

## RIDING THE STORM OUT AFTER THE STONEWALL RIOTS: SUBSEQUENT WAVES OF LGBT RIGHTS IN FAMILY FORMATION AND REPRODUCTION

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### INTRODUCTION

In 1969, the Stonewall Riots took place at the Stonewall Inn in Greenwich Village, New York City. Many consider this the most important event leading to the gay rights and modern LGBT movement in the United States. Prior to the Stonewall Riots, LGBT people primarily had children within heterosexual relationships. LGBT individuals always formed families whereby children were parented with gay parents, but how common it was and what the families looked like prior to the Stonewall Riots was difficult to determine because of how secretive and hidden they had to be about it.<sup>1</sup> Accounts of lesbian women reveal that they usually had children as the result of heterosexual marriages, sex work, or relationships with women who had children from these same means.<sup>2</sup> Unfortunately, prior to 1970, LGBT people who had children in

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1. The timeline is vague in places mainly because there has been no consensus on when a lot of the “firsts” happened. The culture of silence and secrecy around LGBT family formation combined with the sealed records and lack of written opinions of the formal court decisions means that historians often have to rely on organizations and people claiming to be the “first.” See Marie Coyle, *The First Case, 40 Years On*, NAT’L L.J. (Aug. 23, 2010), <https://www.law.com/nationallawjournal/almID/1202470861873/?slreturn=20190719095243> [<https://perma.cc/E2CS-AALP>]; see also CARLOS BALL, *THE RIGHT TO BE PARENTS: LGBT FAMILIES AND THE TRANSFORMATION OF PARENTHOOD* 8, 22–23 (2012).

2. Nancy Polikoff, *Raising Children: Lesbian and Gay Parents Face the Public and the Courts*, in *CREATING CHANGE: SEXUALITY, PUBLIC POLICY, AND CIVIL RIGHTS* 322 (John D. Emilio et al. eds., 2000) (This chapter provides a long history of second-parent adoption, including all of the ambiguities over when it really started happening and where.).

heterosexual marriages often would lose custody when they left those marriages for a gay relationship.

After the Stonewall Riots, LGBT families started to ride out the storm, the result being that LGBT rights in family formation and reproduction roughly can be divided into four waves consisting of: (1) the initial subtle wave of the 1970s to 1980s, (2) a growing wave in the 1990s, (3) a massive wave of growth and change from 2000 through 2019, and (4) the yet to come 2020 wave and beyond.

This Article will explore how LGBT family formation has evolved since the Stonewall Riots. The primary means for LGBT families to build their families, other than traditional intercourse between a man and a woman, were and continue to be through adoption and Assisted Reproductive Technologies (“ART”). In the world of assisted reproduction, typically a lesbian couple or a single woman use donor sperm, either known or unknown, coupled with artificial insemination. Gay men traditionally utilize a traditional or true surrogate (who is genetically related to the child) along with artificial insemination using the sperm of an intended father. As medical technologies in the field of reproduction developed, especially the development of in vitro fertilization (“IVF”) and embryo transfers, more men turned towards assisted reproduction via the use of a gestational carrier along with donor egg, either known or unknown, combined with the sperm of one intended father. This gestational carrier process is less risky than using a true surrogate who is the genetic mother. Additionally, more lesbian couples started to utilize reciprocal IVF whereby one mom contributes her egg, becoming the genetic mom, while the other gestates the embryo formed from that egg along with donor sperm. Overtime, medical advances have opened wider doors for LGBT family formation options.

#### I. RIDING THE STORM OUT: SUBTLE WAVE ONE— THE 1970S TO 1980S

During the 1970s to 1980s, a small and subtle wave of movement began in the area of LGBT family formation consisting of the following: (1) more LGBT families started to adopt children out of foster care, (2) adoption was used as a means of getting around the prohibition on gay marriage in an effort to create secure and legal family relationships, and (3) while joint adoptions were rare, more

LGBT individuals started to be able to effectuate single-parent adoptions, with some second-parent adoptions subsequently, although rarely, taking place. The legal landscape for LGBT families was unchartered, messy, and varied widely from state to state.

During this time period, the infertile, white, married couple was the “face” of adoption, but the growing number of kids in foster care that coincided with the gay rights movement helped to spur some more general acceptance of children being adopted by LGBT people. Note that most of the early LGBT adoption cases involved children in foster care, often with disabilities. During this time period, joint adoptions by gay or lesbian couples were rare and full of tenuous legal issues. Most LGBT parents used second-parent adoption to gain legal standing of their partner’s child, who was usually born initially within a heterosexual relationship or was the product of artificial insemination of a single female by a known sperm donor.

In states that allowed single-parent adoptions, second-parent adoption was also the preferred method for the other partner to gain legal standing with the child. Historically, a second-parent adoption permitted a second, unmarried parent to adopt a child, while a stepparent adoption is the adoption of a child by a married spouse. Because gay marriage was not universally recognized, traditional stepparent adoptions (involving married couples) were not an available legal mechanism to securing parentage by both same-sex parents. This area was a legal mess during this time, which made adoptions even harder. Some states allowed both second-parent and joint adoptions, some states had unclear statutes and no case law, some states barred adoption by unmarried couples, and some states allowed it; but certain judges moved to block it when applied to same-sex couples, and so on.<sup>3</sup> Because the landscape was such a mess, it was much easier for LGBT individuals to adopt and then facilitate a second-parent adoption if they could. Note that during this time frame, there was less of a prohibition on LGBT *individuals* adopting as single parents than there was for couples seeking to adopt.

Moreover, in the 1980s, gay men played important roles in lesbian pregnancies and often served as the sperm donors. Resources

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3. ADOPTION BY LESBIANS AND GAY MEN: A NEW DIMENSION IN FAMILY DIVERSITY 22 (David M. Brodzinsky & Adam Pertman eds., 2012).

were published outlining how to secure an anonymous donation by using a friend or family member to arrange and transport donations.<sup>4</sup> Classes were also offered that would teach lesbian women how to find their cervix using a speculum and practice self-insemination using syringes of water.<sup>5</sup> Lesbians engaged in self-insemination with everyday objects including eye droppers and turkey basters. A popular book at the time, *Our Bodies, Ourselves*, published a chapter in its 1976 second edition on lesbians that included a brief section on self-insemination using a turkey baster or an eye dropper, describing that method as “the simplest, least invasive, and most widely used of the technologies.”<sup>6</sup> Lesbian women found allies in gay men who often were the source of the sperm they used to impregnate themselves.

#### A. *Relevant Events During the 1970s to 1980s*

In 1971, the Minnesota Supreme Court ruled in *Baker v. Nelson* that state law limited marriage to opposite-sex couples and that this limitation did not violate the United States Constitution.<sup>7</sup> In 1972, the United States Supreme Court dismissed the appeal in that case “for want of substantial federal question.”<sup>8</sup> Because the case came to the United States Supreme Court through mandatory appellate review (not certiorari), the dismissal constituted a decision on the merits and established *Baker* as precedent at that time for the nonrecognition of same-sex marriages.<sup>9</sup> Note that *Baker* was not explicitly overruled until 2015 in *Obergefell v. Hodges*,<sup>10</sup> although Minnesota legalized same-sex marriage in 2013.<sup>11</sup>

In 1977, lawyers Donna Hitchens and Roberta Achtenberg in San Francisco formed the Lesbian Rights Project (“LRP”) which subsequently evolved into the National Center for Lesbian Rights

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4. Cheri Pies & Francine Hornstein, *Baby M and the Gay Family*, OUTLOOK NAT'L LESBIAN & GAY Q., Spring 1988, at 79, 81, 84.

