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The Newclear Family: The Broadening Recognition Of Non-Traditional Families And Where To Draw The Line

Ally Nicol

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Introduction

In the past fifty years, American politics and public opinion have shifted regarding parentage and what constitutes a family. In the wake of cases such as *Holtzman v. Knott*,[1] *Johnson v. Calvert*,[2] *K.M. v. E.G.*,[3] *Obergefell v. Hodges*,[4] and *In re M.C.*,[5] the rights of same-sex and other "non-traditional" parents have been clarified and expanded. Biology and marriage have long been the most commonly used means of establishing parental rights, and now those recognitions, particularly in the wake of *Obergefell*, are widely available to most couples.[6] While this recognition has been long-awaited in the LGBT community, issues remain regarding legal parent status based solely on biology and the legal status of non-traditional families. As the law expands to recognize a more diverse spectrum of parents, new issues will arise regarding when parental status should *not* be granted, as opposed to how parental rights should be expanded.

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1. Holtzman v. Knott (*In re* Custody of H.S.H.-K), 533 N.W.2d 419 (Wis. 1995).

2. 851 P.2d 776 (Cal. 1993).

3. 117 P.3d 673 (Cal. 2005).

4. 135 S. Ct. 2584 (2015).

5. 195 Cal. App. 4th 197 (Cal. App. 2d 2011), *superseded by statute* 2013 Cal. Legis. Serv. Ch. 564 (S.B. 274) (West). "Most children have two parents, but in rare cases, children have more than two people who are that child's parent in every way . . . . The purpose of this bill is to abrogate *In re M.C.* . . . insofar as it held that where there are more than two people who have a claim to parentage under the Uniform Parentage Act, courts are prohibited from recognizing more than two of these people as the parents of a child, regardless of the circumstances." Cal. Legis. Serv. Ch. 564 § 1(b) (italics added).

6. Douglas NeJaime, *Marriage Equality and the New Parenthood*, 129 HARV. L. REV. 1185, 1190–91 (2016) (discussing generally the impact of marriage equality and families formed through assisted reproductive technologies).

Holtzman v. Knott was the first decision in the United States in which a court recognized a lesbian as a "de facto parent" of a child conceived and delivered by her partner during the course of their relationship.[7] *Johnson v. Calvert* involved a husband and wife who implanted their fertilized egg into a surrogate, who then claimed to be the mother after the child was born.[8] The court established an "intent test" in California, which determines legal parent status by looking to the parties' intent if a court holds that the Uniform Parentage Act (UPA) does not apply.[9] In *K.M. v. E.G.*, before separating, two women conceived twins together, with one intending to be only an egg donor with no parental rights and the other intending to be the legal mother via in vitro fertilization (IVF).[10] When the biological mother claimed parentage over the birth mother after their relationship dissolved, the court found that both were legal parents, as evidenced by their co-maternal ties in addition to their marriage-like relationship.[11] The court essentially created a new rule in California, looking beyond the UPA and the *Johnson* intent test to hold both parties as functional legal parents, regardless of their intentions.

In *Obergefell v. Hodges*, the U.S. Supreme Court decided that same-sex couples have the fundamental right to marriage.[12] However, this decision also introduced new questions regarding the recognition of both biological and non-biological parents in both marital and non-marital families.[13] *In re M.C.* featured three individuals with parental claims: a biological mother, her same-sex spouse, and the biological father, with whom the biological mother had a sexual relationship beyond that of a sperm donor.[14] The case itself failed to establish that three individuals could be deemed legal parents to a child under the UPA.[15] However, it led to the California legislature passing a multiple-parent bill, which allows a court to

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7. William B. Turner, *The Lesbian De Facto Parent Standard in* Holtzman v. Knott: *Judicial Policy Innovation and Diffusion*, 22 BERKELEY J. GENDER L. & JUST. 135, 135 (2013).

8. 851 P.2d 776, 778 (Cal. 1993).

9. *Id.* at 782.

10. 117 P.3d 673, 675–76 (Cal. 2005).

11. *Id.* at 679 ("K.M. did not intend to simply donate her ova to E.G., but rather provided her ova to her lesbian partner with whom she was living so that E.G. could give birth to a child that would be raised in their joint home.").

12. 135 S. Ct. 2584, 2589 (2015).

13. *See, e.g.*, Gartner v. Iowa Dep't of Pub. Health, 830 N.W.2d 335, 340 (Iowa 2013) (analyzing whether the non-birthing spouse in a lesbian marriage must be listed on a child's birth certificate).

