

White Paper for
Legislative Reform

Unequal Parenthood: How U.S. Parentage Law Fails LGBTQ+ Families in the Age of Assisted
Reproduction—and How to Fix It

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I. INTRODUCTION

LGBTQ+ families are a vital and growing part of the American social fabric. Yet, despite advances in marriage equality and visibility, the legal system governing parentage remains deeply rooted in heteronormative assumptions about biology, gender, and familial structure. Assisted reproductive technology (“ART”) has enabled LGBTQ+ individuals in family formation driven by technological advances including in vitro fertilization (“IVF”), donor insemination, and gestational surrogacy.¹ These forms of reproduction, for LGBTQ+ couples, are not used as a last resort, but rather as their primary means to have a biologically related child to at least one parent.² Regardless of these advancements, however, the legal framework governing parentage has failed to evolve at the same pace.

Traditionally, legal parenthood has been determined by either genetic connection or gestation, with marital presumptions serving as secondary mechanisms for assigning parental status and rights.³ While this framework may adequately function in the context of heterosexual reproduction without technological intervention, it completely dissolves when applied to LGBTQ+ families formed through ART. The consequences of this legal gap are not hypothetical or theoretical, but instead, threaten the familial bond (and legal rights) these families seek to obtain. Non-biological parents in same-sex relationships often times lack automatic legal recognition at birth, despite joint family planning, financing, and performing parental duties.⁴ In many jurisdictions, these parents must undergo second-parent adoption, a process that is both time consuming and costly. During the period before the adoption is finalized, the non-biological parent

¹ Douglas NeJaime, *The Nature of Parenthood*, 126 Yale L.J. 2260 (2017)

² *Id.*

³ *Id.*

⁴ *Id.*

may have no enforceable rights, leaving both the parent and child legally vulnerable in the event of separation, illness, or death. These adoption proceedings are ongoing while the non-recognized parent is still performing their intended parental duties, regardless of legal status.

These legal vulnerabilities are further complicated by geographic inconsistencies and inadequacies. Across state lines, parentage laws vary significantly, creating a patchwork system of parental recognition that creates a structure of instability for nonheteronormative families.⁵ Thus, a family that may be fully recognized in one jurisdiction may face legal uncertainty, or entire denial of parental rights, in another. This instability directly undercuts the core functions of family law; that is, to provide predictability and protection for the children and their caregivers.

These challenges are even more severe for transgender and non-binary individuals. Gender affirming care may affect fertility, yet access to fertility preservation is often limited and inadequately covered by insurance.⁶ Moreover, legal systems frequently rely on gendered definitions of parenthood, leading to misgendering on birth certificates and inconsistencies across legal documents.⁷ These barriers reflect a broader failure to account for gender diversity within existing legal frameworks. This failure is not incidental.

The Supreme Court's decision in *Dobbs v. Jackson Women's Health Organization* further destabilizes the landscape.⁸ In rejecting the substantive due process framework that upheld reproductive rights, the court has cast doubt on a variety of related liberties, including those that support LGBTQ+ family formation.⁹ Justice Thomas's concurrence explicitly called for the

⁵ NeJaime, *supra* note 1.

⁶ National LGBTQ Task Force, Health Disparities Report (2021).

⁷ *Id.*

⁸ *Dobbs v. Jackson Women's Health Org.*, 597 U.S. 215 (2022).

⁹ *Id.*

reconsideration of decisions such as *Obergefell v. Hodges*, which recognized same-sex marriage as a fundamental right.¹⁰ Since many parentage protections for LGBTQ+ families are tied to marriage, specifically spousal presumption, any erosion of marriage equality would have immediate and far reaching consequences.

This paper argues that the current U.S. parentage regime systemically disadvantages LGBTQ+ families by prioritizing biological connection and heteronormative marital units over intent and the performance of parental duties, thus undercutting the best interests of the child. To address these failures, this paper provides a comprehensive framework for reform grounded in three principles: intent-based parentage, equitable access to reproductive technologies, and reproductive justice.

