2020

For the Children: Intentional and Functional Approaches to Same-Sex Parentage in Connecticut

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CONNECTICUT
LAW REVIEW

VOLUME 52 APRIL 2020 NUMBER 1

Note

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Despite major progress that Connecticut has made in recent years towards achieving marriage equality, there is still a large disparity in the legal treatment of Connecticut parents based on their sexual orientation. Many family law doctrines regarding parentage are entrenched in "traditional" heteronormative definitions of marriage and family, despite changes in the legal recognition of marriage. Furthermore, certain doctrines, such as the presumption of legitimacy, maintain the narrative of a child only belonging to one mother and one father in the context of a marriage. Understandings of what it means to be a family are shifting. In 2019, the adoption of the Uniform Parentage Act of 2017 was proposed in the Connecticut General Assembly. Unfortunately, the legislation died in committee. The Uniform Parentage Act would eliminate many barriers that same-sex parents face, such as replacing gendered statutory language such as "mother" or "father" with simply "parent." The Act would also provide a regulatory structure through which definitions of parentage could be broadened to include functional and intentional parents within Connecticut's statutory scheme. This Note argues that current constructions of parentage in society are far too limited and often do more harm to the child than good. Therefore, this Note advocates for the adoption of the Uniform Parentage Act of 2017 in Connecticut. Particularly, this Note outlines the benefits of expanding the legal definition of parent to include more modern realities of family formation such as those who were intended to be parents to a child and those who functioned as a parent in the child's life. Furthermore, this Note was written with future Connecticut legislation in mind and therefore seeks to provide a broad overview of the history and legal doctrine of marriage as well as the practical implications of the Uniform Parentage Act of 2017.

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For the Children: Intentional and Functional Approaches to Same-Sex Parentage in Connecticut

HANNAH KALICHMAN [*]

INTRODUCTION

It is four years since the United States Supreme Court issued its opinion in *Obergefell v. Hodges*,[1] effectively invalidating state laws that, for decades, denied marriage equality to same-sex couples.[2] With a five-justice majority, this landmark decision brought about strong social and political reactions from both affirming and opposing groups.[3] While the 2015 ruling fundamentally changed marital rights across the country, Connecticut has fully recognized same-sex marriages since its 2008 decision *Kerrigan v. Commissioner of Public Health*.[4] The recognition of same-sex marriages, while an important development in American jurisprudence, was not enough to truly bring same-sex couples to an equal status with different-sex couples.[5] This recognition, whether it be at the national or state level, promptly brings a myriad of questions, such as: How does insurance regulation apply to same-sex couples? What are spousal rights in health and medical care? How does redefining marital rights impact social and legal

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[*] J.D. Candidate 2020, University of Connecticut School of Law. Recipient of the Best Student Note Award. I would like to thank Professor Schmeiser for her unwavering support and advice throughout this process. Also, thank you to Professor Chill for guiding me through law school and sparking my interest in child law. I would also like to thank the members of *Connecticut Law Review* for their tireless efforts and dedication. Thank you to my family and friends for their constant encouragement. Specifically, thank you to my father, Seth, for instilling in me a passion to write from a young age and to my mother, Moira, for teaching me to how to be an advocate.

[1] 135 S. Ct. 2584 (2015).

[2] *Id.* at 2607.

[3] Melissa Murray, Obergefell v. Hodges *and Nonmarriage Inequality*, 104 CALIF. L. REV. 1207, 1209 (2016).

[4] 957 A.2d 407 (Conn. 2008).

[5] Throughout this Note, I will be referring to "same-sex" couples as an umbrella term to include couples who identify as being of the same sex or gender. It is important to recognize that not all same-sex or LGBTQ+ experiences are the same. While this Note references same-sex couples generally, lesbian couples and gay-men couples have different experiences, as do individuals who do not identify within the binary of male or female or who identify as trans*. For a full discussion regarding the disparities in experiences for same-sex couples, see Clifford J. Rosky, *Like Father, Like Son: Homosexuality, Parenthood, and the Gender of Homophobia*, 20 YALE J.L. & FEMINISM 257, 267 (2009). To give an example, gay men are generally less likely to be able to adopt than lesbian couples. *Id.* at 268. For the purposes of this Note, I will discuss same-sex couples more broadly, as the proposed functional and intentional parentage definitions would perhaps address some of the disparities amongst same-sex couples through gender neutral legislative language.

definitions of family? More specifically, how are parental rights and custody disputes impacted in the recognition of same-sex couples?

This Note aims to address same-sex parental rights and child custody in Connecticut. While courts and legislatures have asserted that by legalizing same-sex marriages they are declaring all married couples to be equal under the law, the reality experienced by many families is starkly different. Those who do not fit within the societally constructed categories of traditional gender roles and norms often find significant obstacles in their path when seeking parentage.[6] Connecticut has attempted to sort out the question of same-sex couples' rights to children born during and outside of matrimony.[7] Thus far, these attempts have fallen short of achieving truly equal treatment for all families.

This Note examines the historical background of the various doctrines associated with the institutions of marriage, parentage, and child custody. Limited legal avenues are available to same-sex couples seeking parentage. Beyond biology, there are currently two main routes to parentage: (1) prearranged agreements such as adoption or surrogacy and (2) marriage to a woman who bears a child. The latter occurs through the presumption of legitimacy or marital presumption. This presumption grants parental rights to the partner, historically the husband, of a woman who bears a child.[8] Courts and legislatures alike continue to grapple with the presumption of legitimacy and related questions of parentage in the context of same-sex couples. Questions surrounding what defines a parent and how parentage is established under the law are complex and deeply personal. The challenge behind applying this presumption is the inherent case-by-case nature of family law questions.

This Note proceeds in four parts. Part I provides a historical overview of marriage and family in the United States, specifically elaborating a broad, and admittedly abridged, national history of how civil rights, marriage, and parentage have developed within their respective doctrines over the years. In her comprehensive book, *Public Vows: A History of Marriage and the Nation*, Nancy Cott provides extensive insight into the national history of marriage.[9] However, this Note does not attempt to cover every aspect of marital history, but instead seeks to provide a sufficient overview of the evolution of marital legislation and jurisprudence so as to set the backdrop for further analysis. Part II discusses traditional models of defining parentage and their shortcomings when applied to same-sex couples. Part III

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[6] Douglas NeJaime, *The Nature of Parenthood*, 126 YALE L.J. 2260, 2266 (2017).

[7] Barse v. Pasternak, No. HHBFA124030541S, 2015 WL 600973, at *2 (Conn. Super. Ct. Jan. 16, 2015).

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

[9] For a comprehensive account of the history of marriage in the United States, see generally NANCY F. COTT, PUBLIC VOWS: A HISTORY OF MARRIAGE AND THE NATION 1–2 (Harvard Univ. Press 2000).

specifically addresses the rights of same-sex couples and current routes to parentage in Connecticut. Part IV introduces the Uniform Parentage Act and its application in other states, as well as Connecticut's own steps toward adopting it. Part IV also provides two proposals for legislative change in Connecticut.

Instead of relying on antiquated doctrines, such as the presumption of legitimacy, that are ill-fitted for modern definitions of family, this Note calls for the implementation of intentional and functional definitions of parentage. Specifically, Connecticut should adopt relevant provisions of the Uniform Parentage Act (2017) (UPA (2017)),[10] so as to finally have a comprehensive legal scheme through which to define parentage. The writing of this Note is particularly timely given the recent attention that the UPA (2017) has garnered in the Connecticut legislature.[11] While no bill is currently on the floor as of the writing of this Note, it was with potential legislation in mind that this Note was constructed. Hopefully, the following discussion will contribute to Connecticut's legislative process in considering whether to adopt certain provisions of the UPA (2017).

It is time for Connecticut law to recognize same-sex relationships as legitimate beyond a marriage license and fully deserving of recognition and protection under the law when seeking legal parentage. No longer is it sufficient to fit same-sex parents into the margins, including them via proxy and stretching outdated doctrine to fit their situation, as if they were an exception to the norm. Same-sex couples are fully capable parents and should be recognized as such.[12] With implementation of the UPA (2017) provisions in Connecticut, parentage would no longer be limited to the notion that a parent is someone who has passed on genetic material to their offspring. Instead, there would be a recognition of the *role* of the parent, the importance of the parent-child relationship, and a true focus on the best interests and welfare of the child.

I. MARRIAGE AND FAMILY: A NATIONAL HISTORICAL PERSPECTIVE

Marriage and family, while fundamentally private aspects of life, undeniably thrust individuals into the public sphere. Marriage in the United States, and by extension family, have been repeatedly described as central to society.[13] Courts, including the Supreme Court of the United States, have

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[10] UNIF. PARENTAGE ACT (UNIF. LAW COMM'N 2017).

[11] Until February 2019, Connecticut had a bill, Proposed Bill No. 6507, in committee that outlined the adoption of the UPA (2017). *Proposed H.B. No. 6507 Session Year 2019*, CONN. GEN. ASSEMBLY, https://www.cga.ct.gov/asp/cgabillstatus/cgabillstatus.asp?selBillType=Bill&bill_num=HB06507&which_year=2019 (last visited Jan. 4, 2020).

[12] William Meezan & Jonathan Rauch, *Gay Marriage, Same-Sex Parenting, and America's Children*, 15 FUTURE OF CHILD. 97, 103–04 (2005).

[13] *See* COTT, *supra* note 9, at 3 (describing marriage as an institution that influences societal formation).

struggled to come to terms with a definition of family that is both clear and flexible to meet the modern legal needs and rights of individuals. Historically, a family was defined strictly in the nuclear sense, being comprised of a husband, wife, and their legitimate children.[14] This traditional definition has proven problematic as families have morphed beyond such a narrow conceptualization, especially in recent years.[15] Within the family structure, other definitions have shifted as legal doctrines have evolved. Both the doctrines of marriage and family are still changing. For example, marriage no longer defines women as the property of men and marital rape has only recently been recognized as a crime within American penal codes.[16]

A. *A Brief History of Marriage in the United States*

Marriage, while a personal declaration of love and commitment between individuals, is also influenced by public attitudes and acceptance.[17] Since the founding of the nation, marriage has been deeply entrenched in the national narrative.[18] Marriage sets boundaries for the roles prescribed to men and women, culturally defines gender, and determines the very make-up of families.[19] Not only has marriage law defined gender, it also has had a major role in defining race and drawing racial distinctions between groups.[20] Some marriages, such as those between Christian white men and white women, have traditionally been protected whereas marriages outside of this narrow construct have a history of being discouraged or banned.[21] Marital regulation draws stark lines defining what makes a legitimate family.[22]

Even in times of radical social change, from reconstruction to the Civil Rights Movement, advocates did not dare go so far as to challenge the institution of marriage and its inherent assumptions. For instance, during the formation and passage of the Thirteenth Amendment, advocates were sure to clarify that the language would not eliminate "other domestic relations."[23] It was not until 1967 that the United States Supreme Court held that states

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[14] *See id.* at 25 (describing nuclear family structures in America dating back to the Iroquois Nation).

[15] Brief of Historians of Marriage & American Historical Ass'n as Amici Curiae Supporting Petitioners at 4–6, Obergefell v. Hodges, 135 S. Ct. 2584 (2015) (No. 14-556). *See also* Moore v. City of East Cleveland, 431 U.S. 494, 505–06 (1977) (holding grandparents should be included in "family").

[16] COTT, *supra* note 9, at 211.

[17] *Id.* at 2.

[18] *See id.* at 9–10 (describing the various definitions of marriage in the United States during its founding with the underpinning of acceptance and expectation that marriage be between a man and a woman).

[19] *Id.* at 4.

[20] *See id.* ("Consequently, marriage has also been instrumental in articulating and structuring distinctions grouped under the name of 'race.'").

[21] COTT, *supra* note 9, at 3–5.

