The "Parent" Paradox in a Post-*Obergefell* World

Recognizing nonbiological, nonadoptive parents in all 50 states

BY **ERIC I. WRUBEL** & **LINDA GENERO SKLAREN**

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Before *Obergefell v. Hodges*—and even before individual states considered acknowledging the right of gays and lesbians to marry—same-sex couples were creating their own families. In some states, including New York, both members of a gay or lesbian couple could legally adopt the children they raised, even if neither was the biological parent. Even so, two-parent adoptions by same-sex couples were extremely rare in the United States.

Further, even where one parent in a same-sex family was the biological parent, adoption may not have been available to the other same-sex parent if the biological parent did not consent or if the couple could not afford financially to go through the adoption process. As a result, it was not uncommon to find same-sex families where only one partner was the biological or adoptive parent of a child being raised in that union. This situation becomes problematic if the union breaks down and the parties cannot agree on visitation or custody.

Several states apply a "bright-line" rule when defining who is a legal parent. Typically, this rule limits the definition of "parent" to a person related to a child through biology or adoption. As a result, a petition for custody and visitation in these states brought by a person not related to a child through biology or adoption, but who nevertheless parented that child, will be summarily dismissed for lack of standing. Unmarried gay and lesbian couples comprise the vast majority of this parental group, although unmarried heterosexual couples face the same predicament as their homosexual counterparts. Even if parents eventually marry, a question remains as to whether the presumption of legitimacy would be recognized for the children they raise, especially given the biological realities inherent in same-sex couples.

The bright-line rule adopted by some jurisdictions, including New York, essentially views the biological parent's unilateral right to the custody and control of his or her child to be superior to any inquiry into the best interests of the child. In such jurisdictions, persons unrelated to a child by biology or adoption are deemed to be virtual strangers, mere third parties with no standing to assert rights to visitation or custody of a child. Such a situation exists notwithstanding the fact that this "virtual stranger" may have acted as the primary parent and raised the child. In these states, a child's biological or adoptive parent is empowered to use this lack of legal connection to the child as a weapon against his or her former partner to sever the bond between the former partner and the child, regardless of the child's best interests, psychologically and financially.

As *Obergefell* made clear, traditional notions of what constitutes a family, who can be a parent, and who can marry do not reflect our present society. More than

one-half of jurisdictions in the United States subscribe to the view that recognition of the nonbiological, nonadoptive individual as a "de facto" parent is in a child's best interests. However, without a uniform definition of parent, an individual may lose his or her parental status simply by crossing state lines.

In other jurisdictions, where no statutes exist granting nonbiological/nonadoptive parents standing to assert their custodial rights, such individuals often have relied on common law theories of "in loco parentis" and "equitable estoppel" to assert their parental rights. Other jurisdictions have recognized that even though an individual has no biological or adoptive right to assert custody rights to a child, the petitioning party is, nonetheless, a "psychological parent." No matter which theory is used, in all such instances, the petitioning parent generally asserts that the biological parent encouraged and facilitated the close bond that now exists between the petitioning parent and the child, that the petitioning parent had assumed all obligations of parentage (economic as well as emotional), and that it is in the best interests of the child to maintain that relationship.

Ironically, even in states that apply the bright-line rule denying de facto parents' standing to seek custody or visitation, the doctrines of *in loco parentis*, de facto parent, and equitable estoppel have been applied in paternity proceedings to hold that men not related to a child through biology or adoption are, nonetheless, deemed fathers who must pay child support. This rule was interposed at common law for a number of reasons, most importantly to protect a child's interest in continuing an established, significant parent-child relationship with the putative father, whose removal from the child's life would greatly harm the child. Under this rule, even a known biological father has been held not to be a legal parent obligated to support his child when another man has stepped in to fulfill the parental role and established a significant, nurturing parent-child relationship with the child.

