Brooklyn Law Review

Volume 83 | Issue 1 Article 13

12-12-2018

Whither the Functional Parent? Revisiting Equitable Parenthood Doctrines in Light of Same-Sex Parents' Increased Access to Obtaining Formal Legal Parent Status

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Whither the Functional Parent?

REVISITING EQUITABLE PARENTHOOD DOCTRINES IN LIGHT OF SAME-SEX PARENTS' INCREASED ACCESS TO OBTAINING FORMAL LEGAL PARENT STATUS

Jessica Feinberg†

INTRODUCTION

Until relatively recently, the law did not provide avenues through which both members of a same-sex couple could gain recognition as the parents of the children they were raising together. Instead, generally only the member of the same-sex couple who was the child's biological parent was recognized as the child's legal parent, and the nonbiological parent was considered a legal stranger to the child.[1] Historically, nonbiological parents in same-sex relationships could not gain legal parent status because the traditional avenues for establishing legal parent status in the United States have been based upon biology, marriage, and adoption.[2] Since joint biological parenthood was not an option for same-sex couples and for most of the nation's history members of same-sex couples could not marry each other or adopt each other's legal children, the traditional avenues for establishing legal parent status excluded nonbiological parents raising children in same-sex relationships.[3] As a result, if upon the dissolution of the

† Associate Professor, Mercer University School of Law. I am extremely grateful to Susan Frelich Appleton for providing essential feedback on an earlier draft of this article. Thank you also to Libby Adler, Aníbal Rosario Lebrón, and the participants in the Feminist Legal Theory Collaborative Research Network Program at the 2017 Law and Society Conference for providing insightful suggestions and comments. Chantal Peacock and Rebekah Hogg provided invaluable research assistance throughout the drafting process. Finally, thank you to LBF, ABF, and RBF for your unwavering love and support.

[1] Jessica Feinberg, *Consideration of Genetic Connections in Child Custody Disputes Between Same-Sex Parents: Fair or Foul?*, 81 MO. L. REV. 331, 334, 348 (2016).

[2] Pamela Laufer-Ukeles & Ayelet Blecher-Prigat, *Between Function and Form: Towards a Differentiated Model of Functional Parenthood*, 20 GEO. MASON L. REV. 419, 428 (2013).

[3] *See infra* notes 22–26 and accompanying text.

relationship between the "formal legal parent"[4] and the nonbiological parent, the formal legal parent restricted or terminated the nonbiological parent's access to the child, the nonbiological parent generally was left without legal recourse.[5] In such situations, courts usually denied nonbiological parents any rights to custody or visitation, which effectively ended the relationship between a child and an individual who had functioned, oftentimes since birth, as the child's parent.[6]

In an effort to avoid the harsh results stemming from the application of the traditional avenues of establishing legal parent status to nonbiological parents raising children in same-sex relationships, a number of courts and legislatures adopted doctrines to grant visitation or custody rights under certain circumstances to individuals who had functioned as a child's parent, but who were unable to attain formal legal parent status under existing law.[7] Common titles for such doctrines include "de facto parentage, psychological parent, in loco parentis, [and] parent by estoppel."[8] While the doctrines differ by jurisdiction, they commonly provide visitation- or custody-related rights to individuals who, with the legal parent's consent or encouragement, have lived with the child and have functioned as the child's parent by forming a parent-like bond with the child and assuming the obligations of parenthood.[9] This article will refer to such doctrines collectively as "equitable parenthood doctrines."

Over the years, at least eighteen states have adopted equitable parenthood doctrines that grant child custody or visitation rights in certain circumstances to individuals who are not formal legal parents, but who have functioned in a parental role to a child (functional parents).[10] Proponents of equitable parenthood doctrines stress the essential role that such doctrines play in promoting the well-being and best interests of

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[4] For purposes of this article, the term "formal legal parent" will refer to individuals the law concludes or presumes are legal parents as a result of status-based indicators such as, for example, biology, marriage, and adoption.

[5] Feinberg, *supra* note 1, at 348.

[6] *Id.*

[7] *See infra* Section I.B.1.

[8] Joanna L. Grossman, *The New Illegitimacy: Tying Parentage to Marital Status for Lesbian Co-Parents*, 20 AM. U. J. GENDER SOC. POL'Y & L. 671, 677 (2012); *see also* Laufer-Ukeles & Blecher-Prigat *supra* note 2, at 446 ("Thus, although achieving functional parental status requires meeting a significant set of criteria, once the conditions are met, many jurisdictions treat functional parental figures as replacements for and equivalent to formal parents.").

[9] *See infra* notes 83–85 and accompanying text.

[10] Steven W. Fitschen & Eric A. DeGroff, *Is it Time for the Court to Accept the* O.F.F.E.R.*?: Applying* Smith v. Organization of Foster Families for Equality and Reform *to Promote Clarity, Consistency, and Federalism in the World of De Facto Parenthood*, 24 S. CAL. INTERDISC. L.J. 419, 427 (2015).

children, who may suffer significant short- and long-term harm when the relationship they share with an individual whom they view as a parent is severed.[11] Proponents also stress the strict requirements that must be satisfied in order for an individual to qualify under these doctrines, which generally limit application of the doctrine to truly compelling cases involving individuals who have functioned, with the formal legal parent's consent, as a parent to the child.[12] Conversely, opponents of equitable parenthood doctrines maintain that the standards employed in such doctrines are complicated, non-objective, fact-intensive and lead to unpredictable results, and claim that the adoption of such doctrines results in litigation that is costly, lengthy, and contentious.[13] Other opponents have stressed the belief that by granting functional parents custody and visitation rights over the wishes of formal legal parents, the doctrines infringe on legal parents' fundamental rights to direct the care, custody, and control of their children.[14] Despite the differing views regarding equitable parenthood doctrines, the number of jurisdictions that have adopted such doctrines that provide visitation- or custody-related rights to functional parents in same-sex relationships has increased significantly over the past thirty or so years.[15]

Recent developments in laws governing same-sex parentage, however, have created new questions regarding the future of equitable parenthood doctrines. More specifically, as a result of the nationwide legalization of same-sex marriage in 2015 and the increasing number of jurisdictions recognizing second parent adoption in recent years, a growing number of marriage- and adoption-based avenues to establishing formal legal parent status are now available to nonbiological parents raising children within same-sex relationships.[16] Due to the fact that it was, in significant part, the historical denial of avenues to establishing formal legal parent status for nonbiological parents raising children within same-sex relationships that led many courts and legislatures to adopt equitable parenthood doctrines, these same entities may conclude that now that such parents have access to formal avenues to establishing legal parent status, equity no longer requires application or adoption of equitable parenthood doctrines. In fact, in cases involving same-sex parents, several courts have already cited as a justification for declining to

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[11] *See infra* notes 53–71 and accompanying text.
[12] *See infra* notes 112–115 and accompanying text.
[13] *See infra* note 118 and accompanying text.
[14] *See infra* note 117 and accompanying text.
[15] *See infra* note 84 and accompanying text.
[16] *See infra* Section II.A.

adopt or apply equitable parenthood doctrines the availability of a formal avenue through which the individual seeking parental rights could have established legal parent status.[17]

This article argues that courts and legislatures should continue to adopt and apply equitable parenthood doctrines, despite the increasing availability to nonbiological parents raising children within same-sex relationships of formal avenues to establishing legal parent status. As an initial matter, the current avenues to establishing formal legal parent status for nonbiological parents raising children within same-sex relationships generally require marriage, adoption, or both.[18] Importantly, there are many reasons for why same-sex parents may not pursue these marriage- or adoption-based avenues that are completely unrelated to the relationship between the parents or between the parents and their children. Moreover, excluding equitable parenthood doctrines due to the availability to same-sex couples of marriage- or adoption-based avenues for establishing legal parent status would further exacerbate the law's discriminatory treatment of same-sex parents and disproportionately harm same-sex couples and their children. This is because, unlike same-sex couples, different-sex couples raising children have access to a variety of avenues to establishing legal parent status that require neither marriage nor adoption.[19] Moreover, even if in the future same-sex parents receive greater access to the formal avenues of establishing legal parent status available to different-sex parents, equitable parenthood doctrines will still serve an important function. There will always be couples who, despite jointly raising their children, are unable or unwilling for various reasons to take the steps necessary to establish formal

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[17] A.H. v. M.P., 857 N.E.2d 1061, 1065, 1073–74 (Mass. 2006) (refusing to apply an equitable parenthood doctrine despite the fact that the plaintiff had planned with the defendant for the child's birth, attended prenatal activities, helped care for the child for the first year and a half of the child's life, and was referred to as "Mama" by the child, and stating that "[i]n this jurisdiction, same-sex couples, like heterosexual couples, are free to adopt the children of their partners"); Debra H. v. Janice R., 930 N.E.2d 184, 189, 194 (N.Y. 2010) (refusing to apply an equitable parenthood doctrine despite the fact that the plaintiff served as a loving and caring parental figure during the first two and a half years of the child's life and stating that "the right of second-parent adoption . . . furnishes the biological and adoptive parents of children—and, importantly, those children themselves—with a simple and understandable rule by which to guide their relationships and order their lives"), *abrogated by* Brooke S.B. v. Elizabeth A.C.C., 61 N.E.3d 488 (N.Y. 2016); Titchenal v. Dexter, 693 A.2d 682, 683–87 (Vt. 1997) (refusing to apply an equitable parenthood doctrine despite the fact that the plaintiff had held herself out as the child's parent and had provided the majority of care for the child from the time of the child's birth until the child was three and a half years old, and explaining that nonbiological parents in same-sex relationships have the ability to protect their interests through adoption).

[18] *See infra* Section II.A.

[19] *See infra* Section II.B.1.

legal parent status for the functional parent, and it is both unfair and unwise to punish children so harshly for the actions of their parents. A legal approach that categorically refuses to provide rights to functional parents is an approach that fails to promote one of family law's most essential goals: protecting the best of interests of children.

The article is organized in the following manner: Part I provides a historical overview of the legal treatment of same-sex parents raising children together and traces the development of equitable parenthood doctrines. Part II identifies and examines the avenues to establishing formal legal parent status that have been extended to same-sex couples in recent years as well as those avenues available to different-sex couples that have not yet been extended to same-sex couples. Part III evaluates whether under current law governing the recognition of parent-child relationships there is a continuing need for equitable parenthood doctrines, and argues that there are compelling reasons for legislatures and courts to continue to adopt and apply equitable parenthood doctrines despite the recent expansion to same-sex couples of various avenues to establishing formal legal parent status. Part IV first evaluates whether recognition of equitable parenthood doctrines will be necessary if, in the future, same-sex parents gain greater access to the formal avenues to establishing legal parent status enjoyed by different-sex parents. After answering this question in the affirmative, Part IV concludes by exploring the role that the LGBT rights movement should play with regard to the maintenance and promotion of equitable parenthood doctrines.

I. THE LAW'S TREATMENT OF SAME-SEX PARENTS AND THE DEVELOPMENT OF EQUITABLE PARENTHOOD DOCTRINES

A. The Troubled History of the Legal Treatment of Same-Sex Parents and the Need for Equitable Parenthood Doctrines

Historically, the primary bases for bestowing upon an individual the status of legal parent have included "biology, adoption, [and] marriage."[20] As a result, the laws governing the granting of legal parent status had harsh results for same-sex couples raising children, leaving such couples without the ability to establish both members as the legal parents of the children

[20] Laufer-Ukeles & Blecher-Prigat, *supra* note 2, at 428.

they were raising.[21] With regard to biology as a basis for bestowing legal parent status, it has functioned by providing legal parent status for women based upon giving birth and for men based upon genetic fatherhood.[22] Since in female same-sex couples only one member can give birth to the child and in male same-sex couples only one member can be the child's genetic father, generally biology only has provided the basis for granting legal parent status to one member of a same-sex couple.[23] With regard to marriage as a basis for providing legal parent status, under the longstanding marital presumption of paternity, the law presumes that the husband of a woman who conceives or gives birth to a child during the marriage is the legal father of the child.[24] The historical exclusion of same-sex couples from the institution of marriage meant that same-sex couples could not establish legal parent status through marriage-based parentage laws.[25] Finally, with regard to adoption as a basis for providing legal parenthood, for most of the nation's history adoption laws across the country did not allow an individual to adopt the legal child of his or her nonmarital partner (thereby excluding same-sex couples who, until recently, were excluded from the institution of marriage) and did not allow for joint adoption by same-sex partners.[26]

Taken together, the historical legal landscape governing the bases for establishing legal parenthood frequently left same-sex couples raising children in the difficult situation wherein only one member of the couple, the member who was the biological or adoptive parent of the child, formally was recognized as the child's legal parent. In situations in which the parents' relationship dissolved and the formal legal parent restricted or terminated the functional parent's access to the child, the functional parent was often viewed by the court as a legal stranger and denied standing to seek child custody or visitation.[27] Many of these cases involved denying any rights to

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[21] *See supra* note 5 and accompanying text.

[22] Feinberg, *supra* note 1, at 340.

[23] *Id.* at 348.

[24] *Id.* at 340–41.

[25] The first state to legalize same-sex marriage was Massachusetts, which did so in 2003. *Same-Sex Marriage, State by State*, PEW RES. CTR. (June 26, 2015), http://www.pewforum.org/2015/06/26/same-sex-marriage-state-by-state/ [https://perma.cc/5FWF-FFLC].

[26] *Timeline & Victories*, NAT'L CTR. FOR LESBIAN RIGHTS, http://www.nclrights.org/about-us/mission-history/timeline-of-victories/ [https://perma.cc/W68C-CQDF] ("1986—NCLR represents Annie Affleck and Rebecca Smith as they become one of the first same-sex couples to jointly adopt in the U.S. 1987—NCLR wins one of the first second-parent adoption cases in the country and begins promoting second-parent adoption as a legal strategy for protecting same-sex parent families").

[27] Feinberg, *supra* note 1, at 348; Courtney G. Joslin, *Leaving No (Nonmarital) Child Behind*, 48 FAM. L.Q. 495, 497–98 (2014).

maintain contact with the child to individuals who had planned for the child, functioned as the child's parent from the time of the child's birth, and/or formed incredibly strong bonds with the child.[28]

As societal acceptance of same-sex relationships grew over the years, the number of same-sex couples raising children increased and cases involving the custody of their children became more frequent. Leading LGBT rights organizations such as the National Center for Lesbian Rights (NCLR), Lambda Legal Defense and Education Fund, Inc. (Lambda Legal), and Gay & Lesbian Advocates & Defenders (GLAD),[29] consistently played important roles in these cases, representing functional parents or submitting amicus briefs on behalf of functional parents.[30] In case after case over the years, these leading LGBT

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[28] Feinberg, *supra* note 1, at 348; Joslin, *supra* note 27, at 498 ("As a result, hundreds, if not thousands, of children were abruptly cut off from one of the only parents they ever knew.").

[29] In February of 2016, the organization changed its name to GLBTQ Legal Advocates & Defenders. Janson Wu, *The Generations of a Name*, GLAD (Feb. 23, 2016), http://www.glad.org/post/the-generations-of-a-name [https://perma.cc/N6PB-FLUU].

[30] *See, e.g.*, Reply Brief of Petitioner A.B., *In re* Visitation with C.B.L., 723 N.E.2d 316 (Ill. App. Ct. 1999) (No. 1-98-2011), 1999 WL 33741226; Brief of Amicus Curiae Lambda Legal Defense & Educ. Fund, Inc., *In re* Parentage of A.B., 837 N.E.2d 965, (Ind. 2005) (No. 53S01-0511-JV-606, http://www.lambdalegal.org/sites/default/files/legal-docs/downloads/in-re-parentage-of-ab_in_20050112_amicus-lambda-lagal.pdf [https://perma.cc/D8HL-SYLZ] (in support of the petitioner); Brief of Amici Curiae Am. Civil Liberties Union et al., in Support of Plaintiff-Appellee, Frazier v. Goudschaal, 295 P.3d 542 (Kan. 2013) (No. 103,487), 2010 WL 3406616; Brief of Appellee C.E.W., C.E.W. v. D.E.W., 845 A.2d 1146 (Me. 2004) (No. CUM-02-534), 2002 WL 32949146 (in support of the petitioner); Brief of Amicus Curiae Lambda Legal Def. & Educ. Fund, Inc., Conover v. Conover, 141 A.3d 31 (Md. 2016) (No. 79), https://freestate-justice.org/wp-content/uploads/2016/02/Conover-2016.02.25-Amicus-Brief-of-Lambda-Legal.pdf [https://perma.cc/9NF5-2B6M] (in support of the petitioner); Brief of Amicus Curiae Nat'l Ctr. for Lesbian Rights et al., Janice M. v. Margaret K., 948 A.2d 73 (Md. 2008) (No. 122), 2007 WL 1336442 (in support of the respondent/cross-petitioner); Appellants' Brief, White v. White, 293 S.W.3d 1 (Mo. Ct. App. 2009) (No. WD69580), 2008 WL 4143932; Brief of Amicus Curiae Nat'l Ctr. for Lesbian Rights in Support of Plaintiff-Appellant, Latham v. Schwerdtfeger, 802 N.W.2d 66 (Neb. Ct. App. 2011) (No. S-10-742), 2010 WL 4892503; Brief of Amici Curiae Nat'l Ctr. for Lesbian Rights et al., Debra H. v. Janice R., 930 N.E.2d 184 (N.Y. 2010) (No. 106569/08), http://www.lambdalegal.org/in-court/legal-docs/debra-h_ny_20100504_lgbt-groups-amicus [https://perma.cc/WYS6-D88L] (in support of petitioner); Brief of Amicus Curiae Nat'l Ctr. of Lesbian Rights in Support of Appellant Michele Hobbs, *In re* Mullen, 953 N.E.2d 302 (Ohio 2011) (No. 2010-02676), 2010 WL 9012297; Brief of Amicus Curiae Lambda Legal Def. & Educ. Fund, Inc. et al., on Behalf of Appellants, *In re* Bonfield, 780 N.E.2d 241 (Ohio 2002) (No. 2001-0625), 2001 WL 34555949; Brief for Appellant, T.B. v. L.R.M., 874 A.2d 34 (Pa. Super. Ct. 2005) (No. 1241 WDA 2004), 2004 WL 3317890; Brief of Amici Curiae Gay & Lesbian Advocates & Defenders et al., Rubano v. DiCenzo, 759 A.2d 959 (R.I. 2000) (No. 97-604-A), 1997 WL 33808968 (in support of the petitioner); Amicus Brief of Lesbian & Gay Rights Project of the Am. Civil Liberties Union et al., *In re* Parentage of L.B., 122 P.3d 161 (Wash. 2005) (No. 75626–1), 2003 WL 23875746 (in support of the petitioner); Amici Curiae Brief of Nat'l Ctr. for Lesbian Rights et al., *In re* Parentage of L.B., 122 P.3d 161 (Wash. 2005) (Nos. 75626-1 & 52151-9-1), 2005 WL 723841 (in support of the appellant/respondent); Brief of Amicus Curiae Nat'l Ctr. of Lesbian Rights, Sinnott v. Peck, No. 2015-426 (Vt. Argued May 24, 2016) (No. 2015-426), 2015 WL 10007643; Amicus Brief of Nat'l Ctr. for Lesbian

rights organizations argued forcefully for the application of equitable parenthood doctrines to protect the rights and well-being of children and their functional parents,[31] and the arguments in favor of protecting the relationships between children and their functional parents have garnered substantial success.[32] Troubled by the prospect of completely severing the relationship between a child and an adult who had functioned as the child's parent, courts and legislatures in some jurisdictions began to adopt equitable parenthood doctrines to grant custody- and visitation-related parental rights to individuals who had functioned as parents but who lacked legal parent status.[33]

