Current Legal Challenges Facing LGBT Families

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by

Beth Littrell, Staff Counsel
Lambda Legal
Southern Regional Office
Atlanta, Georgia
blittrell@lambdalegal.org

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I. Introduction

On June 26, 2015, life for LGBT[1] people in this country changed dramatically when the Supreme Court ruled in *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015), that same-sex couples and their families were entitled to equal liberty and dignity. In ruling that same-sex couples may not be deprived of the fundamental right "inherent in the liberty of the person" to marriage on "the same terms and conditions," *id.* at 2593, the Court opened up avenues to legally protected relationships that had been unavailable to most LGBT people in this country and secured to all the familial relationships that had been extended by some states. It also opened up family law practitioners to new clientele.

Unfortunately, the watershed decision was not followed by legislative action conforming laws that were drafted for different-sex couples to expressly provide for inclusion of same-sex couples. Courts have grappled with how broadly to apply *Obergefell* despite the eloquence of Justice Kennedy's decision, reasoning that "[f]ar from seeking to devalue marriage, the petitioners seek it for themselves because of their respect—and need—for its privileges and responsibilities…their immutable nature dictates that same-sex marriage is their only real path to this profound commitment," *id*. at 2594, and noting that marriage "safeguards children and families" by, among other things, providing children raised by same-sex couples "to understand the integrity and closeness of their own family and its concord with other families in their community and in their daily lives" and because it "affords the permanency and stability important to children's best interests." *id.* at 2600.

Resolution of the issues that arise as a result of gendered-language in statutory and common law is a state by state process, and often fact-specific. Of the issues that have arisen, parentage is among the most frequent and most important. Only one question appears to have a collective resolution, which is of whether a female spouse must be listed on the birth certificate of a child born to her wife (she does), [2] although the question is not entirely settled in all states or in all

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[1] LGBT is the common acronym for people who are lesbian, gay, bisexual or transgender.

[2] *See, e.g., Pavan v. Smith*, 137 S. Ct. 2075 (2017) (Arkansas was required to treat female spouses in parity with male spouses where a state law required "husbands" to be listed as "fathers" on birth certificates of children born to their wives where the pregnancy was the result of assisted reproductive technology (A.R.T.) with the husbands' consent). *And see Henderson v. Adams*, 209 F. Supp. 3d 1059, 1076 (S.D. Ind. 2016) (female spouse must be named as parent on birth certificate of child born to her wife), *amended by* No. 1:15-cv-00220, 2016 WL 7492478 (S.D. Ind. Dec. 30, 2016) ("When the State Defendant created and utilized the Indiana Birth Worksheet, which asks 'are you married to the father of your child,' the State created a benefit for married women based on their marriage to a man, which allows them to name their husband on their child's birth certificate even when the husband is not the biological father. Because of *Baskin* and *Obergefell*, this benefit—which is directly tied to marriage—must now be afforded to women married to women."); *McLaughlin v. Jones*, 382 P.3d 118, 121-22 (Ariz. Ct. App. 2016) ("We disagree … that it would be impossible and absurd to apply [Marital Presumption Statute] in a gender-neutral manner to give rise to presumptive parenthood in Suzan. Indeed, *Obergefell*

situations. Moreover, whether and how parentage reflected on the marital child's birth certificate can be challenged in a dissolution proceeding between same-sex spouses has yet to be settled in most states.

II. Illustrative Pending Cases

Lambda Legal is currently involved in three post-*Obergefell* cases in which parentage is at issue. Each exemplifies various ways that the shadow of the inability to marry, adopt and divorce have created obstacles to equality.