14. 195 Cal. App. 4th 197, 202–03 (Cal. App. 2d 2011).

15. *Id.* at 214.

find more than two legal parents if not doing so would be detrimental to the child.[16]

These cases illustrate a shift toward a broader recognition of parentage, one that moves beyond biology as the primary determinant of parentage, by recognizing parental rights outside of marriage. Marriage equality arguably facilitates the development of non-traditional parentage concepts across family law and serves as a platform on which to justify further expansion of the traditional parentage model both in and outside marriage.[17] By challenging norms once considered fundamental to parenthood and by encouraging a model of parenthood that derives parentage from intent and conduct rather than biology and marriage, all families have the opportunity to obtain legal recognition.

This Note argues that the recognition of same-sex marriage in *Obergefell* will continue to broaden the recognition of other non-traditional family structures and, more specifically, non-biological parents and multi-parent families. Same-sex marriage supports a parentage structure that reduces the importance of biology and gender and instead focuses on the intent and conduct of those holding themselves out as a family. The logical next step is to expand this understanding of parentage to include, by default, parents who have no biological tie to the child, single or multiple biological parents,[18] and to recognize *all* families, both in and outside of marriage. This Note also argues that in the wake of this progress, it will become increasingly important to establish where the line is regarding the recognition of legal parents. While a shift toward a functional or intent-based model of parentage is a smart step for the courts to take, there remain issues in the framework as it exists and where it is headed, specifically in situations when the court should not grant parental rights to someone who might traditionally have a legally recognized parental relationship to a child, such as through biology or marriage.

This Note utilizes case law to illustrate the chronological journey toward our present day and what potentially lies ahead in the realm of non-traditional family law. Part I provides a brief

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16. CAL. FAM. CODE § 7612(c) (West 2017) ("In an appropriate action, a court may find that more than two persons with a claim to parentage under this division are parents if the court finds that recognizing only two parents would be detrimental to the child.").

17. *See* NeJaime, *supra* note 6, at 1190.

18. *See* Paula Amato et al., *Three-Parent In Vitro Fertilization: Gene Replacement for the Prevention of Inherited Mitochondrial Diseases*, 101 FERTILITY & STERILITY 31, 32–34 (2014) (explaining mitochondrial replacement therapy (MRT) in depth).

background of the political and social climate leading to where we are today regarding non-traditional family rights and highlights how the notion of the traditional family structure shifted throughout the 1970s and 1980s, leading to new legal rights established in the 1990s for non-biological parents in same-sex relationships. Part II discusses the legal status of same-sex families prior to marriage equality and the various ways in which same-sex parents achieved legal status. Part III outlines the post-*Obergefell* changes in family law, specifically regarding the recognition of functional and intentional parentage and ponders what lies ahead for non-traditional families in the wake of advancement in reproductive technologies. Part IV attempts to draw a line using a conduct-based standard regarding situations when a court should *not* award legal parental rights to an individual who might otherwise have a legal claim, biological or otherwise, to a child.

I. Background

The growth of parent-child relationships outside of marriage was primarily a response to changes in American family life.[19] With the introduction of no-fault divorce in the late 1960s and its widespread application by the late 1980s, divorce was more widely available and easier to obtain.[20] As divorced parents and single mothers formed new families, stepparents filled in and assumed parental roles.[21] Stepparent adoption was a mechanism for recognizing non-biological parents by providing parental rights to the stepparent.[22] Prior to marriage equality, same-sex couples had no similar mechanism for recognizing non-biological or third party parents.[23] Beginning in the mid-to-late 1980s,[24] same-sex couples could pursue second-parent adoptions, which essentially adapted the stepparent adoption model and allowed a same-sex partner to adopt their partner's biological or adoptive child without terminating the first parent's legal parental status.[25]

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19. *See* NeJaime, *supra* note 6, at 1195–1196.

20. Herma Hill Kay, *Equality and Difference: A Perspective on No-Fault Divorce and Its Aftermath*, 56 U. CIN. L. REV. 1, 1–2 (1987) (stating that in 1969, California adopted the first no-fault divorce law in the United States and that by 1987, no-fault divorce was available in all 50 states).

21. *See* Margaret M. Mahoney, *Stepparents as Third Parties in Relation to Their Stepchildren*, 40 FAM. L.Q. 81, 82 (2006).

22. *Id.* at 107.

23. *See* NeJaime, *supra* note 6, at 1201.

24. Julie Shapiro, *A Lesbian-Centered Critique of Second-Parent Adoptions*, 14 BERKELEY WOMEN'S L.J. 17, 28 (2013).

25. *Id.* at 28–29.