In its influential 1995 decision *In re Custody of H.S.H.-K.*,[34] the Wisconsin Supreme Court rendered one of the earliest decisions granting custody or visitation rights to a functional same-sex parent[35] and established what has since become the most widely adopted test for determining whether an individual qualifies for relief under states' equitable parenthood doctrines.[36] The case involved a same-sex couple, Ms. Knott and Ms. Holtzman, who together planned for the conception of their child via donor insemination of Ms. Knott.[37] The couple "attended obstetrical visits and childbirth classes together[,] . . . , [and] [Ms.] Holtzman was present during labor and delivery."[38] The child was given a last name that combined Ms. Holtzman and Ms. Knott's last names.[39] Following the child's birth, "[Ms.] Holtzman provided the primary financial support for [Ms.] Knott, herself and the child and both women shared child-care responsibilities."[40] The couple had co-parented the child together in this manner for four years by the time their relationship ended.[41] Approximately eight months after the couple's relationship ended, Ms. Knott cut off all contact

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Rights, *In re* Custody of H.S.H-K, 533 N.W.2d 419 (Wis. 1995) (No. 1993AP2911), 1994 WL 17084701 (in support of the petitioner).

[31] *See supra* note 30 (compiling briefs from leading LGBT rights organizations arguing in favor of the application of equitable parenthood doctrines).

[32] *See infra* Section I.B.1.

[33] Rebecca Aviel, *A New Formalism for Family Law*, 55 WM. & MARY L. REV. 2003, 2053 (2014) ("To avoid the kind of injustices described above and the manifest harm to the children involved, courts have been increasingly responsive to claims that someone who has functioned as a parent should have some legally protectable rights that overcome the objection of the legal parent, even when the statutory scheme makes no such provision.").

[34] *In re* Custody of H.S.H.-K., 533 N.W.2d 419 (Wis. 1995).

[35] Kimberly D. Richman, *(When) Are Rights Wrong? Rights Discourses and Indeterminacy in Gay and Lesbian Parents' Custody Cases*, 30 L. & SOC. INQUIRY 137, 151 (2005).

[36] Grossman, *supra* note 8, at 677–79.

[37] *In re Custody of H.S.H.-K.*, 533 N.W.2d at 421.

[38] *Id.*

[39] *Id.* at 422.

[40] *Id.*

[41] *Id.* at 421–22.

between Ms. Holtzman and the child, and Ms. Holtzman subsequently filed for custody and visitation.[42]

Although the guardian ad litem reported to the trial court that the child believed Ms. Holtzman was his parent and wished to spend time with her, and the court found that Ms. Holtzman had "devoted herself to the child,"[43] it nonetheless reluctantly granted summary judgment in favor of Ms. Knott.[44] The trial court explained that the relevant custody and visitation laws did not recognize the relationship "between a child and a parent's nontraditional partner."[45] The trial court stressed that by ignoring the trauma experienced by children upon the termination of their relationship with a parent-like figure, the law failed to promote the best interests of children.[46] The trial court urged the legislature "to reexamine the law in light of the realities of modern society."[47]

On appeal, the Wisconsin Supreme Court held that despite the fact that none of the existing child custody or visitation statutes directly applied to Ms. Holtzman's situation, the court nonetheless had equitable power to hear her claim for visitation if she could prove that she shares a "parent-like relationship with the child and that a significant triggering event justifies state intervention in the child's relationship with a biological or adoptive parent."[48] The court developed a multipart test to determine whether it was within the court's equitable power to hear a petition for visitation.[49] The first part of the test requires the petitioner to prove each of the following four elements:

> (1) that the biological or adoptive parent consented to, and fostered, the petitioner's formation and establishment of a parent-like relationship with the child; (2) that the petitioner and the child lived together in the same household; (3) that the petitioner assumed 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.[50]

The second part of the test requires the petitioner to demonstrate that a "triggering event" has occurred that "justif[ies] state intervention in the child's relationship with a

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[42] *Id.* at 422.
[43] *Id.*
[44] *Id.*
[45] *Id.*
[46] *Id.*
[47] *Id.*
[48] *Id.* at 421.
[49] *Id.*
[50] *Id.* (footnotes omitted).

biological or adoptive parent" by proving that the legal parent "interfered substantially with the petitioner's parent-like relationship with the child, and that the petitioner sought court ordered visitation within a reasonable time after the parent's interference."[51] If the petitioner is able to satisfy the test, the petitioner has standing to seek visitation, which the court will award if it determines that such visitation is in the best interests of the child.[52]

Although its decision in *In re Custody of H.S.H.-K.* played an essential role in the development of equitable parenthood doctrines, the Wisconsin Supreme Court was far from the first entity to recognize the importance of relationships between children and individuals who function as their parents. In their 1973 book *Beyond the Best Interests of the Child*, which focused on child placement, child psychoanalysts Anna Freud, Joseph Goldstein, and Albert Solnit set forth the psychological parent concept.[53] As set forth, this concept emphasized the importance of maintaining continuity in the relationship between a child and a person who had developed a psychological parenting relationship with that child.[54] A psychological parent was defined not by formal markers such as biology, marriage, or adoption, but instead as a person who "on a continuing, day-to-day basis, through interaction, companionship, interplay, and mutuality, fulfills the child's psychological needs for a parent, as well as the child's physical needs."[55] *Beyond the Best Interests of the Child* highlighted the significant harm to the child that could occur if the child's relationship with a psychological parent was disrupted.[56] Although not without controversy, the theories developed in *Beyond the Best Interests of the Child* have had a significant and enduring influence on the law's approach to resolving issues relating to the placement of children.[57] For example, in custody disputes between legal parents, "[t]he continuity of functional caregiving is central . . . [and] the primary caregiver is regularly considered the preferred custodial

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[51] *Id.*

[52] *Id.*

[53] *See generally* JOSEPH GOLDSTEIN ET AL., BEYOND THE BEST INTERESTS OF THE CHILD 17–20 (1973).

[54] *See id.* at 31–34, 99–100.

[55] *Id.* at 98.

[56] *See id.* at 31–34.

[57] June Carbone, *Child Custody and the Best Interests of Children—A Review of* From Father's Property to Children's Rights: The History of Child Custody in the United States, 29 FAM. L.Q. 721, 735 (1995) (book review) ("[O]ver the last thirty years, the single most influential work on the interests of children is Goldstein, Freud, and Solnit's concept of the 'psychological parent,' with whom the child has emotionally bonded.").

parent."[58] Notably, over one thousand child custody cases have cited *Beyond the Best Interests of the Child*.[59]

Subsequent research has provided further support for the claims made in *Beyond the Best Interests of the Child* regarding the importance of the relationship between a child and an individual who functions as the child's parent. For example, subsequent research has found that attachment relationships between children and adults form through an adult's conduct as a parental figure, not through his or her status as a legal parent.[60] Specifically, attachment relationships form through an adult's "provision of physical and emotional care, continuity or consistency in the child's life and emotional investment in the child."[61] Importantly, there are a variety of ways in which the attachment relationships formed between children and the adults in their lives who function as parents are critical to children's well-being and development. These relationships "serve to protect the child's development, forming the building blocks for the emerging sense of emotional security, the ability to cope with stress, and an increased self-awareness."[62] "Secure attachment relationships lead[] to the [child's] 'development of awareness, social competence, conscience, emotional growth and emotional regulation.'"[63] Moreover, research in the fields of neurology and psychology indicates that the primary environmental factor that shapes brain development during the time of maximum growth is a child's attachment relationships.[64]

If the relationship between a child and an adult with whom he or she has formed an attachment relationship is disrupted, it can be very detrimental to the overall well-being of the child.[65] The disruption of attachment relationships can cause significant both short- and long-term psychological and emotional harm to children.[66] For example, when the relationship between

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[58] Laufer-Ukeles & Blecher-Prigat, *supra* note 2, at 430.

[59] DOUGLAS E. ABRAMS ET AL., CONTEMPORARY FAMILY LAW 806 (4th ed. 2015).

[60] Linda D. Elrod, *A Child's Perspective of Defining a Parent: The Case for Intended Parenthood*, 25 BYU J. PUB. L. 245, 249–50 (2011).

[61] *Id.* at 249.

[62] *Id.* at 250.

[63] *Id.* (quoting NAT'L RES. COUNCIL & INST. OF MED., FROM NEURONS TO NEIGHBORHOODS: THE SCIENCE OF EARLY CHILDHOOD DEVELOPMENT 234, 226, 265 (Jack P. Shonkoff & Deborah A. Phillips eds. 2000)).

[64] Brief of Amici Curiae Nat'l Ass'n of Soc. Workers et al., in Support of Petitioner-Appellant Debra H.'s Appeal at 11, Debra H. v. Janice R., 930 N.E.2d 184 (N.Y. 2010) (No. 106569/08), http://www.lambdalegal.org/in-court/legal-docs/debra-h_ny_20100504_brief-of-nasw-amici [https://perma.cc/2LZU-XCQX].

[65] *Id.* at 18.

[66] Frank J. Dyer, *Termination of Parental Rights in Light of Attachment Theory: The Case of Kaylee*, 10 PSYCHOL. PUB. POL'Y & L. 5, 11 (2004) ("In sum, there are numerous empirical findings that provide a solid research basis for predictions of long-term

an infant or toddler and psychological parent is disrupted, the child suffers anxiety and separation distress, and may have difficulty trusting the individuals with whom they form relationships in the future.[67] In addition, the disruption of an attachment relationship may cause children to regress in various areas of development.[68] Disruption of attachment relationships during childhood also can lead to "aggression, fearful relationships, academic problems in school and . . . elevated psychopathology,"[69] and disruption experienced during childhood may continue to affect an individual even during adulthood.[70] Overall, "[o]nce an adult has lived with and cared for a child for an extended period of time and become that child's psychological parent, removing that 'parent' from the child's life results in emotional distress in the child and a setback of ongoing development."[71] Recognizing the extensive research highlighting the importance of relationships between children and the individuals who function as their parents, a number of jurisdictions have adopted equitable parenthood doctrines.

B. The Current State of Equitable Parenthood Doctrines

1. Jurisdictions That Have Adopted Equitable Parenthood Doctrines

Following the Wisconsin Supreme Court's decision in *In re Custody of H.S.H.-K.*, a number of other jurisdictions adopted equitable parenthood doctrines through judicial or legislative action. At least eighteen states have now adopted equitable parenthood doctrines that grant child custody or visitation rights in certain circumstances to individuals who have functioned in a parental role to a child.[72] Though many of the equitable parenthood doctrines share core similarities with the

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harm associated with disrupted attachment and loss of a child's central parental love objects."); Elrod, *supra* note 60, at 250–51 ("Continuity of the parent-child relationship is essential to the child's overall well-being. When an attachment relationship is severed by one parent dropping out of a child's life, the child suffers emotional and psychological harm. Disrupting attachments can turn a securely attached child into an insecure one."); Rebecca L. Scharf, *Psychological Parentage,* Troxel*, and the Best Interests of the Child*, 13 GEO. J. GENDER & L. 615, 634–35 (2012).

[67] GOLDSTEIN ET AL., *supra* note 53, at 33.

[68] *See id.* at 33–34.

[69] Brief of Amici Curiae Nat'l Ass'n of Soc. Workers et al., *supra* note 64, at 18 (omission in original) (quoting Ana H. Marty et al., *Supporting Secure Parent-Child Attachments: The Role of the Non-Parental Caregiver*, 175 EARLY CHILD DEV. & CARE 271, 274 (2005)).

[70] GOLDSTEIN ET AL., *supra* note 53, at 34.

[71] Scharf, *supra* note 66, at 634.

[72] Fitschen & DeGroff, *supra* note 10, at 427–28.

one adopted in *In re Custody of H.S.H.-K.*, the doctrines in existence today are not uniform in name or substance across jurisdictions. Among the jurisdictions that have adopted equitable parenthood doctrines, various titles have been given. The most common titles include "de facto parentage, psychological parent, in loco parentis, [and] parent by estoppel."[73] Jurisdictions also differ with regard to whether individuals who would otherwise satisfy the requirements of the relevant doctrine can be recognized in situations in which the child already has two formal legal parents.[74] In addition, the position occupied by individuals who qualify under these doctrines for purposes of determining custody and visitation rights varies significantly depending on the jurisdiction.[75] More specifically, in a few jurisdictions, individuals who qualify under these doctrines are treated as equal to legal parents for purposes of both custody and visitation determinations.[76] In at least one jurisdiction, a

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[73] Grossman, *supra* note 8, at 677; Laufer-Ukeles & Blecher-Prigat, *supra* note 2, at 446 ("Thus, although achieving functional parental status requires meeting a significant set of criteria, once the conditions are met, many jurisdictions treat functional parental figures as replacements for and equivalent to formal parents.").

[74] COURTNEY JOSLIN ET AL., LESBIAN, GAY, BISEXUAL & TRANSGENDER FAMILY LAW § 7:14 (2016).

[75] *See* Grossman, *supra* note 8, at 677.

[76] *See, e.g.*, Pitts v. Moore, 90 A.3d 1169, 1181 (Me. 2014) ("A determination that a person is a de facto parent means that he or she is a parent on equal footing with a biological or adoptive parent, that is to say, with the same opportunity for parental rights and responsibilities."); Latham v. Schwerdtfeger, 802 N.W.2d 66, 72 (Neb. 2011) ("[T]he rights, duties, and liabilities of [a person *in loco parentis*] are the same as those of the lawful parent."); T.B. v. L.R.M., 786 A.2d 913, 916–17 (Pa. 2001) (stating that in seeking child custody and visitation, "[t]he rights and liabilities arising out of an *in loco parentis* relationship are, as the words imply, exactly the same as between parent and child"); *In re* Parentage of L.B., 122 P.3d 161, 177 (Wash. 2005) ("We thus hold that henceforth in Washington, a *de facto* parent stands in legal parity with an otherwise legal parent, whether biological, adoptive, or otherwise."). Whether the Establishment of a Parent-Child Relationship Under Delaware's de facto Parent Law Entitles Gabrielle to Child's Benefits on the Earnings Record of the Number Holder, Kathy. PR 01005.009 Delaware (Soc. Sec. Admin. July 10, 2012), https://secure.ssa.gov/poms.nsf/lnx/1501005009 [https://perma.cc/M5VC-MLDJ] ("According to Section 8-201 of Title 13 of the Delaware Code, there is no legal difference between the parent-child relationship of a natural mother/father and child, an adoptive mother/father and child, and a de facto parent and child."); *see also* Conover v. Conover, 146 A.3d 433, 453 (Md. 2016) ("We hold that *de facto* parents have standing to contest custody or visitation and need not show parental unfitness or exceptional circumstances before a trial court can apply a best interests of the child analysis."). *See* Grossman, *supra* note 8, at 677 ("In a few states, once a third party has established de facto or psychological parent status, she stands in parity to a legal parent."). In two of these jurisdictions, Delaware and Maine, parents who qualify under the relevant equitable parenthood doctrines are designated by statute as legal parents. JOSLIN ET AL., *supra* note 74, § 7:14; DEL. CODE. ANN. tit. 13, §§ 8-201, 8-203 (2016); ME. REV. STAT. ANN. tit. 19-a, §§ 1851, 1891 (2016) (establishing that an adjudication of de facto parentage is one way to establish legal parentage). Although the New Jersey Supreme Court stated that psychological parents "stand[ ] in parity" with genetic parents, it also stated that if all else is equal in applying the best interests of the child standard, custody should be given to the legal parent, meaning that psychological

qualifying individual is treated as equal to a legal parent for purposes of visitation determinations, but not custody determinations.[77] In a significant number of jurisdictions qualifying individuals are merely given standing to seek visitation and/or custody,[78] and must meet higher burdens (the language of which differ by jurisdiction) than legal parents[79] in order to obtain such rights.[80] Finally, the elements that a petitioner must meet in order to qualify under these doctrines also differ somewhat by jurisdiction.[81] All of the doctrines, however, seek to promote the best interests of children by providing visitation- or custody-related rights to individuals who, under specified circumstances, have functioned as a child's parent. While cases applying equitable

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parents do not actually stand in parity to legal parents for purposes of custody. V.C. v. M.J.B., 748 A.2d 539, 554 (N.J. 2000).

