

## A STRANGER IN THE EYES OF THE COURT: HOW THE JUDICIAL SYSTEM IS FAILING TO PROTECT NONBIOLOGICAL LGBTQ PARENTS

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*Until the Supreme Court decision in Obergefell v. Hodges, LGBTQ people were constitutionally barred from marrying the person they loved. This lack of constitutionality, however, did not stop many LGBTQ couples from living together, loving one another, and having children. But because marriage was illegal for these couples, many LGBTQ parents were not recognized as their child's legal parent. This lack of legally recognized parentage has caused significant issues for several LGBTQ couples who had children together but separated before Obergefell. Similarly, even after Obergefell, nonbiological LGBTQ parents who have not married run the risk of court saying that they are not their child's legal parent.*

*This Note argues that current legal doctrines traditionally applied to determine parentage, such as equitable adoption and de facto parentage, fail to address the unique needs of nonbiological LGBTQ parents who either could not marry before Obergefell or who have not chosen to marry post-Obergefell. The common law has, understandably, been crafted around heterosexual parents, and therefore has heavily relied on genetics when determining parentage. This reliance on genetics requires states to take legislative action to develop a statutory approach to parentage that looks beyond genetics to address the needs of LGBTQ couples, specifically nonbiological LGBTQ parents. No parent should be viewed as a stranger to their child in the eyes of the court.*

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## I. INTRODUCTION

Jennifer Zunk and Carin Hopps were partners for fifteen years. During that time, the two of them decided to have children. Carin was twice impregnated via artificial insemination and delivered both of their children.<sup>1</sup> For eight years, Jennifer was a mother to these children.<sup>2</sup> Even after Carin and Jennifer ended their relationship, Jennifer continued to live in their home, caring for the children and paying all the household's bills and expenses.<sup>3</sup>

Once *Obergefell v. Hodges* was decided, which held that the Constitution of the United States unequivocally gives same-sex couples the right to marry,<sup>4</sup> Jennifer decided to file for custody of the children she helped raise.<sup>5</sup> Despite the relationship Jennifer had with her children, however, the court denied her request, holding that she had no more parental rights to her children than a stranger.<sup>6</sup> The Michigan Supreme Court has refused to hear the case, leaving Jennifer in the dark as to whether the judicial system will ever recognize her as the mother she truly is and has been.<sup>7</sup>

This is not only a problem in Michigan and is not only an issue facing LGBTQ parents who had children but separated before the U.S. Supreme Court's *Obergefell* decision. The current legal framework for addressing parentage, with its heavy reliance on biology and genetics, risks isolating nonbiological parents who were either unconstitutionally banned from marriage be-

1. Anthony Michael Kreis, *Courts Must Protect the Parental Rights of Same-Sex Partners Who Couldn't Marry or Adopt Pre-Obergefell*, SLATE (Aug. 5, 2016, 11:29 AM), [http://www.slate.com/blogs/outward/2016/08/05/we\\_must\\_protect\\_the\\_parental\\_rights\\_of\\_estranged\\_same\\_sex\\_partners.html](http://www.slate.com/blogs/outward/2016/08/05/we_must_protect_the_parental_rights_of_estranged_same_sex_partners.html).

2. *Id.*

3. *Mabry v. Mabry*, 882 N.W.2d 539, 540 (Mich. 2016) (McCormack, J., dissenting).

4. *Obergefell v. Hodges*, 135 S. Ct. 2584, 2599 (2015).

5. *Mabry*, 882 N.W.2d at 540 (McCormack, J., dissenting).

6. Kreis, *supra* note 1.

7. *Mabry*, 882 N.W.2d at 539.

fore *Obergefell* or who have decided not to marry post-*Obergefell*.<sup>8</sup> For nonbiological LGBTQ parents, a legal frame must exist that provides them the protection they deserve.

This Note argues that current legal doctrines traditionally applied to determine legal parentage, such as equitable adoption and *de facto* parentage, fall short when dealing with same-sex parents, specifically same-sex parents not biologically related to their child or children. Unlike heterosexual parents, in most cases involving LGBTQ parents, one of the parents will not be genetically related to the child, giving courts an easy detail to point out in denying the nongenetically related same-sex parent his or her parental rights.<sup>9</sup> Additionally, elected state judges throughout the country, on average, treat LGBTQ people with more hostility than their federally appointed counterparts, which further increases the potential for a denial of an LGBTQ parents' parental rights.<sup>10</sup> These factors have contributed to devastating situations, like that of Jennifer from Michigan.<sup>11</sup> State legislatures must step in and enact laws that specifically protect both biological and nonbiological LGBTQ—and, in doing so, protect the children of these parents as well.

Part II of this Note provides a brief history of the LGBTQ movement and highlights potential issues facing LGBTQ parents at the state court level. It then looks at doctrines traditionally applied to determine parentage and analyzed how these doctrines apply to LGBTQ parents, specifically nonbiological LGBTQ parents. Part III examines the need for a statutory approach to parentage that meets the needs of LGBTQ parents and evaluates the Uniform Law Commission's Uniform Parentage Act. Part IV recommends the adoption of a parentage statute, like that of the Uniform Parentage Act, that leaves no parent in the dark regarding their parental rights, regardless of sexual orientation or gender. Part V concludes.

## II. BACKGROUND

### A. LGBTQ Activism and State Elected Judges

The marriage equality movement was one of the most successful public issue campaigns in the United States' history.<sup>12</sup> Though it may seem like a distant memory, it was not long ago that marriage equality seemed completely unattainable. In the late 1990s, after a Hawaii court ruled in favor of same-sex marriage, the state legislature “put a constitutional amendment on the ballot to

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8. See *infra* Section II.B.

9. Guy Ringler, *Get Ready for Embryos From Two Men or Two Women*, TIME (Mar. 18, 2015), <http://time.com/3748019/same-sex-couples-biological-children/> (noting that although “[i]t’s been one of the tenets of anti-gay activists for decades: ‘Two men can’t have a biological child, and two women can’t have one either,’ science is developing to allow same-sex couples to produce embryos with both parents’ DNA).

10. ERIC LESH, JUSTICE OUT OF BALANCE: HOW THE ELECTION OF JUDGES AND THE STUNNING LACK OF DIVERSITY ON STATE COURTS THREATEN LGBTQ RIGHTS, 7 (2015).

11. *Mabry*, 882 N.W.2d at 539.

12. See Molly Ball, *What Other Activists Can Learn from the Fight for Gay Marriage*, ATLANTIC (July 14, 2015), <http://www.theatlantic.com/politics/archive/2015/07/what-other-activists-can-learn-from-the-fight-for-gay-marriage/398417/>.

ban gay marriage, and voters overwhelmingly approved it.”<sup>13</sup> This reaction to gay marriage was not unique to Hawaii.<sup>14</sup>

In 2004, Massachusetts became the first state to allow gay marriage, following the Massachusetts Supreme Court’s landmark decision *Goodridge v. Department of Public Health*.<sup>15</sup> Again, however, public reaction to gay marriage was visceral, with thirty states enacting prohibitions to same-sex marriages following *Goodridge*.<sup>16</sup> As these states banned gay marriage, however, supporters of marriage equality continued to band together and work through the judicial system to effect change.<sup>17</sup>

On June 26, 2013, the U.S. Supreme Court struck down the Defense of Marriage Act (“DOMA”), which prohibited federal recognition of “those persons who are joined in same-sex marriages made law by the State [in which they live].”<sup>18</sup> On October 6, 2014, the U.S. Supreme Court denied review of circuit court decisions that struck down same-sex marriage bans in five states, which “clear[ed] the way for same-sex marriages in those states and any other state with similar bans in those circuits.”<sup>19</sup>

By 2014, same-sex marriage was legal in nineteen states, covering over half of the American population.<sup>20</sup> By the end of 2014, thirty-three states and the District of Columbia had enacted legislation allowing same-sex marriage.<sup>21</sup> Not even a full year later, the U.S. Supreme Court ruled in *Obergefell* that the Fourteenth Amendment to the United States Constitution provided same-sex couples an absolute right to be married.<sup>22</sup>

It seems inconceivable that the LGBTQ movement would move so fast, and so effectively, to go from Hawaii constitutionally banning same-sex marriage in the 1990s<sup>23</sup> to the U.S. Supreme Court’s *Obergefell* decision.<sup>24</sup> This incredible success, however, has not resulted in a smooth transition of equal treatment under the law, especially in the context elected state judges.

While we would like to think that the law is impartial and unbiased, that seemingly is not the case when it comes to LGBTQ parents who bring parental cases before state courts that elect their judges. A judge should be unbiased

13. *Id.*

14. See Jonathan Rauch, *So Far, So Fast*, ECONOMIST (Oct. 11, 2014), <http://www.economist.com/news/briefing/21623671-week-americas-supreme-court-dealt-supporters-gay-marriage-great-victory-look/> (“As in confirmation [of the country’s opposition to same-sex marriage], the image of two male figures holding hands on a wedding cake generated more hostile correspondence than any cover had before, overshadowing even the paper’s call for the abolition of the British monarchy. Which seemed, at that time, equally likely to come to pass.”).

15. 798 N.E.2d 941 (Mass. 2003).

16. Rauch, *supra* note 14.

17. See Ball, *supra* note 12 (noting the unique character of the LGBTQ movement in that the movement did not target Congress, but the courts).

18. *United States v. Windsor*, 133 S. Ct. 2675, 2695 (2013).

19. Amy Howe, *Today’s Orders: Same-Sex Marriage Petitions Denied*, SCOTUSBLOG (Oct. 6, 2014, 10:41 AM), <http://www.scotusblog.com/2014/10/todays-orders-same-sex-marriage-petitions-denied/>.

20. See Rauch, *supra* note 14.

21. Courtney G. Joslin, *Leaving No (Nonmarital) Child Behind*, 48 FAM. L.Q. 495, 506 (2014).

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

23. Ball, *supra* note 12.

24. *Obergefell*, 135 S. Ct. 2584.

and open-minded when considering the facts of a case.<sup>25</sup> If a judge were to abandon factual neutrality in determining a case's outcome—for instance, declaring that the defendant is guilty before a trial starts—it is clear to see how that result would be unjust.<sup>26</sup> Similarly, while a judge may have opinions about the law, a judge should be impartial to the parties before her and give no favoritism to one party over the other.<sup>27</sup> A judge, therefore, should separate and set aside any potential bias toward LGBTQ people (or any other person or group) and determine every case on its merits. This has not, however, been the case.

After the Supreme Court's ruling in *U.S. v. Windsor* (2013), which found Section 3 of [DOMA] to be unconstitutional, federal judges in deeply “red” states, who are appointed and have lifetime tenure, ruled in favor of the freedom to marry in quick succession. In contrast, challenges to discriminatory marriage bans in conservative states with elected judges were met with hostility or delay.<sup>28</sup>

For example, a former justice on the Supreme Court of Alabama, Roy Moore, recently suggested that it would be proper for a state supreme court to deny LGBTQ couples the right to marry to resist the U.S. Supreme Court's *Obergefell* decision.<sup>29</sup> This situation is extremely frightening for the LGBTQ community because thirty-nine states elect their judges.<sup>30</sup> An elected state court judge has the power to deny an LGBTQ person his or her “constitutional right to due process” by refusing to apply federal law consistent with the Constitution as interpreted by the U.S. Supreme Court.<sup>31</sup> The prospect of having a judge with a bias against LGBTQ people is even more frightening given the influence of special interest groups in elections. In fact, donations and spending “on state Supreme Court elections [has] more than doubled in the past decade, exceeding \$200 million and breaking records every cycle.”<sup>32</sup>

The election of judges through a political process that involves heavy influence of money and special interest groups infringes on the impartiality of the judiciary by incorporating public pressure into the selection of judges,<sup>33</sup> which may render it more difficult for the judge to “decide cases based on constitutional and legal principles.”<sup>34</sup> Outside influence on judicial elections has a direct impact on the lives of those within the jurisdiction of the elected judge. For example, Justice Moore, the *elected*, former Chief Justice of the Alabama State Supreme Court, who ran on a platform of anti-gay policies, was recently

25. See MODEL CODE OF JUD. CONDUCT (AM. BAR ASS'N 2011)

26. See *id.*

27. See *id.*

28. LESH, *supra* note 10, at 7.

29. *Id.* If the political nature of this decision were in doubt, Roy Moore's current U.S. Senate campaign set those doubts aside. He has been vocal about his anti-LGBTQ views (among other things) in his race to become Alabama's newest U.S. Senator. See Jonathan Martin & Alexander Burns, *Roy Moore Wins Senate G.O.P. Runoff in Alabama*, N.Y. TIMES (Sept. 26, 2017), <https://www.nytimes.com/2017/09/26/us/politics/roy-moore-alabama-senate.html>.

