouses. The court observed, "[w]e need not treat nonmarital partners as putatively married persons in order to apply principles of implied contract, or to extend equitable remedies; we need to treat them only as we do any other unmarried persons."[44] Instead, the court expressly recognized that "many young couples live together without the solemnization of marriage."[45] And furthermore, the court found "[t]hat the mores of the society have indeed changed so radically in regard to cohabitation that we cannot impose a standard based on alleged moral considerations that have apparently been so widely abandoned by so many."[46] The court then reversed the trial court and remanded it so as to permit the plaintiff to proceed with her claim.[47] The rationale of the court, providing equitable remedies when statutory relief was unavailable, was done in the context of protecting economic interests. The protection of the parental interests of functional families through equitable means was in its nascent stages at that time. Today, the parameters of private ordering among adults forming functional families, both economically and as parents, may be summarized by one commentator:

> People should be their own lawmakers when it comes to their personal relationships. Because family and intimate relationships are highly unique and individual, they often do not fit within the limitations of government regulations, and may be more functionally structured through contracts. Families that do not fit the traditional mold should not have to wait for government approval to attain status equivalent to

services not only represents the distillation of the decisional law, but also offers a far more precise and workable standard than that advocated by defendant." *Id.* at 114.

42. *Id.* at 116.

43. *Id.* at 121.

44. *Id.* Common-law marriage is and was unavailable in California and the court defined and rejected the application of the putative spouse doctrine. *See id.* at 118.

45. *Id.* at 122.

46. *Id.* For commentary on the changes, *see* Raymond C. O'Brien, *Family Law's Challenge to Religious Liberty*, 45 U. ARK. LITTLE ROCK L. REV. 3, 34–54 (2012) [hereinafter *Family Law's Challenge to Religious Liberty*].

47. *Marvin*, 557 P.2d at 123. Upon remand the Los Angeles Superior Court ordered the defendant to pay the plaintiff $104,000 to assist with her economic rehabilitation. *See* Marvin v. Marvin, 5 Fam. L. Rptr. 3077, 3085 (Apr. 24, 1977). Nonetheless, a California appellate court deleted the rehabilitative award, holding that the facts did not reveal any basis, in either law or equity, for the economic award to the plaintiff. *See* Marvin v. Marvin, 176 Cal. Rptr. 555, 559 (1981). But the rationale of the appellate decision remains.

> their married counterparts, or, in the case of intended parents who are not biologically related to their intended children, their biological counterparts. Instead, such partners and intended parents should be able to secure their rights through private contract. Contracts can better protect the legal interests of non-married couples and non-legal parents in many cases because contracts affirm autonomy rather than reinforce government as the arbiter of what "family" means.[48]

*2. Adult Status Arrangements*

The individual freedoms of adults developed over time. It was in 1964 that the plaintiff and defendant, illustrated in *Marvin*, met and initiated their nonmarital cohabitation. The following year, in 1965, the U.S. Supreme Court decided *Griswold v. Connecticut*,[49] holding that the U.S. Constitution guaranteed married couples the right to privacy, a right inferred from the penumbra found within five constitutional guarantees.[50] Then, in 1972, after the *Marvin* couple separated in 1971, the Court would decide *Eisenstadt v. Baird*,[51] holding that the right to privacy was extended to individuals, not just married couples.[52] The *Eisenstadt* decision safeguarded individuals from unwarranted governmental intrusions into his or her sexual conduct.[53] But the decision also strengthened individuality, the core element of functional families. Throughout the 1970s and 1980s, courts would address the constitutional rights of functional families when zoning ordinances sought to restrict residential occupancy—excluding persons unrelated by blood, marriage, or adoption.[54] Courts were challenged to address form family restrictions on many issues. Perhaps prompted by the impact of the AIDS crisis in New York City and the need for housing support, one New York decision extended rent control support from form family restrictions to include functional families.[55] Fueled by success

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48. Deborah Zalesne, *The Contractual Family: The Role of the Market in Shaping Family Formations and Rights*, 36 CARDOZO L. REV. 1027, 1031–32 (2015).

49. 381 U.S. 479 (1965).

50. *Id.* at 485–86.

51. 405 U.S. 438 (1972).

52. *Id.* at 453–54.

53. *Id.* For a discussion of the transition from *Griswold* to *Eisenstadt*, see, for example, Janet L. Dolgin, *The Family in Transition: From Griswold to Eisenstadt and Beyond*, 82 GEO. L.J. 1519, 1521–22 (1994); John Demos, *Images of the American Family, Then and Now*, *in* CHANGING IMAGES OF THE FAMILY (Virginia Tufte & Barbara Myerhoff eds., 1979).

54. *See, e.g.*, Vill. of Belle Terre v. Boraas, 416 U.S. 1, 9 (1974) (holding that a local zoning ordinance could exclude functional families, that is, persons not related by blood, marriage or adoption, to safeguard economic interests in the community); Moore v. City of East Cleveland, 431 U.S. 494, 505–06 (1977) (holding a local ordinance that divides a family violates the Due Process Clause of the Fourteenth Amendment because it intrudes on family living arrangements by forcing adults and children to live in certain narrowly confined patterns).

55. *See, e.g.*, Braschi v. Stahl Associates Co., 543 N.E.2d 49, 54–55 (N.Y. 1989) (holding that the concept of family should be based on an objective assessment of the relationship between the adult parties and not on form factors).

in the pursuit of constitutional protections, individuals comprising functional families continued to petition for greater access to economic benefits heretofore reserved for form families.

Constitutional litigation was often based on the heretofore mentioned right to privacy, but also Due Process, Equal Protection, and Free Speech and Association,[56] all of which would find expression in *Obergefell* much later. Concomitantly, society was becoming more mobile, more attuned to media assimilation, and more inclusive in attitudes.[57] As a result, the population was more aware of arguments in favor of abortion rights, nonmarital cohabitation, no-fault divorce, and the acceptability of nonmarital children. Movies and television shows depicted persons living lifestyles based on functional family norms, and greater equality of employment and birth control accessibility fueled multiple lifestyle options. Increasingly, optional lifestyle choices were not limited to opposite sex adults. Same-sex couples formed functional families too, clandestinely at first, but as with other couples they gained increasing protection from media and a modicum of constitutional protection.[58]

Many same-sex couples developed an appreciation of the benefits associated with marriage because they were denied them. While they were able to enter into functional families, they were barred from the status of marriage, which offered many attractive economic and social benefits.[59] Gradually, prompted in part by functional family litigation success, same-sex couples lobbied employers for marriage-like benefits for their partners. These would include health insurance, company employee benefits, bereavement leave, paid leave for the birth of a child, and the ability to make medical determinations for a partner. These employer benefits would evolve to be called domestic partnerships.[60] Entry into and out of the partnership involved registration with an employer willing to provide the status, nothing similar to the extensive requirements necessary to enter into a valid marriage. Although restricted to same-sex

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56. *See, e.g.*, Roberts v. U.S. Jaycees, 468 U.S. 609, 617–18 (1984) (Freedom of Association); Zablocki v. Redhail, 434 U.S. 374, 384–85 (1978) (Due Process); Loving v. Virginia, 388 U.S. 1, 12 (1967) (Equal Protection and Due Process).

57. *See, e.g.*, O'Brien, *Family Law's Challenge to Religious Liberty*, *supra* note 46, at 84–88 (describing the challenge of an evolving world view for a world view based on religious guidelines).

58. One 5–4 Supreme Court decision created an impediment to same-sex couples. *See* Bowers v. Hardwick, 478 U.S. 186, 196 (1986) (upholding a state statute criminalizing consensual sodomy between persons of the same sex). Eventually the decision was challenged in *Romer v. Evans*, 517 U.S. 620, 623–24 (1996), and overturned in *Lawrence v. Texas*, 539 U.S. 558, 578–79 (2003). "By 2010 the number of same-sex partner households rose by 51.8% and to 0.8% of all households; they rose slightly to 11.6% of unmarried-partner households." Lawrence W. Waggoner, *With Marriage on the Decline and Cohabitation on the Rise, What About Marital Rights for Unmarried Partners?*, 41 ACTEC L.J. 49, 55 (2015).

59. *See, e.g.*, Singer v. Hara, 522 P.2d 1187, 1197 (Wash. Ct. App. 1974) (denying same-sex couple's challenge to statute restricting marriage licenses to opposite-sex couples based on the definition of marriage and thereby excluding same-sex couples).

60. *See* Raymond C. O'Brien, *Domestic Partnership: Recognition and Responsibility*, 32 SAN DIEGO L. REV. 163, 166 (1995).

couples, employers soon discovered that providing domestic partnership benefits cost them little and yet it was a means by which they could retain skilled employees. The practice expanded rapidly.[61] Eventually cities and localities began offering domestic partnership benefits to same-sex employees, and then some municipalities mandated that employers could not conduct business with the locality if the company did not offer domestic partnership benefits.[62] Eventually, California would become the most populous state to offer domestic partnership to its citizens, enacting the Domestic Partnership Rights and Responsibilities Act of 2003.[63] The state made its domestic partnership legislation as similar to marriage as it could, providing identical benefits and prerogatives. The status continued in California until the state was permitted to offer marriage licenses for same-sex marriage.

Opposition to same-sex couples receiving any type of state recognition galvanized persons on both sides of the argument. Opponents argued that state benefits sanctioned immorality, pedophilia, and were a bad influence on children who may as a result choose to adopt that same-sex lifestyle.[64] Advocates for same-sex status protections were energized by the opportunities and encouragement presented by business employers, local legislative gains, and constitutional rulings that seemed to open guarantees of economic and social status inclusion. The contest between the opposing views continued until the two sides confronted the issue of equal marriage rights for same-sex couples. Until *Obergefell*, the most significant decision was *Baehr v. Lewin*,[65] decided in 1993 by the Hawaiian Supreme Court. Relying on a 1967 Supreme Court decision permitting interracial marriage, the Supreme Court of Hawaii ruled that the definition of marriage could continue to change with an evolving social order and custom.[66] Until that decision, same-sex persons were denied a marriage license issuance that seemed warranted under Equal Protection, Due Process, or the penumbra of privacy. Courts held that these guarantees were inapplicable because the definition of marriage as one man and one woman was immutable.[67]

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61. *See id.* at 177–81.

62. *See id.* at 181–84.

63. *See* CAL. FAM. CODE § 297.5(a) (West 2004). California later enacted same-sex marriage, which was then rejected by the voters in Proposition 8, by which the state amended its constitution to define marriage as between one man and one woman. Upon challenge, the amendment was ruled a violation of Equal Protection and same-sex marriage was then allowed. *See* Perry v. Brown, 671 F.3d 1052, 1095 (9th Cir. 2012).

64. *See* O'Brien, *Family Law's Challenge to Religious Liberty*, *supra* note 46, at 45–49.

65. 852 P.2d 44 (Haw. 1993). For the role of *Baehr v. Lewin* in the *Obergefell* decision, see Obergefell v. Hodges, 135 S. Ct. 2584, 2596–97 (2015).

66. *Baehr*, 852 P.2d at 63 (relying on *Loving v. Virginia*, 388 U.S. 1, 11–12 (1967)). Chief Justice Roberts, in his dissent in *Obergefell*, alluded to the evolution rationale and questioned if the Court's decision to permit same-sex unions will eventually evolve to permit polygamy. *See Obergefell*, 135 S. Ct. at 2621–22 (Roberts, C.J., dissenting).

67. *See, e.g.*, Singer v. Hara, 522 P.2d 1187, 1195 (Wash. Ct. App. 1974) (holding that the Equal Rights Amendment and other constitutional safeguards are inapplicable because of the definition of marriage).

The Hawaiian court's rationale made this definitional obstacle irrelevant, ruling that if marriage could evolve to include interracial couples then marriage could evolve to include same-sex couples as well.[68] As with interracial marriage and *Loving v. Virginia*,[69] the contemporary impact of the Hawaiian decision in *Baehr* permitting the definition of marriage to evolve and include same-sex couples was significant. This decision cemented an irreversible change in analysis.

Backlash against the Hawaiian decision was swift and vehement. Opponents argued that same-sex marriage would (1) destroy the traditional institution of marriage, (2) that through Full Faith and Credit every state would be forced to adopt same-sex marriages celebrated elsewhere, and (3) that any court's requirement of same-sex marriage was a flagrant example of judicial activism.[70] Such arguments were heard in Hawaii, prompting the state's legislature to act. Rather than permit same-sex marriage in the state, the Hawaiian legislature and the state's voters reached a compromise with proponents of same-sex marriage by enacting a permeation of domestic partnerships. As a result of the compromise, the state became the first to adopt "reciprocal beneficiaries," a status made available solely to same-sex couples that sought to provide identical state benefits as those available to married couples.[71] Nonetheless, as with domestic partnership, a simple registration procedure would entitle registrants to the status.[72] The state constitution was amended to define marriage as between one man and one woman in return for the enactment of reciprocal beneficiaries.[73] In spite of the fact that same-sex couples were still denied the ability to marry in the state, reciprocal beneficiary status was a significant achievement for adults seeking to establish a same-sex functional family. This status and the rationale that precipitated it would continue a progression towards the eventual right to same-sex marriage in 2015.[74]

The third permeation of status was civil unions. This was an innovation adopted by the Vermont legislature on July 1, 2000, prompted by a decision of the Vermont Supreme Court holding that the Common Benefits Clause of the state constitution guaranteed to each citizen common economic benefits;[75] same-

68. *Baehr*, 852 P.2d at 67–68.

69. 388 U.S. 1 (1967).

70. *See, e.g.*, Jane S. Schacter, *Courts and the Politics of Backlash: Marriage Equality Litigation, Then and Now*, 82 S. CAL. L. REV. 1153, 1184–85 (2009). These arguments are acknowledged in the *Obergefell* decision. *See Obergefell*, 135 S. Ct. at 2605–07.

71. *See* Schacter, *supra* note 70, at 1166.

72. *See* HAW. REV. STAT. § 572C-5 (West 1997).

73. *See supra* note 71 and accompanying text.

74. For the role of *Baehr* in the *Obergefell* analysis, *see Obergefell*, 135 S. Ct. at 2596–97.

75. Baker v. Vermont, 744 A.2d 864, 867 (Vt. 1999). In its *Obergefell* decision, the Court defined the benefits of marriage as including: taxation, inheritance and property rights, rules of intestate succession, spousal privilege in the law of evidence, hospital access, medical decision making authority, adoption rights, the rights to 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. *Obergefell*, 135 S. Ct. at 2601.

sex couples were now entitled to the same benefits as married opposite-sex couples. In order to enter into a civil union a same-sex couple had to complete all of the requirements of an opposite-sex couple seeking to enter into marriage.[76] Likewise, in order to bring about dissolution of the civil union the requirements were similar to divorce.[77] Because civil unions attempted to provide all of the benefits of marriage, it was argued that the definition of "marriage" could be reserved for opposite-sex couples, permitting courts and legislatures to dodge the definitional issue. The state felt satisfied that it could create a separate but equal status for same-sex couples, but civil unions instead became the last step in the road to same-sex marriage.

Eventually, a few other states imitated Vermont's civil unions, and it appeared for a while that this status would provide a status quo.[78] But the hiatus was brief, and on May 17, 2004, Massachusetts, at the direction of the state's highest court, began issuing marriage licenses to same-sex couples.[79] And Vermont, the state that initiated civil unions, then progressed beyond civil unions and became the first state to enact same-sex marriage as a result of a vote of the legislature and not because of judicial mandate. Other states followed suit and a patchwork of same-sex marriage jurisdictions arose among the states, a patchwork that only ended with the decision of the U.S. Supreme Court on June 26, 2015 mandating same-sex marriage throughout the nation.

The process from domestic partnership to same-sex marriage, taking more than thirty years, illustrates a process of accommodation of same-sex adults working through functional families and resulting in access to form family. Primarily, the benefits sought were economic, with only a passing reference made to parental status. The process began with judicial recognition, then with employers, localities, and eventually states; all doing what was necessary to provide an increasing amount of economic status for persons denied similar benefits afforded to opposite-sex couples. Once same-sex marriage became a reality, the availability of the intermediate status arrangements—domestic partnership, reciprocal beneficiary, and civil unions—were deemed unnecessary. But until marriage was available, the status accommodations were oriented towards economic benefits for the functioning adult partners.

Children born or adopted into same-sex unions were addressed under the "marriage-like" status arrangements enacted by the states, or they were accommodated through various court-fashioned equity arrangements such as

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76. VT. STAT. ANN. tit. 18, §§ 5131, 5137 (West 2000).

77. *See* VT. STAT. ANN. tit. 15, §§ 551, 1206 (West 2016).

78. *See, e.g.*, DEL. CODE ANN. tit. 13, § 202 (West 2012); 750 ILL. COMP. STAT. 75/20 (2011); N.J. STAT. ANN. §§ 37:1-28 to 37:1-36 (West 2006). Even Hawaii adopted civil unions. *See* 2011 Haw. Sess. Laws 232 (codified at HAW. REV. STAT. §§ 572B-1 to 572B-11 (2011)).

79. The decision to issue licenses was prompted by a decision from the Massachusetts Supreme Court holding that the state constitution's guarantees of liberty and equality under the law mandated that same-sex couples be allowed to marry. *See* Goodridge v. Dep't of Pub. Health, 798 N.E.2d 941, 968 (Mass. 2003).

equitable estoppel, de facto parenthood, and psychological parenthood.[80] Domestic partnership, reciprocal beneficiaries, and civil unions are no longer needed in the same-sex functional family. Does the availability of marriage eliminate the need for equitable accommodation when it comes to establishing parentage?

### *B. Nonmarital Children*

#### *1. Uniform Parentage Act Presumptions*

On many occasions functional families, both opposite and same-sex, have brought children into their households. The 2010 Census Bureau reports that 39% of unmarried opposite-sex couple households have their own children as part of their households, and seventeen percent of unmarried same-sex couple households have children present.[81] The Census Bureau reports that in 2003, male couples raising children together were estimated to comprise nearly twenty-two percent of same-sex households.[82] Same-sex marriage is now available to same-sex partners, and although marriage is not the exclusive means by which paternity may be established, a child conceived or born during marriage is presumptively the child of the husband.[83] Marriage makes paternity and maternity so much easier.

The UPA is the primary arbiter of parentage, not because it has been adopted in every state; but rather, because it culls together what states have already adopted as public policy. Through its adoption and subsequent amendments, it serves as a catalyst too, and now recognizes that unmarried persons may become parents. But the statutory provisions are narrow. Article 2 of the Act, "Parent-Child Relationship," provides the means of establishing paternity under section

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80. *See, e.g.*, Beth R. v. Donna M., 853 N.Y.S.2d 501, 508–09 (Sup. Ct. 2008) (holding that equitable estoppel may be used by a nonparent seeking custody of a child and that a same-sex marriage in Canada assisted in this conclusion); Jean Maby H. v. Joseph H., 676 N.Y.S.2d 677, 682 (App. Div. 1998) (holding that facts may determine that it is in the best interest of a child for a nonparent to have standing to pursue custody of that child). *But see* Janis C. v. Christine T., 742 N.Y.S.2d 381, 383 (App. Div. 2002) (holding that parenting rights and privileges given to nonparents in same-sex domestic partnerships must come from the legislature and not the courts).

81. Waggoner, *supra* note 58, at 57.

82. Jessica Hawkins, *My Two Dads: Challenging Gender Stereotypes in Applying California's Recent Supreme Court Cases to Gay Couples*, 41 FAM. L.Q. 623, 631 (2007) (citing U.S. CENSUS BUREAU, MARRIED-COUPLE AND UNMARRIED-PARTNER HOUSEHOLDS: 2000 9 (2003)).

83. *See, e.g.*, Estate of Cornelious, 674 P.2d 245, 246–48 (Cal. 1984); *In re* Findlay, 170 N.E. 471, 473–75 (N.Y. 1930) (upholding an irrebutable presumption that a child born to a woman cohabiting with her not impotent husband is the child of her husband). The marital presumption of paternity may be applied in a gender neutral fashion. For application to same sex marriages, see, for example, Barse v. Pasternak, No. HHBFA124030541S, 2015 WL 600973, at *13 (Conn. Super. Ct. 2015); Stankevich v. Milliron, 882 N.W.2d 194, 196 (Mich. Ct. App. 2015) (holding that a spouse in a same-sex marriage has standing to raise the equitable-parent doctrine in light of the Supreme Court's decision in *Obergefell*).

201,[84] and then in section 204 the statute provides presumptions that are meant to make it easier to establish parentage for a child.[85] The Act makes distinctions based on a man or a woman, but gradually courts, when interpreting state adaptations of the Act, interpreted the provisions as gender neutral.[86]

Overall, the Act provides that the paternity of the child may be established through acknowledgement of such,[87] or if the presumed parent (in a gender neutral fashion) resides in the same household with the child during the first two years of the child's life and openly holds the child out as his or her own,[88] or if there is an adjudication of the person's paternity/maternity.[89] Second, an adult party to the relationship may adopt the child through statutory procedures.[90] Third, advances in assisted reproductive technology make it possible for an adult party to become a parent through assisted reproductive technology, and to include surrogacy contracts with a gestational carrier.[91] And fourth, also involving assisted reproductive technology, a man or woman may become the parent of a child by consenting to assisted reproduction involving his or her partner that results in the birth of a child.[92]

On its face, the Act provides an avenue for same-sex couples to establish parentage through consent to assisted reproduction, or through residing in the same household during the first two years of a child's life and holding the child out as his or her own.[93] But if the terms of the statute are read in a gender specific

84. UNIF. PARENTAGE ACT § 201 (UNIF. LAW COMM'N 2002).

85. *Id.* § 204.

86. *See, e.g.*, Buzzanca v. Buzzanca, 72 Cal. Rptr. 2d 280, 282 (Ct. App. 1998) (holding that both man and woman could become parents through consent).

87. *See* UNIF. PARENTAGE ACT § 301 (UNIF. LAW COMM'N 2002) ("The mother of a child and a man claiming to be the genetic father of the child may sign an acknowledgement of paternity with intent to establish the man's paternity."). This acknowledgement must, among other requirements, be signed by the mother and the man seeking to establish his paternity. *Id.* § 302.

88. *Id.* § 204(a)(5); *see, e.g.*, Partanen v. Gallagher, 59 N.E.3d 1133 (Mass. 2016) (holding that a person in a same-sex relationship may become a presumed parent under the terms of the statute).

89. *Id.* § 201(a)(2), (b)(3).

90. *Id.* § 201(a)(3), (b)(4); UNIF. ADOPTION ACT § 3-706 (UNIF. LAW COMM'N 1994) ("A decree of adoption is a final order for purposes of appeal when it is issued and becomes final for other purposes upon the expiration of the time for filing an appeal, if no appeal is filed, or upon the denial or dismissal of any appeal filed within the requisite time.").

91. Gestational agreements, if permitted in the jurisdiction where parentage is sought, may establish maternity or paternity under a valid gestational agreement. UNIF. PARENTAGE ACT §§ 201(a)(4), (b)(6), 807 (UNIF. LAW COMM'N 2002). Not all states permit surrogacy.

92. *Id.* § 201(b)(5); *see, e.g.*, Buzzanca v. Buzzanca, 72 Cal. Rptr. 2d 280, 291 (Ct. App. 1998) (holding that both man and woman may become parents of a child born to a gestational carrier through consent in a gender neutral fashion); *see also* Elisa B. v. Superior Court, 117 P.3d 660, 665 (Cal. 2005) (referencing same-sex couples); Kristine H. v. Lisa R., 117 P.3d 690, 695–96 (Cal. 2005); K.M. v. E.G., 117 P.3d 673, 682 (Cal. 2005).