5. LAURA MAMO, QUEERING REPRODUCTION: ACHIEVING PREGNANCY IN THE AGE OF TECHNOSCIENCE 23 (2007).

6. CHRISTIAN PAPILLOU & KORNELIA HAHN, CULTURAL TECHNOLOGIES WITHIN A TECHNOLOGICAL CULTURE: ON THE HYBRID CONSTRUCTION OF SOCIAL LIFE 87 (2008).

7. 191 N.W.2d 185, 186 (Minn. 1971).

8. *Baker v. Nelson*, 409 U.S. 810, 810 (1972).

9. *Id.*

10. 135 S. Ct. 2584 (2015).

11. 2013 Minn. Laws ch. 74 sec. 2 (codified as amended at MINN. STAT. § 517.01).

(“NCLR”).<sup>12</sup> In 1978, the Washington Supreme Court issued the country’s first custody ruling in favor of a lesbian couple.<sup>13</sup> Also in 1978, New York issued a regulation stating that “adoption applicants shall not be rejected solely on the basis of homosexuality,” becoming the first state to enact such a regulation.<sup>14</sup> After that, in 1979, a gay couple in California became the first in the country known to have jointly adopted a child.<sup>15</sup>

In 1982, the Sperm Bank of California began operations and was the first known in the country to serve lesbian couples and single women. Then, in 1985, for the first time in a published decision, a court allowed a nonbiological mother to adopt the biological child of her female partner (second-parent adoption).<sup>16</sup> The ruling in Alaska also allowed the biological father to maintain a relationship with the child.<sup>17</sup> However, in 1986, LGBT families suffered a setback when the United States Supreme Court ruled in *Bowers v. Hardwick*, that the United States Constitution allowed states to pass and enforce sodomy laws targeting LGBTQ individuals.<sup>18</sup>

That same year, NCLR represented Annie Affleck and Rebecca Smith, a lesbian couple, in their adoption case. This case became much more widely known than the 1979 case as an early example of a same-sex couple being able to jointly adopt in the United States. Then, in 1987, NCLR won one of the first second-parent adoption cases in the country and began promoting second-parent adoption as a legal strategy for protecting same-sex parent families.<sup>19</sup> Again making waves in 1988, NCLR won one of the nation’s

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12. *Mission & History*, NAT’L CTR. FOR LESBIAN RIGHTS, <http://www.nclrights.org/about-us/mission-history/> [https://perma.cc/VX8L-5C3K].

13. *See* Schuster v. Schuster, 585 P.2d 130 (Wash. 1978).

14. BALL, *supra* note 1, at 150.

15. The film *Any Day Now* was based on this couple. Andrea Frazier, *Who Was the First Gay Couple To Adopt a Child? It’s Been a Long Journey*, ROMPER (June 25, 2016), <https://www.romper.com/p/who-was-the-first-gay-couple-to-adopt-a-child-its-been-a-long-journey-13187/> [https://perma.cc/A2X3-HUFC].

16. S.N.E. v. R.L.B., 699 P.2d 875, 879 (Alaska 1985).

17. *Id.* at 877, 879.

18. 478 U.S. 186, 196 (1986).

19. *NCLR Timeline: A Glance at History*, NAT’L CTR. FOR LESBIAN RIGHTS, <http://www.nclrights.org/about-us/mission-history/timeline-of-victories> [https://perma.cc/3BAD-9CJQ]. Note that NCLR does not refer to a case name or details. The first written opinion on second-parent adoption was not published until 1991. NANCY D. POLIKOFF, *BEYOND (STRAIGHT AND GAY) MARRIAGE: VALUING ALL FAMILIES UNDER THE LAW* 53 (2008).

first court custody battles, heard in San Bernardino County Superior Court, for a parent, Artie Wallace, with AIDS.<sup>20</sup> In 1989, a group of youth with LGBT parents met at a conference, organized by a precursor to the Family Equality Council (Gay and Lesbian Parents Coalition International), and began organizing among themselves, which eventually led to the creation of Children of Lesbians and Gays Everywhere (“COLAGE”) (originally called Just for Us) in 1990 as an independent national organization.<sup>21</sup>

## II. RIDING THE STORM OUT: GROWING WAVE TWO—THE 1990S

In the 1990s, ART procedures became much more advanced and popular. Since sperm was the first gamete, or human reproductive product, able to be easily cryopreserved at the time, sperm banks began to develop whereby men were paid to contribute their sperm to be frozen and utilized in the world of reproduction. While fertility options and clinics became more advanced for straight couples, the development of sperm cryobanks also gave means for single and lesbian women to more readily utilize anonymous, as opposed to known, sperm donors.

Once sperm banks willing to serve lesbian couples opened in the late 1990s, it was slightly easier to procure a donation, but insemination mostly still occurred in the home.<sup>22</sup> By the late 1990s, a number of sperm banks would require “fertility workups” with the purchase of sperm, where women would be sent to doctors and inseminated with sperm artificially.<sup>23</sup> Big Fertility and higher technology options developed unevenly along with gay rights; fertility advancements often were not available to the LGBT community, thus lesbians still employed at-home insemination with known donors long after these practices were replaced with higher technology options for straight people.<sup>24</sup> It was not until a decade later that the fertility industry began to be more receptive to assisting

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20. DAVID E. NEWTON, *SAME-SEX MARRIAGE: A REFERENCE HANDBOOK* 115 (2010); *NCLR Timeline: A Glance at History*, *supra* note 19.

21. Justin M. Edgar, *Descriptive Summary: Guide to COLAGE (Children of Lesbians and Gays Everywhere)*, in *ONLINE ARCHIVE OF CAL.* 2–3 (2008), <http://www.oac.cdlib.org/findaid/ark:/13030/kt209nd8js> [<https://perma.cc/4Q5S-9TD6>].

22. MAMO, *supra* note 5, at 23–24.

23. *Id.*

24. Claire L. Wendland et al., *Donor Insemination: A Comparison of Lesbian Couples, Heterosexual Couples and Single Women*, 65 *FERTILITY & STERILITY* 764, 767 (1996).

gay men in their desire to achieve fatherhood through ART via use of egg donors and gestational surrogates.<sup>25</sup>

Significant events in the 1990s included NCLR representing a lesbian mother in 1996 in a precedent-setting case holding that Florida courts must not base custody decisions on stereotypes about lesbian and gay parents.<sup>26</sup> In that case, the First District Court of Appeals in Florida held that the trial court erred by purporting to take judicial notice that “a homosexual environment is not a traditional home environment, and can adversely affect a child” because there were no sources before the court to establish this “fact.”<sup>27</sup> The court explained that in considering “moral fitness,” the court “should focus on whether the parent’s behavior has a direct impact on the welfare of the child,” and a connection between the actions of the parent and the harm must be supported by “proof of the likelihood of prospective harm” because the “mere possibility of negative impact” is insufficient.<sup>28</sup>

However, 1996 also had its setbacks for the LGBT community and its goal of forming legally secure families. Effective September 21, 1996, the Defense of Marriage Act (“DOMA”) was a federal law passed by Congress and signed into law by President Bill Clinton that defined marriage for federal purposes as the union of one man and one woman.<sup>29</sup> One of the several negative effects of DOMA was that it allowed states to refuse to recognize same-sex marriages granted under the laws of other states as well as to deny federal benefits to same-sex married couples. That same year, in another setback, the United States Supreme Court struck down Colorado’s Amendment 2, which denied gays and lesbians protections against discrimination, calling them “special rights.”<sup>30</sup> According to Justice Anthony Kennedy, “We find nothing special in the protections Amendment 2 withholds. These protections . . . constitute ordinary civic life in a free society.”<sup>31</sup> This basically was viewed as a step

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25. Dorothy A. Greenfeld, *Gay Male Couples and Assisted Reproduction: Should We Assist?*, 88 FERTILITY & STERILITY 10, 18–20 (2007).

26. *Maradie v. Maradie*, 680 So. 2d 538, 540–43 (Fla. Dist. Ct. App. 1996) (per curiam).