30. See LESH, *supra* note 10, at 5.

31. *Id.* at 25–26.

32. *Id.* at 17.

33. *Id.* at 4 (“While some state court judges are appointed, most are elected and stand for re-election, where they are increasingly susceptible to political pressure and special interest money.”).

34. *Id.* at 26.

suspended (for the second time) for explicitly violating *Obergefell* and its marriage equality ruling.<sup>35</sup> These types of events have also taken place in Texas, Arkansas, Louisiana, and Mississippi.<sup>36</sup> *Obergefell*, however, was unequivocal in its holding that the Fourteenth Amendment grants the constitutional right to marry regardless of one's sexual orientation.<sup>37</sup>

It is thus difficult to reconcile elected state court judges rejecting an LGBTQ person the right to marry with the holding in *Obergefell*, particularly when it is a "central principle of the United States system of government . . . that judges should be able to reach decisions free from political pressure."<sup>38</sup> But, while federal judges located in politically conservative states have applied federal law to LGBTQ people without issue, elected state judges in those same states have reached different conclusions.<sup>39</sup>

The potential for constitutional violations by a state court is great given the number of cases state courts hear every year. While the U.S. Supreme Court hears less than eighty-five cases annually, state courts "handle more than 100 million cases annually, including 2,000 constitutional law cases," meaning LGBTQ people are far more likely to be subject to a state court's interpretation and application of the Constitution than to the U.S. Supreme Court's. LGBTQ people are also far more likely to be subject to a state court's application of the Constitution than to a federal U.S. Court of Appeals's, which collectively only heard 54,244 cases in 2015.<sup>40</sup>

The potential for misapplication of U.S. Supreme Court holdings and constitutional law by elected state courts highlights the difficulty of applying traditional statutory and common-law tools to LGBTQ people. Not only are these rules and case law built on purely heterosexual scenarios and circumstances, but often the LGBTQ party is appearing before a state court judge, who, in many states, is elected and far more likely to hold either intentional or implicit bias against LGBTQ people. Examining these traditional approaches to determining legal parentage will also help demonstrate how these legal tools are failing both LGBTQ parents and their children.

### B. *Problems Facing LGBTQ Parents and Their Children*

The repercussions of denying LGBTQ parents their parental rights can be devastating for both the parents and the children. In one 1991 case, for example, when a child's biological mother passed away, the court nearly placed a thirteen-year-old in foster care because the child legally had no other parent,

35. Zack Ford, *Ala. Chief Just. Suspended Without Pay for Ignoring Federal Marriage Equality Ruling*, THINKPROGRESS (Sept. 30, 2016, 5:15 PM), <https://thinkprogress.org/roy-moore-suspended-marriage-equality-328437b44c21/>.

36. LESH, *supra* note 10, at 7, 8.

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

38. *Judicial Independence: Talking Points*, FED. JUD. CTR., <https://www.fjc.gov/history/talking/judicial-independence-talking-points> (last visited Nov. 9, 2017).

39. LESH, *supra* note 10, at 7.

40. *Fed. Jud. Caseload Stat. 2015*, U.S. COURTS, <http://www.uscourts.gov/statistics-reports/federal-judicial-caseload-statistics-2015> (last visited Nov. 9, 2017).

even though the nonbiological, LGBTQ parent was still alive and well.<sup>41</sup> Although that case does not involve a separated LGBTQ couple, it highlights the dangers of applying traditional legal parentage doctrines to LGBTQ parents. In denying the nonbiological parent parental rights, the court nearly placed a child in foster care over the care of the woman who helped raise the child. This outcome surely would not have been in the best interest of the child, which is the standard every court should use in making decisions “regarding a child’s custody, placement, or other critical life issues.”<sup>42</sup>

Denying parental rights to LGBTQ parents can affect both the nonbiological parent, like Jennifer from our earlier example<sup>43</sup> and the child, who is at the mercy of the court.<sup>44</sup> This outcome is not as rare as one would think. For example, in 2013, “[m]ore than 111,000 same-sex couples [were] raising an estimated 170,000 biological, step, or adopted children.”<sup>45</sup> That is 111,000 LGBTQ couples who had children in 2013 before the *Obergefell* decision.<sup>46</sup> This means that most of these couples did not or could not marry, thereby opening the door for disputes over parentage should the couple separate. But even after *Obergefell*, LGBTQ couples still face the denial of their parental rights.

An estimated 594,000 LGBTQ couple households reside in the United States.<sup>47</sup> Many of these couples may decide to marry in the wake of *Obergefell*, but many will likely continue to live together, and potentially have children together, without getting married.<sup>48</sup> For these couples, given the current legal framework of parentage law, the nonbiological parent faces the denial of their parental rights should they have children but separate without getting married. *Elisa B. v. Superior Court* provides an example of parental dispute between an LGBTQ couple who had children but separated without getting married.<sup>49</sup>

In *Elisa B.*, a lesbian couple decided to have children.<sup>50</sup> Using artificial insemination, Elisa gave birth to Chance, and her partner, Emily, gave birth to twins, Ry and Kaia.<sup>51</sup> Two years later, Emily and Elisa split up, each taking the child or children to whom she gave birth.<sup>52</sup> Emily, who made more money,

41. Nancy S. v. Michele G., 279 Cal. Rptr. 212 (Cal. Ct. App. 1991).

42. CHILDREN’S BUREAU, CHILD WELFARE INFORMATION GATEWAY, DETERMINING THE BEST INTERESTS OF THE CHILD 1 (2012).

43. See *Mabry v. Mabry*, 882 N.W.2d 539 (Mich. 2016).

44. See, e.g., *Nancy S.*, 279 Cal. Rptr. at 212.

45. Gary J. Gates, *LGBTQ Parenting in the United States*, WILLIAMS INST. (Feb. 2013), <https://williamsinstitute.law.ucla.edu/research/census-LGBTQ-demographics-studies/LGBTQ-parenting-in-the-united-states/> (then go to “Click here for the full report.”). It should be noted that footnote 82 cites different numbers for the number of LGBTQ parents raising children. This is not a contradiction, however. This footnote is from 2013, strategically chosen to highlight the number of children born to same-sex parents *before* LGBTQ couples had the right to marry.

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

47. *LGBT Adoption Statistics*, LIFELONG ADOPTIONS, <https://www.lifelongadoptions.com/lgbt-adoption/lgbt-adoption-statistics> (last visited Nov. 18, 2017).

48. For example, nearly 10% of opposite-sex households with children are unmarried. It is not unlikely that LGBTQ households will have similar rates of unmarried households with children as their opposite-sex counterparts. *Id.*

49. *Elisa B. v. Superior Court*, 117 P.3d 660, 663 (Cal. 2005).

50. *Id.*

51. *Id.*

52. *Id.*

supported Elisa and the twins for a while, but she eventually cut off financial support.<sup>53</sup> When Emily sought a writ of mandate, the district court found that Elisa was “obligated to support the twins under the doctrine of equitable estoppel.”<sup>54</sup> The California Supreme Court affirmed the district court’s decision, relying on California’s Uniform Parentage Act and stating “we see no reason why the twins in the present case cannot have two parents, both of whom are women.”<sup>55</sup>

*Elisa B.* demonstrated a favorable outcome for an LGBTQ parent when a court relied on the state’s version of the Uniform Parentage Act<sup>56</sup> and traditional doctrines of legal parentage applied through the lens of the child’s best interest.<sup>57</sup> Favorable outcomes, however, are not always the case when courts rely on traditional legal parentage doctrines in the context of LGBTQ couples.

### C. Overview of Traditional Approaches to Legal Parentage

Traditionally, there have been several methods available to individuals attempting to gain legal parental status.<sup>58</sup> These differing methods include adoption, *de facto* parentage, marital presumption, and equitable adoption, as well as intent.<sup>59</sup> These approaches, which subsequent sections analyze detail, have been successfully applied to heterosexual couples throughout the country. While these doctrines have resulted in the correct outcome for some LGBTQ couples,<sup>60</sup> they have historically failed to translate to LGBTQ parents.

The following subsections examine the application of these traditional approaches. Upon establishing the background of these doctrines, Part III analyzes their application to LGBTQ parents, highlighting any apparent shortcomings, while suggesting ways each can be applied to LGBTQ parents when considering the best interest of the child.

#### 1. Best Interest of the Child

“Every state uses a ‘best interest of the child’ standard” when handling adoption and custody.<sup>61</sup> This standard requires “[a] child’s overall well-being” to receive priority over all “other placement factors considered by adoption agencies”<sup>62</sup> or by a court. As with many legal standards, the child’s best interest standard has undergone significant change in recent years. For example, in

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53. *Id.* at 663–64.

54. *Id.*

55. *Id.* at 666.

56. CAL. FAM. CODE § 7600 (2016).

57. *See Elisa B.*, 117 P.3d 660.

58. *See generally* Myrisha S. Lewis, *Biology, Genetics, Nurture, and the Law: The Expansion of the Legal Definition of Family to Include Three or More Parents*, 16 NEV. L.J. 743 (2016); Alexander Newman, Note, *Same-Sex Parenting Among a Patchwork of Laws: An Analysis of New York Same-Sex Parents’ Options for Gaining Legal Parental Status*, 2016 CARDOZO L. REV. DE NOVO 77 (2016).

59. *See* Lewis, *supra* note 58; Newman, *supra* note 58.

60. *See, e.g., Elisa B.*, 117 P.3d at 662.

61. W. Bradford Wilcox & Robin Fretwell Wilson, *Bringing up Baby: Adoption, Marriage, and the Best Interests of the Child*, 14 WM. & MARY BILL OF RTS. J. 883, 885 (2006).

62. *Id.*



the 1970s a single parent's application for a child's custody would have been rejected because the child's best interest was not to live with a single parent, regardless of that person's qualifications.<sup>63</sup> The heavy reliance on marriage inherently prevented LGBTQ couples from adopting children,<sup>64</sup> but it also created obstacles for heterosexual couples.

In the 1999 case *In re M.F.*, a child's aunt, who was single, and two non-relatives, who were married, filed competing adoption petitions.<sup>65</sup> The aunt was an attorney and had successfully raised a child of her own.<sup>66</sup> Although the aunt "would provide good care" to the child,<sup>67</sup> the court granted the nonrelatives' adoption petition.<sup>68</sup> But a lot has changed since 1999.

"The demographic changes of the past century make it difficult to speak of an average American family."<sup>69</sup> U.S. Census Bureau findings highlight this change. For example, "[b]etween 1970 and 2012, the share of households that were married couples with children under 18 halved from 40 percent to 20 percent."<sup>70</sup> Relatedly, the number of children living with one parent increased to 28% of all children in the United States.<sup>71</sup> Finally, the percentage of LGBTQ couples with children under the age of eighteen increased to 16% of all LGBTQ couples.<sup>72</sup>

The American family looks different today than it did in the past. With this change comes a need for a new standard to evaluate a child's best interest—one not tied to traditional notions of what a family looks like but instead one that functionally focuses on a child's best interest. Later sections discuss this standard as an approach to functionally focus traditional parentage doctrines to meet the needs of LGBTQ parents and their children. The first and most popular form of gaining parentage is adoption.

## 2. Adoption

The number of LGBTQ couples having children has been increasing over the years and is likely to continue to increase.<sup>73</sup> In fact, "[o]f the 594,000 same-sex couple households in the United States, 115,000 have children."<sup>74</sup> Of those households with children, 21.2% are children through adoption.<sup>75</sup> This number

63. *Id.* at 886.