In 1995, the Wisconsin Supreme Court decided in *Holtzman v. Knott* that a lesbian partner could be granted de facto parenthood when the following factors were present:

> (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.[26]

If de facto parenthood is established, then the appropriate standard for determining visitation would be what is in the "best interest of the child," regardless of biological ties or the gender of the person seeking recognition.[27] *Holtzman* was the first decision to recognize a lesbian as a de facto parent.[28] The issue of a non-biological parent's ability to be recognized as a parent was becoming increasingly important at the time of *Holtzman*, as the number of same-sex couples having children was on the rise.[29] The *Holtzman* four-factor test is a balanced and reliable method for determining when standing should be granted to a non-legally recognized parent suing the legally recognized parent for visitation with a child.[30] The dissent in *Holtzman* stated a concern commonly heard in the fight for marriage equality—that by recognizing same-sex parents, legal parents could then be sued by any third party who might choose to assert parental rights to the child.[31]

In *Johnson v. Calvert*, a married couple used the husband's sperm to fertilize the wife's egg via IVF and then implanted the fertilized egg in a surrogate.[32] After the child was born, both the

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26. Holtzman v. Knott (*In re* Custody of H.S.H.-K), 533 N.W.2d 419, 421 (Wis. 1995); *see also* V.C. v. M.J.B., 748 A.2d 539, 551 (N.J. 2000) ("[T]he legal parent must consent to and foster the relationship between the third party and the child; the third party must have lived with the child; the third party must perform parental functions for the child to a significant degree; and most important, a parent-child bond must be forged.").

27. *Holtzman*, 553 N.W.2d at 421.

28. *See* Turner, *supra* note 7.

29. *See* NeJaime, *supra* note 6, at 1197.

30. Beth Neu, *Wisconsin Brings Child Visitation out of the Closet by Granting Standing to Nonparents in* Custody of H.S.H.-K., *533 N.W.2d 419 (Wis.),* cert. denied*, 116 S.Ct. 475 (1995)*, 37 S. TEX. L. REV. 911, 915 (1996).

31. *Holtzman*, 533 N.W.2d at 441–42 (Day, J., concurring and dissenting).

32. 851 P.2d 776, 778 (Cal. 1993).

wife and surrogate claimed to be the child's mother.[33] The court held that both women potentially had valid claims to being the natural mother.[34] However, looking at the parties' intentions, the court found that the wife was the child's natural mother because she intended to be the mother at the time of conception via IVF and implantation.[35] The court denied the surrogate mother legal parental status despite her potential claim as mother under the UPA, which provides parental status for birth mothers.[36] The intent test from *Johnson* was meant to determine parental status when the UPA does not apply.[37] As seen in *Johnson*, intent can be the dominant factor in determining parental status over traditional understandings of parentage, such as being the "natural mother."[38]

The *K.M. v. E.G.* case introduced a new issue regarding lesbian parentage: co-maternity. In this case, the biological mother, K.M., sought recognition as the legal parent over the birth mother, E.G., who was impregnated via IVF using K.M.'s ova fertilized with sperm from an anonymous donor.[39] After their relationship ended, E.G. argued that she intended to be the sole parent of the children while K.M. claimed that the two women had been raising the children together since birth.[40] K.M.'s attorney argued that "[i]f these same facts arose between a husband and wife during a divorce proceeding in which both parties were the genetic and gestational parents of these children, there would not be any valid dispute over parentage."[41] The court ultimately recognized both K.M. and E.G. as legal parents, going against the intent test promulgated in *Johnson*. The court essentially chose to acknowledge the parties' status as functional parents over their clear intent to have only one of them recognized as the legal parent.

With marriage-like relationships such as those in *Holtzman* and *K.M.* now deemed sufficient to indicate parental function and intent, the next logical step is recognition of additional non-married and non-biological parents.

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33. *Id.*

34. *Id.* at 781.

35. *Id.* at 782.

36. UNIFORM PARENTAGE ACT § 3(1) (UNIFORM LAW COMM'N 1973) ("The parent and child relationship between a child and (1) the natural mother may be established by proof of her having given birth to the child . . . .").

37. 851 P.2d 776, 782 (Cal. 1993).

38. *Id.*

39. 117 P.3d 673, 675 (Cal. 2005).

