

# CHILDREN AND THE LAW

AMERICAN BAR ASSOCIATION YOUNG LAWYERS DIVISION



## Committee Newsletter | Fall 2017, Vol. 1 No. 1

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#### **Letter from the Committee Chair** By Allyson D. Burger

Dear Members,

We'd like to officially welcome you all to the ABA Children and the Law Committee and excitedly look forward to the year ahead. All of us share a common interest in the protection and advancement of Children's rights under the law. This year has much promise to be one of collaboration and interaction among our Committee. We would really like for you to participate in sharing with us any pertinent case law and matters going on in your geographic areas. Over the course of the past few weeks there have been proposed changes to laws that may affect us both professionally and personally, including developments related to DACA. Let's work and share together to come up with some great programming and materials for publication for the year ahead.

## Young Lawyers Division – Children and the Law Committee Fall 2017

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To that end, we would also very much like for members to contribute by writing pieces for Committee newsletters and publications – so please let us know what areas of the law pique your interest and do let us know if you're interested in getting more involved. Our Winter Newsletter will be published in early January, and we very much welcome your participation!

Please let us know as soon as possible if you're interested in submitting any of the following for inclusion:

1. Short articles re: recent legal developments (200-300 words);
2. Committee activities;
3. Opportunities for participation in YLD and ABA events;
4. Announcements of upcoming events of interest; and
5. Online resources for new lawyers re: basic training in both substantive and practical aspects of law (approx. 500 words)

If you'd like to contribute towards our upcoming Winter Newsletter about any topic that piques your interest, please do not hesitate to contact myself at [adburger@scrllp.com](mailto:adburger@scrllp.com) or our Vice-Chair, Jessie Conradi at [jessie.conradi@gmail.com](mailto:jessie.conradi@gmail.com).

To that end, I received much communication from members who were all interested about the same subject: the definition of "parent" and the marital presumption of legitimacy. New York's Appellate Division First Department issued a ground-breaking decision earlier this month, holding that the marital presumption of legitimacy also applies to a child born to a same-sex married couple. (*Carlos A. v. Han Ming T.*, 4526A). This sentiment followed suit from the Arizona Supreme Court's September 2017 holding, which in a straight-forward decision on appeal, applied the marital presumption to a same sex spouse. *McLaughlin v. Jones*, 401 P.3d 492, 497 (Ariz. 2017).

In a similar vein, a colleague of mine, Angela Ruffini, recently penned a very interesting Article for the Family Court Review of Maurice A. Deane School of Law at Hofstra University entitled "*Who's Your Daddy?: The Marital Presumption of Legitimacy in the Modern World and its Application to Same-Sex Couples*" (Volume 55, Issue 2, April 2017, Pages 307-320). While we await re-publication rights, I urge you to check it out.

## **Aren't They All Our Children, After All?**

By Michael Andriano, Esq.

The history of marriage is one of both continuity and change.<sup>1</sup> Indeed, changed understandings of marriage are characteristic of a Nation where new dimensions of freedom become apparent to new generations, often through perspectives that begin in pleas or protests and then are considered in the political sphere and the judicial process.<sup>2</sup> In June 2015, the Supreme Court issued its ruling in the blockbuster case of *Obergefell v. Hodges*, wherein the Court held that the Fourteenth Amendment to the United States Constitution guarantees same-sex couples the fundamental right to marry and that couples in same-sex marriages are constitutionally entitled to the “constellation of benefits the States have linked to marriage.”<sup>3</sup> One would think that the legal status of a biological or non-biological same-sex parent to a child is no doubt automatically granted as a benefit of the marriage; however, that is not the case in Florida.<sup>4</sup> The legal status of the parents and children of same-sex married and unmarried couples remains uncertain in Florida. This is because the Florida courts have yet to interpret *Obergefell* as it pertains to child custody, support, and visitation rights of the parents in the event of divorce.<sup>5</sup> Additionally, the Florida statutes pertaining to paternity and parentage have not been updated since the *Obergefell* decision. A litigant may encounter a particular judge who does not rule in accordance with *Obergefell* thereby unduly prolonging the instability for the child. It is very concerning that the Florida courts might not unquestionably extend all marital benefits to same-sex couples under the directive of *Obergefell*.

