Prohibitions on Legal Relationships Between Same-Sex Couples: January 16, 2014

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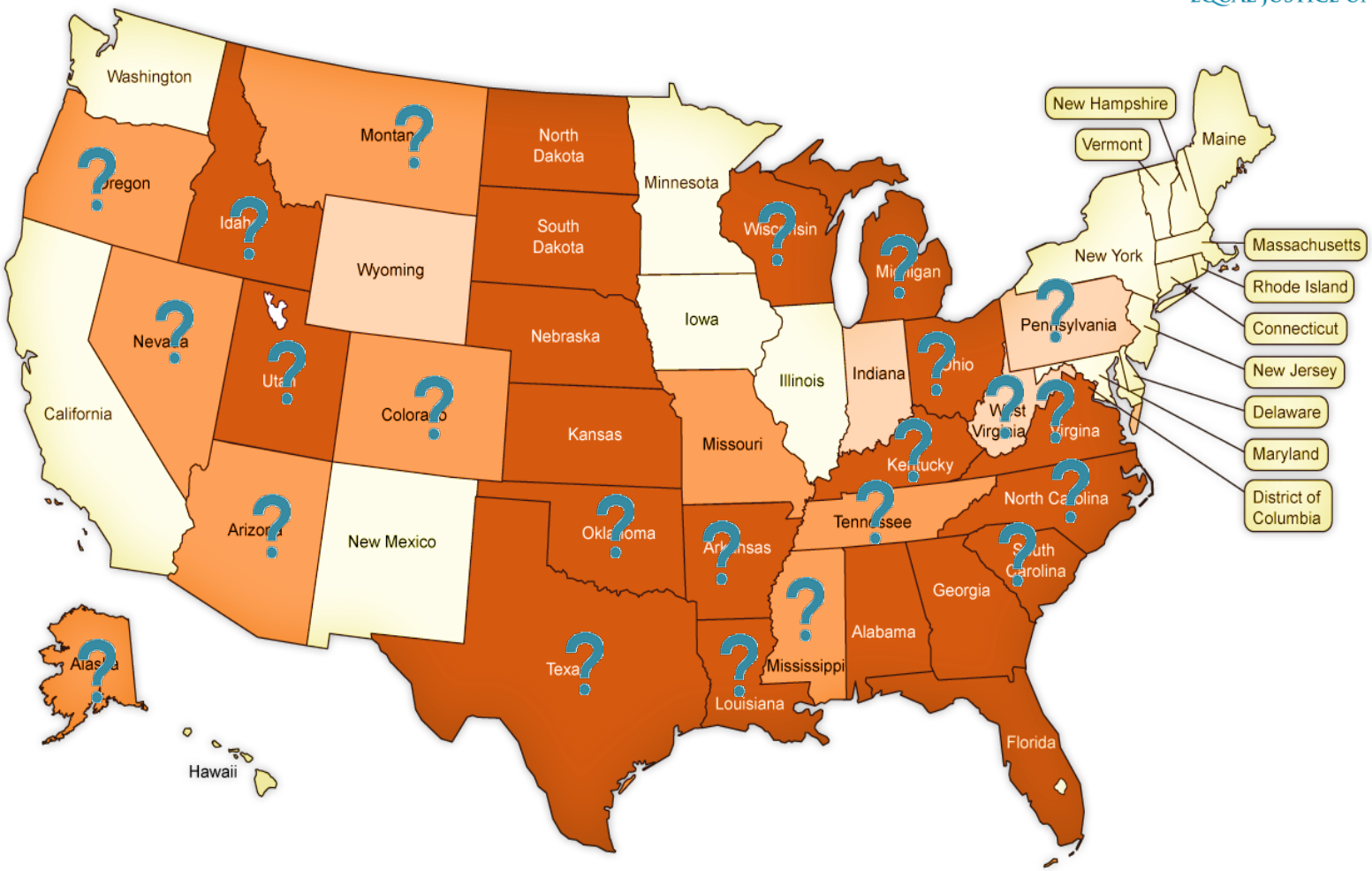

Constitutional amendment bans marriage and other forms of relationship recognition similar to marriage for same-sex couples (20 states)

Constitutional amendment bans marriage for same-sex couples (9 states)

Statute bans marriage for same-sex couples (25 states)

No legal ban on marriage or relationship recognition (17 states + D.C.)