[22] *Id.*

[23] *Id.* at 80.

could no longer restrict marriages between persons solely on the basis of their race.[24] By opining that this was a violation of both the Equal Protection and Due Process Clauses of the Fourteenth Amendment, the Court was singling marriage out as a "fundamental freedom" that was implicit in the concept of liberty.[25] Specifically, in *Loving v. Virginia*, the Court held that "[m]arriage is one of the 'basic civil rights of man,' fundamental to our very existence and survival . . . . Under our Constitution, the freedom to marry, or not marry, a person of another race resides with the individual and cannot be infringed by the State."[26]

While *Loving* proved to be some measure of legal protection for interracial couples seeking to marry, the same cannot be said for same-sex couples. Until 1973, homosexuality was defined as a mental illness.[27] As late as 2003, states were still allowed to criminalize sexual behavior associated with same-sex relationships, particularly sexual acts between men.[28] Reminiscent of the efforts of former slaves after the Civil War, same-sex couples sought the legal recognition of marriage in part to demonstrate their access to basic civil rights.[29] By excluding same-sex couples from free choice and equal marriages, same-sex relationships were stigmatized and heterosexual supremacy was reinforced.[30] Despite the lack of legal protections for same-sex relationships, the decades following the 1960s demonstrated major shifts in household demographics.[31] Along with these shifts in social structure came movement in some states towards recognizing same-sex marriages under the principles of consent, freedom of choice, and privacy.[32]

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[24] *See* Loving v. Virginia, 388 U.S. 1, 12 (1967) (overruling *Pace v. Alabama*, which upheld the State of Alabama's ban on interracial marriages).

[25] *Id.*

[26] *Id.* (citation omitted).

[27] Jack Drescher, *Out of DSM: Depathologizing Homosexuality*, 5 BEHAV. SCI. 565, 565 (2015).

[28] *See* Bowers v. Hardwick, 478 U.S. 186, 196 (1986) (holding that a law criminalizing sodomy was constitutional and met rational basis review). *Lawrence v. Texas* held that the liberty interest protected by the Due Process Clause of the Fourteenth Amendment includes the right of consenting adults to engage in intimate contact in the privacy of their own homes and that this right extended to same-sex couples. 539 U.S. 558, 578–79 (2003).

[29] COTT, *supra* note 9, at 216.

[30] Rosky, *supra* note 5, at 273–74 n.77.

[31] Unmarried couple households multiplied by almost ten times from 1960 to 1998, growing more than five times faster than the number of households overall. However, by the end of the 1990s, marriage no longer was the society milestone it once was considered to be. The proportion of adults declining to marry rose from fifteen to twenty-three percent between 1972 and 1998. COTT, *supra* note 9, at 203.

[32] In 1998, an Alaskan court ruled that the right to choose one's life partner is constitutionally fundamental under the state constitution. The court held that:

> Government intrusion into the choice of a life partner encroaches on the intimate personal decisions of the individual. . . . The relevant question is not whether same-sex marriage is so rooted in our traditions that it is a fundamental right . . . but whether the *freedom to choose* one's life partner is so rooted in our traditions.

Just as the first states, namely Alaska and Hawaii, began to broaden their definitions of marriage to include same-sex couples, opponents of same-sex marriage organized to maintain the heteronormative boundaries of marriage.[33] Between 1996 and 1997, twenty-four states passed legislation effectively banning recognition of same-sex marriages, even when those marriages may have been valid elsewhere.[34] In 1996, opposition groups successfully stalled states from recognizing same-sex marriage with a federal response in the form of the Defense of Marriage Act (DOMA).[35] This Act described marriage under federal law as singularly between a man and woman.[36] DOMA further asserted that states are not required to recognize out-of-state same-sex marriages.[37] It was not until 2013 that the Supreme Court declared DOMA to be unconstitutional in *United States v. Windsor*.[38] The Court reviewed DOMA's impact of denying a lesbian couple who were married in Canada the same protections that different-sex married couples received and determined that the Act violated the Constitution.[39] The Court reasoned that "DOMA writes inequality into the entire United States Code."[40] *Windsor* highlighted the tension between the federal government's interest in protecting Due Process and Equal Protection of individuals and states' interest in making sovereign decisions over marriages within their borders.[41]

Finally, in 2015, the United States Supreme Court in *Obergefell v. Hodges*[42] held that states must issue marriage licenses and recognize lawful out-of-state marriages of same-sex couples.[43] While a major step towards equality for same-sex couples, *Obergefell* has also garnered some concern amongst advocates and scholars alike.[44] By declaring marriage such a central and fundamental institution within society, the Court arguably lowered the status of nonmarital relationships.[45] This is an important point that will be relevant for the discussion of parentage. If marriage is considered central to society by the Court and its status therefore lowers the importance of

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Similarly, Hawaii converted the single route of heterosexual marriage to just one of a few forms of marriage. *Id.* at 216–17 (quoting Brause v. Bureau of Vital Statistics, No. 3AN-95-6562 CI., 1998 WL 88743, at *4–5 (Alaska Super. Ct. Feb. 27, 1998).

[33] *Id.* at 217.

[34] *See id.* ("By the spring of 2000, a total of thirty-five of the fifty states had legislated their unwillingness to recognize same-sex marriage.").

[35] *Id.* at 218.

[36] COTT, *supra* note 9, at 218.

[37] *Id.*

[38] 570 U.S. 744, 745 (2013).

[39] *Id.* at 744–45.

[40] *Id.* at 771.

[41] *Id.* at 770.

[42] 135 S. Ct. 2584 (2015).

[43] *Id.* at 2607–08.

[44] *See* Murray, *supra* note 3, at 1210 (discussing concerns surrounding the *Obergefell* decision).

[45] *Id.*

nonmarried couples' relationships, the doctrine surrounding the protection of parental rights becomes key when considering child custody, whether in marriages or outside of them. Furthermore, recent demographic trends reflect that marriage rates are declining,[46] which raises the question as to whether basing familial definitions along marital lines is the best approach. These trends reflect the continued shifting shape and form of families in the American household. What was once a strict nuclear definition of family in the courts is now changing to embrace the diversity that is far more representative of families' realities.

B. *Changes in Family Formation*

While parentage may seem to be a straightforward biological concept, the application of parentage doctrine is far more complex. Particularly in recent years, courts have been confronted with a tension between two models of parentage. One model revolves around the more "traditional" dual-gendered, biological definition of parentage.[47] The other model focuses on the formation of chosen (intentional) and functional families.[48] Social constructions of gender, sexuality, race, and class have all impacted the laws surrounding family formation and recognition.[49] Much of family law is rooted in heteronormative, classist, and racially hierarchical systems that do not aim to recognize the majority of families within the United States.[50] While family life is presumed to be private and confined to the home, the public sphere plays an active role dictating what it means to be a family and what rights families have.[51] Generally, the state can, and often does, intrude to rigidly define family construction and child custody.[52] When a state does become involved in questions of family construction, there inevitably is an incursion into questions of state values that are certainly influenced by societal norms.[53]

Given the private nature of family and parentage, one must ask *why* states are so interested in defining families and parentage in such stark terms. Certainly, many of us can point to relationships in our lives that might not fit societal norms but still fulfill familial roles that society would find

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[46] D. KELLY WEISBERG & SUSAN FRELICH APPLETON, MODERN FAMILY LAW: CASES AND MATERIALS 225 (Erwin Chemerinsky et al. eds., 6th ed. 2016) (describing the "retreat from marriage" that reflects a decline in the rate of marriage amongst adults and the increase in nontraditional families).

[47] *See* Matthew M. Kavanagh, *Rewriting the Legal Family: Beyond Exclusivity to a Care-Based Standard*, 16 YALE J.L. & FEMINISM 83, 92 (2004) (discussing the "traditional" nuclear family model).

[48] *See id.* at 116 (describing Nancy Polikoff's functional approach to defining parentage).

[49] *Id.* at 143.

[50] *Id.* at 122.

[51] *See* COTT, *supra* note 9, at 3 (describing societal gender norms and the assumed role of women and men within the nuclear family).

[52] *Id.* at 4.

[53] *See id.* at 2–3 (describing certain models of marriage that are encouraged by the government).

important and valid, even if they are not legally recognized. Despite this reality, definitions of family and parentage in the United States are heteronormative.[54] When the phrase "American family" is used, it has traditionally been associated with an economically middle-class, racially white, and structurally nuclear family.[55] In this family, the father goes to work while the mother stays home with her children, one boy and one girl. Obviously, this mythical "American family" is far from the American truth.[56] But it is important to recognize this stereotype in the context of family law because these assumptions and societal norms influence legal conceptualizations of family. Over recent years, however, courts have begun to recognize non-traditional families in a variety of contexts, and from that recognition has come a slow but steady broadening of what it means to be a parent in America.

II. TRADITIONAL MODELS OF DEFINING PARENTAGE

A legal parent is someone who, amongst other roles, is responsible for making decisions about a child's health, education, and well-being.[57] When the question of parentage ventures beyond the context of a man and woman who conceive without assistance, many legal issues arise as to what rights and obligations each parent has, especially if that parent does not have any biological or legal relationship with the child.[58] Legal parentage is often an "all-or-nothing" analysis.[59] For instance, an adoptive parent's rights cannot begin until a biological parent's rights end.[60] This legal analysis is ill-fitted for the modern complexities of families.[61] Often, under traditional definitions of parentage, same-sex parents are disadvantaged or left extremely vulnerable, particularly when they are not married.[62]

Same-sex couples do not define parentage in such heteronormative terms, that is expecting a child to have one mother and one father. Therefore, a same-sex parent faces seemingly insurmountable barriers in seeking

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[54] *See* Kavanagh, *supra* note 47, at 122 (discussing the stereotypes associated with the nuclear family and how it does not reflect reality).

[55] *Id.*

[56] *See id.* at 92 ("Even in its heyday, millions of American families did not have access to the wealth, racial privilege and geographic location necessary to establish the idealized nuclear family.").

[57] NAT'L CTR. FOR LESBIAN RIGHTS, LEGAL RECOGNITION OF LGBT FAMILIES 1 (2019), http://www.nclrights.org/wp-content/uploads/2013/07/Legal_Recognition_of_LGBT_Families.pdf.

[58] *See id.* at 1–4 (describing various paths to parentage).

[59] Nancy D. Polikoff, *This Child Does Have Two Mothers: Redefining Parenthood to Meet the Needs of Children in Lesbian-Mother and Other Nontraditional Families*, 78 GEO. L.J. 459, 464 (1990). *See also id.* at 471–72 (describing the current legal approach to parental disputes and the ongoing efforts of courts to maintain a rigid two-parent family structure).

[60] *Id.* at 470 ("Similarly, a stepparent cannot adopt a child if the child has a living parent of the same sex as the stepparent and that parent does not consent to termination of his or her parental status.").

[61] *Id.* at 473.

[62] *Id.* at 468–69.

custody of children who are not biologically related to them.[63] Whether considering biological or social factors, children may have as many as five parents who could potentially bring a claim of parental rights.[64] Despite this, courts have for the most part adhered to three main paths to parentage: biology, arrangement, or marital presumption of legitimacy. While biology may seem a simple route to parentage, modern technologies bring far more complexity to many biological relationships than in the past when biology was synonymous with "natural" conception.

A. *Biology*

A strictly biological perspective on parentage restricts family formation. For instance, the proposition that a child can have more than one father has been widely rejected.[65] While many courts have worked to adhere to this strict standard, the reality is parents compose a wide variety of people within a child's life and these relationships are far more complex than chromosomal lineage.[66] A series of Supreme Court cases dealt with the question of parental rights, and the doctrine developed to specifically outline how parental rights are constitutionally protected, including which parents are and are not protected. Birth mothers (not in the surrogacy context) tend to benefit from a biological presumption, meaning that their parentage is presumed because of the act of giving birth.[67] Biological fathers do not benefit from the same presumption, particularly when they are not married to the birth mother and therefore cannot benefit from the marital presumption.[68] In fact, a biological father may have fewer rights than a non-biological father who is married to the birth mother.[69] However, there are some protections in place, via procedure, that can facilitate parental rights claims by unwed biological fathers. For example, in 1972 the Court declared that unwed fathers are

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[63] *See id.* at 469 (describing the complexities of family formation and the fiction of familial homogeneity).

[64] *See* John Lawrence Hill, *What Does it Mean to Be a "Parent"? The Claims of Biology as the Basis for Parental Rights*, 66 N.Y.U. L. REV. 353, 355 (1991) ("We now live in an era where a child may have as many as five different 'parents.' These include a sperm donor, an egg donor, a surrogate or gestational host, and two nonbiologically related individuals who intend to raise the child. Indeed, the process of procreation itself has become so fragmented by the variety and combinations of collaborative-reproductive methods that there are a total of sixteen different reproductive combinations, in addition to traditional conception and childbirth.").