Because homosexuality is not a voluntary condition and homosexuals are among the most stigmatized, misunderstood, and discriminated against minorities in the history of the world, the disparagement of their sexual orientation is a source of continuing pain to the homosexual

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<sup>1</sup> *Obergefell v. Hodges*, 135 S.Ct. 2584, 2595 (2015).

<sup>2</sup> *Id.* at 2596.

<sup>3</sup> *Id.* at 2601-05.

<sup>4</sup> *McLaughlin v. Jones*, 401 P.3d 492, 497 (Ariz. 2017).

<sup>5</sup> There is not a published Florida court opinion interpreting and/or extending marital rights and benefits to same-sex couples after *Obergefell*.

community.<sup>6</sup> It is no secret that Florida has a sordid and notoriously hostile history with the LGBTQ community, although there has been more recent significant and widespread acceptance. In fact, at one time, Florida evinced a strong public policy against the recognition of same-sex marriages by enacting an amendment to Florida's Constitution by super-majority vote whereby marriage was defined as between a man and a woman *only*.<sup>7</sup> Further, one court ruled that same-sex couples do not have standing to seek a dissolution of marriage in Florida, even though their marriage was valid in another state.<sup>8</sup> Another court held that a same-sex partner of an auto accident victim could not bring a claim for loss of consortium against alleged tortfeasors, even if the relationship between the partner and victim was committed, exclusive, and intimate; the court opined that the claim was dependent on the existence of a legal relationship, such as marriage, which did not exist in Florida.<sup>9</sup> Perhaps most disturbing has been the consistent refusal of the Florida courts to provide non-genetic LGBTQ parents any rights relating to the children for whom they have functioned as parents for significant periods of time. Florida law is clear: “[t]hose who claim parentage on some basis other than biology or legal status do not have the same rights, including the right to visitation, as the biological or legal parents.”<sup>10</sup> But, as a matter of pure biology, same-

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<sup>6</sup> *Baskin v. Bogan*, 766 F.3d 648, 658 (7th Cir. 2014).

<sup>7</sup> *Advisory Opinion to the Attorney General Re Florida Marriage Protection Amendment*, 926 So. 2d 1229, 1235 (Fla. 2006) (stating that the proposed constitutional amendment recognizing only marriages between a man and woman and invalidating same-sex marriages “implement[s] a public policy decision of statewide significance.”).

<sup>8</sup> *Oliver v. Stufflebeam*, 155 So. 3d 395, 398-99 (Fla. 3d DCA 2014). *But see Brandon-Thomas v. Brandon-Thomas*, 163 So. 3d 644, 647-68 (Fla. 2d DCA 2015) (wherein the court held that the Full Faith and Credit Clause of the United States Constitution required the trial court to exercise jurisdiction over petition for dissolution of same sex marriage validly entered into in Massachusetts).

<sup>9</sup> *Bashaway v. Cheney Bros., Inc.*, 987 So. 2d 93, 96 (Fla. 1st DCA 2008) (recognizing Florida's “public policy” that same-sex “legal relationship[s]” are “unattainable” in this state).