? Active litigation challenging state Constitutional amendment or statute

Laws Recognizing Legal Relationships Between Same-Sex Couples: January 16, 2014

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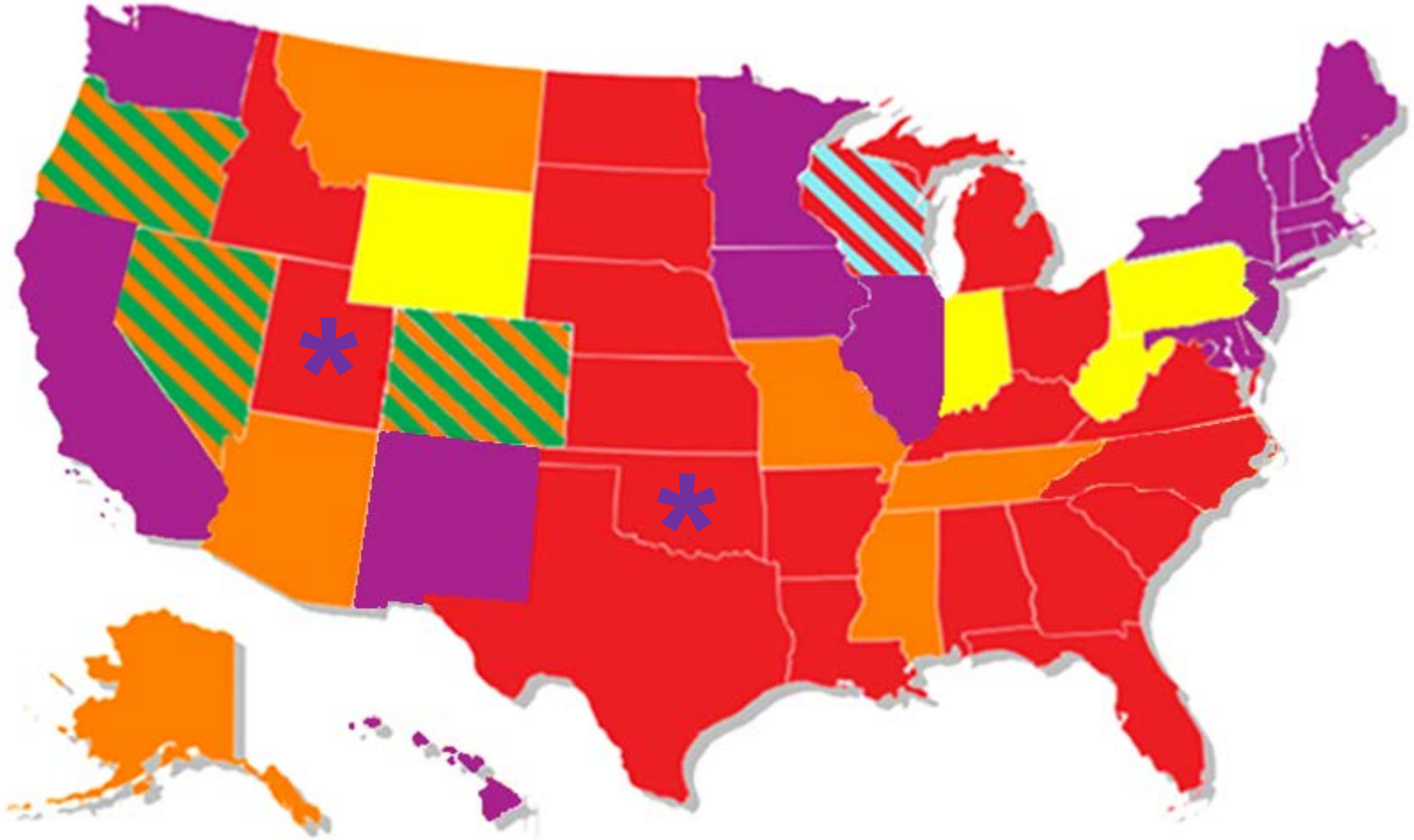