[65] Theresa Glennon, *Somebody's Child: Evaluating the Erosion of the Marital Presumption of Paternity*, 102 W. VA. L. REV. 547, 602 (2000). *See also* Polikoff, *supra* note 59, at 469–70 (describing how few courts consider the possibility that a child may have more than one mother or father).

[66] Polikoff, *supra* note 59, at 469–70; *see also* Moore v. City of East Cleveland, 431 U.S. 494, 504 (1977) (recognizing the importance of grandparents within the household/as part of the family).

[67] Hill, *supra* note 64, at 354 n.8 (describing the "presumption of biology").

[68] *See id.* at 376 (discussing the case of *Michael H.* and the limited ability of a biological father to seek parentage).

[69] *See id.* at 376–77 (discussing *Stanley v. Illinois* and the Court's recognition of a husband's parental rights over those of an alleged biological father).

entitled to a hearing to determine their fitness and are not presumptively unfit parents.[70]

Biology has maintained a mythical status in many courts despite criticism from scholars. Further complicating matters, the birth certificate is often argued by prospective parents as a method of determining parentage.[71] But this method of identification is a legal fiction. Instead of determining or creating parentage, birth certificates are merely intended to accurately reflect the legal relationship between parent and child.[72] The birth certificate does *not* create such a relationship, but instead documents it.[73] Biological limits in defining the boundaries of parentage are expanded through certain agreements.

B. *Parentage by Arrangement*

When considering parentage beyond biology, certain theorists indicate that when considering an adult's intention to be a parent, the existence of an arrangement to procreate, whether formal or informal, should be determinative of parental rights.[74] Adoption and surrogacy arrangements are examples of paths to parentage by agreement. When an adoption takes place, prospective parents agree to take on parental rights and responsibilities and an individual who would otherwise have parental rights must consent, or in state-initiated custody cases have court consent, to have their parental rights terminated.[75] Adoption agreements can take place before birth but do not become realized until the child is born. Similarly, surrogacy agreements allow prospective parents to arrange for another to conceive and deliver their child.[76] Surrogacy agreements give rise to disputes both about who the intentional parents are and also who the biological and presumptive parents are.[77] However, ending the analysis at whether there is the existence of a biological or contractual relationship makes invisible many parent-child relationships within the United States. It is further troubling that adoption

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[70] Stanley v. Illinois, 405 U.S. 645, 658–59 (1972).

[71] *See* Barse v. Pasternak, No. HHBFA124030541S, 2015 WL 600973, at *3 (Conn. Super. Ct. Jan. 16, 2015) (reflecting a plaintiff's claim of parentage, based in part on her name on the birth certificate).

[72] *See* Raftopol v. Ramey, 12 A.3d 783, 789 n.17 (Conn. 2011) ("We have never stated, and do not hold today, that being named on a birth certificate as the parent to the child confers parental status on the named person. A person who is named on a birth certificate as a parent to the child is so named on the certificate as a function of the department's responsibility to keep accurate records of vital records. The birth certificate must accurately reflect the legal relationship between parent and child, but it does not create that relationship.").

[73] *Id.* at 793.

[74] Barbara Bennett Woodhouse, *Hatching the Egg: A Child-Centered Perspective on Parents' Rights*, 14 CARDOZO L. REV. 1747, 1820 (1993).

[75] Hill, *supra* note 64, at 354.

[76] Ilana Hurwitz, *Collaborative Reproduction: Finding the Child in the Maze of Legal Motherhood*, 33 CONN. L. REV. 127, 128 (2000).

[77] *See id.* at 133–34 (providing an example of a dispute arising from a surrogacy agreement).

and surrogacy agreements suggest "that power over children ought to be defined by adults' bargained for exchanges."[78]

While parentage by agreement has certainly been an incredible and often miraculous path for couples to become parents, critics of parentage by agreement point out that certain agreements place individualistic interests above those of the family.[79] There looms a tension between children's rights versus parental rights. Scholars differ in opinion as to whose rights should triumph when there is a conflict.[80] Intentional and functional approaches are needed to address the complexities of modern parent-child relationships. Courts have attempted to include more parent-child relationships by adapting older doctrines of legitimacy to potentially include same-sex couples within traditionally heteronormative models of parentage.

C. *The Marital Presumption of Legitimacy*

Despite courts' reliance on biology in determining parentage, the law has always recognized some form of nonbiological parentage.[81]

> The core rule for assigning parenthood to men historically—the marital presumption—"both facilitated parental recognition that departed from biological facts and cut off claims to parental recognition based on biological facts." Conversely, nonmarital biological fathers generally had no parental rights historically. Thus, contrary to the assertions of some, the law has recognized and continues to recognize nonbiological parenthood.[82]

While birth mothers are included within the "presumption of biology" because of the very act of giving birth, the same cannot be said for fathers.[83] Instead, a more complex doctrine emerged: the presumption of legitimacy (also known as the marital presumption).[84] The presumption addresses when a child is born in the context of a legally recognized marriage.[85] While the mother benefits from the biological presumption, the husband is *presumed* to be the child's natural father regardless of biological ties.[86] The presumption is deeply rooted in long-held concerns regarding the legitimacy

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[78] Woodhouse, *supra* note 74, at 1820.

[79] *Id.* at 1821.

[80] *See id.* (discussing the differences in scholarly approaches to parental and children's rights and whose rights should prevail in a conflict).

[81] Courtney G. Joslin, *Nurturing Parenthood Through the UPA*, 127 YALE L.J.F. 589, 593–94 (2018).

[82] *Id.* (quoting NeJaime, *supra* note 6, at 2272).

[83] Hill, *supra* note 64, at 370.

[84] Glennon, *supra* note 65, at 550; NeJaime, *supra* note 6, at 2266.

[85] Hill, *supra* note 64, at 372–73.

[86] NeJaime, *supra* note 6, at 2289.

of children.[87] By presuming the husband to be the child's father, the doctrine was thought to prevent children from suffering the status of illegitimacy.[88] While this presumption may appear to be biological in nature, it is far from that. The presumption reinforces fatherhood as a status that is a *function* of family relationships.[89] The presumption would, for example, apply to a husband who was not present at the time of conception.[90]

As it became recognized in the context of modern family formation, the presumption was less about biological lineage and more about presumptive parental recognition for the benefit of the child. This doctrine also began to slowly expand to include same-sex nonbiological spouses.[91] This expansion of the presumption has generally applied to lesbian couples where one spouse has a child and the other is then presumed to be the child's other parent.[92] Despite the adaptation of this presumption and its seemingly flexible application, courts have generally declined to recognize that a child might in fact have more than two parents.[93]

Instead, courts usually come to a rigid conclusion about which individual is the *legal* parent with parental rights to the child and which parties are considered third parties who are legally strangers in that child's life.[94] However, if neither marriage nor biology are the defining factors in determining a parent-child relationship, is the marital presumption of legitimacy still a relevant doctrine? When the marital presumption is applied to same-sex couples, it rests not on biology, but on their intentions and functions as parents.[95] This seems to suggest that the presumption has the capacity to embody a functional definition of parentage, or at the very least, justify the incorporation of a functional definition.[96]

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[87] Hill, *supra* note 64, at 373.

[88] *Id.*

[89] *Id.* at 372.

[90] *See id.* at 372–73 (describing how, at common law, a husband did not need to be physically present at the time of conception in order for the presumption to apply; he could be at sea and still be presumed to be the father).

[91] *See* Nicole M. Riel, *The Other Mother: Protecting Non-Biological Mothers in Same-Sex Marriages*, 31 QUINNIPIAC PROB. L.J. 387, 394 (2018) (providing Connecticut as an example of a state that has expanded the presumption to same-sex couples); *see also* NeJaime, *supra* note 6, at 2291 (describing the expansion of the marital presumption).

[92] *See* NeJaime, *supra* note 8, at 1190 (describing how a lesbian partner may be included within the presumption, not because of biology, but because of her intent to be a parent).

[93] *See* Polikoff, *supra* note 59, at 469 (arguing for more flexibility within the court system for the child's best interests).

[94] *See* Michael H. v. Gerald D., 491 U.S. 110, 130 (1989) (holding that the presumption applied to the mother's husband, rendering the biological father a third party with no parental rights to the child).

[95] NeJaime, *supra* note 8, at 1241–42.

[96] *Id.* at 1242.

D. *Parental Rights and Best Interests of the Child*

It is worth noting that there is an apparent tension between parental rights doctrine and the best interests of the child analysis.[97] The best interests analysis focuses on the needs of the child rather than the competing claims of the hopeful custodians.[98] By focusing on the child rather than the relationship between the parents or a parent's desire to have custody of the child, the conversation around parentage would certainly shift.[99] Child rights advocates are calling for a refocusing of the conversation.[100] Instead of working to secure children for adults who bring claims of custody, they assert the law should start providing adults to children who need them.[101] Courts have called into question whether it is truly in a child's best interest, emotionally and developmentally, to retain biological parentage for "some abstract interest in truthfulness."[102] Instead of considering biology to be the test of parentage, the true test can be found in the social relationship between parent, or parents, and the child.[103]

The theory that every child should have exactly one mother and one father denies the existence of nontraditional families and potentially punishes children in nontraditional families for the mere fact that they do not fit the societal mold. Furthermore, a strict approach to parent-child relationships outlines that the legally recognized mother and father should have *all* rights to the child, leaving any other interested party fully divested of any claim of parental rights, regardless of their relationship with a child.[104] As will be discussed further below, it is necessary to shift to intentional and functional definitions of parentage. When the law fails to recognize these nonbiological and nontraditional parent-child relationships, *children* are the ones who are harmed the most. The harms can range from emotional trauma to abrupt cut-offs to complete removal of financial and emotional support.[105] This is a pressingly important concern in the national context but is equally important on the state level and is indeed being addressed in some states.[106]

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[97] Hill, *supra* note 64, at 363.

[98] *Id.*

[99] *See* Kavanagh, *supra* note 47, at 133–34 (describing the Supreme Court's dismissal of a child's best interest position in *Michael H. v. Gerald D.* and how the analysis would have been different had the Court shifted its perspective to the child's best interest).

[100] Woodhouse, *supra* note 74, at 1754–55.

[101] *Id.* at 1812.

[102] Glennon, *supra* note 65, at 589–90 (quoting Susan H. v. Jack S., 37 Cal. Rptr. 2d 120, 123 (Cal. Ct. App. 1994)).

[103] *Id.* at 589.

[104] Polikoff, *supra* note 59, at 469.

[105] Katharine T. Bartlett, *Rethinking Parenthood as an Exclusive Status: The Need for Legal Alternatives when the Premise of the Nuclear Family Has Failed*, 70 VA. L. REV. 879, 902–03 (1984).

[106] Some states have begun to venture beyond biology to reflect the complexity of children's lives. For example, Louisiana now recognizes dual paternity, allowing the child to retain multiple fathers if it is in the child's best interest. Glennon, *supra* note 65, at 602–03.

E. *Re-examining Parental Constructs*

"Best interests of the child" emerged as a means to mitigate the older view of children as property. Advocates are calling for a realignment of family law and a shift of focus onto children.[107] Such a shift would change the role of parents from one of ownership to stewardship.[108] This approach to parentage tends to value the needs of the next generation most highly and encourages adult partnership and collective responsibility for the well-being of children.[109] Where to place the focus is still hotly contested amongst scholars; some call for a refocusing on the best interests of the child,[110] while others find this approach to be inadequate. For example, Katharine Bartlett, a professor at Duke University specializing in Gender, Sexuality, and Feminist Studies,[111] criticizes the best interests analysis as still being too individualistic in nature.[112] Instead of placing children's interests over parents' rights as the best interests test does, she advocates for a focus on the parent-child relationship.[113] Given the flaws in purely functional, intentional, or best interests approaches, this Note advocates for a similar approach of focusing on the existence of a parent-child relationship regardless of other factors such as inter-parent relationships or the quantity of already existing parent-child relationships. If a child happens to have three nurturing, caring, and beneficial parent-child relationships, it hardly seems practical or even ethical to cut one relationship off simply because of the societal notion that only two parent-child relationships may exist at once.

