

**ARE YOU MY MOTHER?: EQUALITY FOR
SAME-SEX PARENTS IN TEXAS FOLLOWING
*OBERGEFELL***

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I. INTRODUCTION

Deciding to have a child is one of the biggest decisions a married couple can make. It can take months or years of waiting and trying to make this decision a reality. News that the couple is pregnant brings so much happiness

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and joy when it finally happens. The chance that they have both waited for—to be a parent—has finally arrived. Nine months later, after all the anticipation, a child is brought into the world and into the relationship. Both parents love and care for the child. But then the state says that one of the parents is not a parent after all.¹ The parent has no legal connection to the child.² When a daughter was born to Meredith and Martha Holley-Miers, this was the heartbreaking situation they faced.³

Meredith and Martha, a legally married couple, decided to have a child together.⁴ They spent “a lot of time and a lot of money and a lot of heartache trying to get pregnant” using an anonymous sperm donor in a process that took many months.⁵ The couple happily welcomed their first child but knew they would need to put more time, money, and heartache into creating a legal connection to their daughter.⁶ Martha gave birth to the baby girl, and though Meredith was married to Martha and together they had decided to have this child, there was no guarantee that Meredith would be considered the child’s mother.⁷

These problems arise, despite the fact that the child was born into their marriage, because there is no presumption that Meredith is the legal mother of the child.⁸ When a married man and woman have a child together, state law presumes that the man is the child’s father whether or not he is biologically related to the child.⁹ The same is not true for two married women in Texas.¹⁰

Same-sex couples have faced innumerable challenges to the recognition of their relationships.¹¹ Couples have fought for decades to protect their rights to intimate association, to marriage, and now to their children.¹² After *Obergefell v. Hodges*—the 2015 United States Supreme Court decision that protected the right of same-sex couples to marry—people assumed that other

1. See Joshua S. Myers, *Legally Married Mothers and the Presumption of Parentage*, OUT SMART MAG. (Jan. 1, 2016), <http://www.outsmartmagazine.com/2016/01/legally-married-mothers-and-the-presumption-of-parentage/>.

2. See *id.*

3. See Ailsa Chang & Selena Simmons-Duffin, *Same-Sex Spouses Turn to Adoption to Protect Parental Rights*, NPR (Sept. 22, 2017, 4:45 PM), <http://www.npr.org/2017/09/22/551814731/same-sex-spouses-turn-to-adoption-to-protect-parental-rights>.

4. *Id.*

5. *Id.*

6. *Id.*

7. *Id.*

8. See *id.*

9. See TEX. FAM. CODE ANN. § 160.204(a)(1) (West 2017).

10. See Myers, *supra* note 1.

11. See *infra* Section II.B (discussing the challenges and developments of the legal protection for LGBT families).

12. See generally *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015); *Lawrence v. Texas*, 539 U.S. 558 (2003). See Chang & Simmons-Duffin, *supra* note 3.

same-sex rights in family law would follow.¹³ However, since that landmark decision, same-sex couples have still struggled to gain family-law rights, including the right to be recognized as a child's legal parent, especially in Texas.¹⁴

Although Texas has begun to comply with *Obergefell* in some ways since the decision, there are still unanswered questions for same-sex parents.¹⁵ Administrative policies have changed to recognize same-sex relationships, but Texas laws do not reflect these recently implemented practices.¹⁶ Hospitals have been required by courts to include both same-sex parents on a child's birth certificate, but not all of the written regulations and instructions for birth certificates show these nongendered requirements.¹⁷ LGBT parents are left with uncertainty that can lead to instability in their lives and end up costing them thousands of dollars and their legal relationship with their child.¹⁸

This Comment addresses historical and current obstacles to family rights and recognition faced by LGBT couples in Texas and proposes solutions to resolve these issues. Part II summarizes the development of same-sex families and rights for same-sex couples in the United States, leading up to the Supreme Court decision in *Obergefell v. Hodges*.¹⁹ Part III exposes the legal impediments—and attendant harms—faced by LGBT headed families. Specifically, it delves into the statutes for establishing parent-child relationships in the Texas Family Code, administrative policies in the state, and the current, limited options same-sex parents have to be recognized as legal parents under these laws. Part IV addresses progress made toward protecting these rights of same-sex couples and families both in Texas and around the country. Part V analyzes the reasons why changes to current Texas laws are necessary. Finally, Part VI provides recommendations for Texas to improve or create protection for same-sex families, presenting practical suggestions for implementing changes in the Texas Family Code and for the use of principles of statutory interpretation by state courts to resolve the remaining family-rights issues faced every day by same-sex couples in the state.

13. Alexa Ura, *With Marriage Decided, Adoption Rights Next*, TEX. TRIB. (June 30, 2015, 6:00 AM), <https://www.texastribune.org/2015/06/30/despite-ruling-same-sex-adoptions-still-question/>; see G.M. Filisko, *After Obergefell: How the Supreme Court Ruling on Same-Sex Marriage Has Affected Other Areas of Law*, A.B.A. J. (June 2016), http://www.abajournal.com/magazine/article/after_obergefell_how_the_supreme_court_ruling_on_same_sex_marriage_has affé (“I felt that once there was some U.S. Supreme Court case or national recognition of marriage that didn’t have any loopholes, everything would be fixed,” Stanley recalls.”).

14. Ura, *supra* note 13.

15. Myers, *supra* note 1.

16. *Id.*

17. *Id.*

18. See *id.*; see also *infra* Section III.D (discussing the challenges and costs for same-sex parents to secure parental rights).

19. See generally *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015).

II. HISTORY OF LGBT FAMILIES AND RIGHTS

A. Modern Families

Family structure has changed over time, with modern family structures raising issues about parental rights and adoption.²⁰ The “nuclear family” is no longer accepted as the only family structure.²¹ Modern families include single parents, blended families after parents remarry, and same-sex parents.²² In 2010, data showed that there were 115,000 same-sex households with children in the United States.²³ The uncertainty of parental rights for same-sex parents burden these 115,000 families.²⁴ Texas alone had 46,401 same-sex couples residing in the state in 2010,²⁵ third only behind New York and California.²⁶ Thirty-three percent of these couples in Texas are raising children under eighteen years of age.²⁷ In 2005, same-sex parent households raised more than 17,000 children in Texas.²⁸ By 2010, same-sex parents were raising nearly 18,700 children.²⁹

The structure of these families necessarily shifts the focus of parenthood away from a solely biological basis to a more intentional model.³⁰ Changing family structures impact society’s ideas of what it means to be a parent.³¹ Today, a biological mother and father are not the only people who may act as parents.³² In particular, the rise of Assisted Reproductive Technology

20. See Douglas NeJaime, *The Nature of Parenthood*, 126 YALE L.J. 2260, 2264 (2017) (discussing the distinction between social parentage and biological parentage).

21. See *id.* at 2323.

22. See *id.*

23. U.S. CENSUS BUREAU, ACSBR/10-03, SAME-SEX COUPLE HOUSEHOLDS: AMERICAN COMMUNITY SURVEY BRIEFS 2 (2011), <https://www2.census.gov/library/publications/2011/acs/acsbr10-03.pdf>.

24. *Id.*

25. Gary J. Gates, *Same-Sex Couples in Texas: A Demographic Summary*, WILLIAMS INST. (Sept. 2014), <https://williamsinstitute.law.ucla.edu/experts/gary-gates/ss-demographics-tx-sep-2014/>.

26. Karen J. Langsley & Shelly L. Skeen, *Same Sex Issues: Parentage Presumption, Adoption, Birth Certificates (and Then Some)*, TXCLE ADVANCED FAM. L. 12.2.V (2016).

27. Gates, *supra* note 25.

28. Adam P. Romero et al., *Census Snapshot: Texas*, WILLIAMS INST. (Jan. 2008), <https://williamsinstitute.law.ucla.edu/wp-content/uploads/TexasCensus2000Snapshot.pdf>.

29. Gates, *supra* note 25.

30. See Douglas NeJaime, *Marriage Equality and the New Parenthood*, 129 HARV. L. REV. 1185, 1188 (2016). When a biological model of parentage would involve a biological father and biological mother conceiving and raising a child, the intentional (or functional) model allows for nonbiological parents to be considered parents. *Id.* at 1187. In an intentional model of parentage, two same-sex parents may choose to adopt a child or have a child through assisted reproductive technology, including the use of a surrogate. *Id.* at 1190–91. In this situation, though, one or both of the parents would not be biologically related to the child; the parents intend to create the parent–child relationship and function as the child’s parents. *Id.* at 1190.

31. See generally NeJaime, *supra* note 20 (discussing the distinction between social parentage and biological parentage).

32. *Id.* at 2264–66.

(ART) has led to more parents raising children who are not biologically related to them.³³

ART procedures generally “involve surgically removing eggs from a woman’s ovaries, combining them with sperm in the laboratory, and returning them to the woman’s body or donating them to another woman.”³⁴ Broader definitions of the term also include artificial insemination.³⁵

The modern “model of parenthood is premised on *intentional* and *functional*, rather than biological and gendered, concepts of parentage.”³⁶ With ART, a child does not exist until parents take intentional steps toward creating the child.³⁷ Because same-sex couples cannot have biological children together, they turn to ART to create families intentionally.³⁸ As family structures shift to the intentional model, these families have a need for legal protection.³⁹ Gay and lesbian couples especially need legislation and judicial decisions to create legal family relationships.⁴⁰

B. Development of Legal Protections for LGBT Families

Advocates of legal protections for LGBT couples have made significant progress in the past forty years.⁴¹ Litigation over the constitutionality of states denying marriage to same-sex couples began in the 1970s.⁴² Over time, this litigation has protected an increasing number of rights for the LGBT community.⁴³ In 2003, *Lawrence v. Texas* reaffirmed that the state’s role was “to define the liberty of all, not to mandate our own moral code,” overturning precedent that criminalized intimacy between same-sex partners.⁴⁴ *Lawrence* also extended the right to privacy to same-sex couples, taking a big step forward in protecting the dignity of gay and lesbian people.⁴⁵

Before *Lawrence*, the Court in *Loving v. Virginia* identified marriage as a fundamental right, stating that “[t]he freedom to marry has long been recognized as one of the vital personal rights essential to the orderly pursuit

33. See generally NeJaime, *supra* note 30, at 1188.

34. *What Is Assisted Reproductive Technology?*, CENTERS FOR DISEASE CONTROL & PREVENTION, <https://www.cdc.gov/art/whatis.html> (last updated Feb. 7, 2017).

35. NeJaime, *supra* note 30, at 1188 n.8.

36. *Id.* at 1187.

37. Melanie B. Jacobs, *Parental Parity: Intentional Parenthood’s Promise*, 64 BUFF. L. REV. 465, 472–74 (2016).

38. See generally NeJaime, *supra* note 30, at 1188–89.

39. *Id.* at 1188–91.