- Marriages
- Full partnership recognition (e.g. civil unions, domestic partnerships)
- Partial Partnership Recognition
- * Marriage equality win, appeal pending (UT, OK)
- No statewide status; no constitutional or statutory ban
- Statute bans marriage between persons of the same sex
- Constitution bans marriage between persons of the same sex
- Constitution bans marriage and other relationship statuses between persons of the same sex

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Selected Cases Involving Marriage or Civil Unions for Same-Sex Couples

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Maine's "Act to Allow Marriage Licenses for Same-Sex Couples and Protect Religious Freedom" (eff. 12/29/12)

19-A M.R.S. §650-A: Marriage is the legally recognized union of 2 people. Gender-specific terms relating to the marital relationship or familial relationships must be construed to be gender-neutral for all purposes throughout the law, whether in the context of statute, administrative or court rule, policy, common law or any other source of civil law.

19-A M.R.S. §650-B: A marriage of a same-sex couple that is validly licensed and certified in another jurisdiction is recognized for all purposes under the laws of this State.

Maine Notice of Intention of Marriage form:

http://www.maine.gov/dhhs/mecdc/public-health-systems/data-research/vital-records/documents/pdf-files/VS2A.pdf

Federal Defense of Marriage Act, 1 U.S.C. § 7, Declared Unconstitutional

U.S. v. Windsor, 133 S.Ct. 2675, 2013 LEXIS 4921 (2013)

http://www.supremecourt.gov/opinions/12pdf/12-307_6j37.pdf

Parenting Cases Involving Marriages, Civil Unions, or Registered Domestic Partnerships of Same-Sex Couples

*Miller-Jenkins v. Miller-Jenkin*s, 2006 VT 78, 180 VT 441, 912 A. 2d 951, (Vt. 2006) (parental rights for child born to civil union partners; also addresses marital presumption)

*Miller-Jenkins v. Miller-Jenkin*s, 2010 VT 98, 12 A. 3d 768 (2010) (affirming Family Court's transfer of custody from birth mother to non-birth mother)

Debra H. v. Janice R., 14 N.Y. 3d 576, 930 N.E.2d 184 (N.Y. 2010) (where New York couple had joined in Vermont civil union, both had parental rights upon separation)

http://law.justia.com/cases/new-york/court-of-appeals/2010/2010-03755.html

Hunter v. Rose, 463 Mass. 488, 975 N.E. 2d 857 (2012) (couple who joined in a registered domestic partnership in California and relocated to Massachusetts are extended comity and both recognized as parents in Massachusetts for purposes of assessing custody and visitation of their children). *See also* at 489: "[B]ecause parties to California RDPs have rights and responsibilities identical to those of marriage, pursuant to our recent decision in *Elia-Warnken v. Elia*, 463 Mass. 29, 972 N.E.2d 17 (2012) [], the judge did not err in treating the parties' RDP as equivalent to marriage in the Commonwealth."

http://law.justia.com/cases/massachusetts/supreme-court/2012/sjc-11010.html

Marital Presumption

*Miller-Jenkins v. Miller-Jenkin*s, 912 A. 2d 951, 2006 VT 78, 180 VT 441 (Vt. 2006) (martial presumption applicable to civil union partners cannot be rebutted by lack of genetic connection between child and non-birth mother)