93. *See, e.g.*, Partanen v. Gallagher, 59 N.E.3d 1133 (Mass. 2016) (holding that a woman in a same-sex relationship who held out the children of her partner as her own children, performing

fashion, it excludes same-sex couples. In addition, not all states adopted the Act's 2002 revision permitting paternity if the person resides in the same household and holds the child out as his or her own for a period of first two years of the child's life. To replicate this provision in the Act, a few states judicially or statutorily adopted de facto parenthood, which provides acceptance of caretaking responsibilities for a similar period of time.[94] Faced with obstacles, state courts responded by refusing to take action or, on the contrary, fashioning equitable remedies to classify persons as parents even though they did not meet the statutory criteria.

*2. Assisted Reproductive Technology Parentage*

Parentage through assisted reproductive technology is one means by which same-sex couples achieve parentage; adoption is the other. In reference to assisted reproductive technology, rapid advances in medical procedures have resulted in enhanced opportunities for persons of the same sex seeking to become parents. In a 2010 law review article, Professor Lee-ford Tritt discussed the 2008 revision to the Uniform Probate Code as it applied to establishing a parent-child relationship, noting the difficulty of legislation keeping pace with technological changes.[95] He observed that "parentage is a much more complicated affair these days . . . DNA testing and advancements in ART [artificial reproductive technology] (such as sperm donations) make presuming and recognizing the father-child relationship more difficult as well."[96] Likewise, Professor Tritt explains, "it used to be that a mother-child relationship was self-apparent, as the mother actually gave birth to the child."[97] But assisted reproductive technology makes motherhood less apparent. For example, "egg donations and gestational surrogacy now make identifying a mother-child relationship more difficult."[98] And likewise, a father's genetic connections always have been less apparent, so legal paternity traditionally has been inferred through a series of presumptions and legal defenses, but technological advances have created an increasing possibilities gap in establishing parentage. For instance, "ART can achieve conception without sex, so people who want a child

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the functions of a parent, was a presumed parent under the terms of the UPA adopted by the state in spite of the lack of a biological connection with the children).

94. *See, e.g.*, Conover v. Conover, 146 A.3d 433, 449–51 (Md. 2016) (adopting judicially, de facto parenthood and referencing other states doing likewise).

95. Lee-ford Tritt, *Technical Correction or Tectonic Shift: Competing Default Rule Theories Under the New Uniform Probate Code*, 61 ALA. L. REV. 273, 275–76 (2010).

96. *Id.* at 299; *see also* St. Mary v. Damon, 309 P.3d 1027, 1032 (Nev. 2013) ("Given the medical advances and changing family dynamics . . . determining a child's parents today can be more complicated than it was in the past.").

97. Tritt, *supra* note 95, at 299.

98. *Id.* For a gestational agreements statute, see UNIF. PARENTAGE ACT, Article 8 (UNIF. LAW COMM'N 2002). For discussion generally, see Pamela Laufer-Ukeles, *Mothering for Money: Regulating Commercial Intimacy*, 88 IND. L.J. 1223 (2013).

may use sperm, ova, or gestational services that have been donated or sold."[99] Because of expanding possibilities, children may have parentage connections to multiple adults:

> For instance, it is now possible for a child to have three potential "mothers": the egg donor, the gestational surrogate, and the woman who plans the pregnancy and intends to raise the child as the legal mother. It is also possible for a child to have three potential "fathers": the sperm donor, the husband to the gestational surrogate, and the man who plans the pregnancy and intends to be legally recognized as the father.[100]

California now acknowledges that it is possible for a child to have multiple legal parents:

> In an appropriate action, a court may find that more than two persons with a claim to parentage under this division are parents if the court finds that recognizing only two parents would be detrimental to the child. In determining detriment to the child, the court shall consider all relevant factors, including, but not limited to, the harm of removing the child from a stable placement with a parent who has fulfilled the child's physical needs and the child's psychological needs for care and affection, and who has assumed that role for a substantial period of time. A finding of detriment to the child does not require a finding of unfitness of any of the parents or persons with a claim to parentage.[101]

As advances in assisted reproductive technologies continue, "their purveyors have been accused of operating in the 'Wild West' of American medicine."[102] In addition, these advances have "coincided with a dramatic change in the legal conception of the family,"[103] and the process of evolution continues. Just as same-sex marriage is now legally possible, new technologies "may in the future allow two women to create a child with whom they both share an equal genetic link, without requiring any male genetic contribution, or two men to create a child with only a minimal female genetic contribution."[104] Such a procedure is a combination of two procedures, somatic cell nuclear transfer (SCNT) and stem cell technology used in the context of two-parent families.[105] As it pertains to

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99. Tritt, *supra* note 95, at 303.

100. *Id.* at 303–04.

101. CAL. FAM. CODE § 7612(c) (West 2004).

102. Yehezkel Margalit et al., *The New Frontier of Advanced Reproductive Technology: Reevaluating Modern Legal Parenthood*, 37 HARV. J. L. & GENDER 107, 108 (2014).

103. *Id.* at 112. For further commentary on the expanding definition of family through ART, see Myrisha S. Lewis, *Biology, Genetics, Nurture, and the Law: The Expansion of the Legal Definition of Family to Include Three or More Parents*, 6 NEV. L.J. 743 (2016).

104. Margalit et al., *supra* note 102, at 116–17.

105. *Id.* at 117 ("[T]he basic process is as follows: SCNT entails removing the original nucleus from an egg (which is then known as an 'enucleated egg') and replacing the nucleus with nuclear material from one or more individuals and sources. After being induced to divide in a laboratory,

same-sex couples, the procedure would be accomplished in the following context:

> To create a child with two female genetic contributors, without the need for a male genetic contribution, one gamete-like cell would be taken from each of the two women. Each cell would contain one-half of the forty-six chromosomes possessed by each woman. The nucleus of each gamete-like cell would be inserted in a laboratory into an enucleated egg from one of the women to mimic a fertilization event. The resulting fertilized egg would then be implanted into one of the women to create a child with whom both women would share an equal genetic link. This process would not require a male genetic contributor.[106]

Such a procedure would be revolutionary, but it would make irrelevant the intent of the parties:

> [T]here would be no need for a contract, a parentage order from the court, reliance on de facto parentage, or second parent adoption. The two women would be the sole biological parents of their child to the same degree as an opposite-sex couple, and there would be no additional third party to assert a biological claim of parenthood.[107]

There are additional parentage-inducing reproductive technologies being discussed. One is uterine transplantation, raising the possibility that "one day a uterus could be transplanted into a man."[108] This would permit two male genetic contributors to establish a parental claim without reference to a female.[109] A second method to eliminate the need for a female gestational mother is human-animal chimeric technology: "This process entails injecting specialized human stem cells into the fetus of a cow to generate an adult cow with a human uterus. Because the gestational period of a cow is nine months, this uterus could hypothetically support human embryonic gestation."[110] However, creating human life in an artificially created uterus has not been attempted because "[c]reating an artificial uterus for human beings is far more complicated, and it

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the embryo, also known as a blastocyst, is then implanted into a uterus and allowed to gestate to form a complete organism.").

106. *Id.* at 118. The procedure for two men provides that:

> each man would contribute about one half of the genetic material to an enucleated egg contributed by a female donor. A woman, either the egg donor or another person, would have to gestate the child. The majority of the egg's DNA (i.e., the nuclear DNA) would be removed, though the egg would retain the women's mitochondria DNA (mt-DNA), a minimal genetic contribution.

*Id.* at 122.

107. *Id.* at 121.

108. *Id.* at 125.

109. *Id.*

110. *Id.* at 126.

is unclear whether the procedures being utilized in animals could be used to create an artificial human uterus."[111]

No matter how bizarre from a contemporary perspective, modern methods of reproductive technology most often share one thing in common with traditional paternity procedures—the biological connection between parent and child. Biology, such as giving birth to a child after a nine-month pregnancy is traditional and presumptions of maternity and paternity follow. Likewise, if biology is absent then parenthood may be established through marriage.[112] Indeed, at least one U.S. Supreme Court decision is willing to ignore the clear scientific evidence of biology and adhere to traditional notions of family as preferred. [113] That is, when genetic certainty contradicts the presumption of paternity brought about through marriage, at least this decision of the Court holds that the integrity of the marital union trumps biology and the genetic evidence should be ignored. If a child is born during an intact marriage, thereby entering into a family unit, genetic evidence should not be considered because of the inherent value in being a part of a family.[114] This holding has been

111. *Id.*

112. The UPA provides for a presumption of paternity to be established in a majority of its provisions: Man and woman are married when the child is born during the marriage; a child is born within 300 days of termination of the marriage; a marriage is annulled and a child is born within 300 days of that void marriage; or the man and the woman married each other after the birth of the child and the man promised to support the child or is named as a parent on the child's birth certificate. UNIF. PARENTAGE ACT § 204(a)(1)–(4) (UNIF. LAW COMM'N 2002).

113. Michael H. v. Gerald D., 491 U.S. 110, 120 (1989) (plurality opinion) (noting that a California statute prohibits "inquiries into child's paternity that would be destructive of family integrity and privacy"); *see* CAL. FAM. CODE § 7540 (West 2015) (establishing the conclusive presumption of paternity). Rebuttal with blood tests is provided under the California Family Code:

> (a) Notwithstanding Section 7540, if the court finds that the conclusions of all the experts, as disclosed by the evidence based on blood tests performed pursuant to Chapter 2 (commencing with Section 7550), are that the husband is not the father of the child, the question of paternity of the husband shall be resolved accordingly.
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> (b) The notice of motion for blood tests under this section may be filed not later than two years from the child's date of birth by the husband, or for the purposes of establishing paternity by the presumed father or the child through or by the child's guardian ad litem. As used in this subdivision, "presumed father" has the meaning given in Sections 7611 and 7612.
>
> (c) The notice of motion for blood tests under this section may be filed by the mother of the child not later than two years from the child's date of birth if the child's biological father has filed an affidavit with the court acknowledging paternity of the child.

CAL. FAM. CODE § 7541 (West 2015).

114. *See Michael H.*, 491 U.S. at 131 (holding that a California statute, specifying that any child born to a married man and his wife while they cohabit is presumed to be the father of that child, does not violate due process rights of a man who has been established as a genetic father when the statute restricts rebuttal to the husband and wife in only limited circumstances). For a critique of this decision, see for example, *id.* at 145 (Brennan, J., dissenting); Laurence H. Tribe & Michael C. Dorf, *Levels of Generality in the Definition of Rights*, 57 U. CHI. L. REV. 1057, 1085–98 (1990); *see also Ex Parte* C.A.P., 683 So. 2d 1010, 1012 (Ala. 1996) (holding that putative father cannot challenge paternity of child born, but not conceived, during marriage); *In re* Melissa

criticized, but the greater challenge will come from continuing advances in genetic identification in the future. The presumptions ensconced in the UPA were born of necessity; it was otherwise impossible to establish paternity. But scientific advances continue to advance both certainty and faster results.

*3. De Facto, Contractual, and Equitable Parentage*

Increasingly, states have adopted equitable or statutory means by which nonparents may achieve parental status other than through adoption. One commentator summarizes that, "[t]oday, only three jurisdiction appear to remain committed to doctrines denying custodial responsibilities altogether to third parties who have engaged in day-to-day residential caretaking in a parenting capacity, and the decisions expressing this commitment are lesbian-coparent cases, reflecting a special resistance to this particular family arrangement."[115] Likewise, two jurisdictions limit recognition of de facto parenthood to situations when the de facto parent was married to the parent.[116]

De facto parenthood, statutory and judicial, is one of the means by which to establish parenthood when adult parties could neither marry nor biologically participate in the conception of a child. This extends the boundaries of parenthood because the "modern basis for awarding legal parenthood is biological kinship and the marital presumption."[117] But as will be discussed, *infra*, de facto parenthood offers an additional means of achieving parenthood. An illustration of the use of statutory de facto parenthood is found in the Delaware Supreme Court decision of *Smith v. Gordon*.[118] The decision concerned two women who had been partners for five years when they decided to adopt a child from Kazakhstan.[119] Same-sex couples could not adopt in that country so one of the women adopted the child and the couple returned to the United States with the adopted child.[120] Once in the United States, the other partner enrolled the child in her health insurance plan and paid for his expenses

G., 261 Cal. Rptr. 894 (Ct. App. 1989) (holding that the child should be placed in foster care rather than with presumed father); David V.R. v. Wanda J.D., 907 P.2d 1025, 1027–28 (Okla. 1995); Pearson v. Pearson, 182 P.3d 353, 359 (Utah 2008) (holding that putative father could not challenge paternity of child upon the mother's divorce).

115. Katharine T. Bartlett, *Prioritizing Past Caretaking in Child-Custody Decisionmaking*, 77 LAW & CONTEMP. PROBS. 29, 66 (2014). The three jurisdictions are Maryland, Missouri, and Utah. *Id.* at 66 n.224. But the number of states drops to two as Maryland judicially adopted de facto parenthood on July 7, 2016. *See generally* Conover v. Conover, 146 A.3d 433, 453 (Md. 2016).

116. The two jurisdictions are New York and Michigan. Bartlett, *supra* note 115, at 66 n.225.

117. Margalit et al., *supra* note 102, at 113. Of course, statutory adoption may also establish parenthood, but one form of adoption, second parent adoption, was unavailable to many same-sex couples because second parent adoption necessitates a valid marriage between the biological parent and the person seeking to adopt.

118. 968 A.2d 1 (Del. 2009).

119. *Id.* at 3.

120. *Id.*

even though she did not adopt the child in the United States.[121] When the couple subsequently ended their relationship the adopting parent refused to allow her former partner visitation with her child and the partner initiated a lengthy litigious struggle seeking visitation rights.[122] Initially, the Delaware Supreme Court upheld the rights of the adopting parent and refused visitation by the nonparent.[123] But the state legislature enacted a de facto parenthood statute and the court applied it retroactively to grant the former nonadopting partner parental status.[124] In doing so the Delaware Supreme Court acknowledged that the state's legislature created an additional form of parentage when it enacted statutory de facto parenthood.[125] Other states have adopted de facto parenthood through common law.[126]

In the absence of statutory or judicial formulations of de facto parenthood, or in rare instances, marriage or adoption, same-sex couples "have had to rely on contract law and equitable principles to validate their parental claims."[127] Clear and convincing proof of their intent to be the parents of a child is required, and proof very often resulted in "contentious litigation and requires courts to delve inappropriately into the hearts and minds of the parties."[128] Such contention led one court to require a test of objectivity, to create "a bright-line rule that promotes certainty in the wake of domestic breakups otherwise fraught with the risk of 'disruptive . . . battle' over parentage as a prelude to further potential

121. *Id.*

122. *Id.* at 3–4.

123. *Id.* at 16.

124. *See* Smith v. Guest, 16 A.3d 920, 924, 936 (Del. 2011). The court cited to the recently enacted Delaware Uniform Parentage Act:

> De facto parent status is established if the Family Court determines that the de facto parent:
> (1) Has had the support and consent of the child's parent or parents who fostered the formation and establishment of a parent-like relationship between the child and the de facto parent;
> (2) Has exercised parental responsibility for the child as that term is defined in § 1101 of this title; and
> (3) Has 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.

DEL. CODE ANN. tit. 13, § 8-201(c) (West 2016).

125. *Smith*, 16 A.3d at 935.

126. *See, e.g.*, Conover v. Conover, 146 A.3d 433, 450–51 (Md. 2016).

127. Margalit et al., *supra* note 102, at 114. Contract claims are discussed in the context of agreements and equitable claims are discussed in the context of extraordinary circumstances, psychological parenthood, and in loco parentis. *See infra* Section II.A.2.

128. Margalit et al., *supra* note 102, at 135; *see, e.g.*, A.H. v. M.P., 857 N.E.2d 1061, 1072–73 (Mass. 2006) (holding that one of the two lesbians who helped raise the child but shared neither a marriage nor a biological connection with the child had insufficient caretaking activities with the child to establish herself as a de facto parent or a parent by estoppel).

combat over custody and visitation."[129] Sadly, bright lines of objectivity are rare in the milieu of functional families.

As will be discussed, *infra*, there are very few options available to courts to satisfy the equities of both adult parties and the best interest of the child or children involved. Throughout the years, when the number and viability of functional families were increasing, courts took note of the realities involved and began to develop approaches, and in a few cases, rules. A similar approach was taken with the economic interests of functional families. Most of the cases involved same-sex couples. Fewer opposite-sex couples were involved, perhaps because they were able to marry, acknowledge paternity, and procreate through intercourse—oblivious to surrogacy contracts, adoption, or egg and sperm donations. Same-sex couples, through litigation and a few legislative enactments, were able to assert parental claims based on equitable principles involving intent, explicit or implied. And yes, these equitable and smattering of legislative advances can continue, but are they needed now that same-sex marriage is available? Like domestic partnerships, perhaps the time has passed for reciprocal beneficiaries and civil unions, and it is necessary, at a minimum to avoid contentious litigation, for same-sex couples to embrace marriage and the presumptions marriage provides. Has costly and lengthy litigation, along with intrusive private scrutiny and the best interests of the child, provided reasons enough to abandon equitable arguments and adopt the objectivity of marriage as the gateway to parenthood? To answer this question, it is necessary to examine the scope of the equitable arrangements that have arisen over the past five decades.

## II. THE EVOLUTION OF EQUITABLE PARENTAGE

### *A. Fundamental Rights of Parents*

#### *1. The Pivotal Role of* Troxel

The U.S. Supreme Court has stated that "[th]e Fourteenth Amendment's Due Process Clause has a substantive component that 'provides heightened protection against government interference with certain fundamental rights and liberty interests,' . . . including parents' fundamental right to make decisions concerning the care, custody, and control of their children."[130] The Court characterized the fundamental rights of parents as "perhaps the oldest of the fundamental liberty interests recognized by this Court."[131] And even though the

129. Debra H. v. Janie R., 930 N.E.2d 184, 191–92 (N.Y. 2010) (citation omitted). *But see* Brooke S.B. v. Elizabeth A.C.C., 61 N.E.3d 488, 498–501 (2016) (departing from the bright line test and permitting establishment of parental status through, at a minimum, a pre-conceptions agreement between adult parties).

130. Troxel v. Granville, 120 S. Ct. 2054, 2056 (2000).

131. *Id.* at 2060. The Court referenced several cases in its characterization of parental rights as a fundamental liberty. *See* Washington v. Glucksburg, 521 U.S. 702, 720 (1997) (stating that

plurality decision was vague in its application,[132] a series of subsequent judicial opinions and statutory enactments ratified the Court's holding.[133] The holding rejected the petition of the grandparents seeking visitation with their grandchildren. Specifically, the Court held:

> [S]o long as a parent adequately cares for his or her children (i.e., is fit), there will normally be no reason for the State to inject itself into the private realm of the family to further question the ability of that parent to make the best decisions concerning the rearing of that parent's children.[134]

Only by proving that the parent is unfit, or that the third party qualifies as a parent, may the state intervene against the wishes of a fit parent to enforce the visitation rights of a third party.[135] *Troxel* presumes that a fit parent always acts in the best interest of his or her child, hence what is in the best interest of a child is only a topic of inquiry when a parent is judged unfit.

The *Troxel* decision illustrates the pursuit of parentage status by persons in a relationship that involves children with whom these petitioners have no parental relationship through adoption, marriage, or biology. Specifically, the facts involve grandparents who loved and cared for their granddaughters since birth and were denied visitation by the children's biological mother. Grandparent petitions for visitation or custody of grandchildren occur frequently and these petitions resemble those of former same-sex partners seeking to visit with a child or children with whom they have bonded.[136] All petitions by third parties are subject to the constitutional parameters established in *Troxel*.

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the right of a parent to "direct the education and upbringing" of their children is protected by the Due Process Clause); Santosky v. Kramer, 455 U.S. 745, 753 (1982) (discussing the fundamental right of parents to care and manage their children); Parham v. J.R., 442 U.S. 584, 602 (1979) (recognizing that parents have broad authority of their children); Quilloin v. Walcott, 434 U.S. 246, 255 (1978) ("[T]he relationship between parent and child is constitutionally protected."); Stanley v. Illinois, 405 U.S. 645, 651 (1972) (stating that the Court respects the interests of parents in managing the care and custody of their children); Wisconsin v. Yoder, 406 U.S. 205, 232 (1972) (stating that the parental role in raising children is an "American Tradition").

132. *See, e.g.*, *Troxel*, 120 S. Ct. at 2064 ("[W]e do not consider the primary constitutional question passed on by the Washington Supreme Court—whether the Due Process Clause requires *all nonparental visitation* statutes to include a showing of harm or potential harm to the child as a condition precedent to granting visitation. We do not, and need not, define today the precise scope of the parental due process right in the visitation context." (emphasis added)).

133. *See, e.g.*, Weldon v. Ballow, 200 So. 3d 654, 672 (Ala. Civ. App. 2015) (holding that the Alabama state statute did not meet the *Troxel* test when it did not sufficiently provide for the parental presumption); Falconer v. Stamps, 886 N.W.2d 23, 46 (Mich. Ct. App. 2015) (holding that the trial court improperly granted visitation to grandparents in part because the court did not give preference to the parental presumption mandated by *Troxel*). *But see* Suarez v. Williams, 26 N.Y.3d 440, 444 (2015) (holding that extraordinary circumstances may rebut the parental presumption and provide a nonparent with standing to seek custody of a child); CAL. FAM. CODE § 3041 (West 2013) (listing factors that may rebut the parental presumption).

134. *Troxel*, 120 S. Ct. at 2061.

135. *Id.* at 2061–62.

136. *Id.* at 2059.

One case, *Debra H. v. Janice R.*,[137] is illustrative of the process and the pivotal role that *Troxel* plays in any resolution of a dispute between two same-sex partners—a parent and a nonparent. The case involved two women who met in 2002 and resided in New York. In 2003, they traveled to Vermont and entered into a civil union where the status of civil unions had been enacted for same-sex couples.[138] Immediately afterwards the two women returned to New York and continued their residence there. In that same year, Janice R. gave birth to a boy through artificial insemination using a donor's sperm. The birth mother's partner was Debra H. and she consistently rebuffed all entreaties by the birth mother for Debra to become the boy's second parent through the process of adoption.[139] Then, in 2006, Janice and Debra separated but Janice permitted Debra limited physical visitation with the boy until 2008 when she discontinued any and all communications between her biological son and her former partner.[140] The refusal to allow Debra to visit with the boy prompted Debra to file suit to obtain "joint legal and physical custody of [the boy], restoration of access and decisionmaking authority with respect to his upbringing, and appointment of an attorney for the child."[141]

The Court of Appeals of New York, the state's highest court, acknowledged prior state precedent, specifically the 1991 decision of *Alison D. v. Virginia M.*,[142] which established an objective standard, eschewing equitable grounds and holding that "only a child's biological or adoptive parent has standing to seek visitation against the wishes of a fit custodial parent . . . ."[143] Then the court in *Debra H.* ruled that any entitlement to custody or visitation rights for persons not related to the child through biology or adoption only arises because of a valid

137. 930 N.E.2d 184 (N.Y. 2010). *But see* Brooke S.B. v. Elizabeth A.C.C., 61 N.E.3d 488, 501 (N.Y. 2016) (holding that more subjective tests could be utilized to establish parenthood in the future).

138. Debra H. v. Janie R., 930 N.E.2d 184, 186–87 (N.Y. 2010).

139. *Id.* at 186.

140. *Id.*

141. *Id.* (alteration in original).

142. 527 N.E.2d 27 (N.Y. 1991).