<sup>10</sup> *Russell v. Pasik*, 178 So. 3d 55, 60 (Fla. 2d DCA 2015); *see also D.E. v. R.D.B.*, 929 So. 2d 1164, 1164-65 (Fla. 5th DCA 2006) (holding that a lesbian parent's decision to deprive the child, conceived with her former partner, of contact with her former partner was an inadequate ground upon which to base an adjudication of dependency because Florida law does not allow a non-parent to seek custody or visitation); *Wakeman v. Dixon*, 921 So. 2d 669, 673 (Fla. 1st DCA 2006) (holding that former lesbian partner of genetic mother was a non-parent who was not entitled to seek custody or visitation despite the fact that the parties agreed to have children via artificial insemination during the relationship, executed co-parenting agreements, and partner had co-parented the children); *Kazmierczak v. Query*, 736 So. 2d 106, 110 (Fla. 4th DCA 1999) (“Without a status equivalent to the biological parent, the appellant [the genetic parent's former partner], in the present case, lacks standing to seek custody or visitation of appellee's biological child . . .”); *Music v. Rachford*, 654 So. 2d 1234, 1235 (Fla. 1st DCA 1995) (affirming dismissal for failure to state a cause of action of a complaint filed by same-sex partner of genetic parent seeking custody and visitation rights to a child born during the relationship via artificial

sex couples simply cannot conceive children on their own, on purpose or accidentally. Advancements in reproductive technology now allow individuals to exercise their desire and basic right to have children, through means which were not contemplated by society centuries or even decades ago.<sup>11</sup> These reproductive technologies have impacted the definition of the “modern” family and the laws in Florida have struggled to catch up and reflect the rapid changes taking place in society.<sup>12</sup> In an attempt to address these rapid changes, in 2013, the Florida Supreme Court ruled that the state must give unmarried same-sex couples using artificial reproductive technology “the same opportunity as [unmarried] heterosexual couples to demonstrate [parental] intent.”<sup>13</sup> However, the decision was tied to the basis that the case arose in the context of a genetic mother being denied access to her child after her relationship with the birth mother ended.<sup>14</sup> Although the case did not address the rights of a non-biological parent, the court explained that even as “the law is being tested as . . . new techniques [of assisted reproduction] become more commonplace and accepted, . . . courts must ensure that the constitutional rights of those individuals who *intended* to be parents to the child are protected.”<sup>15</sup> Gay marriage encompasses more than just gay rights, but also includes family rights. Protecting same-sex parents’ rights is particularly important because both parties in a same-sex relationship are not going to be biologically related to a child. At the forefront is the need to secure functional family relationships for the parents and the children of same-sex couples, married and unmarried. Therefore, the Florida Legislature should address these monumental concerns by doing the following: 1) extending Florida’s presumption of legitimacy to same-sex married couples by statute; 2) reworking the statutory framework to require the unmarried, non-biological and non-adoptive parent to meet specified factors and criteria in order to establish a legal parent-child relationship in the event of dissolution; and 3) reworking the statutory framework to require both same-sex parents to be listed on the child’s birth certificate.

Indeed, the marital presumption has long balanced a presumption of biology with the need to secure functional family relationships. It has been the standard rule in Florida that a child born

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insemination and raised by the couple for three years on the grounds that non-parents have no right to visitation over the wishes of a biological parent).

<sup>11</sup> *D.M.T.*, 129 So. 3d at 338.

<sup>12</sup> *De Los Milagros Castellat v. Pereira*, No. 3D16-1855, 2017 WL 3495773, at \*1 (Fla. 3d DCA Aug. 16, 2017) (Logue, J., concurring).

<sup>13</sup> *D.M.T.*, 129 So. 3d at 343.

<sup>14</sup> *Id.* at 327.

<sup>15</sup> *Id.* at 340; see also Douglas NeJaime, *Marriage Equality and the New Parenthood*, 129 Harv. L. Rev. 1185, 1257 (March 2016).