40. *Id.*

41. Appellant's Reply Brief at 11, K.M. v. E.G. (Ca. Ct. App. Nov. 3, 2003) (No. A101754), 2003 WL 23893651.

II. Recognition of Same-Sex Families Prior to *Obergefell*

As previously mentioned, parental recognitions started shifting away from being defined solely by biology and marriage in the late 1960s, as illustrated by the growing legal recognition of both unmarried biological fathers and married non-biological stepparents. These developments were not only beneficial to heterosexual couples but to same-sex couples as well, in that biology was no longer viewed as a fundamental aspect of parenthood. In the early 1970s, the U.S. Supreme Court recognized the constitutional parental rights of an unmarried father in *Stanley v. Illinois*.[42] The Court held that

> as a matter of due process of law, Stanley was entitled to a hearing on his fitness as a parent before his children were taken from him and that, by denying him a hearing . . . the State denied Stanley the equal protection of the laws guaranteed by the Fourteenth Amendment.[43]

The Court further stated that children who are "unlegitimized by a marriage ceremony . . . cannot be denied the right of other children because familial bonds in such cases were often as warm, enduring, and important as those arising within a more formally organized family unit."[44]

The Court established in the 1970s and 1980s that biology might be only part of the parentage equation, with parental conduct being the other necessary aspect of parenthood required of unmarried biological fathers.[45] The Court explained in *Lehr v. Robinson* that "[t]he significance of the biological connection is that it offers the natural father an opportunity that no other male possesses to develop a relationship with his offspring,"[46] but that a father must "accept[] some measure of responsibility for the child's future"[47] in order to be viewed as a parent. Also in the 1970s, the Uniform Law Commission established the UPA, which included what is now commonly known as the "holding out" presumption, requiring a father to "receive[] the child into his home and openly hold[] out the child as his natural child" in order to be granted full parental rights.[48] In including this conduct-based language, the UPA solidified the shift towards recognizing parental status as

42. 405 U.S. 645, 649 (1972).
43. *Id.*
44. *Id.* at 651–52.
45. *See* Lehr v. Robertson, 463 U.S. 248 (1983).
46. *Id.* at 262.
47. *Id.*
48. UNIFORM PARENTAGE ACT § 4(a)(4) (UNIFORM LAW COMM'N 1973).

being more than biological. Finally, non-biological parents within married heterosexual couples began to gain broader recognition within the law. These non-traditional families included those with stepparents and those created using alternate forms of fertilization, including assisted reproductive technologies such as IVF and sperm donation.[49] These developments illustrate how, in some cases, a biological connection to a child is only one factor considered in establishing parental rights.

Advocates for same-sex marriage and family equality used these new parental recognitions of unmarried, biological fathers and married, non-biological parents to show that a new model of parenthood was emerging that could recognize the non-marital, non-biological parent-child relationships such as those of a same-sex couple using IVF or sperm donation.[50] In summary, in the years leading up to the decision in *Obergefell*, the definition of legal parentage moved away from being defined by biology, gender, sexual orientation, and marriage, to instead being defined more by the intent and conduct of the parties raising a child as a family.

III. The Post-*Obergefell* Landscape

A. Recognizing Functional and Intentional Parentage

As outlined in Section II, proponents of same-sex marriage prior to *Obergefell* argued that same-sex couples are as capable as different-sex couples with regard to parenting, and that the similarities are not related to biology or gender, but instead are related to the functional and intentional relationships displayed within both groups. Opponents of marriage equality instead relied on conservative, child-centered arguments to justify same-sex marriage bans,[51] insisting that the ideal form of parenting includes a married mother and father, which sets same-sex couples outside

49. *Id.* at § 5(a) ("If, under the supervision of a licensed physician and with the consent of her husband, a wife is inseminated artificially with semen donated by a man not her husband, the husband is treated in law as if he were the natural father of a child thereby conceived.").

50. Joanna L. Grossman, *Parentage Without Gender*, 17 CARDOZO J. CONFLICT RESOL. 717, 731 (2016) (arguing that same-sex relationships are capable of showing the same type of family commitment and function as that of a married heterosexual couple and that second-parent adoption was used as an equitable remedy for same-sex couples denied equality).

51. Susan Frelich Appleton, *Presuming Women: Revisiting the Presumption of Legitimacy in the Same-Sex Couples Era*, 86 B.U. L. REV. 227, 248 (2006) (describing how children benefit from exposure to a "'model family,' in which the husband is the father and his wife is the mother").

of this ideal.[52] In order to counter the opposition's view that marriage and heterosexual procreation go hand in hand, those fighting for marriage equality turned to cases on unmarried fathers and stepparents in order to establish conduct and intent, not biology, as the key to parentage. In establishing marriage equality, the *Obergefell* Court also established that a functional and intentional model of parenthood included not only same-sex families, but could also include other non-traditional families that exist outside of marriage.