Gartner v. Iowa Dept. of Public Health, 830 N.W.2d 335 (Iowa 2013), (2013) (statute providing that only a husband may be listed on birth certificate unconstitutional as applied to married lesbian couple)

Retroactivity

Charron v. Amaral, 451 Mass. 767, 889 N.E. 2d 946 (2008) (No claim for loss of consortium by surviving partner where decedent died before same-sex couples were able to marry in Massachusetts.

http://masscases.com/cases/sjc/451/451mass767.html

Marriage Eligibility

Elia v. Elia, 463 Mass. 29, 972 N.E. 2d 17 (2012) (marriage void where one partner had joined in marriage while still a member of a civil union with a different person)

Answers to Frequently Asked Questions for Individuals of the Same Sex Who Are Married Under State Law

http://www.irs.gov/uac/Answers-to-Frequently-Asked-Questions-for-Same-Sex-Married-Couples#.UqzYCXkLi3Q.email

The following questions and answers provide information to individuals of the same sex who are lawfully married (same-sex spouses). These questions and answers reflect the holdings inRevenue Ruling 2013-17 in 2013-38 IRB 201**.**

Q1. When are individuals of the same sex lawfully married for federal tax purposes?

A1. For federal tax purposes, the IRS looks to state or foreign law to determine whether individuals are married. The IRS has a general rule recognizing a marriage of same-sex spouses that was validly entered into in a domestic or foreign jurisdiction whose laws authorize the marriage of two individuals of the same sex even if the married couple resides in a domestic or foreign jurisdiction that does not recognize the validity of same-sex marriages.

Q2. Can same-sex spouses file federal tax returns using a married filing jointly or married filing separately status?

A2. Yes. For tax year 2013 and going forward, same-sex spouses generally must file using a married filing separately or jointly filing status. For tax year 2012 and all prior years, same-sex spouses who file an original tax return on or after Sept. 16, 2013 (the effective date ofRev. Rul. 2013-17), generally must file using a married filing separately or jointly filing status. For tax year 2012, same-sex spouses who filed their tax return before Sept. 16, 2013, may choose (but are not required) to amend their federal tax returns to file using married filing separately or jointly filing status. For tax years 2011 and earlier, same-sex spouses who filed their tax returns timely may choose (but are not required) to amend their federal tax returns to file using married filing separately or jointly filing status provided the period of limitations for amending the return has not expired. A taxpayer generally may file a claim for refund for three years from the date the return was filed or two years from the date the tax was paid, whichever is later. For information on filing an amended return, go to Tax Topic 308, Amended Returns, at http://www.irs.gov/taxtopics/tc308.html.

Q3. Can a taxpayer and his or her same-sex spouse file a joint return if they were married in a state that recognizes same-sex marriages but they live in a state that does not recognize their marriage?

A3. Yes. For federal tax purposes, the IRS has a general rule recognizing a marriage of same-sex individuals that was validly entered into in a domestic or foreign jurisdiction whose laws authorize the marriage of two individuals of the same sex even if the married couple resides in a domestic or foreign jurisdiction that does not recognize the validity of same-sex marriages. The rules for using a married filing jointly or married filing separately status described in Q&A #2 apply to these married individuals.

Q4. Can a taxpayer's same-sex spouse be a dependent of the taxpayer?

A4. No. A taxpayer's spouse cannot be a dependent of the taxpayer.

Q5. Can a same-sex spouse file using head of household filing status?

A5. A taxpayer who is married cannot file using head of household filing status. However, a married taxpayer may be considered unmarried and may use the head-of-household filing status if the taxpayer lives apart from his or her spouse for the last 6 months of the taxable year and provides more than half the cost of maintaining a household that is the principal place of abode of the taxpayer's dependent child for more than half of the year. See Publication 501 for more details.

Q6. If same-sex spouses (who file using the married filing separately status) have a child, which parent may claim the child as a dependent?