27. *Id.* at 540.

28. *Id.* at 540, 542–43.

29. Defense of Marriage Act (DOMA), 28 U.S.C. § 1738C (1996).

30. *Romer v. Evans*, 517 U.S. 620, 631 (1996).

31. *Id.*

backwards as LGBT families were denied any recognition of having equal rights.

Fortunately, a year later, in 1997, New Jersey became the first state to allow same-sex couples to jointly adopt. This case arose from the settlement of a class action lawsuit whose lead plaintiffs, a gay couple from New Jersey, sought to adopt a child from the state's foster care program.<sup>32</sup>

### III. RIDING THE STORM OUT: MASSIVE WAVE THREE— YEARS 2000 TO 2019

In the third wave after the Stonewall Riots, the formation of LGBT families started to garner more publicity, which was not necessarily a good thing initially and created some backlash. This backlash included having child welfare organizations starting to study the “fitness” of LGBT families.<sup>33</sup> During this time, child welfare organizations conducted extensive studies on whether LGBT individuals could be fit parents.<sup>34</sup> Fortunately, the findings were positive and influential in helping push agencies to allow these adoptions.

#### A. *Favorable Case Law Decisions and Presidential Support*

From 2000 to 2019, the massive wave of LGBT activity in family formation overall was positive and favorable, despite some minor setbacks. Among other positives, in 2003, the United States Supreme Court ruled in *Lawrence v. Texas* that sodomy laws in the United States were unconstitutional.<sup>35</sup> This decision expressly overruled the 1986 decision of *Bowers v. Hardwick* issued just seventeen years earlier.<sup>36</sup> In *Lawrence*, Justice Anthony Kennedy

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32. Jeffrey Gold, *NJ Gays Win Right To Adopt*, ASSOCIATED PRESS (Dec. 18, 1997), <https://apnews.com/ff475e9be5f869b60320c1d0c60566cb> [<https://perma.cc/7MHP-98AQ>].

33. See ADOPTION BY LESBIANS AND GAY MEN, *supra* note 3.

34. David J. Eggebeen, *What Can We Learn From Studies of Children Raised by Gay or Lesbian Parents?*, 41 SOC. SCI. RES. 775, 775–78 (2012); Paige Averett et al., *An Evaluation of Gay/Lesbian and Heterosexual Adoption*, 12 ADOPTION Q. 129 (2009).

35. 539 U.S. 558, 578–79 (2003).

36. *Id.* at 578; see generally *Bowers v. Hardwick*, 478 U.S. 186 (1986).

wrote, “Liberty presumes an autonomy of self that includes freedom of thought, belief, expression, and certain intimate conduct.”<sup>37</sup>

Then, in 2008, the California Supreme Court ruled that same-sex couples had a constitutional right to marry, and California became the second state in the United States to legalize same-sex marriages later that year.<sup>38</sup> Shortly thereafter, on October 11, 2009, at the Human Rights Campaign Dinner, President Obama made the first explicit mention of same-sex parents in a presidential proclamation and stated:

You will see a time in which we as a nation finally recognize relationships between two men or two women as just as real and admirable as relationships between a man and a woman. You will see a nation that’s valuing and cherishing these families as we build a more perfect union—a union in which gay Americans are an important part.<sup>39</sup>

In 2010, Florida became the last state to overturn an explicit statutory ban on adoption by gays and lesbians.<sup>40</sup> The case that overturned it was *In re Matter of Adoption of X.X.G. and N.R.G.*<sup>41</sup> Subsequently, in a huge ruling in 2013, the United States Supreme Court in *United States v. Windsor*<sup>42</sup> held that the federal government cannot define the terms “marriage” and “spouse” in a way that excludes married same-sex couples from the benefits and protections that married opposite-sex couples receive.<sup>43</sup> The Court thus struck down section 3 of DOMA<sup>44</sup> under the Due Process Clause of the Fifth Amendment.<sup>45</sup>

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37. 539 U.S. at 562.

38. *In re Marriage Cases*, 183 P.3d 384, 399–400 (Cal. 2008); Adam Liptak, *California Supreme Court Overturns Gay Marriage Ban*, N.Y. TIMES (May 16, 2008), <https://www.nytimes.com/2008/05/16/us/16marriage.html> [<https://perma.cc/49NC-TG78>].

39. Barack Obama, President of the United States, Address at Human Rights Campaign Dinner in Washington, D.C. (Oct. 11, 2009), <https://obamawhitehouse.archives.gov/realitycheck/the-press-office/remarks-president-human-rights-campaign-dinner> [<https://perma.cc/N4AT-NPLW>].

40. The prior statute found at section 63.042(3) of the Florida Code stated, “No person eligible to adopt . . . may adopt if that person is a homosexual.” FLA. STAT. § 63.042(3) (2009).

41. 45 So. 3d 79 (Fla. Dist. Ct. App. 2010).

42. 570 U.S. 744 (2013).

43. *Id.* at 751–53.

44. 28 U.S.C. § 1738C (1996).

45. *Windsor*, 570 U.S. at 775.

Following that decision, in 2014, the United States Supreme Court denied a writ of certiorari in *Bostic v. Schaefer*,<sup>46</sup> which essentially upheld a Fourth Circuit Court of Appeals decision stating that Virginia laws (including Virginia's state constitution) prohibiting same-sex couples from marrying was unconstitutional.<sup>47</sup> On the heels of that case in 2015, the United States Supreme Court ruled in *Obergefell v. Hodges*<sup>48</sup> that the fundamental right to marry is guaranteed to same-sex couples by the Due Process Clause and Equal Protection Clause of the Fourteenth Amendment.<sup>49</sup> At that point, marriage equality became federal law, and couples in states that had effectively banned same-sex adoption, by not acknowledging same-sex marriage and/or adoption by unmarried couples, then arguably could adopt.

After the 2016 United States Supreme Court ruling in *Obergefell*, a federal judge in Mississippi struck down Mississippi law banning same-sex adoptions, representing a final death to one of the last bars to LGBT adoptions.<sup>50</sup> Later, in another big contribution to the large favorable wave towards recognition of LGBT family formation law in 2016, the United States Supreme Court ruled in *V.L. v. E.L.*<sup>51</sup> that the Full Faith and Credit Clause of the United States Constitution required the Alabama state courts to recognize a Georgia state court's adoption order.<sup>52</sup> In a per curiam opinion, the United States Supreme Court held that a state may only refuse to afford full faith and credit to another state's judgment if that court "did not have subject-matter jurisdiction or jurisdiction over the relevant parties."<sup>53</sup> In that case, Georgia law gave the state courts jurisdiction over adoption cases, and there was no established Georgia rule to the contrary, so the United States Supreme Court held that the judgment should be afforded full faith and credit by other state courts.<sup>54</sup> This was a pivotal ruling sending a

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46. 760 F.3d 352 (4th Cir. 2014), *cert. denied*, 574 U.S. 875 (2014).

47. *Id.* at 367–68, 384.

48. 135 S. Ct. 2584 (2015).

49. *Id.* at 2604–05.

50. *Campaign v. Miss. Dep't of Hum. Servs.*, 175 F. Supp. 3d 691 (S.D. Miss. 2016) (order granting preliminary injunction).

51. 136 S. Ct. 1017 (2016) (per curiam).

52. *Id.* at 1019.

53. *Id.* at 1020 (quoting *Underwriters Nat'l Assurance Co. v. N.C. Life & Accident & Health Ins. Guar. Ass'n*, 455 U.S. 691, 705 (1982)).