A. Mississippi

In Mississippi, we represent Christina Strickland, a woman whose wife gave birth in 2010, after their marriage but before *Obergefell* forced the state to recognize the marriage. *Strickland v. Day*, No. 2016-CA-01504 (Miss. appeal docketed October 21, 2016). The parties separated in 2013, after 18 years as a couple. After sharing custody by agreement for several years, marriage was finally recognized in their state and a divorce action was filed. On October 18, 2016, the trial court dissolved the marriage but held that their son was born "during the marriage" but was not a child "of the marriage." It reasoned that the non-genetic mother could not be recognized as a parent because any presumption of parentage had been rebutted by the impossibility of a genetic relationship and because the anonymous sperm donor retained parental rights that required termination before another adult could be found to be a legal parent.

The arguments presented by Appellant in *Strickland*, drafted by the author of these materials, are grounded in Mississippi law and point out that affirmance of the ruling jeopardizes the parentage of hundreds, if not thousands, of children born to married parents who were conceived via A.R.T. with anonymous sperm. By recognizing as a "parent" an unknown, and unknowable, sperm donor, the ruling also is contrary to the state's laws which determine paternity based only on marriage, filing of a voluntary affidavit of paternity or a judicial adjudication. In addition, Appellant argues that the ruling is contrary to common law principles applying the presumption of "legitimacy," *i.e.*, parentage, based on marriage, which presumption attaches at birth for the benefit of the child and the stability of the family unit and can only be disestablished in an appropriate proceeding. Because state law does not allow a husband who consents to his wife's pregnancy via A.R.T. to disestablish his parentage, Appellant argues that the court should apply estoppel principles to similarly refuse to allow the wife/birth mom to do so. *Obergefell* requires these principles be applied to married same-sex couples in order to recognize their marriages "on the same terms and conditions to opposite-sex couples," 135 S. Ct. at 260, and recognizes that dual parentage of marital children is an established feature of marriage.

The case is fully briefed. Two amicus briefs were filed support of Appellant, by: 1) the American Society for Reproductive Medicine, Resolve: The National Infertility Association, American Academy of Matrimonial Lawyers, National Women's Law Center, and American Academy of Assisted Reproductive Technology Attorneys; and 2) National Association of Social Workers and Children of Lesbians and Gays Everywhere (COLAGE). An amicus brief was filed in

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mandates that we do so and the plain language of the statute, as well as the purpose and policy behind it, are not in conflict with that application.").

support of Appellee by the Foundation for Moral Law. No oral argument date has been set as of the date of publication of these materials.

B. Virginia

Lambda Legal is also representing a non-genetic parent, Denise Hawkins, in the Virginia Court of Appeals in *Hawkins v. Grese*, No. 0841-17-1 (Va. Ct. App. appeal docketed May 5, 2017), where she is appealing the decision of the trial court that she was not a parent to the child she raised since the child's birth with her former same-sex partner and that she failed to show "special facts and circumstances" warranting a best interest custody determination. This finding is despite two courts having heard evidence from child psychologists and the guardian ad litem that the nearly 10 year-old child understands our client to be his mother and that he has, and will continue, to suffer harm if that relationship is not maintained. The women jointly planned for the pregnancy, achieved via A.R.T. with anonymous sperm, and welcomed the child into their shared home in 2007. The adults' relationship dissolved in 2014, before Virginia provided access to marriage or adoption, and the parties continued to share joint custody until the genetic mom severed contact in 2016.

Because Virginia law allows a "person with a legitimate interest" to seek custody where one of a list of factors are present, among those "special facts and circumstances sufficient to overcome the presumption" that a "natural" parent acts in the child's best interest, the arguments presented, authored by the author of these materials, include that the following undisputed facts are circumstances are sufficient as a matter of law to overcome the burden in favor of the genetic parent: 1) the parties created a planned family through anonymous donor insemination; 2) the genetic mother created and fostered a parent-child bond intended to be permanent between Denise and the child; and 3) the child having suffered and likely to continue to suffer if his relationship to Denise is severed. Additionally, and alternatively, Appellant argues that because Virginia law unconstitutionally deprived her of any means of securing her parent-child relationship during the parties relationship—either by marriage, or through adoption—this history of discrimination in and of itself should have constituted a sufficiently extraordinary reason to warrant a best interest determination. Because the Supreme Court's ruling in *Obergefell* was based, in large part, on the needs of the children being raised by same-sex *parents* (where the Court did not reference one as a "non-parent"), the lower court committed additional reversible error in refusing to recognize Denise as a parent, instead of as a non-parent, and requiring her to meet a higher burden before a best interest determination could be conducted. Finally, Appellant argues that courts are free to determine custody according to the child's best interests where the evidence shows that a genetic parent intentionally creates, encourages and supports a parent-child relationship with another adult and the child because the genetic parent has waived their constitutional right to exclusive custody in favor of shared parenting, the basis for the presumption in the first place.