to a married couple was presumed to be a child of the marriage.<sup>16</sup> This presumption of legitimacy was created primarily to protect the welfare of the child.<sup>17</sup> However, the marital presumption does not normally protect children of same-sex couples and these children are not automatically provided with the dual support system, a “security blanket” that is in the child’s best interest.<sup>18</sup> Recently, the Arizona Supreme Court ruled that Arizona’s marital presumption statute (containing almost the exact same language as Florida’s), after *Obergefell*, cannot constitutionally exclude same-sex spouses; therefore, the court extended the marital paternity presumption to same-sex spouses.<sup>19</sup> Importantly, in rejecting an argument that the statute only concerns identifying biological parentage, the court held that “the marital paternity presumption encompasses more than just rights and responsibilities attendant to biologically related fathers.”<sup>20</sup> “When the wife in an opposite-sex couple conceives a child, her husband is presumed to be the father even when he is not biologically related to the child.”<sup>21</sup> Thus, the court concluded that Arizona cannot deny same-sex spouses the benefit the presumption affords because biology is not the only reason that the paternity presumption statute exists; the statute does more than just identify biological fathers.<sup>22</sup> Even more recently in a landmark decision by New York’s Appellate Division, First Department, the court ruled that the State of New York’s family law presumption of legitimacy applies to children born to a same-sex married couple.<sup>23</sup> The panel specifically ruled that Han Ming T., the married partner of Marco D., a gay man now living in New York, should have been given notice of a petition to have their child adopted by Marco D.’s new gay partner.<sup>24</sup> The court recognized that marriage equality is eviscerated if the full spectrum of rights and historic legal

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<sup>16</sup> Fla. Stat. § 742.091 (2017).

<sup>17</sup> *Parker v. Parker*, 950 So. 2d 388, 394 (Fla. 2007) (“The presumption of legitimacy is a constitutional right afforded to every child born into a marriage granting the child the right to remain legitimate, both legally and factually, if doing so is in the child’s best interest.”); see art. I, § 9, Fla. Const.

<sup>18</sup> Mikaela Shotwell, *Won’t Somebody Please Think of the Children?!*, 15 J. Gender Race & Just. 141, 160 (Winter 2012) (quoting Jennifer L. Rosato, *Children of Same-Sex Parents Deserve the Security Blanket of the Parentage Presumption*, 44 Fam. Ct. Rev. 74, 76 (2006).

<sup>19</sup> *McLaughlin*, 401 P.3d at 500.

<sup>20</sup> *Id.* at 498.

<sup>21</sup> *Id.*

<sup>22</sup> *Id.*

<sup>23</sup> Jason Grant, *Appeals Panel Recognizes “Presumption of Legitimacy” for Same-Sex Marriage Child*, New York Law Journal (Oct. 5, 2017), <http://www.newyorklawjournal.com/this-weeks-news/id=1202799761475/In-Landmark-Appeals-Panel-Recognizes-Presumption-of-Legitimacy-for-SameSex-Marriage-Child-?mcode=1202615036097&curindex=1&slreturn=20170909115947>.

<sup>24</sup> *Id.*

principles, including the marital presumption of legitimacy, are not applied equally to same-sex spouses.<sup>25</sup>

It has been over two years since *Obergefell* was decided and Florida's marital presumption statute still does not contain language that addresses the rights of same-sex couples and their children; this must change.<sup>26</sup> Without a presumption of paternity, the determination of parental rights and duties for same-sex couples is left entirely to the discretion of the courts – a terrain that is still uncertain in Florida. Florida's legislature must recognize that families are formed because of intention, care, and love and the lack of a parent's biological or adoptive connection to a child can no longer be used to rend fundamental emotional bonds or the integrity of family relationships.<sup>27</sup> After all, family is about raising children and not just about producing them.<sup>28</sup> Extending the presumption of legitimacy to same-sex married couples protects the best interests of the children by providing the stability and security of two parents. Additionally, extending the presumption would ensure emotional and financial security for the parents by ensuring child support guidelines are followed and enforced. Lastly, because Florida statutorily demands 50/50 shared parenting, the presumption would provide an avenue for the non-biological parent to maintain a relationship with the children in the event of a dissolution of the parents' relationship. Thus, extending the presumption would help prevent the emotional trauma of a child being forcibly separated from a parent.<sup>29</sup>

