A Full Constellation of Benefits: How *In Re the Custody of N.S.V.* Exemplifies the Need for Courts and Legislatures to Readdress Definitions of Parenthood in Light of the Recognition of Same-sex Relationships

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Two women fall in love, move in together, and decide to start a family.[1] While two women cannot both *genetically*[2] be the parent of one child, they can choose when to have a child, which sperm donor to use, and how to co-parent a child.[3] However, no matter how much both women see themselves as parents of the child, in the United States that is no guarantee that a court would declare both women to be the *legal parents* of the child.[4]

Determining *who* is a parent in the United States is a complicated and evolving matter.[5] Courts ascribe the matter of

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1. *In re* Custody of N.S.V., No. A18-0990, 2019 WL 4412722, at *1 (Minn. Ct. App. Sept. 16, 2019). This Note will reflect on how the Minnesota Court of Appeals decided who is the legal parent of a child in this situation, discuss different tension points in family law about what makes a parent, and evaluate what those tension points mean for same-sex couples.

2. *See* Roni Dengler, *The Slow March Toward the First Same-Sex Couple to Have a Baby*, DISCOVER (Jan. 28, 2020), https://www.discovermagazine.com/health/the-slow-march-toward-the-first-same-sex-couple-to-have-a-baby [https://perma.cc/2GLW-C49F] (discussing the difficulties scientists have faced in recent years in producing a biological offspring from two mice of the same sex).

3. *See N.S.V.*, 2019 WL 4412722, at *1 (following this same fact pattern).

4. *See, e.g.*, *id.* (holding that the non-biological parent of the children the couple raised together is not a legal parent and shall not receive custody).

5. KATHLEEN KELLEY REARDON & CHRISTOPHER T. NOBLET, CHILDHOOD DENIED 106 (2009) ("The history . . . reveals how views of what matters in determining the 'best interests' of children at risk have changed over time—sometimes because of legal decisions and sometimes because of cultural shifts . . . .") (summarizing MARY ANN MASON, FROM FATHER'S PROPERTY TO CHILDREN'S RIGHTS: THE HISTORY OF CHILD CUSTODY (1994)); *see* June Carbone, *The Legal Definition of Parenthood: Uncertainty at the Core of Family Identity*, 65 LA. L. REV. 1295, 1295 (2005) ("The definition of parentage—and with it the determination of which adults receive legal recognition in children's lives—has become the most contentious issue in family law. Not only are jurisdictions irreconcilably divided in their approach to parentage, decisions under settled law in a given county may not necessarily come out the same way.").

family law—and more specifically, the definition of a parent—to the states, rather than the federal government. Therefore, there is no uniform definition of a "parent."[6] This system fails LGBT families, as many states have legal definitions of parents that focus on matters that often do not apply to same-sex parents. These definitions focus on marriage, biology, and adoption.[7] While some state legislatures and courts have changed their policies to focus on who is functionally a parent or on the intention to be a parent, the process is not universal or streamlined in a way that makes it clear to unmarried LGBT individuals how to claim legal parenthood.[8]

Historically, legal parenthood for a non-gestational parent was based on marriage.[9] The child's mother was the person who gave birth to the child, and courts would likely find the father was the person married to that woman, under the assumption that he was the biological parent.[10] When a court adjudicates a legal parent, it "is a status that [comes with] rights and obligations."[11] In the early nineteenth century, English common law gave married fathers the right to custody after divorce with the obligation to "protect, support, and educate their children."[12] In the middle of the nineteenth century, the "tender years" doctrine became popular with legislatures and courts, giving custody of young children to

6. Sosna v. Iowa, 419 U.S. 393, 404 (1975) (stating that domestic relations, and thus the definition of parentage, is "an area that has long been regarded as a virtually exclusive province of the States"); *see* Douglas NeJaime, *The Family's Constitution*, 32 CONST. COMMENT. 413, 414 (2017) ("[F]amily law is generally perceived as a body of state law.") [hereinafter NeJaime, *The Family's Constitution*].

7. *See infra* notes 27–33 and accompanying text; *see also N.S.V.*, 2019 WL 4412722, at *1 (demonstrating how Minnesota is one state where the policy behind its laws focuses on biology, marriage, or legal adoption in a way that prevents a non-biological individual in a same-sex relationship who raises children from gaining recognition as a parent in court); MARY ANN MASON, FROM FATHER'S PROPERTY TO CHILDREN'S RIGHTS: THE HISTORY OF CHILD CUSTODY 191 (1994) ("Historically, biological parenthood has been recognized or denied by the law to promote marriage, to protect inheritance rights, and to elicit child support.").

8. *Compare* Brooke S.B. v. Elizabeth A.C.C., 61 N.E.3d 488 (N.Y. 2016) (applying an intent approach for same-sex parentage), *with* Elisa B. v. Superior Court, 117 P.3d 660 (Cal. 2005) (applying a functional approach for same-sex parentage).

9. MASON, *supra* note 7, at 4–6 (explaining that until the middle of the nineteenth century, a married woman's identity was legally merged into that of the husband, making the children the property of the husband).

10. Andrea E. Stumpf, *Redefining Mother: A Legal Matrix for New Reproductive Technologies*, 96 YALE L.J. 187, 189 (1986); Katharine K. Baker, *Bargaining or Biology - The History and Future of Paternity Law and Parental Status*, 14 CORNELL J.L. & PUB. POL'Y 1, 12 (2004).

11. Baker, *supra* note 10, at 2.

12. Joan B. Kelly, *The Determination of Child Custody*, 4 FUTURE CHILD. 121, 121 (1994).

their mothers.[13] By the 1940s, courts strongly preferred that mothers have custody, as psychologists found that mothers were better suited to raise children.[14] It was not until the 1970s that the concept of joint custody emerged, allowing both parents in a divorce to retain the rights and obligations of parenthood.[15] During this time, consideration of the "concept of the psychological [parent] (rather than biological)" in determining the best interest of the child gained popularity.[16] In the 1990s legislatures began focusing on finding two parents for every child to increase child support enforcement.[17]

Historically, the emphasis on marriage assumed that the husband was also the biological father of the child, and that a biological father who did not marry the mother forfeited a right to a role in the child's life.[18] Courts reinforced this idea in two ways: by limiting the spouse's ability to contend that the husband had no biological connection to the child and by using equitable doctrines to limit a husband's ability to deny responsibility for support where he knowingly assumed responsibility for a child he knew he had not fathered.[19] Once it became possible to determine paternity with certainty, however, and once social mores changed, the courts had to deal with the conflicting roles of multiple adults who may form connections to children.[20]

Background

Courts and legislatures continue to debate a series of points that come into tension in determining who is a legal parent. If both a husband and biological father are involved in a child's life, which one should the court declare to be the legal parent?[21] Should the court pick the husband to support the institution of marriage? Or

13. *Id.* at 122; REARDON & NOBLET, *supra* note 5, at 91–92.