First, it argues that legal parenthood should be determined by intent (specifically, the intention to conceive and raise a child) rather than leaning solely on biology or marital status. Second, it contends that access to ART must be expanded through insurance mandates within a broader reproductive justice framework that emphasizes not only the right to have children, but also the right to parent them in safe and supportive environments.¹¹

The remainder of this paper examines the structural inequalities that shape access to family formation, focusing on economic barriers and disparities, doctrinal shortcomings of current parentage law, including the limitations of biological based frameworks and the burdens of second parent adoption. This paper further explores the implications of *Dobbs* for LGBTQ+ family recognition, highlighting the fragility of constitutional protections. Finally, the paper ends with a model statutory framework proposal designed to align parentage with the reality of what families

¹⁰ *Id.* (Thomas, J., concurring).

¹¹ Reproductive Justice Collective (2020).

look like in the United States. Ultimately, this paper conceptualizes the reform is both necessary and achievable to create and maintain equitable parenting laws in the United States. By updating parentage law to reflect how families are actually formed, lawmakers can promote stability, equality, and the best interests of children (a key principle central to family law). In doing so, we can move close to a legal system that recognizes and values all families, not simply those that fit within the archaic norms of family formation.

II. STRUCTURAL INEQUALITY IN FAMILY FORMATION

The ability to form a family through assisted reproductive technology is not distributed evenly across the population, rather, it is shaped by a series of structural inequities, including economic status and geographic location. For LGBTQ+ individuals, these inequities are particularly pronounced when ART is the primary pathway to genetic parenthood, which has proven to be most families. The result is a system in which access to legally recognized family formation is conditioned on factors that extend far beyond the choice of the intended parents.

a. Economic Barriers to Assisted Reproductive Technology

The most immediate barrier to ART is fiscal. Procedures such as in vitro fertilization (IVF), donor insemination, and gestational surrogacy are far too expensive. A single cycle of IVF can cost between \$12,00 and \$20,000, excluding necessary medication, which can add several thousand more dollars.¹² Surrogacy arrangements almost always exceed far more than \$100,000 when accounting for agency fees, medical costs, legal services, and compensation for the surrogate.¹³ These costs are not simply high, they are structurally exclusionary.

¹² American Society for Reproductive Medicine, *ART Costs Overview* (2023).

¹³ *Id.*

Unlike other forms of medical care, ART is classified as elective, meaning that insurance coverage is limited, or nonexistent.¹⁴ Even in states that mandate some level of fertility coverage, eligibility criteria frequently rely on narrow, and gendered, definitions of fertility that assume heterosexual relationships.¹⁵ Many policies require proof of unsuccessful attempts to conceive through unprotected intercourse, over a specified period of time. This standard is obviously impossible for same-sex couples to meet.

This framework entirely excludes LGBTQ+ couples from any sort of insurance coverage, and this is by design. It treats infertility as a deviation from heterosexual reproduction rather than a recognition that couples may require ART regardless of reproductive capacity. As a result of this inequity, LGBTQ+ individuals bear the full financial burden of family formation, reinforcing existing economic disparities. The consequences of these financial burdens leave individuals with sufficient resources navigating a complex system: paying for ART, securing legal representation, and completing necessary parentage processes. Moreover, it leaves those without the benefit of financial resources either (1) forgoing biological parenthood altogether; or (2) incurring massive debt as a means to grow a family. Because of this, access to family formation becomes further stratified along class lines, with monetary resources serving as a barrier to parenthood.

b. Geographic Disparities

Economic barriers are compounded by the geographic barriers as it pertains to access to assisted reproductive technology and its relationship to parentage. Parentage laws significantly vary across state lines, creating a fragmented legal system in which the recognition of parental

¹⁴ Movement Advancement Project, *LGBTQ Family Building* (2022).

¹⁵ *Id.*

rights depends heavily on location.¹⁶ Some states have adopted progressive frameworks that recognize intended parents from birth, often through pre-birth parentage orders or expanded marital presumptions. Others continue to rely on outdated statutes that prioritize biology and require post-birth adoption for the non-genetically related parent.