The rationale behind these decisions has been examined and approved by numerous jurists throughout the country. The purpose of these common law doctrines in paternity cases has been to protect the interests of a child in continuing an already recognized and operative parent-child relationship. In the case of same-sex couples, however, courts have been slower to recognize and protect these same interests.

In several jurisdictions, state legislatures have enacted statutes listing the circumstances under which an individual unrelated to a child through biology or adoption may be adjudged a parent. These jurisdictions include Colorado, Pennsylvania, Montana, Minnesota, Kentucky, Virginia, Hawaii, Connecticut, Oregon, Nevada, Indiana, Texas, Wyoming, and Washington, D.C. In Rhode Island, for example, the state's paternity statute has been interpreted broadly enough to extend standing for custody and visitation to those who meet the standards of its definition of de facto parent. *Rubano v. DiCenzo*, 759 A.2d 959, 971 (R.I. 2000).

State Statutes Governing Who Is a Parent

The following state statutes list circumstances under which an individual unrelated to a child through biology or adoption may be adjudged a parent.

Colo. Rev. Stat. Ann. § 14-10-123 (1) (c)
23 Pa. Stat. and Cons. Stat. Ann. § 5324
Mont. Code Ann. § 40-4-228
Minn. Stat. Ann. § 257C.08 (4)
Ky. Rev. Stat. Ann. § 403.270
Va. Code Ann. § 20-124.2
Haw. Rev. Stat. Ann. § 571-46
Conn. Gen. Stat. Ann. § 46b-59
Or. Rev. Stat. Ann. § 109.119
Nev. Rev. Stat. Ann. § 125C.050
Ind. Code Ann. § 31-17-2-8.5
Tex. Fam. Code Ann. § 102.003 (a) (9)
Wyo. Stat. Ann. § 20-7-102
D.C. Code Ann. § 16-831.03

—E. W. & L.G.S.

In other jurisdictions, courts have created a four-part test to determine whether a person alleging that he or she is a parent, but who is unrelated to a child by biology or adoption, has standing to bring a petition for custody or visitation. The petitioning individual must show that:

1. The biological parent consented to the formation of a parent-child relationship with the putative coparent;
2. The putative parent and child lived together in the same household;
3. The putative coparent assumed in relation to the child the full panoply of parental functions (i.e., emotional and financial); and
4. A bonded, dependent parent-child relationship exists between the child and the coparent.

As in all determinations of custody and visitation, best interest of the child controls.

The de facto parent must establish that he or she has participated in the child's life as a member of the child's family, resided with the child, and, with the consent and encouragement of the legal parent, performed a share of caretaking functions. This can be demonstrated by showing that she or he was integrally involved in the child's daily routine, addressed the child's developmental and emotional needs, disciplined the child, and provided for the child's educational and basic needs as well as medical care. Courts examine the quality of the relationship between the de facto parent and the child to understand the bond that exists and the effect on the child, if any, should that bond be severed.

This test exists in numerous states and was initially set forth with clarity by the Supreme Court of Wisconsin in *In re Custody of H.S.H.-K*, 533 N.W.2d 419 (Wis. 1995). For 21 years, the courts of Wisconsin have determined petitions by individuals seeking to be adjudged parents. Numerous other jurisdictions, including Arkansas, Nebraska, Massachusetts, Washington, Maine, Indiana, Connecticut, and New Jersey have adopted the "Wisconsin" test. In none of these jurisdictions have the wheels of justice ground to a halt as a result of being flooded with frivolous litigation from former boyfriends and girlfriends, a common criticism of the Wisconsin test.

Contrary to the naysayers' fears, the traditional rights of a biological or adoptive parent to exercise custody and control over his or her offspring is protected by this approach, because without the knowledge and consent of the biological/adoptive parent, the petitioner will have no basis to establish standing. Experience has shown that such a rule is not unworkable, vague, or amorphous, as some jurists have opined. Trial courts—including those of New York—have been making this type of determination in the context of paternity cases for many years. The rights of parenthood also include the obligations of parenthood, in particular, the duty of support. By itself, this will deter the so-called boyfriend/girlfriend claims that have concerned jurists in some states. Nannies and babysitters who receive remuneration for taking care of children also are precluded from availing themselves of the rule.