[77] *See, e.g.*, *V.C.*, 748 A.2d at 554 ("[U]nder ordinary circumstances when the evidence concerning the child's best interests (as between a legal parent and psychological parent) is in equipoise, custody will be awarded to the legal parent. Visitation, however, will be the presumptive rule, subject to the considerations set forth in *N.J.S.A.* 9:2–4, as would be the case if two natural parents were in conflict."); *see also* Laufer-Ukeles & Blecher-Prigat *supra* note 2, at 449 ("In fact, courts applying functional parenthood have in practice followed [the] presumption [that a functional parent is entitled to visitation but not custody] despite conceptually equalizing parenthood."); *see also* Grossman, *supra* note 8, at 677.

[78] "In two jurisdictions, [Arkansas and Wisconsin,] courts have held that a *de facto* parent may seek visitation, but not custody." JOSLIN ET AL., *supra* note 74, § 7:9.

[79] The standard generally governing custody determinations between fit legal parents is the "best interests of the child" standard. HOMER H. CLARK, JR. & ANN LAQUER ESTIN, DOMESTIC RELATIONS: CASES AND PROBLEMS ON DOMESTIC RELATIONS 959 (7th ed. 2005) (citations omitted). With regard to visitation, however, the prevailing approach is that a fit legal parent is entitled to visitation unless the court determines that visitation would be significantly harmful to the child's well-being. ABRAMS ET AL., *supra* note 59, at 915; CLARK & ESTIN, *supra*, at 982–83; ROBERT E. OLIPHANT & NANCY VER STEEGH, FAMILY LAW: EXAMPLES AND EXPLANATIONS 180 (3rd ed. 2010); UNIF. MARRIAGE & DIVORCE ACT § 407 (NAT'L CONFERENCE OF COMM'RS ON UNIF. STATE LAWS, amended 1973).

[80] *See, e.g.*, Kinnard v. Kinnard, 43 P.3d 150, 154 (Ala. 2002) (holding in a custody dispute with a psychological parent, a legal parent should receive custody "unless the trial court determines that the parent is unfit, has abandoned the child, or that the welfare of the child requires that a non-parent receive custody."); Egan v. Fridlund-Horne, 211 P.3d 1213, 1222, 1224 (Ariz. Ct. App. 2009) (holding that in order to obtain visitation, a person who stands in loco parentis must "rebut[ ] [the] presumption that a fit parent's decision to deny or limit visitation is in the child's best interests," while a legal parent is entitled to visitation "unless the court finds that it would seriously endanger the child's" well-being); A.C. v. N.J., 1 N.E.3d 685, 694 n.6 (Ind. Ct. App. 2013) ("Even assuming Partner is a de facto custodian, she was still required to overcome the presumption in favor of Mother as the natural parent."); McAllister v. McAllister, 779 N.W.2d 652, 658 (N.D. 2010) ("When a psychological parent and a natural parent each seek a court-ordered award of custody, the natural parent's paramount right to custody prevails unless the court finds it in the child's best interests to award custody to the psychological parent to prevent serious harm or detriment to the welfare of the child." (quoting Cox v. Cox., 613 N.W.2d 516, 521–22 (N.D. 2000)); Middleton v. Johnson, 633 S.E.2d 162, 171–72 (S.C. Ct. App. 2006) (stating that a person who qualifies as a psychological parent is entitled to visitation only if he or she is able to prove that "compelling circumstances" exist and providing as an example of compelling circumstances a situation where denying visitation would cause significant harm to the child).

[81] *See infra* notes 83–111 and accompanying text.

parenthood doctrines in the context of same-sex parenting arrangements have received the most attention from legal scholars and commentators, individuals who have functioned as parents within the context of different-sex relationships may also seek relief under these doctrines.[82]

The most widely adopted test for determining whether an individual qualifies for relief under a state's equitable parenthood doctrine is the one articulated in *In re Custody of H.S.H.-K.*[83] Many jurisdictions have adopted identical or very similar tests.[84] While not every jurisdiction has adopted a test identical to the one set forth in *In re Custody of H.S.H.-K.*, the

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[82] In fact, the common requirements of the equitable parenthood doctrines contain gender neutral language. *See infra* notes 83–85 and accompanying text.

[83] Brief of Amici Curiae Nat'l Ctr. for Lesbian Rights et al., *supra* note 30. This test requires the petitioner to prove that: (1) the legal parent fostered and consented to the petitioner forming a parent-like relationship to the child; (2) the petitioner lived in a household with the child; (3) 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) "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." *In re* Custody of H.S.H.-K., 533 N.W.2d 419, 421 (Wis. 1995).

[84] *In re* K.H., 773 S.E.2d 20, 25 n.7 (W. Va. 2015) ("The general legal principles associated with the psychological parent concept were addressed in a 1995 Wisconsin case, and the criteria enumerated in that four-element test have now become incorporated within the definitions of the psychological parent doctrine utilized by most reviewing courts."). Courts in Maryland, New Jersey, Rhode Island, South Carolina, and Washington have adopted the test articulated in *In re Custody of H.S.H-K. See* Conover v. Conover, 146 A.3d 433, 439 (Md. 2016); V.C. v. M.J.B., 748 A.2d 539, 551 (N.J. 2000); Rubano v. Dicenzo, 759 A.2d 959, 974 (R.I. 2000) (adopting the approach of *V.C.*, 748 A.2d 539, which adopted the approach of *In re H.S.H-K*, 533 N.W.2d 419); Middleton v. Johnson, 633 S.E.2d 162, 168 (S.C. Ct. App. 2006); *In re* Parentage of L.B., 122 P.3d 161, 176 (Wash. 2005). Very similar approaches have been adopted in a number of other jurisdictions. *See*, *e.g.*, E.N.O. v. L.M.M., 711 N.E.2d 886, 891 (Mass. 1999) (defining a de facto parent as "one who has no biological relation to the child, but has participated in the child's life as a member of the child's family. The de facto parent resides with the child and, with the consent and encouragement of the legal parent, performs a share of caretaking functions at least as great as the legal parent. The de facto parent shapes the child's daily routine, addresses his developmental needs, disciplines the child, provides for his education and medical care, and serves as a moral guide." (internal citations omitted)); T.B. v. L.R.M., 786 A.2d 913, 916–20 (Pa. 2001) (explaining that "[t]he status of *in loco parentis* embodies two ideas; first, the assumption of a parental status, and, second, the discharge of parental duties" applies "where the child has established strong psychological bonds with a person who, although not a biological parent, has lived with the child and provided care, nurture, and affection, assuming in the child's eye a stature like that of a parent," and involves situations where the legal parent has consented to and encouraged the petitioner to assume parental status); *In re* K.H., 773. S.E.2d 20, 26 (W. Va. 2015) (explaining that "[a] psychological parent is a person who, on a continuing day-to-day basis, through interaction, companionship, interplay, and mutuality, fulfills a child's psychological and physical needs for a parent and provides for the child's emotional and financial support . . . [and that] [t]he resulting relationship between the psychological parent and the child must be of substantial, not temporary, duration and must have begun with the consent and encouragement of the child's legal parent or guardian . . . [and that] . . . [i]n the cases in which this Court has determined a person to be a psychological parent to a child, that person typically has resided in the child's household and interacted with the child on a daily basis").

four elements included in the test, in one form or another, represent the elements that appear most frequently in the eligibility requirements of equitable parenthood doctrines.[85]

With regard to the first element, many states' equitable parenthood doctrines require that the petitioner demonstrate that the child's legal parent consented to or encouraged the formation of a parent-like relationship between the petitioner and the child.[86] This requirement is viewed as important for a variety of reasons. As an initial matter, the consent requirement seeks to avoid judicial infringement on a legal parent's fundamental right to make decisions regarding the care and custody of her child by requiring that the legal parent consents to or encourages, as reflected by her words or conduct, the formation of a parent-like relationship between the petitioner and the child.[87] This requirement is essential because it places the legal parent in control and provides her with complete power to maintain a "zone of privacy" around her child and herself.[88] However, this requirement also recognizes that if a legal parent "wishes to maintain that zone of privacy she cannot invite a third party to function as a parent to her child and cannot cede over to that third party parental authority the exercise of which may create a profound bond with the child."[89] The consent requirement seeks to ensure that the rights of legal parents to determine who functions in a parental role to their children are respected and shields legal parents from intrusive and burdensome custody and visitation claims from individuals who did not have the legal parent's consent to form a parent-like relationship with the child.[90]

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[85] *See infra* notes 86, 91, 98.

[86] Katharine T. Bartlett, *Prioritizing Past Caretaking in Child-Custody Decisionmaking*, 77 L. & CONTEMP. PROBS. 29, 62 (2014) ("Contemporary definitions of de facto parent typically depend, as do the ALI *Principles*, on, a prior, residential, caretaking relationship with the child, developed with the consent or acquiescence of the parent."). *See*, *e.g.*, DEL. CODE ANN. tit. 13, § 8-201(c) (2009); Pitts v. Moore, 90 A.3d 1169, 1179–80 (Me. 2014); *Conover*, 146 A.3d at 439–40; *E.N.O.*, 711 N.E.2d at 892; *V.C.*, 748 A.2d at 551; *T.B.*, 786 A.2d at 918–19; *Rubano*, 759 A.2d at 974; *Middleton*, 633 S.E.2d at 168; *In re Parentage of L.B.*, 122 P.3d at 176; *In re K.H.*, 773 S.E.2d at 25–28; *In re Custody of H.S.H.-K.*, 533 N.W.2d at 421. Even when not stated specifically in the definition of the equitable parenthood status, courts often consider whether the legal parent consented to the formation of the relationship. *See, e.g.*, Latham v. Schwerdtfeger, 802 N.W.2d 66, 76 (Neb. 2011).

[87] *Rubano*, 759 A.2d at 974; *In re Custody of H.S.H-K.*, 533 N.W.2d at 436 ("This exercise of equitable power protects parental autonomy and constitutional rights by requiring that the parent-like relationship develop only with the consent and assistance of the biological or adoptive parent.").

[88] *V.C.*, 748 A.2d at 552.

[89] *Id.*

[90] Brief of Amici Curie Family Law Acads. in Support of Petitioner-Appellant at 8–10, Debra H. v. Janice R., 61 A.D.3d 460 (N.Y. App. Div. 2009) (No. 106569/08), http://www.lambdalegal.org/sites/default/files/2009-11-16_fam._law_academics_amicus_br.pdf [https://perma.cc/K2CE-ANR9].

The second element commonly included within equitable parenthood doctrines is that the petitioner resided in a household with the child.[91] While a few states specifically indicate a minimum amount of time for which the petitioner must have resided with the child,[92] others do not.[93] When this element is considered with the other elements, however, it becomes clear that the amount of time the petitioner resided with the child must have been sufficient for the petitioner and child to have been able to form a parent-child bond.[94] This requirement is viewed as important because it "provides an additional indicator that the [petitioner] has established a genuine familial relationship with the child," the abrupt termination of which likely would harm the child.[95] In addition, the satisfaction of this requirement provides evidence of both the legal parent's consent to the formation of the relationship between the petitioner and child and the commitment of the legal parent and petitioner to mutually provide care for the child.[96] Moreover, this requirement seeks to further protect the

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[91] Bartlett, *supra* note 86, at 62 ("Contemporary definitions of de facto parent typically depend, as do the ALI *Principles*, on, a prior, residential, caretaking relationship with the child, developed with the consent or acquiescence of the parent."). *See, e.g.*, *Pitts*, 90 A.3d at 1179–80; *Conover*, 146 A.3d at 439–40; *V.C.*, 748 A.2d at 551; *T.B.*, 786 A.2d at 917; *Rubano*, 759 A.2d at 974; *Middleton*, 633 S.E.2d at 168; *In re Parentage of L.B.*, 122 P.3d at 176; *In re Custody of H.S.H-K*, 533 N.W.2d at 420.

[92] *See*, *e.g.*, D.C. CODE § 16-831.01(1) (2016) (defining de facto parent as "an individual . . . [w]ho[ ] . . . [l]ived with the child in the same household [since] the child's birth or adoption," or "for at least [ten] of the [twelve] months preceding the" petition for de facto parent status); IND. CODE § 31-9-2-35.5 (2016) (setting forth requirements for how long a petitioner has to have resided with the child in order to be a de facto parent); ALI PRINCIPLES OF THE LAW OF FAMILY DISSOLUTION: ANALYSIS AND RECOMMENDATIONS § 2.03 (AM. LAW INST. 2002) (requiring that an individual reside "with the child for at least two years" in order to be considered a de facto parent). To be a de facto custodian under Kentucky law, "the primary caregiver for, and financial supporter of, a child who has resided with the person for a period of six (6) months or more if the child is under three (3) years of age." If the child is over three years of age, the de facto custodian must have resided with the child for one year. KY. REV. STAT. § 403.270(1)(a) (West 2016). In addition, courts have interpreted the Kentucky de facto parent statute to preclude recognition as de facto parents of individuals who raised the child along with the legal parent. *See* B.F. v. T.D., 194 S.W.3d 310, 310–12 (Ky. 2006) (holding that a partner who lived with the mother and the mother's adopted child as a family did not have standing to seek custody because the child was in the physical custody of the legal parent).

[93] *See, e.g.*, *Pitts*, 90 A.3d at 1179–80; *Conover*, 146 A.3d at 439–40; E.N.O. v. L.M.M., 711 N.E.2d 886, 892 (Mass. 1999); *V.C.*, 748 A.2d at 551; *T.B.,* 786 A.2d at 918–19; *Rubano*, 759 A.2d at 974; *Middleton*, 633 S.E.2d at 168; *In re Parentage of L.B.*, 122 P.3d at 176; *In re Custody of H.S.H.-K*, 533 N.W.2d at 421.

[94] Brief of Amici Curie Family Law Acads. in Support of Petitioner-Appellant, *supra* note 90, at 10.

[95] Brief of Amici Curiae Nat'l Ctr. for Lesbian Rights et al., *supra* note 30, at 21.

[96] *Id.*; Brief of Amici Curie Family Law Acads. in Support of Petitioner-Appellant, *supra* note 90, at 20, n.7.

rights of the legal parent by significantly restricting the class of individuals who can make equitable parenthood claims.[97]

The final two common elements of equitable parenthood doctrines, which relate to the petitioner assuming the obligations of parenthood and forming a parent-child bond with the child, are generally viewed as the most important[98] and appear in some form in most equitable parenthood doctrines.[99] The requirement 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," is viewed as important for a number of reasons.[100] As an initial matter, the requirement significantly restricts the class of individuals who are eligible to make claims under the doctrine by excluding anyone who has cared for or supported the child "with[] the expectation of financial compensation."[101] More importantly, it seeks to ensure that the petitioner actually functioned as the child's parent,[102] limiting eligibility "to those adults who have served literally as one of the child's de facto parents."[103] The provision of financial support is not determinative in assessing whether an individual has functioned as a child's parent and assumed the obligations of parenthood.[104] Instead, the inquiry focuses more broadly on the nature and quality of the petitioner's parenting actions and the child's response to those actions.[105]

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[97] *Middleton*, 633 S.E.2d at 169.

[98] *V.C.*, 748 A.2d at 551 ("[M]ost important, a parent-child bond must be forged."); *Middleton*, 633 S.E.2d at 169 ("The last two prongs are the most important because they ensure both that the psychological parent assumed the responsibilities of parenthood and that there exists a parent-child bond between the psychological parent and child.").

[99] *See In re* E.L.M.C., 100 P.3d 546, 559 (Colo. App. 2004) ("Who may be deemed a psychological parent for the purposes of seeking and receiving an award of parental responsibilities has been variously defined. Common to these definitions is a relationship with deep emotional bonds such that the child recognizes the person, independent of the legal form of the relationship, as a parent from whom they receive daily guidance and nurturance."). *See, e.g.*, DEL. CODE ANN. tit. 13, § 8-201(c) (2016); Kinnard v. Kinnard, 43 P.3d 150, 154 (Ala. 2002); Conover v. Conover, 146 A.3d 433, 453 (Md. 2016); *V.C.*, 748 A.2d at 551; McAllister v. McAllister, 779 N.W.2d 652, 658 (N.D. 2010); T.B. v. L.R.M., 786 A.2d 913, 914, 916–20 (Pa. 2001); Rubano v. Dicenzo, 759 A.2d 959, 967 (R.I. 2000); *Middleton*, 633 S.E.2d at 168; *In re* Parentage of L.B., 122 P.3d 161, 176 (Wash. 2005); *In re* K.H., 773 S.E.2d 20, 24 (W. Va. 2015); *In re* Custody of H.S.H.-K., 533 N.W.2d 419, 421 (Wis. 1995).

[100] *In re Custody of H.S.H-K.*, 533 N.W.2d at 421.

[101] *Id.*; *see also Rubano*, 759 A.2d at 974 ("[A] relationship based on payment by the legal parent to the third party will not qualify." (quoting *V.C.*, 748 A.2d at 552)).

[102] Brief of Amici Curie Family Law Acads. in Support of Petitioner-Appellant, *supra* note 90, at 20.

[103] *Rubano*, 759 A.2d at 974.

[104] *V.C.*, 748 A.2d at 553.

[105] *Id.*

The requirement 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" is viewed as essential for a variety of reasons, not the least of which is that protecting the well-being of children is one of family law's most critical goals.[106] The requirement is directly related to the child development research, described above, regarding children and the adults with whom they form attachment relationships.[107] More specifically, if a functional parent and child have formed a parent-child bond, then severing that relationship can have significant harmful effects on the child's short- and long-term well-being.[108] Thus, at the heart of this requirement is a deep concern for the well-being of children who have developed parent-child bonds with adults who are not their legal parents and who are facing disruption of that relationship.[109] Testimony from experts such as child psychologists, psychiatrists, and social workers regarding the existence and strength of the parent-child bond generally is necessary for a court to determine whether the petitioner has satisfied this requirement.[110] The development of a parent-child bond between the child and the petitioner is emphasized heavily in court decisions applying equitable parenthood doctrines because it has long been considered the duty of courts to protect children from harm, and this requirement is the one most clearly linked to the well-being of the children involved.[111]

Overall, proponents of equitable parenthood doctrines argue that the common elements in determining eligibility set

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[106] *In re* Custody of H.S.H-K., 533 N.W.2d 419, 421 (Wis. 1995); Jane C. Murphy, *Rules, Responsibility and Commitment to Children: The New Language of Morality in Family Law*, 60 U. PITT. L. REV. 1111, 1180–81 (1999) (identifying the "protect[ion] of children" as the "central moral goal of family law").