143. *Debra H.*, 930 N.E.2d at 187 (discussing the holding of *Alison D. v. Virginia M.*, 527 N.E.2d 27 (N.Y. 1991)). The court in *Debra H.* affirmed its holding in *Alison D.* because was "convinced that the predictability of parental identity fostered by *Alison D.* benefits children and the adults in their lives." *Id.* at 192. However, the Court in *Brooke S.B.* overruled *Alison D.* and abrogated *Debra H.*, and held that more subjective factors may lead to the establishment of parenthood. *Brooke S.B. v. Elizabeth A.C.C.*, 61 N.E.3d 488, 498–501 (N.Y. 2016). For a discussion of how the New York Court of Appeals misconstrued the Vermont decision of *Miller-Jenkins v. Miller-Jenkins*, 912 A.2d 951 (Vt. 2006), see Carlos A. Ball, *Rendering Children Illegitimate in Former Partner Parenting Cases: Hiding Behind the Façade of Certainty*, 20 AM. U. J. GENDER SOC. POL'Y & L. 623, 638 (2012); Joanna L. Grossman, *The New Illegitimacy: Tying Parentage to Marital Status for Lesbian Co-Parents*, 20 AM. U. J. GENDER SOC. POL'Y & L. 671, 689 (2012) ("Parentage was not assigned to [the nonparent] based solely on the civil union; in fact; the court expressly rejected that approach and looked instead at a variety of factors." (alteration in original)); Nancy D. Polikoff, *The New "Illegitimacy": Winning Backward in the Protection of the Children of Lesbian Couples*, 20 AM. U. J. GENDER SOC. POL'Y & L. 721 (2012).

marriage between the biological parent and the nonparent seeking custody or visitation. The court considered the civil union a marriage and because the child was born to the birth mother during their marriage, the nonparent was presumed to be a parent under the state's parentage act.[144] Under Vermont law, when two persons of the same sex enter into a civil union in that state, both parties enjoy the status of parent if a child is born through assisted reproductive technology even though one of the parties has no biological connection with the child.[145]

The court noted that *Alison D.* was decided in 1991, before the status of civil unions became available to same-sex couples.[146] And the court noted it was pertinent to *Debra H.*, and distinctive in comparison to *Alison D.*, that Janice and Debra had entered into a valid civil union in Vermont,[147] a status that conferred on them all of the rights of a married couple.[148] Because Janice's biological child was born through assisted reproductive technology, with the consent of her civil union partner, the nonparent civil union partner became a parent and entitled to that status in any dispute over custody or visitation. As a parent, Debra shared a level playing field with the biological parent, Janice, and the issue then became what is in the best interest of the child. The court stated that "[o]ur determination that Debra H. is [the child's] parent allows her to seek visitation and custody at a best-interest hearing. There, she [has] to establish facts demonstrating a relationship with [the child] that warrants an award in her favor."[149]

The 2010 decision of *Debra H.* is pertinent because the court explained why equitable remedies, such as equitable estoppel and psychological parenthood, do not serve the interests of the child or the parents. As the New York court acknowledged, the lower court ruled that, if the facts justified it, Debra had "'a prima facie basis for invoking the doctrine of equitable estoppel.'"[150] The lower court ordered that Debra be given the opportunity to prove that she stood in loco parentis to the boy, and if so, then she "possessed standing to seek visitation and custody."[151] But, on appeal, the appellate court reversed the lower court and ruled that the objective standard of *Alison D.* should prevail, holding that any person not related to the child through adoption or biology "lacks standing to

144. *Debra H.*, 930 N.E.2d at 195.

145. *Id.* The court acknowledges that Vermont permitted civil unions to confer "all the same benefits, protections, and responsibilities under law . . . as are granted to spouses in a marriage." *Id.* (quoting VT. STAT. ANN. tit. 15, § 1204(a)).

146. *Id.* at 196.

147. *Id.* at 186. The lower court ruled that because civil unions are similar to marriage, and because marriage would confer the benefits of parentage if a child were born during the marriage, Debra should be a parent of the boy. *Id.* at 187–88.

148. The court granted comity to the Vermont civil union and, as such, recognized parentage created by a civil union in Vermont. *Id.* at 197.

149. *Id.* (alteration in original).

150. *Id.* at 187 (citation omitted).

151. *Id.* at 188.

seek custody or visitation rights . . . ."[152] When asked to choose between the holding of the lowest court or the appellate court, New York's highest court chose the objective standard and rejected outright the equitable remedies favored by many other jurisdictions. The crucial factor in its decision was the objectivity of the civil union, a status similar to marriage, entered into by the two adults.[153] And now that marriage is available to same-sex couples, the necessity of utilizing equitable remedies, at least in New York, is called into question.[154] The court offered a basis for its rationale. Without an objective element, parties would be forced into contentious litigation that would be costly and lengthy.[155] Such litigation would "trap single biological and adoptive parents and their children in a limbo of doubt."[156] The court then affirmed the overriding import of *Troxel*—affirming the fundamental right of a parent, objectively established through biology, adoption, or marriage in reference to artificial insemination—to reject any parental status being awarded to another, even if that parent permitted or encouraged another adult to become a virtual parent of the child.[157]

But in 2016, the Court of Appeals of New York overruled *Alison D.*, holding that "the definition of 'parent' established by this Court 25 years ago in *Alison D.* has become unworkable when applied to increasingly varied familial relationships."[158] The decision of *Brooke S.B. v. Elizabeth A.C.C.*[159] involved two same-sex couples, each of which had formed an intimate nonmarital relationship and had a child born to one of the partners. In facts that are often repeated in other cases, the partners separated and eventually the biological parent prohibited her former partner, the one lacking any biological or adoptive connection with the child, to visit with the child. This refusal prompted litigation seeking visitation and custody. Both *Alison D.* and *Debra H.* would prohibit their status as parents, thus denying the case's two nonbiological partners a relationship with the child they raised together with the biological parent. But in reversing *Alison D.* the New York court held that

> *Alison D.*'s foundational premise of heterosexual parenting and nonrecognition of same-sex couples is unsustainable, particularly in light of the enactment of same-sex marriage in New York State, and

152. *Id.*

153. *Id.* at 195, 197.

154. *Id.* at 196–97; *see* Stankevich v. Milliron, 868 N.W.2d 907 (Mich. 2015) (remanding a child custody decision because of *Obergefell*, holding that same-sex marriages had to be recognized and therefore the plaintiff in the case had to be considered a parent as a result of her marriage in Canada to the child's biological parent).

155. *Id.* at 192 ("These equitable-estoppel hearings—which would be followed by a second, best-interest hearing in the event functional or de facto parentage is demonstrated to the trial court's satisfaction—are likely often to be contentious, costly, and lengthy.").

156. *Id.* at 193.

157. *Id.*

158. 61 N.E.3d 488, 499 (N.Y. 2016) (citing the increasing number of children being raised by same-sex couples in New York).

159. *Id.*

> the United States Supreme Court's holding in *Obergefell v. Hodges*, which noted that the right to marry provides benefits not only for same-sex couples, but also the children being raised by those couples.[160]

Because *Debra H.*'s holding was premised upon the marital status of the two same-sex partners; it was not overruled. But the holding in *Brooke S.B.* departed from the preference for the "bright line" approach towards establishing parenthood. Indeed, the court held that because the partners in each of the two factual scenarios involved entered into preconception agreements to conceive a child as coparents, the nonbiological partner is a parent for purposes of seeking visitation or custody.[161] But the exact test to be employed in all situations is vague, unlike that employed in *Alison D.* and relied upon in *Debra H.* Instead, the New York court held: "We reject the premise that we must now declare that one test would be appropriate for all situations . . . ."[162] Clearly, because each of the couples could clearly and convincingly prove that they had entered into a preconception agreement whereby the nonbiological partner would be a parent, that person is a parent under *Brooke S.B.* But "we do not opine on the proper test, if any, to be applied in situations in which a couple has not entered into a pre-conception agreement."[163]

The approach taken by *Brooke S.B.* does not delve deeply into the rationale behind that same court's decision in *Debra H.*, a decision that curtailed lengthy litigation by adhering to objective statutory standards. Like *Brooke S.B.*, the 2010 decision of *Debra H.* acknowledged that, first, there are both statutory and equitable means by which parentage may be established. Second, *Debra H.* preferred and adopted a "bright line" approach, establishing objective criteria provided by the state's statute to establish parentage: marriage, biology, or adoption. The reasons underlying *Debra H.* are cogent and based upon the court's consideration of the best interest of the child, the cost and delay of litigation, and the uncertainty surrounding many cases. Yet the New York court rejected the "bright line" approach, finding that "bright lines cast a harsh light on any injustice and . . . there is little doubt by whom that injustice has been most finely felt and most finely perceived . . . ."[164] Third, as often occurs in judicial opinions, *Debra H.* suggests that any additions to establishing parentage status must come from the legislature and not from the courts, but this was absent in the majority opinion of *Brooke S.B.* A reference to legislation in the concurring opinion of *Brooke S.B.*[165] comports with the heretofore policy in New

160. *Id.* at 498.

161. *Id.* at 498–501.

162. *Id.* at 500.

163. *Id.* at 501.

164. *Id.* at 498–99.

165. *Id.* at 504–05 (Pigott, J., concurring). Judge Pigott went on to state: "As we have said before, 'any change in the meaning of 'parent' under our law should come by way of legislative

York announced in both *Alison D.* and *Debra H.* Fourth, both *Debra H.* and *Brooke S.B.* recognized that *Troxel* is the gateway to custody and visitation claims.[166] Persons seeking any rights pertaining to children must satisfy the requirement of *Troxel* by establishing, one way or another, parental status. And fifth, the dispute among the states remains whether parenthood is established through objective factors, such as de facto parenthood or statutory status. The fact that New York established an evolving test for parenthood in *Brooke S.B.* does not negate the fact that other states find that the best interest of a child is better protected with objectivity.[167]

Equity has often complemented statutory definitions of parent. Nonetheless, the use of equity is rare, accompanied by attenuating circumstances, and characterized by protracted litigation, expense, and emotional trauma. What follows is a sampling of equitable remedies that, if successful, may establish the status of parenthood for a petitioner otherwise unable to rebut the presumptive requirements of *Troxel*.

### *2. Rebutting* Troxel*: The Equitable Remedies*

#### *a. Extraordinary Circumstances*

Although it would appear that the U. S. Supreme Court decision in *Troxel* precluded all third parties from exercising parental rights over a child, specifically in regard to the right sought in *Troxel* (visitation); commentators suggest that this is not the case. According to Professor Katharine Bartlett, "the Court's plurality did not preclude the rights of third parties who had served in a de facto capacity with respect to the child . . . ."[168] But the parameters of a "de facto capacity" status, and those who may successfully challenge parental rights, remains murky.[169] Certain situations have occurred that appear to warrant court interference with parental rights. One of these is when extraordinary

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enactment rather than judicial revamping of precedent.'" *Id.* at 501 (quoting Debra H. v. Janice R., 14 N.Y.3d 576, 596 (2010)).

166. *See, e.g.*, *id.* at 498–99 (referencing *Troxel* and discussing the competing liberty interests of children).

167. *See, e.g.*, A.H. v. M.P., 857 N.E.2d 1061, 1076 (Mass. 2006). The Massachusetts Supreme Court, in an opinion denying the estoppel claim of a nonparent seeking custody, opined that "we find general estoppel principles, while appropriate for commercial transactions, an unwieldy and inappropriate tool by which a judge may probe into the intimate, private realm of family life." *Id.*

168. Bartlett, *supra* note 115, at 58. Professor Bartlett cites to two of the three dissenting opinions in the *Troxel* decision. *Id.* at 58 n.171. Justice Stevens' dissent posits a "once-custodial caregiver" as someone constitutionally permitted to have parental status. *See* Troxel v. Granville, 120 S. Ct. 2054, 2070 (2000) (Stevens, J., dissenting). Justice Kennedy suggests a de facto parent would be granted status as a parent. *Id.* at 2077, 2079 (Kennedy, J., dissenting).

169. For a cogent analysis of the evolution of de facto parentage and the *Troxel* decision, see Bancroft v. Jameson, 19 A.3d 730, 750 (Del. Fam. Ct. 2010) (holding that an early de facto statute was unconstitutional).

circumstance arise. Unlike some states that have codified de facto status,[170] the parameters of extraordinary circumstances are elusive, but when they are present, a nonparent may obtain the status of parent in pursuing the best interest of a child, specifically seeking custody or visitation. In determining what constitutes an extraordinary circumstance, it appears that a third party's involvement with the child is not the sole criteria. Rather, extraordinary circumstances exist whenever there is clear and convincing evidence that granting parental status to the nonparent would be in the best interest of the child because of facts pertaining to the child.[171] A few illustrations of extraordinary circumstances include the following: (1) a child's detrimental reliance, (2) transfer of parental status, (3) coparenting agreements, and (4) presumptive parentage.

*i. Child's Detrimental Reliance*

An illustration of how a child may be adversely affected by a parental relationship resulting in extraordinary circumstances is from the New York Court of Appeals, *Bennett v. Jeffreys*.[172] The case involved a child who had been born eight years earlier to a then fifteen-year-old unwed girl. The unwed teenage girl found herself unable to care for the child and despondent over her predicament. Upon the recommendation of her own mother, she transferred the infant to a former classmate of her mother who then raised the little girl as her own for almost nine years.[173] There was never a formal surrender to the third party, and the custodian of the girl never formally adopted the infant. In addition, there was conflicting evidence as to the amount of contact that the biological mother and child had during the intervening years. Nonetheless, the biological mother completed college, was still living with her parents, and sought the return of her child from the child's custodian after almost nine years. The custodian refused to voluntarily surrender the child and, because of her lengthy relationship with the child as her parent, petitioned the court to be treated as a parent in any hearing concerning the best interest of the child. The biological mother disagreed and asserted her parental rights, contesting any parenthood claimed by the custodian.

The decision was decided prior to *Troxel*, but even prior to *Troxel* the parental presumption was ensconced in American jurisprudence. Nonetheless, the court

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170. *See infra* note 312 and accompanying text.

171. *See, e.g.*, *In re* Clifford K., 619 S.E.2d 138, 148 (W.Va. 2005). The court in *Clifford K.* utilized W. VA. CODE § 48-9-103(b), which provides: "In exceptional cases the court may, in its discretion, grant permission to intervene to other persons or public agencies who participation in the proceedings under this article it determines is likely to serve the child's best interests."

172. 356 N.E.2d 277 (N.Y. 1976); *see also* T.B. v. L.R.M., 786 A.2d 913, 919–20 (Pa. 2001) (holding that parental status is achieved if a nonparent is treated as a parent by both the parent and the child); *In re* C.R.S., 892 P.2d 246, 258–59 (Colo. 1995) (holding that parental status is achieved if the nonparent performs caretaking functions and the child psychologically identifies with the nonparent as a parent).

173. *Bennett*, 356 N.E.2d at 280.

recognized that there were rebuttals to this parental presumption. Both presumption and the possibility of rebuttals were recognized in the court's ruling: "The parent has a 'right' to rear its child, and the child has a 'right' to be reared by its parent. However, there are exceptions created by extraordinary circumstances, illustratively, surrender, abandonment, persisting neglect, unfitness, and unfortunate or involuntary disruption of custody over an extended period of time."[174] Viewed from within these circumstances, the court held that in the case of the girl separated from her mother for eight years, "there were extraordinary circumstances present, namely, the protracted separation of mother from child, combined with the mother's lack of an established household of her own, her unwed state, and the attachment of the child to the custodian."[175] These extraordinary circumstances allowed the court to hold that the mother's parental presumption was successfully rebutted by the third party, permitting the court to proceed to a hearing on whether it would be in the best interest of the child to return to the mother or to remain with the custodian.[176]

At the best interest of the child hearing, the court held that the emotional bond the child maintained with the custodian was sufficient to conclude that "to remove the child from such a relationship would endanger the development of the child in many ways and could affect her academic success and her motivation to learn."[177] Thus, after rebutting the parental presumption with "extraordinary circumstances" and a best interest determination, the court held that the child should remain in the custody of the long-time custodial parent.[178]

The *Bennett* decision illustrates the concern voiced by the New York Court of Appeals in its 2010 decision of *Debra H.*[179] The *Debra H.* court was concerned that "equitable estoppel hearings—which would be followed by a second, best-interest hearing in the event functional or de facto parentage is demonstrated to the trial court's satisfaction—are likely often to be contentious, costly, and lengthy."[180] Such concern was illustrated in the litigation occasioned by the *Bennet* decision, where the court found that "[t]he new hearing extended over a four-week period and contain[ed] the testimony of some 26 witnesses . . . ."[181]

Eventually, the New York legislature did enact a statute codifying extraordinary circumstances, at least as the circumstances apply to grandparents, and it included the concept of objectivity.[182] The state statute was instrumental in the 2015 decision of *Suarez v. Williams*.[183] *Suarez* involved a boy who had

174. *Id.* at 281.
175. *Id.* at 284.
176. *Id.* at 285.
177. Bennett v. Marrow, 59 A.D.2d 492, 495 (N.Y. App. Div. 1977).
178. *Id.* at 496.
179. *See supra* note 143 and accompanying text.
180. Debra H. v. Janice R., 940 N.E.2d 184, 192 (N.Y. 2010).
181. *Bennett*, 59 A.D.2d at 494.
182. N.Y. DOM. REL. LAW § 72 (McKinney 2016).
183. 44 N.E.3d 915 (N.Y. 2015).

been born to an unmarried couple, but the child's paternal grandparents played a pivotal role in the child's life from birth until he was ten-years-old.[184] The child's father had moved out of state two years after the child was born and the mother permitted the child to live with the grandparents while she and children from another relationship lived nearby. She often saw the child, but the grandparents made all the major decisions in the child's life. At one point, she and the child's father had a court hearing to determine custody, but the grandparents did not participate.[185] Later, after she began a relationship with a new boyfriend, she brought the child to live with her, and refused to allow the grandparents contact with their grandchild, prompting the grandparents to petition the court for visitation rights under a state statute enacted in 2004.[186]

The court, searching for objectivity but mindful of the extraordinary circumstances rebutting the parental presumption in *Bennett*, ruled in favor of the grandparents, holding that "the grandparents established their standing to seek custody of the child by demonstrating extraordinary circumstances, namely an extended disruption of the mother's custody, in accordance with *Matter of Bennett v. Jeffreys* and Domestic Relations Law § 72(2)."[187] The extraordinary circumstances of *Bennett* were defined by the statute's objective standard of the mother's voluntary "extended disruption of custody" for at least twenty-four

184. *Id.* at 917.

185. *Id.*

186. *Id.*; N.Y. DOM. REL. LAW Section 72 provides the following:

> (2)(a) Where a grandparent or the grandparents of a minor child, residing within this state, can demonstrate to the satisfaction of the court the existence of extraordinary circumstances, such grandparent or grandparents of such child may apply to the supreme court by commencing a special proceeding or for a writ of habeas corpus to have such child brought before such court, or may apply to family court pursuant to subdivision (b) of section six hundred fifty-one of the family court act; and on the return thereof, the court, by order, after due notice to the parent or any other person or party having the care, custody, and control of such child, to be given in such manner as the court shall prescribe, may make such directions as the best interests of the child may require, for custody rights for such grandparent or grandparents in respect to such child. An extended disruption of custody, as such term is defined in this section, shall constitute an extraordinary circumstance.
>
> (b) For the purposes of this section "extended disruption of custody" shall include, but not be limited to, a prolonged separation of the respondent parent and the child for at least twenty-four continuous months during which the parent voluntarily relinquished care and control of the child and the child resided in the household of the petitioner grandparent or grandparents, provided, however, that the court may find that extraordinary circumstances exist should the prolonged separation have lasted for less than twenty-four months.

N.Y. DOM. REL. LAW § 72 (McKinney 2016).

187. *Suarez*, 44 N.E.3d at 923. In the concurring opinion of *Brooke S.B. v. Elizabeth A.C.C.*, Judge Pigott wrote that he would have decided in favor of the non-biological petitioner on the basis of extraordinary circumstances, rather than modifying the statutory definition of parent. Brooke S.B. v. Elizabeth A.C.C., 61 N.E.3d 488, 502–04 (N.Y. 2016) (Pigott, J., concurring).

months.[188] The fact that she visited with her son during this period of time did not overcome the fact that all major decisions in the child's life were made by the grandparents.

*ii. Transfer of Parental Status*

Other state courts have utilized an additional means to rebut the fundamental right of a parent to the custody and control of that parent's child. This may occur whenever a parent voluntarily transfers the status of parent to a nonparent, which may be viewed as a form of extraordinary circumstances. For example, in the 2010 decision of *Boseman v. Jarrell*,[189] the North Carolina Supreme Court held that "when a parent brings a nonparent into the family unit, represents that the nonparent is a parent, and voluntarily gives custody of the child to the nonparent without creating an expectation that the relationship would be terminated, the parent has acted inconsistently with her paramount parental status."[190] The child in question had been born through artificial insemination to a same-sex couple. From the child's birth in 2002 until their separation in 2006, the couple worked together as parents. The nonparent attempted to adopt the child with the consent of the birth parent, but the court held that the adoption procedure the couple employed was void because it did not meet the requirements of the state's adoption statute.[191] Eventually the couple separated and the biological parent restricted contact between the child and the nonparent, prompting the nonparent to petition the court for visitation rights with the child. Because the nonparent's attempt at adoption was void and there was no biological connection, the nonparent sought to establish parental status through equitable means.

The court held that the nonparent should be treated as a parent because of the voluntary transfer of parental status from the parent to the nonparent.[192] The court concluded that both women enjoyed parental status, allowing for the court to proceed to a determination of what would be in the best interest of the child in apportioning custody between the two former partners.[193] The deciding factor of the court was the extraordinary amount of parenting status that was given to the nonparent.[194] The court held:

> The record in the case . . . indicates that defendant [biological parent] intentionally and voluntarily created a family unit in which plaintiff was intended to act—and acted—as a parent. The parties jointly decided to bring a child into their relationship, worked together to conceive a child, chose the child's first name together, and gave the child a last name that "is a hyphenated name composed of both parties'

188. *Suarez*, 44 N.E.3d at 923.
189. 704 S.E.2d 494 (N.C. 2010).
190. *Id.* at 503 (citing Price v. Howard, 484 S.E.2d 528, 537 (N.C. 1997)).
191. *Id.* at 497–98, 502.
192. *Id.* at 504.
193. *Id.* at 503.
194. *Id.* at 503–05 (alteration in original).

> last names." The parties also publicly held themselves out as the child's parents at a baptismal ceremony and to their respective families. The record also contains ample evidence that defendant allowed plaintiff and the minor child to develop a parental relationship.[195]

In affirming the parental rights of the nonparent, the decision also illustrates concerns voiced by the court in *Debra H.*—that equitable approaches to parenthood create contentious and lengthy litigation. In *Boseman*, the decision of the North Carolina Supreme Court occurred four years after the partners separated. In the intervening, four years the district court had granted the mother and her former partner joint legal custody and awarded the mother primary physical custody. The state appellate court affirmed in part, vacated in part, and remanded, leaving intact the trial court's custody determination. The mother then appealed, seeking discretionary review, which was granted.[196] Upon review the North Carolina Supreme Court ruled that the non-biological parent was not a legally recognized parent, but was nonetheless entitled to seek visitation and custody of the child under "the best interest of the child" standard.[197] *Boseman* illustrates the cost of seeking parenthood through more subjective means.

New York's 2016 decision in *Brooke S.B.* held that because there was clear and convincing proof that a same-sex couple entered into preconception agreement to conceive and raise a child together, the nonbiological, nonadoptive partner has standing as a parent.[198] The level of proof provides a modicum of objectivity, but the future in New York is more murky due to the fact that the court held further, "we do not opine on the proper test, if any, to be applied in situations in which a couple has not entered into a pre-conception agreement."[199]

*iii. Coparenting Agreements*

In 2013, the Kansas Supreme Court held that extraordinary circumstances occurred in another case involving a same-sex couple.[200] The facts reveal that two adult women began a relationship in 1995 and eventually one of the women gave birth to two children through artificial insemination—one in 2002 and another in 2004. Each time a child was born, the two women executed a written coparenting agreement stating that the nonbiological partner was:

> a de facto parent and specified that her "relationship with the children should be protected and promoted"; that the parties intended "to jointly and equally share parental responsibility"; that each of the

195. *Id.* at 504.
196. *Id.* at 498.
197. *Id.* at 505.
198. Brooke S.B. v. Elizabeth A.C.C., 61 N.E.3d 488, 500–01 (N.Y. 2016).
199. *Id.* at 500.
200. Frazier v. Goudschaal, 295 P.3d 542 (Kan. 2013).