It would seem to follow logically that after the decision in *Obergefell*, all states should put the same-sex parents of the child on the original birth certificate on the same terms that it does for heterosexual parents. However, such notion has not been the case, as there have been many disputes involving birth certificates, which constitute evidence of parentage. In the case of *Pavan v. Smith*, two married lesbian couples from Arkansas filed suit to challenge the state's refusal to apply the presumption of parenthood to the spouse of the birth mother and its refusal to list both spouses on the birth certificates of children conceived through assisted reproduction.<sup>30</sup> The Court reversed directing officials to include both spouses on the birth certificates because, under *Obergefell*, Arkansas denied married same-sex couples access to the constellation of benefits

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<sup>25</sup> *Id.*

<sup>26</sup> *Goodridge v. Dep't of Pub. Health*, 798 N.E.2d 941, 948 (Mass. 2003) ("Our obligation is to define liberty of all, not to mandate our own moral code.") (quoting *Lawrence v. Texas*, 539 U.S. 558, 571 (2003)).

<sup>27</sup> *Id.*

<sup>28</sup> *Baskin*, 766 F.3d at 663.

<sup>29</sup> See Shotwell, *supra* note 18, at 164.

<sup>30</sup> *Pavan v. Smith*, 137 S.Ct. 2075 (2017).

that the state has linked to marriage.<sup>31</sup> The Court explained that Arkansas could not deny listing non-biological same-sex spouses on birth certificates because it made its birth certificates more than a mere marker of biological relationships.<sup>32</sup> There have been similar challenges here in Florida. Florida Statute § 382.013(2)(a) (2017) provides that if the mother is married at the time of birth, the name of the husband shall be entered on the birth certificate as the father of the child, yet Florida has refused to apply this statutory provision to married lesbian couples.<sup>33</sup> In the case of *Chin v. Armstrong*, the couples argued: because *Obergefell* compels the state to provide married same-sex couples with the full constellation of benefits associated with marriage on the same terms and conditions as opposite-sex couples, both women must be listed on the child's birth certificate.<sup>34</sup> The case of *Chin* is surprisingly still pending in federal court, even after the Supreme Court decided *Paven*. However, both *Obergefell* and *Paven* made clear that Florida must amend its statutory framework to list both parents of a same-sex marriage on the child's birth certificate.

In regards to children born to unmarried same-sex couples, both partners' names should be listed on the child's original birth certificate if both partners are considered legal parents from the moment of birth.<sup>35</sup> This might be the case, for example, if the parties live in a state that has a marital status-neutral assisted reproduction statute and the parties complied with any and all statutory requirements.<sup>36</sup> While Florida does have an assisted reproductive technology statute, the court in *D.M.T.* made clear that it only applies to grant parental rights to unmarried, *biological* same-sex parents who also demonstrate an intent to parent the child.<sup>37</sup> The only alternative option currently available would be for the couple to seek a court order declaring the person's legal

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<sup>31</sup> *Id.* at 2078.

<sup>32</sup> *Id.* at 2078-79 ("The State uses those certificates to give married parents a form of legal recognition that is not available to unmarried parents.").

<sup>33</sup> See Complaint & Jury Demand for Declaratory & Injunctive Relief, *Chin v. Armstrong*, No. 4:15-cv-00399 (N.D. Fla. Aug. 13, 2015); Verified Petition for Dissolution of Marriage with Minor Children, *In re Marriage of Karen Lynskey-Lake & Deborah Lynskey-Lake*, No. FMCE1100065 (Fla. Cir. Ct. Sept. 4, 2015).

<sup>34</sup> Complaint & Jury Demand for Declaratory & Injunctive Relief at 9, *Chin v. Armstrong*, No. 4:15-cv-00399 (N.D. Fla. Aug. 13, 2015) (first quoting *Obergefell*, 135 S. Ct. at 2601; then quoting *id.* at 2605); see also Plaintiffs' Motion for Summary Judgment & Incorporated Memorandum of Law at 7-20, *Chin*, No. 4:15-cv-00399 (N.D. Fla. Dec. 9, 2015).