[107] *See supra* notes 53–71 and accompanying text; *see also In re* Marriage of Martin, 42 P.3d 75, 77–78 (Colo. App. 2002) (citing the work of Freud, Goldstein, and Solnit for the proposition that "[t]he psychological parent is someone other than a biological parent who develops a parent-child relationship with a child through day-to-day interaction, companionship, and caring for the child . . . [and] once this bond forms, many psychologists believe that breaking up the relationship would be harmful to a child's emotional development" (citing JOSEPH GOLDSTEIN ET AL., THE BEST INTERESTS OF THE CHILD: THE LEAST DETRIMENTAL ALTERNATIVE 11–13, 104, 105 (1996)).

[108] *See supra* notes 56, 65–71; *see also* Brief of Amici Curie Nat'l Ctr. for Lesbian Rights, et al., *supra* note 30, at 24; Brief of Amici Curiae Nat'l Ass'n of Soc. Workers, et al., in Support of Petitioner-Appellant Debra H's Appeal, *supra* note 64 at 10.

[109] *In re* E.L.M.C., 100 P.3d 546, 561 (Colo. App. 2004) (citing a number of cases for the proposition that "[t]his deep concern about emotional harm to the child as a result of separation from a psychological parent is echoed by other jurisdictions").

[110] V.C. v. M.J.B., 748 A.2d 539, 553 (N.J. 2000).

[111] *See* Mary L. Bonauto, et al., *Equity Actions Filed by De Facto Parents*, *in* PATERNITY AND THE LAW OF PARENTAGE IN MASSACHUSETTS § 12.2.2(a) (2d ed. 2009) (describing "[Massachusetts'] longstanding parens patriae powers, in which the state has a duty to promote the welfare of children.").

an appropriately high threshold.[112] More specifically, the common elements severely restrict the class of individuals who qualify as equitable parents by "protect[ing] the legal parent against claims by neighbors, caretakers, baby sitters, nannies, au pairs, nonparental relatives, and family friends."[113] Only individuals who have resided in the same household as the child and who have, with the consent and encouragement of the child's legal parent, taken on the obligations of parenthood in a manner that results in the formation of a parent-child bond are eligible for relief under the common elements of the equitable parenthood doctrines. Proponents argue that these elements strike the appropriate balance by respecting the rights of legal parents while serving the essential function of protecting from harm children who form parent-child bonds with non-legal parents.[114] As one court stated, "emotional harm to a young child is intrinsic in the termination or significant curtailment of the child's relationship with a psychological parent under any definition of that term."[115] It is precisely this harm that equitable parenthood doctrines seek to prevent.

2. Jurisdictions That Have Declined to Adopt Equitable Parenthood Doctrines

To date, in several jurisdictions courts that have ruled on the issue have expressly declined to adopt equitable parenthood doctrines that provide rights relating to visitation or custody to functional parents over the wishes of formal legal parents. As an initial matter, in declining to adopt equitable parenthood doctrines not expressly provided for by state statute, a number of courts have cited a lack of judicial authority or, similarly, the better position of the legislature, to adopt and define these doctrines.[116] Another common reason courts have given for

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[112] Conover v. Conover, 146 A.3d 433, 447 (Md. 2016) ("As other courts adopting this test have recognized, these factors set forth a high bar for establishing de facto parent status . . . ."); Brief of Amici Curiae Nat'l Ctr. for Lesbian Rights et al., *supra* note 30, at 23.

[113] *In re E.L.M.C.*, 100 P.3d at 546.

[114] *See supra* notes 88–90 and accompanying text.

[115] *In re E.L.M.C.*, 100 P.3d at 561; Middleton v. Johnson, 633 S.E.2d 162, 169 (S.C. Ct. App. 2006) (stating that "inherent in the bond between child and psychological parent is the risk of emotional harm to the child should the relationship be curtailed or terminated" (quoting *In re E.L.M.C.*, 100 P.3d at 560)).

[116] *See*, *e.g.*, *In re* Parentage of Scarlett Z.-D., 28 N.E.3d 776, 790 (Ill. 2015) (declining to adopt a functional parent doctrine because "[t]he very difficulty of [the] policy considerations [surrounding recognition of functional parenthood], and the legislature's superior institutional competence to pursue this debate, suggest that legislative and not judicial solutions are preferable"); Debra H. v. Janice R., 930 N.E.2d 184, 193 (N.Y. 2010) ("[A]ny change in the meaning of 'parent' under our law should come by way of legislative enactment . . . ."), *abrogated by* Brooke S.B. v. Elizabeth A.C.C., 61

rejecting these doctrines relates to the belief that by granting functional parents visitation- or custody-related rights over the wishes of formal legal parents, the doctrines infringe on the fundamental rights of formal legal parents to direct the care, custody, and control of their children.[117] In addition, a number of courts have declined to adopt such doctrines on the grounds that the standards employed in the doctrines are complicated, nonobjective, fact intensive, and lead to unpredictable results. These courts have stressed that the adoption of such doctrines would result in litigation that is costly, lengthy, and contentious.[118] Similarly, some courts have maintained that formal methods of establishing parental status for a nonbiological parent raising a child within a same-sex relationship, such as adoption, provide a straightforward, bright-line approach to parental determinations that is superior in promoting certainty and stability for parents and their children.[119] Notably, several courts have cited the availability of second parent adoption in the jurisdiction in support of decisions declining to adopt equitable parenthood doctrines.[120]

N.E.3d 488 (N.Y. 2016); Jones v. Barlow, 154 P.3d 808, 817 (Utah 2007) (declining to "overstep its bounds and invade the purview of the legislature" by adopting an equitable parent doctrine); Titchenal v. Dexter, 693 A.2d 682, 689 (Vt. 1997) (reasoning that "[g]iven the complex social and practical ramifications of expanding the classes of persons entitled to assert parental rights by seeking custody or visitation, the Legislature is better equipped to deal with the problem"); LP v. LF, 338 P.3d 908, 919–20 (Wy. 2014) ("[W]hen we review the involvement of our legislature in the parent-child relationship, we do not find a gap of sufficient size to permit us to adopt the de facto parent doctrine. . . . We . . . defer[ ] to the Wyoming Legislature to recognize and define that relationship if it wishes to do so."); *see also In re* N.I.V.S., No. 04–14–00108–CV, 2015 WL 1120913, at *7 (Tex. App. Mar. 11, 2015) ("[W]e need not discuss the elements of the psychological parent doctrine because we are confined to examining standing within the statutory framework of the Family Code." (citing *In re H.G.*, 267 S.W.2d 120, 123–24 (Tex. Ct. App. 2008))); Stadter v. Siperko, 661 S.E.2d 494, 498–99 (Va. App. 2008) (declining to "implement—by judicial fiat—a visitation doctrine of *de facto* or psychological parent in the Commonwealth").

[117] Janice M. v. Margaret K., 948 A.2d 73, 78–87 (Md. 2008), *overruled by* Conover v. Conover, 146 A.3d 433 (Md. 2016); *Debra H.*, 930 N.E.2d at 193; *Jones*, 154 P.3d at 816, 818.

[118] *Debra H.*, 930 N.E.2d at 192; *Jones*, 154 P.3d at 816; *Titchenal*, 693 A.2d at 687.

[119] *See, e.g.*, *Debra H.*, 930 N.E.2d at 192–96.

[120] A.H. v. M.P., 857 N.E.2d 1061, 1073–74 (Mass. 2006) (stating that "[i]n this jurisdiction, same-sex couples, like heterosexual couples, are free to adopt the children of their partners," and refusing to apply an equitable parenthood doctrine in a situation in which the plaintiff had planned with the defendant for the child's birth, helped care for the child for the first year and a half of his life, and was referred to as "Mama" by the child.); *Debra H.*, 930 N.E.2d at 194 (stating that "the right of second-parent adoption . . . furnishes the biological and adoptive parents of children—and, importantly, those children themselves—with a simple and understandable rule by which to guide their relationships and order their lives[,]" and refusing to apply an equitable parenthood doctrine despite the fact that the plaintiff had served as a loving and caring parental figure during the first two and a half years of the child's life); *Titchenal*, 693 A.2d at 683–87 (refusing to apply an equitable parenthood doctrine despite the fact that the plaintiff had held herself out as the child's parent and had provided the majority of care for the child from the child's birth until

II. DEVELOPMENTS IN ACCESS TO AVENUES TO ESTABLISHING FORMAL LEGAL PARENT STATUS FOR NONBIOLOGICAL PARENTS IN SAME-SEX RELATIONSHIPS

A. Avenues of Establishing Formal Legal Parenthood Currently Available to Nonbiological Parents in Same-Sex Relationships

1. Marriage

Today, many of the avenues available for establishing formal legal parenthood are based upon marriage. Until relatively recently, same-sex couples were not able to marry in any jurisdiction in the United States, and thus all of the marriage-based avenues for establishing legal parenthood were simply unavailable to same-sex couples. In 2004, however, Massachusetts became the first state to legalize same-sex marriage.[121] Between 2004 and 2015, same-sex marriage expanded rapidly throughout the United States, culminating with the Supreme Court's decision in *Obergefell v. Hodges*, which held that the remaining state bans on same-sex marriage were unconstitutional and resulted in the recognition of same-sex marriage in every U.S. jurisdiction.[122] This decision has given same-sex couples access to avenues to establishing formal parenthood that were previously unavailable to them.

a. The Marital Presumption of Paternity

The marital presumption of paternity, under which a husband is presumed by law to be the father of a child conceived by or born to his wife during the marriage, is "a longstanding legal presumption in the United States" that still exists in some form in every state.[123] Pursuant to *Obergefell*, in which the Court explicitly stated that states may not "bar same-sex couples from marriage on the same terms as accorded to couples of the opposite sex,"[124] the marital presumption of paternity should apply to both different- and same-sex spouses of women who give

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the child was three and a half years old, and stressing that nonbiological parents in same-sex relationships can protect themselves through adoption).

[121] *Looking Back at the Legalization of Gay Marriage in Mass.*, BOS. GLOBE (June 26, 2015), https://www.bostonglobe.com/metro/2015/06/26/looking-back-legalization-gay-marriage-mass/uhCeyrSeJtWty9tSUde1PI/story.html [https://perma.cc/UP7L-L5NS].

[122] Obergefell v. Hodges, 135 S. Ct. 2584, 2608 (2015).

[123] Feinberg, *supra* note 1, at 341.

[124] *Obergefell*, 135 S. Ct. at 2607.

birth.[125] Significantly, most, though not all, of the courts that have ruled on the issue thus far have concluded that the marital presumption of paternity applies to the same-sex spouse of a woman who gives birth to or conceives a child during the marriage.[126] However, due to the lack of court decisions in many states regarding the applicability of the marital presumption to same-sex couples, the absence of uniform results among court decisions addressing the issue, and the uncertainty regarding whether the presumption, even if extended to female same-sex couples, also would apply to married male same-sex couples,[127] LGBT rights experts continue to strongly recommend that married same-sex couples who conceive a child during the marriage seek

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[125] COURTNEY JOSLIN ET AL., LESBIAN, GAY, BISEXUAL & TRANSGENDER FAMILY LAW § 5:22 (2016) ("After *Obergefell v. Hodges*, there is no question that all marriage-based parentage rules—including the marital presumption—must be applied equally to same-sex spouses (although some states may initially resist this proposition)." (footnote omitted)). This reading of Obergefell is further supported by the Supreme Court's recent decision in *Pavan v. Smith*, in which the Court held that under Obergefell, Arkansas could not refuse to list the name of a birth mother's female spouse on the child's birth certificate when state law generally required the name of birth mothers' male spouses to appear on birth certificates. Pavan v. Smith, 137 S. Ct. 2075, 2079 (2017). However, Pavan concerned only birth certificates, not the presumption of parentage itself, and generally "a birth certificate is merely prima facie evidence of the information stated within." JOSLIN ET AL., *supra* note 74, § 5:24.

[126] *See*, *e.g.*, Barse v. Pasternak, No. HHBFA124030541S, 2015 WL 600973, at *10 (Conn. Super. Ct. Jan. 16, 2015) ("[T]his court finds that the protections of Connecticut's common-law presumption of legitimacy apply equally to children of same-sex and opposite-sex married couples and that the marital presumption applies equally to same-sex and opposite-sex marriages."); Gartner v. Iowa Dep't of Pub. Health, 830 N.W.2d 335, 340–41 (Iowa 2013) (holding that due to its language excluding married female same-sex couples, the existing marital presumption statute was unconstitutional and striking down the portion of the statute containing the exclusionary language); *see also* Kerry Abrams & R. Kent Piacenti, *Immigration's Family Values*, 100 VA. L. REV. 629, 709 (2014) ("Most states that recognize same-sex marriages, for example, also extend the marital presumption of paternity to gay and lesbian couples, even though in many of these instances there is no chance that the marital parent is also the genetic parent."); *cf.* Miller-Jenkins v. Miller-Jenkins, 912 A.2d 951, 970–71 (Vt. 2006) (holding that because civil unions granted same-sex couples all of the rights and obligations of marriage, the marital presumption of paternity applied to same-sex couples who had entered into civil unions). *But see In re* Paczkowski v. Paczkowski, 128 A.D.3d 968, 969 (N.Y. App. Div. 2015) (holding that the statutory marital presumptions of paternity did not apply to the wife of woman who conceived a child during the marriage, "since the presumption of legitimacy [the statutes] create is one of a biological relationship, not of legal status, and, as the nongestational spouse in a same-sex marriage, there is no possibility that [the wife] is the child's biological parent" (citations omitted)). The cases generally involved female same-sex couples, and it is unclear whether courts will be willing to apply the presumption to male same-sex couples, who require a surrogate in order to conceive a child via ART. *See* Susan Frelich Appleton, *Presuming Women: Revisiting the Presumption of Legitimacy in the Same-Sex Couples Era*, 86 B.U. L. REV. 227, 260–61 (2006); Alexandra Eisman, *The Extension of the Presumption of Legitimacy to Same-Sex Couples in New York*, 19 CARDOZO J.L. & GENDER 579, 593–95 (2013).

[127] *See* Appleton, *supra* note 126, at 260–61; Eisman, *supra* note 126, at 593–95.

adoption or a parentage judgment to ensure that the nonbiological parent is recognized as a legal parent across jurisdictions.[128]

b. Consent to a Spouse's Use of Assisted Reproductive Technology

Under statutory or common law rules in most jurisdictions, a husband who consents to his wife's use of assisted reproductive technology (ART) with the intent to be the resulting child's parent is presumed or conclusively determined to be the child's second legal parent, regardless of whether he is the biological father.[129] Among these jurisdictions, some require that the consent be in writing and/or that the procedure be performed by or under the supervision of a physician, while others do not.[130] Pursuant to *Obergefell*, these laws should apply to both different- and same-sex spouses who consent to their wife's use of ART with the intent to be the resulting child's parent.[131] Although only a handful of courts have ruled on the issue, those that have addressed it thus far have held that the ART parentage rules, even if set forth in terms that reference married different-sex couples, are equally applicable to married same- and different-sex couples.[132] Again, even in jurisdictions that have adopted marriage-based parentage rules in the ART context, due to the lack of court decisions in many states regarding the applicability of these rules to same-sex couples and the uncertainty regarding whether such rules encompass married male same-sex couples even if they are extended to

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[128] *See*, *e.g.*, NAT'L CTR. FOR LESBIAN RIGHTS, LEGAL RECOGNITION OF LGBT FAMILIES (2016), http://www.nclrights.org/wp-content/uploads/2013/07/Legal_Recognition_of_LGBT_Families.pdf (2016) [https://perma.cc/Y5PM-7PDX] ("Regardless of whether you are married or in a civil union or comprehensive domestic partnership, NCLR always encourages non-biological and non-adoptive parents to get an adoption or parentage judgment, even if you are named on your child's birth certificate.").

[129] JOSLIN ET AL., *supra* note 74, § 3:3.

[130] *Id.*

[131] *Id.* ("After the decision in *Obergefell v. Hodges* requiring that states permit and recognize marriages between same-sex spouses on the 'same terms and conditions' as for different-sex spouses, these rules must be applied equally to same-sex couples who have children through assisted reproduction during their marriage." (footnote omitted)).

[132] *See*, *e.g.*, Della Corte v. Ramirez, 961 N.E.2d 601, 602–03 (Mass. App. Ct. 2012); Wendy G-M. v. Erin G-M., 45 Misc. 3d 574, 582 (N.Y. Sup. Ct. 2014); Roe v. Patton, No. 2:15–cv–00253–DB, 2015 WL 4476734, at *4 (D. Utah July 22, 2015); *see also* Shineovich and Kemp, 214 P.3d 29, 40 (Or. Ct. App. 2009) (holding, in a decision before the state had legalized same-sex marriage, that the marriage-based ART-provisions extended to female same-sex couples in domestic partnerships because under state law domestic partners were entitled to all of the rights and protections provided to married couples); Douglas NeJaime, *Marriage Equality and the New Parenthood*, 129 HARV. L. REV. 1185, 1244, n.353 (citing *In re* Parentage of L.D.S., No. 2015-DM-000892, at 3–4 (Kan. Dist. Ct. Sept. 16, 2015)).

female same-sex couples,[133] LGBT rights experts continue to forcefully recommend that married same-sex couples who conceive a child during the marriage seek adoption or parentage judgments to ensure that the nonbiological parent is recognized as a legal parent across jurisdictions.[134]

While in most jurisdictions the ART parentage provisions are limited to married couples, ten jurisdictions have expanded the rules to encompass unmarried couples such that a man who consents to a woman's use of ART with the intent to be the resulting child's parent is considered the child's formal legal parent.[135] In six of these ten jurisdictions, the language of the ART parentage provisions encompasses unmarried same-sex couples as well as unmarried different-sex couples.[136] A recent decision by New York's highest court in a case involving an unmarried same-sex couple adopted a slightly different approach, providing standing as a parent for purposes of custody and visitation actions, as opposed to formal legal parent status, to a petitioner who "proves by clear and convincing evidence that he or she has agreed with the biological parent of the child to conceive and raise the child as co-parents."[137]

c. Stepparent Adoption

All states have stepparent adoption processes through which the spouse of a child's formal legal parent can adopt the

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[133] Even among jurisdictions that have adopted statutory language to include same-sex couples under the ART-based parentage provisions, the language often refers to any person who consents to a woman's use of ART, which makes the applicability to male same-sex couples uncertain. *See*, *e.g.*, CAL. FAM. CODE § 7613(a) (West 2017) ("If a woman conceives through assisted reproduction with semen or ova or both donated by a donor not her spouse, with the consent of another intended parent, that intended parent is treated in law as if he or she were the natural parent of a child thereby conceived."); D.C. CODE § 16-909(e)(1) (2017) ("A person who consents to the artificial insemination of a woman . . . with the intent to be the parent of her child, is conclusively established as a parent of the resulting child."); ME. REV. STAT. ANN. tit. 19-A, § 1923 (2016) ("[A] person who consents to assisted reproduction by a woman . . . with the intent to be the parent of a resulting child is a parent of the resulting child."); NEV. REV. STAT. § 126.670 (2016) ("A person who provides gametes for, or consents to assisted reproduction by a woman, as provided in NRS 126.680, with the intent to be a parent of her child is a parent of the resulting child.").