> parties "shall pay the same percent of [child] support as her net income compares to [their] combined net incomes"; "that all major decisions affecting [the] children . . . shall be made jointly by both parties"; and that in the event of a separation "the person who has actual physical custody w[ould] take all steps necessary to maximize the other's visitation" with the children.[201]

Eventually, in 2008, the couple separated and six months afterwards the birth mother began restricting the nonparent's visitation with the children, prompting the nonparent to petition the court for enforcement of the coparenting agreement.[202] The district court held that the agreement was enforceable and awarded the two former partners joint custody of the children,[203] prompting an appeal by the birth mother. Relying on *Troxel* and its argument supporting the fundamental right of a parent over a child, the birth mother rejected any enforcement of the coparenting agreement. But the state's highest court disagreed with the birth mother. The Kansas Supreme Court relied upon the extraordinary circumstances occasioned by the biological parent's action, first by executing the coparenting agreement, then in permitting the parent-child relationship to develop between the children and the nonparent, and the refusal by the parent to permit visitation with the former partner in 2008.[204]

The court held that the agreement between the two partners regarding the children was enforceable and did not violate public policy. Rather, "where two fit parents knowingly, intelligently, and voluntarily waive their parental preference by entering into a custody agreement with a third party that is in the best interests of the child, the court will enforce the agreement rather than second guess the parents' decision."[205] *Troxel* does not bar such an agreement. Instead, *Troxel* supports the right of a parent to shift parental status to a nonparent: "[A] parent should have the right to enter into a coparenting agreement to share custody with another without having the government interfere by nullifying that agreement, so long as it is in the best interests of the children."[206]

Coparenting agreements are subject to the best interests of the child. Any coparenting agreement may benefit from a court's conclusion that a fit parent

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201. *Id.* at 546 (alteration in original).

202. *Id.*

203. *Id.* at 547.

204. *Id.* at 546.

205. *Id.* at 556; *see also In re* Mullen, 953 N.E.2d 302, 304–06 (Ohio 2011) (noting a valid agreement relinquishing parental rights is enforceable); Grossman, *supra* note 143, at 713 ("A valid shared-parenting agreement is enforceable as long as the co-parent is a 'proper person to assume the care, training, and education of the child,' and the agreement serves the child's best interests." (citing *Mullen*, 935 N.E.2d at 307)).

206. *Frazier*, 295 P.3d at 557 (alteration in original). The court remanded the decision so that an appropriate custody and visitation schedule may be established. *Id.* at 558; *see also* Boseman v. Jarrell, 704 S.E.2d 494, 504–05 (N.C. 2010) (holding that a parent may create a new family unit); Rubano v. DiCenzo, 759 A.2d 959, 976 (R.I. 2000) (holding that a biological parent may, by signing an agreement, render that parent's rights less exclusive).

knows what is in the best interest of his or her child; courts are more likely to accept agreements that include a rational plan for the child's future.[207]

*iv. Presumptive Parentage*

The Uniform Parentage Act (UPA or "the Act") was first promulgated in 1973, revised in 2000, and further amended in 2002. "The adoption of the UPA and similar statutes finalized a shift away from reliance on marital status as a proxy for biological fatherhood and towards recognition, and protection, of both burgeoning and full-fledged father-child relationships."[208] The UPA reflected what was occurring throughout the United States, that is, that single persons and functional families were having children outside the confines of marriage and that these children deserved to share in financial support, care, comfort, and support of functional unmarried parents.[209] In addition, putative fathers had a right to the care and custody of their children. Constitutional decisions ratified both the rights of children and fathers.[210]

Prior to 2002, presumptions of paternity arose primarily in the context of marriage, but the 2002 version of the Act provides for presumptive paternity upon marriage and, in addition, refined the provision that a man may be presumed to be a parent of a child if, "for the first two years of the child's life, he resided in the same household with the child and openly held out the child as his own."[211] The 1973 provision contained a similar presumptive parentage provision but provided no time frame for residing with the child, only a "holding

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207. For commentary on co-parenting agreements, see Deborah Zalesne, *The Contractual Family: The Role of the Market in Shaping Family Formations and Rights*, 36 CARDOZO L. REV. 1027 1081–93 (2015); Katherine M. Swift, *Parenting Agreements, The Potential Power of Contract, and the Limits of Family Law*, 34 FLA. ST. U. L. REV. 913, 915–16 (2007).

208. Grossman, *supra* note 143, at 701–02. Professor Grossman argues that the Act's criteria for fatherhood now included, "adjudication or acknowledgement of paternity, marriage to the mother, open and notorious acknowledgement of fatherhood, or clear and convincing evidence of paternity." *Id.*

209. *See* Deborah A. Widiss, *Non-Marital Families and (Or After?) Marriage Equality*, 42 FLA. ST. U. L. REV. 547, 552–65 (2015) (suggesting that even if marriage equality is attained, efforts must continue to provide support for nonmarital families, and providing rights to illegitimate children was an important milestone in broadening constitutional understandings of the family beyond the traditional nuclear family of married parents living with children). In regards to the Supreme Court's milestone decisions on the constitutional understanding of the family, the author states that "[b]oth doctrinally and rhetorically, they affirmed that parent-child relationships formed outside of marriage, as well as extended kinship networks, can be 'real' family relationships." *Id.* at 560.

210. *See, e.g.*, Stanley v. Illinois, 405 U.S. 645, 657–58 (1972) (holding that unwed fathers were parents because of the Due Process Clause of the Fourteenth Amendment); Levy v. Louisiana, 391 U.S. 68, 70 (1968) (holding that illegitimate children are persons within the meaning of the Equal Protection Clause of the Fourteenth Amendment and entitled to the protection of the Constitution).

211. *See* UNIF. PARENTAGE ACT § 204(a)(5) (UNIF. LAW COMM'N 2002); *see also* Partanen v. Gallagher, 59 N.E.3d 1133 (Mass. 2016) (applying the presumption of parenthood to a woman in a nonmarital same-sex relationship).

out" provision. The American Law Institute (ALI) uses a similar two-year time frame when there is an absence of a parenting agreement, but the person had a "good-faith belief that he was the child's biological father, based on marriage or on the actions or representations of the mother, and fully accepted parental responsibilities consistent with that belief."[212] In addition, the ALI permits a person to achieve parental status through coparenting agreements.[213]

Judicial decisions have made it clear that the presumption of parentage is not restricted to men (putative fathers), but can include women too. In a decision by the Kansas Supreme Court, the court used the state's version of the UPA to justify awarding parental status to a female nonparent. In interpreting the provisions of the statute, the court wrote,

> A harmonious reading of all of the [statute's] provisions indicates that a female can make a colorable claim to being a presumptive mother of a child without claiming to be the biological or adoptive mother, and, therefore, can be an "interested party" who is authorized to bring an action to establish the existence of a mother and child relationship.[214]

Other state courts have interpreted their own state parentage statues and arrived at similar conclusions.[215] For example, the New Mexico Supreme Court permitted a same-sex partner, who was not a party to her partner's adoption of a child from Russia, to achieve parental status in a custody dispute.[216] The state's appellate court rejected the nonparent's claim as contrary to the fundamental rights of a parent to raise his or her child. But the state's highest court reviewed what courts in other states had decided and held that the nonparent qualified as a presumptive parent under the state's statute. Clear and convincing evidence of this was established because both parties were in a "committed relationship from 1993 to 2008"; both parties traveled together "to Russia to adopt [the] [c]hild during that relationship in 2000"; the nonparent "openly held the [c]hild out to the world as her daughter ever since [the] [c]hild arrived in New Mexico from Russia"; the child believes that the nonparent is her parent; the child lived with both the adoptive mother and the nonparent in "the same house from May 2000 through August 2008"; and the nonparent "provided financial and

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212. PRINCIPLES OF FAMILY LAW DISSOLUTION: ANALYSIS AND RECOMMENDATIONS § 2.03(1)(b)(ii)(A) (AM. LAW INST. 2002).

213. *Id.* at § 2.03(b)(iii)–(iv).

214. Frazier v. Goudschaal, 295 P.3d 542, 553 (Kan. 2013) (alteration in original).

215. *See, e.g.*, Elisa B. v. Superior Court, 117 P.3d 660, 670 (Cal. 2005) (holding that a mother's former lesbian partner may be a presumptive parent under the UPA when she received the child into the home she shared with her partner and openly held the child out as her own child); *see also* Kristine H. v. Lisa R., 117 P.3d 690, 695 (Cal. 2005); *Frazier*, 295 P.3d at 558; Partanen v. Gallagher, 59 N.E.3d 1133, 1139 (Mass. 2016); *In re* Guardianship of Madelyn B., 98 A.3d 494, 502 (N.H. 2014); Chatterjee v. King, 280 P.3d 283, 285–86 (N.M. 2012).

216. *Chatterjee*, 280 P.3d at 301; *see also* Shineovich v. Kempt, 214 P.3d 29, 39–40 (Or. Ct. App. 2009) (holding that the presumption of parenthood applying to a spouse can apply to a same-sex domestic partner).

emotional support to both [the adoptive parent] and [the] [c]hild throughout this time period."[217]

*b. Psychological Parent: In Loco Parentis*

As discussed in the previous section examining extraordinary circumstances, the court's decision depends upon clear and convincing facts justifying a third party being awarded parental status. These facts may include a child's detrimental reliance, a voluntary transfer of parental authority over a child to a nonparent, an express parenting agreement, or fulfilling the requirements for achieving the statutory presumption of parentage. These factors may be more concrete than achieving parental status by being in loco parentis to a child, or by gradually becoming a psychological parent to a child. When courts utilize the concept of de facto parenthood—that is, they do so through common law and not by statute—they may rely on more subjective factors. Nonetheless, proof must be established by clear and convincing evidence, and the objective remains the best interest of the child.[218] Establishing parental status in this fashion may be nebulous, but as Professor Katharine Bartlett observed, there is a gut feeling that the decision, one way or the other, is correct.[219]

Whenever a parent is unwilling or unable to care for a child, and concomitantly, a nonparent assumes responsibility for the care of that child for a period of time, this nonparent can be said to be serving "in loco parentis" to the child, which means serving in place of the parent. This status of in loco parentis has been codified by some states, with statutes providing objective standards by which to determine in loco parentis.[220] But most often it is the courts that fashion in loco parentis.[221] Traditionally, a nonparent serving in loco

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217. *Chatterjee*, 280 P.3d at 296 (alteration in original); *see also Elisa B.*, 117 P.3d at 670 (holding that a person not related to the child through biology or adoption may be a presumed parent under the state's parentage act); *see also Partanen*, 59 N.E.3d at 1141–43 (holding that a woman in a same-sex nonmarital relationship was a presumed parent to the children her partner gave birth to during their relationship and that she raised together with her partner); *Kristine H.*, 117 P.3d at 696 (holding that the state's parentage act permits a person of the same sex to become a presumed parent to a child of his or her partner if the nonparent takes the child into his or her home and treats the child as his or her own).

218. *See, e.g.*, Conover v. Conover, 146 A.3d 433, 453 (Md. 2016) ("The best interests of the child standard has been 'firmly entrenched in Maryland and is deemed to be of transcendent importance.' With this holding we fortify the best interests standard by allowing judicial consideration of the benefits a child gains when there is consistency in the child's close, nurturing relationships.").

219. Bartlett, *supra* note 115, at 66–67 (citing McKee v. Dicus, 785 N.W.2d 733, 738 (Iowa Ct. App. 2010)).

220. *See, e.g.*, TEXAS FAMILY CODE ANN. § 102.003(9) (West 2015) ("[A] person, other than a foster parent, who has had actual care, control, and possession of the child for at least six months ending not more than 90 days preceding the date of the filing of the petition.").

221. *See, e.g.*, Welton v. Westmoreland, 180 So. 3d 738, 740, 745 (Miss. Ct. App. 2015) (noting that the mother's child resided with her stepfather for twelve years, took his name, and thought that she was his biological child, and now stepfather has in loco parentis and parenthood

parentis is not afforded all of the rights of a biological parent when there is a custody dispute over the child. This is illustrated in the holding of one court: "In such instances the parents have a prima facie right to custody which will be forfeited only if convincing reasons appear that the child's best interest[s] will be served by an award to a third party."[222]

Often in loco parentis status is achieved through conduct that occurs when a third party becomes what may be termed a psychological parent or an equitable parent. It is difficult to define a psychological parent.[223] Often, the term is similar to what others may define as an equitable parent, defined in Corpus Juris Secundum "as one who through judicial determination is able to exercise all the rights and responsibilities of a natural parent."[224] Likewise, a West Virginia decision defines a psychological parent as occurring whenever

> a child has resided with an individual other than a parent for a significant period of time such that the non-parent with whom the child resides serves as the child's psychological parent, during a period when the natural parent had the right to maintain continuing substantial contact with the child and failed to do so, the equitable rights of the child must be considered in connection with any decision that would alter the child's custody.[225]

Regardless of what term is used, parental status rests upon the premise that it clearly and convincingly serves the best interests of the child.[226]

To illustrate the equitable underpinnings of the doctrine of in loco parentis, consider the following:

> [A] husband, who is not the biological father of a child *born or conceived during a marriage*, may be considered the natural father of that child where the husband and child mutually acknowledge a relationship as father and child, or the mother of the child has

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status); *In re* L.F.A., 220 P.3d 391, 392, 394 (Mont. 2009) (holding that a finding of unfitness was not necessary when the former partner of a biological parent with whom she had lived with for twelve years sought custody as a parent); McDonel v. Sohn, 762 A.2d 1101, 1108–09 (Pa. 2000) (noting that the aunt and uncle of child with whom the child had stayed in contact were psychological parents).

222. Jacob v. Shultz-Jacob, 923 A.2d 473, 477–78 (Pa. Super. Ct. 2007) (quoting Charles v. Stehlik, 744 A.2d 1255, 1258 (2000)).

223. *See, e.g.*, *In re* Parentage of L.B., 122 P.3d 161, 167 n.7 (2005). The court notes that "in loco parentis" "is temporary by definition and ceases on withdrawal of consent by the legal parent or parents," thereby providing no parental status. *Id.* The court states that a "psychological parent" refers to "a parent-like relationship which is based . . . on day-to-day interaction" and may result in parental rights vis-à-vis third parties but not parents. *Id.* The court also determines that a "de facto parent" means "an individual who, in all respects functions as a child's actual parent." *Id.*

224. 67A C.J.S. PARENT AND CHILD § 366 (West 2016) (referencing Randy A.J. v. Norma I.J., 677 N.W.2d 630 (Wis. 2004)).

225. *In re* Interest of Brandon L.E., 394 S.E.2d 515, 523–24 (W. Va. 1990) (holding that the grandmother may pursue petition for custody as a psychological parent).

226. *See, e.g.*, *In re* Clifford K., 619 S.E.2d 138, 147 (W. Va. 2005) (citing W. VA. CODE § 48-9-103 (2001)).

> cooperated in the development of such a relationship over a period of time prior to the filing of a complaint for divorce; the husband desires to have the rights afforded to a parent; and the husband is willing to take on the responsibility of paying child support.[227]

Then, once a court accepts the status as an equitable parent, that party "becomes endowed with both the rights and responsibilities of a parent, there is no distinction at that point between an equitable parent and any other parent, and each is endowed with the same rights and responsibilities of parenthood."[228]

Any nonparent may establish himself or herself as an equitable parent, not just husbands. Perhaps because the status arises as a result of judicial action, different names have arisen. Some states use the term equitable parent, others psychological parent, others de facto parenthood. Some states may use all three terms interchangeably. Perhaps de facto parenthood is the most defined of the three, but caution is advised in interpreting the terms. Describing various states' adoption of de facto parenthood, Professor Katharine Bartlett illustrates the interchangeability of the terms, writing that "[s]ince 2000, courts in Alaska, New Jersey, North Dakota, and South Carolina have recognized the similar concept of psychological parent. Pennsylvania and Arkansas have adopted the concept of in loco parentis in coparent situations."[229]

At least prior to the adoption of same-sex marriage, an increasing number of courts were willing to provide the status of parent to nonparents who met the criteria of being a psychological parent.[230] One decision from the West Virginia Supreme Court defined a psychological parent as the following:

> A psychological parent is a person who, on a continuing day-to-day basis, through interaction, companionship, interplay, and mutuality, fulfills a child's psychological and physical needs for a parent and provides for the child's emotional and financial support. The psychological parent may be a biological, adoptive, or foster parent, or any other person. The resulting relationship between the psychological parent and the child must be of substantial, not

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227. 67A C.J.S. PARENT AND CHILD § 366 (emphasis added) (referencing York v. Morofsky, 571 N.W.2d 524, 526 (Mich. Ct. App. 1997); *see also* UNIF. PARENTAGE ACT § 204(a)(5) (UNIF. LAW COMM'N 2002) (permitting parentage when there is a holding out as a parent for the first two years of a child's life).

228. 67A C.J.S. PARENT AND CHILD § 366.

229. Bartlett, *supra* note 115, at 61.

230. *See* Courtney Grant Joslin, *Leaving No (Nonmarital) Child Behind*, 48 FAM. L.Q. 495, 510 (2014) ("While the early equitable parenting cases provided only limited protections, the trend has been in favor of granting greater protections to people who qualify as equitable parents. More and more states allow equitable parents to seek not just visitation, but also custody. In addition, it is increasingly the case under common law doctrine and statutory provisions that once a person establishes her status as an equitable parent, custody is allocated between the equitable parent and the legal parent under application of the best-interest-of-the-child standard. This is based on the conclusion (a correct one, in my opinion) that equitable parents and legal parents are indistinguishable from the perspective of the child.").

> temporary, duration and must have been with the consent and encouragement of the child's legal parent or guardian. . . . [W]e hold that in exceptional cases and subject to the court's discretion, a psychological parent may intervene in a custody proceeding brought pursuant to W. Va. Code § 48-9-103 (2001) (Repl. Vol. 2004) when such intervention is likely to serve the best interests of the children whose custody is under adjudication.[231]

An early, but nonetheless widely-discussed illustration of psychological parenthood, *Guardianship of Phillip B.*,[232] involved a boy born with Down Syndrome. At birth, his parents immediately institutionalized him based on the recommendation of a social worker and the approval of the infant's pediatrician.[233] The boy's name was Phillip and the institution where Phillip was placed was a licensed board and care facility for children up to eight years-of-age. It offered no structured educational or developmental programs, yet Phillip remained there for the first six years of his life, whereupon his parents transferred him to another facility that similarly offered no programs of education or therapy.[234] Throughout Phillip's residency at both institutions his parents visited him infrequently and became increasingly emotionally detached from him.[235] As a result, "[t]he natural parents intellectualized their decision to treat Phillip differently from their other children. [The parents] testified that Phillip, whom they felt would always require institutionalization, should not be permitted to form close emotional attachments which—upon inevitable disruption—would traumatize the youngster."[236]

At the second facility where Phillip was institutionalized, Phillip came into contact with a volunteer who had a history of working with children with special needs. She, her husband, and their two children began to form a special attachment with Phillip. When they first met Phillip he was "unusually small and thin for his age (five); he was not toilet trained and wore diapers, still slept in a crib, walked like a toddler, and crawled down stairs only inches high. His speech was limited and mostly unintelligible; his teeth were in poor condition."[237] Gradually, the volunteer and her husband and their children worked with Phillip to enhance his ability to communicate, feed and dress

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231. *In re* Clifford K., 619 S.E.2d 138, 157–58 (W. Va. 2005). For illustrations of when the court held that no psychological parent status resulted, see *In re* Senturi N.S.V., 652 S.E.2d 490, 493 (W. Va. 2007) (holding that the husband and the husband's cousin were not psychological parents because they neither resided with nor had daily interaction with the child); Jensen v. Brevard, 168 P.3d 1209, 1214 (Or. Ct. App. 2007) (holding that the grandmother was not a psychological parent when child lived with her only three days a week).

232. 188 Cal. Rptr. 781 (1983).

233. *Id.* at 785. *See generally* Robert H. Mnookin, *The Guardianship of Phillip B.: Jay Spears' Achievement*, 40 STAN. L. REV. 841 (1988).

234. *Phillip B.*, 188 Cal. Rptr. at 785.

235. *Id.*

236. *Id.* at 787 (alteration in original).

237. *Id.* at 786.

himself, and to engage in recreational activities. Eventually Phillip spent an increasing amount of time at the home of the volunteer, living in a family setting, attending special Boy Scout meetings, and sharing household chores.[238] Nonetheless, throughout this period Phillip's parents continued to remain physically and emotionally detached from their son. By 1978, when Phillip was twelve-years-old, Phillip's biological parents forbade their son from visiting the home of the volunteer or having personal visits at the facility with the volunteer. As a result of their decision Phillip became angry and began to demonstrate symptoms of emotional disturbance, such as bed-wetting, setting fires, and violence.[239] Phillip "continuously pleaded to return home with [the volunteer]."[240]

By 1981, when Phillip was fifteen-years-old, the biological parents were successful in obtaining consent to remove Phillip from the facility and to place him in another suitable alternative. But no alternative could be found, thus continuing the stalemate between the biological parents and the volunteer family. Eventually the nonparent volunteer petitioned to be appointed as guardian over Phillip, which the biological parents opposed. At trial the court "expressly found that an award of custody to [the parents] would be harmful to Phillip in light of the psychological or 'de facto' parental relationship established between him and respondents."[241] Upon appeal the appellate court stressed the fundamental rights of parents to retain custody of a child, which may be disturbed only in extreme circumstances; such as a parent acting in a way inconsistent with being a parent.[242] The issue became whether the parents acted in such a manner so as to rebut the parental presumption and permit a nonparent to level the playing field and prompt a best interest test. The court held that the conduct of the parents did rise to the level of an extreme circumstance with their "calculated decision to remain emotionally and physically detached—abdicating the conventional role of competent decisionmaker in times of demonstrated need—thus effectively depriving [Phillip] of *any* of the substantial benefits of a true parental relationship."[243] Thus, the court held that "emotional abandonment" by a parent is sufficient to rebut a parent's fundamental right to custody of a child.[244]

238. *Id.* at 786–87.

239. *Id.* at 788.

240. *Id.* (alteration in original).

241. *Id.* at 789.

242. *Id.* at 788.

243. *Id.* at 792. "Phillip's conduct unmistakably demonstrated that he derived none of the emotional benefits attending a close parental relationship largely as a result of appellants' individualized decision to abandon that traditional supporting role." *Id.* at 791.

244. *Id.* at 792.

The *Phillip B.* decision provides an opportunity to consider the status of psychological parent in rebutting the parental presumption.[245] The trial court had found that "an award of custody to [the parents] would be harmful to Phillip in light of the psychological or 'de facto' parental relationship established between him and [the volunteers]."[246] The temptation is to focus solely on the actions of nonparents in establishing close emotional ties with the children of others, becoming "de facto parents" to these children.[247] Importantly, the *Phillip B.* decision focuses on two elements. First, the "emotional abandonment" of the parents, and second, the interaction with the child by the nonparents that then permitted the nonparents to establish a psychological connection with the child. Upon appeal, the appellate court concluded that the trial court correctly found clear and convincing evidence that the parents themselves had performed detrimental acts toward their child.[248] The most obvious act was the emotional abandonment of Phillip, but the court also considered other factors, such as the refusal of the parents to consent to surgery to remedy a medical condition suffered by Phillip. According to the appellate court, "the trial court could have reasonably concluded that [the parents'] past conduct reflected a dangerously passive approach to Phillip's future medical needs."[249] The parents acquiesced in the long-term relationship between their son and the nonparents, which resulted in a psychological relationship of parent and child.