14. Kelly, *supra* note 12, at 122.

15. *Id.*

16. *Id.*; *see* Painter v. Bannister, 140 N.W.2d 152 (Iowa 1966) (finding that grandparents should have custody of a child over the father because the child had developed a psychological bond with the grandparents); NeJaime, *The Family's Constitution*, *supra* note 6, at 413–14.

17. Kelly, *supra* note 12, at 123.

18. Theresa Glennon, *Somebody's Child: Evaluating the Erosion of the Marital Presumption of Paternity*, 102 W. VA. L. REV. 547, 571–85 (2000).

19. *Id.* at 550–51.

20. *Id.* at 552.

21. *See* Michael H. v. Gerald D., 491 U.S. 110 (1989) (plurality opinion) (finding that a biological father does not have a fundamental right to be a legal father when a presumptive father, married to the child's mother, had been acting as the father for a number of years).

should the court pick the biological father because of a special connection between a father and child through biology, or because the child will wonder about the biological parent?[22] Does a non-biological adult who raises a child when a biological parent is absent have a greater claim to parenthood than a biological parent? Should a court find two parents whenever possible, or should a court allow functioning single parents to be the sole parent?

The answers to these questions have changed over time as society, families, and an understanding of psychology have changed.[23] Today, courts face the challenge of defining who is a parent as more same-sex couples are having children.[24] In the landmark case *Obergefell v. Hodges*, which legalized same-sex marriage, Justice Kennedy wrote that same-sex parents should be able to marry *so* they could raise children together in marriage.[25] The Supreme Court found that same-sex couples should have the same constellation of benefits that opposite-sex couples should have, including the right to "marry, establish a home and bring up children" as a central part of the liberty protected by the Due Process Clause.[26]

Even though the *Obergefell* decision focused on allowing same-sex couples to marry to provide greater recognition and protection for their families, the case did not engage with ideas for providing recognition and protection for same-sex families in the United States where the couple is not married. There are little protections for same-sex couples raising a child today. Using biology as a touchstone for legal parenthood does not work for same-sex couples

22. *See* Samantha Besson, *Enforcing the Child's Right to Know Her Origins: Contrasting Approaches Under the Convention on the Rights of the Child and the European Convention on Human Rights*, 21 INT'L J.L. POL'Y & FAM. 137 (2007) (comparing the balance of a child's social and biological identities struck by the Convention on the Rights of the Child and that of the European Convention on Human Rights).

23. REARDON & NOBLET, *supra* note 5, at 89 (describing how starting in colonial times, the lack of communication between colonies caused "cultural differences and social values [to] develop[] independently" and as communication increased among the newly formed states over time, different ideas about families were shared across different cultures and legal precedence).

24. Danielle Taylor, *Same-Sex Couples Are More Likely to Adopt or Foster Children*, U.S. CENSUS BUREAU (Sept. 17, 2020), https://www.census.gov/library/stories/2020/09/fifteen-percent-of-same-sex-couples-have-children-in-their-household.html [https://perma.cc/P744-U74B].

25. Obergefell v. Hodges, 576 U.S. 644, 667 (2015) ("A third basis for protecting the right to marry is that it safeguards children and families and thus draws meaning from related rights of childrearing, procreation, and education.").

26. *Id.* at 668 (quoting Zablocki v. Redhail, 434 U.S. 374, 384 (1978)).

who require a sperm or egg donor to have a child.[27] Using marriage as a touchstone also fails many same-sex couples who co-parent children. Many LGBT individuals consciously choose not to marry.[28] Whether for moral, social, or political reasons, many LGBT adults are not interested in getting married.[29] Adoption also fails as a touchstone to define legal parents for LGBT adults, as couples may lack the financial resources for adoption,[30] or may not realize the need to adopt to secure their status as a legal parent.[31] As recently as 2016, LGBT parents were prohibited from adopting children in several states.[32] Courts and legislatures should not assume that all same-sex couples will adopt their children.

Today, most states do not legally recognize a non-gestational parent if that individual is not married to the gestational parent. Only thirteen states have cases or laws that have recognized the non-gestational parent in an unmarried same-sex couple.[33] See Figure I.

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27. Dengler, *supra* note 2.

28. Cara Buckley, *Choosing to Say 'I Don't'*, N.Y. TIMES (Oct. 25, 2013), https://www.nytimes.com/2013/10/27/style/gay-couples-choosing-to-say-i-dont.html [https://perma.cc/9S93-EM5F].

29. *Id.*; PEW RSCH. CTR., A SURVEY OF LGBT AMERICANS 3 (2013), https://www.pewsocialtrends.org/2013/06/13/a-survey-of-lgbt-americans/ [https://perma.cc/A3PM-DSMG] (finding that while 76% of the general public is either married or says they would like to marry one day, only 60% of LGBT individuals surveyed answered the same).

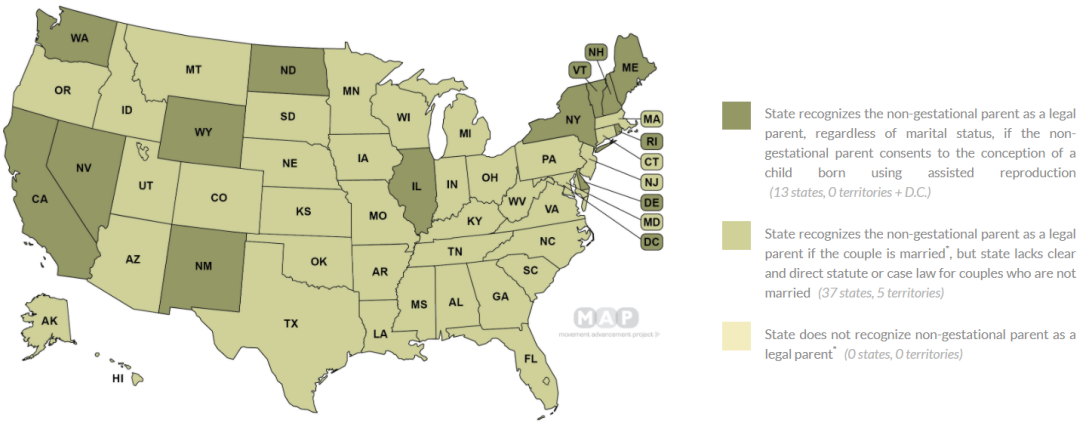
30. Brief for Appellant at 9, *In re* Custody of N.S.V., No. A18-0990, 2019 WL 4412722 (Minn. Ct. App. Sept. 16, 2019).