This is hardly an easy undertaking. Parental rights are rather unique from other rights given the delicate balance between state and individual interests as well as the reality that in order to give all legal parental rights to one individual, usually the other's must first be extinguished.[114] This is not the case in every area of the law but remains so in the area of child custody and parentage. The Family and Medical Leave Act (FMLA), for example, does not restrict the number of parent-child relationships that may exist.[115] Instead, the "specific facts of each situation will determine whether an

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[107] Woodhouse, *supra* note 74, at 1754–55.

[108] *Id.* at 1755.

[109] *Id.*

[110] *Id.*

[111] *Katharine T. Bartlett*, DUKE U., https://scholars.duke.edu/person/Bartlett (last visited July 27, 2019).

[112] Woodhouse, *supra* note 74, at 1821.

[113] Katharine T. Bartlett, *Re-Expressing Parenthood*, 98 YALE L.J. 293, 303–04 (1988).

[114] Bartlett, *supra* note 105, at 883–84.

[115] U.S. DEP'T OF LABOR, WAGE & HOUR DIV., FS 28B, FACT SHEET #28B: FMLA LEAVE FOR BIRTH, PLACEMENT, BONDING, OR TO CARE FOR A CHILD WITH A SERIOUS HEALTH CONDITION ON THE BASIS OF AN "IN LOCO PARENTIS" RELATIONSHIP 2 (2015), https://www.dol.gov/whd/regs/compliance/whdfs28B.pdf ("The FMLA does not restrict the number of parents a child may have.").

employee stands *in loco parentis* to a child."[116] The FMLA illustrates this refocusing; instead of asking what are the parents' intentions or what is the parents' relationship like, it looks to the relationship between the parent and the child to determine whether a parent-child relationship exists.[117]

It is not enough to assume "that an adult's relationship (sexual or otherwise) with a parent creates a caregiving relationship between that person and the child . . . . It again focuses too strongly on parental 'rights' and presumptive statuses."[118] While this Note does not call for such a broad approach that would allow any caretaker to claim full parental rights, reconsidering societal constructs of parentage would allow for potential parents to not be automatically excluded. It would open the door for more *beneficial* and *mutual* parent-child relationships to have legal recognition.[119] While reconfiguring societal constructs and norms may be far more daunting than adopting the intentional and functional provisions of the UPA (2017), these constructs regarding child and parent interests are operating in the background. The sooner the legislature confronts the broader questions of what is a family and how is it defined, the sooner parent-child relationships will be protected.

III. CURRENT APPROACHES TO DEFINING PARENTAGE IN CONNECTICUT

A. *Same Sex Couples' Marital Rights in Connecticut*

Before the deciding of *Obergefell*,[120] the Connecticut legislature, beginning in 2004, addressed same-sex marriage equality by implementing a statutory scheme that implemented civil unions as a means of gaining legal status as a couple.[121] Because same-sex couples only had access to civil unions whereas their heterosexual counterparts had access to the full institution of marriage, the parties in *Kerrigan* filed for summary judgment on constitutional grounds.[122] In *Kerrigan*, the Connecticut Supreme Court

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[116] *Id.* ("The fact that a child has a biological parent in the home, or has both a mother and a father, does not prevent an employee from standing *in loco parentis* to that child.").

[117] *Id.* at 1–2 (defining *in loco parentis* and identifying some factors used by courts to determine whether such a relationship exists between the individual and the child).

[118] Kavanagh, *supra* note 47, at 129–30.

[119] *See id.* at 143 ("The rewriting of the definition of 'family,' and a move away from the exclusive family paradigm has radical potential. It challenges the systems of domination based on class, race and sexuality that serve as the basis for too much of our family law and public policy. Instead, structuring the role of the law and state as one of support rather than family-model enforcement begins to bring care into our political sphere. Re-casting the legal language of family in a flexible, care-based way means that all families can be recognized, protected, and supported in the actual caregiving work that they are doing—a public policy that is good for parents, children, the state, and society as a whole.").

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

[121] Heather J. Lange, *Life with* Kerrigan*: Issues in Advising Same-Sex Couples in Connecticut*, 19 CONN. LAW. 28, 29 (2009).

[122] *Id.*

concluded that "the state has failed to provide sufficient justification for excluding same sex couples from the institution of marriage."[123] *Kerrigan* solidified many rights for same-sex couples in Connecticut, including benefits in taxation, immigration, and probate matters.[124] After the recognition of same-sex marriage, discussions surrounding same-sex parentage began to truly take form.[125] The *Kerrigan* decision, while an exciting and long overdue step forward, did not end all problems for same-sex couples seeking parentage in Connecticut.

B. *Parentage and Defining the Parent-Child Relationship*

As discussed above, the societal construction of the American family generally limits the number of parents a child may have to two. Furthermore, in the legal context, if a child already has two legally recognized parents, one parent's rights would have to end in order for another parent's rights to begin.[126] It seems as though society, and indeed our legislature, remains entrenched in a biological and rigid definition of parentage. But both common knowledge and common law tell us that there is far more to a parent-child relationship than simply genetic ties.

In Connecticut, child custody is often considered by the courts in two contexts: custody disputes between private individuals and proceedings in which the State, via the Department of Children and Families (DCF), becomes involved.[127] Child custody matters are litigated under the Connecticut General Statutes that provide for both termination of parental rights as well as subsequent child adoption proceedings.[128] It is helpful to briefly examine parental rights termination grounds when considering the parent-child relationship because courts are asked to consider the intent of the legislature as well as what it means to have an ongoing parent-child relationship.[129] Courts, when confronted with the question of parentage,

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[123] Kerrigan v. Comm'r of Pub. Health, 957 A.2d 407, 412 (Conn. 2008); *see also* Lange, *supra* note 121, at 29 (quoting the Connecticut Supreme Court in *Kerrigan*).

[124] Lange, *supra* note 121, at 29–31.

[125] When *Kerrigan* was decided, significant barriers still existed for same-sex couples seeking parentage. For example, even after *Kerrigan*, the Department of Children and Families could consider sexual orientation when determining adoption, and many Connecticut statutes still employed gendered language such as "husband" and "wife." *Id.* at 31.

[126] Bartlett, *supra* note 105, at 879.

[127] *See* CONN. JUDICIAL BRANCH LAW LIBRARIES, CHILD CUSTODY ACTIONS IN CONNECTICUT: A GUIDE TO RESOURCES IN THE LAW LIBRARY 6 (2018), https://www.jud.ct.gov/lawlib/Notebooks/Pathfinders/ChildCustody/childcustody.pdf (discussing the "few legal avenues" where a person can obtain legal custody of a minor in Connecticut).

[128] CONN. GEN. STAT. § 45a-717 (Westlaw through enactments of public acts enrolled and approved by Governor on or before July 3, 2019 and effective on or before July 1, 2019).

[129] *See In re* Jessica M., 586 A.2d 597, 603 (Conn. 1991) (discussing the legislature's intentional decision to maintain the language "no ongoing parent-child relationship" as opposed to characterizing that relationship as meaningful or otherwise).

often look to termination statutes for guidance.[130] When considering the parent-child relationship in the context of parental rights termination proceedings, Connecticut courts have recognized that a biological tie, or even parental love, is not necessarily enough to establish a parent-child relationship.[131]

Termination of parental rights is defined as "complete severance by court order of the legal relationship, with all its rights and responsibilities, between the child and [their] parent."[132] Connecticut courts have clearly indicated that deference should be accorded to the parental relationship given its significance and that termination of parental rights is "a most serious and sensitive judicial action."[133] Because of this, there is ample language from both the legislature and the courts regarding what constitutes an ongoing parent-child relationship. Central to this ground for termination is the question of whether the child has any present memories or feelings for the parent.[134] This is relevant in the context of same-sex couples and their parental rights because it suggests that the State has already recognized that there are factors beyond biology or contract that impact whether it is in the child's best interest for a legally recognized parent to maintain their parental rights.

C. *Relevant Case Law for Same-Sex Couples Seeking Parentage in Connecticut*

Connecticut, like other states, tends to privilege biological relationships when considering parental rights, and thus opposite-sex married couples tend to have an advantage that same-sex couples are deprived.[135] Connecticut historically has recognized three paths to parentage: conception, adoption, or consent pursuant to the artificial insemination statutes.[136] While these are the most well recognized paths to parentage, they hardly reflect the full breadth of experience of Connecticut parentage. For instance, the marital presumption is well-founded in Connecticut common law given the state's strong public policy favoring the legitimacy of children.[137] While the presumption has been applied in the context of same-sex parental disputes in Connecticut, it is not necessarily clear how to

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[130] *See* Raftopol v. Ramey, 12 A.3d 783, 788–90, nn.16–18 (Conn. 2011) (referencing Connecticut statutes that deal with routes to parenthood, parent-child relationships, and termination of parental rights).

[131] *In re* Ashley S., 769 A.2d 718, 725 (Conn. App. Ct. 2001).

[132] CONN. GEN. STAT. § 45a-707(8) (Westlaw through enactments of public acts enrolled and approved by Governor on or before July 3, 2019 and effective on or before July 1, 2019).

[133] *In re* Luis C., 554 A.2d 722, 726 (Conn. 1989).

[134] *In re* Valerie D., 613 A.2d 748, 768 (Conn. 1992).

[135] Riel, *supra* note 91, at 387–88.

[136] Raftopol v. Ramey, 12 A.3d 783, 789 (Conn. 2011).

[137] Barse v. Pasternak, No. HHBFA124030541S, 2015 WL 600973, at *8 (Conn. Super. Ct. Jan. 16, 2015).

apply the presumption in Connecticut and what its interaction is with equitable parentage. Furthermore, Connecticut has a quasi-functional definition of parentage in its approach to third-party visitation.

A seminal case in this area is a 1998 Connecticut Supreme Court decision *Doe v. Doe*,[138] concerning custody of a child born via surrogacy. Upon the dissolution of their marriage, the plaintiff wife sought custody of the child she had raised with her then husband, the defendant.[139] While the plaintiff and defendant had raised the child together, no adoption proceedings took place that established the plaintiff, a nonbiological parent, as an adoptive mother.[140] In reviewing her claim, the court declined to apply the equitable parent doctrine to include the plaintiff as a parent of the child.[141] The court went on to outline the various circumstances under which it would recognize individuals as legal parents of a child; however, intended parentage was not included in the court's list.[142] The court explained its role as one that provides appropriate remedies rather than defining parentage.[143] The *Doe* court construed both common and statutory law to include a narrow set of circumstances under which nonbiologically-related individuals could assume a parental role in a child's life, and these circumstances necessarily

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[138] 710 A.2d 1297 (Conn. 1998).

[139] The child at issue in the case was conceived via surrogacy and was biologically related only to the defendant husband. Prior to their marriage, the defendant solicited a surrogate on Craigslist who subsequently became pregnant. After the child's birth, the surrogate mother and her husband did not bring any claim of parentage. No adoption proceedings took place during the marriage despite the plaintiff and defendant raising the child together for fourteen years. The trial court found that the child was not an "issue of the marriage" because she was conceived a few months prior to the defendant and plaintiff's wedding. Furthermore, the lower court noted that the presumption of legitimacy pointed to the *surrogate's* husband being the legal father of the child as the child was born during *their* wedlock rather than during the parties' marriage. The trial court therefore found that it did not have jurisdiction to enter custody orders in regard to the child because the child was neither an issue of the marriage nor adopted by the parties, nor a natural child of one of the parties who had been adopted by the other. *Id.* at 1297–1303.

[140] *Id.* at 1300.

[141] *See id.* at 1317 ("[I]mplicit in our analysis is that we reject the 'equitable parent' doctrine.").

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> Although the statutes have never explicitly defined the contours of the concept of a "child of the marriage," our cases have interpreted that concept in a consistent manner, both before and after the historic 1973 revision. A review of that case law . . . leads us to conclude that the meaning of that concept . . . is limited to a child conceived by both parties, a child adopted by both parties, a child born to the wife and adopted by the husband, a child conceived by the husband and adopted by the wife, and a child born to the wife and conceived through artificial insemination by a donor pursuant to §§ 45a-771 through 45a-779.