40. *Id.*

41. COURTNEY G. JOSLIN ET AL., *LESBIAN, GAY, BISEXUAL AND TRANSGENDER FAMILY LAW* § 8:2 (2017).

42. *Id.*

43. *Id.*

44. *Lawrence v. Texas*, 539 U.S. 558, 571 (2003) (quoting *Planned Parenthood v. Casey*, 505 U.S. 833, 850 (1992)).

45. *Id.* at 562–64. The Court held that “same-sex couples have the same right as opposite-sex couples to enjoy intimate association.” *Obergefell v. Hodges*, 135 S. Ct. 2584, 2600 (2015).

of happiness by free men.”⁴⁶ The Supreme Court has reaffirmed the importance of the right to marriage time after time.⁴⁷ Marriage serves numerous purposes in society, including providing protection for children by creating stability.⁴⁸ The Court has also acknowledged that “the right to ‘marry, establish a home and bring up children’ is a central part of the liberty protected by the Due Process Clause.”⁴⁹ *Lawrence* and *Loving*, along with other cases, established a foundation that fostered progress in marriage and family rights for same-sex couples.

In 1993, the Supreme Court of Hawaii first took on the issue of same-sex marriage.⁵⁰ The court held that the state’s law restricting marriage to opposite-sex couples was subject to strict scrutiny under the Equal Protection Clause of Hawaii’s state constitution because it discriminated on the basis of sex.⁵¹ This was a big win for same-sex couples; although, the implications were not as broad as they may seem because it was based on the Hawaii state constitution, not the federal Constitution.⁵² Even so, in response to this holding and its implications, many states and the federal government sought to deny same-sex couples the option of marrying legally.⁵³ Congress did so by passing the Defense of Marriage Act (DOMA).⁵⁴ This Act reserved marriage and its benefits to opposite-sex couples only by “defining marriage for all federal-law purposes as ‘only a legal union between one man and one woman as husband and wife.’”⁵⁵ The passage of DOMA led to an increase in litigation over the right to same-sex marriage.⁵⁶

The pinnacle of this litigation was *Obergefell v. Hodges*, a case in which many same-sex couples sued state officials for enforcing laws that state that

46. *Loving v. Virginia*, 388 U.S. 1, 12 (1967) (holding that bans on interracial marriage violate the Equal Protection and Due Process Clauses of the Fourteenth Amendment).

47. See *Obergefell*, 135 S. Ct. at 2598; *Turner v. Safley*, 482 U.S. 78, 95 (1987); *Zablocki v. Redhail*, 434 U.S. 374, 384 (1978); *Loving*, 388 U.S. at 12.

48. *Obergefell*, 135 S. Ct. at 2600.

49. *Id.* (alteration in original omitted) (quoting *Zablocki*, 434 U.S. at 384).

50. *Baehr v. Lewin*, 852 P.2d 44, 48–49 (Haw. 1993).

51. *Id.* at 67. To decide whether there has been a violation when an Equal Protection Clause question comes before a court, the court must determine which level of scrutiny to apply. See *id.* at 56–57. Strict scrutiny is the highest level of scrutiny and is applied when laws discriminate on the basis of a suspect class or infringe a fundamental right granted by the constitution. See *id.* at 63–64. Under strict scrutiny, these laws are presumed to be unconstitutional unless the state can show a compelling state interest to justify the classification. *Id.* On the other end of the spectrum, when the law in question does not discriminate against a suspect class, the rational basis test is applied. *Id.* In such an instance, the state is only required to show that there was a legitimate state interest for the discriminatory law. *Id.* at 64. In this case, the Hawaii Supreme Court held that marriage was a fundamental right and sex was a suspect class; so under the strict scrutiny test, the government must show a compelling reason for denying the right to marriage based on sex. *Id.* at 65–67.

52. JOSLIN ET AL., *supra* note 41.

53. *Obergefell*, 135 S. Ct. at 2597.

54. *Id.*

55. *Id.* (quoting 1 U.S.C. § 7 (West 1996)).

56. See JOSLIN ET AL., *supra* note 41.

marriage is between a man and a woman.⁵⁷ Petitioner James Obergefell sued the State of Ohio to be listed on his husband's death certificate after the two had been married in Maryland, where same-sex marriage was legal.⁵⁸ Because the State of Ohio did not recognize marriage between two men, Obergefell could not be listed as a surviving spouse on his husband's death certificate.⁵⁹ In the holding for this case, the Supreme Court ruled that same-sex couples could not be denied the fundamental right to marriage.⁶⁰ Same-sex couples are legally no different than opposite-sex couples when it comes to family relationships.⁶¹ *Obergefell's* holding protects marriage for same-sex couples along with the "constellation of benefits" that come with marriage.⁶² Thus, Obergefell must be listed on his husband's death certificate because an opposite-sex spouse would be.⁶³ The same reasoning applies to birth certificates of children born to same-sex parents and all other benefits that come with marriage.⁶⁴ States may no longer deny same-sex couples the right to marry and may not treat same-sex married couples differently than opposite-sex married couples when it comes to marriage and its attendant benefits.⁶⁵

1. Texas's Reaction to Obergefell

Despite *Obergefell's* historic ruling, states continue to deny certain rights to same-sex couples.⁶⁶ Upon the issuance of the *Obergefell* opinion, Texas Attorney General Ken Paxton instructed county clerks to wait to issue marriage licenses to same-sex couples until he directed them otherwise.⁶⁷ Governor Greg Abbott made a statement vowing "to defend the religious liberties of those who believe marriage is between one man and one woman."⁶⁸ Many states rely on freedom of religion arguments to avoid extending certain protections or benefits to same-sex couples.⁶⁹ Although a federal district court judge ruled that Texas must recognize same-sex

57. *Obergefell*, 135 S. Ct. at 2593.

58. *Id.* at 2594.

59. *Id.*

60. *Id.* at 2591.

61. *See id.* at 2601.

62. *Id.* at 2590. Benefits conferred by marriage "include: taxation; inheritance and property rights; rules of intestate succession; spousal privilege in the law of evidence; hospital access; medical decisionmaking authority; adoption rights; the rights and benefits of survivors; birth and death certificates; professional ethics rules; campaign finance restrictions; workers' compensation benefits; health insurance; and child custody, support, and visitation rules." *Id.* at 2601.

63. *Id.* at 2601.

64. *Id.*

65. *See id.* at 2602.

66. *See* Alexa Ura, *Supreme Court: Gay Marriage Bans Are Unconstitutional*, TEX. TRIB. (June 26, 2015, 9:00 AM), <https://www.texastribune.org/2015/06/26/supreme-court-ruling-gay-marriage/>.

67. *Id.*

68. *Id.*

69. *See id.*

marriages for purposes of state documents, challenges still exist for same-sex couples.⁷⁰ Discrimination and legal obstacles remain despite *Obergefell*.⁷¹ Although same-sex couples could legally marry, the State of Texas did not make it easy to exercise this right immediately following the Supreme Court's decision.⁷² Additionally, Texas and many other states continue to deny same-sex couples the "constellation of benefits" that go along with marriage.⁷³ One of the greatest challenges is still the legal recognition of same-sex families with children. It is because of these challenges that the fight for same-sex equality still continues today. The right to marriage has been won, but "equality for same-sex parents has not yet been fully realized."⁷⁴

III. SETBACKS TO EQUALITY

Although significant progress in LGBT equality has been made, the need for legislation and judicial opinions that adequately protect LGBT rights still exists. In the post-*Obergefell* legal landscape, same-sex families are still vulnerable in many states. This is true in Texas.⁷⁵ The Texas Family Code, Texas Administrative Code, and policies do not provide for the recognition of a parent-child relationship between a woman and a child when the woman's wife gave birth to the child through ART.⁷⁶ This means Texas children do not have the security of a family recognized by law, and parents do not have the certainty of a legal parental relationship to those children.⁷⁷ This may exclude a person acting as a child's parent from being able to exercise normal rights of parents, such as authorizing medical treatment of the child, or lead to a parent losing custody of a child.⁷⁸ Gaining the right to marry was only one step forward on the path to equality for same-sex families, but many obstacles, including the lack of legal recognition for these families, still lie ahead.

70. See Alexa Ura, *Judge Gives Texas Deadline on Same-Sex Marriage Policies*, TEX. TRIB. (Aug. 12, 2015, 9:00 AM), <https://www.texastribune.org/2015/08/12/judge-gives-texas-deadline-same-sex-marriage-polic/>.

71. See Ura, *supra* note 66.

72. See *id.*

73. *Obergefell v. Hodges*, 135 S. Ct. 2584, 2590 (2015); see Ura, *supra* note 13.

74. Mary Kay Kisthardt & Richard A. Roane, *Who Is a Parent and Who Is a Child in a Same-Sex Family? – Legislative and Judicial Issues for LGBT Families Post-Separation, Part II: the U.S. Perspective*, 30 J. AM. ACAD. MATRIM. LAW. 55, 80 (2017).

75. See *infra* Sections III.A, III.B, III.C (discussing the obstacles same-sex couples face in Texas).

76. See *infra* notes 79–80, 94–97 and accompanying text (explaining the Texas Family Code and the Texas Administrative Code's treatment, respectively).

77. See *infra* notes 99–102 and accompanying text (discussing the effects that Texas policies have on same-sex families).

78. See *infra* notes 121, 134–35 and accompanying text (highlighting the consequences that may stem from Texas's policies).

A. Texas Family Code

A “parent” in Texas is defined as “the mother, a man presumed to be the father, a man legally determined to be the father, a man who has been adjudicated to be the father by a court of competent jurisdiction, a man who has acknowledged his paternity under applicable law, or an adoptive mother or father.”⁷⁹ This statute fails to provide for same-sex parents, unless the second parent is an adoptive parent.⁸⁰ The same is true of the Texas statute on the establishment of the parent–child relationship, which reads:

- (a) The mother-child relationship is established between a woman and a child by:
 - (1) the woman giving birth to the child;
 - (2) an adjudication of the woman’s maternity; or
 - (3) the adoption of the child by the woman.
- (b) The father-child relationship is established between a man and a child by:
 - (1) an un rebutted presumption of the man’s paternity of the child under [§] 160.204;
 - (2) an effective acknowledgment of paternity by the man under Subchapter D, unless the acknowledgment has been rescinded or successfully challenged;
 - (3) an adjudication of the man’s paternity;
 - (4) the adoption of the child by the man; or
 - (5) the man’s consenting to assisted reproduction by his wife under Subchapter H, which resulted in the birth of the child.⁸¹

Based on the language of this statute, a “man” can establish a parental relationship with the child by consenting to assisted reproduction; however, a woman cannot.⁸² A plain meaning reading of this statute in isolation prohibits two married women who have agreed to use assisted reproduction to have a child from being legal mothers of that child.⁸³ Because this statute also provides that the man must consent to assisted reproduction with his “wife,” this law discriminates against gay men as well.⁸⁴ Subchapter H, mentioned in § 160.201(b)(5), provides that “[i]f a husband provides sperm for or consents to assisted reproduction by his wife as provided by [§] 160.704, he is the father of a resulting child.”⁸⁵ The consent must be

79. TEX. FAM. CODE ANN. § 101.024 (West 2017).

80. *Id.*

81. *Id.* § 160.201 (footnotes omitted).