31. *See, e.g.*, *In re* M.C., 123 Cal. Rptr. 3d 856, 863 (Cal. Ct. App. 2011) (exemplifying a case in which a same-sex parent did not adopt her child "because she did not think she needed to since she and [the same-sex partner] were married").

32. Arthur Dobrin, *Barriers to Adoption for Same Sex Couples*, PSYCH. TODAY (Feb. 1, 2016), https://www.psychologytoday.com/us/blog/am-i-right/201602/barriers-adoption-same-sex-couples [https://perma.cc/VL4C-G88S]; *see States Where Same-Sex Couples Are Able to Get Joint and/or Second Parent Adoption Statewide*, ACLU, https://www.aclu.org/map-states-where-same-sex-couples-are-able-get-joint-or-second-parent-adoption [https://perma.cc/7GNU-9LSR].

33. *Equality Maps: Other Parental Recognition Laws*, MOVEMENT ADVANCEMENT PROJECT (Oct. 12, 2021) [hereinafter *Equality Maps*], https://www.lgbtmap.org/equality-maps/other_parenting_laws [https://perma.cc/24EQ-T34S].

Figure I[34]



In light of the Supreme Court's recognition that same-sex parents should have the same benefits as heterosexual couples in raising children and the increasing number of unmarried individuals within same-sex relationships choosing to have biological children, courts and legislatures need to readdress their definition of who is a parent. This requires courts and legislatures to reconsider legal theories in tension as to what should make a parent. First, is a parent a person who intended to have a child or one who functionally acts as a parent? Second, is a parent defined based on formal legal documents (a birth certificate or adoption), or should a legal parent reflect the reality of who is raising the child? Finally, should a court find two parents in every case, or are there times where a parent should have the right to be a single or third parent?

This Note explores several of the legal problems derived from recognizing parenthood in light of legal recognition of same-sex couples. It addresses how the laws developed to address legal parenthood are ill-equipped to handle issues regarding same-sex couples and suggests that courts should reassess the tension points around parenthood to create a legal definition of parenthood that gives a full constellation of rights to LGBT parents while providing for the best interests of the child.

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34. *Id.*

Part I of this Note gives an example of how a traditional definition of legal parenthood leaves no opening for an unmarried, non-gestational parent in a same-sex relationship to claim legal parenthood. This is explored in the context of the 2019 Minnesota court case *In re Custody of N.S.V.* In *N.S.V.*, the Minnesota court found that when an unmarried same-sex couple split after planning for and raising children together, the biological parent was the only individual with a right to legal parenthood.[35] Part II of this Note explains why courts and legislatures should adopt an "intent plus" test when determining legal parenthood of unmarried, non-gestational individuals in same-sex relationships. This test requires an individual to prove they intended to be the child's parent at conception, followed by either a formalization of that intent or action proving the intent. This test is to be limited by the rights of an individual parent or a third parent. Part III of this Note applies the "intent plus" test to *N.S.V.* to show how the test can lead to more equitable determinations of parentage.

Analysis

To correctly identify who is a parent in light of same-sex couples raising children, courts will need to reevaluate basic assumptions about what makes a parent. When jurisdictions do not reconsider these assumptions, the traditional legal definition of a parent fails LGBT parents.[36] *N.S.V.* illustrates how courts that do not reconsider what makes a parent—as more adults in same-sex relationships raise children together—can fail to give legal rights to an individual who believed themselves to be a parent, and who society would recognize as a parent.[37]

35. *In re* Custody of N.S.V., No. A18-0990, 2019 WL 4412722, at *5 (Minn. Ct. App. Sept. 16, 2019).

36. *See id.*

37. *Id.* (denying the non-biological mother third-party custody despite raising three children with her wife for five years).

I. *N.S.V.* exemplifies how traditional interpretations of pre-*Obergefell* statutes leave no opportunity for the recognition of same-sex parents.

A. N.S.V. illustrates that even when an individual is accepted as a parent by society, their children, and their partner, courts may conclude that they are not legal parents.

In 2001, Terri and Linda fell in love, moved in together, and dreamed of a family.[38] Even though they met before the Supreme Court legalized gay marriage, they pursued that dream to the extent they could. In anticipation of future children, the couple purchased a bookstore together in the hopes that Terri could watch the kids there while bringing in an income.[39] In 2003, after Terri had difficulty getting pregnant, they decided together that Linda would try to have a baby instead.[40] The couple selected a sperm donor together who they believed had Terri's characteristics, and Linda gave birth.[41] As planned, Terri brought the child into the bookstore daily.[42] The couple wanted their child to have siblings, so together they decided that Linda would get pregnant again.[43] This time Linda had twins.[44] The couple decided Terri should become a full-time stay-at-home mom.[45] The couple always held themselves out as the parents of the children—both appeared as parents on birth and baptismal announcements.[46] Terri said that while she and Linda meant to complete a second-parent adoption, they did not feel that they had the financial resources to do so.[47] In 2015, the relationship failed, and the couple separated.[48] Terri, the non-gestational parent who had spent years as a stay-at-home mom, asked for parental rights in court when Linda started to keep the kids away from her.[49] Terri showed that she always intended to be the mother of these children, raised these children since they were

38. Brief for Appellant at 4, *In re* Custody of N.S.V., No. A18-0990, 2019 WL 4412722 (Minn. Ct. App. Sept. 16, 2019).
39. *Id.*
40. *Id.*
41. *Id.* at 4–5.
42. *Id.* at 6.
43. *Id.* at 7.
44. *Id.*
45. *Id.*
46. *Id.* at 8.
47. *Id.* at 9.
48. *Id.* at 10.
49. *Id.* at 9.