Id. at 1314.

[143] *Id.* at 1318.

included proceedings such as adoption or a rebuttal of the presumption of legitimacy.[144]

Doe v. Doe illustrates multiple approaches to parentage that are available in considering statutory reform in Connecticut. The court first considered the biological relationships at play. In *Doe*, the court referenced the genetic ties that existed between the surrogate mother and the child.[145] The court contemplated the presumption of legitimacy, as the lower court had found that it applied to the *surrogate's* husband due to the child being born within that marriage, as opposed to the marriage between the plaintiff and defendant.[146] The court found that the presumption was sufficiently rebutted due to the clear intentions of the defendant and plaintiff in raising the child for fourteen years.[147] Furthermore, the presumption would have proved problematic in this case as it would be the surrogate's husband who could have been presumed to be a parent since the child was technically an issue of the surrogate's marriage, despite her giving the child up at birth.[148] Ultimately, the court ruled that, given her active role in the child's life, the lower court should allow the plaintiff the opportunity to seek custody. The court further alluded that there "was ample evidence in this record that, if credited, would have been sufficient to justify an award of joint custody to both parties."[149]

More than a decade after *Doe*, in 2011, the Connecticut Supreme Court was confronted with the question of whether an intended parent, not biologically related to the child nor an adoptive parent, could "become a legal parent of that child by means of a valid gestational agreement."[150] In *Raftopol v. Ramey*, the court noted that *Doe* was decided prior to the passage of new artificial insemination statutes.[151] The court held that Connecticut statutes did allow "an intended parent who is a party to a *valid* gestational agreement to become a parent without first adopting the children, without respect to that intended parent's genetic relationship to the children."[152] The court provided the following hypothetical to illustrate their decision.

> Suppose an infertile couple who desire to have children but cannot supply the womb, the eggs, or the sperm . . . . These intended parents would need to rely on third party egg and sperm donors to produce embryos that are implanted in a

[144] *See id.* at 1323–24 (holding that the presumption was sufficiently rebutted in this case as the plaintiff and defendant participated in nearly every aspect of the child's life since she was born).

[145] *Id.* at 1300–01.

[146] *Id.* at 1303.

[147] *Id.* at 1323–24.

[148] *Id.* at 1300.

[149] *Id.* at 1324.

[150] Raftopol v. Ramey, 12 A.3d 783, 784–85 (Conn. 2011).

[151] *Id.* at 796.

[152] *Id.* at 797.

> gestational carrier pursuant to a gestational agreement. If § 7-48a confers parental status only on biological intended parents, the intended parents are not the parents of any resulting child, nor are the gestational carrier, any spouse she may have, the gamete donors, or any spouses each may have. Every possible parent to the child would be eliminated as a matter of law, yielding the result of a child who is born parentless, not due to the death of the parents, but simply due to elimination by operation of law.[153]

The *Raftopol* court therefore found that, even without formally adopting a child, an *intended* parent who is party to a valid gestational agreement gains recognition as a parent to that child and may have their name placed on the birth certificate, regardless of any biological connection.[154] Finally, it is worth noting that *Raftopol* did not address intentional parentage in the *absence* of such an agreement.

More recently, in 2015, a New Britain superior court considered the case of a lesbian couple seeking divorce, *Barse v. Pasternak*.[155] The parties' civil union of 2005 was converted into a legally recognized marriage in 2010.[156] In 2008, the defendant became pregnant via artificial insemination. The plaintiff never adopted the child and the parties never entered into a gestational agreement.[157] This removes the case from the previously mentioned *Raftopol* decision because there was no agreement in place that the court could have used to infer intent. In *Barse*, the defendant, seeking sole custody, argued the marital presumption of legitimacy did not apply to children born to married same-sex couples.[158] The court noted that there was no controlling authority on this matter in the state.[159] The *Barse* court therefore looked to *Kerrigan* and found guidance in the court's holding that same-sex and different-sex couples should be afforded the same rights and benefits of marriage.[160]

The defendant claimed that the plaintiff was not the legal parent as she did not comply with one of the three recognized paths to parentage: conception, adoption, or gestational agreement.[161] In regard to the legal significance of parties' failure to comply with artificial insemination statutes, the *Barse* court found that neither the language nor the legislative history of the statutes implied they were intended to be the exclusive means

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[153] *Id.* at 804.
[154] *Id.*
[155] No. HHBFA124030541S, 2015 WL 600973, at *1 (Conn. Super. Ct. Jan. 16, 2015).
[156] *Id.* at *2.
[157] *Id.*
[158] *Id.* at *8.
[159] *Id.*
[160] *Id.* at *9.
[161] *Id.* at *3.

to establish parentage.[162] The plaintiff further argued that the artificial insemination statutes didn't replace the common law marital presumption of legitimacy. The plaintiff pointed to factors such as being named on the birth certificate, the child being an "issue" of the marriage, and being an intended parent. Therefore, she argued, the court should adopt the equitable parent doctrine because to do otherwise would be discriminatory.[163]

The court in *Barse* was able to rely on equitable principles in order to prevent the marital presumption of legitimacy from being rebutted in regard to a nonbiologically-related same-sex spouse claiming parental rights.[164] Equitable estoppel "differs from the equitable parent doctrine in that it does not create a legal status, but rather prohibits the other party from opposing that status."[165] The distinction between equitable estoppel and equitable parentage is important. Equitable parentage focuses on the relationship between the nonbiological parent and the child as opposed to equitable estoppel, which deals mostly with the relationship between the parents as well as the nonbiological parent's reliance on the other parent's representations.[166]

The court noted that the plaintiff could use equitable principles (not equitable parentage) to estop rebuttal of the presumption, but it was up to the plaintiff to meet her burden of proof.[167] In discussing equitable parentage versus equitable estoppel, the court referenced a Michigan case, *Atkinson v. Atkinson*.[168] There, the Michigan Court of Appeals outlined three considerations under the doctrine of equitable parentage: (1) the parent-child relationship is mutually acknowledged; (2) the individual desires the right to be a parent; and (3) the individual is willing to take on the responsibility of child support.[169] The *Atkinson* court subsequently found that the nonbiological parent in that case was legally a parent.[170] Connecticut has yet to apply such a clearly functional definition of parentage.

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[162] *Id.* at *6–7. The court also discussed *Laura WW. v. Peter WW.*, 51 A.D.3d 211, 217–18 (N.Y. App. Div. 2008), in which the husband was considered to be the child's father when the child was conceived via artificial insemination. The court found the husband to be the child's father even though there was no written record of the husband's intent to have a child. For further discussion of *WW. v. WW.*, see *Barse*, 2015 WL 600973, at *6.

[163] *Barse*, 2015 WL 600973, at *3.

[164] Riel, *supra* note 91, at 394.

[165] *Id.* at 402 (citing Doe v. Doe, 710 A.2d 1297, 1334 n.16 (Conn. 1998) (Katz, J., dissenting)).

[166] *See Doe*, 710 A.2d at 1334 n.16 (Katz, J., dissenting) ("I disagree with the defendant's argument that the doctrines of equitable estoppel and equitable parentage are essentially the same. Although both address the issues of representation and reliance, equitable parentage focuses primarily upon the relationship between the nonbiological parent and the child whose custody is at issue, while equitable estoppel focuses exclusively on the nonparent's reliance on the representations of the parent.").

[167] *Barse*, 2015 WL 600973, at *14 (noting that this is a question of fact).

[168] 160 Mich. App. 601 (Mich. Ct. App. 1987).

[169] *Id.* at 608–09.

[170] *Id.* at 610–11.

Connecticut courts have considered a quasi-functional definition of parentage when employing the third-party doctrine. In *Roth v. Weston*,[171] the Connecticut Supreme Court engaged with this doctrine to work out the parameters of third-party visitation and how to balance the best interests of the child with the fundamental rights of a parent.[172] The claim was brought by the child's maternal grandmother and maternal aunt seeking third-party visitation rights.[173] After the passing of the child's mother, the defendant father ceased contact with the plaintiffs, thus causing them to bring an action for court-ordered visitation in the best interests of the child.[174]

Roth first engaged in a discussion of the U.S. Supreme Court decision *Troxel v. Granville*.[175] In *Troxel*, the Court reviewed a Washington Supreme Court decision that held a visitation statute to be facially unconstitutional.[176] The plurality in *Troxel*, while hesitant to make a finding that all such statutes were unconstitutional on their face, held that this particular statute was unconstitutional in its application.[177] It would have allowed two grandparents to assert visitation rights over the parent's right to decide who interacts with their child.[178] The Court held that the statute at issue was overly broad and invaded the fundamental rights of parents to choose how to raise their children.[179] Further, the Court noted that the lower court "failed to accord the determination of Granville, a fit custodial parent, any material weight."[180]

In defining the parameters of when the State may impose visitation upon a parent, the *Roth* court stated that the best interests of a child are secondary to the fundamental privacy interests of parents.[181] The court clarified that in the absence of abuse or neglect, the State's interest in the child's best interest is outweighed by the constitutional protections afforded to legally recognized parents.[182] This assertion, at first glance, appears to be a major obstacle for intentional and functional parents alike. Despite it being in the best interest of the child to have that parent recognized, parental rights of legally recognized parents are given more weight.[183] However, the *Roth*

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[171] 789 A.2d 431 (Conn. 2002).

[172] *See id.* at 436 (discussing the defendant's claim that the statute at issue violates his parental rights to choose how to raise his child).

[173] *Id.* at 433–34.

[174] *Id.* at 434.

[175] 530 U.S. 57 (2000).

[176] *See id.* at 57 ("Washington Rev. Code §26.10.160(3) permits '[a]ny person' to petition for visitation rights 'at any time' and authorizes state superior courts to grant such rights whenever visitation may serve a child's best interest." (alteration in original)).

[177] *Id.* at 57–58.

[178] *Id.* at 60–61.

[179] *Id.* at 67.

[180] *Id.* at 72.

[181] Roth v. Weston, 789 A.2d 431, 443–44 (Conn. 2002).

[182] *Id.* at 444.

[183] *Id.*

court went on to make an important connection. The court recognized that in certain circumstances, such emotional ties are formed between a child and legally unrecognized parent that denial of visitation may cause serious harm rising to the level of abuse or neglect.

We can envision circumstances in which a nonparent and a child have developed such substantial emotional ties that the denial of visitation could cause serious and immediate harm to that child. For instance, when a person has acted in a parental-type capacity for an extended period of time, becoming an integral part of the child's regular routine, that child could suffer serious harm should contact with that person be denied or so limited as to seriously disrupt that relationship. Thus, proof of a close and substantial relationship and proof of real and significant harm should visitation be denied are, in effect, two sides of the same coin. Without having established substantial, emotional ties to the child, a petitioning party could never prove that serious harm would result to the child should visitation be denied. This is as opposed to the situation in which visitation with a third party would be in the best interests of the child or would be very beneficial. The level of harm that would result from denial of visitation in such a situation is not of the magnitude that constitutionally could justify overruling a fit parent's visitation decision. Indeed, the only level of emotional harm that could justify court intervention is one that is akin to the level of harm that would allow the State to assume custody under General Statutes sections 46b-120 and 46b-129—namely, that the child is "neglected, uncared-for or dependent" as those terms have been defined.[184]

While not explicitly applied in the context of same-sex parentage, the *Roth* court exemplifies the value that an intentional or functional parent can have in a child's life. Without the proper protections, however, intentional and functional parents face a high bar to even gain *visitation* with their child, let alone custody or any semblance of full parental rights.[185]

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[184] *Id.* at 445.