64. *See supra* Section II.A (discussing the LGBTQ movement to gain marriage equality).

65. *In re M.F. v. D.A.H.*, 1 S.W.3d 524, 528 (Mo. Ct. App. 1999).

66. *Id.* at 533.

67. *Id.*

68. *Id.* at 538.

69. *Troxel v. Granville*, 530 U.S. 57, 63 (2000).

70. JONATHAN VESPA ET AL., AMERICA'S FAMILIES AND LIVING ARRANGEMENTS: 2012 1 (U.S. Census Bureau, 2013), <https://www.census.gov/prod/2013pubs/p20-570.pdf>.

71. *Id.* at 23.

72. *Id.* at 21.

73. *LGBTQ Adoption Statistics*, LIFELONG ADOPTIONS, <https://www.lifelongadoptions.com/LGBTQ-adoption/LGBTQ-adoption-statistics> (last visited Nov. 9, 2017).

74. *Id.*

75. *Id.*

is over four times higher than the adoption rate for both married and unmarried opposite-sex couples.<sup>76</sup>

LGBTQ couples usually have two forms of adoption available to them: “stepparent adoptions and second-parent adoptions.”<sup>77</sup> Stepparent adoption is where a biological parent either marries (or remarries), and the biological parent’s new spouse adopts the child, becoming the child’s legal parent.<sup>78</sup> Second-parent adoption is a legal procedure where an “individual adopts a child whom he or she is co-parenting, but with whom he or she has no existing legal relationship.”<sup>79</sup>

For LGBTQ people, before the passage of *Obergefell*, the first question was not what type of adoption the parents would undertake, but whether the state would allow LGBTQ parents to adopt.<sup>80</sup> Even after *Obergefell*,<sup>81</sup> marriage equality still did not create a “completely certain playing field” when it came to LGBTQ adoption.<sup>82</sup> For Daniel and Cameron, a gay couple seeking to adopt, even after *Obergefell* they repeatedly ran into obstacles because Florida had laws in place limiting joint adoption to only a “husband” and a “wife.”<sup>83</sup>

Today, thankfully, all fifty states have laws in place offering LGBTQ parents the right to joint adoption when the couple is married.<sup>84</sup> In these cases, many states have already acted to modify traditional parentage doctrines to meet the changing compositions of families through legislation. Some states, however, retain restrictions on adoption by LGBTQ couples.

For example, only fourteen states and the District of Columbia allow LGBTQ parents who are not married to petition for second-parent adoption.<sup>85</sup> So, absent a marriage, in the event of the biological parent’s death or a failure in the relationship, the outcome is uncertain for a LGBTQ couple that does not live in one of the fourteen states that allow second-parent adoption. In these circumstances—where there was neither marriage nor adoption, followed by tragedy or separation—legal doctrines like marital presumption, equitable adoption, and *de facto* parentage play a role in determining parentage and child custody. In these circumstances, a modified child’s best interest standard can apply to functionally focus traditional doctrines on meeting the unique needs and circumstances of LGBTQ parents who either had children but separated

76. The adoption rate for married opposite-sex couples is 4.4% and for unmarried opposite-sex couples 5.2%. *Id.*

77. Newman, *supra* note 58, at 82.

78. *Id.*

79. *Id.*

80. See, e.g., William E. Adams, *Whose Family is it Anyway? The Continuing Struggle for Lesbians and Gay Men Seeking to Adopt Children*, 30 NEW ENG. L. REV. 579, 581 (1996) (discussing “issues concerning ‘stranger adoptions’ as exemplified by [then] ongoing litigation in the State of Florida, which along with the state of New Hampshire, completely prohibit[ed] homosexuals from adopting children”).

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

82. Rebecca Beitsch, *Despite Same-Sex Marriage Ruling, Gay Adoption Rights Uncertain in Some States*, PEW CHARITABLE TRUST (Aug. 19, 2015), <http://www.pewtrusts.org/en/research-and-analysis/blogs/stateline/2015/08/19/despite-same-sex-marriage-ruling-gay-adoption-rights-uncertain-in-some-states>.

83. *Id.*

84. *Joint Adoption Laws*, FAM. EQUALITY COUNCIL, [http://www.familyequality.org/get\\_informed/resources/equality\\_maps/joint\\_adoption\\_laws/](http://www.familyequality.org/get_informed/resources/equality_maps/joint_adoption_laws/) (last visited Nov. 9, 2017).

85. *Id.*

before *Obergefell* or who had children but separated without getting married post-*Obergefell*.

### 3. Marital Presumption

“Traditionally, a man is presumed to be the biological, and thus legal, father of a child born to his wife.”<sup>86</sup> While this presumption of legitimacy seems obvious, because the husband will most often be the biological father, the most interesting applications of the doctrine occur in cases involving infidelity.<sup>87</sup> In *Michael H. v. Gerald D.*, Gerald, a French oil company executive, was married to Carole, an international model.<sup>88</sup> Carole, however, was engaged in an extramarital affair with Michael, her neighbor.<sup>89</sup> On May 11, 1981, Carole gave birth to a child and Gerald was listed as the child’s father.<sup>90</sup> Shortly thereafter, however, Carole informed Michael, the neighbor, that she believed he was the child’s father.<sup>91</sup> Blood tests revealed that there was a 98.07% chance Michael was, in fact, the child’s father.<sup>92</sup> Despite the scientific evidence of Michael’s parentage, however, the court concluded that Gerald was the father under the marital presumption.<sup>93</sup>

The court engaged in a “purely legal” inquiry when determining that the legal parentage diverged from the genetic parentage.<sup>94</sup> Similarly, when applied to LGBTQ parents, the presumption nearly always diverges from genetic parentage, and is, therefore, a “legal fiction.”<sup>95</sup> This “fiction” requires different approaches in dealing with the traditionally gender-based doctrine of the marital presumption.<sup>96</sup> Some have suggested modifying the approach to look at the parties’ intent,<sup>97</sup> while others have suggested a functional test.<sup>98</sup> Application of this doctrine to nonmarital parents, such as LGBTQ parents with children before *Obergefell* or LGBTQ parents with children who have decided not to marry post-*Obergefell*, is rooted in the doctrine’s legal-fiction character.

86. Douglas NeJaime, *Marriage Equality and the New Parenthood*, 129 HARV. L. REV. 1185, 1190 (2016).

87. Lynn D. Wardle, *Parental Infidelity and the “No-Harm” Rule in Custody Litigation*, 52 CATH. U. L. REV. 81, 87 (2012) (discussing the courts’ move from hostility to acceptance regarding infidelity in marriage and how the marital presumption will remain unless there is “a showing of harm, or negative impact, on the child”).

88. *Michael H. v. Gerald D.*, 491 U.S. 110, 113 (1989).

89. *Id.*

90. *Id.*

91. *Id.* at 113–14.

92. *Id.* at 114.

93. *Id.* at 131.

94. Susan Frelich Appleton, *Presuming Women: Revisiting the Presumption of Legitimacy in the Same-Sex Couples Era*, 86 B.U. L. REV. 227, 229 (2006).

95. *Id.* at 230.

96. See NeJaime, *supra* note 86, at 1190 (“Yet under the same presumption, the nonbiological lesbian co-parent is the mother of a child born during the marriage not because she is assumed to be biologically related to the child, but because she is the *intended* parent of the child and will *function* as the child’s parent.”); see also Appleton, *supra* note 94 (discussing the different approaches required for application to traditional couples, lesbian couples, and gay couples).

97. NeJaime, *supra* note 86, at 1190.

98. Appleton, *supra* note 94, at 232.

Although marriage traditionally “defined the scope of state-recognized parenting,” the U.S. Supreme Court in 1968 “began to develop a body of equal protection law rejecting state laws that discriminated against ‘illegitimate,’ or nonmarital, children.”<sup>99</sup> At this time, additional modifications developed, such as the expansion of parental rights to unmarried fathers.<sup>100</sup> In *Stanley v. Illinois*, the U.S. Supreme Court noted that “‘familial bonds’ outside the context of marriage w[ere] ‘often as warm, enduring, and important as those arising within a more formally organized family unit.’”<sup>101</sup>

These expansions related to nonmarital parents eventually developed into a standard that placed a biological connection to the child as a starting point—as opposed to an end-all-be-all—in a court’s analysis.<sup>102</sup> Even with a reduced focus on biology, however, as the definition of “family” has become more diverse,<sup>103</sup> having biology as the starting point still removes many LGBTQ parents from being considered parents in the eyes of the court. Advocates, therefore, argued for application of the doctrine in cases where LGBTQ parents demonstrated the intent and function of “marriage-like adult relationships—regardless of the relationships’ legal status.”<sup>104</sup>

Given the previously discussed “legal fiction” of the marital presumption doctrine,<sup>105</sup> the transition in its application from married, nonbiological parents to LGBTQ parents in a “marriage like” relationship should have been quick and logical, and in some states it was. For example, certain states with civil unions in place before *Obergefell* held that civil-union laws extended the presumption to LGBTQ couples.<sup>106</sup> While this does not address those LGBTQ couples who did not have the opportunity to undergo a civil union, it demonstrates some courts’ willingness to extend the doctrine. This willingness to modify the marital presumption to meet the changing times, however, was not the norm. Even today, some courts are refusing to expand the doctrine to meet the needs of LGBTQ parents. One concern that may be creating issues for courts is that of “gender equality or neutrality,” which is an issue unique to LGBTQ couples.<sup>107</sup>

With the increase in LGBTQ couples cohabitating, marrying, and having children, courts now must consider how the law should apply concepts like “husband” and “wife” to lesbian couples and gay couples.<sup>108</sup> Another question facing courts is whether the quickly changing landscape of family law requires either (1) a new set of rules specifically focused on LGBTQ parents, or (2) whether an entirely new rule should exist “governing parent-child relationships

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99. NeJaime, *supra* note 86, at 1193–94.

100. *Id.* at 1194.

101. *Id.*

102. *Id.*

103. *See supra* Subsection II.C.1.

104. NeJaime, *supra* note 86, at 1197.

105. Appleton, *supra* note 94, at 230.

106. *See Miller–Jenkins v. Miller–Jenkins*, 912 A.2d 951, 968 (Vt. 2006). *Obergefell* was decided in 2015. 135 S. Ct. 2584 (2015).

107. Appleton, *supra* note 94, at 231.

108. *Id.*

across the board” to meet the change.<sup>109</sup> As courts have struggled with these questions, results of parentage cases have often resulted in inequitable outcomes.

In *Smith v. Paven*,<sup>110</sup> three married female couples sought “a declaration that the refusal to issue birth certificates with the names of both spouses on the birth certificates of their respective minor children violated their constitutional rights to Equal Protection and Due Process.”<sup>111</sup> The first couple got married in 2011 in New Hampshire, and one of the partners gave birth to their child in Arkansas in May 2015. The second couple married in 2010 in Iowa, and one of the partners gave birth to their child in Arkansas in June 2015. The final couple gave birth to their child in January 2015 in Arkansas and shortly thereafter married in Arkansas. All of the children were conceived through artificial insemination involving an anonymous donor. In every case, the Arkansas Department of Health refused to place the nonbiological mother’s name on her child’s birth certificate.<sup>112</sup>

In light of *Obergefell*, the circuit court granted the mothers injunctive relief and also declared parts of an Arkansas statute that “govern[ed] entry of the name of the mother and the father of the child on birth certificates” unconstitutional.<sup>113</sup> The Arkansas Supreme Court, however, disagreed, stating “*Obergefell* did not address Arkansas’s statutory framework regarding birth certificates, either expressly or impliedly.”<sup>114</sup> In so holding, the Arkansas court determined that, although *Obergefell* stated “the right to marry is a fundamental right inherent in the liberty of the person, and . . . couples of the same-sex may not be deprived of that right and that liberty,” these nonbiological mothers did not have the right to have their names on their children’s birth certificates.<sup>115</sup> The Arkansas court further stated, “we cannot say that naming the nonbiological spouse on the birth certificate of the child is an interest of the person so fundamental that the State must accord [that] interest,” and denied the mothers’ requests.<sup>116</sup>

In denying these requests to apply the doctrine of marital presumption, although its application seamlessly translated from its traditional use, the court created inequitable outcomes despite its precedent. In fact, in 2011, the Arkansas Supreme Court stated that “the strong presumption of the legitimacy of a child born of marriage continues to be one of the most powerful presumptions in Arkansas law.”<sup>117</sup> Based on its holding in *Paven*, the Arkansas Supreme Court must have only intended this “strong presumption”<sup>118</sup> for children born

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109. *Id.*

110. *Smith v. Paven*, No. CV-15-988, 2016 Ark. LEXIS 369, at \*1 (Ark. Dec. 6, 2016).