The marital presumption is a traditional notion that any child born to a married woman is presumed to be the biological and legal child of the husband, regardless of whether he is actually the biological father. With same-sex couples, there are very limited scenarios that would result in both partners having a biological connection to the child, meaning that non-biological parents would almost exclusively rely on the marital presumption or adoption to attain parental status alongside their partner as a biological parent. As mentioned earlier, the "holding out" concept could apply to an unmarried non-biological partner in a same-sex marriage to determine whether that person had the appropriate parent-like relationship with the child to be deemed a legal parent.

In the wake of *Obergefell*, courts are faced with determining how to rework the marital presumption to address certain issues regarding same-sex families, such as who is allowed to be listed on a birth certificate. The Supreme Court of Arkansas held that the state is not constitutionally required to grant lesbian couples a birth certificate that lists both female partners as mothers to a child conceived through donor insemination.[53] The court stated that the Arkansas statute in question regarding birth certificates "centers on the relationship of the biological mother and the biological father to the child, not on the marital relationship of husband and wife," and therefore, the statute does not go against the ruling in *Obergefell*.[54] Some states continue to define the marital

52. Lofton v. Sec'y of the Dep't of Children & Family Servs., 358 F.3d 804, 818 (11th Cir. 2004) (stating that families with married mothers and fathers "provide the stability that marriage affords and the presence of both male and female authority figures, which it considers critical to optimal childhood development and socialization").

53. Smith v. Pavan, 505 S.W.3d 169, 180 (Ark. 2016) ("[W]e cannot say that naming the nonbiological spouse on the birth certificate of the child is an interest of the person so fundamental that the State must accord the interest its respect under either statute."). The Supreme Court granted petition for writ of certiorari and reversed the Arkansas Supreme Court, remanding the case for further proceedings in light of *Obergefell*. Pavan v. Smith, 137 S.Ct. 2075 (2017).

54. *Smith*, 505 S.W.3d at 178.

presumption for same-sex couples by biology, even though the same is not always true for opposite-sex couples.[55]

Recent case law is still somewhat split between recognizing equal rights for non-biological parents or instead continuing to limit those rights. The Court of Appeals of New York held that "a person who is not a biological or adoptive parent may obtain standing to petition for custody or visitation,"[56] which overruled an earlier New York decision stating that a biologically unrelated third party will not be considered a parent in regards to seeking custody, even if the party has a "close and loving relationship with the child."[57] The later court cited social science research that highlights the trauma suffered "as a result of separation from a primary attachment figure—such as a de facto parent—regardless of that figure's biological or adoptive ties to the children."[58] This decision brought New York in line with most other states regarding the rights of de facto parents to seek visitation and custody.[59]

Similarly, the Supreme Judicial Court of Massachusetts held in *Partanen v. Gallagher* that a person may establish him or herself as a child's presumptive parent in the absence of a biological relationship with the child.[60] Partanen, the non-biological and non-birth mother, was not listed on either of her children's birth certificates, nor did she ever adopt the children, but she participated in raising the children from the time of their birth and she and her partner, the biological mother, held themselves out as the children's parents.[61] The court reasoned that Partanen showed that the children were born to both her and her partner with "the full acknowledgment, participation, and consent" of Partanen and "with the shared intention that [the parties] would both be parents to the resulting children."[62] The ruling in this case applies broadly to any non-biological parent.

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55. *See, e.g.*, COLO. REV. STAT. ANN. § 19-4-105(1)(a) (2017); MICH. COMP. LAWS § 700.2114(1)(a) (2017); WIS. STAT. § 891.41 (2017) (using the word "natural" to define the presumption of paternity).

56. *In re* Brook S.B. v. Elizabeth A.C.C., 28 N.Y.3d 1, 28 (N.Y. 2016).

57. Alison D. v. Virginia M., 77 N.Y.2d 651, 655 (N.Y. 1991).

58. *Brooke S.B.*, 28 N.Y.3d at 25.

59. *See, e.g.*, Pitts v. Moore, 2014 ME 59, ¶ 19 (Me. 2014) (holding that the court may award visitation to a "person with significant bonds to the child" who has had more than a "limited relationship to the child"); Hicks v. Halsey, 402 S.W.3d 79, 83–84 (Ky. Ct. App. 2013) (holding that custody shall be determined "in accordance with the best interests of the child and equal consideration shall be given to each parent and to any de facto custodian") (internal citations omitted).

60. 59 N.E.3d 1133, 1135 (Mass. 2016).