born, and gave up her job to care for these children while Linda worked.[50] Linda admitted that the children had lived with Terri their entire lives and knew her as their mother.[51] Despite these facts, the court dismissed Terri's claim to parenthood, explaining that Terri did not fall into any of the legal parent categories under the Minnesota Parentage Act (MPA).[52] Terri was not a legal mother and was denied custody on the basis of Minnesota's parentage laws.[53]

B. Minnesota's outdated parentage statutes provide no recourse for non-gestational parents in a same-sex relationship.

In considering Terri's case, the court relied on Section 257.52 of the MPA. The MPA exemplifies traditional parentage statutes as it was based on the Uniform Parentage Act (UPA).[54] The Minnesota Court of Appeals found that the purpose of the MPA is to find a parent-child relationship between a biological or adoptive parent and their child. Since Terri was neither, she was not a parent.[55]

Terri argued that even though she did not give birth to the children, she fell under another section of the Act that confers parenthood to those that "hold[] out" the children as their own.[56] California has adopted this interpretation of the UPA, finding that the lack of a biological tie does not itself rebut the presumption of parentage if the result of disallowing parentage would leave the child with only one parent.[57] However, the Minnesota court rejected that argument in finding that section only applied to a man who could possibly be a biological parent. The court asserted that "the

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50. *Id.* at 7.

51. Respondent's Brief and Addendum at 6, *In re* Custody of N.S.V., No. A18-0990, 2019 WL 4412722 (Minn. Ct. App. Sept. 16, 2019).

52. *In re* Custody of N.S.V., No. A18-0990, 2019 WL 4412722, at *3 (Minn. Ct. App. Sept. 16, 2019).

53. *Id.*

54. *See* MINN. DEP'T HUM. SERVS., UNIFORM PARENTAGE ACT TASK FORCE FINAL REPORT (2002) [https://perma.cc/NHS5-KRGW] (discussing the resulting feedback from a task force created to "review the Uniform Parentage Act and make recommendations to the legislature on whether Minnesota should enact all or part of the Uniform Parentage Act . . .").

55. *N.S.V.*, 2019 WL 4412722, at *3.

56. *Id.* at *2.

57. *See* Elisa B. v. Superior Court, 117 P.3d 660, 666–71 (Cal. 2005); *infra* notes 100–03 and accompanying text (explaining that California courts have held that both men and women can be the presumed natural father or parent of a child even if they could not biologically be the parent, because the assumption is only rebutted *if* a biological parent comes forth to rebut the presumption).

act was adopted in an effort 'to find the biological father and then adjudicate that person the legal father.'"[58]

Terri next argued that the MPA is unconstitutional as it discriminates on the basis of gender and marital status.[59] The court applied the intermediate scrutiny test to the gender-based claim, finding that the government had an important interest in protecting the general welfare of children by declaring legal parentage.[60] The court also found that the MPA was constitutional under the Fourteenth Amendment, as the Act is substantially related to defining the parent and child relationship.[61] Moreover, the court struck down Terri's claim that the MPA is unconstitutional because it discriminates against her based on marital status.[62] The court applied a rational basis test to this claim, concluding that it is reasonable to assume that when a couple is married, the husband is the father of the child.[63]

Lastly, Terri argued that she was entitled to third-party custody of the children.[64] However, the court found that Terri did not meet the statutory requirements because (1) the custodial parent had not "abandoned, neglected, or otherwise disregarded the child[ren]'s well-being," (2) placement with Terri did not "'take[] priority over preserving the day-to-day parent-child relationship' because of physical or emotional danger to the child[ren], or 'other extraordinary circumstances[,]'" and (3) Terri did not "prove by a preponderance of the evidence that it is in the best interests of the child[ren] to be in the custody" of Terri.[65] The court was not persuaded that Terri's bond with the children constituted an "extraordinary circumstance."[66] The court found that Terri was not a legal parent, had no right to custody, and no right to third-party custody.[67]

Minnesota is not the only court to reach this conclusion.[68] While several states, by common law or statute, recognize

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58. *N.S.V.*, 2019 WL 4412722, at *3.
59. *Id.*
60. *Id.*
61. *Id.* at *4.
62. *Id.*
63. *Id.*
64. *Id.*
65. *Id.* (quoting Minn. Stat. § 257C.03, subd. 7(a)(1)).
66. *Id.* at *5.
67. *Id.*
68. *See, e.g.*, Hawkins v. Grease, 809 S.E.2d 441, 451–52 (Va. Ct. App. 2018) (denying custody to the non-biological mother from a same-sex couple because "[g]iven that [the child] would benefit from a continuing relationship with [the non-

parentage even when a same-sex couple is not married, many states do not.[69] Most states only recognize both parents in a same-sex relationship via the marital presumption (if the couple is married at the time of the birth of the child) or through adoption.[70]

II. The Minnesota legislature should update its laws to allow for courts to consider an intent-plus standard in determining the legal recognition of a non-biological, non-adoptive parent in a same-sex relationship.

Had the Minnesota legislature reconsidered the new issues that arise with same-sex parents and updated its parentage act, the Minnesota Court of Appeals could have come to a different conclusion and found Terri to be a legal parent. Instead, the court was bound to the outdated precedent associated with the MPA.[71] *N.S.V.* focused on the facial legislative intent of the parentage law, adopted by Minnesota in 2006, to find a biological father.[72] The court in *N.S.V.* did not consider how the purpose behind the law could be applied to unmarried same-sex couples, or to other couples that intended to act as parents or functionally acted as parents, even without biological ties to the child. The Minnesota legislature should update its statute to allow for an individual in a same-sex relationship to be adjudicated a parent if (1) that individual and the biological or adoptive parent intended the non-biological adult to be a parent and (2) either the couple made a formal showing that person should be a parent, or the individual acted as a parent.

Legislatures should embrace an "intent plus" test when adjudicating legal parentage in a same-sex couple. By applying an intent plus test, courts will be able to more accurately adjudicate proper parents for non-biological unmarried individuals raising a child in a same-sex relationship.[73] An intent plus test gives courts the opportunity to consider the adults' intention at the child's conception, but also requires that the individual seeking parental

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biological mother], that alone does not rebut the presumption that [the biological mother] is a fit mother capable of making child rearing decisions for [the child]").

69. *Equality Maps*, *supra* note 33.

70. *Id.*

71. *N.S.V.*, 2019 WL 4412722, at *3.