<sup>35</sup> Courtney G. Joslin, Shannon P. Minter, and Catherine Sakimura, *Lesbian, Gay, Bisexual and Transgender Family Law* § 5:24, Chapter 5. Birth Certificates, generally, 2 (September 2017).

<sup>36</sup> *Id.*

<sup>37</sup> Fla. Stat. §§ 742.13, 14 (2017); *D.M.T.*, 129 So. 3d at 342-44.

parentage and directing the relevant officials to put both partners' names on the birth certificate.<sup>38</sup> However, same-sex couples should not have to jump through more hoops than a heterosexual couple in order to have both names listed on their child's birth certificate. Moreover, as already demonstrated by the current litigation in Florida (and the *D.M.T.* case) and in other states, it would be unsurprising that a couple may find their request for a court order denied. One solution would be to update Florida's assisted reproductive technology statutes setting forth factors to be met that allows same-sex unmarried couples a chance to claim legal parentage and be listed on their child's birth certificate.

Non-genetic parents in same-sex relationships still face serious hurdles in seeking parental rights upon dissolution of the relationship. Under the current legal framework in Florida, which emphasizes biology, it is impossible – without marriage or adoption, and even then marriage is still uncertain – for both former partners of a same-sex couple to have standing to assert visitation rights, as only one can be biologically related to the child.<sup>39</sup> “By fixing biology as the key to visitation rights,” the current law in Florida has inflicted disproportionate hardship on the growing number of non-traditional families across the state.<sup>40</sup> Especially in the wake of *Obergefell*, this is a huge anomaly. For example, in the case of *Russell v. Pasik*, the Second District Court of Appeals distinguished *D.M.T.* in denying parental rights to a non-biological mother whose same-sex partner had children through donor insemination and to which she had raised for seven years.<sup>41</sup> The court declined to expand the definition of a parent and left it up to the legislature to institute a “policy change of this magnitude.”<sup>42</sup> The Court pointed out that regardless of her marital status, Pasik still could have made the decision to adopt the children, thereby guaranteeing her the rights of a parent.<sup>43</sup> However, a mother or father should not have to adopt his or her own child. Additionally, the court failed to take into consideration that adoption is not an option for every same-sex couple. Most often, adoption is a very lengthy, time-consuming, intrusive, and expensive process. A lot of same-sex couples simply do not have the resources to

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<sup>38</sup> Joslin, *supra* note 35, at 2.

<sup>39</sup> *Brooke S.B. v. Elizabeth A.C.C.*, 61 N.E.3d 488, 498 (N.Y. 2016).

<sup>40</sup> *Id.* at 499.

<sup>41</sup> *Russell*, 178 So. 3d at 60 (“When, as in the present case, there is not a biological connection between petitioner and child and it is a non-parent that is seeking to establish legal rights to a child, there is no clear constitutional interest in being a parent.”).

<sup>42</sup> *Id.* at 61.

<sup>43</sup> *Id.* Florida's statutory ban on homosexuals adopting children was stricken as unconstitutional in 2010, during the pendency of Russell and Pasik's relationship. See *Fla. Dep't of Children & Families v. Adoption of X.X.G.*, 45 So. 3d 79 (Fla. 3d DCA 2010).

achieve legal parent status through adoption. The non-genetic parent is thereby doomed to be a legal stranger to the child; however, there must be another route.