111. *Id.* at \*3.

112. *Id.*

113. *Id.* at \*5.

114. *Id.* at \*13.

115. *Id.* (quoting *Obergefell v. Hodges*, 135 S. Ct. 2584, 2605 (2015)).

116. *Id.* at \*24.

117. *R.N. v. J.M.*, 61 S.W.3d 149, 155 (Ark. 2011).

118. *Id.*

of marriages comprised of one man and one woman, not children born to *any* marriage.<sup>119</sup>

One potential explanation for outcomes like that of *Paven*, beyond potential implicit bias against LGBTQ people,<sup>120</sup> is a court's inability to answer the two previously stated questions facing courts today regarding how to apply gender-based rules to LGBTQ couples.<sup>121</sup> In *Paven*, the court referenced gender stereotypes by stating that "the situation involving the female spouse of the biological mother" simply "[did] not have the same biological nexus to the child" that a "biological father" would have.<sup>122</sup> Other courts have also failed to treat males and females equally by failing to remove gender from the equation.<sup>123</sup> For example, courts will look at a man's relationship with a child—such as if he brought that child, born to his wife out of wedlock, into his home—in determining whether to establish parentage.<sup>124</sup> The marital presumption doctrine, however, while considering a father's relationship with the child, does not extend parentage in cases of a wife bringing a husband's biological child into the home.<sup>125</sup>

As displayed in *Paven*, the marital presumption doctrine has an inherent flaw that affects the doctrine's applicability to LGBTQ couples in that it fails to look at the child's best interest.<sup>126</sup> For example, when a husband has a child out of wedlock, which does not extend the presumption of parentage to the wife,<sup>127</sup> the doctrine does not consider whether the child would be *better off* with a legally recognized parent-child relationship with its biological father, despite the fact that the child's father is not married to the child's mother.<sup>128</sup> This lack of analysis through the lens of the child's best interest directly contradicts the general rule that a child's best interest must receive priority over all other factors in determining an adoption or parentage issue.<sup>129</sup> Only a handful of states have recognized a child's best interest in the marital presumption doctrine, such as Arkansas, California, Colorado, Georgia, Maine, Maryland, Missouri, New York, North Carolina, South Dakota, Wisconsin, and Wyoming.<sup>130</sup>

119. It is interesting to note here that Arkansas elects its state judges. *See supra* Section II.A.

120. *See* Subsection II.A. This is especially relevant given the increased likelihood for elected state judges to rule against federal policies related to LGBTQ matters, and Arkansas does in fact elect its judges. *See also Elected Officials*, ARK. SEC'Y OF ST.: MARK MARTIN, <http://www.sos.arkansas.gov/elections/Pages/myElectedOfficials.aspx> (last visited Nov. 9, 2017).

121. Those two questions being: (1) how to apply "gender equality or neutrality" to same-sex couples and (2) whether the changing familial landscape requires a modification or complete new set of parental rules. *See supra* text accompanying notes 108–09.

122. *Smith v. Paven*, No. CV-15-988, 2016 Ark. LEXIS 369, at \*24–25 (Ark. Dec. 6, 2016).

123. *Appleton*, *supra* note 94, at 239.

124. *Id.* at 255.

125. *Id.* at 238.

126. Throughout the opinion, the Arkansas Supreme Court never deeply analyzed what may be in the best interest of the child, focusing instead on distinctions between the right to marry and the benefits it confers on adults. In fact, the opinion only once mentioned the children's best interests, but failed to further discuss them. *Paven*, No. CV-15-988, 2016 Ark. LEXIS 369, at \*47.

127. *Appleton*, *supra* note 94, at 238.

128. *Id.* at 244.

129. *See Wilcox & Wilson*, *supra* note 61, at 885.

130. *Appleton*, *supra* note 94, at 235 n.35.

In states with the best interest standard, courts consider factors such as “concerns about child welfare,” “protecting the unitary family,” and the strong connection between a child and its biological parent.<sup>131</sup> These factors translate to married lesbian couples when one of the women gave birth to the child. They do not, however, extend so smoothly to gay male partners who must rely on assisted reproduction technology (“ART”) or surrogacy to achieve the goal of having biological children.<sup>132</sup> As discussed above, courts must resolve how to handle gender norms and overarching parental legal questions in deciding whether to extend the marital presumption of parentage to LGBTQ parents. To answer these questions, courts should undergo a functional approach centered on a child’s best interest.

“Parental conduct and familial relationships, as actually experienced, would provide the criteria for determining parentage, without regard to gender.”<sup>133</sup> With this approach, which has existed since colonial times,<sup>134</sup> a child’s parent is understood to be the one who repeatedly and continually provided the child’s care. This would not be an automatic test that applied directly upon the birth of the child. Instead, this would be a backward-looking test to determine whether the parent was a “functional parent” at the time of the child’s birth and continued in that role so that it would be in the child’s best interest to consider the person a parent—regardless of gender or sexual orientation. Stated another way, courts would examine whether the parent seeking parental rights was the child’s “psychological parent.”<sup>135</sup>

One determines a “psychological parent” by evaluating the “day-to-day interaction, companionship, and shared experiences” between the intended parent and child.<sup>136</sup> “The role can be fulfilled either by a biological parent or by an adoptive parent or by any other caring adult—but never by an absent, inactive adult, whatever his biological or legal relationship to the child may be.”<sup>137</sup> Under this approach, the view of marital presumption can encompass the functionality and reality of the relationship between the parent and child, and make the best decision for that child, without facing archaic gender-based obstacles or biological roadblocks.<sup>138</sup>

As the marital presumption stands today, its applicability to LGBTQ couples is only going to result in an outcome favorable to all parties in a select few cases, and those outcomes hinge on a court’s willingness to functionally apply the doctrine to today’s changing family. While applying the marital presumption with a modern best-interest test may result in more equitable outcomes, as it will similarly be seen in discussion of the remaining parentage doctrines, states need to step in and address this issue through legislation.

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131. *Id.* at 260.

132. *Id.* at 261.

133. *Id.* at 271.

134. See MARY ANN MASON, FROM FATHER’S PROPERTY TO CHILDREN’S RIGHTS: THE HISTORY OF CHILD CUSTODY IN THE UNITED STATES 24 (1994).

135. JOSEPH GOLDSTEIN ET AL., BEYOND THE BEST INTERESTS OF THE CHILD 18–20 (1979).

136. *Id.*

137. *Id.*

138. *Id.*

#### 4. De Facto Parentage

In 2002, the American Law Institute (“ALI”) released *Principles of the Law of Family Dissolution: Analysis and Recommendations* (“*Principles*”), which promised to affect the way our legal system approached legal questions surrounding the family.<sup>139</sup> Since then, courts have often looked to *Principles* for guidance on familial topics, but courts return to *Principles* for one issue more than any other: conferring parental “rights” to partners of a child’s “legal parent.”<sup>140</sup> ALI’s *Principles* defines “*de facto* parent” as:

[A]n 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, (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.<sup>141</sup>

As we have seen in earlier examples, although the definition of *de facto* parent seems to translate to *any* parent, its application in the context of LGBTQ parents has not been without its problems.

In *Holtzman v. Knott*, Wisconsin was the first state to adopt a *de facto* parentage rule for LGBTQ parents.<sup>142</sup> In *Holtzman*, the court created a four-prong test to determine when a person stands in such a relationship to a child, with such a clear intent to be a parent, that legal parental rights should be given.<sup>143</sup> These factors included:

(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 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.<sup>144</sup>

As groundbreaking as this ruling was, it had its limitations. For example, the court held that this decision only granted visitation rights, not full custody of the child.<sup>145</sup>

139. Robin Fretwell Wilson, *Trusting Mothers: A Critique of the American Law Institute’s Treatment of De Facto Parents*, 38 HOFSTRA L. REV. 1103, 1111 (2010).

140. *Id.* at 1111–12.

141. PRINCIPLES OF THE LAW OF FAMILY DISSOLUTION: ANALYSIS AND RECOMMENDATIONS § 2.03 (AM. LAW INST. 2002).

142. 533 N.W.2d 419 (Wis. 1995), *cert. denied*, Knott v. Holtzman, 516 U.S. 975 (1995).

143. *Holtzman*, 533 N.W.2d at 421.

144. *Id.*

145. *Id.* at 437.



Within ten years of *Holtzman*'s decision, seven states granted visitation rights to lesbian ex-partners using the *Holtzman* test, while two states denied lesbian ex-partners visitation rights.<sup>146</sup> *Holtzman*'s dissent sheds light on the reasoning behind the different outcomes among these states.

*Holtzman*'s dissent argues that the majority ignored U.S. Supreme Court precedent that stated: "biological and adoptive parents have a constitutionally protected 'fundamental right' to raise their children free from unnecessary intrusion by the government."<sup>147</sup> The dissent focuses on the biological element of parentage, "recognizing that 'a *natural* parent has a protective right under both state law and the United States Constitution to rear his or her child free from governmental intervention."<sup>148</sup>

The dissent asserted that the extension of visitation rights to a lesbian co-parent would infringe on the rights of the legal parent, assuming that a nonbiological LGBTQ parent cannot have the type of relationship with the child that justifies an extension of the doctrine.<sup>149</sup> The majority, however, recognized that lesbian and gay parents deserved a legally recognized relationship with their children greater than that of a third party.<sup>150</sup> The divide highlighted between *Holtzman*'s majority and dissent can be seen throughout the country as states and judges work through the application of *de facto* parentage in the context of LGBTQ couples, as will be seen in the following example.

Christina Smarr and Tina Burch were partners, and on December 25, 1999, they welcomed a son into their family.<sup>151</sup> Christina and Tina raised their son together until a car accident occurred on June 1, 2002, resulting in Christina's death.<sup>152</sup> Following the crash, Christina's father took custody of Tina's son while Tina recovered from her injuries.<sup>153</sup> During that time, a West Virginia court appointed Christina's father as the boy's guardian.<sup>154</sup> In the family court proceeding that followed, a court-appointed psychologist recommended that Tina should receive sole custody of the child under the doctrine of *de facto* parentage.<sup>155</sup> Christina's father, however, appealed the decision.<sup>156</sup>

This appeal resulted in a state circuit court remanding the decision, holding that Tina was "not the legal parent" of her son because the state had not extended *de facto* parentage to include "the former same sex partner of a biologi-

146. William B. Turner, *The Lesbian De Facto Parent Standard in Holtzman v. Knott: Judicial Policy Innovation and Diffusion*, 22 BERKELEY J. GENDER L. & JUST. 135, 140 (2007).

147. *Holtzman*, 533 N.W.2d at 442-43 (Steinmetz, J., dissenting) (quoting *Barstad v. Frazier*, 1348 N.W.2d 479 (Wis. 1984)) (citing *Prince v. Massachusetts*, 321 U.S. 158, 166 (1944)).

148. *Id.* (emphasis added).

149. Turner, *supra* note 146, at 145.

150. *Id.* at 143.

151. Abbe A. Klezer, *The Need for a More Comprehensive De Facto Parenting Definition*, 36 WOMEN'S RTS. L. REP. 206, 206 (2015).