C. Florida

Another case that Lambda Legal is involved with that illuminates how past discrimination complicates family law is pending in a Florida court of appeals. The case is *In re Adoption of E.I.C.C.* and involves the validity of second parent adoptions.

E.I.C.C. involves two women, Ashley and Danielle, whose romantic relationship began in 2010. They decided to start a family and chose a sperm donor, who executed a sperm donor agreement. Ashley changed her last name, became pregnant and gave birth to their first child in August of 2011. A finalized adoption order recognizing Danielle as a second parent was entered in October of 2011.

The couple soon decided to have a second child. Ashley became pregnant again with the same donor sperm and gave birth to E.I.C.C. in September of 2013. In preparation for the second parent adoption, a favorable home study was conducted in March of 2014 and the couple participated in a commitment ceremony. Ashley and Danielle filed a Verified Petition for a second parent adoption in May of 2014, signed by both parties. The couples' relationship deteriorated shortly thereafter. They broke up in July of 2014, when E.I.C.C. was 11 months old. In August, 2014, Ashley filed a Motion to Strike the Adoption Consent Form and to Revoke Consent to Adopt, claiming she did not understand what she was signing. Ashley married a man in September, 2014, and she and her husband filed a Joint Petition for Stepparent Adoption on Sept. 27, 2014. Two weeks later, Ashley filed a Motion to Dismiss the Second Parent Adoption for Lack of Jurisdiction. The court denied the Motion to Dismiss on October 22, 2014.

Further home studies conducted in 2015, 2016, and 2017 produced favorable views of Danielle's fitness as a parent with encouragement for the adoption to proceed. In January, 2017, the trial court issued a Final Judgment of Adoption and declared Danielle to be the legal adoptive parent. Ashley appealed, arguing that Florida courts lack jurisdiction to recognize second parent adoptions because the mother's parental rights were not terminated and the adoptive parent is not a spouse.

The Florida Legislature does not currently explicitly recognize second parent adoptions. Rather, the statute states that "any person...may be adopted" and "an unmarried person" may adopt. Lambda Legal anticipates filing an amicus in support of Danielle, arguing that courts have jurisdiction to grant second parent adoptions and that estoppel principles apply to bar the action.

D. Georgia

The question of how Georgia courts will treat same-sex couples who had children prior to *Obergefell* and whether they will interpret gendered language embedded in statutes and case law to apply to same-sex couples remains to be determined. Some observations and arguments to present in advocacy of equal treatment are presented below.

i. Presumption of Parentage

Although Georgia recognizes that "[a]ll children born in wedlock or within the usual period of gestation thereafter are legitimate," Ga. Code Ann. § 19-7-20, it also allows the legitimacy to be "disputed" by clear evidence that the child is not biologically related to the spouse. *Id.* Indeed, DNA is conclusive on the issue of paternity. Ga. Code Ann. § 19-7-49 ("On a finding that the alleged father is the father of the child, the court shall issue an order designating the alleged father as the father of the child."). Given the near impossibility[3] of a biological connection

[3] Same-sex female couples can both be biologically related where the child is conceived with fertilized embryo containing one woman's ova carried to term and delivered by the other woman.

between a married same-sex couple, the parentage of a same-sex spouse can be easily overcome under current law. The questions of who has standing to challenge the parentage and whether the court should allow a party to the marriage and pregnancy via A.R.T. – where both are aware of a lack of genetic connection to the child – to disestablish the parent-child relationship that should attach at birth to a martial child presents itself for adjudication.