82. *See id.* § 160.201(b)(5).

83. *See id.*

84. *See id.*

85. *Id.* § 160.703.

recorded and “signed by the woman and her husband”; however, “[f]ailure by the husband to sign a consent . . . does not preclude a finding that the husband is the father of a child born to his wife if the wife and husband openly treated the child as their own.”⁸⁶ This statute also fails to explicitly apply to families formed by same-sex parents.⁸⁷

1. Presumption of Paternity

The gendered application of the Texas Presumption-of-Paternity statute is a major impediment to the rights of married same-sex parents. The Texas statute on presumption of paternity states: “A man is presumed to be the father of a child if: (1) he is married to the mother of the child and the child is born during the marriage”⁸⁸ On its face, the gendered language of the law precludes same-sex spouses from being presumed legal parents because, even though they were married at the time of the child’s birth, in the case of two women, neither of them is the “father.”⁸⁹

Surrogacy is another alternative method of reproduction that is becoming increasingly common among same-sex couples.⁹⁰ The Texas statute on establishing a parental relationship between a mother or father and a “child born to a gestational mother under a gestational agreement” is reassuringly unproblematic.⁹¹ The statute has provisions for mother–child relationships and father–child relationships but lacks language requiring a child to have only one mother and one father.⁹² This makes it possible for the statute to be applied if same-sex parents—for example, two men—have a child through surrogacy. Both fathers may establish a parent–child relationship with the infant under this statute.⁹³

86. *Id.* § 160.704.

87. *See id.* § 160.703.

88. *Id.* § 160.204(a)(1).

89. *See id.*

90. *See* Nara Schoenberg, *Gay Men Increasingly Turn to Surrogates to Have Babies*, CHI. TRIB. (Nov. 23, 2016, 8:59 AM), <http://www.chicagotribune.com/lifestyles/health/sc-gay-men-having-babies-health-1130-20161123-story.html>.

91. FAM. §§ 160.753–.754 (stating that a “mother-child relationship exists between a woman and a child by an adjudication confirming the woman as a parent of the child born to a gestational mother under a gestational agreement if the gestational agreement is validated under this subchapter or enforceable under other law, regardless of the fact that the gestational mother gave birth to the child,” and a “father-child relationship exists between a child and a man by an adjudication confirming the man as a parent of the child born to a gestational mother under a gestational agreement if the gestational agreement is validated under this subchapter or enforceable under other law”).

92. FAM. §§ 160.753–.754.

93. *See id.* §§ 160.753–.754, .760.

B. Texas Administrative Code

The Texas Administrative Code gives the state registrar the authority to create regulations governing the content of Texas birth certificates.⁹⁴ These regulations dictate that the attendant file the birth certificate at birth with the state's Vital Statistics Unit, and the content of the birth certificate must include basic information about the mother, the mother's health information, and basic information about the father (which is automatically included if the mother is married).⁹⁵ These requirements are gendered because they only require a mother and a father to be listed on the birth certificate.⁹⁶ The requirements also clarify situations involving ART.⁹⁷ These are also gendered, as reflected in Texas's parentage laws.⁹⁸ The instructions on whom to list as the child's parents in the case of artificial insemination read:

If a husband and wife consent to the artificial insemination of the wife, any resulting child is the child of the couple; the resulting child is not the child of the donor, unless the donor is the husband of the woman. The consent must be in writing and must be acknowledged. If the mother of the child was married at the time of conception or the birth of the child, the husband of the mother is presumed to be the father of the child unless otherwise determined by a court of competent jurisdiction.⁹⁹

The language of this policy leaves no room for a same-sex spouse to be listed on the child's birth certificate if two female parents have agreed to use artificial insemination to conceive a child.¹⁰⁰

Many of these written policies do not reflect current administrative practices in Texas, which involve placing two married, same-sex parents on a child's birth certificate automatically.¹⁰¹ So, the policies and statutes must be clarified to prevent an institution from denying two same-sex parents from being listed on a child's birth certificate.¹⁰²

94. 25 TEX. ADMIN. CODE § 181.13 (2018).

95. TEX. VITAL STATISTICS UNIT, BIRTH REGISTRATION HANDBOOK 12, <https://www.dshs.texas.gov/vs/field/docs/Birth-Registration-Handbook.pdf>.

96. *See id.*

97. *See id.* at 11.

98. *See id.*; *see also* FAM. §§ 160.204(a)(1), .703 (using gendered terms when defining the parent-child relationship).

99. TEX. VITAL STATISTICS UNIT, *supra* note 95, at 11.

100. *See id.*

101. Melissa Repko, *Gay Parents Push to Get Both Names on Birth Certificates*, DALL. MORNING NEWS (July 2015), <https://www.dallasnews.com/news/news/2015/07/12/gay-parents-push-to-get-both-names-on-birth-certificates>.

102. *Id.*

*C. Consequences of Inequality in Legal Recognition of Same-Sex Families**1. Birth Certificates*

Same-sex parents face serious consequences if their legal rights to their children are not protected.¹⁰³ Without legal recognition, parents cannot enforce their parental rights or protect their children.¹⁰⁴ In Texas, a parent will be legally recognized if he or she fits the definition of a parent in the Family Code.¹⁰⁵ If a parent is not recognized this way, then his or her rights are in jeopardy.¹⁰⁶ Although it is not sufficient to create the relationship under the law, being listed on a child's birth certificate is important evidence that the parent-child relationship exists.¹⁰⁷

If a parent is not listed on a birth certificate, the individual may not be recognized as the child's parent for many important purposes. Birth certificates are "among the most critical government-issued records."¹⁰⁸ Birth certificates are "a permanent legal record of an individual's birth [and] . . . an individual's basic claim and proof of citizenship, identification[,] and relationship to his or her parent(s)."¹⁰⁹ They are used to identify the child when setting up a bank account, obtaining other government documents such as a passport, and determining custody of the child.¹¹⁰ Birth certificates are also used to register a child for school.¹¹¹ Section 25.002 of the Texas Education Code requires that:

If a parent or other person with legal control of a child under a court order enrolls the child in a public school, the parent or other person or the school district in which the child most recently attended school shall furnish to the school district:

103. See *infra* Section III.C.2 (discussing consequences resulting from lack of recognition as a legal parent).

104. See *Legal Recognition of LGBT Families*, NAT'L CTR. FOR LESBIAN RTS. 1, http://www.nclrights.org/wp-content/uploads/2013/07/Legal_Recognition_of_LGBT_Families.pdf (last updated Sept. 2016).

105. See TEX. FAM. CODE ANN. § 101.024 (West 2017).

106. See Myers, *supra* note 1.

107. Shohreh Davoodi, *More Than a Piece of Paper: Same-Sex Parents and Their Adopted Children Are Entitled to Equal Protection in the Realm of Birth Certificates*, 90 CHI.-KENT L. REV. 703, 707 (2015).

108. Petition for Writ of Certiorari for Petitioner-Appellant, Pavan v. Smith, 137 S. Ct. 2075 (2017) (per curiam) (No. 16-992), 2017 WL 587527, at *6.

109. TEX. VITAL STATISTICS UNIT, *supra* note 95, at 1.

110. Davoodi, *supra* note 107, at 708.

111. Adam Liptak, *Gay Couples Entitled to Equal Treatment on Birth Certificates, Justices Rule*, N.Y. TIMES (June 26, 2017), <https://www.nytimes.com/2017/06/26/us/politics/gay-couples-entitled-to-equal-treatment-on-birth-certificates-justices-rule.html>; see also Pavan v. Smith, 137 S. Ct. 2075, 2078 (2017) (per curiam) (discussing the need for a birth certificate to enroll a child in school).

(1) the child's birth certificate or another document suitable as proof of the child's identity¹¹²

If a parent is not able to present a birth certificate on which that parent is listed, he or she may not be able to enroll the child in school—a normal right and task for parents.¹¹³ The most significant purpose of a birth certificate is to establish and show evidence of parenthood.¹¹⁴ Because it serves these important purposes, an inaccurate birth certificate has serious consequences.

Children are injured by inaccurate birth certificates because their documentation does not correctly represent their family structure.¹¹⁵ Further, by refusing to acknowledge the particular family dynamic in a same-sex household, the state denies the validity of the family.¹¹⁶ The child has no accurate record of the composition of the family the child was born into if the people the child knows as parents are not listed on the child's birth certificate.¹¹⁷ A state's legal position on same-sex families validates society's negative attitude, which leads to discrimination and stigmatization of same-sex couples and their children.¹¹⁸ This stigma, caused by a state's failure to recognize a child's family, impacts a child both socially and emotionally.¹¹⁹

2. Legal Parentage

In addition to these societal consequences of inaccurate birth certificates that are damaging to parents and children, there are serious legal consequences to discriminatory statutes regarding the establishment of parent-child relationships. For instance, same-sex parents may not realize they need to take extra steps to secure their parental rights to their children.¹²⁰ In fact, they may not be able to afford the cost of taking those steps, which includes adoption or obtaining a parentage order.¹²¹ Sometimes protecting one's rights requires litigation, but the cost of litigating to protect those rights, which a person theoretically already has, can be so great that the person may

112. TEX. EDUC. CODE ANN. § 25.002 (West 2017).

113. *See id.*

114. Davoodi, *supra* note 107.

115. *See* Paula Gerber & Phoebe Irving Lindner, *Birth Certificates for Children with Same-Sex Parents: A Reflection of Biology or Something More?*, 18 N.Y.U. J. LEGIS. & PUB. POL'Y 225, 238 (2015).

116. *See id.*

117. *See id.* at 239.

118. *See id.* at 238–41.

119. *See id.* at 240.

120. *See* Myers, *supra* note 1.