54. *Id.* at 1020–21.

signal to all LGBT families to not just rely on birth certificates but to obtain court orders via adoption or a parentage judgment in order to best secure legal parentage.<sup>55</sup>

Not too long after that, in 2017, the United States Supreme Court ruled in *Pavan v. Smith*<sup>56</sup> that marriage equality means that both parents in a same-sex marriage have the right to be on their children's birth certificates and to be legally recognized as parents.<sup>57</sup>

### B. *Favorable State Statutory Changes and the 2017 Uniform Parentage Act*

As of 2019, at least thirty-three states and the District of Columbia enacted sperm donor and artificial insemination statutes.<sup>58</sup> The significance of such enactments is that they provide for lesbian couples to use donor sperm without any concerns that the sperm donor will attempt to claim parentage. Moreover, such statutes further aid in securing presumed parentage where a child is born from donor sperm during the course of the marriage. Of those statutes, only thirteen are gender neutral at present in terms of securing the parentage for married lesbian couples.<sup>59</sup> However, the trend has

55. See *Legal Recognition of LGBT Families*, NAT'L CTR. FOR LESBIAN RIGHTS (2019), [http://www.nclrights.org/wp-content/uploads/2013/07/Legal\\_Recognition\\_of\\_LGBT\\_Families.pdf](http://www.nclrights.org/wp-content/uploads/2013/07/Legal_Recognition_of_LGBT_Families.pdf) [<https://perma.cc/794K-HEV3>].

56. 137 S. Ct. 2075 (2017) (per curiam).

57. *Id.* at 2078–79.

58. ALA. CODE § 26-17-702; ALASKA STAT. § 25.20.045; ARK. CODE ANN. § 28-9-209; CAL. FAM. CODE § 7613; COLO. REV. STAT. § 19-4-106; CONN. GEN. STAT. §§ 45a-771, -774; DEL. CODE ANN. tit. 13, § 8-102; D.C. CODE § 16-401; FLA. STAT. § 742.11; IDAHO CODE §§ 39-5401 to -5408; 750 ILL. COMP. STAT. 46/103; IND. CODE § 16-41-14-3; KAN. STAT. ANN. §§ 23-2301 to -2303; LA. CIV. CODE ANN. art. 188; MD. CODE ANN. EST. & TRUSTS § 1-206; MASS. GEN. LAWS ch. 46, § 4B; MICH. COMP. LAWS ANN. § 333.2824(6); MINN. STAT. §§ 257.56; MO. REV. STAT. § 210.824; MONT. CODE ANN. § 40-6-106; NEV. REV. STAT. §§ 126.510, .590; N.J. STAT. ANN. § 9:17-44; N.M. STAT. ANN. § 40-11A-102; N.Y. DOM. REL. LAW § 73; N.C. GEN. STAT. § 49A-1; OHIO REV. CODE ANN. §§ 3111.88–.96; OKLA. STAT. tit. 10, § 551; OR. REV. STAT. §§ 109.239, .243, .247, .355; 677.360, .365, .370; TENN. CODE ANN. § 68-3-306; TEX. FAM. CODE ANN. §§ 160-102, -201; UTAH CODE ANN. §§ 78B-15-102, -201; VT. STAT. ANN. tit. 15C, §§ 102, 201; VA. CODE ANN. §§ 20-156, -158 (Cum. Supp. 2019); WASH. CODE §§ 26.26A.010, .26A.610; WIS. STAT. §§ 767.47(9), 891.40.

59. ALA. CODE § 26-17-702; ALASKA STAT. § 25.20.045; ARK. CODE ANN. § 28-9-209(a)(2); CAL. FAM. CODE § 7613; DEL. CODE ANN. tit. 13, §§ 8-102, -129; D.C. CODE § 16-401; 750 ILL. COMP. STAT. 46/103, /204; MD. CODE ANN. EST. & TRUSTS § 1-206(a); NEV. REV. STAT. §§ 126.510, .590; OR. REV. STAT. §§ 109.239, .243, .247, 677.355, .360, .365, .370; VT. STAT. ANN. tit. 15C, §§ 102, 201, 401; VA. CODE ANN. § 20-158 (Cum. Supp. 2019); WASH. REV. CODE §§ 26.26A.010, .26A.115, .26A.610.

been that, since the recognition of same-sex marriage, more states fortunately are starting to have gender neutral legislation or case law whereby the spouse of the gestational parent or the spouse of the genetic, intended parent is the presumed, other legal parent.<sup>60</sup>

In 2018, three states—California, Vermont, and Washington—adopted the 2017 Uniform Parentage Act (“UPA”) (which updated the former 2002 version).<sup>61</sup> In 2019, it was introduced (but not enacted) by four more states: Connecticut, Massachusetts, Pennsylvania, and Rhode Island.<sup>62</sup> The 2017 UPA made five major changes to the 2002 version, most of which were highly favorable to LGBT families.<sup>63</sup> First, the 2017 UPA seeks to ensure the equal treatment of children born to same-sex couples and, therefore, uses gender-

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60. See, e.g., ALASKA STAT. § 25.20.045 (“A child, born to a married woman by means of artificial insemination performed by a licensed physician and consented to in writing by both spouses, is considered for all purposes the natural and legitimate child of both spouses.”); CAL. FAM. CODE § 7540(a) (“Except as provided in Section 7541, the child of spouses who cohabited at the time of conception and birth is conclusively presumed to be a child of the marriage.”); VA. CODE ANN. § 20-158 (“The spouse of the gestational mother of a child is the child’s other parent, notwithstanding any declaration of invalidity or annulment of the marriage obtained after the performance of assisted conception, unless such spouse commences an action in which the mother and child are parties within two years after such spouse discovers or, in the exercise of due diligence, reasonably should have discovered the child’s birth and in which it is determined that such spouse did not consent to the performance of assisted conception.”). In June 2017, the Supreme Court held that a state may not, consistent with its prior ruling in *Obergefell*, deny recognition of naming both parents of a married same-sex couple on their children’s birth certificates. *Pavan v. Smith*, 137 S. Ct. 2075, 2078–79 (2017) (per curiam); see also, *McLaughlin v. Jones*, 382 P.3d 118, 122 (Ariz. Ct. App. 2016) (Because of the United States Supreme Court decision of *Obergefell v. Hodges*, 135 S. Ct. 2071 (2015), Arizona courts must construe Arizona’s paternity statute in a gender-neutral way.); *Kelly S. v. Farah M.*, 28 N.Y.S.3d 714, 721–23 (N.Y. App. Div. 2016) (In applying California law, the New York court held that a woman who entered into a registered domestic partnership in California prior to the birth of a child to her partner and who agreed to be named as a parent on the birth certificate was the child’s presumed parent under CAL. FAM. CODE §§ 297.5(d), 7611(a), (c)(1), and was the presumed parent of another child born after the couple married in California. As a matter of comity, and consistent with the recognition of same-sex marriages under N.Y. DOM. REL. LAW § 10-a and the case law, she was the children’s parent under New York law and could seek visitation. Failure to comply with CAL. FAM. CODE § 7613 when performing the artificial insemination did not preclude recognition of parentage under California law, nor was the public policy of N.Y. DOM. REL. LAW § 73 implicated; the birth mother’s paternity petitions against the sperm donor were properly dismissed.); *Roe v. Patton*, No. 2:15-cv-00253-DB, 2015 U.S. Dist. LEXIS 96207, at \*6 (D. Utah July 22, 2015) (concluding that the plaintiffs were “highly likely to succeed in their claim” that extending the “benefits of the assisted reproduction statutes [which are based on UPA (2002)] to male spouses in opposite-sex couples but not for female spouses in same-sex couples” was unconstitutional).