152. *Id.*

153. *Id.*

154. Clifford K. v. Paul S. *ex rel.* Z.B.S., 619 S.E.2d 138, 144 (W. Va. 2005).

155. Note the West Virginia court calls the doctrine "psychological parentage," but *de facto* and psychological parentage are interchangeable. See Dara E. Purvis, *Intended Parents and the Problem of Perspective*, 24 YALE J. L. & FEMINISM 210, 226 (2012) ("[A] modern reform in definition of parentage is to include a functional theory, sometimes called *de facto* or psychological parenthood.").

156. *Clifford K.*, 619 S.E.2d at 144.

cal parent.”<sup>157</sup> What followed was three years of drawn-out legal battles between Tina and her partner’s father, which forced the child to move “from home to home,” even if that home had no connection whatsoever to his actual mother.<sup>158</sup> In the end, the Supreme Court of Appeals of West Virginia decided that Tina had the legal right to raise her child.

In reversing the lower court’s decision, the appellate court defined a *de facto* parent as “a person who, on a continuing day-to-day basis, through interaction, companionship, interplay, and mutuality, fulfills a child’s psychological and physical needs” and may be “the biological, adoptive, or foster parent, or any other person.”<sup>159</sup> While the court may have glossed over the true reason for this prolonged litigation,<sup>160</sup> the court eventually concluded that the child belonged with his mother, regardless of the fact they were not biologically related.

That this took three years of legal process for the child’s mother to receive full custody of the child highlights the need for modification of traditional parentage doctrines, like *de facto* parentage, to meet the needs of LGBTQ families. While West Virginia may have arrived at the proper outcome in the case, many states do not extend parental rights to *de facto* parents. Each state must decide whether a *de facto* parent will receive either: full parental rights, visitation rights or custody, or simply be little more than “a legal stranger to the child.”<sup>161</sup>

According to the Movement Advancement Project, an independent non-profit organization focusing on LGBTQ rights, as of February 2017, six states have decided to not recognize *de facto* parents at all, removing 11% of the LGBTQ population from the doctrine’s application and benefits.<sup>162</sup> An additional fourteen states have not expressly extended the doctrine to apply to LGBTQ parents and may require a parent to prove his or her status as a parent to the court.<sup>163</sup> Even in these cases, the state does not use the doctrine to apply full parental rights, only visitation and/or custody.<sup>164</sup> Twenty-five percent of the LGBTQ population live in states with a *de facto* parentage doctrine that only provides visitation and/or custody.<sup>165</sup> Finally, only six states allow *de facto* parents to receive full parental rights.<sup>166</sup> This varied and diverse application of

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157. *Id.*

158. Klezer, *supra* note 151, at 206.

159. *Clifford K.*, 619 S.E.2d at 157 (emphasis added). The result of this decision was to reinstate the family court’s decision to grant Tina full custody over her son.

160. The court showed concern over the boy’s circumstances following the tragic accident stating he “currently finds himself . . . in litigation over his permanent custodial placement only because too many people love” him, though the more likely circumstance for such prolonged litigation had to do with the fact he was born into a family comprised of two mothers. *Clifford K.*, 619 S.E.2d at 159.

161. Purvis, *supra* note 155, at 226.

162. *De Facto Parenting Statutes*, MOVEMENT ADVANCEMENT PROJECT, [http://www.LGBTQmap.org/equality-maps/de\\_facto\\_parenting\\_statutes](http://www.LGBTQmap.org/equality-maps/de_facto_parenting_statutes) (last visited Nov. 9, 2017).

163. *Id.*

164. *Id.*

165. *Id.*

166. *Id.*

the doctrine among the states can, and does, cause issues for LGBTQ couples.<sup>167</sup>

As discussed earlier, one effective way to address the application of a traditional parentage doctrine to LGBTQ parents is to shift the analysis to consider the best interest of the child.<sup>168</sup> In *Holtzman*, however, the dissent explicitly rejected this approach, stating that “absent narrowly defined, compelling circumstances, the legal parent of a child is constitutionally entitled to decide whether visitation by a nonparent is in the best interest of the child.”<sup>169</sup> In the context of LGBTQ parents, this approach simply discriminates against the nonbiological parent. Under this view, the biological parent, as the “natural” parent of the child, has the constitutional right to withhold access to the child’s other parent, regardless of what may be in the child’s best interest.<sup>170</sup>

Courts have struggled to modify *de facto* parentage to meet the needs of LGBTQ parents. And even when they have modified the doctrine, not all states have extended the doctrine to provide full parental rights.<sup>171</sup> For LGBTQ families living in states that only provide visitation or custody rights through the doctrine, the outcome is far from certain should a parent be required to go to court seeking legal parentage. Just as states have struggled with *de facto* parentage, states have also faced the challenges of analyzing the parentage doctrine of equitable adoption in the context of LGBTQ parents.

### 5. *Equitable Adoption*

“[M]any courts have recognized that, when an individual who is legally competent to adopt a child enters into a valid and binding contract to do so . . . the contract may be enforced in equity” to give the child the status of being “formally adopted.”<sup>172</sup> Courts’ application of this doctrine vary significantly by jurisdiction.<sup>173</sup> While some courts require the presence of a contract to adopt as a prerequisite to the doctrine,<sup>174</sup> some states have abandoned this prerequisite, electing instead to look at the behavior of the parties in determining whether equitable adoption applies.<sup>175</sup> For example, instead of requiring an express contract, a California court held that a person seeking parental rights “must demonstrate the existence of some direct expression” of the “intent to adopt” the child.<sup>176</sup>

The primary use of this doctrine occurs when a person presents an executory contract for adoption after the death of a trustee of an estate to recover under the laws of inheritance.<sup>177</sup> “However, since equitable adoption is only an

167. See *Clifford K. v. Paul S. ex rel. Z.B.S.*, 619 S.E.2d 138 (W. Va. 2005).

168. See *supra* Subsection II.C.1.

169. *Holtzman v. Knott*, 533 N.W.2d 419, 443 (Wis. 1995) (Steinmetz, J., dissenting).

170. *Id.* (quoting *Barstad v. Fravier*, 348 N.W.2d 479 (Wis. 1984)).

171. Turner, *supra* note 146, at 140–41.

172. Tracy Bateman Farrell, Annotation, *Modern Status of Law as to Equitable Adoption or Adoption by Estoppel*, 122 A.L.R. 5th 205 § 2[a] (2004).

173. See *id.*

174. *DeHart v. DeHart*, 2013 IL 114137, ¶ 52.

175. *Id.* at ¶ 53.

176. *Id.* at ¶ 54 (quoting *Estate of Ford v. Ford*, 82 P.3d 747, 754 (Cal. 2004)).

177. Farrell, *supra* note 172, § 2(a).

equitable remedy to enforce a contract right, it is not intended or applied to create the legal relationship of parent and child . . . nor is it meant to create a legal adoption.”<sup>178</sup> Because of this equitable standard, courts have denied children adopted through equitable adoption from inheriting from the blood relatives of their adopted families, from receiving workers’ compensation or wrongful death benefits upon their adoptive parent’s death, and from being considered legally adopted when their adoptive parent passes away.<sup>179</sup> This, however, has not stopped states from modifying the doctrine to find grounds for parentage.

In *Stankevich v. Milliron*, a Michigan appellate court extended the doctrine of equitable adoption to cover a lesbian couple who married in Canada but separated two years later while living in Michigan.<sup>180</sup> In that case, Jennifer Stankevich and Leanne Milliron married in 2007, and shortly thereafter, Leanne became pregnant through ART and gave birth to a child.<sup>181</sup> In 2009, Jennifer and Leanne separated, and although they initially agreed on a schedule for visitation times with the child, that quickly deteriorated.<sup>182</sup> Jennifer, the nonbiological parent, then filed a petition for custody, but a trial court granted Leanne’s petition, the biological mother, stating that Jennifer had no basis for filing the petition because she was not a parent.<sup>183</sup> On appeal that decision was reversed on the basis of equitable adoption.<sup>184</sup>

Michigan, however, did not always extend equitable adoption to LGBTQ parents. In *Van v. Zahorik*, Michigan denied extending the doctrine to apply to LGBTQ parents because “recognizing plaintiff’s same-sex union as a marriage under the equitable-parent doctrine would have violated the constitutional and statutory provisions defining marriage.”<sup>185</sup> Not until the U.S. Supreme Court’s decision in *Obergefell*, which held it was a constitutional right for all people to marry,<sup>186</sup> did LGBTQ couples in Michigan have standing to pursue equitable adoption.<sup>187</sup> In its holding, the Michigan court established three elements for equitable adoption: (1) the person seeking parental rights and the child have developed a relationship before the divorce; (2) the person seeking parental rights desires to have parental rights; and (3) that person is willing to take on all the responsibilities of supporting the child.<sup>188</sup>

The Michigan court expressly stated that in light of *Obergefell*, any law limiting the equitable parent doctrine to the confines of marriage is void, and that marriage no longer applies as a barrier to the application of equitable adoption.<sup>189</sup> Concluding that there is no requirement for an express or implied

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178. *Id.*

179. *Id.*

180. *Stankevich v. Milliron*, 882 N.W.2d 194 (Mich. Ct. App. 2015).

181. *Id.* at 195.

182. *Id.*

183. *Id.* at 195–96.

184. *Id.* at 199.

185. *Id.* at 196.

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

187. *Stankevich*, 882 N.W.2d at 196–97.

188. *Id.* at 197.

189. *Id.* at 198.

contract to adopt—meaning marriage is not a prerequisite for the enforcement of a “contract” to determine parentage—the equitable adoption doctrine functions like that of *de facto* parentage. For example, in *Wheeling Dollar Savings & Trust Co. v. Singer*, the West Virginia Supreme Court refused to require the presence of a contract to apply equitable adoption, instead holding that equitable adoption applies when the circumstances demonstrate the intended parent loved the child, intended to adopt the child, cared for the child from an early age, and held out the child as his or her own.<sup>190</sup> This analysis by the West Virginia court holds a striking resemblance to the ALI *de facto* parentage factors that look at the parent-child relationship and the duties and responsibilities a parent had over the child.<sup>191</sup>

### III. ANALYSIS

Although several methods provide legal parental rights to individuals—such as the marital presumption and *de facto* parentage—their applicability to LGBTQ people is difficult given their often unique situations. Additionally, the rights extended to these LGBTQ parents are often less than full legal parental rights.<sup>192</sup> The inadequacy and inconsistency of existing approaches necessitate a modernized statutory approach to dealing with parentage is necessary.

Extending statutory parentage to LGBTQ couples would remove the hit-or-miss application of traditionally heterosexual parental doctrines, the potential for anti-LGBTQ bias, and the case-by-case analysis of whether a court should extend parental rights to an LGBTQ parent, specifically a nonbiological LGBTQ parent. Instead, a statutory approach would create an easy-to-apply statutory scheme that would impose clarity and greater uniformity on an otherwise fraught process.<sup>193</sup>

#### A. *The Importance of Parentage by Statutory Definition*

For nonbiological parents and their children, it is critical to be recognized as a child’s legal parent, as opposed to a guardian or just one with custody over the child.<sup>194</sup> While legal status is not required to care for a child, “legal parentage has attendant benefits, such as long-term stability and clear lines of responsibility and obligation, that benefit the child in the long term.”<sup>195</sup> Children also have deeper emotional relationships with legal parents, as opposed to permanent caregivers.<sup>196</sup> Most importantly, however, are the constitutional protec-

190. *Wheeling Dollar Sav. & Trust Co. v. Singer*, 250 S.E.2d 369, 373–74 (W. Va. 1978).

191. Compare PRINCIPLES OF THE LAW OF FAM. DISSOLUTION: ANALYSIS & RECOMMENDATIONS § 2.03 (AM. L. INST. 2002), with *Holtzman v. Knott*, 533 N.W.2d 419 (Wis. 1995).

192. *Holtzman*, 533 N.W.2d at 437 (applying the doctrine to only extend visitation rights, not full parental rights).