61. *Id.* at 1136.

62. *Id.* at 1142.

The intent and conduct of parties has become increasingly relevant in custody and visitation disputes as states move away from biology and marriage as the primary determinants of parentage. Two recent Indiana cases deal with this notion. In *Gardenour v. Bondelie*, the court held that the non-biological mother in a lesbian partnership was the child's legal parent under Indiana law.[63] She was awarded joint legal custody, visitation, and was ordered to pay child support.[64] The court relied on two cases dealing with heterosexual couples using a sperm donor in which the court established that because both parties knowingly and voluntarily consented to the artificial insemination, the non-biological father was a legal parent and was required to pay child support after the couple separated.[65] The second case, *Sheetz v. Sheetz*, involves a married couple who held out the child of an affair as their own for 12 years, even though the child was conceived while the husband was in prison.[66] The Indiana Court of Appeals ordered the husband, a non-biological father, to pay child support, stating that any other ruling would essentially leave the minor "without a father."[67] The court relied in all of these cases on the non-biological parent holding out the child as their own, regardless of the lack of a biological connection. In both cases, the court looked to the parties' intent and conduct to determine whether the non-biological parent had parental rights.

Not all courts find in favor of parental rights for the non-biological parent. The Michigan Court of Appeals issued an opinion denying legal standing to a non-biological lesbian partner who had co-parented the child in question since birth.[68] The biological mother denied all contact with their son after their relationship ended.[69] The court relied on Michigan Supreme Court precedent,[70]

63. 60 N.E.3d 1109, 1121 (Ind. Ct. App. 2016).

64. *Id.* at 1121.

65. *See, e.g.*, Levin v. Levin, 645 N.E.2d 601 (Ind. 1994); Engelking v. Engelking, 982 N.E.2d 326 (Ind. Ct. App. 2013).

66. 63 N.E.3d 1077, 1078 (Ind. Ct. App. 2016).

67. *Id.* at 1083.

68. Lake v. Putnam, 894 N.W.2d 62, 67 (Mich. Ct. App. 2016).

69. *Id.* at 68.

70. Van v. Zahorik, 597 N.W.2d 15 (Mich. 1999) (holding that the equitable parent doctrine, which gives de facto parents standing to seek custody and visitation in court, can only be recognized in the context of a legal marriage). The court majority refused to recognize a heterosexual man who co-parented his former girlfriend's children as an equitable parent, making no reference to the "best interest of the child" standard. Since same-sex couples could not marry in Michigan until 2015, same-sex parents could legally be denied equitable parent protection, meaning that the biological parent could elect to completely remove a child from the life of the non-biological parent.

which rejected the argument that holding oneself out as a child's parent alone is sufficient to be considered that child's parent under the equitable parent doctrine.[71]

It is arguable that the *Obergefell* decision exacerbates concerns that courts will continue to limit paths to legal parentage outside of marriage for *any* parents, since *Obergefell* describes marriage as "a keystone of our social order."[72] The *Obergefell* Court goes on further to state that

> [w]ithout the recognition, stability, and predictability marriage offers . . . children [of same-sex couples] suffer the stigma of knowing their families are somehow lesser. They also suffer the significant material costs of being raised by unmarried parents, relegated through no fault of their own to a more difficult and uncertain family life.[73]

Even considering that states are still seeking to deny equal rights to non-biological parents, marriage equality has allowed the courts to recognize an ever-expanding array of non-traditional parents, at least for those who are married. Questions remain regarding how the courts will treat parties that do not follow traditional gender-based constructs. In a recent decision out Louisiana, the state Court of Appeals vacated and remanded the trial court's decision denying a petition for custody by a non-biological transgender male partner of the birth mother.[74] It is interesting to ponder what the Court would have decided if the parties were legally married,[75] since the marital presumption would hold the male partner in a marriage as the presumed natural father, regardless of whether he was the biological father.

B. Recognizing Non-Traditional Families in the Wake of Recent Technological Advancements

Marriage equality has made possible parental structures based on intent and function and, in turn, has arguably moved parentage away from being defined solely by biology, gender, sexual orientation, and marital status. Marriage equality is only the beginning though, in terms of recognizing non-traditional families, as there are many scenarios that do not incorporate marriage at all. Section A of this Part briefly discussed some non-traditional ideas

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71. *Id.* at 23.

72. Obergefell v. Hodges, 135 S. Ct. 2584, 2601 (2015).

73. *Id.* at 2600 (citing United States v. Windsor, 133 S. Ct. 2675, 2694–95 (2013)).