[134] *See*, *e.g.*, JOSLIN ET AL., *supra* note 74, § 3:4; NAT'L CTR. FOR LESBIAN RIGHTS, *supra* note 128, at 1 ("Regardless of whether you are married or in a civil union or comprehensive domestic partnership, NCLR always encourages non-biological and non-adoptive parents to get an adoption or parentage judgment, even if you are named on your child's birth certificate.").

[135] JOSLIN ET AL., *supra* note 74, § 3:3.

[136] *Id.*

[137] Brooke S.B. v. Elizabeth A.C.C., 61 N.E.3d 488, 501 (N.Y. 2016) ("[W]e stress that this decision addresses only the ability of a person to establish standing as a parent to petition for custody or visitation . . . .").

child without terminating the legal parent's rights as long as the child does not already have a second legally recognized parent or the rights of the second legally recognized parent are terminated.[138] As a result of the nationwide legalization of same-sex marriage, married same-sex couples in every state should be able to avail themselves of stepparent adoption procedures.[139] Many states treat stepparent adoptions differently than other types of adoptions, waiving or authorizing judicial waiver of requirements for costly and intrusive steps like home studies and financial accountings for stepparent adoptions.[140] This differential treatment is based on the justification that stepparent adoptions are distinct because typically the child already will have been living with the stepparent, and thus the process is simply formalizing an already existing parent-child relationship and does not disrupt the child's living situation.[141] In addition, "the concerns about unlawful payments to birth parents or intermediaries which are expressed about other types of adoptions are arguably not present in stepparent adoptions."[142] Even in jurisdictions that waive requirements such as financial accountings and home studies, the stepparent adoption procedure can nonetheless be costly and complicated. Many individuals require the assistance of an attorney to navigate the process and thus incur attorney's fees, and the procedure often requires, *inter alia*, submitting various documents, paying court fees, appearing in court, and submitting to a background check.[143]

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[138] Mark Strasser, *Courts, Legislatures, and Second-Parent Adoptions: On Judicial Deference, Specious Reasoning, and the Best Interests of the Child*, 66 TENN. L. REV. 1019, 1026 (1999); JOSLIN ET AL., *supra* note 74, § 5:3.

[139] JOSLIN ET AL., *supra* note 74, § 5:3; NAT'L CTR. FOR LESBIAN RIGHTS, *supra* note 128, at 1.

[140] UNIF. ADOPTION ACT § 4-111 (NAT'L CONFERENCE OF COMM'RS ON UNIF. STATE LAWS 1994) ("At present, most States do not require an evaluation or home-study when a stepparent seeks to adopt a stepchild. Even in States where a home-study is ostensibly required, the court usually has the discretion to waive the requirement."); THOMAS A. JACOBS, CHILDREN AND THE LAW: RIGHTS AND OBLIGATIONS § 4:5 (2017 ed.) ("Most states waive the requirement for a homestudy . . . [and] [f]ormal accounting procedures are generally waived in a stepparent adoption . . . ." (footnote omitted)); Margaret M. Mahoney, *Stepparents as Third Parties in Relation to Their Stepchildren,* 40 FAM. L.Q. 81, 94 n.51 (2006); W. Bradford Wilcox & Robin Fretwell Wilson, *Bringing Up Baby: Adoption, Marriage, and the Best Interests of the Child,* 14 WM. & MARY BILL RTS. J. 883, 885 n.6 (2006).

[141] UNIF. ADOPTION ACT § 4 cmt. (NAT'L CONFERENCE OF COMM'R ON UNIF. STATE LAWS 1994).

[142] *Id.*

[143] *See*, *e.g.*, Roe v. Patton, No. 2:15–cv–00253–DB, 2015 WL 4476734, at *2 (C.D. Utah, July 22, 2015) ("To complete a step-parent adoption, [the petitioners] would have to file a Petition to Adopt a Minor Stepchild in Utah State Court and pay a filing fee of $360. [The stepparent] would also have to submit to a background check by the Utah Bureau of Criminal Identification and the Utah Division of Child and Family Services. Once the adoption petition is submitted, [the petitioners] would have to wait

2. Second Parent Adoption

Second parent adoption is currently available statewide in at least thirteen states and the District of Columbia, and is available in certain counties in at least another fourteen jurisdictions.[144] Second parent adoption is similar to stepparent adoption in that the partner of a child's formal legal parent is able to adopt the child without the formal legal parent's rights being terminated, but differs from stepparent adoption in that unmarried couples can utilize the procedure.[145] The first jurisdictions to grant second parent adoptions did so "in the mid-1980s."[146] Since same-sex couples could not marry until recently, for many years second parent adoption represented the primary manner through which both members of same-sex couples could gain recognition as the formal legal parents of the biological child of one of the partners.[147]

Like stepparent adoption, second parent adoption usually requires, *inter alia*, hiring an attorney, paying court fees, executing various documents, submitting to background checks, and appearing in court.[148] Notably, however, the second parent adoption process is often more costly,[149] intrusive,[150] and

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for a judge to schedule a hearing on their adoption petition, and they would then have to appear in person at the hearing to a get the judge's approval for [the petitioner] to adopt [the child]"); *see also* CHILD WELFARE INFO. GATEWAY, STEPPARENT ADOPTION 2–4 (2013), https://www.childwelfare.gov/pubpdfs/f_step.pdf [https://perma.cc/TZB8-TJSV] (providing a broad overview of stepparent adoption); SUPERIOR COURT OF CALIFORNIA, CTY. OF SACRAMENTO, STEPPARENT ADOPTION 1–3 (2017), https://www.saccourt.ca.gov/family/docs/fl-stepparent-adoption.pdf (describing the requirements for a stepparent adoption in California); *Stepparent Adoption is Permanent*, OHIO STATE BAR ASS'N (Dec. 22, 2015), https://www.ohiobar.org/forpublic/resources/lawyoucanuse/pages/lawyoucanuse-204.aspx [https://perma.cc/A566-E7BC] (describing the Ohio stepparent adoption process).

144 NAT'L CTR. FOR LESBIAN RIGHTS, *supra* note 128, at 2.

145 *Id.*; JOSLIN ET AL., *supra* note 74, § 5:2.

146 *Id.*

147 *Id.*

148 *See*, *e.g.*, STATE OF COLORADO JUDICIAL DEP'T, INSTRUCTIONS FOR SECOND PARENT ADOPTION, https://www.courts.state.co.us/Forms/PDF/JDF%20495%20Second%20Parent%20Adoption%20InstructionsR7-17.pdf [https://perma.cc/Y763-UL4B] (providing instructions for obtaining a second parent adoption in Colorado).

149 For instance, in California the maximum cost of a home study for a second parent adoption is $700, while "the cost of a home investigation for an independent adoption is $4,500." JOSLIN ET AL., *supra* note 74, § 5:2.

150 Catherine Connolly, *The Voice of the Petitioner: The Experiences of Gay and Lesbian Parents in Successful Second-Parent Adoption Proceedings*, 36 L. & SOC'Y REV. 325, 334 (2002) (comparing stepparent adoptions to second parent adoptions and stating that "[t]he legal process for stepparents to adopt the children of their new spouse is often much more relaxed and usually does not require a full home study").

lengthy[151] than the stepparent adoption process.[152] For example, unlike for stepparent adoptions, home studies, which can be intrusive and costly and can prolong the adoption process, are generally required for second parent adoptions (although some states grant courts discretion to waive the home study requirement).[153] Second parent adoptions cost between $2,000 and $3,000 on average[154] and, depending on the jurisdiction, can cost upwards of $5,000.[155] Until the adoption process is completed and the adoption decree is granted, the adopting parent generally is considered a legal stranger to the child.[156]

B. Avenues for Establishing Legal Parent Status That Generally Have not yet Been Extended to Same-Sex Parents

1. Formal Avenues for Establishing Legal Parent Status That Generally Have not yet Been Extended to Same-Sex Parents

a. Voluntary Acknowledgements of Paternity

The voluntary acknowledgement of paternity (VAP) is the most common avenue through which unmarried fathers establish legal paternity of their children.[157] A VAP is a document that identifies a man as a child's father and is signed by both the child's mother and the man identified as the child's

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[151] NAT'L CTR. FOR LESBIAN RIGHTS, *supra* note 128, at 2 (Stepparent "adoptions have the same effect as a second parent adoption, but they may be faster and less expensive than second parent adoptions, depending on where you live.").

[152] JOSLIN ET AL., *supra* note 74, § 5:2; Richard F. Storrow, *Rescuing Children from the Marriage Movement: The Case Against Marital Status Discrimination in Adoption and Assisted Reproduction*, 39 U.C. DAVIS L. REV. 305, 343–44 (2006).

[153] JOSLIN ET AL., *supra* note 74, § 5:19; Alexander Newman, *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, 85 (2016) ("Stepparent adoptions are often preferable to second-parent adoptions, in part because they frequently are less costly: second-parent adoptions can require expensive home studies before the adoption is approved, whereas stepparent adoptions do not.").

[154] *How Much Does Adoption Cost?*, HUMAN RTS. CAMPAIGN http://www.hrc.org/resources/how-much-does-adoption-cost [https://perma.cc/2TVF-LRE2].

[155] Blake Ellis, *Adoption Tax Credit for Same-Sex Couples*, CNN MONEY (Feb. 25, 2013, 10:48 AM), http://money.cnn.com/2013/02/25/pf/taxes/same-sex-adoption/ [https://perma.cc/7N3W-U94V].

[156] 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, 207 (2009).

[157] Leslie Joan Harris, *The New "Illegitimacy": Revisiting Why Parentage Should Not Depend on Marriage: Voluntary Acknowledgments of Parentage for Same-Sex Couples*, 20 AM. U. J. GENDER SOC. POL'Y & L. 467, 469 (2012).

father.[158] The document establishes legal paternity.[159] VAPs are usually signed at the hospital at the time of birth or shortly thereafter.[160] Under federal law, states must make VAPs available to unmarried parents in order to receive welfare funding.[161] Consequently, VAPs are available to unmarried couples in every state.[162] Importantly, "[w]hile the federal legislation contemplated that VAPs would be used simply to establish paternity, usually for the sake of collecting child support, empirical evidence indicates that unmarried parents are using VAPs for another purpose: to identify themselves as a child's co-parents and to memorialize that relationship."[163]

Federal law mandates that state VAP procedures meet a number of requirements. For example, all public and private birthing hospitals as well as birth records offices in the state must offer VAPs.[164] With regard to birthing hospitals specifically, they "must provide voluntary paternity establishment services focusing on the period immediately before and after the birth of a child born out-of-wedlock."[165] In addition, birthing hospitals and birth records offices must have staff trained to advise unmarried parents regarding VAPs,[166] and "each party must be given oral and written notice of the alternatives to, legal consequences of, and rights and responsibilities arising from the signed acknowledgment."[167] The state cannot require a man to submit to genetic testing before signing a VAP, although in some states either the VAP or the accompanying instructions indicate that only biological fathers should sign.[168] Either the mother or the putative father may rescind the VAP until either sixty days have passed or there has been "an administrative or judicial proceeding relating to the

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158 *Id.* at 475.

159 *Id.*; *see also* DEP'T OF HEALTH & HUM. SERV., OFF. OF INSPECTOR GEN., OFF. OF EVALUATIONS AND INSPECTIONS, OEI-06-98-00053, PATERNITY ESTABLISHMENT: USE OF VOLUNTARY PATERNITY ACKNOWLEDGMENTS 1 (2000), https://oig.hhs.gov/oei/reports/oei-06-98-00053.pdf [https://perma.cc/HLJ8-3S8G] [hereinafter OFFICE OF THE INSPECTOR GENERAL].

160 *Child Support 101.2: Establishing Paternity*, NAT'L CONF. ST. LEGIS., (Mar. 19, 2014), http://www.ncsl.org/research/human-services/enforcement-establishing-paternity.aspx [https://perma.cc/49ZU-VSMN] [hereinafter Child Support 101.2] ("Most often, voluntary paternity acknowledgment is completed in the hospital within days of the child's birth."); Harris, *supra* note 157, at 476 n.36.

161 Harris, *supra* note 157, at 475.

162 *Id.*; *see also* OFFICE OF THE INSPECTOR GENERAL, *supra* note 159, at i.

163 Harris, *supra* note 157, at 476–77.

164 45 C.F.R. §§ 303.5(g)(1)(i), (ii) (2016); Harris, *supra* note 157, at 476.

165 45 C.F.R. § 303.5(g)(1)(i).

166 *Child Support 101.2.*, *supra* note 160.

167 Harris, *supra* note 157, at 476 (citing 42 U.S.C. § 666(a)(5)(C)(i) (2012)); *see also* 45 C.F.R. § 303.5(g)(2)(i);; OFFICE OF THE INSPECTOR GENERAL, *supra* note 159, at 1.

168 Feinberg, *supra* note 1, at 343–44.

child," whichever is earlier.[169] Importantly, a VAP that is not rescinded within sixty days, must be "considered a legal finding of paternity."[170] Moreover, states must give full faith and credit to out-of-state VAPs that comply with federal law and the law of the issuing state.[171]

After sixty days have passed, VAPs "can only be challenged on the grounds of fraud, duress, or material mistake of fact."[172] The most frequent challenges to VAPs following the sixty-day rescission period involve claims that the man identified in the VAP is not the child's biological father and allegations of either fraudulent conduct by the mother in misleading the father or mistake of material fact.[173] Most states that have ruled on the issue have allowed challenges to VAPs based upon DNA testing, though test results indicating that the man identified in the VAP is not the child's biological factor do not always result in rescission of the VAP.[174] For example, courts in some states require evidence of fraud or mistake beyond the test results, allow for rescission on this basis only if it is in the best interests of the child, or use theories of equitable estoppel to prevent rescission on this basis in certain situations.[175]

Although at least one scholar has set forth a comprehensive proposal to expand the use of VAPs to same-sex parents, to date same-sex parents generally have not been able to utilize VAPs to establish legal parent status.[176] Due to the fact that in situations involving same-sex parents the parent identified in the VAP would often lack genetic ties to the child, VAP procedures across the United States would need to be restructured so that representations regarding genetic ties were not a part of the execution process and genetics-based claims could not be grounds for rescission. In addition, standards likely would need to be set forth regarding the applicable procedure to be followed when the child's second biological parent is not a member of the couple seeking to execute the VAP, but is known to the couple.[177] The lack of availability of VAPs to same-sex couples further reflects the substantial differences that continue to exist with regard to the ease with which different- and same-

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169 42 U.S.C. § 666(a)(5)(D)(ii); OFFICE OF THE INSPECTOR GENERAL, *supra* note 159, at 1.

170 42 U.S.C. § 666 (a)(5)(D)(ii), (E).

171 Harris, *supra* note 157, at 476.

172 *Id.*

173 *Id.* at 479.

174 *Id.* at 479–80.

175 *Id.* at 480.

176 *See generally* Harris, *supra* note 157.

177 *Id.* at 487.

sex couples are able to establish both members of the couple as the formal legal parents of their children.

b. Procedures That Establish Legal Paternity for Unmarried Men Based upon Biology

In addition to VAPs, other avenues exist to establish the legal paternity of unmarried men. In situations in which paternity establishment has not been completed through a VAP, interested parties, such as the mother, the putative father, or a child support agency, commonly pursue legal proceedings to establish the putative father's paternity. Establishing a putative father's paternity through legal proceedings generally involves genetic testing demonstrating that the putative father is the child's biological father.[178] Notably, federal law governing child support requires that all states adopt:

> [p]rocedures under which the State is required, in a contested paternity case (unless otherwise barred by State law) to require the child and all other parties . . . to submit to genetic tests upon the request of any such party, if the request is supported by a sworn statement by the party . . . alleging paternity, and setting forth facts establishing a reasonable possibility of the requisite sexual contact between the parties; or . . . denying paternity, and setting forth facts establishing a reasonable possibility of the nonexistence of sexual contact between the parties.[179]

Furthermore, federal child support law also requires states to adopt standards that create a conclusive or rebuttable presumption of paternity based upon genetic testing results demonstrating that the putative father is the child's biological father.[180] Due to the genetics-based nature of establishing paternity through these legal proceedings and the reality that in same-sex relationships it is usually the nonbiological parent who lacks legal parent status, this avenue of establishing legal parent status generally is unavailable to same-sex couples.

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[178] Marilyn Ray Smith & Paula M. Carey, *Paternity Challenges to Children Born During a Marriage*, *in* PATERNITY AND THE LAW OF PARENTAGE IN MASSACHUSETTS § 8.1 (2d ed. 2009) ("Contested [paternity] matters usually involve compelling the putative father to submit to genetic tests . . . .").

[179] 42 U.S.C. § 666(a)(5)(B)(i) (2012).