193. See *infra* Section III.A.

194. Purvis, *supra* note 155, at 213.

195. *Id.*

196. *Id.*

tions that come with parental status, which grant parents the right to “determine the care, custody, and control of a child.”<sup>197</sup>

These constitutional protections give “near complete independence in decision-making” to the parent, and protect that decision-making vehemently.<sup>198</sup> Only under certain limited circumstances can the government intervene on a child’s behalf and dictate a parent’s decisions. The U.S. Supreme Court has said “that a parent’s desire for a right to ‘the companionship, care, custody, and management of his or her children’ is an important interest that ‘undeniably warrants deference and, absent a powerful countervailing interest, protection.’”<sup>199</sup> When deciding whether circumstances warrant terminating one’s parental rights, “the decision to terminate his or her parental status is, therefore a commanding one.”<sup>200</sup>

This standard is so commanding, in fact, that the U.S. Supreme Court has held that, for public policy reasons, the standard required in evaluating parental termination cases should be higher than “those minimally tolerable under the Constitution”<sup>201</sup>; meaning a parent has both a substantive and procedural due process aspect to his or her parental rights.<sup>202</sup> As has been seen throughout this Note, however, not every parent can be recognized in every state as a child’s legal parent.

Before *Obergefell*, it was difficult for LGBTQ couples to adopt a child because many states did not allow the process for LGBTQ people.<sup>203</sup> After *Obergefell*, while all fifty states removed bans on LGBTQ adoptions,<sup>204</sup> obstacles to parenthood (and parentage) remain for many LGBTQ couples. Under the marital presumption doctrine, couples who were constitutionally denied the right to marriage were discriminated against for not being able to marry because the doctrine relies on the presence of marriage.<sup>205</sup> Additionally, even as the marital presumption moved beyond requiring a biological connection to be considered a parent, simply having biology as a starting point in the analysis instantly removed nonbiological LGBTQ parents from the doctrine’s consideration.<sup>206</sup> Similarly, under the *de facto* parentage doctrine, the emphasis on biology and the varied rights granted to a *de facto* parent limit the extent to which many LGBTQ parents can benefit from the doctrine.<sup>207</sup>

Parental doctrines, when viewed through the lens of a child’s best interest, often fail to provide LGBTQ parents with legal parentage. These doctrines are applied on a case-by-case basis, and, for some courts, these cases will call forward the question of whether it is in the child’s best interest to have

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197. *Id.* at 214.

198. *Id.*

199. *Lassiter v. Dep’t of Soc. Servs.*, 452 U.S. 18, 27 (1981) (quoting *Stanley v. Illinois*, 405 U.S. 645, 651 (1972)).

200. *Id.*

201. *Id.* at 33.

202. *Id.* at 37.

203. *See supra* text accompanying notes 80–83.

204. *Joint Adoption Laws*, FAM. EQUAL. COUNCIL, [http://www.familyequality.org/get\\_informed/resources/equality\\_maps/joint\\_adoption\\_laws/](http://www.familyequality.org/get_informed/resources/equality_maps/joint_adoption_laws/) (last visited Nov. 9, 2017).

205. *See supra* Section II.C.3.

206. *Id.*

207. *See supra* Section II.C.4.

LGBTQ people as parents.<sup>208</sup> While most courts may not see having LGBTQ parents as an issue, some courts—especially at the state level—have demonstrated a bias against LGBTQ people in their rulings.<sup>209</sup>

When there is a statute in place defining legal parentage, however, these functional questions and case-by-case analyses by courts are removed and replaced with a standard of parentage that meets the needs of both biological and nonbiological parents and extends the protections provided by such legal parental status. The Uniform Law Commission (“ULC”) is currently engaged in discussion on drafting a new Uniform Parentage Act to address several of the issues mentioned above and released a draft of the updated Act in July 2016.<sup>210</sup> It becomes clear by reading past and present discussion of proposed parentage acts that the ULC has come a long way since it first began discussing a uniform approach to parentage terms.<sup>211</sup>

### B. *The Uniform Parentage Act of 2002*

The ULC had a long history of addressing parentage before it began discussing changes to the Uniform Parentage Act to accommodate LGBTQ parents. The ULC’s first attempt at addressing parentage came in 1922 with the Uniform Illegitimacy Act.<sup>212</sup> Following the Uniform Illegitimacy Act, in 1960, the ULC promulgated the Uniform Blood Tests To Determine Paternity Act.<sup>213</sup> None of these acts were ever widely accepted, with nine states enacting the blood test standard and only four adopting the Uniform Illegitimacy Act.<sup>214</sup>

“The most important uniform act addressing the status of the nonmarital child was the Uniform Parentage Act (“UPA”) approved in 1973.”<sup>215</sup> Over the next few decades, nineteen states enacted the 1973 UPA.<sup>216</sup> Additionally, many states enacted portions of the Act.<sup>217</sup> The most successful achievements contained in the 1973 UPA were that the Act declared that “all children should be treated equally without regard to marital status of the parents” and “established a set of rules for presumptions of parentage.”<sup>218</sup>

Although the 1973 UPA inadvertently took steps in the right direction in addressing the unique and challenging issues facing LGBTQ parents,<sup>219</sup> even the ULC’s touted highlights and achievements of the Act systematically dis-

208. Purvis, *supra* note 155, at 216–17.

209. See *supra* Section II.A.

210. UNIF. PARENTAGE ACT (UNIF. LAW COMM’N, Discussion Draft 2016), [http://www.uniformlaws.org/shared/docs/parentage/2016AM\\_AmendedParentage\\_Draft.pdf](http://www.uniformlaws.org/shared/docs/parentage/2016AM_AmendedParentage_Draft.pdf) [hereinafter 2017 UPA].

211. See *infra* Section III.C.

212. UNIF. PARENTAGE ACT Prefatory Note (UNIF. LAW COMM’N 2002), [http://www.uniformlaws.org/shared/docs/parentage/upa\\_final\\_2002.pdf](http://www.uniformlaws.org/shared/docs/parentage/upa_final_2002.pdf) [hereinafter 2002 UPA].

213. *Id.*

214. *Id.*

215. 2002 UPA, *supra* note 212, Prefatory Note 1.

216. *Id.*

217. *Id.*

218. *Id.*

219. See *Elisa B. v. Superior Court*, 117 P.3d 660, 663 (Cal. 2005) (using the 1973 UPA to find legal parentage for a lesbian couple).

criminated against LGBTQ parents.<sup>220</sup> Though the UPA has undergone changes since its original implementation by the ULC,<sup>221</sup> the most recently promulgated UPA fails to adequately address LGBTQ parentage.<sup>222</sup>

For example, in the 2002 UPA, although there were “[f]our separate definitions of ‘father’” provided in the Act to account for “permutations of a man who may so be classified,” no term expressly acknowledged gay males.<sup>223</sup> Even when addressing artificial insemination, a situation gay males would likely face when trying to have a family, the 2002 UPA did not address parentage for both male partners, only the male who “provides sperm for . . . the assisted reproduction by a woman.”<sup>224</sup> It is no surprise, then, that when discussing the presumption of paternity, the 2002 UPA did not provide for a presumption of paternity for a gay male partner who did not contribute genetically to an assisted reproduction.<sup>225</sup> The lack of accommodations for LGBTQ people in the 2002 UPA does not end with gay men—it also affects lesbian mothers.<sup>226</sup>

For example, when discussing the acknowledgment of paternity, the 2002 UPA states that a “mother of a child and a man claiming to be the genetic father of the child may sign an acknowledgment of paternity with intent to establish the man’s paternity.”<sup>227</sup> This does not address the potential scenario where a lesbian partner seeks acknowledgment of parentage. In fact, when defining “voluntary acknowledgment of paternity,” the Act never addresses a situation that is not heterosexual.<sup>228</sup> When discussing gestational agreements, the Act only seems to address heterosexual agreements.<sup>229</sup> The section begins by saying “[a] prospective gestational mother, her husband if she is married, a donor . . . and the intended *parents* may enter into a written agreement,”<sup>230</sup> which seems to demonstrate that “parents” is not inherently heterosexual because there are no gendered terms qualifying it. The Act, however, also appears to exclude LGBTQ people from this definition. This is seen in subparagraph (b) of the same section that states “[t]he *man and the woman* who are the intended parents must both be parties to the gestational agreement.”<sup>231</sup> Although the

220. See *supra* Section II.C.3 (discussing how the presumption of marriage historically failed to translate in application to LGBTQ parents who had children before *Obergefell*, and therefore, could not marry).

221. See, e.g., 2017 UPA, *supra* note 210 (discussing proposed changes to the 2002 UPA).

222. See *infra* Section III.C.

223. 2002 UPA, *supra* note 212, § 102 cmt. at 6.

224. *Id.* § 703 (discussing the parentage of only one father who provided the sperm without delving into the possibility that two fathers may be participating in the assisted reproduction).

225. *Id.* § 204(a) (demonstrating when the presumption of paternity applies, but only using examples between “he and the mother of the child,” and never using an example pertinent to LGBTQ couples).

226. See generally Nancy D. Polikoff, *A Mother Should Not Have to Adopt Her Own Child: Parentage Laws for Children of Lesbian Couples in the Twenty-First Century*, 5 STAN. J. C.R. & C.L. 201 (2009) (discussing how the 2002 UPA did not recognize the parental rights of lesbian partners, and that it was not until the promulgation of the 2008 Uniform Probate Code that lesbian mothers were recognized in a Uniform Act).

227. 2002 UPA, *supra* note 212, § 301.

228. *Id.* §§ 301–02 (“[T]he child whose paternity is being acknowledged: (A) does not have a presumed father, or has a presumed father whose full name is stated; and (B) does not have another acknowledged or adjudicated father.”) (emphasis added).

229. See *id.* § 801.

230. *Id.* § 801(a) (emphasis added).

231. *Id.* § 801(b) (emphasis added).



language of the 2002 UPA does not specifically reference LGBTQ parentage, certain provisions have been applied to LGBTQ people.<sup>232</sup>

For example, some courts “have interpreted two standard provisions of the [2002 UPA] to find a biological mother’s same-sex partner the parent of child.”<sup>233</sup> These two provisions include the man’s presumption of parentage if he “receives the child into his home and openly holds out the child as his natural child,”<sup>234</sup> and the mother-child relationship provision that states “insofar as practicable, the provisions of this part applicable to the father and child relationship apply.”<sup>235</sup> Although applying these heterosexual provisions from the UPA to lesbian parents appears to have resulted in some equitable outcomes, “[t]he lack of statutory clarity on when, by whom, and on what basis the parentage presumption can be rebutted results in an unacceptable level of uncertainty threatening the stability of a child’s family.”<sup>236</sup> The 2002 UPA failed to meet the needs of LGBTQ parents, and traditional doctrines of parentage as applied by courts have inadequately met LGBTQ parents’ needs.<sup>237</sup> Therefore, action must be taken to specifically address the unique and challenging needs of nonbiological LGBTQ parents who either could not marry before *Obergefell* or who have decided to not marry post-*Obergefell*.

Thankfully, the ULC recently began discussing a new draft of the Uniform Parentage Act.<sup>238</sup> The shortfalls of the 2002 UPA highlights the importance of the changes currently being discussed by the ULC, as well as the continued improvements the ULC can make to its most recent draft.

### C. Discussion Draft of the Uniform Parentage Act of 2017

The ULC intends for the 2017 UPA to address three primary issues.<sup>239</sup> “First, the 2017 UPA seeks to ensure the equal treatment of children born to same-sex couples.”<sup>240</sup> The ULC’s shift in policy comes following the “2015 decision in *Obergefell v. Hodges* . . . [where] the United States Supreme Court held that laws barring marriage between two people of the same sex are unconstitutional,” meaning, “some parentage laws that treat same-sex couples differently than different-sex couples may [also] be unconstitutional.”<sup>241</sup> One step

232. See *infra* text accompanying notes 262–63. It should be noted that the ULC’s lack of LGBTQ accommodations should not come as such a surprise given that only one state recognized same-sex unions in 2002, while two states had constitutional bans on gay marriage in place. *Timeline: Gay Marriage Chronology*, L.A. TIMES (June 26, 2015), <http://graphics.latimes.com/usmap-gay-marriage-chronology/> (showing that as of November 5, 2000, only one state, Vermont, had civil unions (passed July 1, 2000), while two states, Nebraska and Nevada, constitutionally banned same-sex marriage).