More than ten years after *Phillip B.* was decided, the Wisconsin Supreme Court decided a case, which adopted the status of psychological parents to order visitation rights for a third party. The facts involved a same-sex couple in which the partner of a biological parent sought custody and visitation rights to the biological parent's child.[250] The two women, Sandra and Elsbeth, "shared a close, committed relationship for more than ten years."[251] They mutually agreed

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245. For additional discussion see, for example, *In re* Clifford K., 619 S.E.2d 138, 157 (W. Va. 2005) ("[W]e hold that a psychological parent is a person who, on a continuing day-to-day basis, through interaction, companionship, interplay, and mutuality, fulfills a child's psychological and physical needs for a parent and provides for the child's emotional and financial support.").

246. *Phillip B.*, 188 Cal. Rptr. at 789 (alteration in original). *See generally* GOLDSTEIN, FREUD & SOLNIT, BEYOND THE BEST INTERESTS OF THE CHILD (1973) (describing the status of psychological parents).

247. *See, e.g.*, Pitts v. Moore, 90 A.3d 1169, 1179 (Me. 2014) ("[A] court contemplating an order that creates a parent out of a non-parent must first determine that the child's life would be substantially and negatively affected if the person who has undertaken a permanent, unequivocal, committed, and responsible parental role in the child's life is removed from that role."); *see also* Samuel Johnson, Comment, *Are You My Mother? A Critique of the Requirements for De Facto Parenthood in Maine Following the Law Court's Decision in* Pitts v. Moore, 67 ME. L. REV. 353 (2015).

248. *Phillip B.*, 188 Cal. Rptr. at 790; *see also* Guardianship of Jenna G., 74 Cal. Rptr. 47, 50 (Cal. Ct. App. 1998) (reaffirming the necessity of providing clear and convincing evidence to rebut the parental presumption in a custody dispute between a parent and a nonparent).

249. *Phillip B.*, 188 Cal. Rptr. at 792.

250. *In re* Custody of H.S.H.-K., 533 N.W.2d 419, 420–21 (Wis. 1995).

251. *Id.* at 421.

to have a child together and as a result of this agreement, Elsbeth gave birth to a baby in 1988 with the assistance of artificial insemination. The two women jointly selected a name for the child, were named as the child's parents during a dedication ceremony at their church, and shared responsibility for raising the child.[252] In 1993, the couple separated, Elsbeth taking the child with her. By 1994, when the child was six-years-old, Elsbeth, the biological parent, informed her former partner, Sandra, that she would no longer allow her contact with the child.[253] Sandra subsequently filed a petition for custody of the child, and then filed a petition for visitation. A guardian ad litem was appointed for the child, who reported the following to the circuit court:

> The child stated that he believed [Sandra] was his parent and that he would like to see, spend time with and telephone [Sandra]. He was able to recite [Sandra's] new address and telephone number. The child acknowledged that his mother [Elsbeth] no longer viewed [Sandra] as his parent, that she would be upset if he continued to see [Sandra], but that he wanted to see her anyway. He stated that he did not consider anyone other than [Sandra] and [Elsbeth] to be his parents.[254]

The lower court dismissed Sandra's petition for custody and visitation, but urged the legislature to reexamine the law in light of the realities of modern society and the need to protect a child against the trauma that a child suffers when a child forms a bond with a biological parent's nontraditional partner and that adult relationship then dissolves.[255] Following the lower court's decision, Sandra appealed directly to the Wisconsin Supreme Court.

The state's highest court agreed with the lower court that the nonparent, Sandra, had not proven the biological parent's unfitness with clear and convincing evidence and hence she had not rebutted the parental presumption.[256] Such a holding rests firmly on the traditional rights of a parent as expressed in the *Troxel* decision. The court then reviewed the state's overall statutory policy affecting visitation with a child and concluded that, "[i]t is reasonable to infer that the legislature did not intend the visitation statutes to bar the courts from exercising their equitable power to order visitation in circumstances not included within the statutes but in conformity with the policy directions set forth in the statutes."[257] Such a pronouncement appears to contradict the 2000 holding of *Troxel*, which was decided after this 1995 Wisconsin decision. In 2000 the Court in *Troxel* held,

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252. *Id.* at 421–22.

253. *Id.* at 422.

254. *Id.*

255. *Id.* at 422–23.

256. *Id.* at 424.

257. *Id.* at 431. For another illustration of a court's willingness to utilize equity unless expressly prohibited by the state legislature, see *In re* Parentage of L.B., 122 P.3d 161, 177 (Wash. 2005) (holding that a nonparent was a de facto parent because of equitable considerations).

> [S]o long as a parent adequately cares for his or her children . . . there will normally be no reason for the State to inject itself into the private realm of the family to further question the ability of that parent to make the best decision concerning the rearing of that parent's children.[258]

But concomitantly, the *Troxel* court also held, that "we do not consider the primary constitutional question . . . whether the Due Process Clause requires all nonparent visitation statutes to include a showing of harm or potential harm to the child as a condition precedent to granting visitation."[259]

Thus, viewed in the context of *Troxel*, the Wisconsin Supreme Court did not ignore the constitutional rights of the biological parent.[260] The Wisconsin court permited a nonparent to petition for visitation with the child when the parent permitted the child to develop a relationship with the nonparent, and in so doing established a psychological bond between the child and the nonparent. The court held:

> Mindful of preserving a biological or adoptive parent's constitutionally protected interest and the best interest of the child, we conclude that a circuit court has equitable power to hear a petition for visitation when it determines that the petitioner has a parent-like relationship with the child and that a significant triggering event justifies state intervention in the child's relationship with a biological or adoptive parent. To meet these two requirements, a petitioner must prove the component elements of each one. Only after the petitioner satisfies this burden may a circuit court consider whether visitation is in the best interest of the child."[261]

Similar to the holding of the West Virginia Supreme Court in its decision of *In re Clifford K.*,[262] the Wisconsin Supreme Court established specific delineating elements of a psychological relationship sufficient to create a parental status. It held that any petitioner must prove four elements:

> (1) that the biological or adoptive parent consented to, and fostered, the petitioner's formation and establishment of a parent-like relationship with the child; (2) that the petitioner and the child lived together in the same household; (3) that the petitioner assumed

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258. Troxel v. Granville, 120 S. Ct. 2054, 2061 (2000).

259. *Id.* at 2064. The harm triggering state intervention in the decision of *In re Custody of H.S.K.-K.* is the parent's consent and assistance that brought about the parent-like relationship that then was severed due to the action of the parent. *In re* Custody of H.S.K.-K., 533 N.W.2d 419, 436 (Wis. 1995).

260. *See* Bartlett, *supra* note 115, at 59–60 (suggesting that the Wisconsin Supreme Court in *In re Custody of H.S.H.-K.*, in allowing nonparent visitation claims, conformed to *Troxel*'s constitutional parameters because the nonparent's status is defined by "very specific and rigorous criteria").

261. *Custody of H.S.H-K.*, 533 N.W.2d at 435. These elements of psychological parenthood meet the definition pronounced in the decision of *In re Clifford K.*, 619 S.E.2d 138 (W. Va. 2005), which is discussed *supra*.

262. 619 S.E.2d 138 (W. Va. 2005) (adopting psychological parent).

> obligations of parenthood by taking significant responsibility for the child's care, education and development, including contributing towards the child's support, without expectation of financial compensation; and (4) that the petitioner has been in a parental role for a length of time sufficient to have established with the child a bonded, dependent relationship parental in nature.[263]

Furthermore, there must be a significant triggering event to justify a state's interference with the parent-child relationship, prompting the petition for parental status, such as "[t]he petitioner must prove that the parent has interfered substantially with the petitioner's parent-like relationship with the child, and that the petitioner sought court ordered visitation within a reasonable time after the parent's interference."[264]

While recognizing the groundbreaking effect of the Wisconsin decision, commentators also criticized the limited applicability of the decision. The decision pertained only to visitation petitions, not custody cases.[265] Nonetheless, commentators report that an increasing number of states adopted the rationale of the decision and applied this rationale to both visitation and custody matters.[266] Yet, at the same time, other commentators report that a few states continue to reject the court's rationale.[267] Likewise, reminiscent of the protracted litigation concerns elucidated by *Debra H.*, "[c]ourts also cite the lack of certainty about parental status as a reason to reject de facto parentage, and the lack of statutory authority to create a quasi-parental status not obviously provided for by the legislature."[268] Nonetheless, as other court opinions illustrate, "certainty may come at the expense of the welfare of children who sometimes develop strong relationships with adults who do not fit the clearly demarcated role of 'legal

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263. *Custody of H.S.H.-K.*, 533 N.W.2d at 435–36. The importance of the first prong of the test, the parent's consent to the establishment of the relationship, is emphasized in a decision of the New Jersey Supreme Court. *See* V.C. v. M.J.B., 748 A.2d 539, 552 (N.J. 2000) (holding that the parent must willingly create and foster the bond between the child and the nonparent, and adopting the test of *In re Custody of H.S.H.-K.* to establish a psychological parent status). Once a person becomes a psychological parent that person "stands in parity with the legal parent" and any custody of visitation issues between them must be determined on a best interest of the child standard. *Id.* at 554.

264. *Custody of H.S.H.-K.*, 533 N.W.2d at 436.

265. Joslin, *supra* note 230, at 499–500; *see also* Bartlett, *supra* note 115, at 57 (noting that the Wisconsin decision was a "significant exception" to a preexisting pattern of rejecting nonparent visitation petitions).

266. Joslin, *supra* note 230, at 500–01.

267. Grossman, *supra* note 143, at 679 ("Their chief concern is intruding on the rights of the biological mother, in violation of her constitutionally protected parental rights.").

268. *Id.* at 679–80. The author references, for example, *Jones v. Barlow*, 154 P.3d 808, 810 (Utah 2007) ("We decline to extend the common law doctrine of in loco parentis to create standing where it does not arise out of statute."). *See also* Guardianship of Z.C.W., 84 Cal. Rptr. 2d 48, 51 (Cal. Ct. App. 1999); DEL. CODE ANN. tit. 13, § 8-101 (West 2016).

parent.'. . . This latter consequence is especially troubling given the law's commitment, in the custody context, to continuity of care for children."[269]

Many courts utilize equitable factors to permit nonparents to obtain parental rights pertaining to children with whom they have been involved for a long period of time.[270] For example, in 2005, the Washington Supreme Court utilized common law to establish parental status, writing that

> Washington courts have consistently invoked their equity powers and common law responsibility to respond to the needs of children and families in the face of changing realities. We have often done so in spite of legislative enactments that may have spoken to the area of law, but did so incompletely.[271]

The court held that without specific legislative prohibition, the court is free to use common law to arrive at the controlling interest in such cases, this being the best interest of the child.[272] But the court was careful to avoid prohibitions established by *Troxel*, so it utilized the four objective factors established by the Wisconsin court to established parenthood.[273] Once the four factors have been established, the Washington Supreme Court held that, "henceforth in Washington, a *de facto* parent stands in legal parity with an otherwise legal parent, whether biological, adoptive, or otherwise."[274] These rights include a duty to support the child, the right to be named on a child's birth certificate, and the right to inherit through intestate succession.[275]

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269. Grossman, *supra* note 143, at 685.

270. Bartlett, *supra* note 115, at 66 (specifying that few states refuse to recognize some form of de facto parenthood); Nancy D. Polikoff, *From Third Parties to Parents: The Case of Lesbian Couples and Their Children*, 77 LAW & CONTEMP. PROBS. 195, 208 (2014) (stating that only a minority of states refuse some recognition of legal parenthood for functional partners); Conover v. Conover, 146 A.3d 433, 449–50 n.21 (Md. 2016) (providing a list of states evidencing a modern trend towards the recognition of the status of de facto parentage).

271. *In re* Parentage of L.B., 122 P.3d 161, 166 (Wash. 2005); *see also* C.E.W. v. D.E.W., 845 A.2d 1146, 1150–51 (Me. 2004) (holding that a nonparent could have parental rights as an undefined de facto parent); T.B. v. L.R.M., 786 A.2d 913, 914 (Pa. 2001) (granting parental rights to a nonparent because she had "assumed a parental status and discharged parental duties with the consent of the biological parent"); Rubano v. DiCenzo, 759 A.2d 959, 975 (R.I. 2000) (holding that certain circumstances could result in a nonparent being awarded parental rights over a child); E.N.O. v. L.M.M., 711 N.E.2d 886, 892 (Mass. 1999) (holding that the court has equity power to grant visitation to a nonparent when that nonparent has participated in the child's life).

272. *Parentage of L.B.*, 122 P.3d at 172–73.

273. *Id.* at 176. Subsequently, the Washington Supreme Court held that there were no categorical exclusions when petitioning as a de facto parent. *See In re* Custody of A.F.J., 314 P.3d 373, 374 (Wash. 2013); *In re* Custody of B.M.H., 315 P.3d 470, 472 (Wash. 2013).

274. *Parentage of L.B.*, 122 P.3d at 177. But note that stepparents may not become de facto parents. *See In re* Parentage of M.F., 228 P.3d 1270, 1273–74 (Wash. 2010). A court then held that a stepparent has a statutory remedy when seeking custody of a stepchild. *Id.* at 1273.

275. *Parentage of L.B.*, 122 P.3d at 180 n.2 (Johnson, J., dissenting); *see also* Shondel J. v. Mark D., 853 N.E.2d 610, 611 (N.Y. 2006) (stating that the best interest of the child will result in the inability of a nonparent to cease support payments); Jacob v. Schultz-Jacob, 923 A.2d 473, 482 (Pa. Super. Ct. 2007) (holding that two biological parents and one person standing *in loco parentis*

In 2016 the highest court in Maryland likewise employed the four-part test enunciated in *In re Custody of H.S.H.-K.*[276] and reversed its holding in *Janice M. v. Margaret K.*,[277] a 2008 decision rejecting de facto parenthood.[278] In its 2016 decision the Maryland high court held that the state's adoption of same-sex marriage in 2012 signaled greater acceptance of same-sex relationships.[279] Furthermore, the majority of states have moved towards recognition of a status identified as de facto parentage or a similar status, such as psychological parent, in loco parentis, or when there were extraordinary circumstances.[280] Based on a national trend, and in the absence of any contrary legislative pronouncements, the court held that "de facto parenthood is a viable means to establish standing to contest custody or visitation" without the necessity of proving the unfitness of the child's parent.[281] As the court did in Wisconsin and other states, the Maryland court held that for de facto parent status to apply "the legal parent must consent to and foster the relationship between the third party and the child; the third party must have lived with the child; the third party must perform parental functions for the child to a significant degree; and most important, a parent-child bond must be forged."[282] The court held that the "third-party seeking de facto parent status bears the burden of proving" these factors.[283] Furthermore, seeking to meet the test of *Troxel*, the court held,

> The de facto parent doctrine does not contravene the principle that legal parents have a fundamental right to direct and govern the care, custody, and control of their children because a legal parent does not

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to child all had child support obligations for child); L.S.K. v. H.A.N., 813 A.2d 872, 878 (Pa. Super. Ct. 2002) (holding that a former opposite-sex unmarried partner stood *in loco parentis* to the children she bore and had a duty to provide financial support for them).

276. 533 N.W.2d 419 (Wis. 1995).

277. Janice M. v. Margaret K., 948 A.2d 73, 87 (Md. 2008); *see also* Toni S. Boettcher, *Same-Sex Couples and Custody and Visitation*, 45 MD. B.J. 48, 49 (2012) ("In the past decade, the number of same-sex couples residing in Maryland has increased by 51%, and more than 25% of those couples are raising children, according to the 2010 U.S. Census Bureau.").

278. Conover v. Conover, 146 A.3d 433, 453 (Md. 2016). In *Conover*, two lesbians began a relationship in 2002 and one of them gave birth to a boy in 2010 through artificial insemination. *Id.* at 434. The couple validly married after the birth of the child, but then separated and divorced in 2012. *Id.* Following the divorce, the birth mother refused visitation to her former spouse and that spouse filed a claim seeking visitation rights. *Id.*

279. *Id.* at 448.

280. *Id.* at 450.

281. *Id.* at 35; *see also* Bartlett, *supra* note 115, 64–65 ("More often, standing itself is limited to persons who have a residential, caregiving relationship with the child. Some states single out particular categories of individuals, like grandparents, stepparents, or siblings, as individuals who can seek specified visitation or custody rights, but since *Troxel*, these special standing statutes, too, require that the relative has lived with the child, sometimes for a particular length of time, or can show that the child's parents are unfit or unavailable.").

282. *Id.* at 37 (quoting V.C. v. M.J.B., 163 N.J. 200, 223 (2000)).

283. *Id.* at 44.

> have a right to voluntarily cultivate their child's parental-type relationship with a third party and then seek to extinguish it.[284]

Unlike the more subjective approaches establishing parental status in nonparents, such as extraordinary circumstances or psychological parents, the identifiable factors adopted in Wisconsin's decision of *In re Custody of H.S.H.-K.*, and in other states including Maryland, offer an objective standard of de facto parentage. The objective factors differ from judicial approaches because they offer the certainty sought by the New York court in *Debra H.*, yet at the same time do not require functional families to conform to the requirements of marriage. A review of the factors indicates that functional families may easily slip into conformity with the factors, providing an element of objectivity and continuity in a child's life.

*c. De Facto Parent by Statute*

Heretofore, the term de facto parent has been used most often in the context of common law—a court reviewing the facts and determining that a parent has permitted a nonparent to assume the role of a parent as a de facto parent. But there are statutory formulations of de facto, legal, and estoppel parenthood. The ALI statutorily defines a parent as someone who is a legal parent, a parent by estoppel, or a de facto parent.[285] Most common is a legal parent, someone who

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284. *Id.* at 45 ("The *H.S.H.-K.* standard for determining de facto parenthood is therefore consistent with the Supreme Court's reaffirmation in *Troxel*.").

285. PRINCIPLES OF FAMILY LAW DISSOLUTION: ANALYSIS AND RECOMMENDATIONS § 2.03(1) (AM. LAW INST. 2002). The statute defines parent as follows:

> Unless otherwise specified, a *parent* is either a legal parent, a parent by estoppel, or a de facto parent:
>
> (a) A *legal parent* is an individual who is defined as a parent under other state law.
>
> (b) A *parent by estoppel* is an individual who, though not a legal parent,
>
> (i) is obligated to pay child support under Chapter 3; or
>
> (ii) lived with the child for at least two years and
>
> (A) over that period had a reasonable, good-faith belief that he was the child's biological father, based on marriage to the mother or on the actions or representations of the mother, and fully accepted parental responsibilities consistent with that belief, and
>
> (B) if some time thereafter that belief no longer existed, continued to make reasonable, good-faith efforts to accept responsibilities as the child's father; or
>
> (iii) lived with the child since the child's birth, holding out and accepting full and permanent responsibilities as parent, as part of a prior co-parenting agreement with the child's legal parent (or, if there are two legal parents, both parents) to raise a child together each with full parental rights and responsibilities, when the court finds that recognition of the individual as a parent is in the child's best interests; or
>
> (iv) lived with the child for at least two years, holding out and accepting full and permanent responsibilities as a parent, pursuant to an agreement with the child's parent (or, if there are two legal parents, both parents), when the court finds that recognition of the individual as a parent is in the child's best interests.
>
> (c) A *de facto parent* is an individual other than a legal parent or a parent by estoppel who, for a significant period of time not less than two years,
>
> (i) lived with the child and,

is defined as such under applicable state law.[286] A parent by estoppel is someone who does not meet the definition of a parent under state law, but is obligated to pay child support or has lived with the child for at least two years and had a reasonable good-faith belief that he or she was a parent of the child.[287] In addition, a parent by estoppel may have a coparenting agreement with the child's legal parent to accept full and permanent responsibility for the child, or finally, had an agreement with the parent to accept full and permanent responsibility for the child and the court finds that it is in the best interest of the child to enforce the agreement.[288] Comments to the ALI provision state that a parent by estoppel focuses "on function, rather than on detrimental reliance," and overall, "a parent by estoppel is an individual who, even though not a legal parent, has acted as a parent under certain specified circumstances which serve to estop the legal parent from denying the individual's status as a parent."[289] The Comments also specify that the status of parent by estoppel only applies when "the court determines that the status is in the child's best interests."[290] If a person qualifies as a parent by estoppel, the ALI comments specify that he or she

> is afforded all of the privileges of a legal parent under this Chapter, including standing to bring an action and the right to have notice of and participate in an action brought by another under § 2.04, the benefit of the presumptive allocation of custodial time provided for in § 2.08(1)(a), the advantage of the presumption in favor of a joint allocation of decisionmaking responsibility afforded by § 2.09(2), the right of access to school and health records specified in § 2.09(4), and

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> (ii) for reasons primarily other than financial compensation, and with the agreement of a legal parent to form a parent-child relationship, or as a result of a complete failure or inability of any legal parent to perform caretaking functions,
>
> (A) regularly performed a majority of the caretaking functions for the child, or (B) regularly performed a share of caretaking functions at least as great as that of the parent with whom the child primarily lived.

*Id.*

286. *Id.* § 2.03(1)(a).

287. *Id.* § 2.03(1)(b). Comments suggest that good faith belief may result from a number of factors, such as marriage to the mother of the child, or sexual intercourse with the mother at the approximate time of conception. *See id.* § 203 cmt. (b)(ii).

288. *Id.* § 203(1)(b)(i)–(iv). The comment to Section 203 states:

> A formal, written agreement is not required to create a parent-by-estoppel status under Paragraph (1)(b)(iii), but the absence of formalities may also affect the factfinder's determination of whether an agreement was made. The factfinder must determine whether, given the circumstances, the actions of the individual seeking status as parent and those of the legal parent or parents are sufficiently clear and unambiguous to indicate that a parent status was understood by all of them.

*Id.* § 203 cmt. (b)(iii).

289. *Id.* § 203 cmt. (b).

290. *Id.* § 203 cmt. (b)(iii).

> priority over a de facto parent and a nonparent in the allocation of primary custodial responsibility under § 2.18.[291]

The ALI creates a third statutory status, a de facto parent. A de facto parent is an individual other than a legal parent or a parent by estoppel who, for a significant period of time, not less than two years, lived with the child throughout this period of time for reasons other than financial compensation, regularly performed a majority of the caretaking functions for the child or regularly performed a share of the caretaking functions at least as great as that of the parent with whom the child primarily lived.[292] In addition, the de facto parent must assume these caretaking responsibilities[293] as a result of an agreement with the legal parent to form a parent-child relationship, or as a result of a complete failure or inability of any legal parent to perform caretaking functions.[294] Apparently, the distinction between a parent by estoppel and a de facto parent is that the latter never had a good faith belief that he or she was a parent of the child.[295] Once a de facto status is obtained, the ALI section 2.18

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291. *Id.* § 203 cmt. (b).

292. *Id.* § 2.03(1)(c)(i)–(ii).

293. *Id.* § 2.03(5). The statute provides what constitutes caretaking:

> Caretaking functions are tasks that involve interaction with the child or that direct, arrange, and supervise the interaction and care provided by others. Caretaking functions include but are not limited to all of the following:
> (a) satisfying the nutritional needs of the child, managing the child's bedtime and wake-up routines, caring for the child when sick or injured, being attentive to the child's personal hygiene needs including washing, grooming, and dressing, playing with the child and arranging for recreation, protecting the child's physical safety, and providing transportation;
> (b) directing the child's various developmental needs, including the acquisition of motor and language skills, toilet training, self-confidence, and maturation;
> (c) providing discipline, giving instruction in manners, assigning and supervising chores, and performing other tasks that attend to the child's needs for behavioral control and self-restraint;
> (d) arranging for the child's education, including remedial or special services appropriate to the child's needs and interests, communicating with teachers and counselors, and supervising homework;
> (e) helping the child to develop and maintain appropriate interpersonal relationships with peers, siblings, and other family members;
> (f) arranging for health-care providers, medical follow-up, and home health care;
> (g) providing moral and ethical guidance;
> (h) arranging alternative care by a family member, babysitter, or other child-care provider or facility, including investigation of alternatives, communication with providers, and supervision of care.