[185] While *Roth* calls for a demonstration of harm before denying a third-party visitation, courts in other states have made the distinction between third parties and de facto parents who are in parity with a legally recognized parent. *In re* Parentage of L.B., 122 P.3d 161, 163–64 (Wash. 2005), concerned the custody of a child who was conceived during the relationship of two women: Carvin and Britain. *Id.* at 164. During their relationship, the couple decided to have a child. With the assistance of a family friend, Britain conceived the child via artificial insemination. The couple then held themselves out to be the parents of the child for seven years. Upon the dissolution of their relationship, Britain sought to end all contact between Carvin and the child. *Id.* at 163–64. The Washington Supreme Court allowed for recognition of a de facto parent, *distinct from third-party status*, without requiring a demonstration of harm should the relationship cease. *Id.* at 176. Instead, the court considered whether:

> (1) the natural or legal parent consented to and fostered the parent-like relationship; (2) the petitioner and the child lived together in the same household; (3) the petitioner assumed obligations of parenthood 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 examining the aforementioned cases, Connecticut courts have come up with a series of approaches to assist same-sex parents in being legally recognized as parents. Whether this is by stretching the marital presumption of legitimacy or applying equitable principles, the courts have worked to provide equal footing to same-sex couples. Thus, even though Connecticut courts have given considerable attention in select circumstances in which *married* same-sex couples may seek parental rights, the question remains: What about everyone else? Marriage is on a steady decline in the United States.[186] As discussed above, the definition of family is changing. However, same-sex parents who have children in unmarried relationships continue to lack the same protections as unwed fathers in different-sex relationships.

The Connecticut Supreme Court has recognized the gaps in current legislation noting that the legislature itself recognized that it has "postponed" working on these issues.[187] It is time for the legislature to abandon this "piecemeal"[188] approach and face issues of parentage head on. This Note advocates for a change, albeit significant, in Connecticut legislation that would incorporate provisions of the Uniform Parentage Act (2017) and shift the conversation from a focus on parents and individualistic rights to a specific focus on *children* and *their* relationship with *their* parents, whether biological, contractual, presumed, intended, or functional.

IV. ADOPTION OF THE UNIFORM PARENTAGE ACT (2017) IN CONNECTICUT

Given the flaws with biologically based parental recognition and the potential to focus more on parent-child relationships, the Uniform Parentage Act (2017) (UPA (2017)) provides a model of what functional and intentional definitions of parentage could look like in Connecticut.[189] While not binding, the UPA (2017) offers a means for states to reform parentage statutes in a way that will hopefully promote uniformity across the country.[190] The UPA (2017) provides guidance as to *who* should be considered a parent when there are multiple claimants[191] and expands who can be recognized as a parent with the purpose to protect actual parent-child relationships.[192] The newest version of the UPA came out in 2017 and is significantly different from previous versions in a few important ways.

Id. at 176. Therefore, on remand, if Carvin could establish that she was a de facto parent, both mothers would have fundamental liberty interests at stake.

[186] COTT, *supra* note 9, at 203.

[187] Raftopol v. Ramey, 12 A.3d 783, 801 (Conn. 2011).

[188] *Id.*

[189] Joslin, *supra* note 81, at 592.

[190] *Id.* at 610.

[191] *Id.* at 604.

[192] *Id.* at 601–02.

A. *Restructuring of the Uniform Parentage Act*

The UPA (2017) removed the gendered terminology, such as father, mother, maternity, and paternity, that can be found in previous versions, replacing those words with "parent" or "parentage."[193] This allows for further inclusion of diverse families and also ease of administration throughout the provisions of the Act.[194] For example, the UPA (2017) contains a revised holding out provision that is now more inclusive.[195] The holding out provision allows an individual to be recognized as a parent "based on the individual's conduct of living with the child and treating the child as her own."[196] While the holding out provision has been included in the UPA since its initial promulgation in 1973, this change in gendered terms is highly significant as it now applies beyond just prospective fathers.[197] The UPA (2017) now contains gender neutral provisions concerning voluntary acknowledgement of parentage (rather than paternity) and a de facto parentage.[198]

Beyond these provisions, the UPA (2017) also accounts for other methods of parental recognition such as the marital presumption, assisted reproduction, and surrogacy.[199] Given the current gaps in Connecticut law, the legislature should consider adopting a version of the UPA (2017). The advantages of recent changes are outlined by advocates in the field and cannot be overstated.[200] By adopting the changes inherent in the UPA (2017), Connecticut would be protecting parent-child relationships and correct the State's present failure in recognizing loving and supportive relationships. The UPA (2017) would provide certainty to many Connecticut families who are seeking to have children.[201] Furthermore, it would make the difficulties of family breakdown less traumatic for children because, regardless of parent gender or sexual orientation, the process of parental recognition would be laid clear.

B. *Previous Attempts: The Connecticut Parentage Act*

Connecticut case law reflects a general reluctance amongst the courts to apply an equitable parent doctrine to claims of parentage by same-sex couples. Therefore, the legislature is best situated to address the growing

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[193] Douglas NeJaime, *What Is the Uniform Parentage Act of 2017 and Why Does Connecticut Need It?* 1 (Apr. 16, 2019) (on file with author).

[194] *Id.*

[195] Joslin, *supra* note 81, at 600–01.

[196] *Id.* at 600.

[197] *Id.*

[198] *Id.* at 601.

[199] *Id.* at 602–03.

[200] *See id.* at 611–12 (discussing the implications of adopting the UPA (2017)).

[201] *Id.* at 603 n.83.

need for revised definitions of parentage. In early January 2019, during the drafting of this Note, a bill rose in the Judiciary Committee that had the potential to address many of the barriers discussed. The Connecticut Parentage Act (CPA), as proposed, would have clarified who could be a parent and how to establish parentage.[202] This kind of legislation would be a significant step in the direction of removing same-sex parents from their current, often vulnerable, legal status.[203] As of February 2019, the proposed bill was pulled from committee and is being redrafted possibly for the following legislative session in early 2020.[204]

As definitions of parentage change, new definitions must be realistically operationalized, otherwise parentage will cease to be a helpful legal doctrine and will be reduced to nothing more than theory.[205] While not denying the importance of biological lineage, there is a great need to expand the definition of parent to include social factors that contribute to parent-child relationships.[206] This urgent need to change definitions of family stems from the fact that there are so many other kinds of families that go beyond "traditional" concepts of the nuclear family. Whether it be parents who employ modern technology to conceive and have children, or parents who have no biological relationship to their children at all, these parent-child relationships must be examined within the *context* of the relationship to the *child*.

It is true that Connecticut has begun to expand the presumption of legitimacy to stretch and include same-sex couples seeking parentage; however, its application is unsatisfactory and limited. Marriage rates

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[202] *See* NeJaime, *supra* note 193, at 1 (on file with author).

[203] *See generally id.* (discussing the necessary changes that would occur should Connecticut adopt the UPA (2017)).

[204] E-mail from Douglas NeJaime, Anne Urowsky Professor of Law, Yale Law Sch., to Hannah Kalichman, Student, Univ. of Conn. Sch. of Law (Feb. 26, 2019, 7:27 EST) (on file with author).

[205] *See* Hill, *supra* note 64, at 361 (describing that changing the definition of parenthood too much may diminish its social significance).

[206]

> Consider just a few examples. In Connecticut, a married different-sex couple had a child through surrogacy and raised the child together for fourteen years. When they divorced, the court deemed the mother, who had neither a gestational nor genetic connection to the child, a legal stranger to her child. In Florida, an unmarried same-sex couple used the same donor sperm to have four children, with each woman giving birth to two children. They raised the children together until their relationship ended several years later, at which point the court left each woman with parental rights only to her two biological children. In New Jersey, a male same-sex couple used a donor egg to have a child through a gestational surrogate. The court recognized the gestational surrogate, rather than the biological father's husband (and the child's primary caretaker), as the second parent.

NeJaime, *supra* note 6, at 2265 (citing Doe v. Doe, 710 A.2d 1297 (Conn. 1998); Russell v. Pasik, 178 So. 3d 55, 59–60 (Fla. Dist. Ct. App. 2015); A.G.R. v. D.R.H., No. FD-09-001838-07, 2009 N.J. Super. Unpub. LEXIS 3250 (Super. Ct. Ch. Div. Dec. 23, 2009)).

continue to decline nationally while nonmarital cohabitation becomes progressively less taboo.[207] As children are born out of wedlock without the once detrimental consequences of "illegitimacy," the logic of having marriage dictate much of parental rights seems diminished. Nationally a trend has begun to develop that favors a functional, social definition of parentage. This definition includes the individuals who *function* as a parent in a child's life. The question now is not *whether* to recognize parentage in the absence of a biological relationship, but *how*.

Given Connecticut's active work towards promoting marriage equality, it is time for the state to follow through and fully protect parent-child relationships that are outside the traditional, heteronormative narrative. While the UPA (2017) has not yet been adopted in a great number of states,[208] the next sections describe two legislative proposals that are guided by the UPA (2017): one advocates for the adoption of an intentional parentage framework that would allow parents to establish their status even before the child is born, and the other advocates for a functional, de facto definition of parentage to better address situations where the question of parentage is litigated later in the parent-child relationship.

C. *Intentional Parentage*

In the context of child custody, courts already employ an intent-based analysis in certain situations outside of the context of the UPA (2017). For example, when there are conflicting claims amongst biological relatives, many courts will then consider intentionality as a dispositive factor in determining parental rights.[209] Additionally, adoption is a quintessential example in which a person's intent to be a parent counts in their claim for parentage.[210] Granted, adoption is reinforced by agreement, but it is an example of a "strong social tradition of recogniz[ing] the purely social and psychological dimensions of parenting."[211] When a child is conceived via artificial insemination and a surrogate is used, potentially three mothers may have claims of parentage.[212] In California, for example, the state supreme court gave priority to a commissioning mother's claim of legal parentage,

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[207] COTT, *supra* note 9, at 203.

[208] Thus far, only three states, Washington, California, and Vermont, have adopted versions of the UPA (2017). *Parentage Act*, UNIFORM L. COMMISSION, https://www.uniformlaws.org/committees/community-home?CommunityKey=c4f37d2d-4d20-4be0-8256-22dd73af068f (last visited July 27, 2019).

[209] *See* Hill, *supra* note 64, at 386 (discussing the *Baby M* case and the considerations of intention in the surrogacy context).

[210] *See* Hurwitz, *supra* note 76, at 146 (discussing how intent to place a child up for adoption is "multidimensional and complicated," despite court reliance on contracts as exclusive evidence of intent).

[211] Hill, *supra* note 64, at 354.

[212] *See* Hurwitz, *supra* note 76, at 135–40 (describing priorities of the courts to honor claims of motherhood by genetic mothers, intentional mothers, and gestational mothers).

finding intent to be the "tie breaker."[213] This lends support to the argument that a parent's pre-birth intent to be a parent is a valid and important factor in considering parental rights.[214]

Vermont is one of the first states to adopt a version of the UPA (2017): the Vermont Parentage Act.[215] In *Sinnott v. Peck*, the Vermont Supreme Court was confronted with a scenario that the UPA (2017) was intended to address: a non-biological parent in a same-sex relationship who had not legally adopted the child, was not married to the child's legal parent, and sought legal recognition of their parent-child relationship.[216] The couple in *Sinnott* had mutually decided to proceed with an adoption from Guatemala.[217] Due to extenuating circumstances, the couple agreed that the defendant would formally seek the adoption given her past experience with the process.[218] After the relationship ended, the couple continued to co-parent the child for three years before the defendant stopped allowing the plaintiff to see the child.[219]

The plaintiff brought an action in Vermont Superior Court seeking legal recognition as a parent under the Vermont Parentage Act.[220] The Vermont Supreme Court focused on the legislative intent of adoption statutes and their general aim of promoting child welfare.[221] In discussing relevant Vermont caselaw, the court noted that instead of basing parentage off of the parents' relationship status alone, the courts look to a series of factors including the nature of the inter-parent relationship, a mutual intention to co-parent, participation in decision making, and the fact that no other person is claiming parental status.[222] These factors echo the considerations outlined in the UPA (2017) and allowed the court to recognize the important parent-child

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[213] *Id.* at 135.

[214] *Id. See also* Woodhouse, *supra* note 74, at 1757 (describing the "gestational father" who supports and nurtures the mother during pregnancy, a role that modern definitions often omit when determining parent-child relationships). However, it is also important to note here that critics of intentional parentage caution against a purely intentional approach. They point to incidents of accidental conception where the initial intent to be a parent may be lacking but the functioning of a parent later comes to exist. Hill, *supra* note 64, at 387.

[215] VT. STAT. ANN., tit. 15C, § 101 (Westlaw through 2019 portion of 2019–2020 Legis. Sess.); GLAD, *Putting Children First: More Courts Recognize Today's Families*, GLAD LEGAL ADVOCATES & DEFENDERS (Jan. 26, 2018), https://www.glad.org/post/putting-children-first-courts-recognize-todays-families/.