[180] *Id.* at § 666(a)(5)(G).

2. Function-Based Avenues for Establishing Legal Parent Status That Generally Have not yet Been Extended to Same-Sex Parents: "Holding Out" Presumptions

A number of states have statutory provisions that set forth "holding out" presumptions.[181] Holding out presumptions can be traced to a 1973 Uniform Parentage Act (UPA) provision which stated that a man is entitled to a presumption of paternity if "while the child is under the age of majority, he receives the child into his home and openly holds out the child as his natural child."[182] While a number of states continue to employ holding out presumptions that contain language similar to that of the 1973 UPA, nine states have adopted variations of the holding out provision set forth in the 2002 UPA, which "has a durational requirement, providing that the person must have lived with and held out the child [] as his own for the first two years of the child's life."[183] Because the language of holding out presumptions generally requires that an individual hold the child out as his "natural" or "own" child, the applicability of these provisions to a nonbiological parent in a same-sex relationship with the child's biological parent is uncertain.[184]

In 2005, the Supreme Court of California held that the state's holding out presumption, which provided a presumption of paternity to a man who "receives the child into his home and openly holds out the child as his natural child," applied to a woman in a same-sex relationship with the child's biological mother.[185] The California legislature recently amended the holding out presumption to make it gender neutral.[186] This avenue for establishing legal parent status, however, is one of the newer avenues, and to date very few court decisions in other jurisdictions have ruled on the applicability of holding out presumptions to

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[181] JOSLIN ET AL., *supra* note 74, § 5:22.

[182] UNIF. PARENTAGE ACT § 4(a)(4) (1973).

[183] JOSLIN ET AL., *supra* note 74, § 5:22.

[184] NeJaime, *supra* note 132, at 1215–16 ("The UPA's 'holding out' provision, section 7611(d), was designed for unmarried, biological fathers. It provided that one is a presumed father if 'he receives the child into his home and openly holds out the child as his *natural* child.' While the provision focused on unmarried fathers' parental conduct, it seemed—with the term 'natural'—constrained by biology." (emphasis in original) (quoting CAL. FAM. CODE § 7611(d) (West 2014))).

[185] *See* Elisa B. v. Superior Court, 117 P.3d 660, 664, 670, 672 (Cal. 2005) (quoting CAL. FAM. CODE § 7611(d) (West 2014)).

[186] NeJaime, *supra* note 132, at 1261.

same-sex parents.[187] Like the equitable parenthood doctrines discussed above, this avenue for establishing parental rights is not available immediately at the time of birth and requires the petitioner to prove that he or she engaged in certain conduct relating to the child.[188]

III. EVALUATING THE CURRENT NEED FOR CONTINUED LEGAL RECOGNITION OF EQUITABLE PARENTHOOD DOCTRINES

In cases involving same-sex parents, even though it remains far more difficult for same-sex couples to establish both members as formal legal parents as compared to their different-sex counterparts, it will be tempting for judges to refuse to apply equitable parenthood doctrines on the grounds that there were avenues available through which the functional parent could have obtained formal legal parent status, and thus equity does not require application of the doctrine.[189] This will likely be especially true in jurisdictions in which the establishment of formal legal parent status for functional parents in same-sex relationships is available through various marriage-based avenues, second parent adoption, or a combination of these avenues.[190] In addition, in jurisdictions that provide same-sex couples with various marriage- or adoption-based avenues through which the functional parent can obtain formal legal parent status, opponents of equitable parenthood doctrines likely will argue that the failure of the couple to pursue these avenues demonstrates a lack of consent on the part of the formal legal parent to the functional parent forming a parent-like relationship with the child, and that application of an equitable parenthood

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[187] JOSLIN ET AL., *supra* note 74, § 5:22. The Supreme Judicial Court of Massachusetts recently held that the state's holding-out presumption applies to same-sex couples. Partanen v. Gallagher, 59 N.E.3d 1133, 1142 (Mass. 2016).

[188] *See supra* Section I.B.

[189] *See, e.g.*, A.H. v. M.P., 857 N.E.2d 1061, 1073–74 (Mass. 2006); Debra H. v. Janice R., 930 N.E.2d 184, 193 (N.Y. 2010) (citing the availability of second parent adoption in support of decision declining to apply an equitable parenthood doctrine), *abrogated by* Brooke S.B. v. Elizabeth A.C.C., 61 N.E.3d 488 (N.Y. 2016); Titchenal v. Dexter, 693 A.2d 682, 689 (Vt. 1997); NeJaime, *supra* note 132, at 1252 ("Courts that may otherwise have used equitable theories to recognize such parents may find that for nonbiological parents who had the opportunity to legally marry a child's biological parent, their choice not to do so undermines their claim to parental rights."); Nancy Polikoff, *The New "Illegitimacy": Winning Backward in the Protection of the Children of Lesbian Couples*, 20 AM. U. J. GENDER SOC. POL'Y & L. 721, 728 (2012) ("The existence of marriage—or an equivalent formal status—makes it easier to implement bright line rules about legal consequences. This ease means that judges and legislators, satisfied that marriage is a good enough dividing line, will be less likely to engage in the messier business of achieving justice.").

[190] *See supra* note 189 and accompanying text.

doctrine is therefore inappropriate.[191] These arguments, however, are ultimately unpersuasive, and it would be a mistake for courts and legislatures to decline to apply or establish equitable parenthood doctrines on the grounds that marriage or adoption-based avenues to establishing legal parent status for functional parents in same-sex relationships exist in the jurisdiction.

This Part will proceed as follows: it first addresses the implications for same-sex parents of courts and legislatures declining to adopt or apply equitable parenthood doctrines based upon the availability of marriage-based avenues to establishing formal legal parent status in the relevant jurisdiction. It then addresses the implications for same-sex parents of courts and legislatures declining to adopt or apply equitable parenthood doctrines due to the availability of second parent adoption as an avenue to establishing formal legal parent status in the relevant jurisdiction. Finally, the Part concludes by exploring whether declining to apply equitable parenthood doctrines on the basis of the availability to same-sex couples of marriage- and adoption-based avenues of establishing formal legal parent status will further the best interests of children.

A. The Preclusion of Equitable Parenthood Doctrines Based Upon Current Avenues for Establishing Legal Parent Status for Same-Sex Parents That Require Marriage

1. Marriage-Based Presumptions of Parentage

With regard to the question of whether the extension of marriage-based presumptions of parentage to married same-sex couples should preclude application of equitable parenthood doctrines, it is important to note at the outset that most jurisdictions have not ruled on whether their existing marriage-based presumptions of parentage actually extend to married same-sex couples.[192] Moreover, those jurisdictions that have ruled on the issue have not all reached the same result.[193] Importantly, even in jurisdictions that have extended marriage-based presumptions of parentage to married same-sex couples, because such presumptions typically remain gendered in that they have as their starting point a woman who gives birth to or conceives a child while married, it is far from clear that the extensions encompass male same-sex couples.[194] Indeed, the

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[191] *See supra* notes 115–116 and accompanying text.
[192] *See supra* notes 126–127 and accompanying text.
[193] *See supra* note 126 and accompanying text.
[194] Appleton, *supra* note 126, at 260–65.

court decisions extending marriage-based presumptions of parentage to same-sex couples have arisen in the context of female same-sex couples.[195] Thus, abandoning equitable parenthood doctrines based upon statutes or judicial decisions that on their face extend marriage-based presumptions of parentage to same-sex couples but do not explicitly address the application of such presumptions to male same-sex couples, would be deeply unfair to male same-sex couples. Even for female same-sex couples, however, the availability of marriage-based presumptions of parentage should not exclude application of equitable parenthood doctrines. The potential arguments in favor of requiring a formal legal parent and a functional parent to marry in order for the functional parent to obtain legal recognition of his or her relationship with the couple's child are unpersuasive, and this type of approach to establishing the rights of same-sex parents is both discriminatory and deeply flawed.

Potential arguments for excluding equitable parenthood doctrines based upon the availability to same-sex couples of marriage-based presumptions of parentage likely will arise from the underlying idea that marriage to a child's formal legal parent is a superior basis for establishing parental rights because the decision to marry is uniquely reflective or predictive of certain spousal understandings and conduct relating to children born or conceived during the marriage.[196] For example, one possibility is that the decision to marry signifies an individual's consent to her spouse serving as a parent to any child born to or conceived by that individual during the marriage.[197] A related possibility is that the decision to marry demonstrates an individual's willingness to assume the obligations of parenthood for any child born to or conceived by his or her spouse during the marriage.[198] Another possibility rests on an assumption that a married individual will form a meaningful parent-child bond with any child born to or conceived

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[195] *See id.* at 265.

[196] *See supra* notes 193–195 and accompanying text; *infra* notes 197–199 and accompanying text.

[197] *See* Joanna L. Grossman, *Parentage Without Gender*, 17 CARDOZO J. CONFLICT RESOL. 717, 740 (2016) ("Second, the biological mother's consent to marry is sometimes treated as consent to share parental rights of any children born during the union. Recall the ruling in *Debra H.*, in which the New York Court of Appeals held that marriage to a child's mother is the only way other than adoption through which a lesbian co-parent can gain parental status. The court based its ruling squarely on the notion of consent. While Janice M., the biological mother, had the power to exclude other adults from her child's life, she gave up that power by entering into a civil union with Debra H. while pregnant and inviting her to assume a parental role." (footnote omitted)).

[198] NeJaime, *supra* note 132, at 1242.

by his or her spouse during the marriage.[199] These arguments for requiring same-sex parents to marry in order for the functional parent to receive legal recognition of his or her relationship with the couple's child, however, are ultimately unpersuasive.

There are many reasons for why couples choose to remain unmarried, and a decision to remain unmarried may say nothing about whether the formal legal parent has consented to the functional parent serving as a parent to the child, the functional parent has assumed the obligations of parenthood, or a meaningful parent-child bond exists between the child and functional parent.[200] Couples may remain unmarried for many reasons, including, *inter alia*, that they do not feel that they are in a stable enough economic position to marry;[201] they wish to avoid the financial consequences accompanying marriage;[202] they are opposed to marriage due to its patriarchal, racist, and discriminatory history and the related societal expectations that still often accompany marriage;[203] or they simply prefer to exist in a relationship that does not include the state as a member.[204] Marriage is simply an ineffective proxy for the determination of questions relating to the formal legal parent's consent, the functional parent's assumption of parental obligations, or the formation of meaningful parent-child bonds between the child and functional parent. Importantly, instead of using an imprecise proxy such as marriage to determine these important questions relating to consent, the assumption of parental obligations, and the formation of meaningful parent-child bonds, the common elements of the equitable parenthood doctrines actually require courts to directly investigate and answer these questions.[205]

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[199] *See* Grossman, *supra* note 197, at 739–40.

[200] *See infra* notes 201–204.

[201] Meg Murphy, *NowUKnow: Why Millennials Refuse to Get Married*, BENTLEY U., http://www.bentley.edu/impact/articles/nowuknow-why-millennials-refuse-get-married [https://perma.cc/S25X-T2BK]; Wendy Wang & Kim Parker, *Record Share of Americans Have Never Married: As Values, Economics, and Gender Patterns Change*, PEW RES. CTR., (Sept. 24, 2014), http://www.pewsocialtrends.org/2014/09/24/record-share-of-americans-have-never-married/ [https://perma.cc/NT9X-57XR] ("For young adults who want to get married, financial security is a significant hurdle. Compared with their older counterparts, young adults who have never been married are more likely to cite financial security as the main reason for not being currently married.").

[202] *Marriage v. Cohabitation*, FINDLAW, http://family.findlaw.com/living-together/marriage-vs-cohabitation.html [https://perma.cc/74M5-42PW].

[203] Jessica R. Feinberg, *The Survival of Nonmarital Relationship Statuses in the Same-Sex Marriage Era: A Proposal*, 87 TEMP. L. REV. 45, 61–62 (2014).

[204] Keith Ablow, *Let's Make a New Way to Get Married and Get the State Out of the Matrimony Business*, FOX NEWS (Dec. 21, 2011), http://www.foxnews.com/opinion/2011/12/21/lets-make-new-way-to-get-married-and-get-state-out-matrimony-business.html [https://perma.cc/C63P-ELJ7].

[205] *See* Grossman, *supra* note 8, at 719–20 ("The partner's functional role in parent-like activities over a period of time—particularly if the partner was involved in

Moreover, excluding equitable parenthood doctrines based upon the availability to same-sex couples of marriage-based presumptions of parentage, and essentially requiring same-sex parents to marry in order for the functional parent to receive parental rights, is discriminatory against same-sex couples and their children. As discussed above, different-sex couples do not need to marry in order for both members to receive parental rights—a variety of avenues to establishing formal legal parent status are available to unmarried different-sex parents.[206] The law recognizes the value of the relationships between unmarried different-sex parents and their children and the importance of providing children with two legally recognized parents. In fact, the establishment of formal legal parent status for unmarried different-sex parents has become an essential goal of family law, and consequently the law provides straightforward and uncomplicated procedures for unmarried different-sex parents to obtain formal legal parent status.[207]

Any argument that attempts to justify requiring only same-sex couples to marry in order to receive parental rights by pointing to the greater likelihood that both members of a different-sex couple are biologically related to their child, is unconvincing. Jurisdictions that have extended marriage-based presumptions of parentage to same-sex couples necessarily recognize that biological connections should not be a prerequisite to receiving parental rights, and that children of same-sex parents, like children of different-sex parents, benefit significantly from having two legally recognized parents. Furthermore, the most common avenue for establishing parental rights for unmarried men in different-sex relationships, the VAP, by law does not require proof of a biological connection between the child and the man identified through the VAP as the father.[208] Excluding equitable parenthood doctrines based upon the availability to same-sex couples of marriage-based presumptions of parentage and requiring same-sex parents to marry in order for both parents to receive parental rights is unjustifiable discrimination against same-sex couples and their children.

There are also significant class- and race-based implications of declining to apply equitable parenthood doctrines on the basis of the availability to same-sex couples of marriage-

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the decision to conceive a child in the first place—would seem a much better indicator of consent to share the role of parent than whether the couple said vows to each other at some point.").

[206] *See supra* Section II.B.

[207] *See supra* Section II.B.

[208] *See supra* note 168 and accompanying text.

based presumptions of parentage. Today, "[m]arriage itself has become a marker of privilege [and] [t]hose who marry . . . are more likely to be white, relatively educated, and relatively high-income."[209] Consequently, denying rights to functional parents based solely on their decision to remain unmarried would disproportionately harm less privileged parents. Moreover, same-sex couples that include at least one member who is African American or Latino are more likely to be raising children than same-sex couples in which both members are white, and the average income of same-sex couples raising children is substantially lower than the average income of same-sex couples as a broader population.[210] As a result, "if trends regarding marriage . . . by same-sex couples follow more general trends, the members of the LGB community who are statistically *most* likely to be raising children are also statistically *least* likely to marry . . . ."[211] This demonstrates the necessity of maintaining equitable parenthood doctrines to protect parents raising children within same-sex relationships regardless of the extension to same-sex couples of marriage-based avenues to establishing formal legal parent status.

2. Stepparent Adoption

In jurisdictions that do not extend marital presumptions of parentage to married same-sex couples, courts may nonetheless decline to adopt or apply equitable parenthood doctrines on the basis that equity does not require the application of such doctrines because the nonbiological parent could have undertaken a stepparent adoption in order to obtain formal legal parent status. As an initial matter, an individual who wishes to undertake a stepparent adoption must first marry the child's formal legal parent.[212] Although same-sex marriage is now available in every U.S. jurisdiction, for the reasons discussed in the previous subsection, the availability to same-sex couples of avenues for establishing formal legal parent status that require marriage should not preclude recognition of equitable parenthood doctrines.[213] Moreover, there are a number of additional compelling reasons for why the availability to

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[209] NeJaime, *supra* note 132, at 1250 (footnote omitted).

[210] Deborah A. Widiss, *Non-Marital Families and (or After?) Marriage Equality*, 42 FLA. ST. U. L. REV. 547, 568 (2015).

[211] *Id.* (emphasis in original).

[212] *See supra* note 138 and accompanying text.

[213] *See supra* Section III.A.1.

same-sex couples of stepparent adoption should not lead courts to decline to adopt or apply equitable parenthood doctrines.

As detailed above, stepparent adoption is a substantial undertaking.[214] Even in jurisdictions that waive some of the more intrusive and time-consuming requirements such as financial accountings and home studies, the procedure can nonetheless be costly and complicated.[215] Many individuals require the assistance of an attorney to navigate the process and consequently incur attorney's fees, and the procedure often requires, *inter alia*, filing a number of documents, paying court fees, appearing in court, and submitting to a background check.[216] Requiring stepparent adoption in addition to marriage in order for nonbiological parents raising children within same-sex relationships to obtain parental rights would disproportionately harm low-income same-sex parents and their children, and would further exacerbate the differences in the cost and difficulty of obtaining parental rights for same- and different-sex parents.[217] Consequently, the arguments against precluding recognition of equitable parenthood doctrines based upon the availability of stepparent adoption are even more compelling than the arguments against precluding recognition of equitable parenthood doctrines based upon the availability of marriage-based presumptions of parentage.

B. The Preclusion of Equitable Parenthood Doctrines Based Upon the Availability of Second Parent Adoption

As an initial matter, second parent adoption, in which the non-marital partner of a child's formal legal parent is able to adopt the child without the formal legal parent's rights being terminated, is not available in all jurisdictions.[218] For the reasons discussed in the previous subsections, the need for equitable parenthood doctrines is clear in jurisdictions in which marriage provides the only avenue through which nonbiological parents raising children within same-sex relationships can obtain parental rights.[219] In jurisdictions that do recognize second parent adoption, it will be tempting for courts and legislatures to decline to adopt or apply equitable parenthood

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[214] *See supra* Section II.A.3.a.

[215] *See supra* note 143.

[216] *See supra* note 143.

[217] This is because different-sex parents are able to obtain parental rights through avenues that require neither marriage nor adoption. *See supra* Section II.B.

[218] *See supra* note 144 and accompanying text.