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Cases Embracing the Wisconsin Test

Bethany v. Jones, 378 S.W.3d 731 (Ark. 2011)
Latham v. Schwerdtfeger, 802 N.W.2d 66 (Neb. 2011)
E.N.O. v. L.M.M., 711 N.E.2d 886 (Mass. 1999)
In re Parentage of L.B., 122 P.3d 161 (Wash. 2005)
C.E.W. v. D.E.W., 845 A.2d 1146 (Me. 2004)
A.B. v. S.B., 837 N.E.2d 965 (Ind. 2005)
Laspina-Williams v. Laspina-Williams, 742 A.2d 840 (Conn. Super. Ct. 1999)
V.C. v. M.J.B., 748 A.2d 539 (N.J. 2000)

—E. W. & L.G.S.

Children unrelated to their parents through biology or adoption deserve the same protections that the children of legally sanctioned relationships enjoy. The myriad reasons couples—heterosexual and homosexual—decide not to marry one another and/or adopt the children they raise together have little relevance to the issue of standing in custody cases. Whatever the reasons, children are the innocent parties.

Refusal to acknowledge de facto parentage is out of touch with *Obergefell* and the realities of modern life. *Obergefell* acknowledged that a family does not consist solely of two heterosexual parents and their biological offspring, thereby, in essence, expanding the group of individuals that should be included in any definition of "parent." Implicit in acknowledging same-sex marriages is a recognition that a biological connection will not necessarily exist in same-sex families. In the case of female same-sex couples using assisted reproductive measures, only one parent will be biologically related to their child. For male same-sex couples, no biological connection at all is more likely. Thus, tying the definition of parenthood to biology or adoption is obsolete and no longer viable.

Furthermore, even with the now established right of same-sex couples to marry—or, if they are financially able—to adopt, many couples will, nonetheless, raise children without getting married or will be financially unable to proceed with a second-parent adoption. There is a critical need to protect the children of such families. All children deserve the same protections, regardless of the marital or financial status of their parents.

Legislators and jurists should alter unjust past precedent based on outdated laws and tired, unresponsive, insensitive social norms, just as the United States Supreme Court so eloquently did in *Obergefell*. The term "parent" should be broadly construed to further the state's *parens patriae* power, the intent of *Obergefell*, and above all, to accomplish the stated purpose of all custody and visitation proceedings: to ensure the best interests of all of our children. FA

Eric I. Wrubel is chair of the matrimonial department of Warshaw Burstein, LLP. He has practiced family and matrimonial law for more than nineteen years and is a fellow of both the American Academy of Matrimonial Lawyers (AAML) and the International Academy (IAML), and sits on the Board of Managers for the New York chapter. He has been listed in *Best Lawyers in America* since 2010, is chair of the Committee on LGBT People and the Law of the New York State Bar Association, and is an adjunct professor at Cardozo Law School where he teaches a seminar on family law. Mr. Wrubel will appear before the New York Court of Appeals in *In re* Brooke S.B. v. Elizabeth A. C. C., on behalf of the appellant-attorney for the child, R. Thomas Rankin, Esq., of Goodell & Rankin.

Linda Genero Sklaren is a partner at Warshaw Burstein, LLP with more than thirty years of experience in complex commercial litigation and business disputes, with an emphasis on handling difficult, voluminous pretrial discovery; motions of all types, especially dispositive motions; and appeals. She is admitted to practice in New York and Michigan and has been admitted *pro hac vice* in litigation matters in Pennsylvania, New Jersey, and Maryland, among others. She devotes approximately forty percent of her time to the matrimonial/family law group where, in addition to advising on general matrimonial and family law issues, she specializes in motions and appeals.
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