In representing a non-genetic parent whose same-sex spouse seeks to disclaim her parentage in a divorce action, consider raising estoppel claims in conjunction with equal protection arguments. That is, where husbands have been prevented from disestablishing paternity, based on collateral estoppel, *see Grice v. Detwiler*, 227 Ga. App. 280 (1997), and a wife has been denied the right to compel the husband to submit to paternity testing, *see Williamson v. Williamson*, 302 Ga. App. 115 (2010) (finding that although wife was not precluded from contending that someone other than husband was biological father of child, she was not entitled to compel husband to submit to genetic paternity testing where she failed to make a threshold showing that delegitimizing child was in child's best interest), the same principles should apply where the child is born to a married same-sex couple and both are recognized on the child's birth certificate or otherwise recognized as a parent. *And see Brine v. Shipp*, 291 Ga. 376, 380 (2012) ("When, as here, a biological father's petition to legitimate a child born in wedlock can only be granted by first terminating the legal father's parental rights, we conclude that the superior court does not have jurisdiction over the termination decision."). The same principles should apply even where the child has not been recognized on the birth certificate, but the challenge is greater.

ii. Adoption

Although stepparent adoptions are now available to married same-sex couples, whether second parent adoptions secured before marriage are valid remains open. *See Bates v. Bates*, 317 Ga. App. 339 (2012) ("The idea that Georgia law permits a 'second parent' adoption is a doubtful one.") (citing *Wheeler v. Wheeler*, 281 Ga. 838, 840 (2007) (Carley, J., dissenting from denial of cert.) Although in *V.L. v. E.L.*, 136 S. Ct. 1017 (2016), the Supreme Court reversed an Alabama decision setting aside as void *ab initio* a Georgia second parent adoption that had been granted eight years earlier to an unmarried same-sex couple on the ground that the Georgia court lacked subject matter jurisdiction to grant the adoption, *Ex parte E.L.*, 208 So. 3d 1102 (Ala. 2015) *rev'd sub nom. V.L. v. E.L.*, 136 S. Ct. 1017 (2016), the reasoning of the Alabama court reveals the vulnerabilities of such orders. According to the Alabama court, Georgia adoption law barred the adoptive mother, V.L., from adopting the children unless birth mother, E.L., relinquished her own parental rights. The court found that the Georgia court misapplied its own state's adoption law and that the Georgia court's error was "jurisdictional" and, therefore, need not be honored under the Full Faith and Credit Clause. Fortunately, the U.S. Supreme Court reversed the Alabama Supreme Court decision, without issuing an opinion, holding that the Georgia superior

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See T.M.H. v. D.M.T., 129 So. 3d 320 (Fla. 2013) (upholding parental rights of woman whose ova were used to impregnate her female partner and remanding for a determination of custody and parenting time allowing both women to be recognized as parents notwithstanding lack of recognition for *de facto* parents); *see also* Charlotte Lytton, *Biological Same-Sex Parent Babies Could Be a Reality by 2017*, DAILY BEAST, February 25, 2015, available at <http://www.thedailybeast.com/biological-same-sex-parent-babies-could-be-a-reality-by-2017>

court had subject-matter jurisdiction to hear and decide the adoption petition, triggering Alabama courts' Full Faith and Credit obligation.