[219] *See supra* Sections III.A.1–2.

doctrines on the grounds that equity does not require the application of such doctrines because the individual who is now seeking parental rights could have obtained formal legal parent status through second parent adoption. In fact, a few courts have already used the availability of second parent adoption procedures in their jurisdictions in support of decisions declining to adopt or apply equitable parenthood doctrines.[220] Although a decision to pursue second parent adoption arguably addresses questions of the legal parent's consent to the formation of a parent-child relationship between the functional parent and the child and the functional parent's assumption of the obligations of parenthood more directly than a decision to marry, it nonetheless would be both unwise and unfair for courts and legislatures to refuse to apply or adopt equitable parenthood doctrines on the basis of the availability of second parent adoption.

Second parent adoption is a complicated process that requires substantial resources, and the failure to undertake a second parent adoption may have nothing to do with whether the legal parent has consented to the formation of parent-child relationship between the child and functional parent or whether the functional parent has assumed the obligations of parenthood.[221] Like stepparent adoption, second parent adoption usually requires, *inter alia*, hiring an attorney, paying court fees, executing various documents, submitting to background checks, and appearing in court.[222] Moreover, as discussed above, the second parent adoption process is often even more costly, intrusive, and/or lengthy than the stepparent adoption process.[223] For example, unlike for stepparent adoptions, home studies, which can be both intrusive and costly and can prolong the adoption process, are generally required for second parent adoptions (although some states grant courts discretion to waive the home study requirement).[224] Second parent adoptions cost

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[220] *See supra* note 120.

[221] Polikoff, *supra* note 189, at 733–34 ("There are numerous reasons why couples do not go this route. It is time consuming and expensive, it requires a lawyer, it subjects the family to court scrutiny, and it cannot start until after the child's birth, leaving the relationship unrecognized for months or longer until a final adoption decree is signed. Couples may be unfamiliar with such procedures, may lack resources to pursue them, and may not understand the ramifications of not completing them.").

[222] *See supra* notes 140, 148 and accompanying text.

[223] *See supra* notes 152–153.

[224] JOSLIN ET AL., *supra* note 74, § 5:19; Newman, *supra* note 153, at 85. ("Stepparent adoptions are often preferable to second-parent adoptions, in part because they frequently are less costly: second-parent adoptions can require expensive home studies before the adoption is approved, whereas stepparent adoptions do not.").

between $2,000 and $3,000 on average,[225] and, depending on the jurisdiction, can cost upwards of $5,000.[226]

Overall, as Nancy Polikoff has explained, the second parent adoption process "is time consuming and expensive, it requires a lawyer, it subjects the family to court scrutiny, and . . . [c]ouples may be unfamiliar with such procedures, may lack resources to pursue them, and may not understand the ramifications of not completing them."[227] A couple's failure to undergo the second parent adoption process is clearly an ineffective proxy for a lack of consent on the part of the formal legal parent or a lack of the assumption of the obligations of parenthood on behalf of the functional parent, and thus it should not preclude application of the equitable parenthood doctrines. Importantly, the common elements of the equitable parenthood doctrines directly address the questions of the legal parent's consent and the functional parent's assumption of the obligations of parenthood.[228] Thus, it is within the application of the equitable parenthood doctrines that courts can most effectively analyze the issues of the formal parent's consent and the functional parent's assumption of parental obligations, including whether the failure to obtain a second parent adoption was in any way related to these issues.[229] Finally, just like excluding equitable parenthood doctrines due to the availability of marriage-based avenues for establishing formal legal parent status would disproportionately harm same-sex couples and their children, so too would excluding equitable parenthood doctrines on the basis of the availability of second parent adoption. This is because unlike same-sex couples, different-sex couples have access to a variety of avenues to establishing parental rights that require neither adoption nor marriage.[230]

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[225] HUMAN RIGHTS CAMPAIGN, *supra* note 154.

[226] Ellis, *supra* note 155.

[227] Polikoff, *supra* note 189, at 733–34.

[228] *See supra* Section I.B.

[229] This is the approach taken by the ALI Principles with regard to its "parent by estoppel" doctrine. The comment accompanying the doctrine indicates that the failure to adopt should not preclude application of the doctrine, but may be relevant to the question of agreement between the parties to co-parent. ALI PRINCIPLES OF THE LAW OF FAMILY DISSOLUTION: ANALYSIS AND RECOMMENDATIONS § 2.03 cmt. b.(iii) (AM. LAW INST. 2002).

[230] *See supra* Section II.B.

C. *The Effects on the Best Interests of Children if Equitable Parenthood Doctrines are Eschewed Based on the Availability to Same-Sex Couples of Marriage- and Adoption-Based Avenues to Establishing Formal Legal Parent Status*

As discussed in the previous two subsections, there exist many compelling reasons for maintaining equitable parenthood doctrines even when marriage- and adoption-based avenues of establishing formal legal parent status are available to same-sex couples. What is perhaps the most compelling reason, however, is that eschewing equitable parenthood doctrines due to the availability of marriage and adoption-based avenues for establishing formal legal parent status does not further the best interests of children. An approach that determines parental rights based exclusively upon formal steps such as marrying a child's formal legal parent or undertaking an adoption, and categorically refuses to provide rights to informal parents regardless of the degree to which they have functioned as a child's parent, is an approach that runs counter to the promotion of children's best interests.[231] As scholar Carlos Ball has correctly noted,

> [O]ver- and under-inclusivity results from the application of a rule that uses the existence of biological or adoptive links between the adult and the child, or of a legal relationship between the two adults, as a necessary pre-condition for the granting of parentage status. The rule is overinclusive because it affords legal protections to children even in circumstances in which the adults in question play no meaningful roles in their lives. And it is underinclusive because it denies protections to children who have established parent-child bonds with individuals who are unable to meet the courts' bright-line rules aimed at promoting certainty.[232]

A significant body of research indicates that children form strong bonds with parental figures regardless of the existence of biological or adoptive ties.[233] Disrupting relationships between

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[231] J. Herbie DiFonzo & Ruth C. Stern, *Breaking the Mold and Picking up the Pieces: Rights of Parenthood and Parentage in Nontraditional Families*, 51 FAM. CT. REV. 104, 108 (2013) ("[T]he insistence that same-sex partners follow specific and lengthy legal procedures in order to verify their right to parent the children they view as their own will ultimately hurt the children of these families. These children will be ripped from a relationship with one of the parents who was raising them . . . .").

[232] Carlos Ball, *Rendering Children Illegitimate in Former Partner Parenting Cases: Hiding Behind the Facade of Certainty*, 20 AM. U.J. GENDER SOC. POL'Y & L. 623, 667 (2012).

[233] *See supra* notes 53–71 and accompanying text; *see also* Ball, *supra* note 232, at 666 ("Most children understand, from a very young age, who their parents are. Indeed, that understanding is in place well before they comprehend the legal implications of biological and adoptive links. Young children, therefore, do not make distinctions between their legal and non-legal parents.").

children and the individuals who they view as parents can have significantly harmful short- and long-term effects on children.[234] It is unfair to punish children due to the failure or inability of their parents to take the steps necessary to obtain formal legal parent status for the functional parent.[235] Precluding the recognition of equitable parenthood doctrines based upon the availability to same-sex parents of marriage- and adoption-based avenues to establishing formal legal parent status, means there will be more children who, "through no fault of their own, miss out on the legal, financial, and emotional benefits of having a second parent."[236] As one judge stated, in these situations, "[t]he child is helpless with the most to lose."[237] Moreover, since there is a positive correlation between income level and marriage rates and the adoption process requires substantial resources, it is the already disadvantaged children of lower-income parents who will most often be denied the substantial benefits of maintaining a relationship with an individual who has functioned as their parent and with whom they have formed a parent-child bond.[238]

IV. THE FUTURE OF EQUITABLE PARENTHOOD DOCTRINES

A. The Continuing Need for Equitable Parenthood Doctrines Even if Same-Sex Couples Receive Greater Access to the Avenues of Obtaining Formal Legal Parent Status Available to Different-Sex Couples

It is possible that in the future, methods of establishing formal legal parent status that require neither marriage nor adoption will be extended to same-sex parents. For example, perhaps states will extend the use of VAPs to same-sex couples or more states will enact statutes that extend formal legal parent status to an individual who consents to a partner's use of ART with the intent to parent the child, regardless of marital status or gender. If it becomes easier for members of same-sex couples to obtain formal legal parent status in efficient, low-cost manners, the argument that equity requires the provision of

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[234] *See supra* notes 53–71 and accompanying text.

[235] Polikoff, *supra* note 189, at 723 ("[C]hildren should not suffer because their parents do not marry.").

[236] Ball, *supra* note 232, at 663.

[237] Chatterjee v. King, 253 P.3d 915, 929 (N.M. Ct. App. 2010) (Vigil, J., dissenting).

[238] *See supra* notes 209, 225–226 and accompanying text; *see also* Michael Greenstone & Allen Looney, *The Marriage Gap: The Impact of Economic & Technological Change on Marriage Rates*, BROOKINGS (Feb. 3, 2012), https://www.brookings.edu/blog/jobs/2012/02/03/the-marriage-gap-the-impact-of-economic-and-technological-change-on-marriage-rates/ [https://perma.cc/43LJ-JEHS].

parental rights to functional parents will weaken. Moreover, in disputes between formal legal parents and functional parents, the increased availability to same-sex couples of straightforward, lost-cost avenues of establishing formal legal parent status will strengthen the argument that the formal legal parent did not actually consent to the functional parent forming a parent-like relationship with the child. In fact, in such situations the formal legal parent will likely argue that the couple's failure to pursue available efficient, low-cost manners of establishing formal legal parent status for the functional parent directly reflects a lack of consent on the part of the formal legal parent to the functional parent forming a parent-like relationship with the child, and thus that application of equitable parenthood doctrines is inappropriate.

Even in a potential future where the more efficient, low-cost avenues to establishing legal parent status are available to same-sex parents, however, there will continue to be some situations in which equity requires the application of equitable parenthood doctrines. As an initial matter, the more efficient, low-cost avenues to establishing legal parent status such as VAPs and consent to a partner's use of ART[239] generally will be of little help to a functional parent who enters the lives of the legal parent and his or her child at some point after the child is born.[240] For these individuals, adoption, which in some jurisdictions requires marriage as a prerequisite, may be the only option available for obtaining formal legal parent status. As discussed in detail above, there are many reasons for why a couple may not pursue adoption.[241] These reasons may have nothing to do with the legal parent's consent, the functional parent's assumption of parental obligations, or the bond between the child and functional parent, and thus equitable parenthood doctrines serve an essential function even when adoption is available in the jurisdiction.[242] Moreover, even functional parents who pursue adoption lack formal recognition as legal parents until the lengthy adoption process is completed, and

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[239] It is important to note, however, that for couples who would like to use ART without the involvement of a physician, the consent to a spouse's use of an ART avenue would not qualify as a low-cost or efficient option if the governing statute required, as a number currently do, that the procedure be performed by or under the supervision of a physician. *See supra* note 130 and accompanying text.

[240] While VAPs can be signed following discharge from the hospital, most are signed in the hospital or birthing center because that is where these documents are presented to the birth parent. *See supra* notes 160–164 and accompanying text. In addition, the language of many VAPs instructs that only men who believe that they are the child's biological father should sign, and thus it would not be applicable to a parent who entered the picture after the child's birth. *See supra* note 168.

[241] *See supra* Section III.B.

[242] *See infra* Section IV.B.

therefore such parents may require the protection provided by equitable parenthood doctrines.[243]

Another reason that equitable parenthood doctrines should remain—even if there is an expansion to same-sex couples of more efficient, low-cost avenues to establishing formal legal parent status—is that there have been situations where legal parents have, by their words and actions, consented to and encouraged the formation of a parent-like relationship between the functional parent and child, but who have used manipulation to obstruct the functional parent from establishing formal legal parent status.[244] For example, in the case of *Debra H. v. Janice R.*, according to the court, the nonbiological parent, Debra, "served as a loving and caring parental figure during the first [two and a half] years of the child's life," until she and the child's biological mother, Janice, separated.[245] At first, Janice allowed Debra to see the child multiple times each week and to speak with the child over the phone each day, but Janice subsequently limited the amount of time Debra spent with the child and eventually terminated all communication between Debra and the child.[246] According to Debra, who had not obtained a second parent adoption even though second parent adoption was available in the jurisdiction, Janice had convinced Debra that they did not need to pursue this formal means of establishing legal parent status, stating "We don't need an adoption. *You are his parent. I'm a lawyer*. I know the court system. We don't want the courts to get involved . . . ."[247] Debra also claimed Janice told Debra that she "would never take [the child] away from her."[248] While manipulating a functional parent in this manner will be more difficult if a variety of efficient, low-cost avenues to obtaining parenthood for same-sex couples are available, it will still be possible. This will be particularly true in situations where the functional parent enters the picture sometime after

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[243] *See supra* note 156 and accompanying text.

[244] *See* Grossman, *supra* note 8, at 703–04 (explaining that without the equitable parenthood doctrines, "the biological mother alone can decide whether to permit her female partner to adopt, whether to enter into a marriage or civil union that might result in joint parentage, or whether to consent to shared custody or visitation after a break-up. Yet the couple's decision as to which partner will bear the child may rest on considerations—such as fertility, age, and health—that have nothing to do with which of the two would be a better parent, let alone the *only* parent." (emphasis in original)).

[245] Debra H. v. Janice R., 877 N.Y.S.2d 259, 260 (App. Div. 2009), *rev'd* 930 N.E.2d 184 (N.Y. 2010), *abrogated by* Brooke S.B. v. Elizabeth A.C.C., 61 N.E.3d 488 (N.Y. 2016).

[246] *Debra H.*, 930 N.E.2d at 186.

[247] Verified Petition at ¶ 31, Debra H. v. Janice R., No. 106569/08, 2008 WL 7675822 (N.Y. Sup. Oct. 2, 2008) (No. 0810656908), 2008 WL 7471048 (emphasis in original).

[248] *Debra H.*, 2008 WL 7675822, at *4.

the child's birth when efficient, low-cost avenues to obtaining legal parent status are less likely to be available.[249]

Additional reasons for maintaining equitable parenthood doctrines despite the expansion to same-sex couples of more efficient, low-cost avenues to establishing formal legal parent status include that there are some individuals who will decline to take steps to establish formal legal parent status due to fear or mistrust of the government or a desire to exclude the state from their home life to the largest extent possible.[250] This may be particularly likely among groups of individuals who have faced discrimination and mistreatment at the hands of the government or legal system in the past. Moreover, for anyone who is not the child's birth mother or her spouse at the time of the child's birth, there likely will always be steps required to obtain formal legal parent status and there will always be some parents who are simply unaware of these steps. This will be true even if the required procedures are efficient and low-cost.

Overall, even if the existing formal avenues to establishing legal parent status or their equivalent are expanded to same-sex couples, there will always be individuals who, for one reason or another, cannot or do not take the steps required to obtain legal parent status through the available formal avenues. For some of these families, the reasons for not pursuing formal legal parent status for the functional parent will be completely unrelated to the consent of the formal legal parent, the assumption of the obligations of parenthood by the functional parent, and the bond between the functional parent and child. In these situations, equitable parenthood doctrines play an essential role in protecting the well-being of children and the important relationships formed between children and their functional parents. Notably, in a number of cases courts have used equitable parenthood doctrines to grant rights to a functional parent who is involved in a different-sex relationship with the child's formal legal parent.[251] The application of equitable parenthood doctrines in cases involving different-sex parents provides forceful support for the notion that there will be situations in which application of these doctrines is necessary to protect children and their functional parents even if the avenues of obtaining formal legal parent status currently

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[249] *See supra* notes 239–240 and accompanying text.

[250] *See supra* note 204 and accompanying text.

[251] *See*, *e.g.*, Kinnard v. Kinnard, 43 P.3d 150 (Ala. 2002); McAllister v. McAllister, 779 N.W.2d 652 (N.D. 2010); Michael L. v. Hilary W.-S., No. 947CV2002, 2002 WL 32140628 (Pa. Commw. Ct. Nov. 25, 2002); Middleton v. Johnson, 633 S.E.2d 162 (S.C. Ct. App. 2006); Michaelholt v. Holt, 315 P.3d 470 (Wash. 2013).

available to different-sex couples are expanded to same-sex couples. Moreover, the decline in marriage among different-sex couples and rise in births outside of marriage over the past several decades have increased the number of children who do not have two formal legal parents and have made it more likely that a significant number of children being raised within different-sex relationships will have a functional parent-child relationship with an individual who has not obtained formal legal parent status.[252] Consequently, abandoning these doctrines will harm not only families that include same-sex parents, but also will harm different-sex parents and their children. Importantly, equitable parenthood doctrines do not seek to supplant, and have not supplanted, formal avenues to establishing legal parent status.[253] Instead, the equitable parenthood doctrines simply serve to provide a safety net for compelling cases involving parents who have, for whatever reason, fallen through the gaps in the avenues of establishing formal legal parent status.[254]

While the availability to functional parents of efficient, low-cost avenues to establishing formal legal parent status should not preclude application of equitable parenthood doctrines, the availability of such avenues may factor into the application of the doctrines. As discussed above, the vast majority of equitable parenthood doctrines include as an element that the formal legal parent consented to or encouraged the formation of a parent-like relationship between the functional parent and the child.[255] A couple's failure to obtain formal legal parent status for the functional parent despite the availability of low-cost, efficient avenues to obtaining such status could be something courts weigh in relevant situations in assessing the consent element of the jurisdiction's equitable

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[252] *See* Jeffery A. Parness, *Dangers in De Facto Parenthood*, 37 U. ARK. LITTLE ROCK L. REV. 25, 28 (2014) ("[T]here has been a significant rise in unwed mothers, who at birth or thereafter, choose to raise their children with new intimate partners or with family members, like grandparents. These mothers' children have no fathers listed on their birth certificates and biological fathers who fail to ever attain parental childcare status." (footnotes omitted)); *see also* Laufer-Ukeles & Blecher-Prigat, *supra* note 2, at 435.

[253] *See supra* Part II (discussing formal avenues to establishing legal parent status).