74. Ferrand v. Ferrand, 221 So.3d 909 (La. Ct. App. 2016).

75. *Id.* at 918–19 n.9 (stating that Vincent, the male partner, testified that they were a same-sex couple at the time of their union, and as a result they were unable to obtain a marriage license at that time).

about parentage, specifically regarding the use of assisted reproductive technology and also regarding parents who do not fit traditional gender constructs. As reproductive technology continues to develop, the reality of having a single biological parent, three or more biological parents, or even same-sex biological parents is growing near. In response to technological advances like mitochondrial gene therapy, which can implant the cells of one female into the egg of another female, courts that elevate biological ties above all else will need to grapple with this new form of non-traditional, yet biological, parenthood.

Marriage equality has the potential to normalize certain alternative forms of reproduction, such as surrogacy and IVF, simply because of the frequency with which same-sex couples use these methods to start a family. Surrogacy contracts are still forbidden in some states,[76] so the shifting landscape caused by marriage equality could benefit more than just same-sex couples. Additionally, the functional and intentional parentage ideals that have flourished post-marriage-equality could potentially lead to broader recognition of multiple-parent families. As mentioned above, *In re M.C.* featured three people with parentage claims: a biological mother, her same-sex spouse, and the biological father with whom the biological mother had a sexual relationship.[77] When the Court ruled that the UPA only allowed two parents, the California legislature responded with a multiple-parent bill allowing a court to declare more than two legal parents if not doing so would be detrimental to the child.[78] Marriage equality is just one mechanism used to broaden recognition for non-traditional parentage regimes, but it is not required in order for states to recognize new forms of parentage. States that prohibited same-sex marriage prior to *Obergefell* recognized multiple parents in some cases. In *Jacob v. Shultz-Jacob*, the court recognized that three individuals—a biological mother, a non-biological mother, and a sperm donor—may have parental rights and obligations.[79] Families with multiple parents can be formed by same-sex and different-sex couples, both in and out of marriage, so legal recognition is not limited to certain situations involving only same- or opposite-sex couples in or outside of marriage. What the future will hold for non-

76. *See, e.g.*, D.C. CODE § 16-402 (2013); MICH. COMP. LAWS § 722.855 (2011); N.Y. DOM. REL. LAW § 122 (McKinney 2010).

77. 195 Cal. App. 4th 197, 202 (Cal. App. 2d 2011).

78. CAL. FAM. CODE § 7612(c) (West 2013).

79. 923 A.2d 473, 482 (Pa. Super. Ct. 2007).

traditional parentage will be unpredictable, and it will likely continue to grow.

IV. Deciding When to Withhold or Withdraw Legal Parental Rights in Response to the Shifting Landscape

This Note concludes by attempting to establish the situations in which parental rights should not be recognized. There are two general categories where it might not be appropriate for someone to have parental rights. The first can be described as the caregiver-versus-legal-parent determination. In this category, it is sometimes difficult to determine when it is appropriate to recognize a caregiver—which is defined as a person who is not a parent, "but who nevertheless is allocated and exercises residential responsibility or custodial responsibility" for a child[80]—as a legal parent and when it might not be necessary. The second category includes situations where a legal parent should have their rights eliminated, such as in instances where the child is the product of rape.

Caregivers can exist in many forms. The most common caregivers are parents. At issue in this section are non-biological caregivers, such as stepparents and grandparents or extended family. Caregivers are also relevant in multiple-parent situations, such as co-parenting families where there might be two separate sets of partners jointly raising a child, or in families where there are multiple people caring for and raising a child. When there are several people vying for parental rights, even if all of the parties are in agreement about co-parenting together, the possibility of causing harm to the child increases if those relationships deteriorate, causing uncertainty regarding who is legally recognized as a parent and who is not.

Additional issues can arise when multiple parents come in and out of a child's life. Should each successive partner attain parental rights simply through the marital presumption or by holding out the child? Is it in the best interests of a child to have multiple parties exchanging parental rights over the child? The answers to these questions ultimately rely on the intent of the parties. If a parent intends for each successive partner to become their child's legal parent, the court should recognize them as such. What is more difficult is determining if there should be some limit to how many parents can be recognized for one child. Since many children of

80. PRINCIPLES OF THE LAW OF FAMILY DISSOLUTION: ANALYSIS AND RECOMMENDATIONS § 3.02(7) (AM. LAW INST. 2002).

divorce already have two sets of parents, a logical cap would be to only recognize legal status for up to four parents of a child at any given time, regardless of biological or familial ties. However, there is no similar framework to help determine how many parents *over time* should be allowed to have parental rights. Ideally, only those who come into a child's life with the intention of remaining involved indefinitely should be granted parental rights.