121. Madeline Marzano-Lesnevich & Galit Moskowitz, *In the Interest of Children of Same-Sex Couples*, 19 J. AM. ACAD. MATRIM. LAW. 255, 275 (2005).

never seek to enforce those rights.¹²² If litigating to enforce existing rights is too expensive, families cannot enjoy the protection those rights are meant to provide.¹²³

The parent who has been raising a child may not be a legal parent.¹²⁴ When they are not recognized as legal parents, parents are denied important rights, such as being able to make medical decisions for the child,¹²⁵ because only a legal parent can “make decisions about the child’s health, education, and well-being.”¹²⁶ To illustrate, “If an emergency were to arise, schools and hospitals may treat the . . . children as if they had only one parent.”¹²⁷ Only that parent would have the right to make decisions for and about the child.¹²⁸ For instance, when a two-year-old girl who was the daughter of a lesbian couple from Austin fell and broke her front tooth, one of her mothers “rushed the crying, bleeding child to a pediatric dentist.”¹²⁹ However, the dentist refused to treat the child unless the “real mother” was present.¹³⁰ The mother of the child called her wife in tears, explaining that the dentist would only see the biological mother and that she would have to leave work and bring the child’s birth certificate before the child could be treated.¹³¹ Both parents were devastated that their child could be refused care because of a question of their legal parentage.¹³² If a parent is not a legal parent, he or she may not be able to do something as simple as sign a consent form for the child to go on a school field trip.¹³³ Additionally, the parent may not be able to claim the child as a dependent for health insurance.¹³⁴ In short, even if a person acts as a parent to the child, without the status of legal parent, that person may be denied the ability to do all the things a parent can do for a child.¹³⁵

122. See Leonore F. Carpenter, *The Next Phase: Positioning the Post-Obergefell LGBT Rights Movement to Bridge the Gap Between Formal and Lived Equality*, 13 STAN. J. C.R. & C.L. 255, 275 (2017).

123. See *id.*

124. NeJaime, *supra* note 20.

125. *Id.* at 2318.

126. *Legal Recognition of LGBT Families*, *supra* note 104.

127. *Obergefell v. Hodges*, 135 S. Ct. 2584, 2595 (2015).

128. See *id.*

129. Brief of Amici Curiae Lambda Legal Defense and Education Fund, Inc., Family Equality Council, et al., in Support of Respondents, *Masterpiece Cakeshop, Ltd. v. Colo. Civil Rights Comm’n*, 138 S. Ct. 1719 (2018) (No.16-111), 2017 WL 5127317, at *18–19 [hereinafter Brief of Amici Curiae]; see *Legal Recognition of LGBT Families*, *supra* note 104.

130. Brief of Amici Curiae, *supra* note 129.

131. *Id.*

132. *Id.*

133. *Legal Recognition of LGBT Families*, *supra* note 104.

134. *Id.*

135. See *id.*

3. Challenging Parentage

Issues arise if a challenge is made to the nonbiological parent's "claimed status of being a legal parent."¹³⁶ If the parents separate and did not realize adoption was necessary to protect their parental rights, those rights may not be preserved.¹³⁷ Only a legal parent has the right to have custody of the child.¹³⁸ Without a recognized relationship, a child can be denied the right to visit or live with the nonlegal parent.¹³⁹ This can have a severe negative impact on both the parent and child.¹⁴⁰ It causes psychological harm to a child to legally remove an adult that a child considers a parent.¹⁴¹

Even if a same-sex parent is able to get his or her name on the birth certificate, this will not be sufficient to protect the parent's legal rights.¹⁴² The Texas Family Code does not support the assumption that being listed on a child's birth certificate creates a legal parent-child relationship.¹⁴³ Having his or her name on the child's birth certificate will be useful to the parent in a case where the spouse is challenging parentage because it shows an intent of both spouses to be considered parents of that child.¹⁴⁴ However, a birth certificate is only evidence of a legal parent relationship; it does not serve to create the legal relationship.¹⁴⁵ Parentage must be established under the state law to be legally recognized.¹⁴⁶

Additionally, if the biological parent listed on the birth certificate with a recognized legal relationship to the child dies or becomes incapacitated, the remaining parent may not be able to preserve his or her parental rights or protect the child.¹⁴⁷ If the biological parent dies, the child could be considered an orphan despite the fact that the nonlegal parent is still living.¹⁴⁸ The living parent, having no legal connection to the child, may not be allowed to retain custody of the child.¹⁴⁹ Now a child dealing with the trauma of the death of one parent also has to cope with losing a second parent because the law failed to recognize the parent-child relationship.¹⁵⁰ This leaves the child without emotional, legal, or financial security.¹⁵¹

136. See Myers, *supra* note 1.

137. NeJaime, *supra* note 20, at 2264–65.

138. *Legal Recognition of LGBT Families*, *supra* note 104.

139. Marzano-Lesnevich & Moskowitz, *supra* note 121, at 270.

140. See *id.*

141. Langsley & Skeen, *supra* note 26.

142. See Myers, *supra* note 1.

143. See *id.*

144. See *id.*

145. *Id.*

146. *Id.*

147. See *Obergefell v. Hodges*, 135 S. Ct. 2584, 2595 (2015).

148. See Gerber & Lindner, *supra* note 115, at 240.

149. See *Legal Recognition of LGBT Families*, *supra* note 104.

150. See Marzano-Lesnevich & Moskowitz, *supra* note 121, at 270.

151. *Id.*

4. Adoption of a Child Born into the Marriage

To ensure that parental rights are secure, a same-sex parent may have to adopt the child, even if the child was born to one spouse during the marriage.¹⁵² This is not true for opposite-sex, married couples because the statutory presumption of paternity applies to them; therefore, both spouses are automatically recognized as legal parents.¹⁵³ Forcing a parent to adopt a child that was born into the marriage sends the message that, from the beginning, that child does not belong to that parent, which has significant societal and legal implications.¹⁵⁴ A lack of acceptance for same-sex couples and their children in society and Texas law creates instability in family relationships that should be protected.¹⁵⁵

Ultimately, gendered terms in the Texas Family Code do not align with administrative practices the state was required to institute following the decision in *Obergefell*.¹⁵⁶ This results in a lack of legal protection for same-sex parents that have no biological connection to their children.¹⁵⁷ This deficit harms same-sex families in the State of Texas because, even when two spouses intentionally bring a child into the marriage and are both listed on that child's birth certificate, the child will not have a legal connection to both parents, and the family will be left vulnerable to the uncertainty that brings.

D. Current Options for Same-Sex Parents

Same-sex parents face challenges to securing parental rights that opposite-sex couples in Texas do not. Because same-sex spouses are not both automatically considered the child's parents upon the birth of the child, they must take additional steps to establish and protect their parental rights.¹⁵⁸ One option is that the spouse of the birth mother must "adopt the child later to gain parental rights."¹⁵⁹ This is known as either second-parent adoption or step-parent adoption.¹⁶⁰ Second-parent adoption allows the partner in a relationship, either "heterosexual or same-sex, to adopt the other partner's biological or legal child."¹⁶¹ This can be done without terminating the rights of the other parent and gives both the biological and adoptive parent an equal legal status in relation to the child.¹⁶² This is currently the most popular option

152. Chang & Simmons-Duffin, *supra* note 3.

153. See TEX. FAM. CODE ANN. § 160.204(a)(1) (West 2017).

154. NeJaime, *supra* note 20, at 2319.

155. See *Obergefell v. Hodges*, 135 S. Ct. 2584, 2601 (2015).

156. See Myers, *supra* note 1.

157. See *id.*

158. Chang & Simmons-Duffin, *supra* note 3.

159. Ura, *supra* note 13.

160. See Kisthardt & Roane, *supra* note 74, at 76.

161. See *Legal Recognition of LGBT Families*, *supra* note 104.

162. See Kisthardt & Roane, *supra* note 74.

because adoption is thought to be the most secure method of gaining parental rights as a nonbiological caregiver.¹⁶³ Adoption is the most secure method for a nonbiological caregiver to gain parental rights because adoption “conclusively establishes parenthood.”¹⁶⁴ Additionally, other states will recognize adoption decrees entered in another state, making it preferable to other methods of securing parental rights.¹⁶⁵ However, there is a significant cost to go through this process.¹⁶⁶ An Austin attorney specializing in LGBT, second-parent adoptions uses a sliding-scale rate based on the clients’ incomes, so an adoption can cost anywhere from \$1,000 to \$3,000, not including any other fees that may be required.¹⁶⁷ Additionally, every adoption requires a home study to be completed, which could cost between \$500 and \$1,000.¹⁶⁸ However, other attorneys in the state may charge up to \$6,500 in fees for a second-parent adoption.¹⁶⁹ Adoption also requires that the child resides with the adoptive parent for six months, so for children born into the marriage there will be a six-month waiting period before the adoption can be finalized; although, this may be waived in some cases.¹⁷⁰

A person can also be declared the legal parent of a child through an adjudication of parentage if the person is not automatically considered a legal parent.¹⁷¹ Although this is typically used to determine the father of a child and to allow him to be listed on the child’s birth certificate (securing his parental rights whether or not he is married to the child’s mother), some states allow same-sex parents to use this mechanism.¹⁷² With a court judgment of parentage, a nonbiological parent will be recognized as the legal parent of a child.¹⁷³ An order of parentage will be recognized in other states the same way an adoption would be.¹⁷⁴ In turn, Texas recognizes court judgments of parentage from other states.¹⁷⁵ However, some believe the parentage order does not carry the same weight as an adoption and may not be recognized

163. *Id.*

164. *Id.*

165. *See id.*; *see also* V.L. v. E.L., 136 S. Ct. 1017, 1022 (2016) (holding that the Full Faith and Credit Clause of the Constitution required Alabama to respect an adoption order from Georgia making two women the parents of a child).

166. Telephone Interview with Suzanne Bryant, Attorney (Jan. 22, 2018); *see also* Chang & Simmons-Duffin, *supra* note 3 (stating that “the whole adoption process took months and cost about \$3,500”).

167. Telephone Interview with Suzanne Bryant, *supra* note 166.

168. *Id.*

169. *Id.*

170. Telephone Interview with Leigh Jorgeson & Ian Pittman, Founding Partners, Jorgeson Pittman LLP (Jan. 25, 2018).

171. *Adjudicate Parentage*, AM. FAM. L. CTR., <https://americafamilylawcenter.org/adjudicate-parentage-in-texas-steps-to-adjudicate-parentage/> (last visited Nov. 24, 2018).

172. *See id.*

173. *Legal Recognition of LGBT Families*, *supra* note 104, at 4.

174. *See id.*; *see also* U.S. CONST. art. IV, § 1, cl. 1 (“Full Faith and Credit shall be given in each State to the public Acts, Records, and judicial Proceedings of every other State.”).