72. *Id.* ("[T]he act was adopted in an effort 'to find the biological father and then to adjudicate that person the legal father.'"); *see generally* NAT'L CTR. FOR LESBIAN RTS., LEGAL RECOGNITION OF LGBT FAMILIES (2016) (discussing how various states define "legally-recognized" parents) [https://perma.cc/F2YG-GNSX].

73. *Cf.* Haim Abraham, *A Family is What You Make It? Legal Recognition and Regulation of Multiple Parents*, 25 AM. U. J. GENDER, SOC. POL'Y & L. 405, 439 (2017) (discussing the "intention-based approach" to defining a parent in recognition of "the realities of contemporary society, in which there is no singular family structure").

rights make a showing beyond that intent.[74] The test would be limited by considering the rights of individuals to be single parents.

A. While courts have used intent-based approaches and function-based approaches in adjudicating a legal parent in a same-sex relationship, courts should make their first focus of inquiry on intent.

The first part of the intent plus test requires courts to consider who the gestational or adoptive parent intended to be a parent and whether the non-gestational, non-adoptive individual intended to be a parent.

An intent-based approach is familiar to family courts in the realm of assisted reproduction.[75] In the intent-based approach, "parental status is determined according to the individual's intention to assume such a role."[76] For example, if a married heterosexual couple uses a sperm donor, courts will assume the husband is the father rather than the sperm donor if the couple intended the husband to be the parent.[77] In the 1993 case *Johnson v. Calvert*, the California Supreme Court used the intent approach when determining who the legal mother should be between an egg donor and a gestational surrogate.[78] A husband and wife wanted to have a child, and while the wife could produce eggs, she could not become pregnant.[79] The two produced an embryo and entered into an agreement with a gestation surrogate to carry the baby.[80] When the couple and the surrogate had a series of disagreements, the surrogate and the couple both filed lawsuits claiming to be the legal mother and legal parents, respectively.[81] Both the wife and the surrogate fell under the definition of "mother" listed in the UPA.[82]

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74. *See* Lehr v. Robertson, 463 U.S. 248, 262 (1983) (indicating that some evidence of accepting responsibility of a child is needed beyond a biological connection to forge a parent-child relationship); *see also* Ian Parker, *What Makes A Parent?*, NEW YORKER (May 15, 2017), https://www.newyorker.com/magazine/2017/05/22/what-makes-a-parent?source=search_google_dsa_paid&gclid=CjwKCAiAgJWABhArEiwAmNVTBx1w_hc18rzBKG0wgornPg6y55_95w48h2DHv9G2czdwpjuOw40k4xoCckYQAvD_BwE [https://perma.cc/PP27-SL7M] (explaining that a preconception plan put into motion could offer proof of parentage intention).

75. Abraham, *supra* note 73, at 417.

76. *Id.* at 415.

77. *See generally id.* (discussing how to determine parental status in the context of assisted reproduction).

78. Johnson v. Calvert, 851 P.2d 776, 782 (Cal. 1993) (in banc).

79. *Id.* at 778.

80. *Id.*

81. *Id.* at 778.

82. *Id.* at 781.

The court determined that the wife was the legal mother because she "intended to bring about the birth of a child that she intended to raise as her own . . . ."[83] This intent-based approach to surrogacy was adopted in other jurisdictions.[84] Because technological advancements have allowed multiple parties to act together to bring a child into this world, legal issues have arisen when states automatically confer legal parenthood onto the woman who gave birth.[85] In resolving conflict between these parties, the courts have looked to their pre-conception intent when resolving disputes.[86]

Same-sex parentage now has several states applying that same intent approach to a new fact pattern. New York courts have developed an intent approach for same-sex parentage.[87] The Court of Appeals of New York came to this conclusion when it heard two combined cases on the issue.[88] In the first, *Brooke S.B. v. Elizabeth A.C.C.*, a same-sex former partner of a child's biological mother sought custody and visitation with her intended child.[89] A family court dismissed the former partner's petition for lack of standing, as she had neither married the mother nor adopted the child.[90] In the second, a family court estopped the biological mother from refusing visitation and custody of her child to a former domestic partner.[91] The Court of Appeals of New York, in reviewing the two cases, held that the rule in such cases shall be "where a partner shows by clear and convincing evidence that the parties agreed to

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83. *Id.* at 782 ("'[W]hile all of the players in the procreative arrangement are necessary in bringing a child into the world, *the child would not have been born but for the efforts of the intended parents* . . . .'") (quoting John Lawrence Hill, *What Does It Mean to Be a "Parent"? The Claims of Biology As the Basis for Parental Rights*, 66 N.Y.U. L. REV. 353, 415 (1991)).

84. *See In re* Paternity & Custody of Baby Boy A, No. A07-452, 2007 WL 430448 at *1–7 (Minn. Ct. App. Dec. 11, 2007) (unpublished opinion) (discussing a gay man who wanted to have a child; his sperm and a donor egg were used to implant an embryo into a Minnesota woman, and the court relied on the Parties' statement of intent in determining the surrogate was not a legal parent: "I have no intention of having physical or legal custody or any parental rights, duties or obligations with respect to any child born of this gestational surrogacy process").

85. *See id.* at *2.

86. *See id.* at *5–7.

87. *See, e.g.*, Brooke S.B. v. Elizabeth A.C.C., 61 N.E.3d 488, 501 (N.Y. 2016) ("[W]here a petitioner proves by clear and convincing evidence that he or she has agreed with the biological parent of the child to conceive and raise the child as co-parents, the petitioner has presented sufficient evidence to achieve standing to seek custody and visitation of the child.").

88. *Id.*; Estrellita A. v. Jennifer D., 963 N.Y.S.2d 843 (Fam. Ct. 2013), *aff'd sub nom.* Arriaga v. Dukoff, 999 N.Y.S.2d 504 (App. Div. 2014), *aff'd sub nom.* Brooke S.B. v. Elizabeth A.C.C., 61 N.E.3d 488 (N.Y. 2016).

89. *Brooke S.B.*, 61 N.E.3d at 491.

90. *Id.* (describing the case's background, including the Family Court decision).

91. *Estrellita A.*, 963 N.Y.S.2d at 847.

conceive a child and to raise the child together, the non-biological, non-adoptive partner has standing to seek visitation and custody . . . ."[92] In this case, the unmarried, non-biological mothers would be considered parents, because the non-biological mother intended to be a parent at the time of the conception of the child.[93] The intent-based approach protects unmarried, non-biological parents in a child's life who intended to be parents at the time of conception, even if they are later pushed away by the biological parent.