This patchwork system creates instability for families, particularly those who move across state lines. A parent legally recognized in one jurisdiction may lose that status in another, depending on how the receiving state interprets those parentage laws.¹⁷ The lack of uniformity also increases the complexity and cost of family formation. Families must often engage in “jurisdiction shopping,” seeking out states with more favorable surrogacy or parentage recognition.¹⁸ This process requires legal expertise and financial resources, further exploiting the inequality of parenthood for same-sex couples.

III. DOCTRINAL FAILURES IN PARENTAGE LAW

The structural inequalities outlined above are reinforced, and in many cases, manufactured, by the doctrinal foundations of U.S. Parentage Law. At its core, parentage law remains anchored in frameworks that prioritize biology, gestation, and heterosexual marriage. While these principles once provided a decently stable foundation for parental rights, they are currently deficient to take on the realities of family formation, specifically in the context of ART. The result is a legal framework that often fails to recognize LGBTQ+ parents, imposes burdensome alternatives to parentage, and produces inconsistent and inequitable outcomes across the board.

The Uniform Parentage Act (2017) (“UPA”) represents the most comprehensive attempt

¹⁶ American Society for Reproductive Medicine, *supra* note 1.

¹⁷ National LGBTQ Task Force, *Health Disparities Report* (2021).

¹⁸ NeJaime, *supra* note 1.

to modernize parentage law in the United States.¹⁹ The 2017 revision incorporates provisions addressing assisted reproduction and attempts to move beyond purely biological definitions of parentage. However, it remains only partially practiced due to uneven adoption across states and inconsistent implementation in states where it has been adopted. At the core of it, the UPA recognizes that parentage may arise from intent, particularly in the context of ART. This is a significant doctrinal shift as it acknowledges that individuals who plan for a child, consent to assisted reproduction, and undertake parental responsibilities should be legally recognized as parents regardless of genetic connection. However, because the UPA is not federally mandated, its protections are limited and fragmented. Some states have adopted the 2017 revisions in its entirety, others have adopted prior versions, and many have not adopted the UPA at all.

The lack of uniformity undermines the very purpose of the Act.²⁰ Families cannot, with any confidence, rely on consistent recognition across jurisdictions, and legal certainty remains vague. Moreover, even in adopting states, courts may interpret UPA provisions narrowly, requiring additional procedural safeguards that reintroduce the burdens that the revisions of the Act seek to eliminate.

a. Biology and Gestation as Default Rules

Historically, parentage has been determined through two primary mechanisms: genetic connection and gestation. The individual who gives birth is presumed to be the legal mother, while genetic contributors (commonly the biological father) may establish parentage through proof of biological connection.²¹ These rules developed in a context where reproduction occurred without

¹⁹ Uniform Parentage Act (2017)

²¹ Uniform Parentage Act (2017).

technological intervention and within heterosexual relationships. However, in the context of ART, these assumptions erode. A child may have multiple people involved in their contraception and birth (egg donors, sperm donors, gestational carriers, and intended parents), where only some intend to assume any parental responsibilities. With this, traditional doctrines fail to distinguish between biological connection and parental intent.

b. The Burden and Limits of Second Parent Adoption

In response to the limitations of traditional doctrines, many LGBTQ+ families rely heavily on second parent adoption as a legal mechanism for securing legal rights as a parent. This process allows a non-biological parent to adopt their partner's child without terminating the rights of the biological parent. While it provides a pathway to recognition, it is, at its core, not suitable in the context which it is often used (situations involving unrelated individuals, not for co-parents who jointly planned to raise the child from birth). The process of second parent adoption imposes a series of requirements like home studies, background checks, and court hearings that are costly and time consuming.²² These requirements may take months or even years to satisfy, during which the non-biological parent lacks enforceable rights, but is expected to perform parental responsibilities.

Even when completed, the second parent adoption does not entirely resolve the problem as recognition may not be enforced across state lines, specifically in jurisdictions with restrictive parentage laws.²³ Because of this, families may still face uncertainty when traveling or relocating, undermining the purpose of the adoption process, familial stability.

²² Courtney G. Joslin, *Protecting Children*, 83 S. Cal. L. Rev. 1177 (2010).

²³ Douglas NeJaime, *The Nature of Parenthood*, 126 Yale L.J. 2260 (2017).