[254] Ball, *supra* note 232, at 667–68 ("The application of the doctrine, in other words, does not prevent courts from using biology, adoption, and the entering into legally-recognized relationships as means through which to grant parentage status. Instead, the doctrine serves as an alternative means of acquiring that status, one that recognizes the diversity of American families at the beginning of the twenty-first century without jeopardizing the ability of the majority of individuals to be recognized as parents through the application of bright-line rules.").

[255] Suzanne B. Goldberg, et al., *Family Law Scholarship Goes to Court: Functional Parenthood and the Case of* Debra H. v. Janice R., 20 COLUM. J. GENDER & L. 348, 363 (2011).

parenthood doctrine.[256] In appropriate situations, the failure to obtain formal legal parent status despite the availability of efficient, low-cost avenues might also factor into the analysis of whether the functional parent assumed the obligations of parenthood, which is another common element of equitable parenthood doctrines.[257] The result may be that the availability of various low cost, efficient avenues to establishing formal legal parent status makes it more difficult for functional parents to obtain relief through equitable parenthood doctrines. This result is preferable to entirely eliminating equitable parenthood doctrines. Considering that protecting the best interests of children is a fundamental goal of family law, the law should not create a situation where parental rights for an individual who has functioned as a child's parent depend entirely on whether that individual has undertaken the formal steps necessary to obtain legal parent status.[258] To completely abandon the equitable parenthood doctrines based solely on the grounds that formal avenues to establishing legal parent status were available would mean that actually functioning as a parent is a largely unimportant consideration in determining an individual's eligibility for parental rights—a curious approach for an area of the law that purports to place children's best interests at the forefront of its goals.

Finally, while in the coming years same-sex couples will likely edge closer to different-sex couples with regard to access to low-cost, efficient avenues to establishing formal legal parent status, it is unlikely that the ability of same-sex parents to establish formal legal parent status will ever truly be equal in all respects to the ability of different-sex parents to establish formal legal parent status. This is due in significant part to the law's longstanding and continued emphasis on biology in

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[256] This is the approach taken by the ALI, which states that the failure to adopt should be considered in evaluating whether the parties agreed that the informal parent would take on a parental role. Deborah L. Forman, *Same-Sex Partners: Strangers, Third Parties, or Parents? The Changing Legal Landscape and the Struggle For Parental Equality*, 40 FAM. L.Q. 23, 46 (2006) ("However, the ALI comments to its section on 'Parenthood by Estoppel' provide that failure to adopt, when it is an available option, relates merely to whether an agreement existed that the partner would assume a parental role.").

[257] *See supra* notes 98–99 and accompanying text.

[258] Forman, *supra* note 256, at 46 ("If we look at these cases from the children's perspective, it becomes clearer that whether the partner adopted or not, the completion of a formal adoption seems beside the point, especially if she functioned as a parent and developed the resulting psychological attachment with the child."); Ball, *supra* note 232, at 660-61 ("It is unlikely that a child under these circumstances will consider [a functional parent who has not obtained legal parent status] to be any less of a parent—especially if she served in that capacity for an extended period of time.").

determining formal legal parent status.[259] Consequently, even if in the future same-sex couples gain greater access to low-cost, efficient avenues to establishing formal legal parent status, it is likely that abandoning equitable parenthood doctrines will still disproportionately harm same-sex parents and their children.[260] Overall, equitable parenthood doctrines will continue to play an essential role in protecting LGBT parents and their children regardless of whether same-sex couples gain greater access to avenues of establishing formal legal parent status. The promotion of equitable parenthood doctrines should therefore remain a significant goal of the LGBT rights movement even as the movement continues to pursue greater access to low-cost, efficient avenues to establishing formal legal parent status.

B. The Role of the LGBT Rights Movement in Maintaining and Promoting Equitable Parenthood Doctrines

1. Clarifying the Goals of the Movement

On a broad scale, the LGBT rights movement is reaching a point where it must decide if its ultimate relationship recognition goals simply relate to attaining equal access to formal relationship statuses or if there is something more that the movement is seeking. Specifically, the movement needs to determine whether changing laws relating to marriage, parentage, and other issues is important beyond just the reform that creates greater equality in access to the existing formal relationship statuses. The LGBT rights movement has been stunningly successful on a number of fronts in obtaining greater access to formal relationship statuses for LGBT individuals.[261] To stop at mere equality of access to existing formal relationship statuses, however, would be to leave underdeveloped one of the most impressive accomplishments of the LGBT rights movement to date: challenging law and society to think differently about

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[259] *See* NeJaime, *supra* note 132, at 1258–59.

[260] *Id.* at 1258–59 ("Indeed, in observing that '[i]t is the children of same-sex couples who will be most severely affected by being limited in their opportunity to maintain bonds with a party who is not a biological parent but who has . . . functionally behaved as the children's second parent, the opinion evinced an appreciation for how resistance to nonbiological parentage in both marital and nonmarital families reflects and produces LGBT inequality. Importantly, it suggested that, as a constitutional matter, *Obergefell* calls such inequality into question." (omission and alteration in original) (footnote omitted) (quoting McGaw v. McGaw, 468 S.W.3d 435, 454 (Mo. Ct. App. 2015))).

[261] This is reflected by the nationwide recognition of same-sex marriage as well as the advancements in access to formal avenues to obtaining legal parent status for same-sex parents discussed in Section II.A.

how family is defined so that important relationships, regardless of their form, are supported and protected.

In terms of the more narrow issue of the LGBT rights movement's goals with regard to parental rights, the movement has been a major force in furthering legal developments that provide parental rights to nonbiological parents raising children within same-sex relationships. One of the most consequential ways it has done this is through the promotion of equitable parenthood doctrines—the LGBT rights movement has played an essential role in advancing these doctrines in jurisdictions throughout the United States.[262] Recently, however, much of the movement's focus has shifted to advocating for the expansion to same-sex couples of existing avenues to obtaining formal legal parent status. There is no doubt that some of this shift stems from the achievement of marriage equality, which opened the door to the application of marriage-based avenues to establishing formal legal parent status to same-sex couples.[263] The movement must now decide whether the promotion of equitable parenthood doctrines will remain a significant part of its focus, or whether instead it will focus more exclusively on obtaining greater access to formal avenues to obtaining legal parent status. In answering this question, the movement should identify and examine any worthy goals furthered by equitable parenthood doctrines and assess whether these goals would be furthered as effectively through increased access for same-sex couples to avenues of establishing formal legal parent status. This will allow the movement to determine whether the promotion of equitable parenthood remains an important and worthy endeavor even as the movement pursues increased access to avenues of establishing formal legal parent status.

One possibility is that the sole worthy goal furthered by equitable parenthood doctrines relates to protecting the rights and interests of individuals in same-sex relationships who have functioned as parents but lack biological ties to their children. If this were the case, one may argue that because the need for equitable parenthood doctrines stemmed from the historical exclusion of nonbiological parents raising children within same-sex relationships from avenues of establishing formal legal parent status, the recent success the movement has had in expanding access to avenues to establishing formal legal parent status for such parents renders equitable parenthood doctrines

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[262] *See supra* note 30 and accompanying text.

[263] *See* Polikoff, *supra* note 189, at 721–23.

unnecessary.[264] Even if the sole worthy goal furthered by equitable parenthood doctrines related to protecting the interests of nonbiological parents in same-sex relationships, these doctrines would continue to be necessary to promote this goal regardless of the expansion to same-sex couples of formal avenues to establishing legal parent status. As discussed above, there have been, and there will continue to be, nonbiological parents raising children in same-sex relationships who are unable to use the available formal avenues to establish legal parent status despite increases in access to such avenues for same-sex couples.[265] Consequently, the existence of equitable parenthood doctrines is essential to protecting the rights and interests of these nonbiological parents raising children in same-sex relationships despite increased availability to same-sex couples of formal avenues to establishing legal parent status.[266]

Protecting the rights of nonbiological parents in same-sex relationships, however, is far from the only important goal furthered by equitable parenthood doctrines. The LGBT rights movement must be careful not to overlook what it has long identified as a core purpose of equitable parenthood doctrines: furthering the well-being of children by protecting the relationships formed between children and the individuals in their lives who have functioned as their parents.[267] The arguments set forth by leading LGBT rights organizations, scholars, and attorneys over the last several decades in support of the adoption and application of equitable parenthood doctrines have stressed the idea that these doctrines are essential because research indicates children can suffer great harm when their relationship with a parental figure is disrupted, regardless of whether that parental figure is a formal legal parent.[268] To abandon the promotion of these doctrines as a result of the expansion to same-sex couples of avenues to establishing formal legal parent status would be to ignore the arguments made over the years by leading LGBT rights advocates and to render those arguments seemingly disingenuous.

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[264] *See supra* Section II.A.

[265] *See supra* Section IV.A.

[266] *See supra* Section IV.A.

[267] *See supra* note 30 (compiling briefs submitted by leading LGBT rights organizations arguing in favor of the application of equitable parenthood doctrines).

[268] *See, e.g.*, Amici Curiae Brief of Nat'l Ctr. for Lesbian Rights et al., *supra* note 30 ("[T]here is a compelling interest in protecting the child from the 'emotional harm . . . intrinsic in the termination or significant curtailment of the child's relationship with a psychological parent under any definition of that term.'" (omission in original) (quoting *In re* E.L.M.C., 100 P.3d 546, 561 (Colo. App. 2004))); *see also supra* notes 60–71 and accompanying text.

More importantly, since it is inevitable that, despite the expansion to same-sex couples of formal avenues to establishing legal parent status, situations will continue to arise in which individuals who have formed parent-like bonds with their children could not or did not take the steps necessary to establish formal legal parent status, equitable parenthood doctrines will remain essential in protecting the well-being and best interests of children.[269] Moreover, due to the law's historical reliance on biology in determining legal parent status and the continuing discrimination against same-sex parents with regard to access to formal avenues of establishing legal parent status, it likely will long remain the case that the equitable parenthood doctrines will most frequently serve to protect children within LGBT families.[270] Overall, if protecting the well-being of children, especially children being raised by same-sex parents, is a goal that the LGBT rights movement wishes to continue to promote, the advancement of equitable parenthood doctrines should remain a focus of the movement, regardless of how successful it is in obtaining greater access to formal avenues of establishing legal parent status.

2. Advocating for Increased Access for Same-Sex Couples to Formal Avenues of Establishing Legal Parent Status Without Leaving Functional Parents Behind

While the LGBT rights movement should continue to promote equitable parenthood doctrines, it should also continue to advocate for the expansion to same-sex parents of formal avenues to establishing legal parent status. Obtaining formal legal parent status is important for parents as well as their children for a number of reasons. Even in states that have adopted equitable parenthood doctrines, most do not treat equitable parents as equal to legal parents for purposes of custody and visitation.[271] In addition, while a wide variety of

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[269] *See supra* Section IV.A.

[270] *See supra* note 259 and accompanying text.

[271] Feinberg, *supra* note 1, at 353–54 (discussing the approach of a number of jurisdictions in which equitable parents are treated as inferior to legal parents in determining custody and visitation rights); Laufer-Ukeles & Blecher-Prigat, *supra* note 2, at 449 ("Thus, although the V.C. court initially equated functional and formal parenthood and indicated that once functional parenthood is assigned that person is a parent for all intents and purposes, it later said there should be a presumptive rule that functional parents (as opposed to formal parents) will receive visitation as opposed to full custody. In fact, courts applying functional parenthood have in practice followed this presumption despite conceptually equalizing parenthood.").

legal rights and obligations attach to formal legal parent-child relationships, "[i]t remains unclear in many states whether equitable parents have [any] rights or obligations outside the context of child custody and visitation."[272] Moreover, application of equitable parenthood doctrines is complicated and intrusive for the parties and their children, and relying on these doctrines to secure parental rights is a risky endeavor. Having the parent in question identified as early as possible as a legal parent with all of the attendant rights and obligations is undoubtedly in the best interests of the children involved.[273]

Expanding formal avenues of establishing legal parent status to same-sex parents, while important, will only be effective if same-sex parents actually take advantage of such avenues. Unfortunately, some parents underestimate the importance of obtaining legal parent status or mistakenly believe that functioning as a parent will be enough to result in legal protection of their relationship with the child. Consequently, conveying the idea that obtaining legal parent status is of vital importance in securing parental rights should be a key goal of the LGBT rights movement and the movement should educate same-sex parents regarding the steps necessary to establish formal legal parent status, encourage them to take such steps, and assist them in doing so. However, the movement's message with regard to establishing formal legal parent status needs to be set forth in a way that, while effectively and forcefully highlighting the importance of obtaining formal legal parent status, does not denigrate functional parents.

Specifically, the message should stress that while functional parents are as important to their children's lives as formal parents and deserve equal respect, the reality is that the law places great weight on the establishment of formal legal parent status. The message should convey that establishing formal legal parent status provides rights and protections that are essential not only to functional parents, but also to their children, and that failure to obtain formal legal parent status can result in both children and their functional parents being unjustly denied many of these important rights and protections.

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[272] Joslin, *supra* note 27, at 502–03 ("For example, a child may not be entitled to children's Social Security benefits through her functional but nonlegal parent. The child may also not be entitled to child support through her functional but nonlegal parent. Additionally, a de facto parent may not have standing to oppose an adoption by a third person." (footnotes omitted)).

[273] Aviel, *supra* note 33, at 2065–66 ("Professor Elizabeth Bartholet has similarly argued that children do better when parental authority is concentrated in two clearly identified parents who enjoy that status from the time of the child's birth."); *see also* Laufer-Ukeles & Blecher-Prigat, *supra* note 2, at 464–65.

Moreover, because many people prefer not to plan for or consider the potential demise of their romantic relationships, the message should stress that the rights and protections accompanying formal legal parent-child relationships are important for children and parents within both intact and non-intact families.[274] Overall, the message should celebrate functional parents while simultaneously encouraging them to become formal parents by stressing that it is the fact that functional parents are so important to the lives of their children that makes it essential that they take the steps necessary for them to obtain formal legal parent status.

Finally, it is important to understand that no amount of messaging from the movement regarding the importance of obtaining formal legal parent status will be enough to help same-sex parents who lack the resources to pursue the available avenues of establishing formal legal parent status. It is therefore essential that the movement commit to providing assistance to same-sex parents in obtaining formal legal parent status. Equally essential, however, is that the movement recognize that it is inevitable that there will be functional parents who could not or did not obtain formal legal parent status and, as a result of this recognition, continue to advocate forcefully for the adoption and application of equitable parenthood doctrines. It is this that is the most important action the movement can take to avoid denigrating functional parents while it continues to pursue increased access to avenues of establishing formal legal parent status.

CONCLUSION

As same-sex parents gain increasing access to formal avenues of establishing legal parent status, the future of equitable parenthood doctrines is uncertain. It will be tempting for courts and legislatures to abandon equitable parenthood doctrines in favor of exclusive reliance on formal avenues to establishing legal parent status. This is in part because the relatively straightforward, bright-line approach to establishing legal parent status that inheres in the formal avenues allows courts to make parentage determinations more efficiently and without having to undertake any significant inquiry into the

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[274] For example, whether within the context of intact or non-intact families, children may not be able to claim Social Security benefits based upon a functional parent-child relationship, and a de facto parent may not have the right to make medical or educational decisions for the child. Joslin, *supra* note 27, at 502; JOSLIN ET AL., *supra* note 74, § 7:1.

dynamics of the relationships between the parties or the child and party seeking parental rights. In contrast, application of equitable parenthood doctrines requires courts to examine very closely facts relating to the dynamics of the relationships at issue and to undertake complicated analyses regarding the consent of the formal legal parent, the assumption of the obligations of parenthood by the functional parent, and the bond between the functional parent and child. In addition, due to the fact that it was, in significant part, the historical denial to same-sex parents of avenues to establishing formal parent status that led many courts and legislatures to adopt equitable parenthood doctrines, these entities may now conclude that the increasing expansion to same-sex parents of formal avenues to establishing legal parent status renders such doctrines unnecessary.

To abandon equitable parenthood doctrines, however, would be a mistake. As an initial matter, the current formal avenues available to same-sex couples for establishing legal parent status are based primarily upon marriage and adoption. Couples may be unable or unwilling to pursue marriage- and adoption-based avenues to establishing formal legal parent status for a wide variety of reasons, and the failure to pursue these avenues may indicate nothing about the functional parent's relationship with the child or the understanding between the functional parent and the formal legal parent regarding that relationship. In addition, excluding equitable parenthood doctrines due to the availability of marriage- or adoption-based avenues for establishing formal legal parent status would disproportionately harm same-sex couples and their children—unlike same-sex couples, different-sex couples have access to a variety of formal avenues to establishing legal parent status that require neither marriage nor adoption. Moreover, equitable parenthood doctrines should not be abandoned even if most of the existing formal avenues of establishing legal parent status or their equivalent are expanded to same-sex couples. There will always be parents who, for whatever reason, are unable or unwilling to take the formal steps necessary to establish legal parent status, and a legal approach that categorically refuses to provide rights to functional parents is an approach to parental rights that fails to promote children's best interests.

For family law to most effectively advance what is perhaps its most essential goal, protecting the best interests of children, it must continue to adopt and apply equitable parenthood doctrines even as formal avenues to establishing

legal parent status increasingly are expanded to same-sex couples. Research demonstrates conclusively that children form strong bonds with parental figures regardless of the existence of biological or adoptive ties.[275] The disruption of the relationships between functional parents and their children can lead to significantly harmful short- and long-term effects for the children involved.[276] As a result, it is essential to maintain equitable parenthood doctrines so that in appropriate cases, the doctrines can be used to protect the well-being of children who have formed a parent-child relationship with a parental figure who has not established formal legal parent status. Moreover, in order to most effectively protect LGBT families, the LGBT rights movement, which has long played a key role in promoting the adoption and application of equitable parenthood doctrines, should continue to advocate for these doctrines even as it pursues the equally important goal of increasing access for same-sex couples to formal avenues of establishing legal parent status.

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[275] *See supra* notes 53–71, 233 and accompanying text.

[276] *See supra* notes 53–71 and accompanying text.