Whether Georgia second parent adoptions are vulnerable to attack remains an open question, and you may want to consider advising securing a stepparent adoption, confirmatory adoption, or filing a declaration of parentage action to secure your non-genetic clients' parentage if they have an existing second-parent adoption. Also, principles of estoppel should be raised to prevent a birth mother who participated in acquiring the adoption order from changing her position to the detriment of her former partner and the child. *See In re Adoption of D.P.P.*, 158 So. 3d 633 (Fla. Dist. Ct. App. 2014) (holding biological mother was estopped from challenging the second parent adoption judgment which she had jointly petitioned the court to obtain).

iii. Parenting Agreements

Georgia courts should elevate equality and justice over statutory interpretations that turn a blind eye to perpetuating past discrimination and recognize the non-genetic parents as *parents*, just as the Supreme Court recognized and referenced several of the couples raising children together who sought access and recognition of marriage in *Obergefell*. However, given that Georgia appellate courts have not led when it comes to same-sex couples' rights and have yet to embrace *de facto* parentage as most other jurisdictions have done,[4] the first hurdle (for non-genetic parents who were unable to adopt their child) involves establishing standing to seek custody or visitation. One argument that can be raised is that under Ga. Code Ann. § 19-7-1(b), which allows a parent to "relinquish" custody by "voluntary contract," a genetic parent has relinquished exclusive custody by his or her actions evincing an oral contract. Be sure to plead appropriate jurisdiction. Potential jurisdiction exists under Ga. Code Ann. §19-7-1(b) and Ga. Code Ann. § 9-4-2 (declaratory actions). Jurisdiction premised under paternity actions and domestic relations statutes that still exclude same-sex couples in the gendered language used is more vulnerable to a motion to dismiss without reaching the merits.

Several recent cases involving same-sex female couples who each used A.R.T. to become pregnant and thereafter raised a child as equal co-parents but whose relationships ended prior to the ability to adopt or marry each other raised Ga. Code Ann. § 19-7-1(b) arguments in the Georgia appellate courts. Each case ended unceremoniously as the appellate courts sidestepped the issues and dismissed the cases based on jurisdictional deficiencies.

Lambda Legal filed amicus briefs in support of the non-genetic parents on behalf of several Professors of Law who are experts in family law matters and in LGBT issues in both cases. *Amici* argued the merits and attempted to pave a path for the courts to find that a non-genetic, non-adoptive parent has standing under a relinquishment theory, which argument likewise shows that there is no constitutional violations of the genetic parent's constitutional right to parental autonomy, and that the non-genetic parent should be considered a parent in a post-*Obergefell* world. Excerpts from the amicus brief authored by the author of these materials and filed in *Faubert-Rocha v. Perez*, No. S17D0212 (Ga. dismissed Jan. 17, 2017) follows.

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[4] *See* Katharine T. Bartlett, *Prioritizing Past Caretaking in Child-Custody Decisionmaking*, 77 Law & Contemp. Probs. 29, 66 (2014) (observing that most jurisdictions that "have directly confronted the matter recognize *de facto* parenthood in certain limited circumstances").

A. Material Facts Relevant to *Faubert-Rocha* Appeal

This appeal involves a former same-sex couple who jointly agreed to bring a child into their family. The former couple agreed that Appellee would seek to conceive the child by means of assisted reproduction with anonymous sperm whom they would raise together as equal co-parents in their two-parent home. Appellee became pregnant and the couple's child, M.B., was born in 2011. At the time of the conception and birth of M.B., the parties were living as a family unit, but were prevented from marrying each other based on laws that have been ruled unconstitutional. Ga. Const. art. I, § 4, ¶. I; Ga. Code Ann. § 19-3-3; *Obergefell*, 135 S. Ct. 2584.

The parties lived together as a family for three years after the birth of M.B., and M.B. developed a child-parent bond with both parties. The parties ended their romantic relationship in 2014, prior to their ability to marry and at a time when Georgia law unconstitutionally barred courts from adjudicating any "disputes arising out of" any "union[]" between same-sex couples that "provided marital benefits." Ga. Const. art. I, § 4, ¶ I (b). The parties mutually entered into a Settlement Agreement/Parenting Plan ("Parenting Agreement") on January 19, 2016, following the dissolution of their relationship.