175. *See* Langsley & Skeen, *supra* note 26.

outside the state.¹⁷⁶ The basis of issuing parentage orders for two female spouses is part of the statute for establishing parent–child relationships, which states that a mother–child relationship is established by “adjudication of the woman’s maternity”¹⁷⁷ This allows a court to issue an order declaring the woman to be the parent of a child.¹⁷⁸

There are also legal costs associated with obtaining a parentage order. However, these costs can be about half of the cost of an adoption and do not include fees for a home study or background check.¹⁷⁹ Even so, obtaining a parentage order can cost a family thousands of dollars.¹⁸⁰ But because it is more cost effective and faster than an adoption, some parents prefer this method despite the popular belief that it holds less weight than an adoption.¹⁸¹ While adopting your child may be seen as asking the court for permission to be considered the child’s parent, receiving a parentage order is viewed as asking the court to recognize that you are already a parent of your child.¹⁸²

Since a federal district judge ordered Texas to comply with *Obergefell* by recognizing same-sex marriage for the purposes of state documents, the state has allowed same-sex parents to amend their child’s birth certificate to include the second parent.¹⁸³ Now, “couples . . . may file a request with Vital Statistics to have the second [parent’s] name added to the birth certificate.”¹⁸⁴ Two Vital Statistics forms allow for amendments.¹⁸⁵ One allows both same-sex parents to be listed on the birth certificate for their adopted child and the other allows married same-sex parents to add the second parent’s name to the birth certificate if one parent is already listed.¹⁸⁶ There is a \$25 fee associated with filing these forms with the state.¹⁸⁷ Today, most hospitals will provide a form for parents to complete with the information that will be listed on the birth certificate.¹⁸⁸ This form provides sections for “PARENT 1” and “PARENT 2” and allows the parent to choose to be listed as “Mother,”

176. *Id.*

177. TEX. FAM. CODE ANN. § 160.201(a)(2) (West 2017).

178. *See id.*

179. Telephone Interview with Leigh Jorgeson & Ian Pittman, *supra* note 170.

180. *Id.*

181. *Id.*

182. *Id.*

183. *See Legal Recognition of LGBT Families, supra* note 104.

184. David Taffet, *Texas Gaybies Now Get Both Parents on Their Birth Certificates*, DALLASVOICE (Oct. 23, 2015), <http://www.dallasvoice.com/texas-gaybies-parents-birth-certificates/>.

185. *See Application for a New Birth Certificate Based on Parentage*, TEX. DEP’T ST. HEALTH SERVICES, <https://dshs.texas.gov/vs/reqproc/forms/VS-166-Revised-03-2016.pdf> (last updated Mar. 2016); *New Birth Certificate Based on Parentage*, TEX. DEP’T ST. HEALTH SERVICES, <https://dshs.texas.gov/vs/reqproc/amendparentage.shtm> (last updated Nov. 1, 2018).

186. *See Application for a New Birth Certificate Based on Parentage, supra* note 185; *New Birth Certificate Based on Parentage, supra* note 185.

187. *New Birth Certificate Based on Parentage, supra* note 185.

188. *Parent’s Worksheet for Child’s Birth Certificate*, TEX. DEP’T ST. HEALTH SERVICES, <https://www.dshs.texas.gov/vs/reqproc/forms/vs109-1-REV-8-2016.pdf> (last updated Aug. 2016).

“Father,” or “Parent.”¹⁸⁹ Although courts require this form to be completed automatically for married same-sex parents having a child, some hospitals in Texas still fail to do so.¹⁹⁰

Lawyers generally advise same-sex parents seeking to protect their rights to their children to adopt those children.¹⁹¹ Even if both parents are able to get their names on the child’s birth certificate, they are *still* advised to adopt their children.¹⁹² In the case of two married same-sex parents who have not used second-parent adoption, “the nonbiological parent may have limited legal rights over the child.”¹⁹³ In fact, in many situations a nonbiological parent—as a legal stranger to the child—has no rights.¹⁹⁴ Adoption is the most certain way to protect parental rights as a gay or lesbian parent at this time.¹⁹⁵ However, attorney Suzanne Bryant emphasizes the importance of choosing an experienced attorney to handle the adoption.¹⁹⁶ There have been many instances where same-sex couples hired an attorney who was not familiar with the special circumstances of adoption by a spouse in a same-sex couple, and, because of the lack of knowledge, the adoption was not completed correctly.¹⁹⁷ In one specific case, a couple hired a photographer and invited family who flew across the country to celebrate the adoption only to have the judge deny the adoption because the parents were a same-sex couple.¹⁹⁸ Married opposite-sex parents do not have to account for the time and cost that these processes require because their parental relationship with the child is established automatically.¹⁹⁹ This is a major distinction between the rights of married same-sex couples and married opposite-sex couples.

IV. MOVING TOWARD GREATER FAMILY PROTECTION

Since *Obergefell*, and in some cases even before, many states have moved to create greater equality for same-sex couples and protections for their families.²⁰⁰ Some changes resulted from court decisions clarifying how

189. *Id.*

190. Telephone Interview with Suzanne Bryant, *supra* note 166.

191. Denise Brogan-Kator, Chief Policy Officer, Family Equal. Council, Lecture at the Texas Tech University School of Law: First Comes Love, Then Comes Marriage, Then Comes Discrimination: Anti-LGBT Bias in Parentage Laws and the Child Welfare System (Oct. 12, 2017).

192. *Id.*

193. Kate Prickett & Alexa Martin-Storey, *Laws and Policies that Undermine Same-Sex Parenting Are Not Based on Science*, UT NEWS (Nov. 19, 2015), <https://news.utexas.edu/2015/11/19/policies-against-same-sex-parenting-not-science-based>.

194. *See Legal Recognition of LGBT Families*, *supra* note 104.

195. Chang & Simmons-Duffin, *supra* note 3.

196. Telephone Interview with Suzanne Bryant, *supra* note 166.

197. *Id.*

198. *Id.*

199. NeJaime, *supra* note 20, at 2317.

200. *See, e.g.*, CAL. HEALTH & SAFETY CODE § 102425 (West 2018).

Obergefell should be applied to family law situations.²⁰¹ Others resulted from legislative action.²⁰² The following Sections will examine different approaches taken around the country.

A. Challenges to Discriminatory Statutes

In *Pavan v. Smith*, two same-sex couples challenged an Arkansas law establishing a presumption of paternity, similar to the law in Texas, and eventually reached the Supreme Court.²⁰³ The women in those respective marriages used artificial insemination to become pregnant and gave birth but were denied when they requested that both female parents be listed on their child's birth certificate.²⁰⁴ Only one parent was listed on each birth certificate.²⁰⁵ The Arkansas law stated: "If the mother was married at the time of either conception or birth or between conception and birth the name of the husband shall be entered on the certificate as the father of the child"²⁰⁶ That language gave a presumption of paternity to the husband of the mother.²⁰⁷ The same presumption was not given to same-sex couples.²⁰⁸

The State argued that the presumption was based on biology, not on marriage, because in an opposite-sex relationship it is most likely that the mother's husband is the biological father; thus, a married same-sex couple was not entitled to the same presumption as a married opposite-sex couple.²⁰⁹ That argument attempted to avoid the application of *Obergefell*, which requires the extension of rights related to marriage to same-sex couples.²¹⁰ However, the presumption of parentage is also given to opposite-sex couples that become pregnant with the aid of ART, in which case the father may not always be the biological father.²¹¹ In *Pavan*, the Court found that because the presumption extended to opposite-sex couples that use ART, the presumption was based on marriage, not on biology.²¹² Thus, under *Obergefell*, same-sex couples were entitled to the same marital rights as opposite-sex couples, and state laws could not discriminate against a same-sex couple in that way.²¹³

201. See *infra* Section IV.A (discussing court decisions from challenges to discriminatory statutes).

202. See *infra* Section IV.B (examining other state statutes that have increased protections for same-sex couples).

203. ARK. CODE ANN. § 20-18-401 (West 2018); TEX. FAM. CODE ANN. § 160.204(a)(1) (West 2017); *Pavan v. Smith*, 137 S. Ct. 2075, 2077 (2017) (per curiam).

204. *Pavan*, 137 S. Ct. at 2077.

205. *Id.*

206. ARK. CODE ANN. § 20-18-401(f)(1).

207. *Pavan*, 137 S. Ct. at 2077.

208. *Id.*

209. *Id.*

210. See generally *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015).

211. See NeJaime, *supra* note 20, at 2295–96.

212. *Pavan*, 137 S. Ct. at 2078–79.

213. *Id.* at 2078.

Both women must be listed as parents on their child's birth certificate.²¹⁴ On appeal, the Court struck down the Arkansas law in a per curiam decision, with three Justices dissenting.²¹⁵ This decision clarified the scope of *Obergefell*.²¹⁶

A recent Texas decision, *Pidgeon v. Turner*, cited *Pavan* in the context of a 2014 challenge by Texas taxpayers to the City of Houston's policy of providing benefits to the same-sex spouses of city employees.²¹⁷ While this case was pending, the Supreme Court handed down decisions in *Obergefell* and *Pavan*.²¹⁸ The plaintiffs in *Pidgeon* relied on the Texas Defense of Marriage Act (Texas DOMA) as the foundation for their claim.²¹⁹ However, in light of the *Obergefell* decision, the Texas DOMA was unconstitutional and could no longer be enforced.²²⁰ Plaintiffs argued that on remand the Supreme Court of Texas should instruct the trial court to construe *Obergefell* narrowly, interpreting it to protect only the right to same-sex marriage but not extend taxpayer-funded spousal benefits from the city to same-sex couples.²²¹ Because *Obergefell* does not specifically address whether the state must provide the same publicly funded benefits to all married couples, the Texas Supreme Court remanded the case, dictating that it should be decided in light of *Obergefell*.²²² *Pavan* should also be taken into consideration on remand because it clarified the Supreme Court's ruling in *Obergefell*.²²³ *Pidgeon* allows further challenges to same-sex marriage and the extent of *Obergefell*'s protection on remand.²²⁴ Furthermore, it directly contradicts the Court's per curiam decision in *Pavan*, "stating explicitly that states may not treat same-sex married couples differently than other married couples," which is a setback to using *Obergefell* and *Pavan* to definitively protect the rights of same-sex families.²²⁵

214. *Id.*

215. *Id.* at 2079. Per curiam decisions are typically intended to issue an unsigned, unanimous decision from the Court but may also be used to remand a case to a lower court in light of a recent decision. See Ira Robbins, *Scholarship Highlight: The Supreme Court's Misuse of Per Curiam Opinions*, SCOTUSBLOG (Oct. 5, 2012, 11:13 AM), <http://www.scotusblog.com/2012/10/scholarship-highlight-the-supreme-courts-misuse-of-per-curiam-opinions/>.

216. Andrew Chung, *U.S. High Court Overturns Arkansas Ruling Blocking Birth Certificates for Same-Sex Couples*, REUTERS (June 26, 2017, 9:19 AM), <http://www.reuters.com/article/usa-court-gaymarriage/update-1-u-s-high-court-overturns-arkansas-ruling-blocking-birth-certificates-for-same-sex-couples-idUSL1N1JN018>.