*Id.*

294. *Id.* § 2.03(1)(c)(ii).

295. *See id.* § 2.03 cmt. (b)(ii) ("The parent-by-estoppel definition is more strict, however, in requiring that the man have had a reasonable, good-faith belief that he was the parent. When this reasonable good faith exists, the individual is seeking status based not solely on his functioning as a parent, but on the combination of the parental functions performed and the expectations of the parties. As is the case with a de facto parent, the necessary indications of a commitment to the

gives "preference to legal parents and parents by estoppel, and it precludes an allocation of responsibility to adults other than the parents except in a narrow range of cases."[296] The ALI explains the priority it gives to legal parents and parents by estoppel over a de facto parent as resulting from "the societal consensus that responsibility for children ordinarily should be retained by a child's parents, while recognizing that there are some exceptional circumstances in which the child's needs are best served by continuity of care by other adults."[297]

The ALI's definition of de facto parenthood is a statutory one, but some state courts have used the term de facto parent in crafting an equitable remedy called by the same term.[298] For example, the Massachusetts Supreme Court, in a 2006 decision, defined a de facto parent as follows:

> [O]ne who has no biological relation to the child, but has participated in the child's life as a member of the child's family. The de facto parent resides with the child and, with the consent and encouragement

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child must have existed for a period of at least two years, assuring that the commitment is serious, long-term, and significant.").

296. *Id.* § 2.18. The Section allocates parental responsibility as follows:

> (1) The court should allocate responsibility to a legal parent, a parent by estoppel, or a de facto parent as defined in § 2.03, in accordance with the same standards set forth in §§ 2.08 through 2.12 except that
>
> (a) it should not allocate the majority of custodial responsibility to a de facto parent over the objection of a legal parent or a parent by estoppel who is fit and willing to assume the majority of custodial responsibility unless
>
> (i) the legal parent or parent by estoppel has not been performing a reasonable share of parenting functions, as defined in § 2.03(6), or
>
> (ii) the available alternatives would cause harm to the child; and
>
> (b) it should limit or deny an allocation otherwise to be made if, in light of the number of other individuals to be allocated responsibility, the allocation would be impractical in light of the objectives of this Chapter.
>
> (2) A court should not allocate responsibility to an individual who is not a legal parent, a parent by estoppel, or a de facto parent, over a parent's objection, if that parent is fit and willing to care for the child, unless any of the following circumstances exist:
>
> (a) the individual is a grandparent or other relative who has developed a significant relationship with the child and
>
> (i) the parent objecting to the allocation has not been performing a reasonable share of parenting functions for the child; and
>
> (ii) if there is another legal parent or parent by estoppel, that parent is unable or unwilling to care for the child, or consents to the allocation;
>
> (b) the individual is a biological parent of the child who is not the child's legal parent but who has an agreement with a legal parent under which the individual retained some parental rights or responsibilities;
>
> (c) the available alternatives would cause harm to the child.

*Id.*

297. *Id.* § 2.18 cmt. (a).

298. For an illustration of various state statutes utilizing de facto parentage, see Jeffrey A. Parness, *Troxel Revisited: A New Approach to Third-Party Childcare*, 18 RICH. J.L. & PUB. INT. 227, 232–37 (2015). For a judicial construct using the same term, see, for example, Conover v. Conover, 146 A.3d 433, 446–53 (Md. 2016).

> of the legal parent, performs a share of the caretaking functions at least as great as the legal parent.[299]

The Massachusetts court ruled that the status of de facto parenthood resulted from "the Probate and Family Court's general equity powers . . . to protect the welfare of minors."[300] The court recognized that its own perception of de facto parent was influenced by the statutory formulation of the ALI,[301] holding that the focus on "caretaking in the ALI Principles is one means by which to anchor the best interests of the child analysis in an objectively reasonable assessment of whether disruption of the adult-child relationship is potentially harmful to the child's best interests."[302]

Comments to the ALI state that "requirements for becoming a de facto parent are strict, to avoid unnecessary and inappropriate intrusion into the relationships between legal parents and their child."[303] Please note that there is a two-year living together time frame in the ALI provision, which the Comments suggest means spending the night in the same residence. In addition to this two-year commitment, the child and the putative de facto parent must have resided with the child within six-months prior to commencing an action to be named as a de facto parent.[304] The ALI reasons,

> This additional standing requirement is justified by the fact that the status of a de facto parent is based on an individual's functioning as a parent, and it is assumed that the importance of this role diminishes as the period of functioning as a parent becomes more remote in time.[305]

Other states have adopted the status of de facto parent through state legislation. For example, Indiana defines the status as a custodian "who has been the primary caregiver for, and financial support of, a child who has resided with the person for at least (1) six (6) months if the child is less than three (3) years of age; or (2) one (1) year if the child is at least three (3) years of age."[306] In 2014, the Indiana Court of Appeals held that a stepfather to a child born prior to his marriage to the child's mother qualified as a de facto parent when he and

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299. A.H. v. M.P., 857 N.E.2d 1061, 1070 (Mass. 2006) (holding that biological mother's partner's relationship with the child did not rise to the level of a de facto parent).

300. *Id.*

301. *Id.* at 1071.

302. *Id.* (citing PRINCIPLES OF FAMILY LAW DISSOLUTION: ANALYSIS AND RECOMMENDATIONS § 2.03(1)(c)(ii)(B) (AM. LAW INST. 2002)).

303. PRINCIPLES OF FAMILY LAW DISSOLUTION: ANALYSIS AND RECOMMENDATIONS § 2.03 cmt. (c) (AM. LAW INST. 2002).

304. *See id.* § 2.04(1)(c).

305. *Id.* § 2.03 cmt. (c)(iv).

306. IND. CODE ANN. § 31-9-2-35.5 (West 2007) ("Any period after a child custody proceeding has been commenced may not be included in determining whether the child has resided with the person for the required minimum period.").

the child lived together in the same household from the time the child was three until the child was seven.[307]

In 2009, the Delaware Supreme Court refused to recognize the standing of a lesbian partner of a child's adoptive mother, seeking custody of the child as a de facto parent. The court refused to use common law to supplant the absence of legislative enactment of de facto parenthood.[308] As a result of this 2009 decision the legislature enacted an amendment to the state's UPA, which provided for the status of de facto parentage in Delaware, which was then applied retroactively to the litigants in the 2009 case.[309] Nonetheless, that statute was held to be unconstitutional because "[e]xtending the sacred right of parenthood to more than two people dilutes the constitutional rights of the two parents."[310] Specifically, the Delaware Family Court held that the state's enacted de facto parentage statute is unconstitutional because it is "overbroad and violates the due process rights of the parents under the Constitution of the United States and also under the Constitution of the State of Delaware."[311]

Seeking to rectify the statute's infirmity, the Delaware legislature amended the state's parentage act,[312] permitting the statutory amendment to apply retroactively to the litigants in the 2009 decision. Hence, in 2011 the Delaware Supreme Court revisited the state's statutory policy of de facto parental status and ruled that the most recent version of the statute was constitutional and may be applied to the original litigants.[313] The decision involved two lesbians, one of whom had adopted a child but her partner did not. When their relationship ended the adoptive parent terminated any contact between the child and the

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307. *See* Fry v. Fry, 8 N.E.3d 209, 216 (Ind. Ct. App. 2014). Under Indiana law the stepfather would be allowed to file for custody independently. *Id.* at 216 n.1 ("Indiana Code section 21-17-2-3(2) . . . . provides that any person 'other than a parent' may seek custody of a child by initiating an independent cause of action for custody that is not ancillary to a dissolution, legal separation, or child support action, subject to the law governing third party-natural parent custody disputes."). For analysis, see Amy E. Higdon & Emily J. Barry, *Recent Developments in Indiana Family Law*, 48 IND. L. REV. 1297, 1323 (2015).

308. *See* Smith v. Gordon, 968 A.2d 1, 9–10 (Del. 2009).

309. *See* Smith v. Guest, 16 A.3d 920, 924 (Del. 2011).

310. Bancroft v. Jameson, 19 A.3d 730, 750 (Del. Fam. Ct. 2010).

311. *Id.*

312. DEL. CODE ANN. tit. 13, § 8-201(c) (2010). The Code states:

> (c) De facto parent status is established if the Family Court Determines that the de facto parent:
>
> (1) Has had the support and consent of the child's parent or parents who fostered the formation and establishment of a parent-like relationship between the child and the de facto parent;
>
> (2) Has exercised parental responsibility for the child as that term is defined in § 1101 of this title; and
>
> (3) Has 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.

*Id.*

313. Smith, 16 A.3d at 923–24.

former partner and the partner petitioned the court for custody and visitation with the child. As a result of the legislature's amendment to the statute, the categories of parents with standing to seek custody were enlarged to include de facto parents.[314] Because the nonparent became a parent by reason of the new legislation, there was no conflict with *Troxel*, since that decision involved a parent and nonparents seeking visitation.[315]

Litigation between the contesting adopting parent and the nonparent continued from 2004 until the decision by the Delaware Supreme Court in 2011. Sadly, lengthy and contentious litigation is often associated with these cases and the court acknowledged this in its decision: "We empathize with both parties in having to continue the process of litigating who has custody of [the child]. We also are sensitive to the emotional considerations and frustrations that both parties have experienced throughout this process."[316] But the court then concluded that it is within the prerogatives of the legislature to establish the definition of parent in the state, a definition that may now include de facto parents.[317] Providing the statutory formula offers objectivity, suggesting speedier resolution of future cases.

The ALI's statutory approach to de facto parenthood continues to be the subject of commentary. Professor Robin Fretwell Wilson argued that the "ALI's thinned out test for parenthood overrides the judgments of mothers without sufficient consideration for the risks to children."[318] But Professor Katharine T. Bartlett concluded that the treatment of "de facto parents in the ALI Principles combines the approach taken by the Wisconsin Supreme Court in *H.S.H.-K.*, allowing third-party claims to functional parents in certain limited circumstances, with the kind of limits on third-party visitation contemplated in *Troxel*."[319] Professor Bartlett noted that the ALI's de facto parenting approach does the following: (1) relies on past caretaking practices, (2) the qualifications involve very specific and rigorous criteria, (3) grandparents and other relatives have no special priority, (4) a fit parent will still have custodial care priority over a de facto parent unless that fit parent has not been performing a reasonable share of the parenting functions or unless available alternatives would harm the child, (5) a de facto parent may have preference over a relative of the child, and (6) a de facto parent may be allotted visitation with the child.[320]

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314. *Id.* at 928.

315. *Id.* at 930–31.

316. *Id.* at 936.

317. *Id.*

318. Robin Fretwell Wilson, *Limiting the Prerogatives of Legal Parents: Judicial Skepticism of the American Law Institute's Treatment of De Facto Parents*, 25 J. AM. ACAD. MATRIM. LAW., 477, 484 (2013) (describing how a child's stepfather would have become her de facto parent after years of committing domestic violence against the child's mother).

319. Bartlett, *supra* note 115, at 59. The decision of *H.S.H.-K.* also influenced courts in New Jersey and Washington. *See* V.C. v. M.J.B., 748 A.2d 539, 551–52 (N.J. 2000); *In re* Parentage of L.B., 122 P.3d 161, 173–74 (Wash. 2005).

320. Bartlett, *supra* note 115, at 59–60.

As testament to the value of the certainty provided by the ALI's statutory formulation, Professor Bartlett writes,

> Since the ALI began publishing Tentative Drafts of the Principles, the law in an increasing number of states has evolved in the direction that the Principles recommend. Various state courts, including courts in Massachusetts, New Jersey, Washington, Maine, Rhode Island . . . have recognized de facto parenthood under certain circumstances, as had a few state statutes even earlier.[321]

In addition, Professor Bartlett concluded that the past caretaking activity that the ALI requires offers a "reasonably determinate and child-centered corrective" to the subjectivity that permeates child custody decisions,[322] and that "[p]ast caretaking history is the factor with the strongest societal consensus about the best interests of children, and the factor that will also produce the greatest consistency."[323]

## III. THE IMPACT OF *OBERGEFELL*: SAME-SEX MARRIAGE

### *A. Judicial Achievement*

Having discussed the various equitable and statutory parentage remedies that have arisen in the last sixty years, it is pertinent to ask if the availability of same-sex marriage will affect them, specifically extraordinary circumstances, psychological parentage, or de facto parentage. Arguably, because the presumptive parentage of marriage was previously unavailable to same-sex couples, these equitable and statutory remedies provided same-sex persons parentage status sufficient to overcome the prohibitive holding of *Troxel*. These remedies provided status when states prohibited them from entering into marriage. But are they needed now? Since same-sex couples may marry, can courts and legislatures be more demanding and require the bright line of marriage and the traditional parentage presumptions associated with it? Would the elimination of alternative means of establishing parentage minimize litigation, promote better protection of a child's best interests, and require those who seek state intervention to complete the necessary formalities of marriage?

The impact of same-sex marriage in the United States is undetermined. But, the momentous events precipitating the 5-4 decision of the Supreme Court of the United States on June 26, 2015, are chronicled and testify to the vigilance of those who made it happen. The decision rested upon previous decisions of the Supreme Court and many federal and state courts. One author observed that the decision in *Obergefell* occurred on the twelfth anniversary, to the day, of

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321. *Id.* at 61–62. Maryland may be added to that list of state courts. *See* Conover v. Conover, 146 A.3d 433, 451–53 (Md. 2016).

322. Bartlett, *supra* note 115, at 67.

323. *Id.*

*Lawrence v. Texas*[324] and the second anniversary of *United States v. Windsor*,[325] both notable and precipitous decisions.[326] These two decisions were particularly instrumental in what would become the Court's consensus on same-sex marriage. But other decisions of the Court contributed to the holding in *Obergefell*. Surely the right to privacy, announced in 1965 in *Griswold v. Connecticut*,[327] and then privacy's application to individuals and not just married couples in *Eisenstadt v. Baird*[328] in 1972, were essential. Likewise, when the Court held that the definition of marriage could include persons of different races in *Loving v. Virginia*[329] in 1967, the evolving definition of marriage rationale could proceed so that marriage could evolve to be defined as including persons of the same sex.[330] Then, in 1996, when the Court held in *Romer v. Evans*[331] that a state constitutional amendment violated the Equal Protection Clause of the Fourteenth Amendment because it practiced invidious discrimination against persons because of sexual orientation, it marked a change in perspective. The *Romer* decision signaled that the Court would interpret the Constitution to protect not only racial minorities, but sexual orientation minorities too. This change in perspective would find further expression in the 2013 decision of *United States v. Windsor*,[332] holding that the federal Defense of Marriage Act (DOMA) was unconstitutional because it violated the guarantee of equal liberty of persons under the Due Process Clause of the Fifth Amendment.[333] Simply stated, if any state permitted same-sex marriage, why should any same-sex married couple in that state be denied federal benefits if these benefits were provided to opposite-sex couples in that state? Clearly, these two couples were being denied equality of treatment in that state as it pertained to federal benefits. There was a shift in judicial perspective among the states, which contributed to

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324. 539 U.S. 558, 562 (2003) (holding that the liberty interest of adults under the Due Process Clause of the Fourteenth Amendment protects voluntary intimate conduct).

325. 133 S. Ct. 2675, 2695 (2013) ("Defense of Marriage Act is unconstitutional as a deprivation of the liberty of the person protected by the Fifth Amendment of the Constitution.").

326. LILLIAN FADERMAN, THE GAY REVOLUTION 635 (2015).

327. 381 U.S. 479, 484–86 (1965).

328. 405 U.S. 438, 453 (1972).

329. 388 U.S. 1, 12 (1967).

330. The Court acknowledges the evolution of perspective in its opinion in *Lawrence v. Texas*, 539 U.S. 558 (2003), reversing *Bowers v. Hardwick*, 478 U.S. 186 (1986) and holding that there can be "an emerging awareness that liberty gives substantial protection to adult persons in deciding how to conduct their private lives in matters pertaining to sex." *Lawrence*, 539 U.S. at 597. The court also emphasized that, "history and tradition are the starting point but not in all cases the ending point of the substantive due process inquiry." *Id.* at 572 (quoting Cty. of Sacramento v. Lewis, 523 U.S. 833, 857 (1998)).

331. 517 U.S. 620, 635 (1996).

332. 133 S. Ct. 2675 (2013).

333. *Id.* 2695–96.

the Court's holding mandating that same-sex marriage be permitted in all the states.[334]

There had been an evolving shift in social perception too. According to commentary on the issue, "the biggest reason behind the shift in public opinion was that the sixty-year civil rights struggle of homophiles, gays and lesbians, and the LGBT community had not been for naught."[335] The media had made the public aware of the horror of AIDS, discriminatory treatment of persons with AIDS, their long-time partners, and the tragedy of parents witnessing their sons—and soon to be daughters—dying of a disease that targeted the marginalized with disproportionate vengeance.[336] On May 12, 2012, Vice President Biden appeared on the popular NBC program *Meet the Press*. The host, David Gregory, asked the Vice President what he thought of gay marriage and the Vice President replied that for him, it came down to "who you love" and he was fine with it.[337] Compare this with the 2004 State of the Union address of President George W. Bush when he called for a constitutional amendment to define marriage as one man and one woman.[338] But then, when on the campaign trail running against John Kerry, Bob Schieffer of CBS news asked President Bush: "Do you believe homosexuality is a choice?" "I just don't know," said the President, "I do know that we have a choice to make in America, and that it is to treat people with tolerance and respect and dignity."[339]

Toleration had made it possible for LGBT persons to "come out of the closet" and Americans were discovering that their neighbors or their neighbors' children were gay or lesbian.[340] For the first time, television viewers witnessed persons of the same sex displaying affection in popular television shows such as *Will and Grace* or *Glee*. In 2012, Vice President Biden, when asked why he favored

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334. For a discussion on how the Court's decision in *Obergefell* was a "game changer for substantive due process jurisprudence," see Kenji Yoshino, *A New Birth of Freedom?:* Obergefell v. Hodges, 129 HARV. L. REV. 147, 148 (2015).

335. FADERMAN, *supra* note 326, at 613 (2015).

336. *See generally* Michael T. Flannery & Raymond C. O'Brien, *Mandatory HIV Testing of Professional Boxers: An Unconstitutional Effort to Regulate a Sport that Needs to be Regulated*, 31 U.C. DAVIS L. REV. 409, 443–48 (1998); AIDS AND THE HEALTH CARE SYSTEM 3–12 (Lawrence O. Gostin ed., 1990); Raymond C. O'Brien, *AIDS: Perspective on the American Family*, 34 VILL. L. REV. 209, 209–19 (1989); MONROE E. PRICE, SHATTERED MIRRORS: OUR SEARCH FOR IDENTITY AND COMMUNITY IN THE AIDS ERA 63–80 (1989).

337. FADERMAN, *supra* note 326, at 613.

338. JEAN EDWARD SMITH, BUSH 392 (2016). "A Gallup poll taken a week before the president spoke indicated that 64 percent of Americans opposed same-sex marriage while only 32 percent were in favor." *Id.* at 393.

339. *Id.* at 410–11.

340. President Obama admitted in an interview with Robin Roberts of ABC's *Good Morning America* that his mind about same-sex marriage had been changed by "members of his own staff 'who [were] in incredibly committed monogamous, same-sex relationships, and who are raising kids together.'" FADERMAN, *supra* note 326, at 616 (alteration in original); *see also* O'Brien, *Family Law's Challenge to Religious Liberty*, *supra* note 46, at 20–25 (describing an evolution of attitude in congregants of the Roman Catholic Church).

same-sex marriage, replied that "'things begin to change when social culture changes'—*Will and Grace* was his example."[341] Specifically, Biden stated that *Will and Grace* "probably did more to educate the American public [about gay people] than almost anything anybody's done so far."[342]

It came as no surprise that Associate Justice Kennedy would deliver the Court's opinion in *Obergefell*. He had been appointed to the Court by President Reagan in 1988, two years after the Court had decided *Bowers v. Hardwick*.[343] In that decision, the Court held that the Due Process Clauses of both the Fifth and Fourteenth Amendments do not permit the Court to declare that homosexuals have a fundamental right to engage in sodomy.[344] The opinion stated,

> There should be, therefore, great resistance to expand the substantive reach of those Clauses, particularly if it requires redefining the category of rights deemed to be fundamental. Otherwise, the Judiciary necessarily takes to itself further authority to govern the country without express constitutional authority. The claimed right pressed on us today falls far short of overcoming this resistance.[345]

Explicitly, the Court's decision permitted states with statutes criminalizing sodomy to prosecute same-sex persons engaging in sexual acts defined as such.[346] Implicitly, because the Court's factual context involved persons of the same sex, it had a chilling effect on the constitutional rights of same-sex persons.[347]

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341. FADERMAN, *supra* note 326, at 613.

342. *Id.*

343. 478 U.S. 186 (1986), *overruled by* Lawrence v. Texas, 539 U.S. 558 (2003).

344. *Id.* at 194–95.

> [T]o claim that a right to engage in such conduct is "deeply rooted in this Nation's history and tradition" or "implicit in the concept of ordered liberty" is, at best, facetious. Nor are we inclined to take a more expansive view of our authority to discovery new fundamental rights imbedded in the Due Process Clause.

*Id.* at 194.

345. *Id.* at 195; *see* Yoshino, *supra* note 334, at 148 ("[The *Obergefell* decision] became a game changer for substantive due process jurisprudence." (alteration in original)). Yoshino further states that by granting government approval of same-sex marriage, the decision grants positive substantive due process rights, and that such a "shift from negative to positive rights could have radical implications." *Id.* at 166, 168.

346. *See Bowers*, 478 U.S. at 196 ("We . . . are unpersuaded that the sodomy laws of some 25 States should be invalidated on [the] basis [of morality]." (alteration in original)). The Georgia statute challenged in *Bowers* provides:

> (a) A person commits the offense of sodomy when he performs or submits to any sexual act involving the sex organs of one person and the mouth or anus of another. . . .
> (b) A person convicted of the offense of sodomy shall be punished by imprisonment for not less than one nor more than 20 years. . . .

GA. CODE ANN. § 16-6-2 (1984).

347. *See* Obergefell v. Hodges, 135 S. Ct. 2584, 2606 (2015) ("Although *Bowers* was eventually repudiated in *Lawrence*, men and women were harmed in the interim, and the substantial

There was a strong dissent in *Bowers* from Justices Blackmun, Brennan, Marshall, and Stevens. Justice Blackmun wrote that the Constitution gave "individuals the right to decide for themselves whether to engage in particular forms of private, consensual sexual activity."[348] Furthermore, Justice Stevens wrote,

> Although the meaning of the principle that "all men are created equal" is not always clear, it surely must mean that every free citizen has the same interest in 'liberty' that the members of the majority share. From the standpoint of the individual, the homosexual and the heterosexual have the same interest in deciding how he will live his own life, and, more narrowly, how he will conduct himself in his personal and voluntary associations with his companions. State intrusion into the private conduct of either is equally burdensome.[349]

Eventually, in 2003, Justice Kennedy delivered the majority opinion in *Lawrence v. Texas*,[350] which overruled the Court's holding in *Bowers*. The facts in *Lawrence* also involved a state sodomy statute and two persons of the same sex arrested for violating that statute.[351] The Texas statute provided that "[a] person commits an offense if he engages in deviate sexual intercourse with another individual of the same sex."[352] The statute defines "[d]eviate sexual intercourse" as follows: "(A) any contact between any part of the genitals of one person and the mouth or anus of another person; or (B) the penetration of the genitals or the anus of another person with an object."[353] However, unlike *Bowers*, the majority opinion in *Lawrence*, written by Justice Kennedy, not only overruled *Bowers*, but provided recognition and support for intimate conduct associated with same-sex relationships.[354] In *Lawrence*, the Court recognized that the activity criminalized involved

> two adults who, with full and mutual consent from each other, engaged in sexual practices common to a homosexual lifestyle. The petitioners are entitled to respect for their private lives. The State cannot demean their existence or control their destiny by making their private sexual conduct a crime. Their right to liberty under the Due Process Clause

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effects of these injuries no doubt lingered long after *Bowers* was overruled. Dignitary wounds cannot always be healed with the stroke of a pen.").