In the Parenting Agreement, the parties agreed to share joint legal custody of M.B. The parties further agreed to "confer on all major decisions regarding the welfare of the Child, including education, health care, religion and extra-curricular activities." … Appellee acknowledged under the Parenting Agreement that "a close and continuing parent-child relationship with both parents and continuity in the Child's life will be in the best interest of the Minor Child."

[After] Appellant filed a Petition for Legitimation under Ga. Code Ann. § 19-7-21, seeking to establish that she is M.B.'s parent, and seeking contact with her child[,] Appellee began refusing to follow the parties' Parenting Agreement and withholding the child from Appellant. On May 16, 2016, Appellant filed an Amended Petition for Legitimation to Include Claims for the Declaration of Parentage and the Establishment of Custody, attaching the parties' Parenting Agreement for enforcement under Ga. Code Ann. § 19-7-1(b)(1). … Jurisdiction was additionally premised on Ga. Code Ann. § 19-9-3. On June 21, 2016, Appellee filed a Motion to Dismiss for Failure to State a Claim.

A hearing on Appellee's Motion was held on July 13, 2016. The trial court issued its ruling on Appellee's Motion on July 20, 2016, holding that "Petitioner is not the biological father of the child, who was born out of wedlock, and thus, there is no legal standing for the current action." The court also dismissed Appellant's claim for the declaration of parentage and the establishment of custody, noting merely that "such a cause of action is not in existence in the law of the State of Georgia."

B. Arguments in *Faubert-Rocha* and Similar Cases

The trial court erred in dismissing Appellant's claim of parentage based on its conclusion that "such a cause of action is not in existence." It has long been the rule in this State that "there is no magic in mere nomenclature, even in describing pleadings." *Girtman v. Girtman*, 191 Ga. 173(4) (1940). *See also McDonald v. State*, 222 Ga. 596(1) (1966) ("Under our rules of pleading substance, not mere nomenclature, controls."). It is manifest from the pleadings that Appellant based her request for establishment of parentage and custody on Ga. Code Ann. § 19-7-1(b),

which expressly provides that a parent may relinquish parental power by contract, and the court's equitable and inherent *parens patriae* authority. Dismissal without consideration of the merits of Appellant's request was error. Instead, the trial court should have applied traditional common law principles to Appellant's allegations and request to establish parentage and custody.

Where custody or visitation is at issue between a person recognized by statute as a legal parent and a person without explicit statutory recognition as a parent, Georgia courts begin their analysis by asking whether the recognized parent has lost or ceded some degree of parental power. *Waldrup v. Crane*, 203 Ga. 388, 389 (1948); *Weiss v. Varnadore*, 246 Ga. App. 654, 657 (2000). Parental power can be lost several ways, one of which is by voluntary relinquishment. *In re M.A.F.*, 254 Ga. 748, 751 (1985). As this Court has recognized, a parent can also relinquish partial parental power to another adult, allowing a court to award joint custody or visitation. *Weiss*, 246 Ga. App. at 657. A court has the authority to find that a person in Appellant's position is a parent and, if not, to recognize her as a person standing *in loco parentis* who can bring a claim for custody. *In re M.A.F.*, 254 Ga. at 751-752. Finally, Georgia law recognizes the authority of courts to make custodial decision in exceptional circumstances to protect the welfare of the child. *Clark v. Wade*, 273 Ga. 587, 597 (2001).

…

This Court held that an agreement relinquishing exclusive parental power in favor of shared parental power, such as the Parenting Agreement entered into between the parties here, is enforceable. *Weiss*, 246 Ga. App. at 657. In *Weiss*, involving a custody dispute between a grandmother and birth mother, this Court held that Georgia law allows "an award of joint custody to a third party…upon the consent of the parent to such an arrangement or upon a waiver by such parent of constitutionally protected parental rights, provided that the trial court determines that the award is in the best interest of the child." *Id.*; *see also Ormond v. Ormond*, 274 Ga. App. 869, 869 n.3 (2005) (characterizing *Weiss* as "approving award of joint custody" upon parent's consent or waiver of parental rights, provided trial court determines that award is in best interest of child").