For LGBTQ+ families, this failure is particularly pronounced. A non-biological parent in a same-sex relationship may be fully involved in the decision to conceive, the financial investment in ART, and the ongoing care of the child, however, may lack legal recognition as a parent.

c. The Emergence and Limitations of Intent Based Parentage

Due to these shortcomings described above; courts have increasingly turned to intent-based parentage as an alternative framework. Under this approach, legal parenthood is assigned based on the intention to conceive and raise a child, rather than leaning solely on biological connection. This principle is specifically important as it involves ART, where intent often provides a clearer indication of parental responsibility.

The Uniform Parentage Act (UPA) reflects this shift by incorporating provisions that recognize intended parents in assisted reproduction arrangements.²⁴ For example, individuals who consent to the use of donor gametes with the intention of becoming parents may be recognized as such, regardless of biological connection. Despite this, however, the intent-based approach still remains incomplete as its adoption is uneven and inconsistent.²⁵ First, since the revisions of the UPA in 2017, not all states have implemented it. Second, even where it is recognized, procedural requirements such as court orders and written agreements exhibit yet another barrier for families who lack resources.

d. Marriage as a Proxy for Parentage

The marital presumption stands as another key feature of modern parentage law. Historically applied to heterosexual couples, the marital presumption provides that a child born within a marriage is presumed to be the legal child of both spouses. Following the Supreme Court's

²⁴ Uniform Parentage Act (2017).

²⁵ *Id.*

decision in *Obergefell v. Hodges*, this presumption has been extended to same-sex couples.²⁶ Further, *Pavan v. Smith* reinforced this principle by holding that states must apply birth certificate presumptions equally to same-sex married couples.²⁷ This decision marked a vital step toward formal equality, reinforcing the idea that married LGBTQ+ couples receive the same recognition as their heterosexual counterparts. However, the reliance on this as the primary mechanism for parentage excludes unmarried couples who may be equally committed to raising a child but lack access to the marital presumption. Secondly, it conflates parental rights to marital status rather than to the substantive relationship between the parent and child. This reliance also creates vulnerability in the current constitutional climate, where the stability of marriage equality itself stands uncertain after the Supreme Court's ruling of *Dobbs v. Jackson Women's Health Organization*.²⁸

IV. CONSTITUTIONAL FRAGILITY POST-DOBBS

The doctrinal shortcomings of parentage law do not exist in a vacuum; they are embedded within a broader constitutional framework that is itself undergoing significant transformation. The decision in *Dobbs v. Jackson Women's Health Organization* represents a pivotal moment in constitutional law.²⁹ By overturning *Roe v. Wade*, the Court rejected the substantive due process framework that had protected reproductive autonomy for nearly half a century.³⁰ While the majority opinion emphasized abortion, the reasoning extends to other rights grounded in privacy and liberty. *Dobbs* introduces uncertainty into a range of rights that underpin LGBTQ+ family

²⁶ *Obergefell v. Hodges*, 576 U.S. 644 (2015).

²⁷ *Pavan v. Smith*, 582 U.S. 563 (2017).

²⁸ *Dobbs v. Jackson Women's Health Org.*, 597 U.S. 215 (2022)

²⁹ *Id.*

³⁰ *Roe v. Wade*, 410 U.S. 113 (1973)

formation, including marriage equality, access to contraception, and the broader concept of privacy.

The Supreme Court, for centuries, has recognized a set of fundamental rights grounded in the Due Process Clause of the Fourteenth Amendment. These rights included the ability to make intimate decisions about family, reproduction, and personal relationships without undue government interference.³¹ Cases like *Griswold*, *Lawrence*, and *Obergefell* collectively established a framework that protected both reproductive freedom and autonomy, as well as LGBTQ+ relationships.³² However, in *Dobbs*, this Court rejected this framework, holding that the Constitution does not conger a right to abortion, criticizing prior reliance on substantive due process as “lacking historical grounding.”³³ The majority opinion calls into question the doctrinal foundation of other privacy based rights, and, in his concurrence, Justice Clarence Thomas makes this implication explicit. He made clear that the Court should reconsider landmark precedent such as *Griswold*, *Lawrence*, and *Obergefell*, all of which rely on the same substantive due process principles rejected in *Dobbs*.³⁴

The potential shift from *Obergefell* is particularly significant for LGBTQ+ parentage as it does not solely confer the right to marry, but provides same-sex couples access to legal presumptions and benefits that directly correlate to parentage, such as marital presumption. Beyond marriage, *Dobbs* raises concerns about the future of reproductive autonomy in a broader sense.