61. UNIF. PARENTAGE ACT (UNIF. LAW COMM’N 2017).

62. *Id.*

63. *Id.*

neutral terms. These changes include broadening the presumption, acknowledgment, genetic testing, and assisted reproduction articles of the UPA to make them gender neutral. Second, the 2017 UPA includes a provision for the establishment of a de facto parent as a legal parent of a child. Third, it includes a provision that precludes establishment of a parent-child relationship by the perpetrator of a sexual assault that resulted in the conception of the child. Fourth, the 2017 UPA updates the surrogacy provisions of the 2002 UPA to reflect developments in that area of the law. Overall, states were particularly slow to enact article 8 of the 2002 UPA (“Article 8”) which contained surrogacy provisions. Eleven states adopted versions of the 2002 UPA: Alabama, Delaware, Illinois, Maine, New Mexico, North Dakota, Oklahoma, Texas, Utah, Washington, and Wyoming.<sup>64</sup> Of these eleven states, only two—Texas and Utah—enacted the surrogacy provisions based on Article 8.<sup>65</sup> At least five of the eleven states that enacted the 2002 UPA enacted surrogacy provisions that were not premised at all on the 2002 UPA.<sup>66</sup> These states include: Delaware (permitting surrogacy and enacted in 2013); Illinois (permitting surrogacy and enacted in 2004); Maine (permitting surrogacy and enacted in 2015); North Dakota (banning surrogacy and enacted in 2005); and Washington (banning compensated surrogacy and enacted in 1989 but since replaced by the 2017 UPA). Accordingly, the 2017 UPA updates the surrogacy provisions to make them more consistent with current surrogacy practice, especially the use of surrogates or gestational carriers by same-sex male couples seeking to build a family. Finally, the 2017 UPA includes a new article—Article 9—that addresses the right of children born through ART to access medical and identifying information regarding any gamete providers which again is essential to LGBT family formation, given that lesbian couples must use sperm donors and gay male couples must use donor eggs unless they have a traditional surrogate who is contributing her own egg.<sup>67</sup>

Other states not adopting the UPA still have pushed for statutory changes favoring LGBT family formation. By way of example, up until July 1, 2019, Virginia’s ART statute, entitled “Status on

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64. *Id.*

65. *Id.*

66. *Id.*

67. *Id.*

Children of Assisted Conception” and found at Virginia Code sections 20-156, -158 to -163, and -165, still referred to Intended Parents as a married man and woman and also did not permit parents to use donor embryos without doing an adoption proceeding.<sup>68</sup> Married dads Jay Timmons and Rick Olson worked with this Author and Delegate Rip Sullivan in 2018 and 2019 to change that.

Dubbed “Jacob’s Law,” Jay and Rick had great incentive to create change. While already raising two daughters who were born through surrogacy, the couple was approached by some friends who asked them if they would consider accepting an embryo to bring to life, and they said yes.<sup>69</sup> After this Author assisted them with the embryo donation agreement, a gestational carrier was located in Wisconsin where the state supreme court had acknowledged that contracts in surrogacy were binding and where other same-sex couples had not experienced many issues.<sup>70</sup> Their effort to expand their family soon turned into a nightmare when Jim Troupis, who at the time served as a judge in Wisconsin, labeled the couple as “human traffick[ers]” and stripped them of their parental rights.<sup>71</sup> After spending hundreds of thousands of dollars in legal fees to gain custody of their son Jacob, Troupis eventually resigned from his position, and his replacement quickly gave Timmons and Olson parental rights over Jacob. However, years later, Timmons and Olson were still fighting the attorney fees, including those of the guardian ad litem appointed for Jacob who also fought their parentage.<sup>72</sup>

When Delegate Sullivan learned about the couple’s case, he wanted to change Virginia’s laws to both make surrogacy just as accessible to same-sex spouses as it is to straight married couples

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68. Act of Mar. 14, 2019, ch. 375, 2019 Va. Acts (H.B. 1979).

69. Tamar Lewin, *These Two Dads Almost Lost Their Son in a Bizarre Surrogacy Case*, BUZZFEED NEWS (Aug. 27, 2016), <https://www.buzzfeednews.com/article/tamarlewin/wisconsin-surrogacy-case> [<https://perma.cc/5JAP-3NCU>]; Jenna Portnoy, *How George Allen’s Chief of Staff Inspired Legislation To Make It Easier for Gay Couples To Raise Children*, WASH. POST (Feb. 26, 2019), [https://www.washingtonpost.com/local/virginia-politics/how-george-allens-chief-of-staff-inspired-legislation-to-make-it-easier-for-gay-couples-to-raise-children/2019/02/26/c55ce368-393b-11e9-aaae-69364b2ed137\\_story.html](https://www.washingtonpost.com/local/virginia-politics/how-george-allens-chief-of-staff-inspired-legislation-to-make-it-easier-for-gay-couples-to-raise-children/2019/02/26/c55ce368-393b-11e9-aaae-69364b2ed137_story.html) [<https://perma.cc/9L6K-E5XB>]; James Wellemeyer, *Gay Couple’s Surrogacy Fight Inspires ‘Jacob’s Law’*, WASH. BLADE (Mar. 6, 2019), <https://www.washingtonblade.com/2019/03/06/gay-couples-surrogacy-fight-inspires-jacobs-law/> [<https://perma.cc/WG3T-KVMY>].

70. Lewin, *supra* note 69.

71. *Id.*

72. *Id.*

and to provide for the use of donor embryos without intended parents having to undergo an adoption.<sup>73</sup> This Author drafted those changes to Virginia Code sections 20-156, -158 to -163, and -165, originally enacted in 1994 and long overdue to be updated, which among other things, made that chapter of the code gender neutral, provided for the use of donor embryo, and affirmed that a single intended parent could utilize a surrogate or gestational carrier. Working as a team, House Bill 1979, now known as “Jacob’s Law,” was promoted as bipartisan “right-to-life” legislation (given the million or so embryos currently held in cryopreserved storage), and the bill passed with an effective date of July 1, 2019.<sup>74</sup>

### C. *Growth of Multi-parent Recognition*

Another development over the 2000 to 2019 span of twenty years, and supported by the 2017 UPA, is the increasingly continued recognition of more than two parents. Multi-parent recognition tends to be directed mainly at the LGBT community. Whether by “default,” such as when a heterosexual married couple have children together, divorce, and one spouse remarries a same-sex partner, or by “design,” such as when a lesbian couple and a gay couple all decide to have and raise a child together, multi-parenting is increasingly gaining greater and greater recognition.<sup>75</sup>

### D. *Continued Use of Equal Protection Arguments*

This third massive wave of change from 2000 to 2019 has required the continuance of creative lawyering and especially the use

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73. Portnoy, *supra* note 69; Wellemeyer, *supra* note 69.

74. See VA. CODE ANN. § 20-156, -158 to -163, -165 (Cum. Supp. 2019); Portnoy, *supra* note 69.

75. See generally Colleen Quinn, *Mom, Mommy & Daddy and Daddy, Dad & Mommy: Assisted Reproductive Technologies & the Evolving Legal Recognition of Tri-Parenting*, 31 J. AM. ACAD. MATRIM. LAW. 175 (2018) (providing a comprehensive overview of the status of legally recognized multiple-parent families both by statute and published case law, in the United States and elsewhere, the current state of the legality to place more than two parents on birth certificates, some of the unpublished case law for multiple parents, and the arguments favoring and disfavoring “multiple” parent recognition); see also UNIF. PARENTAGE ACT § 609 (UNIF. LAW COMM’N 2017) (garnering acceptance by three states in 2018, California, Vermont and Washington, and providing for the recognition of more than two parents including for the establishment of a de facto parent as a legal parent of a child).