Some courts have used a functional approach in determining who is a parent in a same-sex relationship. In the functional approach, "courts should recognize an individual as a parent if she acted as one in a regular way."[94] Courts often look to several factors to determine whether an individual is *functionally* a parent.[95] These factors include whether the adult and child have lived together, if the adult is not paid for doing day-to-day parental tasks, the length of time of the parent-like relationship, and the relationship between the adult and child.[96] While there is an intent element to the functional approach—as an adult *intends* to act like a parent to the child—the functional approach focuses on the actions the adult takes during the child's life, rather than the intent of parenthood at conception.[97]

In *Elisa B. v. Superior Court*, a California court adopted the functional approach in a same-sex parentage case.[98] Elisa was in a same-sex relationship with Emily when Emily had twins through artificial insemination.[99] When Elisa and Emily split, Elisa claimed she did not need to pay child support as she was not a parent under the UPA, Emily was the natural mother, and California law recognizes only one natural mother.[100] The California Supreme Court applied subdivision (d) of section 7611 of the UPA to Elisa, stating that a man is presumed to be the natural father of a child if "[h]e receives the child into his home and openly holds out the child as his natural child."[101] California case law provided that the definition of presumed father in the UPA should apply to a second

92. *Brooke S.B.*, 61 N.E.3d at 490.
93. *Id.*
94. Abraham, *supra* note 73, at 412.
95. *See id.* at 412–13.
96. *Id.* at 412.
97. *See id.* at 413.
98. Elisa B. v. Superior Court, 117 P.3d 660, 666–71 (Cal. 2005).
99. *Id.* at 662–63.
100. *Id.* at 664–65.
101. *Id.* at 667 (quoting Cal. Fam. Code § 7611, subd. (d) (West 2020)).

mother and, thus, since Elisa "received the twins into her home and held them out to the world as her natural children," she was a parent.[102] Even though Elisa couldn't be a "natural" or "biological" mother to the children, the California court said the purpose of the "natural" requirement was that the assumption of parenthood *could* be rebutted by a presumed biological father, but with no rebuttal she was the legal parent.[103]

The functional approach is beneficial as it is likely to provide a child with a parent that has been active and involved in the child's life. However, the functional approach risks harming the interests of a single parent. Instead of sole custody, a single parent may be required to give up custody, decision-making power, and ability to move when a second legal parent is involved.

To avoid encroaching on an individual's right to parent, the first part of the intent plus test determines intent, with later aspects of the test reviewing whether an individual acts as a parent. The *intent* part of the test would closely follow the test in *Brooke S.B.*: "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 to seek visitation and custody . . . ."[104]

However, simply requiring intent prior to conception to have a child together or intent to adopt is too broad a standard on its own. Standing alone, the test could mean that same-sex couples who discuss having a child together one day could both be proclaimed the parents of a child that was born when one of the individuals planned to parent alone or parent with a new partner. The question of whether a same-sex partner could be considered a parent purely based on intent was tested in a New York case where a woman sought recognition as a legal parent because she intended to be a parent when submitting adoption paperwork with her partner.[105]

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102. *Id.* at 669.

103. *Id.* at 667–68. California had determined prior to this case that proof of no biological connection did not rebut the presumption of parenthood. *See In re* Nicholas H., 46 P.3d 932, 941 (Cal. 2002) ("[T]he Legislature is unlikely to have had in mind an action like this—an action in which no other man claims parental rights to the child, an action in which rebuttal of the section 7611(d) presumption will render the child fatherless. Rather, we believe the Legislature had in mind an action in which another candidate is vying for parental rights and seeks to rebut a section 7611(d) presumption in order to perfect his claim, or in which a court decides that the legal rights and obligations of parenthood should devolve upon an unwilling candidate.").

104. Brooke S.B. v. Elizabeth A.C.C., 61 N.E.3d 488, 490 (N.Y. 2016).

105. Parker, *supra* note 74.

Circe Hamilton and Kelly Gunn were in a same-sex relationship when Circe submitted adoption paperwork, with the agreement that the two would later seek to add Kelly to the paperwork once the child was in New York.[106] At that moment, they both intended to co-parent a child.[107] But the two separated before the adoption agency notified Circe that the agency had a child ready for adoption, and Circe went ahead with the adoption on her own.[108] While the two were not a couple, Circe named Kelly a godmother of the child, and Kelly was involved in the child's life.[109] When Circe made plans to move out of the country with her child, Kelly sued claiming that she was a legal parent and Circe could not move the child away without her permission.[110] Ultimately, the court found that Kelly was not a legal parent because, even though she made plans to become a parent with Circe, that plan had not "continued unabated."[111] The New York court seemed to add a new gloss to its decision in *Brooke S.B.*[112] However, in Kelly's case, where a partner showed the parties agreed to adopt and raise a child together by submitting adoption paperwork, the non-biological, non-adoptive partner did not have standing as a parent.[113] The court seemed to recognize that it is not enough to make a plan together to raise a child, but that intent must extend to something more definitive, such as conception, birth, or receiving an adopted child.[114] Under the intent plus test, ensuring that both of the parties intended to parent a child together requires a plus—something beyond just a verbal agreement prior to the conception of a child.

The court, in its determination as to whether Kelly—a woman whose past partner adopted a child—was a mother, seemed to recognize the need for a *plus* in requiring that Kelly show the couple's plan to have a child together "continued unabated."[115] Even though Kelly and Circe had decided to adopt a child together, it was Circe alone who ultimately adopted the child.[116] The court wanted

106. *Id.*
107. *Id.*
108. *Id.*
109. *Id.*
110. *Id.*
111. *Id.*
112. *See* Brooke S.B. v. Elizabeth A.C.C., 61 N.E.3d 488, 490 (N.Y. 2016) ("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 to seek visitation and custody . . . .").
113. *Id.*
114. *Id.*
115. Parker, *supra* note 74.
116. *Id.*

proof that Kelly did more than make an agreement at some point before a child arrived that she wanted to be a parent.[117]

B. After a showing of intent, courts should confirm a couple did more than merely intend for an individual to be a parent by making a finding that the individual either formally declared intent to be a parent or acted as a parent in the child's everyday life.