217. See *Pidgeon v. Turner*, 538 S.W.3d 73, 78 (Tex. 2017).

218. See *id.* at 76.

219. See *id.* at 78–79.

220. See *id.* at 83.

221. See *id.* at 85–86.

222. See *id.* at 87.

223. See *id.* at 89.

224. See *Texas Supreme Court Ruling Revives Attacks on Same-Sex Marriage*, LAMBDA LEGAL (June 30, 2017), https://www.lambdalegal.org/blog/20170630_tx-supreme-court-distorts-obergefell-to-revive-attacks.

225. *Id.*

In recent years, LGBT advocacy groups have participated in a number of suits around the country involving the rights of same-sex families.²²⁶ State supreme courts are following the trend toward protecting the rights of same-sex parents to be listed on their children's birth certificates and to be included in the statutory presumption of parentage in compliance with the *Obergefell* ruling.²²⁷ In September 2017, the Arizona Supreme Court held that the presumption of parentage available to a man married to a woman who gives birth to a child during their marriage also applies to a same-sex spouse.²²⁸ "Legal parent status is, undoubtedly, a benefit of marriage" that is constitutionally protected.²²⁹

Similarly, a Utah district court held that the State was enjoined from enforcing assisted-reproduction statutes in a way that discriminated between married opposite-sex couples and married same-sex couples.²³⁰ The statute gave the male spouse of a woman who gave birth through sperm donation parental rights to a child, but the same rights were not granted to a female spouse of a woman who gave birth through sperm donation.²³¹ Furthermore, the State was ordered to issue a birth certificate for the child showing both women as legal parents.²³²

B. Other State Approaches

Over time, many states have increased legal protections for same-sex couples, including legalizing same-sex marriage before *Obergefell* and altering state laws to apply to both opposite- and same-sex couples after *Obergefell*.²³³ Many states have altered the language of their marital-presumption statutes to include women married to the mother of a child instead of only men.²³⁴ The Illinois presumption-of-parentage statute states that "[a] person is presumed to be the parent of a child if: (1) the person and the mother of the child have entered into a marriage, . . . and the child is born to the mother during the marriage"²³⁵

226. See *All Family Cases*, LAMBDA LEGAL, <https://www.lambdalegal.org/in-court/cases/all?issue=11446> (last visited Jan. 8, 2019); *Full Case & Advocacy List*, NAT'L CTR. FOR LESBIAN RTS., <http://www.nclrights.org/cases-and-policy/full-cases-and-advocacy-list/> (last visited Jan. 8, 2019).

227. See, e.g., *McLaughlin v. Jones*, 401 P.3d 492, 500 (Ariz. 2017).

228. See *id.* at 494.

229. *Id.* at 497 (citing *Pavan v. Smith*, 137 S. Ct. 2075, 2078 (2017) (per curiam)).

230. See UTAH CODE ANN. § 78B-15-201(2)(e) (West 2018); *Roe v. Patton*, No. 2:15-cv-00253-DB, 2015 U.S. Dist. LEXIS 96207, at *9 (D. Utah July 22, 2015).

231. See UTAH CODE ANN. § 78B-15-201(2)(e) (creating a father-child relationship may be established by "the man having consented to assisted reproduction by a woman under Part 7, Assisted Reproduction, which resulted in the birth of the child," but a mother-child relationship may not); *Roe*, 2015 U.S. Dist. LEXIS 96207, at *2-3.

232. See *Roe*, 2015 U.S. Dist. LEXIS 96207, at *9-10.

233. See generally *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015).

234. See NeJaime, *supra* note 20, at 2339.

235. 750 ILL. COMP. STAT. ANN. 46 / 204 (West 2018).

The State of Washington has changed its marital-presumption statute to be gender neutral so that it can apply to opposite-sex parents, as well as same-sex parents of either gender.²³⁶ The statute reads: “[A] person is presumed to be the parent of a child if . . . [t]he person and the *mother or father* of the child are married to each other . . . and the child is born during the marriage”²³⁷

Similarly, Vermont has a presumption-of-parentage statute that provides that “[a] person alleged to be a parent shall be rebuttably presumed to be the natural parent of a child if . . . the child is born while the alleged parents are legally married to each other.”²³⁸ This allows a legal parent–child relationship to be created automatically for parents of either gender when a child is born.²³⁹

V. REASONS FOR REFORM IN TEXAS

In light of the *Obergefell* opinion protecting the right to same-sex marriage and all the related benefits and the recent supporting opinion from *Pavan*, which clarified that a presumption of parental connection to a child is one of the benefits of marriage, Texas parentage statutes are problematic.²⁴⁰ The Texas approach to the presumption for the spouse of a mother is very similar to the Arkansas law that was recently struck down.²⁴¹ Additionally, in recent history, and especially since *Obergefell*, the trend among states has been to apply the parentage presumption in a way that creates equal rights for same-sex parents.²⁴² It would be prudent for Texas to join the states that have already created gender-neutral laws and regulations to eliminate the practice of unconstitutional discrimination against same-sex parents.²⁴³ The *Pavan* decision states in no uncertain terms that the benefits of marriage cannot be denied to same-sex couples.²⁴⁴ Because *Obergefell* and *Pavan* settled this question, Texas needs to comply with the rulings.²⁴⁵ This will avoid unnecessary cost to the state’s taxpayers, align with public policy, promote the best interest of children, and relieve the unfair financial burden on same-sex parents.

236. See NeJaime, *supra* note 20, at 2339–40.

237. *Id.* at 2339 (alterations in original) (quoting WASH. REV. CODE ANN. § 26.26.116 (West 2018) (repealed 2019)).

238. VT. STAT. ANN. tit. 15, § 308 (West 2014) (repealed 2017).

239. See *id.*

240. See Chung, *supra* note 216. See generally *Pavan v. Smith*, 137 S. Ct. 2075 (2017) (per curiam); *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015).

241. See ARK. CODE ANN. § 20-18-401 (West 2018); TEX. FAM. CODE ANN. § 160.204(a)(1) (West 2017); see also *supra* note 203 and accompanying text (articulating that Arkansas and Texas’s statutes both use gendered language to give only the husband of the mother a presumption of paternity).

242. See generally *McLaughlin v. Jones*, 401 P.3d 492 (Ariz. 2017).

243. See *Pavan*, 137 S. Ct. at 2078.

244. See generally *Pavan*, 137 S. Ct. 2075.

245. See generally *id.*; *Obergefell*, 135 S. Ct. 2584.

A. Litigating Settled Matters and Cost to Taxpayers

The current statutory scheme in Texas for establishing family relationships results in unnecessary litigation.²⁴⁶ Despite the definitive ruling in *Obergefell* that established rights for same-sex couples and decided that they are constitutionally protected, litigation has continued around the country over the issue of same-sex marriage and same-sex family rights.²⁴⁷ When the *Obergefell* decision was first handed down, states refused to comply, citing religious freedom as the reason for refusing to recognize same-sex marriage and to provide the benefits that accompany marriage.²⁴⁸ Although the decision in *Obergefell* is settled law, states keep looking for ways to deny rights to same-sex couples.²⁴⁹

The reality is that attacks on *Obergefell* by the religious right continue.²⁵⁰ While further litigation is not necessary in light of the law established in *Obergefell*, efforts to overturn settled law continue in an attempt to maintain a heteronormative paradigm and subordinate LGBT people.²⁵¹ Those seeking to impose their religious views on others through the law see this litigation as necessary to achieve that end.²⁵² Protecting the rights of LGBT people from discrimination outweighs the religious argument for allowing such discrimination for many reasons, including that, while allowing LGBT people to participate fully in society may offend an individual's religious beliefs, it does not require him or her to change those beliefs.²⁵³ While allowing same-sex families to share fully in the rights they are entitled to may require some to participate in practices that do not align with their beliefs, there are limits on the free exercise of religion.²⁵⁴ The litigation resulting from many of these challenges could be avoided if Texas amended problematic laws currently in the Family Code, expanding them to create unquestionable protection for same-sex families.

Changes to the Family Code would not only curtail challenges by the religious right but would preclude the need for litigation in family courts and

246. See *Texas Supreme Court Ruling Revives Attacks on Same-Sex Marriage*, *supra* note 224.

247. Steve Sanders, *Windsor and Obergefell: Marriage Equality as Equal Dignity*, HUM. RTS. CAMPAIGN (June 30, 2016), <https://www.hrc.org/blog/windsor-and-obergefell-marriage-equality-as-equal-dignity>; *Texas Supreme Court Ruling Revives Attacks on Same-Sex Marriage*, *supra* note 224.

248. *Ura*, *supra* note 66.

249. See, e.g., *Pavan*, 137 S. Ct. at 2078 (litigating an issue settled by a previous Supreme Court decision in *Obergefell*); Kyle C. Velte, *All Fall Down: A Comprehensive Approach to Defeating the Religious Right's Challenges to Antidiscrimination Statutes*, 49 CONN. L. REV. 1, 3 (2016).

250. Velte, *supra* note 249, at 4–5.

251. See *id.*

252. See *id.*

253. See *id.* at 52.

254. See *id.* at 47–48 (stating that religious beliefs do not excuse an individual from compliance with valid laws).

for suits against the state.²⁵⁵ For example, two same-sex parents in the process of a divorce may find themselves in a drawn-out court battle fighting over custody of a child born into marriage. If both parents were legal parents, they may be able to agree outside of court about custody and a visitation schedule, or the judge could settle the matter in court. However, if one of the parents has failed to establish legal parentage under the Texas law, the court proceedings become much longer, more complex, and more expensive because the court now must determine whether the nonlegal parent asserting a right to custody of the child is in fact a legal parent.²⁵⁶ If the parent is not considered a legal parent, he or she will not be entitled to custody of the child.²⁵⁷ If Texas extended the presumption-of-paternity statute to married same-sex couples, this piece of the litigation would not exist, saving the judicial system, and the parties, time and money.

The cost of appeals to higher courts must also be considered. A couple could sue the state, as in *Pavan*, to have the state recognize the legal relationship between a nonbiological LGBT parent and a child when the individual was married to the biological or birth parent at the time of the child's birth.²⁵⁸ It would cost the state time and taxpayer dollars to litigate such a case in a trial court and even more time and taxpayer money to litigate the matter up to the state supreme court, or higher, if either party appeals the lower court's decisions. The money the state would spend on this litigation would be better spent elsewhere because, in such a matter, the courts are bound by precedent to extend a presumption of parentage based on marriage to same-sex parents.²⁵⁹

Furthermore, taxpayers should disapprove of spending public funds to litigate matters that were settled by *Obergefell* and reaffirmed by *Pavan*.²⁶⁰ In 2016, the state spent over \$400 million to fund the judicial system.²⁶¹ Increased litigation results in greater expense for the state, especially when cases go to trial.²⁶² Marriage equality—and the attendant benefits of marriage—is the law of the land.²⁶³ The right to marry and to be legally recognized as the parent of children born to one's spouse during the marriage has been definitively established.²⁶⁴ It is a waste of time and taxpayer dollars to litigate these issues when the courts are bound by Supreme Court precedent

255. See *infra* notes 268–71, 273 and accompanying text (explaining how changes to the Texas Family Code would avoid litigation).