of Equal Protection Clause arguments in order to protect the equality of LGBT families in family formation. A case commonly relied upon in the LGBT ART legal community is that of *In re Roberto d.B.*, a Court of Appeals of Maryland decision issued in 2007.<sup>76</sup> In *Roberto*, the intended father's sperm was used to fertilize a donor's eggs.<sup>77</sup> The resulting embryos were then transferred into a gestational carrier.<sup>78</sup> The father filed a petition, which was joined by the gestational carrier, asking the court to declare the father to be the sole legal parent and order the issuance of an accurate birth certificate, which would remove the gestational carrier's name and list only the father as the parent of the child.<sup>79</sup> Initially, the circuit court rejected the petition and refused to remove the carrier's name.<sup>80</sup> However, the Court of Appeals granted certiorari and ruled in favor of the father (petitioner) finding that as a matter of first impression, the name of a genetically unrelated gestational host of a fetus, with whom the petitioner contracted to carry in vitro fertilized embryos to term, is not required to be listed as the mother on the birth certificate.<sup>81</sup> The petitioner's main contention in that case was that "the [current] parentage statutes . . . do not 'afford equal protection of the law to men and women similarly situated.'"<sup>82</sup> Additionally, the petitioner argued that

a woman has no equal opportunity to deny maternity based on genetic connection . . . in a paternity action, if no genetic link between a man and a child is established, the man would not be found to be the parent, and the matter would end, but a woman, or a gestational carrier . . . will be forced by the State to be the "legal" mother . . . despite her lack of genetic connection.<sup>83</sup>

The Court of Appeals held, "Because Maryland's [Equal Rights Amendment] forbids the granting of more rights to one sex than to the other, in order to avoid an equal rights challenge, the paternity statutes in Maryland must be construed to apply equally to both males and females."<sup>84</sup> The court stated that the language of the

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76. 923 A.2d 115 (Md. 2007).

77. *Id.* at 117.

78. *Id.*

79. *Id.* at 118–19.

80. *Id.* at 119.

81. *Id.* at 117.

82. *Id.* at 119.

83. *Id.* at 121.

84. *Id.* at 124.

statute itself does not need to be redrafted, but is instead a matter of interpretation. All that is required is an application of the statute that extends the same rights to women and maternity as it does to men and paternity.<sup>85</sup>

Prior to the changes to Virginia's surrogacy statute, effective July 1, 2019,<sup>86</sup> (the changes now clearly provide that a single, intended father or married, intended fathers can use a donor egg or embryo along with a gestational carrier and be declared the legal parents), the *Roberto* case was used regularly by this Author in order for a single, intended father using a gestational carrier to not have to do an adoption but, instead, to use Virginia's paternity statutes to obtain a parentage order.<sup>87</sup> The case also has been used in Virginia and elsewhere for same-sex male couples using a gestational carrier in order for the biological father to be declared as a legal father under paternity statutes and for his spouse or partner to be declared the other legal parent via a stepparent or second-parent adoption.

Another use of the constitutional Equal Protection Clause is when a lesbian couple engages in reciprocal IVF—that is where one mother carries or gestates the child while the other mother contributes the egg that forms the embryo. In such cases, one mother is the gestational mother and the other mother is the biological mother. Contending that courts should treat orders or acknowledgements of maternity in a similar manner to those of paternity so as to avoid an equal protection violation, this Author obtained the first court order in Virginia recognizing both genetic mom, and gestational mom, equally as parents.<sup>88</sup> The arguments included reliance on an older 1979 decision, *Caban v. Mohammed*,

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85. *Id.* at 125.

86. VA. CODE ANN. § 20-156 to -165 (Repl. Vol. 2017 & Cum. Supp. 2019).

87. *Id.* § 20-49.1 to -49.10 (Repl. Vol. 2017); Deborah Elkins, *Single Father Wins With 'Equal Protection' Claim*, VA. LAW. WKLY. (Feb. 19, 2016), <https://valawyersweekly.com/2016/02/19/single-father-wins-with-equal-protection-claim/> [<https://perma.cc/WC5V-ELXU>].

88. Deborah Elkins, *Kids' Birth Certificates Must List Both Moms*, VA. LAW. WKLY. (Dec. 22, 2014), <https://valawyersweekly.com/2014/12/22/birth-certificate-must-list-both-moms-court-says/> [<https://perma.cc/PUC3-AGQ2>]; Laura Kebede, *Lesbian Couple Wins Right To Have Names on Children's Birth Certificates*, RICH. TIMES-DISPATCH (Jan. 25, 2015), [https://www.richmond.com/news/virginia/lesbian-couple-wins-right-to-have-names-on-children-s/article\\_de7cfa92-72aa-5d19-835b-f87853b07a1a.html](https://www.richmond.com/news/virginia/lesbian-couple-wins-right-to-have-names-on-children-s/article_de7cfa92-72aa-5d19-835b-f87853b07a1a.html) [<https://perma.cc/7YZM-T9GM>].

in which the United States Supreme Court recognized the importance of protecting the parental rights of both mothers and fathers.<sup>89</sup> In *Caban*, the United States Supreme Court held as unconstitutional, under the Equal Protection Clause, a state law allowing an unwed mother but not an unwed father to block an adoption.<sup>90</sup>

E. *Greater Acceptance and Reception by the Fertility Industry of LGBT Family Formation*

The leading organization of medical professionals in the fertility industry in the United States is the American Society of Reproductive Medicine (“ASRM”).<sup>91</sup> In 2013, ASRM issued an Ethics Committee Opinion on *Access to Fertility Treatment by Gays, Lesbians, and Unmarried Persons: A Committee Opinion*, and in 2015 issued *Access to Fertility Services by Transgender Persons: An Ethics Committee Opinion*.<sup>92</sup> In 2016, this Author spoke at the ASRM annual convention on *Challenges & Controversies in Treating LGBTQ Patients—The Legal Perspective*. This speech discussed the need for many fertility clinics to massively revise their intake forms, consent forms, and other documents to be more LGBT-friendly. That same year at ASRM, ASRM’s LGBT Special Interest Group met for the first time.<sup>93</sup>

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89. 441 U.S. 380, 391–94 (1979).

90. *Id.* at 394. Other states and lower federal courts have recognized that Equal Protection issues arise when parentage statutes distinguish between the rights of parents based on sex in other contexts. See *J.R. v. Utah*, 261 F. Supp. 2d 1268, 1294 (D. Utah 2003) (finding that the construction of a Utah statute which would allow the genetic father but not the genetic mother to be listed on a birth certificate of a child born to a gestational surrogate violates the Fourteenth Amendment’s Equal Protection guarantee); *Soos v. Superior Court*, 897 P.2d 1356, 1360 (Ariz. Ct. App. 1994) (holding unconstitutional a state statute which allowed biological father to prove paternity but did not allow biological mother to prove maternity of a child born to a gestational surrogate); *In re Roberto d.B.*, 923 A.2d 115, 124 (Md. 2007) (holding that “the paternity statutes in Maryland must be construed to apply equally to both males and females”); *In re Adoption of Sebastian*, 879 N.Y.S.2d 677, 688–89 (N.Y. Sur. Ct. 2009) (holding that applying the New York parentage statutes so as to allow the genetic mother but not the father to establish parentage is constitutionally impermissible).

91. See *Vision of ASRM*, AM. SOC’Y FOR REPROD. MED., <https://www.reproductivefacts.org/about-asrm/vision-of-asrm/> [https://perma.cc/K4QB-984V].

92. *LGBTQIA Reproductive Rights*, AM. SOC’Y FOR REPROD. MED., <https://www.asrm.org/topics/topics-index/lgbtqia-reproductive-rights/> [https://perma.cc/K3PA-KHTR].

93. See generally *LGBTQ Special Interest Group (LGBTQSIG)*, AM. SOC’Y FOR REPROD. MED., <https://www.asrm.org/membership/asrm-member-groups/special-interest-groups/groups/lgbtq-special-interest-group-lgbtqsig/> [https://perma.cc/F243-CY2R].