Formality in parenthood focuses on giving individuals legal parenthood through marriage, biology, or adoption.[118] Since formalities such as marriage, biology, and adoption often do not benefit non-biological parents raising children in same-sex relationships, states could adopt additional formalities that make it easier for same-sex couples to declare parenthood.[119]

Historically, courts have struggled balancing different claims of formality (i.e., one parent has a claim through marriage and the other through biology) and often consider the reality on the ground when making a decision.[120] In 1983, the Supreme Court in *Lehr v. Robertson* allowed states to take both formality and reality on the ground into account when determining parenthood.[121] In *Lehr*, a biological father who was cut out of his child's life sought parental rights when the biological mother remarried and the new husband adopted the child.[122] The Supreme Court found the adoption should go through and that the biological father was not entitled to notification of the adoption because he was an absent parent.[123] The Court explained that "[t]he significance of the biological connection is that it offers the natural father an opportunity that no other male possesses to develop a relationship with his offspring[,]" but he must "grasp[] that opportunity and accept[] some measure of responsibility for the child's future . . . [to] enjoy the blessings of the

117. *Id.*

118. *See* Jessica Feinberg, *Whither the Functional Parent? Revisiting Equitable Parenthood Doctrines in Light of Same-Sex Parents' Increased Access to Obtaining Formal Legal Parent Status*, 83 BROOK. L. REV. 55, 55–56 (2018).

119. *Id.*

120. *See id.* at 56.

121. *See, e.g.*, Lehr v. Robertson, 463 U.S. 248, 262–63 (1983) (holding that both biology and reality of the parent-child relationship could play a role in a court's determination as to whether a biological parent had the right to intervene in an adoption proceeding).

122. *Id.* at 250–52.

123. *Id.* at 267–68.

parent-child relationship . . . ."[124] Where a biological father has a formal claim, he must take practical steps to make himself, in reality and thus legally, a father. The plus part of the intent plus test mirrors the practical steps necessary to claim a parent-child relationship that the Supreme Court prescribed in *Lehr*.[125]

The competing claims to formal parenthood leave little space for an individual who is not a biological parent, adoptive parent, or parent by marriage to have a claim to legal parenthood. In recognition of this, some courts have adopted different legal doctrines that look to the reality on the ground of adults acting as a parent to grant visitation or custody rights.[126] These doctrines include "de facto parentage, psychological parentage, in loco parentis, [and] parent by estoppel."[127] These equitable parenthood doctrines have different tests associated with each, depending on jurisdiction, that often include elements such as consent of a legal parent, assumption of parental obligations, formation of a parent-child bond, and/or residence with the child.[128] The remedies under these doctrines also differ across jurisdictions, allowing some individuals full legal parenthood and merely allowing other individuals standing to seek visitation.[129] Each of these doctrines focuses on who is functioning as a parent, most often when a child only has one legal parent.[130]

As early as 1995, the Wisconsin Supreme Court applied such a test to a woman claiming to be a non-biological parent in a same-sex relationship who had planned for the conception of the child with the biological parent and agreed to raise the child together.[131] The test required the non-biological parent to demonstrate that a "triggering event justifie[d] state intervention in the child's relationship with a biological or adoptive parent" and establish existence of a parent-like relationship by proving each of the following four elements:

> (1) that the biological or adoptive parent consented to, and fostered, the petitioner's formation and establishment of a parent-like relationship with the child; (2) that the petitioner

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124. *Id.* at 262.

125. *Id.*

126. *See* Joanna L. Grossman, *The New Illegitimacy: Tying Parentage to Marital Status for Lesbian Co-Parents*, 20 AM. U. J. GENDER SOC. POL'Y & L. 671, 677 (2012).

127. *Id.* (listing the most common labels state courts use in recognition of a full parental or quasi-parental status based on a functional parent-child relationship).

128. *See* Feinberg, *supra* note 118, at 69–74.

129. *Id.* at 68.

130. *Id.* at 66–67.

131. *In re* Custody of H.S.H.-K., 533 N.W.2d 419 (Wis. 1995).

> and the child lived together in the same household; (3) that the petitioner assumed obligations of parenthood by taking significant responsibility for the child's care, education and development, including contributing towards the child's support, without expectation of financial compensation; and (4) that the petitioner has been in a parental role for a length of time sufficient to have established with the child a bonded, dependent relationship parental in nature.[132]

While equitable principles focusing on the reality on the ground have been used to give the non-biological parent in a same-sex relationship legal rights, reality on the ground has also played a role when courts have used principles of intent or function to find a second legal parent.

Returning to *Elisa B.*, in Elisa's efforts to avoid paying child support, the court looked to whether Elisa "received the [children] into her home and openly held them out as her natural children."[133] In determining whether Elisa held out the children as her own, the court looked to the facts on the ground.[134] The court analyzed Elisa's day-to-day actions—such as breast-feeding the children and discussions with her employer during which she described the children as *her* children—as supporting the concept of holding the children out to be her own.[135] Additionally, in *Brooke S.B.*—the case used to illustrate the intent-based approach—the New York court found that while a pre-conception agreement was enough to gain standing in a paternity action, actual determinations of legal parenthood would be based on the facts presented.[136]

While traditional formalities, such as marriage, adoption, and biology, do not paint a clear picture as to who has been involved as a parent in a child's life, states could make it easier for same-sex couples to opt into formalities. In fact, most states already have an opt-in formality established for unmarried fathers.[137] A voluntary acknowledgement of paternity (VAP) is an "easy and inexpensive alternative to getting a court order establishing the legal father" and only requires the birth mother to sign with the father and the

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132. *Id.* at 421.

133. Elisa B. v. Superior Court, 117 P.3d 660, 667 (Cal. 2005).

134. *See id.*

135. *Id.* at 669.