256. See TEX. FAM. CODE ANN. § 160.201 (West 2017).

257. See *Legal Recognition of LGBT Families*, *supra* note 104.

258. See generally *Pavan v. Smith*, 137 S. Ct. 2075 (2017) (per curiam).

259. See generally *id.*; *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015).

260. See *Pavan*, 137 S. Ct. at 2078; *Obergefell*, 135 S. Ct. at 2591.

261. TEX. JUDICIAL COUNCIL, ANNUAL STATISTICAL REPORT FOR THE TEXAS JUDICIARY: FY 2015 (2016), <http://www.txcourts.gov/media/1308021/2015-ar-statistical-print.pdf>.

262. See generally *id.*

263. See *Obergefell*, 135 S. Ct. at 2590.

264. See *Pavan*, 137 S. Ct. at 2078; *Obergefell*, 135 S. Ct. at 2591.

to render a certain holding. Decreasing unnecessary litigation would lessen the burden on state courts, and the state would not be allocating money for this needless expense.

B. Public Policy and Human Rights

Public policy dictates that Texas should change its Family Code to extend more protections to same-sex parents. Failing to recognize the relationships in same-sex families leaves those families with instability that opposite-sex families are not expected to endure.²⁶⁵ Furthermore, excluding same-sex couples from parental status shows same-sex couples that they are not equal to other couples in important ways.²⁶⁶ It is demeaning to gays and lesbians to exclude them from significant family relationships.²⁶⁷ The right to marry is a fundamental human right, and denying the benefits that come with marriage also violates the human rights of LGBT couples.²⁶⁸ Moreover, there are serious consequences for parents who are not legally related to their children; this reform would create equal legal protection for same-sex parents and their children that is currently unavailable to them under Texas law.²⁶⁹

The plain meaning of current statutes governing parentage in the Texas Family Code fails same-sex parents and their children.²⁷⁰ As the Code currently stands, same-sex parents are not included because the gendered language of the statutes does not account for two parents of the same gender.²⁷¹ These discriminatory statutes leave same-sex couples vulnerable to attacks on their parental rights that they should not be subjected to.²⁷² By amending the law to be gender neutral, Texas can protect same-sex families in a way that they are not protected now. A gender-neutral law that allows an *individual* married to the mother of the child at the time of birth, rather than only allowing a *man* married to the mother, to be considered the parent of the child automatically—without further court proceedings—would give same-sex parents the certainty that the current statute does not provide.²⁷³ This certainty is afforded to opposite-sex married couples and must be extended to same-sex married couples for the sake of equality.²⁷⁴

265. See *Obergefell*, 135 S. Ct. at 2601.

266. See *id.* at 2602.

267. See *id.*

268. See *id.*

269. See *supra* Section III.A (analyzing the current laws under the Texas Family Code).

270. See TEX. FAM. CODE ANN. §§ 160.201, .204(a)(1) (West 2017).

271. See *supra* Section III.D (discussing the current options for same-sex parents).

272. See *supra* Section III.C (acknowledging the consequences of failing to establish legal parentage, including losing access to the child).

273. See FAM. § 160.204(a)(1).

274. See *supra* notes 88–89 and accompanying text (denoting the differences in parental rights between opposite-sex couples and same-sex couples).

Attitudes toward LGBT families have moved toward acceptance in the state and around the country. Through “substantial cultural and political developments,” same-sex couples have been able to lead more public lives, resulting in greater tolerance and understanding of same-sex families.²⁷⁵ The *Obergefell* decision reflects the shifting attitudes toward LGBT families in our country, and it is time to bring Texas laws in line with these social developments to give citizens of the state the protection they are entitled to.²⁷⁶

C. Best Interest of the Child

Additionally, in cases involving children, law and public policy dictate that the best interest of the child must be the primary consideration.²⁷⁷ Texas uses “[t]he best interest of the child” standard to determine “issues of conservatorship and possession of and access to the child.”²⁷⁸ Aside from protecting parental rights, changes to Texas statutes would protect the child’s best interest.²⁷⁹ Legal recognition for children and parents in same-sex families would mean that state law acknowledges that the child in question has a legal connection to both parents, regardless of gender. Legally recognizing these parent–child relationships will spare children from the social stigma of not having their bond with both parents accepted.²⁸⁰ This recognition vests all of the rights and duties of legal parenthood.²⁸¹ By legally recognizing the relationship between same-sex parents and their children, children gain stability.²⁸² Because only a legal parent is entitled to custody of the child, a nonlegal parent who has acted in a parental capacity throughout the child’s life may lose access to the child.²⁸³ Additionally, if the biological parent dies, an established legal relationship between the nonbiological parent and the child will spare the child from becoming an orphan and the family from a potential custody suit by the deceased parent’s relatives.²⁸⁴ Thus, amending the Texas Family Code will save children from the emotional and psychological impact of having one parent legally removed

275. See *Obergefell v. Hodges*, 135 S. Ct. 2584, 2596 (2015).

276. See *id.* at 2596–97.

277. See NeJaime, *supra* note 30, at 1239–40; see also FAM. § 153.002 (“The best interest of the child shall always be the primary consideration of the court . . .”).

278. FAM. § 153.002.

279. See *Obergefell*, 135 S. Ct. at 2600 (discussing how recognizing this relationship adds stability to the child’s life); Gerber & Lindner, *supra* note 115, at 240 (discussing how recognizing this relationship shields the child from the social stigma of having same-sex parents); Langsley & Skeen, *supra* note 26 (discussing how recognizing this relationship ensures that the child will not be taken from the nonbiological parent if the biological parent were to die); Jennifer L. Rosato, *Children of Same-Sex Parents Deserve the Security Blanket of the Parentage Presumption*, 44 FAM. CT. REV. 74, 77 (2006) (discussing how recognizing this relationship provides the child with financial security).

280. See Gerber & Lindner, *supra* note 115, at 240.

281. See *Legal Recognition of LGBT Families*, *supra* note 104.

282. See *Obergefell*, 135 S. Ct. at 2600.

283. *Legal Recognition of LGBT Families*, *supra* note 104.

284. See Gerber & Lindner, *supra* note 115, at 240.

from their lives, which never would have happened if that parent had been legally recognized.²⁸⁵ Furthermore, children with no legal connection to a parent would not be entitled to receive child support, inheritance, or other financial benefits from that parent (such as survivorship benefits through Social Security or the military).²⁸⁶ Recognizing a legal relationship between the nonbiological parent and the child would protect the child's right to be financially supported by that parent.

D. Financial Burden

Lastly, the state's failure to provide certainty for same-sex parents leaves these families not only with an emotional burden but a financial burden as well. Same-sex couples incur costs trying to establish parental relationships with their children that opposite-sex couples in the same situation do not.²⁸⁷ A married man and woman can have a child together, and both are automatically listed on that child's birth certificate and vested with the rights and obligations of parenthood.²⁸⁸ However, when two married women have a child together, the same is not true.²⁸⁹ They must spend time and money to hire a lawyer and go through the process of second-parent adoption or obtaining a parentage order to make sure that they both have equal legal status as parents of that child.²⁹⁰ These processes cost the couple thousands of dollars—a cost opposite-sex married couples never have to consider.²⁹¹ Additionally, a couple using second-parent adoption must pay hundreds of dollars for the state to conduct a home study to ensure that the parent is fit to adopt a child—*her own child*—that was born into the marriage.²⁹² The father in a married opposite-sex couple would receive the automatic presumption of paternity in Texas and never has to consider paying the state to tell him whether he is fit to be the parent of his own child. This disparity is not only unfair but is prohibited by *Obergefell*.²⁹³ Under this holding, a difference such as the one described above is not acceptable.²⁹⁴ The state cannot treat same-sex couples differently than their opposite-sex

285. Langsley & Skeen, *supra* note 26.

286. Telephone Interview with Suzanne Bryant, *supra* note 166; *see* Rosato, *supra* note 279, at 75–76.

287. *See supra* notes 161–70 and accompanying text (discussing the cost of second-parent adoption).

288. *See* TEX. FAM. CODE ANN. § 160.204(a)(1) (West 2017).

289. *See id.*

290. *See supra* notes 161–70 and accompanying text (stating that second-parent adoption can cost up to \$6,500).

291. *See supra* notes 161–70 and accompanying text (stating all the costs that go into second-parent adoption).

292. *See supra* notes 163–68 and accompanying text (stating that home studies can cost between \$500 and \$1,000).

293. *See generally* Obergefell v. Hodges, 135 S. Ct. 2584 (2015).

294. *See generally id.*

counterparts for the purposes of marriage and its benefits.²⁹⁵ For all of these reasons, Texas must make legislative changes so that all of its citizens are treated equally.

VI. RECOMMENDATIONS FOR TEXAS

Although Texas recognizes same-sex marriages after *Obergefell* and has implemented administrative procedures to allow same-sex parents to be listed on a child's birth certificate, there is no codified protection for same-sex families.²⁹⁶ Without a gender-neutral presumption of parentage statute or a broader definition of parent, Texas parents and children are still at risk of not having their legal relationship recognized, leaving them open to the most serious consequence—the loss of that relationship.²⁹⁷ To protect its citizens, Texas must update the Family Code and consider additional ways that the court system can safeguard same-sex family relationships to provide the certainty that these families currently lack.

A. Legislative Reforms

To protect the rights of same-sex parents and their children, the Texas Legislature needs to address certain issues. Specifically, Texas must revise the gendered language of the presumption-of-paternity statute to extend the presumption to same-sex spouses that are married at the time of the birth of their child.²⁹⁸ Also, by modifying all gendered statutes in the Family Code affecting parental relationships and parental rights, the legislature could create statutes that adequately protect the rights of same-sex parents²⁹⁹ and comply with Supreme Court decisions on this issue.³⁰⁰ Texas should look to the approaches of other states like Washington or Vermont for sample language for gender-neutral statutes.³⁰¹

The Texas Presumption-of-Paternity statute should be retitled “Presumption of Parentage.” A Presumption of Parentage would read: “(a) [An *individual*] is presumed to be the [*parent*] of a child if: (1) [*the individual*] is married to the [*parent*] of the child and the child is born during the marriage.”³⁰²

295. See generally *id.*

296. See *supra* Section III.C (stating the legal difference in treatment between same-sex and opposite-sex couples).

297. See *supra* Section III.A (discussing the current language in the Texas presumption-of-parentage statute).

298. See TEX. FAM. CODE ANN. § 160.204(a)(1) (West 2017).

299. See *supra* Section III.A (discussing how same-sex married parents are not adequately protected under the current language of the Texas Family Code).