“It is not the biological relationship per se, but rather the assumption of the parental responsibilities which is of constitutional significance.”<sup>44</sup> It is in this context that Florida can look to the state of New York for a solution. In the case of *Brooke S.B. v. Elizabeth A.C.C.*, New York’s highest court held that where a partner shows by clear and convincing evidence that the parties agreed to conceive a child and to raise the child together, the non-biological, non-adoptive partner has standing, as a parent, to seek visitation and custody.<sup>45</sup> The court relied heavily on the notion that each of these couples made a commitment to bring a child into a two-part family, and it is unfair to the children to let the commitment go unenforced and also refused to only consider biology as the primary factor.<sup>46</sup> Additionally, Florida should model Delaware’s Establishment of Parent-Child Relationship statute. Delaware’s paternity statute establishes the various ways that a mother-child,<sup>47</sup> father-child,<sup>48</sup> or de facto parent<sup>49</sup> relationship can be established and are

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<sup>44</sup> *D.M.T.*, 129 So. 3d at 328 (quoting *Matter of Adoption of Doe*, 543 So. 2d 741, 748 (Fla. 1989).

<sup>45</sup> *Brooke S.B.*, 61 N.E.3d at 500-01.

<sup>46</sup> *Brooke S.B.*, 61 N.E.3d at 497-99.

<sup>47</sup> See 13 Del.C. § 8-201 (a)(1)-(6) (2017):

- (a) The mother-child relationship is established between a woman and a child by:
- (1) The woman's having given birth to the child, unless she is not the intended parent pursuant to a gestational carrier arrangement;
  - (2) An adjudication of the woman's maternity;
  - (3) Adoption of the child by the woman;
  - (4) A determination by the court that the woman is a de facto parent of the child; or
  - (5) The woman's intending to be the mother of a child born pursuant to a gestational carrier arrangement; or
  - (6) The woman's having consented to assisted reproduction by another woman under subchapter VII of this chapter which resulted in the birth of the child.

<sup>48</sup> See 13 Del.C. § 8-201 (b)(1)-(6) (2017):

- (b) The father-child relationship is established between a man and a child by:
- (1) An un rebutted presumption of the man's paternity of the child under § 8-204 of this title;
  - (2) An effective acknowledgment of paternity by the man under subchapter III of this chapter, unless the acknowledgment has been rescinded or successfully challenged;
  - (3) An adjudication of the man's paternity;
  - (4) Adoption of the child by the man;
  - (5) The man's having consented to assisted reproduction by a woman under subchapter VII of this chapter which resulted in the birth of the child; or
  - (6) A determination by the court that the man is a de facto parent of the child.

<sup>49</sup> See 13 Del.C. § 8-201 (c)(1)-(3) (2017):

- (c) De facto parent status is established if the Family Court determines that the de facto parent:

applicable to both heterosexual and homosexual couples. Of significance is the fact that this statute contemplates assisted reproductive technology in conceiving children and has routes to confer parental rights in those situations. Courts must do the important work of examining actual evidence of each parent’s bond with the child and each parent’s ability to meet the needs of the child. We terminate parental rights to children when the continued presence of that parent is not in the child’s best interest, so why can we not *give* parental rights to a child’s non-biological parent when it is in the child’s best interest to have them in their life?<sup>50</sup> Affording equal rights of parentage would foster instead of disrupt the permanency and stability important to a child’s best interest.<sup>51</sup> Adopting the position set forth in *Brooke S.B. v. Elizabeth A.C.C.* and the statutory framework of Delaware’s Establishment of Parent-Child Relationship statute would allow Florida to expand the legal definitions of parents and provide for greater legal rights and protections for the relationships between children and individuals who function in parental roles.<sup>52</sup> We can no longer ignore the fact that when a child is involved, Florida’s strong public policy of protecting the child by determining custody matters in accordance with the best interests of the child is implicated.<sup>53</sup>

“In a family law system in which intent and function govern over biology and gender, same-sex and different-sex couples are similarly situated, both inside and outside marriage. And in a world in which marriage equality is accepted – the post-*Obergefell* world – sexual orientation nondiscrimination becomes a more universal norm.”<sup>54</sup> Again, scientific advancements in reproductive technology that allow individuals to exercise their desire and basic right to have children were not contemplated by society decades or even centuries ago.<sup>55</sup> Currently, there exists a disparity in the support and custody contexts in Florida, thus creating an inconsistency in

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(1) Has had the support and consent of the child's parent or parents who fostered the formation and establishment of a parent-like relationship between the child and the de facto parent:

(2) Has exercised parental responsibility for the child as that term is defined in § 1101 of this title; and

(3) Has 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.