136. Brooke S.B. v. Elizabeth A.C.C., 61 N.E.3d 488, 500–01 (N.Y. 2016).

137. *See Recognition of Parentage*, MINN. DEP'T HUM. SERVS., (2017), https://mn.gov/dhs/people-we-serve/children-and-families/services/child-support/programs-services/recognition-of-parentage.jsp [https://perma.cc/7J8R-ZNJB]. Many states have a similar website providing forms and steps to file a voluntary acknowledgement of paternity.

two to file with the State.[138] Federal "[w]elfare reform legislation requires that States develop a simple civil process for parents to voluntarily acknowledge paternity, which serves as a conclusive finding of parentage . . . ."[139] Adopting a similar form for unmarried same-sex parents, or allowing same-sex parents to use this form, could prevent down-the-road litigation over legal parenthood.[140]

The intent to raise a child together can be likened to biological connection in *Lehr*.[141] The Supreme Court in *Lehr* recognized that being there at conception does not make a parent without something more.[142] The Court in Kelly's case made a similar decision, finding that while Kelly was present for the decision to adopt a child, she could not be a parent without an additional step.[143]

As *Lehr's* "accept[ing] some measure of responsibility for the child's future"[144] and Kelly's "continue unabated"[145] suggest, the *plus* part of intent plus could be a reflection of the facts on the ground. Courts could apply a test similar to those of equitable parenthood doctrines with factors such as consent of a legal parent, assumption of parental obligations, participation in a child's life as a member of the child's family, and/or residing with the child.[146] These factors help determine if the reality on the ground reflects that the individual who *intended* to be a parent actually *acts* as a parent.[147]

The plus in intent plus could also be a formal plus. Couples who sign a document showing intent to parent a child together once a child is born should also be found to be legal parents. States could offer same-sex couples a version of a VAP to register both adults as legal parents with the state.

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138. *Id.*

139. OFF. INSPECTOR GEN., DEP'T HEALTH & HUM. SERVS., PATERNITY ESTABLISHMENT i (1999), https://oig.hhs.gov/oei/reports/oei-06-98-00051.pdf [https://perma.cc/ZTL9-8YP9].

140. *See* Feinberg, *supra* note 118, at 83–85 ("[T]o date same-sex parents generally have not been able to utilize VAPs to establish legal parent status.").

141. *See* Douglas NeJaime, *The Nature of Parenthood*, 126 YALE L.J. 2260, 2295 (2017) (comparing biological connection to intent to raise a non-biological child born through reproductive technology) [hereinafter NeJaime, *The Nature of Parenthood*]; Lehr v. Robertson, 463 U.S. 248 (1983).

142. *Lehr*, 463 U.S. at 261–63.

143. Parker, *supra* note 74.

144. *Lehr*, 463 U.S. at 262.

145. Parker, *supra* note 74.

146. *See* Feinberg, *supra* note 118, at 69–74.

147. *See id.*

While courts need to initially find intent to raise a child together, that intent needs to be affirmed with a *plus*—either a showing that the non-biological parent acts as a parent in reality, or a formal agreement between the parties to co-parent a child.

C. Once courts find a showing of intent, substantiated either through a formality or equitable parenthood doctrine, courts must limit their recognition based on the rights of a single parent.

When there is a single parent and a claim of a second individual to parenthood, courts must grapple with what that means for the rights of the first parent. Giving a second individual legal and physical custody of a child can take away from the first parent the right to make decisions unilaterally for the child. While many states have a policy of finding two parents whenever possible, courts must consider what such a policy means for the first parent.[148]

The Supreme Court considered the rights of a single parent in *Troxel v. Granville*, where two children's grandparents sued the children's mother for visitation rights.[149] In Justice O'Connor's plurality opinion, she found that under the Constitution there must be deference to the views of a fit parent.[150] The Court recognized that "the State's recognition of an independent third-party interest in a child can place a substantial burden on the traditional parent-child relationship."[151]

While focus on intent, function, and reality on the ground are helpful touchstones for providing custody to the non-biological parent in a same-sex relationship, these principles should be limited by the right of single parents. If rules are not carefully crafted, a same-sex partner who a biological parent never intended to be a parent may be able to gain custody of a child. Legislatures and courts should carefully craft their laws and standards so as not to infringe upon the right of a single parent.

In the intent plus test, once a court finds the couple *intended* for the non-biological or non-adoptive person to be a parent,

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148. *See* NeJaime, *The Nature of Parenthood*, *supra* note 141, at 2334 (discussing how many states have parentage determinations that seek to establish two parents for a child in a way that promotes "'the state's interest in the welfare of the child and the integrity of the family'" (quoting *In re* Guardianship of Madelyn B., 98 A.3d 494, 500 (N.H. 2014))).

149. Troxel v. Granville, 530 U.S. 57, 60–61 (2000).

150. *Id.* at 68–69.

151. *Id.* at 64.

substantiated by a formal or factual showing, courts should consider the rights of a parent to be a single parent as to not too generously assign parenthood to a second individual simply for the sake of having a second parent. As the Supreme Court found in *Troxel*, a parent's views deserve deference.[152] For example, if a woman discussed raising a child together with a former partner but split from the partner before conception and proceeded alone with the plan without intending or inviting the old partner to be part of the family, those views should be respected above that of the state's interest in assigning two parents to every child.

As traditional indicators of legal parentage fail when applied to same-sex couples, courts and legislatures should consider an intent plus approach to identify appropriate legal parents in a same-sex relationship.

III. Under the intent plus test, Terri would have been found to be a legal parent.

Under the intent plus test outlined above, the Minnesota Court of Appeals would have found Terri to be a legal parent of her three children. Terri would have been able to show that she and Linda intended to conceive and raise a child together. Intent could be proven by the fact that they were both present for each insemination attempt, they chose a sperm donor together, and the couple planned to raise the children together.[153]

While Terri did not make a formal declaration of her intent to be a parent of the children with any sort of legal document, she would fulfill the plus part of the test given the fact that she met the "reality on the ground" requirement by raising the children. It is likely Terri could show she had Linda's consent to act as a parent, she assumed parental obligations, she participated in the children's lives, and she resided with the children.[154]

While Linda also has rights as a fit parent, the fact that she accepted Terri as a co-parent of her biological children gives Terri legal rights to be a parent. Terri is not a third-party taking control away from Linda, but—like many queer women—a person who deserved an opportunity to become a legal parent. The opportunity to become a parent is a star in the constellation of rights that an LGBT person should have had a right to seek.

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152. *Id.* at 68–69.

153. Brief for Appellant at 1–2, *In re* Custody of N.S.V., No. A18-0990, 2019 WL 4412722 (Minn. Ct. App. Sept. 16, 2019).

154. *Id.*

Conclusion

As more same-sex couples are choosing to have children, but not necessarily choosing to get married, state legislatures must readdress their paternity statutes to be more inclusive of the intentions of parents in same-sex relationships. Courts should adopt an intent plus test to appropriately adjudicate a legal parent. This approach should consider the intent of the parents, substantiated by a formal showing of intent to be a parent or a showing of acting as a parent given the facts on the ground, and the rights of an individual to be a single parent.