[216] 180 A.3d 560, 561 (Vt. 2017).

[217] *Id.* at 562.

[218] *Id.* at 562.

[219] *Id.* at 562–63.

[220] *Id.* at 563.

[221] *Id.* at 564.

[222] *Id.* at 566.

relationship that existed in this case based off the individual's *intention* to be that child's parent.[223]

Beyond defining intentional parentage, the UPA (2017) includes a voluntary acknowledgement of parentage provision that promotes the recognition of an individual's intention to be a parent. This allows same-sex couples the opportunity to engage in family planning and hopefully assert their intentions to become parents prior to the birth or adoption of a child. Prior versions of the UPA included only the establishment of paternity through this administrative process.[224] In contrast:

> UPA (2017) makes Article 3 gender neutral and refers to the establishment of parentage through the acknowledgement process for an alleged genetic father, an intended parent, and a presumed parent, allowing Article 3 to apply to both men and women. The gender-neutral language and addition of the term "intended parent" is consistent with one of the goals of this revision process, which is to ensure that UPA (2017) applies equally to same-sex couples.[225]

The UPA (2017) sets forth a procedure through which individuals may voluntarily acknowledge their parentage so long as their acknowledgement is not in conflict with another individual's established parental status.[226] Although significant as a means of providing same-sex couples with a route to parentage, the UPA (2017) continues to reinforce the societal assumption that a child may only have two legally recognized parents.

A purely intent-based test has been criticized as implying that an intent to parent equates to the ability to parent, which is certainly not an accurate assumption.[227] There are numerous examples of parents who had every intention of being a good and loving parent to a child but failed for one reason or another.[228] Some states, such as New Hampshire and Virginia, have imposed measures to safeguard against potential dangers of intentional

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[223] *See* UNIF. PARENTAGE ACT § 201 (UNIF. LAW COMM'N 2017). The majority in *Sinnott* agreed with the dissenting opinion that there was a great need for the legislature to act in this area of Vermont law. The majority's discussion of the role of the court in defining parental doctrine helps to illustrate the tension that often arises between courts interpreting existing statutes and the constraints imposed by the lack of new legislation. It is imperative that legislatures update parental legislation so as to enable courts to fully adjudicate these claims. *Sinnott*, 180 A.3d at 573–74.

[224] Joslin, *supra* note 81, at 603–04.

[225] UNIF. PARENTAGE ACT art. 3 cmt. (UNIF. LAW COMM'N 2017).

[226] *Id.* § 302.

[227] Hurwitz, *supra* note 76, at 143.

[228] *See id.* at 144 ("There are alarming examples underscoring this point. Recently, a surrogate mother brought wrongful death and survival actions against a surrogacy clinic after the clinic's client, a sperm donor and commissioning parent, repeatedly abused and eventually murdered the child born of the surrogacy. In New York, a father was convicted of first-degree manslaughter in the brutal homicide of his six-year-old adopted daughter." (footnotes omitted)).

parentage. These measures include judicially pre-approving surrogacy contracts and imposing home studies of intended parents to "determine suitability for parenthood."[229] Notably, such fitness inquiries are not required of a heterosexual couple who conceive outside of an assisted process.[230] While providing safeguards for children is a strong state interest, lawmakers must also be cautious not to over-burden same-sex intentional parents who lack the protection of a contractual agreement indicating their intent to parent.

By adopting the voluntary acknowledgement of parentage provision under the UPA (2017), Connecticut would be setting same-sex couples up for success. This particular provision would allow for pre-birth *planning*, which would promote thoughtful and intentional family formation that would reduce the chances of litigation during the child's life. It would promote both parental interests in control and custody of their children as well as the child's best interests due to the increased chance of permanency and consistency in the child's life. This intentional approach will not address all custody obstacles facing same-sex couples, and parents more broadly. Particularly, it is important to consider how to approach parentage when the child's parent may not have been an intended parent pre-birth but certainly *functions* as a parent in the child's life.

D. *Functional Parentage*

The UPA (2017) outlines a functional, de facto parentage provision.[231] This embodies what many states already do to recognize functional parent-child relationships. Section 609 of the UPA allows for individuals who stand in parity with legally recognized parents (regardless of biological relation) to be recognized as parents.[232] The de facto parent doctrine differs from the holding out provision in as much as it allows claims of parentage to be brought at different times in the child's life.[233] In order to bring a claim under the holding out provision, one must have held the child out as one's own since the child's birth.[234] However, both de facto parentage and the holding out provision require the existence of an ongoing parent-child relationship but embody different relationships in regard to when they came to be.[235]

When considering a claim of de facto parentage, the court may consider a series of factors as outlined by the UPA (2017). These factors include

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[229] *Id.* at 144–45.

[230] *See id.* at 145 (discussing the applicability of such fitness inquiries only in the contexts of adoption and surrogacy).

[231] Joslin, *supra* note 81, at 601–02.

[232] UNIF. PARENTAGE ACT § 609 (UNIF. LAW COMM'N 2017); Joslin, *supra* note 81, at 602.

[233] Joslin, *supra* note 81, at 602.

[234] *Id.*

[235] *Id.*

whether the alleged parent: (1) "resided with the child as a regular member of the child's household for a significant period"; (2) "engaged in consistent caretaking of the child"; (3) "undertook full and permanent responsibilities of a parent of the child without expectation of financial compensation"; (4) "held out the child as the individual's child"; (5) "established a bonded and dependent relationship with the child which is parental in nature"; (6) had this bonded and dependent relationship with the child that was "fostered or supported" by another parent of the child; and (7) has a relationship with the child, the continuation of which would be in the best interest of the child.[236]

There are examples of de facto parentage that can help to illustrate the implications of enacting such a provision. Delaware, for example, describes that when a legal parent

> "foster[s] the formation and establishment of a parent-like relationship between the child and the de facto parent," parental status can be established by a showing that the de facto parent "exercised parental responsibility for the child" and "acted in a parental role for a length of time sufficient to have established a bonded and dependent relationship with the child that is parental in nature."[237]

While Delaware has not adopted the UPA (2017), its de facto parentage provision seems to echo similar factors that are outlined in the UPA (2017). De facto parentage can address situations beyond the context of same-sex couples including stepparents, grandparents, and cohabitating partners.[238]

New York approached de facto parentage from common law, rather than legislation. Relevant caselaw illustrates the implications of enacting a functional parentage doctrine. By examining these cases both advantages and consequences of enacting functional parentage become clear. *Brooke S.B. v. Elizabeth A.C.C.*[239] altered the definition of parent in New York.[240] During this case, LGBT advocates at the Sanctuary for Families argued for the adoption of an intent-based test that would act as an "equality measure"

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[236] UNIF. PARENTAGE ACT § 609 (UNIF. LAW COMM'N 2017).

[237] Douglas NeJaime, *The Story of* Brooke S.B. v. Elizabeth A.C.C.*: Parental Recognition in the Age of LGBT Equality*, *in* REPRODUCTION RIGHTS AND JUSTICE STORIES (Melissa Murray et al. eds., forthcoming 2019) (preliminary draft at 13) (on file with author) [hereinafter NeJaime, *The Story*] (quoting DEL. CODE tit. 13, § 8–201(c) (2017)).

[238] *Id.*

[239] 61 N.E.3d 488 (N.Y. 2016).

[240] From 1991 until 2016, New York operated on a narrow definition of parent. This was based on the holding in *Alison D. v. Virginia M.*, 572 N.E.2d 27 (N.Y. 1991), in which the court held that a partner in an unmarried relationship was not considered the child's "parent" for purposes of seeking custody or visitation when that partner was not married to a biological parent or biologically related to the child themselves. It was not until 2016, with the case of *Brooke S.B. v. Elizabeth A.A.C.*, that this definition changed. NeJaime, *The Story*, *supra* note 237, at 11–12.

for same-sex parents.[241] However, in their brief, Sanctuary for Families also cautioned against a more functional approach, describing it as "overbroad" and requiring too much of a "case-by-case analysis [that] would empower former abusive partners with no biological or adoptive connection to a child to claim parental rights as a way to continue threatening their victims."[242] In the case of *Brooke S.B.*, the court applied an intent-based test without fully foreclosing the possibility of applying a functional definition.[243]

Despite the words of caution by Sanctuary for Families, many LGBTQ advocates call for a functional definition of parentage. Gay and Lesbian Advocates and Defenders (GLAD) declares: "We believe (as with ducks) that if it looks like a family, if it holds itself out as a family, and if it functions like a family, then it is a family."[244] By allowing individuals who already function as a parent in a child's life to bring forth a claim of parentage, the Connecticut legislature would be furthering the goal of protecting children and keeping families intact. However, the legislature must be cautious when drafting functional definitions of parentage. The concerns expressed by Sanctuary for Families should not be ignored.

Professor Nancy Polikoff at the American University Washington College of Law, echoes concerns regarding purely functional parentage definitions and provides the example of an Oregon statute[245] that attempts to provide a functional avenue to parentage.[246] The statute allows anyone who "has established emotional ties creating a child-parent relationship with a child" to petition for custody or visitation.[247] While this particular statute may allow nonbiological lesbian mothers a path to parentage, Polikoff cautions that this particular statute is over-broad in its application.[248] While advocating for a functional approach to parentage, Polikoff criticizes the Oregon Supreme Court for its interpretation of this particular statute as not focusing enough on the *intent* to parent and instead on the parental function alone.[249] Polikoff points out the advantages of including both function and

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[241] NeJaime, *The Story*, *supra* note 237, at 17.

[242] *Id.* at 17–18.

[243] *Id.* at 19.

[244] Katharine K. Baker, *Quacking Like a Duck? Functional Parenthood Doctrine and Same-Sex Parents*, 92 CHI.-KENT L. REV. 135, 135 (2017).

[245] Polikoff, *supra* note 59, at 487 ("If the court determines that custody, guardianship, right of visitation, or other generally recognized right of a parent or person in loco parentis, is appropriate in the case, the court shall grant such custody, guardianship, right of visitation or other right to the person having the child-parent relationship, if to do so is in the best interests of the child.") (citing OR. REV. STAT. § 109.119(1) (1989)).

[246] Polikoff, *supra* note 59, at 486–87.

[247] *Id.* at 486 (citation omitted).

[248] *Id.* at 488 (citing OR. REV. STAT. § 109.119 (1989)).

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> There is little mention of this amendment in the committee minutes and no mention of its effect on the custodial rights of natural parents. Although we have no occasion

intention in a definition of parentage, thus promoting a balance between parental rights and the best interests of the child.[250]

Concerns that purely functional definitions of parentage are generally messy and hard to apply is a sentiment that warrants consideration.[251] A solely functional definition leaves too much discretion to the judiciary to decide what a functioning parent looks like.[252] For example, another New York case following *Brooke S.B.* illustrates that a de facto parentage definition does have serious implications for parents. The case, *K.G. v. C.H.*,[253] concerned a lesbian couple who considered adoption of a child during their relationship. The relationship came to an end, and Circe Hamilton (C.H.), the defendant, continued with the adoption process without Kelly Gunn (K.G.), adopting a child approximately a year after the break up.[254] Thus, *K.G.* is distinguishable from *Brooke* in that the parties' intentions in the case are far less clear than in *Brooke*, where they were beyond dispute.[255]

After the adoption, Gunn remained in both the child's and Hamilton's lives, however, the trial court found that the mutual intention to adopt and raise a child ended when the romantic relationship ceased.[256] Upon Hamilton's decision to move, with the child, to Europe for work, Gunn brought an action claiming she was a parent of the child with standing to

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> to decide its effect on the issue presented by this case, we note that the language used is at least in some respects wholly consistent with this court's previous decisions in child custody disputes between natural parents and others. In such disputes, it would never be proper to give custody to someone *other* than a natural parent unless custody in the other person best served the child's interests. The ambiguity of the sentence lies in whether it would allow a court to deny custody to a natural parent if custody in another would best serve the child's interests. The answer turns on whether the language "is appropriate in the case" calls for consideration of the custodial rights of natural parents.

Polikoff, *supra* note 59, at 488.