…

A parent may relinquish by voluntary contract their parental power to *any* adult, subject to the court's determination that doing so is in the child's best interests. *See, e.g.*, *In Interest of A.M.Y.*, 189 Ga. App. 847 (1989) (biological mother had effected a valid relinquishment to petitioner, unrelated prospective adoptive mother with whom she placed child as infant and for the following three years); *In re M.A.F.*, 254 Ga. at 751 (biological mother relinquished custody of child by virtue of voluntary contract with appellant, unrelated adult caretaker with whom mother had placed child four years earlier). Here, the Parenting Agreement alone demonstrates in clear, definite, and unambiguous terms that Appellee relinquished partial parental power to Appellant.

…

The court below also erred in declining to recognize that Appellant has standing as a statutory parent or as a parent under equitable principles such as the *in loco parentis* doctrine. … In recent years, our nation has come to a deeper understanding of and respect for the families created by same-sex couples, and acknowledged the harm caused to children in same-sex families when their relationships with both of their parents are not recognized. *See* Tanya Washington, Susannah Pollvogt, Catherine Smith, Lauren Fontana, *Children's Rights in the Midst of*

Marriage Equality: Amicus Brief in Obergefell v. Hodges by Scholars of the Constitutional Rights of Children, 14 Whittier J. Child & Fam. Advoc. 1 (2015). These developments in the law should inform current interpretations and applications of Georgia family law. *See Windsor*, 133 S. Ct. 2675, 2689 (2013) (noting "a new perspective, a new insight" that has come to shape standards for same-sex families in recent years). *Amici* submit that the U.S. Supreme Court's watershed decisions in *Windsor* and *Obergefell* should also inform this Court's analysis. In considering whether the constitutional principles of liberty and equality were violated by governmental obstruction to marriage rights, these decisions regarded both members of same-sex couples as "parents" to their children, without reference to whether the parents and children had genetic or adoptive ties. In *Obergefell*, the Supreme Court considered parties with non-biological relationships to children in same-sex families to be parents, not "third parties" or non-parents, and the Court acknowledged how these filial relationships serve children's best interests. 135 S. Ct. at 2595, 2606.

In addition, Georgia courts recognize the *in loco parentis* status of an adult, such as Appellant, who functions as a child's parent and that adult's resulting standing to seek custody. For example, the Georgia Supreme Court vacated an order removing a child from his caretaker, with whom the parent placed the child years earlier, based on the *in loco parentis* relationship, defined as "'a quasi-parental relationship inferred from and implied by the fact that a child or youth has been taken into a family and treated like any other member thereof, unless an express contract exists to the contrary." *In re M.A.F.*, 254 Ga. at 752 (citations omitted); *see also Maddox v. Queen*, 150 Ga. App. 408, 418-19 (1979) (Quillian, J., dissenting) (explaining the long-standing recognition in Georgia of a person *in loco parentis*, "'defined as one who has assumed the status and obligations of a parent without a formal adoption'….The assumption of the parental relationship is largely a question of intention….'") (citations omitted); *Howard v. Randolph*, 134 Ga. 691, 693 (1910) (defining *in loco parentis* as "a person [who] voluntarily assumes the relation of a parent to a child, whom he is under no obligation to support, and faithfully discharges the duties of that relation by receiving such child into his family and educating and supporting him on the same footing as if the child were his own").