233. Polikoff, *supra* note 226, at 218.

234. *Id.* (quoting CAL. FAM. CODE § 7611(d) (West 2009)).

235. *Id.* (quoting CAL. FAM. CODE § 7650 (West 2009)).

236. *Id.* at 225–26.

237. See *supra* Section III.B.

238. 2017 UPA, *supra* note 210.

239. *Id.* at 1.

240. *Id.*

241. *Id.* (“The 2017 UPA updates the Act to address this potential constitutional infirmity by amending the provisions so that they address and apply equally to same-sex couples.”).

the ULC takes to address this issue is to change the “gendered terms” used in the 2002 UPA.<sup>242</sup>

The 2017 UPA also updates “surrogacy provisions to reflect developments in that area,” and addresses “the rights of children born through assisted reproductive technology.”<sup>243</sup> Both issues apply to the LGBTQ community given the necessity for many LGBTQ couples, especially gay men, to use surrogacy and given that some courts have denied nonbiological LGBTQ parents their parental rights over the best interest of the children.<sup>244</sup> Analyzing the 2017 UPA’s approach to meeting these goals will reveal the strengths and weaknesses of the 2017 UPA in its current form.

### 1. *Equal Treatment of Children Born to LGBTQ Couples*

Following *Obergefell*, there was a lot of uncertainty as to how the landmark decision would affect other areas of the law.<sup>245</sup> Broad discussion ensues over *Obergefell*’s impact on religious liberty and role in facilitating LGBTQ public accommodations.<sup>246</sup> Accordingly, the ULC felt compelled to address *Obergefell*’s impact on parentage in the United States. In discussing the proposed changes to the 2002 UPA, the ULC specifically addressed how after *Obergefell* some state parentage laws were deemed unconstitutional based on the unequal treatment of LGBTQ couples.<sup>247</sup>

For example, the district court in Utah in *Roe v. Patton*<sup>248</sup> held that a statute was unconstitutional because, following *Obergefell*, no statute can differentiate “between male spouses of women who give birth through assisted reproduction . . . and similarly situated female spouses of women who give birth through assisted reproduction.”<sup>249</sup> The court maintained that a parentage law must not treat couples differently based on their gender composition. Therefore, one of the biggest changes to the 2017 ULC in its discussion draft was to remove gendered terms from parentage definitions.<sup>250</sup>

One of the most significant changes that resulted from the removal of gendered terms can be found in the definition of “[i]ntended parent.”<sup>251</sup> This definition states that an intended parent “means an individual, married or unmarried, who manifests the intent to be legally bound as the parent of a child

242. *Id.*

243. *Id.* at 1–2.

244. *See* Kreis, *supra* note 1.

245. *See, e.g.,* William B. Duff et al., *Obergefell Uncertainty*, SCHIFF HARDIN (Oct. 1, 2015), <http://www.schiffhardin.com/insights/publications/2015/obergefell-uncertainty> (discussing uncertainty regarding retroactive application of *Obergefell* in fields such as compensation, employee benefits, and self-insured healthcare plans).

246. *See generally* Robin Fretwell Wilson, *Bargaining for Religious Accommodations: Same-Sex Marriage and LGBTQ Rights After Hobby Lobby*, in *THE RIGHT OF CORPORATE RELIGIOUS LIBERTY* (Micah Schwartzman et al. eds., 2016); Charles J. Russo, *Religious Freedom in Faith-Based Education Institutions in the Wake of Obergefell v. Hodges: Believers Beware*, 2016 BYU EDUC. & L.J. 263 (2016).

247. 2017 UPA, *supra* note 210, at 1.

248. *Id.*

249. *Row v. Patton*, No. 2:15-cv-00253-DB, 2015 WL 4476734, at \*2, \*4 (D. Utah July 22, 2015).

250. 2017 UPA, *supra* note 210, at 1.

251. *Id.* § 102(16).

resulting from an assisted reproduction.”<sup>252</sup> The updated definition is a drastic change from the 2002 UPA’s definition of “intended parent,” which explicitly stated that the intended parents were to be a man and a woman.<sup>253</sup> While this is a huge step forward for those parents—regardless of their marital status—who have children through ART, it does not address all LGBTQ parents because it only addresses those intended parents using or pursuing ART conception. Other changes to the Act should help reconcile this, though.

Section 204 of the 2017 UPA discusses the presumption of parentage.<sup>254</sup> As discussed earlier, the marital presumption has traditionally had a negative effect on LGBTQ parents because, until *Obergefell*, LGBTQ couples did not have the constitutional right to marry.<sup>255</sup> But changes to the 2017 UPA could potentially alleviate this negative treatment. The 2017 UPA offers several options for when parentage can be presumed.<sup>256</sup> The first four options all apply to heterosexual couples, but these options could arguably assist lesbian parents in arguing for the presumption of parentage as all four options discuss parentage between an “individual and the woman who gave birth to the child.”<sup>257</sup> The fifth option for meeting the presumption of parentage test under the 2017 UPA could open the door for gay male parents in addition to lesbian parents.

The fifth option under section 204 states that “[a]n individual is presumed to be the parent of a child if” that individual “for the first two years of the child’s life . . . resided in the same household with the child and openly held out the child as the individual’s own.”<sup>258</sup> This definition, unlike earlier in the 2017 UPA, does not include gender pronouns, not even to mention the woman who gave birth to the child. This presumption of parentage, therefore, seems to open the door for all LGBTQ parents who undergo steps to have a child—either through ART, surrogacy, or naturally—if both individuals hold themselves out to be the child’s parent and live in the same home as the child for two years.<sup>259</sup> By its language, this option seems to take a similar approach to parentage as the ALI and several states that apply the *de facto* parentage doctrine.<sup>260</sup>

If this option for meeting the presumption of parentage were applied to the case discussed in the opening of this Note, *Marby v. Marby*—dealing with Jennifer Zunk and Carin Hopps<sup>261</sup>—there would likely be a different outcome. If Michigan had a statutory provision that presumed parentage for an individual who lived with a child for the first two years of its life and “held out the child” as his or her own, the court would have been more likely to rule favor of

252. *Id.*

253. See 2002 UPA, *supra* note 212, § 801, cmt. at 71.

254. 2017 UPA, *supra* note 210, § 204(a).

255. See *supra* Subsection II.C.3.

256. See 2017 UPA, *supra* note 210, § 204(a).

257. *Id.* § 204(a)(1)–(4) (discussing four options for presumption of parentage between “the individual and the woman who gave birth to the child”). In qualifying that the presumption is between an “individual” and the “woman who gave birth to the child,” this excludes gay male parents, but it does open the door for non-biological lesbian mothers to claim presumption when their partner gives birth to a child. *Id.*

258. *Id.* § 204(a)(5).

259. *Id.*

260. See *supra* Subsection II.C.4.

261. See *Mabry v. Mabry*, 882 N.W.2d 539, 540 (Mich. 2016).

Jennifer, who may not have given birth to her children, but who raised them, lived with them, and was their mother in every other sense.<sup>262</sup>

This is especially true given that case dealt with a lesbian couple, as all five presumption of parentage tests in the 2017 UPA could apply to them.<sup>263</sup> Even if the case had involved a gay male couple with a child, however, it could apply under subparagraph five of section 204 because the parent seeking parental status in *Marby* lived with the children for several years while publicly holding out to be the child's parent.<sup>264</sup> This proposed change to the 2017 UPA could have an important impact on LGBTQ parents who had children and separated before *Obergefell* or how have decided not to marry post-*Obergefell*. Unlike *de facto* parentage, which leaves it up to the states which rights are conferred upon a *de facto* parent,<sup>265</sup> this statute would provide the full panoply of parental rights.<sup>266</sup> Of course, given that the proposed language does not explicitly reference LGBTQ parents, it potentially leaves too much ambiguity and confusion, opening the door for courts to interpret the statute in a way that negatively impacts LGBTQ parents, especially considering many courts' hostility toward LGBTQ people.<sup>267</sup>

Another change in the 2017 UPA is in Article 7, which covers assisted reproduction techniques outside of surrogacy.<sup>268</sup> This section is extremely relevant to LGBTQ couples, and its modification to address LGBTQ couples is imperative for equitable treatment of LGBTQ parents. The proposed changes to Article 7 are consistent with the overall emphasis of the Act: to address the needs of LGBTQ people, specifically through the removal of gendered terms.<sup>269</sup>

In removing the term "[a] man" from the 2002 UPA in the updated draft, the Act attempts to open the door to LGBTQ couples seeking legal paternity of children born through ART.<sup>270</sup> Through Article 7, the establishment of paternity must be met as prescribed in section 704, which states that "[c]onsent by a woman, and the individual who intends to be a parent of a child born through assisted reproduction must be in a record."<sup>271</sup> The "[f]ailure to consent in a record . . . does not preclude a finding of parentage if the woman giving birth and the individual, during the first two years of the child's life resided together . . . and openly held out the child as their own."<sup>272</sup> This language, as drafted,

262. See *supra* text accompanying notes 1–3.

263. Because the tests contain "and the woman who gave birth to the child," lesbian couples could be presumed parents in circumstances where one of the women carried the child to term. 2017 UPA, *supra* note 210, § 204(a).

264. *Id.* § 204(a)(5).

265. See *supra* Subsection II.C.4.

266. See *supra* Section III.A.

267. See *supra* Section II.A.

268. 2017 UPA, *supra* note 210, § 703.

269. Compare 2017 UPA, *supra* note 210, § 703 ("An individual who provides a gamete for, or who consents to, assisted reproduction by a woman . . . is a parent of the resulting child."), with 2002 UPA, *supra* note 212, § 703 ("A man who provides sperm for, or consents to, assisted reproduction by a woman . . . is a parent of the resulting child.").

270. 2017 UPA, *supra* note 210, § 704.

271. *Id.*

272. *Id.*

meets the needs of those members of the LGBTQ community to which the language applies: lesbian mothers.<sup>273</sup> By removing male-gender terms, when two women decide to have a child using ART, the nongenetical mother will be presumed the child's mother if there were either consent or the two women lived together for two years following the child's birth.<sup>274</sup>

Just as seen with the 2017 UPA's proposed changes in section 204,<sup>275</sup> the 2017 UPA discussion draft corresponds with traditional parentage doctrines. Just as the ALI's *de facto* parentage definition requires a parent seeking parental rights to have lived with the child for two years while holding out to be the child's parent publicly,<sup>276</sup> the 2017 UPA modifications would also allow for the presumption of parentage when two women lived together for two years while holding out to be the child's mothers.<sup>277</sup> This similarity in approach demonstrates that, while traditional parental doctrines have not resulted in equitable outcomes for many LGBTQ parents, the underlying principles of the doctrines may, in fact, meet the needs of courts looking beyond the gender norms and traditionally held definitions of family and apply the doctrines to the facts of the case. Again, applying these proposed changes to Jennifer Zunk and Carin Hopps, the 2017 UPA would have met their unique needs.

Jennifer and Carin were partners for fifteen years and had two children through ART during that time.<sup>278</sup> This pulls Jennifer and Carin into the coverage of the UPA's proposed changes to Article 7. Then, Jennifer lived with her children and for eight years publicly held out to be their mother.<sup>279</sup> Under the 2017 proposed changes, Jennifer would clearly meet the prerequisites to be considered her children's legal parent.<sup>280</sup> Unfortunately, Jennifer was subject to a court that refused to extend a traditional parentage doctrine, holding that Jennifer was no more than a stranger to her children under the law.

The ULC's attempted modifications to the 2002 UPA are steps in the right direction, and so far, do a better job than traditional parentage doctrines in meeting the needs of LGBTQ parents who had children but separated before *Obergefell* or who have made the decision not to marry post-*Obergefell*.

## 2. Modernizing Surrogacy Provisions

The second stated goal of the 2017 UPA is the modernization of surrogacy provisions.<sup>281</sup> Although states have been generally receptive to the 2002 UPA,<sup>282</sup> "[s]tates have been particularly slow to enact Article 8 of the 2002

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273. Article 7 is inapplicable to gay men, who by nature must either go through adoption or surrogacy to have a child, and Article 7 does not apply to surrogacy.