348. *Bowers*, 478 U.S. at 199 (Blackmun, J., dissenting).

349. *Id.* at 218–19 (Stevens, J., dissenting).

350. 539 U.S. 558, 578 (2003) ("*Bowers* was not correct when it was decided, and it is not correct today. It ought not to remain binding precedent. *Bowers v. Hardwick* should be and now is overruled.").

351. *See id.* at 562.

352. TEX. PENAL CODE ANN. § 21.06(a) (West 2003).

353. TEX. PENAL CODE ANN. § 21.01(1) (West 2003).

354. *Lawrence*, 539 U.S. at 578.

> gives them the full right to engage in their conduct without intervention of the government.[355]

Justice Kennedy's analysis in *Lawrence* resonated in *Obergefell* twelve years later. *Obergefell* involved fourteen same-sex couples, and two men whose same-sex partners were deceased at the time of the petition, who challenged the laws in four states that refused to issue them marriage licenses.[356] The couples argued that the refusal was a violation of the Fourteenth Amendment[357] because "[u]nder the Due Process Clause . . . no State shall 'deprive any person of life, liberty, or property, without due process of law.'"[358] The Court held that the guarantee of liberty extended to "certain personal choices central to individual dignity and autonomy, including intimate choices that define personal dignity and beliefs."[359] By defining liberty in such a manner, the Court identified with the individualism essential to functional families, the sense of privacy announced in *Griswold* and *Eisenstadt*, and then applied these factors to a choice to marry. The Court concluded that, "the right to marry is a fundamental right inherent in the liberty of the person, and under the Due Process and Equal Protection Clauses of the Fourteenth Amendment couples of the same-sex may not be deprived of that right and that liberty."[360] And with that holding, the

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355. *Id.*

356. Obergefell v. Hodges, 135 S. Ct. 2584, 2593 (2015).

357. *Id.* The Court stated:

> The right of same-sex couples to marry that is part of the liberty promised by the Fourteenth Amendment is derived, too, from that Amendment's guarantee of the equal protection of the laws. The Due Process Clause and the Equal Protection Clause are connected in a profound way, though they set forth independent principles.

*Id.* at 2602–03. The Court held additionally that "[e]ach concept—liberty and equal protection—leads to a stronger understanding of the other." *Id.* at 2603; *see also* Yoshino, *supra* note 334, at 148 ("*Obergefell* made liberty the figure and equality the ground. *Obergefell* also placed a far stronger emphasis on the intertwined nature of liberty and equality.").

358. *Obergefell*, 135 S. Ct. at 2597 (citing U.S. CONST. amend. XIV, § 1).

359. *Id.* "Like choices concerning contraception, family relationships, procreation, and childbearing, all of which are protected by the Constitution, decisions concerning marriage are among the most intimate that an individual can make." *Id.* at 2599. For further analysis of the underpinnings of this liberty interest applied contemporaneously, see *Lawrence*, 539 U.S. 578–79 ("Had those who drew and ratified the Due Process Clauses of the Fifth Amendment or the Fourteenth Amendment known the components of liberty in its manifold possibilities, they might have been more specific. They did not presume to have this insight. They knew times can blind us to certain truths and later generations can see that laws once thought necessary and proper in fact serve only to oppress.").

360. *Obergefell*, 135 S. Ct. at 2604. In his dissent, Chief Justice Roberts disagreed with the majority's approach to fundamental rights, stating that "[t]he majority acknowledges none of [the] doctrinal background, and it is easy to see why: Its aggressive application of substantive due process breaks sharply with decades of precedent and returns the Court to the unprincipled approach of *Lochner*." *Id.* at 2618–19 (Roberts, C.J., dissenting).

Court went beyond traditional rights deeply rooted in the country's history and compelled public state-government approval of same-sex relationships.[361]

The importance of marriage is a reoccurring theme throughout the Court's decision in *Obergefell*. The following quotes illustrate this societal and historical importance:

- "Choices about marriage shape an individual's destiny."[362]
- Quoting from the Massachusetts Supreme Judicial Court, the Court elevated marriage, writing that "it fulfils [sic] yearnings for security, safe haven, and connection that express our common humanity, civil marriage is an esteemed institution, and the decision whether and whom to marry is among life's momentous acts of self-definition."[363]
- "Marriage responds to the universal fear that a lonely person might call out only to find no one there. It offers hope of companionship and understanding and assurance that while both still live there will be someone to care for the other."[364]
- "Marriage also affords the permanency and stability important to children's best interests."[365]
- "[M]arriage is a keystone of our social order."[366]
- Perhaps most resoundingly, the Supreme Court stated,

> No union is more profound than marriage, for it embodies the highest ideals of love, fidelity, devotion, sacrifice, and family. In forming a marital union, two people become something greater than once they were. . . . [M]arriage embodies a love that may endure even past death. It would misunderstand these [plaintiffs] to say they disrespect the idea of marriage. Their plea is that they do respect it, respect it so deeply that they seek to find its fulfillment for themselves. Their hope is not to be condemned to live in loneliness, excluded from one of civilizations oldest institutions.[367]

The majority opinion in *Obergefell* was delivered by Justice Kennedy, in which Justices Ginsberg, Breyer, Sotomayor, and Kagan joined.[368] There were four separate dissents issued by Chief Justice Roberts, and Justices Scalia,

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361. For a discussion of the impact of the Court's holding, see Yoshino, *supra* note 334, 167–71.

362. *Obergefell*, 135 S. Ct. at 2599.

363. *Id.* (quoting Goodridge v. Dep't of Pub. Health, 798 N.E.2d 941, 955 (Mass. 2003)).

364. *Obergefell*, 135 S. Ct. at 2600. Chief Justice Roberts responds that, "[s]ame-sex couples remain free to live together, to engage in intimate conduct, and to raise families as they see fit. No one is 'condemned to live in loneliness' by the laws challenged in these cases—no one." *Id.* at 2620 (Roberts, C.J., dissenting).

365. *Id.* at 2600.

366. *Id.* at 2601.

367. *Id.* at 2608 (alteration in original).

368. *Id.* at 2591.

Thomas, and Alito; some of the Justices joined in the dissents of others.[369] None of the dissents question the unique and fundamental role of marriage, but rather, the means by which the majority arrived at the decision, particularly the majority's willingness to change the definition of marriage to include same-sex persons, a departure not included in its fundamental nature. The constitutional underpinnings of the decision are beyond the scope of this Article. However, the brief history and scope of the decision is provided to illustrate that marriage is distinctively important; it has and does provide economic and public benefits. Today, after *Obergefell*, it is incorrect to suggest that it is an irrelevant option to consider when same-sex couples have children together. As Chief Justice Roberts wrote in his dissent in *Obergefell*, "[c]elebrate the achievement of a desired goal. Celebrate the opportunity for a new expression of commitment to a partner. Celebrate the availability of new benefits. But do not celebrate the Constitution. It had nothing do to with it."[370] Constitutional scholars will continue to discuss if the Constitution had anything to do with the Court's decision, but the fact remains that same-sex couples can marry. What are the consequences for functional families?

### *B. Consequences of Marriage*

Incidents of family law have, for the most part, been reserved to the states and the Court in *Obergefell* acknowledged this fact, stating that "while the States are in general free to vary the benefits they confer on all married couples, they have throughout our history made marriage the basis for an expanding list of governmental rights, benefits, and responsibilities."[371] The Court then listed certain categories of rights pertinent to married couples, thereby providing general parameters of what is available to spouses:

> [T]axation; inheritance and property rights; rules of intestate succession; spousal privilege in the law of evidence; hospital access, medical decision making 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.[372]

Additionally, "[v]alid marriage under state law is also a significant status for over a thousand provisions of federal law."[373]

Based on the protracted litigation precipitating the guarantee of same-sex marriage, it is reasonable to presume that, in addition to the social and historical benefits associated with marriage, the economic and parental benefits would incentivize same-sex couples to marry. Specifically, economic support

369. *Id.*
370. *Id.* at 2626 (Roberts, C.J., dissenting).
371. *Id.* at 2601.
372. *Id.*
373. *Id.*

obligations would provide greater financial security for persons in a valid marriage. Additionally, and pertinent to this Article, the facilitation of establishing parental status would provide an objective and accelerated means of avoiding the hurdles of *Troxel*. This Article will briefly describe both.

*1. Economic Benefits*

The majority opinion in *Obergefell*, like many other courts ruling on the entitlement of same-sex couples to the status of marriage, held that marriage conferred "privileges and responsibilities."[374] Because the state is a party to any marriage[375] there are enforceable responsibilities that do not consistently complement nonmarital partnerships. Among these responsibilities is the obligation of a spouse to provide for the necessities of the other throughout the course of their marriage.[376] While the doctrine of necessaries arose at common law, some states codified it.[377] If a married couple petitions to bring about a legal separation, one of the spouses may be required to provide maintenance to the other until such time as a final decree of divorce is issued by an appropriate court.[378] Then, following a final decree of divorce, a court may divide the

374. *Id.* at 2594.

375. The basis of the state's involvement in a valid marriage was expressed by the Court in *Maynard v. Hill*, 125 U.S. 190, 205 (1888) ("Marriage as creating the most important relation in life . . . has always been subject to the control of the legislature.").

376. 41 C.J.S. HUSBAND & WIFE § 72 (2016) ("The 'doctrine of necessaries' arose from the common-law duty of the husband to provide for the necessary expenses . . . of his wife."). More recently, "some states have expanded or reformulated the doctrine by making it applicable to both spouses . . ." while others have abrogated it entirely. *Id.*

377. *See, e.g.*, VA. CODE ANN. § 55-37 (2012). The Virginia statute codifies the doctrine of necessaries as follows:

> Except as otherwise provided in this section, a spouse shall not be responsible for the other spouse's contract or tort liability to a third party, whether such liability arose before or after the marriage. The doctrine of necessaries as it existed at common law shall apply equally to both spouses, except where they are permanently living separate and apart, but shall in no event create any liability between such spouses as to each other. No lien arising out of a judgment under this section shall attach to the judgment debtors' principal residence held by them as tenants by the entireties or that was held by them as tenants by the entireties prior to the death of either spouse where the tenancy terminated as a result of the death of either spouse.

*Id.*

378. *See, e.g.*, MONT. CODE. ANN. § 40-4-203(1)–(2) (2005). The Code states:

> (1) In a proceeding for dissolution of marriage or legal separation or a proceeding for maintenance following dissolution of the marriage by a court that lacked personal jurisdiction over the absent spouse, the court may grant a maintenance order for either spouse only if it finds that the spouse seeking maintenance:
>
> (a) lacks sufficient property to provide for the spouse's reasonable needs; and
>
> (b) is unable to be self-supporting through appropriate employment or is the custodian of a child whose condition or circumstances make it appropriate that the custodian not be required to seek employment outside the home.

marital property accumulated by the parties during marriage.[379] In addition, the court may impose an obligation to pay alimony—spousal support—for a limited period of time, or possibly, until the recipient spouse dies or remarries. In a common law state, the amount and length of the award will depend on equitable factors.[380] In a community property state, the courts may use similar factors to

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(2) The maintenance order must be in amounts and for periods of time that the court considers just, without regard to marital misconduct, and after considering all relevant facts, including:

(a) the financial resources of the party seeking maintenance, including marital property apportioned to that party, and the party's ability to meet the party's needs independently, including the extent to which a provision for support of a child living with the party includes a sum for that party as custodian;

(b) the time necessary to acquire sufficient education or training to enable the party seeking maintenance to find appropriate employment;

(c) the standard of living established during the marriage;

(d) the duration of the marriage;

(e) the age and the physical and emotional condition of the spouse seeking maintenance; and

(f) the ability of the spouse from whom maintenance is sought to meet the spouse's own needs while meeting those of the spouse seeking maintenance.

*Id.*

379. *See, e.g.*, MONT. CODE ANN. § 40-4-202(1) (2005). This section provides:

(1) In a proceeding for dissolution of a marriage, legal separation, or division of property following a decree of dissolution of marriage or legal separation by a court that lacked personal jurisdiction over the absent spouse or lacked jurisdiction to divide the property, the court, without regard to marital misconduct, shall, and in a proceeding for legal separation may, finally equitably apportion between the parties the property and assets belonging to either or both, however and whenever acquired and whether the title to the property and assets is in the name of the husband or wife or both. In making apportionment, the court shall consider the duration of the marriage and prior marriage of either party, the age, health, station, occupation, amount and sources of income, vocational skills, employability, estate, liabilities, and needs of each of the parties, custodial provisions, whether the apportionment is in lieu of or in addition to maintenance, and the opportunity of each for future acquisition of capital assets and income. The court shall also consider the contribution or dissipation of value of the respective estates and the contribution of a spouse as a homemaker or to the family unit. In dividing property acquired prior to the marriage, property acquired by gift, bequest, devise, or descent, property acquired in exchange for property acquired before the marriage or in exchange for property acquired by gift, bequest, devise, or descent, the increased value of property acquired prior to marriage, and property acquired by a spouse after a decree of legal separation, the court shall consider those contributions of the other spouse to the marriage, including:

(a) the nonmonetary contribution of a homemaker;

(b) the extent to which the contributions have facilitated the maintenance of the property; and

(c) whether or not the property division serves as an alternative to maintenance arrangements.

*Id.*

380. *See, e.g.*, ARIZ. REV. STAT. ANN. § 25-319(A)–(B) (2016). The Arizona statute states:

A. In a proceeding for dissolution of marriage or legal separation, or a proceeding for maintenance following dissolution of the marriage by a court that lacked personal

determine what is just and reasonable.[381] Or the court may divide the community between the two spouses.

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jurisdiction over the absent spouse, the court may grant a maintenance order for either spouse for any of the following reasons if it finds that the spouse seeking maintenance:

1. Lacks sufficient property, including property apportioned to the spouse, to provide for that spouse's reasonable needs.
2. Is unable to be self-sufficient through appropriate employment or is the custodian of a child whose age or condition is such that the custodian should not be required to seek employment outside the home or lacks earning ability in the labor market adequate to be self-sufficient.
3. Contributed to the educational opportunities of the other spouse.
4. Had a marriage of long duration and is of an age that may preclude the possibility of gaining employment adequate to be self-sufficient.

B. The maintenance order shall be in an amount and for a period of time as the court deems just, without regard to marital misconduct, and after considering all relevant factors, including:

1. The standard of living established during the marriage.
2. The duration of the marriage.
3. The age, employment history, earning ability and physical and emotional condition of the spouse seeking maintenance.
4. The ability of the spouse from whom maintenance is sought to meet that spouse's needs while meeting those of the spouse seeking maintenance.
5. The comparative financial resources of the spouses, including their comparative earning abilities in the labor market.
6. The contribution of the spouse seeking maintenance to the earning ability of the other spouse.
7. The extent to which the spouse seeking maintenance has reduced that spouse's income or career opportunities for the benefit of the other spouse.
8. The ability of both parties after the dissolution to contribute to the future educational costs of their mutual children.
9. The financial resources of the party seeking maintenance, including marital property apportioned to that spouse, and that spouse's ability to meet that spouse's own needs independently.
10. The time necessary to acquire sufficient education or training to enable the party seeking maintenance to find appropriate employment and whether such education or training is readily available.
11. Excessive or abnormal expenditures, destruction, concealment or fraudulent disposition of community, joint tenancy and other property held in common.
12. The cost for the spouse who is seeking maintenance to obtain health insurance and the reduction in the cost of health insurance for the spouse from whom maintenance is sought if the spouse from whom maintenance is sought is able to convert family health insurance to employee health insurance after the marriage is dissolved.
13. All actual damages and judgments from conduct that results in criminal conviction of either spouse in which the other spouse or child was the victim.

*Id.*

381. *See, e.g.*, CAL. FAM. CODE § 4330(a) (West 2016). California law provides the following:

(a) In a judgment of dissolution of marriage or legal separation of the parties, the court may order a party to pay for the support of the other party an amount, for a period of time, that the court determines is just and reasonable, based on the standard of living established during the marriage, taking into consideration the circumstances as provided in Chapter 2 (commencing with Section 4320).

In the event that a spouse should die during an intact valid marriage, the surviving spouse is entitled to a plethora of benefits: Social Security entitlements, preference for pension benefits under the Employee Retirement Security Act of 1974, homestead protection against creditors,[382] family maintenance during the time it takes to administer the decedent spouse's estate,[383] a personal property exemption from the claims of creditors,[384] and every state provides a mechanism by which a surviving spouse may claim at least a portion of any assets passing to a third party at the death of the decedent spouse without the consent of the surviving spouse.[385]

It seems apparent that the financial security offered by a valid marriage is substantial. As this brief summary illustrates, a spouse may have necessities paid during a viable marriage, maintenance provided upon a legal separation, support following the dissolution of the marriage, and division of any accumulated marital property. In the event of death, a surviving spouse has preference for any pension benefits administered by ERISA, a host of state protections against encroachment by creditors, then intestate benefits, a forced elective share against a spouse's estate, Social Security or ERISA benefits, and priority status when making decisions concerning the estate. And just as there are financial benefits during marriage and after divorce, the potential for financial security after death is significant.

*2. Parentage Benefits*

An additional benefit of marriage arises in tandem with the UPA, enacted in one form or another in many of the states. The UPA, as has been discussed, *supra*, establishes presumptions of parentage when otherwise a child could be considered nonmarital.[386] Undoubtedly, the UPA's emphasis on marriage facilitates parentage, and while it is does not address all potential situations, especially in regards to assisted reproduction, it addresses a significant portion of the factual scenarios relating to same-sex couples. Revisions have been made ostensibly to protect functional families. The UPA is meant to assist putative parents, men and women, seeking to establish parentage in the context of

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*Id.*

382. *See* FLA. CONST. art. X, § 4(a)(1) (providing that under the homestead protection, Florida allows up to one-half of an acre in a municipality and 160 acres elsewhere).

383. *See, e.g.*, 755 ILL. COMP. STAT. ANN. § 5/15-1(a) (West 2010) (allowing an amount "suited to the condition in life of the surviving spouse and to the condition of the estate").

384. *See, e.g.*, UNIF. PROB. CODE § 2-403 (UNIF. LAW COMM'N 2010) (providing a $15,000 exemption).

385. This process of "election" replaces ancient doctrines of dower and curtesy. For a description of the process see Raymond C. O'Brien, *Integrating Marital Property into a Spouse's Elective Share*, 59 CATH. U. L. REV. 617 (2010) (discussing the Uniform Probate Code's elective share provision).

386. For a more complete discussion of the Act, see *supra* note 112 and accompanying text.

functional families, often utilizing assisted reproductive technology.[387] In addition, the UPA seeks to serve the best interests of children involved. While not perfect, the UPA nonetheless offers persons, especially married persons, the easiest means by which to establish paternity or maternity. Most of all, the UPA provides an objective standard, a bright line, thereby lessening the contentious and lengthy litigation process often associated with establishing parentage through common law methods.

Even though the UPA provides that any child born to unmarried parents "has the same rights under the law as a child born to parents who are married to each other,"[388] this does not address who qualifies as a parent of that child. To address this, section 204 of the UPA creates presumptions of paternity and maternity because the section will be applied without gender restrictions. Of the five presumptions provided in the statute, four involve marriage between the man and child's mother, and only one provides another option: a presumption of paternity if "for the first two years of the child's life, [the man] resided in the same household with the child and openly held out the child as his own."[389] Otherwise, paternity may be established through birth, adjudication, acknowledgement,[390] or consent to assisted reproduction, which resulted in the birth of a child.[391] Finally, surrogacy contracts or gestational agreements are valid in some states, and the UPA provides the parameters of what constitutes a valid gestational agreement, including when the agreement is authorized and the subsequent establishment of parentage.[392]

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387. *See* Grossman, *supra* note 143, at 701–02 ("The adoption of the UPA and similar statutes finalized a shift away from reliance on marital status as a proxy for biological fatherhood and towards recognition, and protection, of both burgeoning and full-fledged father-child relationships.").

388. UNIF. PARENTAGE ACT § 202(a)(5) (UNIF. LAW COMM'N 2002); *see also* UNIF. PROB. CODE § 2-117 (UNIF. LAW COMM'N 2010) ("[A] parent-child relationship exists between a child and the child's genetic parents, regardless of the parents' marital status.").

389. UNIF. PARENTAGE ACT § 204(a)(5).

390. *See id.* § 301 ("The mother of a child and a man claiming to be the genetic father of the child may sign an acknowledgement of paternity with intent to establish the man's paternity."). In addition, the requirements for acknowledgement are extensive. There must be a signed record by the man and the mother, no adjudicated father, determination of whether there is a presumed father and whether genetic testing was performed, and that the parties signing understand that acknowledgement is an adjudication of paternity and this must be challenged, if at all, within two years or be barred. *Id.* § 302(a).

391. *See id.* §§ 201(b)(5), 704.

392. *See id.* §§ 801–809 (provisions on gestational agreements). *See generally* Jillian Casey, Courtney Lee & Sartaz Singh, *Assisted Reproductive Technologies*, 17 GEO. J. GENDER & L. 83, 99 (2016) (providing that "states approach surrogacy contracts in different ways" when determining enforceability); Douglas Nejaime, *Marriage Equality and the New Parenthood*, 129 HARV. L. REV. 1185, 1210–15 (2016) (explaining the California courts' application of the intentional parenthood principle when deciding issues arising from gestational agreements and the extension of the principle to unmarried same-sex couples).

Presumptions established under the UPA are applicable unless rebutted by persons with standing[393] and with sufficient evidence supported by genetic testing.[394] Both standing and the submission of evidence are, to quote the comments of the UPA, "confused in the case law,"[395] thereby qualifying marriage and adoption as the best ways by which to establish parenthood over a child. Due to the formalities associated with each marriage and adoption, they offer objective bright-line rules facilitating parentage in comparison to the more subjective equitable formulations.[396] Adoption by same-sex unmarried couples had become increasingly available among the various states.[397] Stepparent adoption may be available to unmarried or married same-sex couples.

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393. *See* UNIF. PARENTAGE ACT § 602 (UNIF. LAW COMM'N 2002). Section 602 provides:

> a proceeding to adjudicate parentage may be maintained by:
> (1) the child;
> (2) the mother of the child;
> (3) a man whose paternity of the child is to be adjudicated;
> (4) the support-enforcement agency [or other governmental agency authorized by other law];
> (5) an authorized adoption agency or licensed child-placing agency; [or]
> (6) a representative authorized by law to act for an individual who would otherwise be entitled to maintain a proceeding but who is deceased, incapacitated, or a minor[; or]
> (7) in intended parent under [Article 8].