…

The lower court also erred in declining to consider whether the allegations of significant harm to the child from severing a child-parent relationship rise to the level of exceptional or "other circumstances" permitting the court to exercise its equitable authority to enforce or modify the terms of the Parenting Agreement. *See Clark*, 273 Ga. at 597 (recognizing authority of courts to make custodial decisions separating children from legal parents based on "misconduct **or other circumstances**") (citing *In re J.C.*, 242 Ga. 737, 738 (1978)) (emphasis added); *Perkins v. Courson*, 219 Ga. 611, 625 (1964) ("in every case regardless of the parties, the welfare of the child is the controlling and important fact.…[I]f through misconduct **or other circumstances** it appears that the case is exceptional, and that the welfare of the child requires that it should be separated even from its parent, the *parens patriae* must protect the helpless and innocent.") (emphasis added); *Hill v. Rivers*, 200 Ga. 354, 389 (1946) (recognizing that legal right of a parent to custody of his child is subservient to child's interest or safety, and to duty of state to protect individuals of whatever age). In the context of determining the constitutionality of Ga. Code Ann. § 19-7-1(b.1), the Georgia Supreme Court noted that decisions concerning "exceptional circumstances" sufficient to grant custody over a legally-recognized parent must be

made on a case by case basis and are not limited to unfitness. *Clark*, 273 Ga. at 592 ("Our overriding concern in these cases has been the interest and welfare of the child.").

Here, as in other states, the authority to award non-statutory parents custody of the children they have co-parented derives from the state's authority to act as *parens patriae* and its compelling interest in protecting children from the threat of detrimental "emotional harm…intrinsic in the termination or significant curtailment of the child's relationship with a psychological parent." *In re E.L.M.C.*, 100 P.3d 546, 561 (Colo. App. 2004).

…

This case involves the exceptional circumstances of a child raised to depend on two women as her *parents* for *5 years*, now facing the "significant, long-term emotional harm" of losing the love and support of one of those essential parental relationships. The resulting injury is beyond "merely social or economic disadvantages." *See Clark*, 273 Ga. at 598; *see also*, Sec.II, *infra*. As such, this case is distinguishable from a case involving a grandparent or other third party seeking to intrude upon a family unit. *See Clark*, 273 Ga. at 696 (recognizing distinction between third party seeking to intrude upon family unit and situations in which petitioner is "responsible for the daily care of the child and already has established a family unit for the child."). *See also Brooks*, 265 Ga. at 197 (Sears, J. concurring specially) ("Between parent and child, there is no monster like separateness."). The allegations and evidence in the record here support a finding that this case is exceptional and that failure to protect M.B.'s familial relationship with Appellant would cause M.B. significant long-term emotional harm.

III. CONCLUSION

The foregoing discussion should suffice to show that equality for same-sex couples and their children is not quite reality. Practitioners should not presume that *Obergefell* settled the matter. For example, it may be wise to counsel that all non-biological parents get an adoption or court order of parentage, if possible, even if they are on their child's birth certificate, because they risk losing rights if they divorce or travel where not all jurisdictions recognize parentage based on marriage where a genetic relationship is an impossibility. Neither should advocates for equality representing LGBT clients, or judges, relegate *Obergefell* to effecting only the right to marry a same-sex partner. The effect of *Obergefell*, building as it did on the teachings in *Windsor*, 133 S. Ct. 2675, and as recently reinforced in *Pavan*, 137 S. Ct. 2075, serve as strong support for a recognition that non-biological parents in planned families comprising same-sex couples and their children are in fact *parents*, and that to deny these families recognition harms not just adults who have been barred from marriage, but their children as well. As barriers to adoption and marriage by same-sex couples have been struck down as unconstitutional, state court around the country have recognized the sea-change effected by the belated recognition in *Obergefell* of the injustice that has been perpetrated against same-sex couples and their families and now apply more enlightened standards to same-sex parents and their relationships with their children. *See, e.g.*, *Brooke S.B. v. Elizabeth A.C.C.*, 61 N.E.3d 488, 499 (N.Y. 2016); *Conover v. Conover*, 146 A.3d 433 (Md. 2016); *Ramey v. Sutton*, 362 P.3d 217, 218 (Okla. 2015). Georgia appellate courts should follow suit.