And in Europe, in 2014, the European Society of Human Reproduction and Embryology (“ESHRE”) issued ESHRE’s *Task Force on Ethics and Law 23: Medically Assisted Reproduction in Singles, Lesbian and Gay Couples, and Transsexual People*.<sup>94</sup> The fertility industry not only moved from accepting LGBTQ families, but to catering specifically to them. One prime example of the movement is the formation of the nonprofit organization Men Having Babies, Inc. that “spun off in July 2012 from a program that ran at the NYC LGBT Center since 2005.”<sup>95</sup> Kicking off with conferences in Paris and New York in 2011, Men Having Babies offers monthly workshops and supports conferences now around the world.<sup>96</sup>

#### IV. 2020 AND BEYOND—THE WAVE AHEAD

Despite the massive wave of progress in the past twenty years, there still remain areas of discrimination against LGBT families in the areas of family formation and reproduction. Among other things, these areas include discrimination remaining in state constitutions, statutes, and regulations; the necessity for LGBT families to obtain court orders and not just rely on birth certificates; the need for clear donor agreements to avoid parentage dispute; and the non-recognition of marriage equality by many foreign countries and governments.

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94. G. De Wert et al., *ESHRE Task Force on Ethics and Law 23: Medically Assisted Reproduction in Singles, Lesbian and Gay Couples, and Transsexual People*, 29 HUM. REPROD. 1859 (2014).

95. *About MHB*, MEN HAVING BABIES, <https://www.menhavingbabies.org/about/> [<https://perma.cc/94UP-K7T8>].

96. *See id.*

*A. State Constitutions, Statutes, and Regulations*

As of November 2019, at least six states, Virginia,<sup>97</sup> Alabama,<sup>98</sup> Alaska,<sup>99</sup> Arizona,<sup>100</sup> Arkansas,<sup>101</sup> and Florida,<sup>102</sup> still had state constitutions that define marriage as only between a man and a woman. Moreover, numerous state statutory schemes have not been made gender neutral. For example, the Virginia Code Commission Gender Terms Project<sup>103</sup> was formed in 2016 as an effort to gender neutralize the Virginia Code and this Author was appointed to that project committee. Unfortunately, the effort was abandoned after the Commission leaders determined that many of the changes were substantive in nature. Among them, this Author reviewed the pregnancy discrimination provisions found at Virginia Code section 2.2-3901 (“Unlawful discriminatory practice and gender discrimination defined”)<sup>104</sup> as well as the pregnancy assistance provisions found at section 32.1-11.6<sup>105</sup> (“Virginia Pregnant Women Support Fund; purpose; guidelines”). Given that transgender men often have their reproductive parts or maintain reproductive capability, the suggestion was made to change “pregnant women” to “pregnant persons.” However, this was deemed to be substantive and not administrative in nature thus requiring legislative change.

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97. VA. CONST. art. I, § 15-A (“That only a union between one man and one woman may be a marriage valid in or recognized by this Commonwealth and its political subdivisions.”).

98. ALA. CONST. art. I, § 36.03(b) (“Marriage is inherently a unique relationship between a man and a woman.”).

99. ALASKA CONST. art. I, § 25 (“To be valid or recognized in this State, a marriage may exist only between one man and one woman.”).

100. ARIZ. CONST. art. XXX, § 1 (“Only a union of one man and one woman shall be valid or recognized as a marriage in this state.”).

101. ARK. CONST. amend. LXXXIII, § 1 (“Marriage consists only of the union of one man and one woman.”).

102. FLA. CONST. art. I, § 27 (“Inasmuch as marriage is the legal union of only one man and one woman as husband and wife, no other legal union that is treated as marriage or the substantial equivalent thereof shall be valid or recognized.”).

103. Va. Code Comm’n Meeting Minutes on Gender Terms Project (2017).

104. VA. CODE ANN. § 2.2-390(1) (Repl. Vol. 2017).

105. *Id.* § 32.1-11.6 (Repl. Vol. 2017).

In addition, nine states, including Virginia, still have statutes that permit faith based licensed adoption agencies to legally discriminate against LGBT families in the provision of home studies and placement of children for adoption.<sup>106</sup>

### B. *LGBT Families Cannot Rely on Birth Certificates Alone*

Continued challenges still require same-sex couples to obtain court orders and not rely on birth certificates alone. A birth certificate is an administrative record subject to challenge while a court order carries significantly more weight under the case law.

By way of recent history, in 2016, a judge in Knox County, Tennessee ruled in a same-sex divorce case that the non-biological mother had no parental rights over the child because the statute specifically defined parents as “husband” and “wife.”<sup>107</sup> The couple, Erica and Sabrina Witt, married in Washington, D.C., had their child in Tennessee through artificial insemination. Using an anonymous sperm donor and Sabrina’s eggs, Sabrina gave birth to a baby girl. The couple was going through divorce proceedings and having trouble determining the custody of their child because of the vague statutory language in Tennessee. Similar to the statutory language in Virginia at that time, the parents of a child created through assisted conception were defined as “husband” and “wife,” or “man” and “woman.”<sup>108</sup> In the Witt case, as both the gestational and biological mother, Sabrina was considered the mother, and Erica was technically considered to have no relationship to the child, even though she was married to Sabrina and had stood in loco parentis to the child since the child’s birth.<sup>109</sup> The judge agreed with the interpretation that the statute should be read narrowly and determined that Erica Witt had no parental rights to the child as she was not the biological mother and she never adopted the

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106. *See id.* § 63.2-1709.3(D) (Repl. Vol. 2017). Other states include Alabama, Kansas, Mississippi, North Dakota, Oklahoma, South Carolina, South Dakota, and Texas.

107. Jamie Satterfield, *Parenting Rights in Same-Sex Divorces Headed to a Tennessee Appellate Court*, KNOXVILLE NEWS SENTINEL (June 29, 2016), <http://archive.knoxnews.com/news/crime-courts/parenting-rights-in-same-sex-divorces-headed-to-a-tennessee-appellate-court-36046f02-b742-54df-e053--384279061.html> [<https://perma.cc/8DHF-V7AX>].

108. TENN. CODE ANN. § 68-3-306.

109. Satterfield, *supra* note 108.

child.<sup>110</sup> That decision left Erica Witt without parental rights, although, had they effectuated a stepparent adoption, she would have been deemed a legal mother.

To similar effect, in 2015, the Michigan Court of Appeals considered a case with very similar facts.<sup>111</sup> In that case, the parties had married in Canada in 2007, and one of the mothers gave birth to a child conceived through ART.<sup>112</sup> Shortly thereafter, after the parties separated, the non-biological mother attempted to seek an order affirming her parentage and addressing custody and visitation.<sup>113</sup> The biological mother, however, filed a motion for summary judgment stating that the non-biological mother did not have standing to bring the action because she was not a parent.<sup>114</sup> After a series of appeals and remands, and the intervening decision of the United States Supreme Court in *Obergefell v. Hodges*, the Michigan Court of Appeals eventually concluded that the non-biological mother had standing to argue equitable parentage.<sup>115</sup> However, that case demonstrates the uncertainty and potential protracted litigation that same-sex couples may face in the event of separation without an order of lawful adoption.

Then, in the 2015 case of *Ex parte E.L. (In re: E.L. v V.L.)*, decided by the Supreme Court of Alabama, a biological mother attempted to void her same-sex partner's second-parent adoption in Alabama, which had been granted by Georgia.<sup>116</sup> The biological mother argued that Alabama should not give full faith and credit to the Georgia adoption order because, she claimed, the Georgia court lacked the subject-matter jurisdiction to enter the order, and giving full faith and credit to the order would be contrary to Alabama's public policy.<sup>117</sup> The Supreme Court of Alabama agreed that Georgia lacked subject-matter jurisdiction, and declined to give full faith and credit to the adoption order.<sup>118</sup> The non-biological mother then appealed to the United States Supreme Court,

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110. *Id.*

111. *Stankevich v. Milliron*, 882 N.W.2d 194, 195–96 (Mich. Ct. App. 2015) (per curiam).