The second category includes those who arguably do not deserve to be recognized as parents, but are often still recognized as parents in some form under the law. Within this category are rapists, parents who sexually abuse or otherwise mentally or physically harm their partners or children, and absent parents who only return later in a child's life seeking to regain the parental rights that they abandoned. Since parental rights are viewed as fundamental rights in the United States, these rights are not easily removed.[81] In order to overcome biology and remove someone's parental rights, there must be "grave and weighty reasons" for such a removal.[82]

In *S.J. v. L.T.*, the court held that a biological father's parental rights would not be terminated even though he was convicted of sexually assaulting the mother and there was ample evidence that the child was conceived because of that sexual assault.[83] Additionally, the issue of abuse frequently involves the distinction between physical custody and visitation. If a parent does not have physical custody, courts are hesitant to deny them visitation rights. In *Arnold v. Naughton*, the court held that a noncustodial father who sexually abused his child could still have supervised visitation rights.[84] In *Bobbitt v. Eizenga*, the trial court held that a man had no rights to custody or visitation due to a North Carolina statute that denied custody and visitation rights to persons convicted of "first and second degree rape" that resulted in the birth of a child.[85] The state Court of Appeals reversed, holding that because this case concerned a man convicted of "attempted statutory rape," the statute did not apply.[86] The court went further to hold that without specific legislation regarding "attempted statutory rape," the court

81. Kara N. Bitar, *The Parental Rights of Rapists*, 19 DUKE J. GENDER L. & POL'Y 275, 276 (2012).

82. S.J. v. L.T., 727 P.2d 789, 795–97 (Alaska 1986).

83. *Id.* at 791.

84. 486 A.2d 1204, 1208 (Md. Ct. Spec. App. 1985).

85. 715 S.E.2d 613, 614 (N.C. Ct. App. 2011).

86. *Id.* at 616.

would not deny visitation to a man convicted of such a crime which resulted in the birth of a child.[87]

Since courts are clearly not a reliable source for protecting the victims of rape from having to share parental rights with their rapists, legislation is necessary to address this issue. Without legislation in place to withhold parental rights in these situations, rapists have the same rights as any other biological parent.[88] While some states have enacted statues that limit the rights of rapists—and many first require a conviction—some rely heavily on judicial discretion and most inadequately protect victims from subsequent trauma.[89] Enacting nationwide legislation terminating a rapist's parental rights would demonstrate not only that our society sees rape as an atrocious crime, but also that victims deserve the protection of the law.

The argument for limiting parental rights in these scenarios stems from the best interests of the child, while also taking account of parental conduct. Children who are born because of rape are not served by allowing the rapist to have a parental claim to them. Similarly, parents who neglect, abuse, or otherwise harm their children should not be allowed to retain their parental rights but instead should have those rights removed to protect the safety and health of the child. A person's harmful and abusive conduct should be grounds for having all parental rights terminated.

There is no clear line between when legal status should be given to an individual and when it should be taken away, but this Note suggests that there are at least two categories that outline situations in which parental recognition should be limited to a certain number of recognized parents and when recognition simply is not appropriate. As the law expands and societal understandings of families and parenthood continue to develop, courts will have to grapple with what is right, what is in the best interests of a child, and what is the law. Above all, parental conduct should be the deciding factor in cases that come close to this line.

Conclusion

With the expansion of parentage laws in the 1960s and 1970s to recognize unmarried, biological fathers and non-biological stepparents, and now with the establishment of marriage equality, both married and unmarried couples, of both same- and opposite-

87. *Id.*
88. *See* Bitar, *supra* note 81, at 285.
89. *Id.* at 291–93.

sex, we are seeing a shift toward a broader understanding of what it means to be a parent. Marriage equality challenged the traditions of biology that once defined parenthood and in turn helped broaden the understanding of parentage to include things like parental conduct and intent. This shifting understanding of what defines a family and what makes a person a parent will continue to evolve as new technology further challenges our understanding of reproduction and as new forms of family challenge our ideas about what is in the best interest of a child. The continual evolution of parentage will force courts to make increasingly judgment-based determinations as to what constitutes a legal parent and what does not and what truly is in the best interests of a child. While there is no clear line between who should and who should not have parental rights, it is critical for all states to establish legislation regarding scenarios where parental rights should not be given by default, such as when children are born as a result of rape. Ultimately, parental conduct should be considered over intent, marriage, or even biology, when deciding who should have parental rights.