300. See generally *Pavan v. Smith*, 137 S. Ct. 2075 (2017) (per curiam); *Obergefell*, 135 S. Ct. 2584.

301. See VT. STAT. ANN. tit. 15, § 308 (West 2014) (repealed 2017); NeJaime, *supra* note 20, at 2339.

302. See FAM. § 160.204(a)(1) (emphasis added).

Other Texas statutes should be modified in the same way to be less restricted to one gender. For example, a bill filed in December 2016 in the Texas Legislature recommends adding a section to the Texas Family Code that clarifies how gendered terms in the code should be construed:

Sec. 101.0012. CONSTRUCTION OF GENDER-SPECIFIC TERMINOLOGY. When necessary to implement the rights and duties of spouses or parents in a marriage between persons of the same sex under the laws of this state, gender-specific terminology must be construed in a neutral manner to refer to a person of either gender.³⁰³

This provision would apply a gender-neutral construction to Family Code statutes in no uncertain terms.³⁰⁴ To resolve issues of when provisions for a parent of one gender should apply to a parent of another, many gendered statutes in the Texas Family Code should be revised to be gender neutral so that the statute on construction is not needed to determine the meaning of the statutes. For example, the definition of parent would certainly apply to same-sex couples if the current statute were amended to read:

“Parent” means the mother, [*an individual*] presumed to be the [*parent*], [*an individual*] legally determined to be [*a parent*], [*an individual*] who has been adjudicated to be [*a parent*] by a court of competent jurisdiction, [*an individual*] who has acknowledged [*parentage*] under applicable law, or an adoptive mother or father. Except as provided by Subsection (b), the term does not include a parent as to whom the parent–child relationship has been terminated.³⁰⁵

This revision would leave no questions about how to apply the statute to two female parents or two male parents. Similarly, the statute governing the establishment of parent–child relationships currently provides distinct methods for establishing a mother–child relationship and a father–child relationship.³⁰⁶ To allow equal legal recognition for same-sex parents, provisions (b)(1), (2), and (5), establishing a father–child relationship in § 160.201 of the Family Code, should be included as nongendered methods for establishing mother–child relationships as well.³⁰⁷ This would allow women to create legal relationships with their children through the presumption of parentage by an acknowledgment of parentage and by consenting to assisted reproduction by the woman’s spouse.³⁰⁸ The updated

303. Tex. H.B. 573, 85th Leg., R.S. (2017).

304. *See id.*

305. FAM. § 101.024(a) (emphasis added); Tex. H.B. 573 (stating that the Texas Family Code should be amended to include gender-neutral terminology).

306. FAM. § 160.201.

307. *Id.*

308. *See id.*

statute, alternatively, could combine the provisions for the establishment of both male and female parent–child relationships to create one provision for the establishment of parent–child relationships in general, including these provisions for all parents.³⁰⁹ A gender-neutral statute on the establishment of a parent–child relationship might read:

- (a) A [parent]–child relationship is established between a [parent] and a child by:
- (1) the [parent] giving birth to the child;
 - (2) an adjudication of [parentage];
 - (3) the adoption of the child by the [parent;] . . .
 - (4) an un rebutted presumption of [parentage] under [§] 160.204;
 - (5) an effective acknowledgment of [parentage] by the [individual] under Subchapter D, unless the acknowledgment has been rescinded or successfully challenged; [or] . . .
 - (6) the [individual’s] consenting to assisted reproduction [by the individual’s spouse] under Subchapter H, which resulted in the birth of the child.³¹⁰

Together these statutes would create certainty for LGBT families. The need for Texas to make these necessary statutory changes is urgent. Each day that passes without these reforms means that another child will be born into a family where the child’s legal relationship with both parents is in question.³¹¹ Texas must not allow this to happen any longer.

B. Judicial Resolution Through Statutory Interpretation

Although legislative action would be the most definite way to protect same-sex parents, Texas courts could resolve the issue of unequal statutes by applying the Texas statute on statutory construction to gendered laws in the Family Code.³¹² Often, families ask courts to apply gender-neutral meanings to gendered laws.³¹³ However, “requiring individual families to ask courts to do this on a case-by-case basis places an enormous burden on families” and on courts.³¹⁴ For this reason, many courts have called on state legislatures to update parentage statutes.³¹⁵

309. *See id.*

310. *See generally id.*

311. *See* Tex. H.B. 573, 85th Leg., R.S. (2017); Gerber & Lindner, *supra* note 115.

312. TEX. GOV’T CODE ANN. § 312.003(c) (West 2017) (“The masculine gender includes the feminine and neuter genders.”).

313. Courtney G. Joslin, *Nurturing Parenthood Through the UPA* (2017), 127 YALE L.J. F. 589, 611 (2018).

314. *Id.*

315. *Id.*

Though it is not the most ideal way to protect parental rights, Texas courts can still address this issue, possibly more quickly, by applying parentage statutes in nongendered ways, especially until the legislature is able to amend the existing law. Based on the Texas statute regarding statutory construction for all civil codes, the masculine gendered words in the Family Code must be interpreted to include the feminine gender.³¹⁶ “Father” is defined as “a male parent,” a gendered term.³¹⁷ Thus, when the nongendered construction of subsection (b) of § 160.201, which defines “father–child” relationships, is applied, the statute would also be applied to “mother–child” relationships.³¹⁸ In this case, § 160.201(b)(1) would read: “The [*mother*]–child relationship is established between a [*woman*] and a child by . . . an un rebutted presumption of the [*woman’s maternity*] of the child under [§] 160.204.”³¹⁹ Under § 160.204, the presumption-of-paternity statute, a “man” is the father of a child if the child was born during the marriage.³²⁰ After applying the Texas Family Code’s statutory principle of nongendered construction, § 160.204 would read as follows: “A [*person*] is . . . the [*parent*] of a child if . . . the child is born during the marriage.”³²¹ Therefore, the presumption should be read to mean that a woman married to the mother of the child is the mother or parent of the child born during the marriage.³²² Courts in other states have applied comparable statutes this way.³²³

Section 160.106 of the Texas Family Code allows “[t]he provisions of this chapter relating to [a] determination of paternity [to] apply to a determination of maternity.”³²⁴ A Texas court of appeals clarified the application of this statute, stating that the statute is construed “to mean that the procedures applicable to adjudicating paternity are equally applicable when it is necessary to adjudicate maternity.”³²⁵ Under this statute, the presumption of paternity granted to the husband of the mother can also be granted to the wife of the mother.³²⁶ Although this is sufficient to get both parents listed on the child’s birth certificate and recognized in the state, it does not carry the same weight as a court order and may not be recognized outside the state.³²⁷ This does, however, create a foundation for courts to issue a parentage order to a same-sex couple intending to have a child together, which would be more secure.³²⁸ If all courts in Texas support this

316. GOV’T §§ 312.001, .003(c).

317. *Father*, MERRIAM-WEBSTER DICTIONARY (2016).

318. TEX. FAM. CODE ANN. § 160.201(b) (West 2017).

319. *Id.* § 160.201(b)(1) (emphasis added).

320. *Id.* § 160.204(a)(1).

321. *See id.* (emphasis added).

322. TEX. GOV’T CODE ANN. §§ 312.001, .003(c) (West 2017); *see* FAM. § 160.204(a)(1).

323. *See generally In re Parental Responsibilities of A.R.L.*, 318 P.3d 581 (Colo. App. 2013).

324. FAM. § 160.106.

325. *In re M.M.M.*, 428 S.W.3d 389, 396 (Tex. App.—Houston [14th Dist.] 2014, pet. denied).

326. *See* FAM. § 160.204(a)(1); Langsley & Skeen, *supra* note 26.

327. Langsley & Skeen, *supra* note 26.

328. Telephone Interview with Leigh Jorgeson & Ian Pittman, *supra* note 170.

interpretation, the state will take a large step forward in realizing full equality for same-sex families.

VII. CONCLUSION

Now that the United States Supreme Court has ruled on the issue of marriage equality and same-sex family rights, it is time for the State of Texas to take measures to fully comply with this decision.³²⁹ It is unconstitutional to continue to enforce laws that discriminate against same-sex married couples and same-sex parents.³³⁰ Currently, many of the laws in the Texas Family Code contravene *Obergefell* and *Pavan*.³³¹ It is in the state's interest to stop litigating an area of law that is settled and bring state statutes into modern times to protect the rights of its citizens.³³²

Legal recognition is only the first step. The real solution to this problem would be that all of society stops questioning the rights of same-sex parents.³³³ Only then will these rights be meaningful.³³⁴ Before this happens, the rights may exist but families may have to go through unnecessary and expensive legal battles to enforce those rights.³³⁵ At the end of the day, “formal equality gains do not simply produce equality.”³³⁶

Gay and lesbian rights have come a long way over the past few decades, but it is clear that they still have a way to go, at least in Texas. While the main issue of this Comment—extending the presumption of paternity to same-sex parents—mostly creates a solution to a problem experienced by two married female parents, male same-sex couples are also waiting for equal rights. It is probable that even if the presumption of paternity is extended, and a birth mother's female spouse is listed automatically on a child's Texas birth certificate, male same-sex parents will still be left to adopt their children to protect their parental rights. Additionally, unmarried same-sex parents are still vulnerable. For these reasons, it is important for Texas to take a comprehensive look at the Family Code, starting with the statutes mentioned in this Comment,³³⁷ and change problematic statutes to comply with the Supreme Court's decision in *Obergefell*³³⁸ to adequately protect Texas same-sex families.

329. See generally *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015).

330. See generally *Pavan v. Smith*, 137 S. Ct. 2075 (2017) (per curiam).

331. See *supra* Section III.A (discussing paternity under the Texas Family Code). See generally *Pavan*, 137 S. Ct. 2075; *Obergefell*, 135 S. Ct. 2584.

332. See *supra* notes 222–25 and accompanying text (explaining that the Texas Supreme Court indicates that *Obergefell* and *Pavan* are not definitive on the issue of same-sex family rights and remands case to lower court). See generally *Pavan*, 137 S. Ct. 2075; *Obergefell*, 135 S. Ct. 2584.

333. See Carpenter, *supra* note 122.

334. See *id.*

335. See *id.*

336. See *id.*

337. See *supra* Section III.A (discussing the Texas Family Code).

338. See generally *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015).

Finally, a lack of societal support for same-sex families in the state is an important practical and political obstacle for these families.³³⁹ Law and society thus interact to continue the subordination of LGBT couples and their families. To address this challenge, people in Texas need a better understanding of same-sex families.³⁴⁰ Perhaps then society and the law in Texas will give same-sex families the equality they deserve.

339. Telephone Interview with Suzanne Bryant, *supra* note 166.

340. *Id.*