112. *Id.* at 195.

113. *Id.*

114. *Id.* at 195–96.

115. *Id.* at 196–98.

116. 208 So. 3d 1102, 1103–04 (Ala. 2015) (per curiam).

117. *Id.* at 1106–07.

118. *Id.* at 1113.

which in 2016 reversed, thus creating the national precedent that same-sex adoption orders must be given full faith and credit across all fifty states.<sup>119</sup> Fortunately, this case now establishes that same-sex adoption orders must be given full faith and credit throughout the United States; however, there is no such precedent for birth certificates. Thus, an adoption order remains the only way by which non-biological parents can safely and permanently protect themselves against future challenges to their parental status.

The NCLR has issued a strong recommendation that “all non-birth parents get an adoption or judgment from a court recognizing that they are a legal parent, even if they are married, and even if they are listed as a parent on the birth certificate.”<sup>120</sup> The statement from the NCLR recommends this for all non-biological and non-adoptive parents.<sup>121</sup> The recommendation from the NCLR reflects the current legal state of the rights of non-biological parents in same-sex relationships, which is still uncertain and evolving.

Finally, without an adoption order, a child may not receive the other parent’s social security benefits or inherit under current intestate laws, and the other parent may not be allowed to claim the child on her or his taxes as a dependent. These are areas of the law still in flux for LGBT families.

### C. *LGBT Families Must Have Clear Donor and Ownership Agreements to Avoid Parentage Disputes*

When a known donor is used by a lesbian couple, it is critical that a sperm donor agreement and release be entered into by the donor and the recipients and, if a fertility clinic or physician’s office is being used, that a donor release also be executed between the

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119. *V.L. v. E.L.*, 136 S. Ct. 1017, 1022 (2016) (per curiam).

120. LEGAL RECOGNITION OF LGBT FAMILIES, NAT’L CTR. FOR LESBIAN RIGHTS (2019), [http://www.nclrights.org/wp-content/uploads/2013/07/Legal\\_Recognition\\_of\\_LGBT\\_Families.pdf](http://www.nclrights.org/wp-content/uploads/2013/07/Legal_Recognition_of_LGBT_Families.pdf) [<https://perma.cc/SU5V-RZ7X>].

121. *Id.*; PROTECTING YOUR FAMILY AFTER MARRIAGE EQUALITY, NAT’L CTR. FOR LESBIAN RIGHTS (2019), <http://www.nclrights.org/wp-content/uploads/2015/01/Protecting-Your-Family-After-Marriage-Equality.pdf> [<https://perma.cc/2CUA-MZ8L>]; see also *Post-Election LGBT FAQs*, HAAS & ASSOCS.: BLOG, <http://carolinafamilylaw.com/post-election-lgbt-faqs/> [<https://perma.cc/9MLA-AAVY>] (“Being married to a birth parent does not automatically mean your parental rights will be fully respected if they are ever challenged. There is no way to guarantee that your parental rights will be respected by a court unless you have an adoption or court judgment.”).

donor and the clinic or physician. While an increasing number of known donor arrangements are using fertility clinics and physicians to assist with the artificial insemination, many known donor arrangements by lesbians and single moms still do not use medical intervention and rely on home or self-insemination. When a home or self-insemination procedure is used, it may not be in compliance with applicable statutory requirements in existence because many state statutes typically require that the inseminated woman be married, and/or that a licensed physician perform the insemination, and/or that an intervening medical technology be used in order for the state's donor statute or laws to apply. For example, in 2014, the circuit court in Roanoke, Virginia, in the case of *Boardwine v. Bruce*,<sup>122</sup> ruled that the use of a "turkey baster" did not constitute an intervening medical technology.<sup>123</sup> The case was upheld on appeal in 2015 by the Virginia Court of Appeals.<sup>124</sup> Notably, the parties in that case also did not have a donor agreement in place.<sup>125</sup>

The joint purchase by gay couples of donor eggs or donor sperm also creates enormous issues unless a clear ownership agreement is in place as between the couple. It is highly recommended that gay couples purchase donor egg or sperm as separate property by the partner who intends to contribute his sperm or her egg to the purchased donor gametes. Alternatively, it is recommended that when a gay male couple jointly purchases donor eggs, that they keep the donor eggs separate from, and not fertilized by, any sperm to be used by either man until such time as they are ready to have an embryo formed and transferred into a gestational carrier. Once any embryos are formed, the embryos become jointly owned by both men, even if only one contributed the sperm, because both jointly purchased and owned the donor eggs used to create the embryos even if only one man's sperm was used to fertilize them. This oftentimes results in fights over who owns the embryos in the event of separation or divorce. To similar effect, lesbian couples ideally should purchase donor sperm separately or not jointly purchase donor sperm without having an ownership agreement in place. Alternatively, if they purchase donor sperm jointly, then they should keep the sperm separate from any eggs retrieved from either

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122. 88 Va. Cir. 218 (2014), *affirmed on appeal*, 770 S.E.2d 774 (Va. Ct. App. 2015).

123. *Id.* at 224.

124. *Bruce*, 770 S.E.2d at 778.

125. *See also* Jason P. v. Danielle S., 215 Cal. Rptr. 3d 542, 563 n.18 (Cal. Ct. App. 2017).

woman until such time as they are ready to fertilize the egg and perform an embryo transfer procedure.

In other words, once jointly purchased and owned donor eggs or donor sperm are combined with the egg or sperm of the parents to be, the subsequently formed embryos become the property of both prospective parents. Without a clear ownership agreement, just as with heterosexual couples, the embryos easily become subject to ownership disputes when couples separate or divorce.<sup>126</sup>

#### D. *Many Foreign Countries Still Do Not Recognize Marriage Equality*

While advances in the United States over the past twenty years have been significant for LGBT families, other countries have not had the same advances. In fact, a number of countries have yet to recognize marriage equality. As of October 2019, thirty countries and territories allowed same-sex marriage.<sup>127</sup> Mexico only allows gay marriage in certain territories.<sup>128</sup> While most of the countries that recognize gay marriage, besides the United States and Canada, are in Western Europe, as of 2019, Italy and Switzerland still did not allow same-sex unions.<sup>129</sup> The lack of many countries to recognize and honor marriage as between same-sex couples makes travel to or residing in such countries somewhat prohibitive for LGBT families and also allows room for one parent to move to such non-recognition countries in an attempt to disadvantage the other parent—just as we have seen occur in the United States.

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126. See, e.g., *In re Marriage of Rooks v. Rooks*, 429 P.3d 579, 580 (Colo. 2018) (en banc); *Patel v. Patel*, 99 Va. Cir. 11, 11 (2017). For a comprehensive overview of embryo disposition cases, see Gary A. Debele & Susan L. Crokin, *Legal Issues Surrounding Embryos and Gametes: What Family Law Practitioners Need To Know*, 31 J. AM. ACAD. MATRIM. LAW. 55, 74 (2018).

127. *Same-Sex Marriage Around the World*, PEW RES. CTR. (Oct. 28, 2019), <https://www.pewforum.org/fact-sheet/gay-marriage-around-the-world/> [<https://perma.cc/6LMX-PDQ3>].

128. *Id.*

129. David Masci & Drew Desilver, *A Global Snapshot of Same-Sex Marriage*, PEW RES. CTR.: FACT TANK (Oct. 29, 2019), <https://www.pewresearch.org/fact-tank/2019/10/29/global-snapshot-same-sex-marriage/> [<https://perma.cc/7J3V-QGUR>].

### CONCLUSION

The world of LGBT family formation has come a long way since the 1969 Stonewall Riots fifty years ago. But, like the civil rights movement, prejudices and biases still exist. Now is not the time to take off the life vest—now is the time to keep it on and prepare for the next wave.