³¹ *Griswold v. Connecticut*, 381 U.S. 479 (1965); *Lawrence v. Texas*, 539 U.S. 558 (2003).

³² *Id.*

³³ *Dobbs v. Jackson Women’s Health Org.*, 597 U.S. 215 (2022)

³⁴ *Id.* (Thomas, J., concurring).

While ART has generally been regulated at a state level, its availability has been upheld by a broader constitutional commitment to privacy and personal decision making in instances of reproduction. Stripped of this constitutional commitment, states may have greater freedom to regulate, and restrict access to ART. This potential regulatory scheme could include limitations on surrogacy, restrictions on the use of donor gametes, or eligibility requirements tied to marital status or sexual orientation.³⁵ These measures would disproportionately affect LGBTQ+ individuals, for whom ART is essential for biological reproduction. Further, the absence of constitutional protection may embolden states to enact policies that reflect moral or ideological objections to non-traditional family structures. This raises the possibility of a legal landscape in which access to ART (and the ability to form a family) is contingent upon compliance with norms.

In light of these limitations, legislative reform emerges as the most viable path forward. Unlike judicial decisions, statutes can provide clear, prospective rules that apply uniformly within a jurisdiction. They also can be designed to address specific gaps in the law, such as the recognition of intended parents in ART arrangements. Importantly, legislative action can operate independently of constitutional doctrine. By establishing statutory rights to parentage and access to ART, lawmakers can create protections that are not contingent on the continued viability of substantive due process. This is particularly critical in the post-Dobbs scheme, where constitutional protections are increasingly unstable.

Legislative reform further offers an opportunity to incorporate principles of equity and inclusion that are difficult to include through case law. Statutes can explicitly prohibit discrimination on sexual orientation or gender identity, mandate insurance coverage for fertility

³⁵ Movement Advancement Project, *LGBTQ Family Building* (2022).

services, and require gender-neutral language in legal documents. This is difficult to achieve when working to establish precedent on a case-by-case basis.

V. LEGISLATIVE REFORM AND POLICY RECOMMENDATIONS

The preceding analysis demonstrates that the current parentage framework is systemically inadequate for LGBTQ+ families. It relies on outdated doctrinal assumptions, produces inequitable outcomes, and is increasingly unstable in the post-*Dobbs* landscape. While judicial solutions are important, they are insufficient to address these systemic failures. Rather, legislative reform is required to redefine parentage in a way that reflects family formation as it stands today.

a. Recentring Parentage based on Intent

The first step towards meaningful reform is to shift from biological based definitions of parenthood to intent based parenthood. As discussed, traditional doctrines fail to account for the realities of ART, where multiple individuals may contribute to the creation of a child, but not all intend to assume parental responsibilities. An intent based framework resolves this issue by recognizing parents who:

1. Plan for the conception of the child;
2. Consent to the use of assisted reproduction; and
3. Intend to raise the child as their own.

This approach is already reflected in the UPA; however, it must be broadly adopted for it to be effective. Intent should be treated as the primary determinant of parentage, with biology serving as a secondary, or more of an evidentiary role rather than a dispositive role. It is important to note that intent-based parentage aligns with the existing purposes of family law. It provides stability, caregiving, and bolsters the best interests of the child by ensuring those who undertake parental responsibilities are recognized as such from the outset.

b. Universal Access to Pre-Birth Parentage Orders

A critical component of this framework is the availability of pre-birth parentage orders. These orders allow intended parents to establish legal recognition before the child is born, eliminating the need for post-birth adoption proceedings. Pre-birth orders serve several key functions:

1. To provide immediate legal certainty at the moment of birth;
2. Reduce the rise of disputes of parentage;
3. Ensure continuity of care in medical and emergency situations.