274. *Id.*

275. See *supra* text accompanying notes 254–67.

276. PRINCIPLES OF THE LAW OF FAMILY DISSOLUTION: ANALYSIS AND RECOMMENDATIONS § 2.03 (AM. L. INST. 2002).

277. 2017 UPA, *supra* note 210, § 704.

278. Kreis, *supra* note 1.

279. *Id.*

280. 2017 UPA, *supra* note 210, § 704.

281. *Id.* at 1.

282. *Id.* at 2 (“Eleven (11) states adopted versions of the 2002 UPA.”).

UPA, which covers surrogacy.<sup>283</sup> Only two states have enacted provisions related to Article 8.<sup>284</sup>

The fact that very few states enacted Article 8 is likely the result of a confluence of factors. One likely factor is the controversial nature of surrogacy itself. But the fact that four of the states that enacted the 2002 UPA have provisions permitting surrogacy that are not modeled on Article 8 of the 2002 UPA suggests that the small number of enactments is also affected by the substance of Article 8. Accordingly, the 2017 UPA updates the surrogacy provisions to make them more consistent with current surrogacy practice.<sup>285</sup>

The key modernization aspect of Article 8 in the 2017 UPA is the removal of gendered terms, consistent with earlier analysis.<sup>286</sup> This is the key improvement in Article 8. The remaining changes may encourage more states to adopt the Article, but do not have a direct impact on LGBTQ parents pursuing surrogacy.

For example, the first part of Article 8 describes surrogacy agreements. By removing gendered terms, the 2017 UPA highlights the requirements that (1) must be taken by the woman acting as the surrogate and (2) by the “intended parent or parents, whether genetically related to the child or not.”<sup>287</sup> In this function, the language would allow anyone, regardless of sexual orientation or gender, to be an intended parent. In conjunction with the earlier discussed change in the 2017 UPA regarding presumed parentage, with the update, LGBTQ parents could both enter surrogacy agreements and be presumed parents.

### 3. *Rights of Children Born Through Assisted Reproductive Technology*

The final goal of the 2017 UPA was to address the rights of children born through assisted reproductive technology.<sup>288</sup> An estimated 1.6% of all children born in the United States are conceived using ART.<sup>289</sup> Research suggests that this percentage will grow over time.<sup>290</sup> Because of this anticipated growth, the 2017 UPA discussion draft includes an entirely new article, Article 9, addressing the rights of children conceived and born through ART.<sup>291</sup>

Because Article 9 would only have a prospective effect, benefiting only those children born after the enactment of the Act, Article 9 would not play a

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283. *Id.*

284. *Id.*

285. *Id.*

286. Compare 2017 UPA, *supra* note 210, § 801 (describing a surrogacy agreement between an “intended parent or parents” and “a woman” who will give birth to the child), with 2002 UPA, *supra* note 212, § 801 (describing an agreement between a “man and the woman who are the intended parents” with the “prospective gestational mother”).

287. 2017 UPA, *supra* note 210, § 801.

288. *Id.* at 2.

289. CTS. FOR DISEASE CONTROL, ART SUCCESS RATES, <http://www.cdc.gov/art/reports> (last updated May 4, 2017).

290. 2017 UPA, *supra* note 210, at 2 (citing Gaia Bernstein, *Unintended Consequences: Prohibitions on Gamete Donor Anonymity and the Fragile Practice of Surrogacy*, 10 IND. HEALTH L. REV. 291, 298 (2013)).

291. *Id.*

role in specifically addressing the needs of nonbiological LGBTQ parents who had children but separated before *Obergefell*.<sup>292</sup> Article 9 could play an important role in addressing the needs of children born to LGBTQ parents following the adoption of the Act.

Article 9 of the 2017 UPA, however, deals nearly exclusively with the disclosure of identifying information of the donor of genetic material used in ART processes.<sup>293</sup> In fact, Article 9 was specifically drafted to address “the rights of a child to genetic information.”<sup>294</sup> Article 9 does not discuss either the child’s best interest or tests that would be implemented in determining a child’s parent. In short, Article 9 governs a child’s access to information, not to ensure the child has the ability to recognize his or her legal parent.

#### D. *Obstacles Facing a Perfect Outcome*

Overall, the 2017 UPA takes several steps in the right direction to address the unique and challenging needs of LGBTQ parents. In addressing how to treat the children born to LGBTQ couples on par with those of heterosexual couples, the UPA took several steps that built and improved upon traditional forms of parentage to meet the needs of LGBTQ parents. As discussed in the case of Jennifer and Carin, by applying some of the proposed amendments to the 2002 UPA to disputes between LGBTQ parents who had children but separated before *Obergefell*, the 2017 UPA could have an immediate impact of protecting nonbiological LGBTQ parents, while serving the best interests of the children.<sup>295</sup> Similarly, these amendments could play a significant role in protecting nonbiological LGBTQ parents who have decided not to marry following *Obergefell*, but fully intended and acted as a child’s parent. Although implementing this change seems relatively easy—requiring states to pass nongendered parental rights statutes that build upon the 2017 UPA proposal—several obstacles face any potential solution.

One issue potentially inhibiting a solution to this problem is the number of states controlled by Republican legislatures.<sup>296</sup> While that is not to say Republicans are automatically anti-LGBTQ, Republican state legislatures have recently pushed several anti-LGBTQ bills.<sup>297</sup> And just as state-elected judges have been shown to discriminate against LGBTQ people at a higher rate than their federal counterparts, Republican state legislatures have been far worse on LGBTQ issues than states with Democratic majority legislatures. For example, in 2016, six bills were introduced in state legislatures that would prevent local

292. *Id.* § 901 (“This [article] applies only to gametes that are collect after the effective date of this [act].”).

293. 2017 UPA, *supra* note 210, §§ 901–905.

294. *Id.* (Article 9, Reporter’s Comments).

295. *Id.*

296. Following the November 2016 elections, Republicans controlled a record 68% of all partisan state legislative chambers in the country. Barbara Hollingsworth, *Republicans Now Control Record Number of State Legislative Chambers*, CNSNEWS (Nov. 16, 2016, 4:47 PM), <http://www.cnsnews.com/news/article/barbara-hollingsworth/after-winning-7-more-seats-gop-dominance-state-legislatures-all>.

297. See *Past LGBTQ Nondiscrimination and Anti-LGBTQ Bills Across the Country*, ACLU, <https://www.aclu.org/other/past-LGBTQ-nondiscrimination-and-anti-LGBTQ-bills-across-country?redirect=LGBTQ-nondiscrimination-and-anti-LGBTQ-bills-across-country> (last visited Nov. 9, 2017).

governments from passing nondiscrimination protections for LGBTQ people, with one of those laws, North Carolina's HB 2, becoming law.<sup>298</sup> As the solution to this problem requires states to enact statutes specifically focused on protecting LGBTQ families, many states may act quickly to remedy the problem, but other will likely not move as quickly, or at all, to protect the parental rights of LGBTQ parents.

#### IV. RECOMMENDATION

LGBTQ couples with children who separated before *Obergefell* or who have made the decision post-*Obergefell* not to get married must be viewed as parents, not strangers, under the law. Several options are available to courts to address this issue. Courts can immediately start applying traditional parentage doctrines, like *de facto* parentage, using a functional best interest test to grant legal parentage in cases that demonstrate that granting parentage serves the best interest of the child. By focusing the analysis on the child—while removing the traditional notion of biology in the interpretation of who can be a parent—courts can begin to address the unique situations of nonbiological LGBTQ parents. Courts can grant parentage in circumstances where it is evident that the parents intended to be the child's caregivers and the child's interests is met by having them recognized as their legal parents. And while some courts have done a good job applying these doctrines to these meet these unique needs,<sup>299</sup> many courts have refused to extend traditional parentage doctrines to LGBTQ parents.<sup>300</sup> Although courts should apply these doctrines to LGBTQ parents in ways that mirror their application to opposite-sex parents, more needs to be done to ensure the protection of parental rights of these nonbiological LGBTQ parents.

State legislatures must step in and adopt legislation that protects LGBTQ parents. Enacting a statutory scheme that specifically addresses the needs of LGBTQ parents will have far-reaching effects on LGBTQ parents, specifically nonbiological LGBTQ parents. One of the most significant benefits of adopting a statutory approach to parentage are the constitutional benefits derived from being a statutory parent.<sup>301</sup> Additionally, having a statute in place that clearly and unambiguously defines parents in a way that encompasses LGBTQ parents will prevent bias in state courts and the inequitable results regarding parental rights reached under traditional common law doctrines. The Uniform Parentage Act, last amended in 2002 and adopted by fourteen states,<sup>302</sup> defined the parent-child relationship using terms of "mother-child" and "father-child."<sup>303</sup> The use of gendered terms in the Act failed to see the disparate im-

298. *Id.* Those states were Indiana, North Carolina, Oklahoma, South Carolina, Virginia, and West Virginia, all of which were Republican controlled. See *Partisan Composition of State Houses*, BALLOTPEdia, [https://ballotpedia.org/Partisan\\_composition\\_of\\_state\\_houses](https://ballotpedia.org/Partisan_composition_of_state_houses) (last visited Nov. 9, 2017).

299. See, e.g., Clifford K. v. Paul S. ex rel. Z.B.S., 619 S.E.2d 138, 157 (W. Va. 2005); *supra* text accompanying notes 165–78.

300. See, e.g., Mabry v. Mabry, 882 N.W.2d 539 (Mich. 2016); *supra* text accompany notes 1–7.

301. See *supra* Section III.A.

302. 2002 UPA, *supra* note 212, at 1–2.

303. 2017 UPA, *supra* note 210, at 7.



pact such definitional language could have on LGBTQ people, and, in fact, no reference to LGBTQ people was made in the 2002 version of the UPA.<sup>304</sup> The proposed changes to the Uniform Parentage Act, however, address many of the issues facing LGBTQ parents, and states should follow suit by enacting a version of the proposed changes to protect LGBTQ parents.<sup>305</sup>

Any action by a state following the proposed changes in the 2017 UPA to address the needs of LGBTQ parents should take into consideration the rule as a whole. The proposed 2017 UPA removed gendered terms, but in some circumstances, the Act's requirements would still create difficulties for LGBTQ parents.<sup>306</sup> Nonetheless, the 2017 UPA's proposed changes to Article 7, as written, could benefit LGBTQ couples who had children but separated before *Obergefell* or who have decided not to marry post-*Obergefell*. As demonstrated by applying the proposed language to the case of Jennifer and Carin, the 2017 UPA proposed language has the ability to come to an outcome that considers the intent of the parents and best interest of the child.<sup>307</sup> Additionally, by using a statutory framework to determine parentage, LGBTQ parents would be provided constitutional rights.<sup>308</sup> In taking legislative action, legislatures can take the decision away from the courts, where the outcomes can be diverse and inconsistent, and protect nonbiological LGBTQ parents who may not have a biological connection to their children, but are parents in every other sense of the word.

## V. CONCLUSION

When two people make the choice to have a child together, that child should not be punished for any later action of his or her parents. Whether those two adults who were constitutionally prevented from being married when they had a child or whether they simply decided not to marry after *Obergefell*, neither they nor their child should not be punished by court when seeking legal parental rights because they were not married. That, however, is the current reality for many LGBTQ couples in America. Because current legal doctrines applied to parentage so heavily rely on marriage and biology in determining parentage, many LGBTQ parents are without protection when seeking to gain legal parentage recognition over their child. That is why action must be taken at the state level to adopt statutory language that unequivocally recognizes LGBTQ parents and addresses their unique needs. No parent should be a stranger to their child in the eyes of the court.

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304. 2002 UPA, *supra* note 212, at 1.

305. 2017 UPA, *supra* note 210 (discussing changes to the definitions of "parent" to remove gender pronouns and use terms such as "an intended parent").

306. *See supra* Subsection III.C.

307. *Id.*

308. *See supra* Section III.A.