<sup>50</sup> The refusal to do so harms children, “[b]y telling them they don’t have two parents, like other children, and harms the parent who is not the adoptive parent by depriving him or her of the legal status of a parent.” *Baskin*, 766 F.3d at 671.

<sup>51</sup> *Turner v. Steiner*, 398 P.3d 110, 117 (Ariz. Ct. App. 2017) (Winthrop, J., dissenting).

<sup>52</sup> Jessica Feinberg, *Consideration of Genetic Connections in Child Custody Disputes Between Same-Sex Parents: Fair or Foul?*, 81 Mo. L. Rev. 331, 365 (Spring 2016).

<sup>53</sup> *Brandon-Thomas*, 163 So. 3d at 648.

<sup>54</sup> See NeJaime, *supra* note 15, at 1258.

<sup>55</sup> *D.M.T.*, 129 So. 3d at 338.

the rights and obligations attendant to being a parent. “The dissolution of a non-traditional household can have damaging consequences on a child which are identical to the consequences of a dissolution of a traditional marriage-based relationship.”<sup>56</sup> Yet, the child in the non-traditional family in Florida is not protected either by statute or by the ability of the courts to secure the best interests of the child when the household dissolves.<sup>57</sup> Quickly establishing the parentage of Florida’s children born from same-sex relationships is crucial to the safety and welfare of the children. Social science studies have revealed time and time again the trauma children suffer as a result of separation from a primary attachment figure – such as a de facto parent – regardless of that figure’s biological or adoptive ties to the children.<sup>58</sup>

“Marriage responds to the universal fear that a lonely person might call out only to find no one there. It offers the hope of companionship and understanding and assurance that while both still live there will be someone to care for the other.”<sup>59</sup> So too should a child born of a marriage or committed relationship be able to call out to both parents when care is needed. Something as rigid as a biological connection should not cut off a non-biological parent’s right to parent that child when that parent has cared for, loved, and provided support for that child.<sup>60</sup> By unnecessarily limiting the children’s opportunity to maintain bonds which are, no doubt, crucial to their development, the lack of legal remedies available to unmarried same-sex couples, and the uncertainty as to married same-sex couples, has fallen hardest on the children – this Florida can no longer condone. Florida’s children are simply too important.<sup>61</sup>

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<sup>56</sup> *Wakeman*, 921 So. 2d at 675 (Van Nortwick, J., specially concurring).

<sup>57</sup> *Id.*

<sup>58</sup> *Brooke S.B.*, 61 N.E.3d at 499.

<sup>59</sup> *Obergefell*, 135 S.Ct. at 2600.

<sup>60</sup> “The intangible fibers that connect parent and child have infinite variety. They are woven throughout the fabric of our society, providing it with strength, beauty, and flexibility. It is self-evident that they are sufficiently vital to merit constitutional protection in appropriate cases.” *D.M.T.*, 129 So. 3d at 326 (citations omitted).

<sup>61</sup> *S.M. v. Dep’t of Children and Families*, 202 So. 3d 769, 784 (Fla. 2016).

## NEWS AND ANNOUNCEMENTS

### **Register for the 2018 ABA Midyear Meeting**

The ABA Midyear Meeting will be held in Vancouver, British Columbia, from February 2, 2018 through February 4, 2017. The meeting promises to host meaningful CLE programming, speakers, and special events. Both the “Big Bar” and Young Lawyers Division will be hosting an array of CLE programs, business meetings, and social networking events.

Please let us know if you’ll be in attendance so that we can arrange for an in person meet-up!