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> Courts or legislatures looking for guidance in developing a new definition of parenthood would best serve the interests of children by focusing on two criteria: the legally unrelated adult's performance of parenting functions and the child's view of that adult as a parent. Courts would also protect the interests of legal parents in parental autonomy by focusing on the actions and intent of those parents in creating additional parental relationships.

Id. at 490–91.

[251] *See* Baker, *supra* note 244, at 135–36 (discussing potential problems with a purely functional approach to parentage).

[252] *Id.* at 135.

[253] 163 A.D.3d 67 (N.Y. App. Div. 2018).

[254] Ian Parker, *What Makes a Parent?*, NEW YORKER (May 22, 2017), https://www.newyorker.com/magazine/2017/05/22/what-makes-a-parent.

[255] *K.G.*, 163 A.D.3d at 78.

[256] *Id.* at 76–77.

seek custody and visitation.[257] The court noted that "equitable estoppel concerns whether a child has a bonded and de facto parental relationship with a nonbiological, nonadoptive adult. The focus is and must be on the child. It is for this reason that the child's point of view is crucial whenever equitable estoppel is raised."[258] While there was no preadoption plan indicating an intent to parent,[259] the court found the record inadequate to rule on the applicability of equitable estoppel grounds and thus remanded the case for further proceedings.[260]

The UPA (2017) addresses many of the aforementioned concerns by weaving considerations of intent into a functional definition of parentage. Furthermore, few advocates and courts, if any, have called for a purely functional approach to parentage.[261] For example, in 1995, the Wisconsin Supreme Court adopted the de facto parentage doctrine, under which the first factor to be considered was intent.[262]

> Despite being known as the quintessential functional parent test, the first element listed by Wisconsin goes to intent, not function. The biological or adoptive parent must "consent[] to . . . the establishment of a parent-like relationship." The Court explained that consent was important in order to "protect[] parental autonomy and the constitutional rights" of the biological or adoptive parent.[263]

The two doctrines are not in conflict. After all, it would be difficult for one to function as a parent without also intending to be a parent, even if that intention was not present at the outset of the child's life.

E. *The Advantages of Adopting Both Functional and Intentional Definitions of Parentage in Connecticut*

Defining relationships based on their function or an individual's intent is not necessarily a novel concept. Function has become a determinative factor, or at least a persuasive one, in a wide range of contexts. Even in popular children's literature the concept of functional parentage has made an appearance.[264] Beyond books, functional relationships have more

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[257] *Id.*

[258] *Id.* at 82–83 (citation omitted).

[259] *Id.* at 73.

[260] *Id.* at 84.

[261] Baker, *supra* note 244, at 136.

[262] *Id.* at 145.

[263] *Id.* (alterations in original) (footnote omitted).

[264] *Horton Hears a Who* represents what it means to truly intend to be a parent. Horton takes it upon himself to sit on Mayzie Bird's egg until it hatches. When Mayzie returns claiming that hatchling to be hers and not Horton's, it is true that Mayzie's claim is that which is traditionally recognized by the courts as she is the egg's biological parent. However, something interesting happens. The egg hatches and shares

generally been recognized in the tenancy context, as illustrated by *Braschi v. Stahl Associates*.[265] The court in *Braschi* found that cohabitating same-sex partners were to be included under the statute's definition of family so as to protect the surviving partner from eviction in the event of the named tenant dying.[266] The court came to this conclusion by objectively examining the *totality* of the couple's relationship as evidenced by the dedication, caring, and self-sacrifice within the relationship.[267] The court considered the exclusivity and longevity of the relationship, the parties' emotional and financial commitment to one another, their reliance on one another, and how they held themselves out to society.[268] These considerations go beyond the factual inquiry of whether the couple was married and fully encompasses the *function* and *intention* of their relationship. By considering the relationship in its entirety, the court was able to see that the couple fit within what the legislature intended when referring to family in this context.[269]

Leading up to the Supreme Court's finding in *Obergefell v. Hodges*, courts expressed frustration with the limitations of the biological construction of family. In *Perry v. Brown*,[270] Judge Posner of the Seventh Circuit dismissed the "argument that the purpose of marriage is 'to encourage child-rearing environments where parents care for their biological children in tandem.'"[271] The court further questioned the need for biological ties when "family is about raising children and not just about producing them."[272] In that particular case, the court "elevated functional parenting over procreative sex, gender, and biology."[273] Further, prior to the recognition of same-sex marriage, many opponents of its recognition would point to the *intention* of same-sex couples to have children as a reason for why same-sex marriage was unnecessary.[274] In resisting and disregarding these arguments, courts were reluctant to make distinctions between different-sex procreation and assisted reproduction, implicitly signaling

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features with Horton the elephant, implying that Horton's intentions and functions as a parent had an impact on his claim of parentage. For a full discussion of this analogy, see Woodhouse, *supra* note 74, at 1749–51.

[265] 543 N.E.2d 49 (N.Y. 1989).

[266] *Id.* at 54.

[267] *Id.* at 55.

[268] *Id.*

[269] *See id.* at 211 ("The intended protection against sudden eviction should not rest on fictitious legal distinctions or genetic history, but instead should find its foundation in the reality of family life.").

[270] 671 F.3d 1052 (9th Cir. 2012), *vacated*, Hollingsworth v. Perry, 570 U.S. 693 (2013).

[271] *See* NeJaime, *supra* note 92, at 1238 (quoting Baskin v. Bogan, 766 F.3d 648, 663 (7th Cir. 2014)).

[272] *Id.* (quoting *Baskin*, 766 F.3d at 663).

[273] *Id.*

[274] *Id.* at 1239.

acceptance of intentional parenting as a component of marital and functional parenting.[275]

A small number of courts have adopted a more explicitly functional approach to parentage. They have done this by applying the doctrine of *in loco parentis*.[276] This doctrine has its roots in common law and creates parental rights and responsibilities in individuals who voluntarily provide support for or take over custodial duties of a child.[277] When these courts are making their determinations, intent is a crucial consideration.[278] Historically, this doctrine often arises in the context of stepparents.[279] Beyond the general consideration of whether there is a parent-child relationship, courts operating under this doctrine will grant custody, visitation, or other parental rights if it is in the best interests of the child.[280] Intentional parentage is distinct from functional parentage in so much as it addresses planned family formation.[281] However, intent is an important consideration in functional parentage.[282] It therefore makes sense for Connecticut to adopt both the voluntary acknowledgment of parentage (intentional) and de facto (functional) parentage provisions of the UPA (2017) so as to fully reflect the complexity of parent-child relationships.[283] This is further supported by the reality that intentional parentage is a narrower prospective doctrine, and de facto parentage a broader, more retrospective doctrine.[284] Both provisions of the UPA (2017) were designed to protect parent-child relationships, and Connecticut's adoption of these provisions would be significant in moving towards protecting children and their parent-child relationships, particularly in the context of same-sex couples seeking parental recognition.[285]

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[275] *Id.*

[276] Glennon, *supra* note 65, at 590.

[277] Polikoff, *supra* note 59, at 502.

[278] *Id.*

[279] *Id.* at 507–08.

[280] For an example of a statutory scheme that outlines this, see *id.* at 487 (quoting OR. REV. STAT. § 109.119(1) (1989)).

[281] NeJaime, *The Story*, *supra* note 237, at 2.

[282] *See id.* at 13–14 (describing how intentional and functional approaches to parenthood often "bleed together" given that individuals who plan to have a child together usually raise that child together).

[283] *See* Sinnott v. Peck, 180 A.3d 560, 562 (Vt. 2017) (discussing the plaintiff's intention to be a parent at the time of the adoption as well as the role the plaintiff played, as a parent, in the child's life).

[284] NeJaime, *The Story*, *supra* note 237, at 14.

[285] *See id.* at 20 ("The intentional and functional concepts embedded in the UPA (2017) grew out of efforts to protect families formed by same sex couples, whose equality interests are understood as bound up in the protection of nonbiological parent-child relationships. As the UPA (2017) demonstrates, both intentional and functional standards are necessary to provide comprehensive protection for nonbiological parents." (footnote omitted)).

CONCLUSION

The law should recognize the insiders in a child's life even when they do not fit the nuclear or exclusive model of parent, *especially* when the child considers them to be an insider.[286] While national and local origins of family law are entrenched in heteronormative and exclusive models, this does not have to dictate the future of family law in Connecticut. Non-traditional families have driven a significant amount of parental doctrine development thus far and they will continue to do so.[287] Given the strides Connecticut has made to advance state laws to be more inclusive, it is time for the legislature to enact the voluntary acknowledgement of parentage and de facto provisions of the UPA (2017).

As previously discussed in this Note, there are concerns that allowing nonbiologically-related individuals to bring forth claims of parentage will lead to an excess of claims and ultimately be harmful to children. Studies have shown that there is no difference in quality of attachment between adoptive and natural mothers and their children.[288] Furthermore, redefining parentage in functional and intentional terms would not erase the biological or contractual parent-child relationships that have long enjoyed recognition. By adopting the UPA (2017), there would be clear guidelines as to who may bring a claim and what is required in order to be considered a parent. Parental relationships would be analyzed under a functional and intentional approach. While not harming biological relationships, this new approach to parentage will validate many parent-child relationships that have been denied that respect and security for years.[289]

Critiques and general reluctance to adopt the UPA (2017) reflect the complex nature of parental rights. Unlike other rights enjoyed throughout this country, parental rights are granted to one individual usually at the cost of another.[290] This is a framework that must be broken. Instead of forcing

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[286] Kavanagh, *supra* note 47, at 130.

[287] NeJaime, *supra* note 92, at 1188.

[288] Hill, *supra* note 64, at 402.

[289] Claims that unknown or undeserving third parties would be able to bring forward harmful claims of parentage that would disrupt current family structures and put children at risk are also not supported. Often, parents that would be included under intentional and functional definitions of parentage already have ongoing parent-child relationships that the legal parents are aware of and often facilitate. *See* Kavanagh, *supra* note 47, at 129 ("Further, parents would not have to worry, under this principle, that an 'outside' caregiver would challenge them for custody or decision-making power, since these privileges would be based truly on an adult's relationship with the child."). Instead of a free for all of multiple individuals gaining parental rights, caregivers would simply not be automatically written out. *Id.* at 130. This new perspective would not limit legal relationships. Instead, previously recognized relationships such as biology or adoption would be further social bases for establishing parental relationships. *Id.* These newly recognized relationships encourage creative caregiving relationships. While the shift away from traditional structures of presumptive family recognition may make some uncomfortable, this discomfort is not enough to justify denying nontraditional parents' recognition and protection under Connecticut law.

[290] Parker, *supra* note 254.

families to exist in an unrealistic and contrived paradigm of a two-parent household, it is time for a reconsideration of how family and parent are defined. Beyond simply who can be a parent, it is important to challenge and question why only two individuals may have a bite at the apple. If a child has more than two parent-child relationships, but only two may be fully legally recognized, the best interests of the child seem to be in peril. Family law, particularly around parentage and custody, must adjust its focus and become re-centered on the individual to which all parties involved claim to have great care and attachment: the child.

The potential for Connecticut to move away from the heteronormative and restrictive definitions of parentage would greatly benefit same-sex couples, their children, and non-normative families in Connecticut. It would place children and their interests back in the foreground and highlight the importance of examining the parent-child relationship as a whole. If Connecticut adopts the voluntary acknowledgement of parentage and de facto parentage provisions of the UPA (2017), courts would be given the option to consider intentional and functional factors of parentage.[291] The UPA (2017) was not intended to eliminate genetic or biological ties; instead it makes clear that while important, biological ties do not presumptively trump other indications of a parent-child relationship.[292] These new avenues to parentage would protect children and same-sex parents whose relationships are at risk under present law. While there are consequences to including these definitions, the protection this would offer to parent-child relationships and same-sex parents can no longer be ignored. The legislature needs to recognize the vulnerability of same-sex parents in Connecticut and act accordingly by adopting both the voluntary acknowledgment of parentage and de facto parentage provisions of the UPA (2017). Not only will this protect same-sex individuals' parental rights but it will protect important parent-child relationships so that a child is not punished for the composition of their family.

[291] *See* Joslin, *supra* note 81, at 605 (noting that this would not eliminate the importance of other parent-child relationships).

[292] *Id.*