*Id.*

394. *Id.* at § 505. Section 505 states,

> (a) Under this [Act], a man is rebuttably identified as the father of a child if the genetic testing complies with this [article] and the results disclose that:
> (1) the man has at least a 99 percent probability of paternity, using a prior probability of 0.50, as calculated by using the combined paternity index obtained in the testing; and
> (2) a combined paternity index of at least 100 to 1;
> (b) A man identified under subsection (a) as the father of the child may rebut the genetic testing results only by other genetic testing satisfying the requirements of this [article] which:
> (1) excludes the man as a genetic father of the child; or
> (2) identifies another man as the possible father of the child.
> (c) Except as otherwise provided in Section 510, if more than one man is identified by genetic testing as the possible father of the child, the court shall order them to submit to further genetic testing to identify the genetic father.

*Id.*

395. *See id.* at Prefatory Note. The confusion results from different approaches taken among the states to whether the presumption may be rebutted, who has standing to rebut, and the type of evidence that may be introduced to form an effective rebuttal. *Id.*

396. *See generally* Grossman, *supra* note 143, at 684–85 (explaining that considering the nature of custody hearings, it is not inconsistent for a statute governing child support to direct the court to consider equitable estoppel, while the statute governing parental custody is silent, and such difference is necessary to promote certainty; however, the different treatment unexpectedly resulted in the bright line rule).

397. *See generally* Nadia Stewart, Note, *Adoption by Same-Sex Couples and the Use of the Representation Reinforcement Theory to Protect the Rights of Children*, 17 TEX. WESLEYAN L. REV. 347, 357 (2011) (noting that California, Massachusetts, and Maine allow joint adoption by same-sex couples).

Stepparent adoption may occur whenever the spouse of a parent with custody of a child seeks to adopt a stepchild and both biological parents agree. Like all adoptions, the process is statutory so the procedures established in each of the states must be satisfied. To illustrate, the Uniform Adoption Act permits

> a stepparent . . . to adopt a minor stepchild who is the child of the stepparent's spouse if:
>
> > (1) the spouse has sole legal and physical custody of the child and the child has been in the physical custody of the spouse and the stepparent during the 60 days next proceeding the filing of the petition for adoption;
> >
> > (2) the spouse has joint legal custody of the child with the child's other parent and the child has resided primarily with the spouse and the stepparent during the 12 months next preceding the filing of the petition; [or]
> >
> > (3) the spouse is deceased or mentally incompetent, but before dying or being judicially declared mentally incompetent, had legal and physical custody of the child, and the child has resided primarily with the stepparent during the 12 months next preceding the filing of the petition[.][398]

If a stepparent does not meet the conditions, for "good cause shown," a court may nonetheless allow a petition to be filed to adopt the child.[399] Finally, consent of the former spouse of the biological parent with custody of the child is required prior to adoption by the stepparent,[400] but if consent is not obtained, the statute permits a petition to terminate that parent's parental rights.[401] Obviously, consent by the spouse of the stepparent, the child's biological parent, is required as well.

An adopted child is a child of the adopting parents and entitled to all of the benefits associated with that status. To illustrate, the Uniform Probate Code addresses the rights of that child to inherit. The Code treats a stepparent adoption differently from other adoptions. The Uniform Probate Code defines a "parent-child relationship" as follows:

> A parent-child relationship exists between an individual who is adopted by the spouse of either genetic parent and: (1) the genetic parent whose spouse adopted the individual; and (2) the other genetic

398. UNIF. ADOPTION ACT § 4-102(a)(1)–(3) (UNIF. LAW COMM'N 1994).

399. *Id.* § 4-102(b).

400. *Id.* § 2-401(a)(1)–(3) (requiring consent by biological parents, guardian, and current adoptive parents); *id.* § 4-104 (requiring consent by the stepchild adoptee who is at least twelve-years-old, the minor's stepparents, guardian, and agency); *id.* § 4-105 (requiring consent by stepparent's spouse); *id.* § 4-106 (requiring the form of consent to be in writing if the consent is from the minor's parent that is not stepparent's spouse); *id.* § 4-102(b) (requiring consent of custodial parent even if the stepparent does not have standing to adopt under Section 4-102(a)).

401. *Id.* § 4-102(c).

> parent, but only for the purpose of the right of the adoptee or a descendant of the adoptee to inherit from or through the other genetic parent.[402]

Thus, the Code permits a child adopted by the spouse of the child's genetic parent to inherit from and through at least three persons: the two genetic parents and the adopting stepparent. Nonetheless, the inheritance right is only to benefit the child, the noncustodial parent whose consent was required may not inherit from or through that child. The comment to Section 2-119(b) of the Code states the following:

> [A] parent-child relationship also continues to exist between an adopted stepchild and his or her other genetic parent (the noncustodial genetic parent) for purposes of inheritance from and through that genetic parent, but not for the purposes of inheritance by the other genetic parent and his or her relatives from or through the adopted stepchild.[403]

When confronted with the possibility of contentious litigation concerning parental status of same-sex partners, courts often recommended that the same-sex partner not genetically connected to the child adopt the child to preclude disputes. Such an adoption would objectively establish parenthood even though there is no genetic connection. In addition, the genetically connected partner does not relinquish his or her parental rights when the child is adopted by a partner. For example, in *Smith v. Gordon*,[404] the facts involved two women who traveled together to a foreign country to adopt a child.[405] Local law prohibited both women from adopting, so only one adopted the child and all three returned to Delaware where they resided together in a common household.[406] The adopting woman's partner intended to adopt the child once back in the United States, but never did so.[407] Eventually, the two women dissolved their relationship and the adopting parent, soon afterwards, refused to allow her former partner visitation with the child.[408] Adoption, or marriage if it had been a possibility, would have precluded the extensive litigation that occurred between 2004 and 2011 as the nonparent petitioned for visitation with the

402. UNIF. PROB. CODE § 2-119(b) (UNIF. LAW COMM'N 2010).

403. *Id.* § 2-119 cmt. (b).

404. 968 A.2d 1 (Del. 2009).

405. *Id.* at 3.

406. *Id.*

407. *Id.*; *see also* A.H. v. M.P., 857 N.E.2d 1061, 1066 (Mass. 2006) (partner "viewed the adoption [of the child] as a formality necessary only in the unlikely event of a 'worst case scenario.'").

408. *Smith*, 968 A.2d at 3.

child.[409] Only when the Delaware legislature adopted de facto parentage did the litigation end.[410]

Adoption can be expensive and involves administration and intensive scrutiny by state agencies organized to protect children from abuse and neglect. Marriage, on the other hand, is inexpensive, speedy, and in many circumstances establishes paternity of a child immediately. For example, in the *Smith* case, two women were in a committed relationship when one of them adopted a child in a foreign country.[411] If they had been married when the child was adopted the partner who was a stranger to the adoption would have been a parent by reason of a presumption in the UPA, which would reason that she is the presumed parent because she "and the mother of the child are married to each other and the child is born during the marriage."[412] This was the means of establishing parentage in *Debra H. v. Janice R.*[413] Recall that in that decision, the highest court in New York held a valid same-sex civil union in Vermont counted as a marriage entitled to comity in New York.[414] The nonbiological partner was married to the biological parent at the time she gave birth to the child, thus, it made the nonbiological spouse a parent of a child born after the civil union.[415] Therefore, because the child in question was conceived after the civil union, a status comparable to marriage, the child was considered a child of both of the "married" partners.[416] This remains a viable option in spite of more recent developments in New York law.[417]

The Delaware decision of *Smith v. Guest*[418] illustrates the value in bright line objectivity as compared to equitable models that are, according to a decision of New York's highest court, "contentious, costly, and lengthy."[419] The establishment of parenthood litigation traps "single biological and adoptive parents and their children in a limbo of doubt."[420] The facts illustrate this. For example, in *Debra H.*, the couple met in 2002, one of the women had a child through artificial insemination in 2003, and they separated in 2006. Then the mother prohibited her former partner from having contact with the child in

409. *Id.* at 4.

410. *See* Smith v. Guest, 16 A.3d 920, 936 (Del. 2011) (providing that the legislature intended the newly enacted statutory language of *de facto* parentage to apply retroactively).

411. *Smith*, 968 A.2d at 3.

412. UNIF. PARENTAGE ACT § 204(a)(1) (UNIF LAW COMM'N 2002).

413. 930 N.E.2d 184 (N.Y. 2010).

414. *Id.* at 196–97

415. *Id.* at 195.

416. *Id.*

417. *See, e.g.*, Brooke S.B. v. Elizabeth A.C.C., 61 N.E.3d 488, 501–02 (N.Y. 2016) (abrogating *Debra H.* and holding that parenthood may be established through proof of more subjective criteria, such as clear and convincing evidence of a preconception agreement between the partners).

418. 16 A.3d 920 (Del. 2010).

419. *Debra H.*, 930 N.E.2d at 192; *Guest*, 16 A.3d at 931.

420. *Debra H.*, 930 N.E.2d at 193.

2008.[421] Litigation commenced immediately, ending only in 2010, with the state's highest court's ruling. Ten years had elapsed between birth of the child and a cessation of litigation. Likewise, in *Smith v. Guest*, formerly *Smith v. Gordon*, two women met and formed a relationship in 1994. One of the parties adopted a child in 2003 and then ended their relationship in 2004, followed by a refusal to allow visitation with the adopted child.[422] The facts indicate that litigation did not cease until 2011 when the child was then eight-years-old. Similarly, in *Alison D.*, another New York decision, a child was born to one of the partners in 1981 through artificial insemination and 26 months later the couple ended their relationship but began litigating over the status of the nonbiological partner. That litigation ended in the highest court of New York in 1991 when the court ruled that the biological mother's former partner was not a parent.[423] Again, ten years elapsed between birth of the child and the end of litigation, and eight years elapsed between when the couple separated and the end of litigation. Even though the New York court reversed its holding in *Alison D.*,[424] the facts illustrate the contentious nature of litigation surrounding the establishment of parenthood.

### *C. Will Marriage Make a Difference?*

Same-sex marriage is predicated upon the premise that same-sex couples should have equal access to the financial and status benefits of marriage identically with opposite-sex couples. This premise is illustrated in the 1993 decision of the Hawaii Supreme Court in which same-sex couples petitioned the court to order the state to issue them a marriage license. In its decision the court wrote the following:

> The applicant couples correctly contend that the DOH's refusal to allow them to marry on the basis that they are members of the same sex deprives them of access to a multiplicity of rights and benefits that

421. *Id.* at 186.

422. Smith v. Gordon, 968 A.2d 1, 3 (Del. 2009).

423. Alison D. v. Virginia M., 572 N.E.2d 27, 29–30 (N.Y. 1991); *see also* A.H. v. M.P., 857 N.E.2d 1061, 1065, 1073 (Mass. 2006) (noting that a child was born via artificial insemination in 2001, the couple separated in 2003, and litigation ended in 2006 when Massachusetts' highest court refused to find a common law de facto parentage status existed); Boseman v. Jarrell, 704 S.E.2d 494, 497–98, 504–05 (N.C. 2010) (noting the baby was born to committed partners in 2002, the relationship ended in 2006, and the highest state court granted nonbiological person parental status in 2010); Conover v. Conover, 146 A.3d 433, 435–38 (Md. 2016) (noting that the child was born via artificial insemination in 2010, the parties then separated in 2011, the biological parent stopped visitation in 2012, and the litigation eventually ended in 2016 when Maryland adopted common law de facto parenthood); *In re* Parentage of L.B., 122 P.3d 161, 164, 176 (Wash. 2005) (noting that a couple had a child in 1995, separated in 2001, and then litigation ended in 2005 when court adopted common law de facto parenthood); Jones v. Barlow, 154 P.3d 808, 810, 819 (Utah 2007) (noting that a baby was born via artificial insemination to two women in 2001, the relationship ended in 2003, and litigation concerning nonbiological partner's status ended in 2007 when Utah's highest court refused to adopt common law de facto parentage).

424. Brooke S.B. v. Elizabeth A.C.C., 61 N.E.3d 488, 500–02 (N.Y. 2016).

> are contingent upon that status. Although it is unnecessary in this opinion to engage in an encyclopedic recitation of all of them, a number of the most salient marital rights and benefits are worthy of note. They include: (1) a variety of state income tax advantages, including deductions, credits, rates, exemptions, and estimates, under HRS . . . ; (2) public assistance from and exemptions relating to the Department of Human Services . . . ; (3) control, division, acquisition, and disposition of community property . . . ; (4) rights relating to dower, curtesy, and inheritance . . . ; (5) rights to notice, protection, benefits, and inheritance under the Uniform Probate Code . . . ; (6) award of child custody and support payments in divorce proceedings . . . ; (7) the right to spousal support . . . ; (8) the right to enter into premarital agreements . . . ; (9) the right to change of name . . . ; (10) the right to file a nonsupport action . . . ; (11) post-divorce rights relating to support and property division . . . ; (12) the benefit of the spousal privilege and confidential marital communications . . . ; (13) the benefit of the exemption of real property from attachment or execution . . . ; and (14) the right to bring a wrongful death action . . . . For present purposes, it is not disputed that the applicant couples would be entitled to all of these marital rights and benefits, but for the fact that they are denied access to the state-conferred legal status of marriage.[425]

Likewise, when same-sex couples sought marriage licenses in Vermont, the couples argued that

> in denying them access to a civil marriage license, the law effectively excludes them from a broad array of legal benefits and protections incident to the marital relation, including access to a spouse's medical, life, and disability insurance, hospital visitation and other medical decisionmaking privileges, spousal support, intestate succession, homestead protections, and many other statutory protections.[426]

The Vermont Supreme Court agreed in a 1999 decision, holding that the "Vermont Constitution would ensure that the law uniformly afforded every Vermonter its benefit, protection, and security so that social and political preeminence would reflect differences of capacity, disposition, and virtue, rather than governmental favor and privilege."[427] The court then enumerated the rights that marriage provides in the state:

> While the laws relating to marriage have undergone many changes during the last century, largely toward the goal of equalizing the status of husbands and wives, the benefits of marriage have not diminished in value. On the contrary, the benefits and protections incident to a

425. Baehr v. Lewin, 852 P.2d 44, 59 (Haw. 1993).

426. Baker v. State, 744 A.2d 864, 870 (Vt. 1999).

427. *Id.* at 876–77.

> marriage license under Vermont law have never been greater. They include, for example, the right to receive a portion of the estate of a spouse who dies intestate and protection against disinheritance through elective share provisions . . . ; preference in being appointed as the personal representative of a spouse who dies intestate. . . ; the right to bring a lawsuit for the wrongful death of a spouse . . . ; the right to bring an action for loss of consortium . . . ; the right to workers' compensation survivor benefits . . . ; the right to spousal benefits statutorily guaranteed to public employees, including health, life, disability, and accident insurance . . . ; the opportunity to be covered as a spouse under group life insurance policies issued to an employee . . . ; the opportunity to be covered as the insured's spouse under an individual health insurance policy . . . ; the right to claim an evidentiary privilege for marital communications…; homestead rights and protections . . . ; the presumption of joint ownership of property and the concomitant right of survivorship . . . ; hospital visitation and other rights incident to the medical treatment of a family member . . . ; and the right to receive, and the obligation to provide, spousal support, maintenance, and property division in the event of separation or divorce . . . . Other courts and commentators have noted the collection of rights, powers, privileges, and responsibilities triggered by marriage.[428]

Even though its decision would be reversed on appeal,[429] in 2005 the New York Supreme Court held that same-sex couples had a right to marry as a result of the state constitution's guarantee of equal protection and due process of laws.[430] And as did previous courts, the New York court, in its opinion, acknowledged the extensive benefits and protections provided by marriage. The court specified that

> [The state] does not dispute that plaintiffs and their children suffer serious burdens by being excluded from civil marriage. Marriage provides an extensive legal structure that protects the couple and any children. It is not disputed, for example, that among many other disadvantages, plaintiff couples may not own property by the entireties; file joint state income tax returns; obtain health insurance through a partner's coverage; obtain joint liability or homeowner's insurance; collect from a partner's pension benefits; have one partner of the two-women couples be the legal parent of the other partner's artificially inseminated child, without the expense of an adoption proceeding; invoke the spousal evidentiary privilege; recover damages for an injury to, or the wrongful death of, a partner; have the right to

428. *Id.* at 883–84.

429. Hernandez v. Robles, 805 N.Y.S.2d 354, 377 (App. Div. 2005).

430. *See* Hernandez v. Robles, 794 N.Y.S.2d 579, 604–05 (Sup. Ct. 2005).

> make important medical decisions for a partner in emergencies; inherit from a deceased partner's intestate estate; or determine a partner's funeral and burial arrangements. "Marriage laws provide many financial and legal protections to married couples. The U.S. General Accounting Office has identified 1049 federal laws in which benefits, rights and privileges are contingent on marital status."[431]

In addition to benefits, there is added value in the status of marriage. Justice Kennedy, in his majority opinion in *Obergefell v. Hodges*, described marriage as "essential to our most profound hopes and aspirations,"[432] and that for same-sex couples, "their immutable nature dictates that . . . marriage is their own real path to this profound commitment."[433] Justice Kennedy further explained that children of same-sex couples, "[w]ithout the recognition, stability, and predictability marriage offers . . . suffer the stigma of knowing their families are somehow lesser."[434] These quotes testify to the inherent status of marriage as a conveyor of historical and cultural value.

Finally, in the view of the litigants advocating in the courts and on the streets for marriage equality, the opportunity to marry may provide another aspect: affirmation. Frank Kameny, an outspoken advocate for the gay and lesbian community, summarized what affirmation means. In an eulogy he gave for a colleague, who died in 1997, he reflected on the progress of the gay and lesbian community:

> "We started with nothing, and look what we have wrought!" . . . recalling the dark decades when "the government was our enemy, and was out to get us—and they did"; then revealing that in the nineties almost a million lesbians and gays filled the Washington Mall; lesbian and gay federal employees came out at work and weren't fired because there were laws protecting them; and the president and vice president of the United States sent congratulatory letters and showed up in person at major lesbian and gay events.[435]

These things, together with same-sex marriage, were affirming.

Beyond the benefits and the status, it appears that affirmation will be the most enduring impact of same-sex marriage. Why? Because affirmation furthers status as an individual, enhancing choice, opportunity, and exploration. These elements are the facets of functional families, not the commitment explicitly and objectively required by marriage. The benefits and protections provided by the state are valuable, but they come at a significant cost (individuality), and hence they are expensive to obtain. Statistics illustrate both the rejection of form

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431. *Id.* at 586 (citation omitted).
432. Obergefell v. Hodges, 135 S. Ct. 2584, 2594 (2015).
433. *Id.*
434. *Id.* at 2590.
435. FADERMAN, *supra* note 326, at 630.

marriage and that those least able to afford marriage are the ones more likely to reject it.

> Between 1867 and 1967, the annual marriage rate changed little . . . [but] [b]y 2000, the marriage rate had declined. . . . The rate continued to spiral downward, reaching an historic low . . . in 2009. From 2009 to 2012, the latest years for which marriage-rate statistics are available, the marriage rate stabilized at that historically low rate. . . ."[436]

Phrased another way, "[i]n 1960, 72% of all adults age 18 and older were married," but by 2010, that number was only 51%.[437] While marriage rates have fallen, the number of nonmarital cohabitants rose to "7.7 million in 2010 and grew 41% between 2000 and 2010."[438] Between 2000 and 2010, the number of "opposite-sex unmarried partner households rose by 40.2%," representing 5.9% of all households.[439] Likewise, during the same time span, "the number of "same-sex partner households rose by 51.8%," comprising 11.6% of all unmarried-partner households.[440]

The percentage of unmarried persons cohabiting is highest among persons who are between the ages of 20 and 29, with lower rates for those who are in middle age and older.[441] Further, "[a]n unfortunate feature of some cohabiting couples is that they are at or below the poverty level,"[442] and they are also "less educated, disproportionately nonwhite, and more likely to have children from multiple partners."[443] Among same-sex couples, those "with relatively low levels of educational attainment are more likely to be raising children than couples with college or graduate degrees; same-sex couples that include racial minorities are also more likely to be raising children than white couples."[444] "Specifically, forty-three percent of same-sex couples with less than a high school education are raising children together . . . same-sex couples raising children have substantially lower incomes on average than same-sex couples in general."[445]

The statistics indicate that the very couples who would benefit most from the economic benefits offered by marriage are those less likely to take advantage of

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436. Waggoner, *supra* note 58, at 50–51 (alteration in original).

437. *Id.* at 52 (quoting D'VERA COHN ET AL., PEW RESEARCH CTR., BARELY HALF OF U.S. ADULTS ARE MARRIED—A RECORD LOW 1 (Dec. 2011)), http://www.pewsocialtrends.org/files/2011/12/Marriage-Decline.pdf).

438. Waggoner, *supra* note 58, at 53.

439. *Id.* at 55.

440. *Id.*

441. *Id.* at 64.

442. *Id.*

443. *Id.* (quoting Clare Huntington, *Postmarital Family Law: A Legal Structure for Nonmarital Families*, 67 STAN. L. REV. 167, 185–96 (2015)).

444. Widiss, *supra* note 209, at 551.

445. *Id.* at 568.

the newly established opportunity to marry. The reality of these statistics, together with the individualistic attitude of those younger adults who, although better educated and more affluent, are cohabiting in rising numbers, further suggest that marriage equality will have little impact. To meet the reality of this situation, a few commentators have written in support of greater recognition for nonmarital families.[446] In other words, for state and federal governments to expand benefits beyond marriage they should encompass persons in functional family cohabitation. Their suggestion is that alternative status arrangements other than marriage should be adopted by governments, but provide similar benefits. These alternative status arrangements would create objective criteria, similar in fashion to what is currently used to create parental status for de facto parents. This option, increased recognition for a kaleidoscope of family structures, seems more likely to be effective in creating benefits and parenthood among unmarried couples than the effect same-sex marriage will have on functional families other than affirmation for gays and lesbians.

## IV. CONCLUSION

In the midst of a cultural shift in the United States towards functional rather than form families, the Supreme Court has ruled that same-sex couples have a constitutional right to marry. Such a right would appear to offer a solution to the nonmarital couples with children, providing a marital presumption for that partner, heretofore, without a genetic or an adoptive connection to the child the couple is raising together. Marriage would offer an objective criterion, which would eliminate the often lengthy and costly litigation that accompanies petitions for custody or visitation. As this Article illustrates there are many scenarios where a nonmarital union dissolves, and the genetically unrelated partner wishes to continue to be a parent with the child, but the genetic or adoptive parent refuses. The attractiveness of marriage seems substantial, the avoidance of costly litigation is paramount to all of the parties involved, but the option of marriage is illusory. Reflection on the statistics concerning the continual rise of nonmarital cohabitation, even the financial and status benefits associated with marriage will not be sufficient to entice younger adults to return to marriage. The culture of functionalism is too firmly embedded in many younger persons who are tech savvy and supported by the media message advocating individualism. Additionally, poorer young adults, faced with caring for children from multiple relationships are preoccupied and just as influenced by the media message of individuality, thereby connecting with their more educated and more affluent neighbors.

Same-sex marriage will have little impact on same-sex couples. It is arguable that any advantage will arise because of the status affirmation the decision gives

446. *See, e.g.*, Waggoner, *supra* note 58, at 81–93 (supporting a Uniform De Facto Marriage Act); Widiss, *supra* note 209, at 571–72 (suggesting that the government needs to advance recognition of nonmarital families).

to gay and lesbian persons, including same-sex couples. But for the children of same-sex couples, the current litigious system of determining parentage through extraordinary circumstances, psychological parenthood, and de facto parenthood will continue unabated. As desirable as it is to reduce dissension, litigation, delay, and cost when seeking to provide for the best interest of those children involved, same-sex marriage is not the answer likely to be chosen by couples. And because couples will not qualify under objective statutory criteria as parents—but nonetheless have arguable equitable claims to parenthood—statutes delineating de facto parenthood will be of little avail when establishing parental status. For increasing numbers, contentious litigation is the unintended consequence of functionalism, self-ordering, and independence. Marriage is unattractive. Sadly, when considering *Obergefell's* impact on functional families, the conclusion must be that there will be very little impact at all.