Despite these benefits, access to pre-birth orders varies widely across states.³⁶ In some jurisdictions, they are readily available; in others, they are restricted or unavailable altogether. The inconsistency undermines their effectiveness and directly contributes to the issues that the patchwork system provides. Reform should mandate the availability of pre-birth orders in all jurisdictions and streamline the process to make it accessible. Requirements should be limited to the demonstration of intent, without imposing unnecessary procedural barriers that disproportionately burden marginalized families.

c. Expanding Access to Assisted Reproductive Technology

Legal recognition alone is insufficient if individuals lack access to the means of family formation. Accordingly, legislative efforts must also address access to ART, which remains heavily structured by cost and insurance coverage.

1. *Insurance Mandates*. States should require insurance providers to cover fertility treatments and fertility preservation services, including those used in the context of ART. Criteria for coverage must be revised to eliminate heteronormative definitions of infertility and instead

³⁶ Movement Advancement Project, *LGBTQ Family Building* (2022).

recognize that *all* individuals may require ART regardless of reproductive capacity.³⁷

2. *Fertility Preservation for Transgender Individuals.* Special attention must be given to transgender individuals who may have unique barriers to fertility preservation. Insurance coverage should include procedures such as sperm and egg freezing prior to gender affirming care, ensuring individuals are not forced to choose between parenthood and gender affirmation.³⁸
3. *Anti-Discrimination Protections.* Legislation should explicitly prohibit discrimination in access to ART based on sexual orientation, gender identity, marital status, or socioeconomic status. Such protections are essential to ensuring that access to family formation is not conditioned on conformity to traditional norms.

d. Ensuring Interstate Recognition and Uniformity

One of the most significant sources of instability in the current parentage law is the lack of uniformity across jurisdictional bounds. Families formed through ART often rely on legal recognition that may not be honored outside the state in which it was established. To address this issue, reform must ensure interstate recognition of parentage. At a minimum, states should be required to recognize valid parentage orders issued in other jurisdictions.

In reality, federal legislation must establish baseline standards for parentage recognition in ART cases. While family law has traditionally been left up to the states, the interstate nature of family formation through ART justifies a more coordinated and standardized approach.

³⁷ *Id.*

³⁸ National LGBTQ Task Force, *Health Disparities Report* (2021).

e. Gender Neutral and Inclusive Legal Language

Another critical reform is the adoption of gender inclusive language in statutes, court forms, and administrative practices. Many existing parentage laws rely on gendered terms such as “mother” and “father,” which fail to account for the diversity of our social landscape. Gender neutral terms will serve multiple purposes:

1. Ensure that legal recognition aligns with the individuals’ gender identities;
2. Reduces administrative confusion and inconsistency;
3. Promotes inclusivity and respect within legal systems.

For transgender and non-binary parents, this reform is particularly important. Accurate representation on birth certificates and other legal documents is essential to securing parental rights and navigating institutions such as healthcare and education.

VI. MODEL STATUTORY FRAMEWORK

Taking into account the principles outline above; this section proposes a model statutory framework for LGBTQ+ parentage. While simplified, it illustrates how legislative reform can put into effect intent-based parentage and promote equality in all family units.

Section 1. Definition of Parent

- (a) A “parent” is an individual who demonstrates intent to conceive and raise a child, including through the use of assisted reproductive technology.
- (b) Intent may be established through written agreement, conduct, or judicial determination consistent with the best interests of the child.

Section 2. Establishment of Parentage

- (a) Courts shall issue pre-birth parentage orders upon a showing of intent and compliance with statutory requirements.
- (b) Such orders shall confer full parental rights and responsibilities upon the birth of the intended child.

Section 3. Non-Discrimination

- (a) No individual shall be denied access to assisted reproductive technology or parentage recognition on the basis of sexual orientation, gender identity, marital status, or socioeconomic status.

Section 4. Interstate Recognition

- (a) Parentage determinations made in one jurisdiction shall be recognized in all other jurisdictions.

Section 5. Gender-Neutral Language

- (a) All statutory and administrative language shall be gender-neutral and inclusive of diverse family structures and gender identities.

Section 6. Access and Equity

- (a) The state shall ensure equitable access to assisted reproductive technology through insurance mandates and public funding mechanisms where appropriate.

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