A6. If a child is a qualifying child under section 152(c) of both parents who are spouses (who file using the married filing separate status), either parent, but not both, may claim a dependency deduction for the qualifying child. If both parents claim a dependency deduction for the child on their income tax returns, the IRS will treat the child as the qualifying child of the parent with whom the child resides for the longer period of time during the taxable year. If the child resides with each parent for the same amount of time during the taxable year, the IRS will treat the child as the qualifying child of the parent with the higher adjusted gross income.

Q7. Can a taxpayer who is married to a person of the same sex claim the standard deduction if the taxpayer's spouse itemized deductions?

A7. No. If a taxpayer's spouse itemized his or her deductions, the taxpayer cannot claim the standard deduction (section 63(c)(6)(A)).

Q8. If a taxpayer adopts the child of his or her same-sex spouse as a second parent or co-parent, may the taxpayer ("adopting parent") claim the adoption credit for the qualifying adoption expenses he or she pays or incurs to adopt the child?

A8. No. The adopting parent may not claim an adoption credit. A taxpayer may not claim an adoption credit for expenses incurred in adopting the child of the taxpayer's spouse (section 23).

Q9. Do provisions of the federal tax law such as section 66 (treatment of community income) and section 469(i)(5) ($25,000 offset for passive activity losses for rental real estate activities) apply to same-sex spouses?

A9. Yes. Like other provisions of the federal tax law that apply to married taxpayers, section 66 and section 469(i)(5) apply to same-sex spouses because same-sex spouses are married for all federal tax purposes.

Q10. If an employer provided health coverage for an employee's same-sex spouse and included the value of that coverage in the employee's gross income, can the employee file an amended Form 1040 reflecting the employee's status as a married individual to recover federal income tax paid on the value of the health coverage of the employee's spouse?

A10. Yes, for all years for which the period of limitations for filing a claim for refund is open. Generally, a taxpayer may file a claim for refund for three years from the date the return was filed or two years from the date the tax was paid, whichever is later. If an employer provided health coverage for an employee's same-sex spouse, the employee may claim a refund of income taxes paid on the value of coverage that would have been excluded from income had the employee's spouse been recognized as the employee's legal spouse for tax purposes. This claim for a refund generally would be made through the filing of an amended Form 1040. For information on filing an amended return, go to Tax Topic 308, Amended Returns, at http://www.irs.gov/taxtopics/tc308.html. For a discussion regarding refunds of Social Security and Medicare taxes, see Q&A #12 and Q&A #13.

Example. Employer sponsors a group health plan covering eligible employees and their dependents and spouses (including same-sex spouses). Fifty percent of the cost of health coverage elected by employees is paid by Employer. Employee A was married to same-sex Spouse B at all times during 2012. Employee A elected coverage for Spouse B through Employer's group health plan beginning Jan. 1, 2012. The value of the employer-funded portion of Spouse B's health coverage was $250 per month.

The amount in Box 1, "Wages, tips, other compensation," of the 2012 Form W-2 provided by Employer to Employee A included $3,000 ($250 per month x 12 months) of income reflecting the value of employer-funded health coverage provided to Spouse B. Employee A filed Form 1040 for the 2012 taxable year reflecting the Box 1 amount reported on Form W-2.

Employee A may file an amended Form 1040 for the 2012 taxable year excluding the value of Spouse B's employer-funded health coverage ($3,000) from gross income.

Q11. If an employer sponsored a cafeteria plan that allowed employees to pay premiums for health coverage on a pre-tax basis, can a participating employee file an amended return to recover income taxes paid on premiums that the employee paid on an after-tax basis for the health coverage of the employee's same-sex spouse?

A11. Yes, for all years for which the period of limitations for filing a claim for refund is open. Generally, a taxpayer may file a claim for refund for three years from the date the return was filed or two years from the date the tax was paid, whichever is later. If an employer sponsored a cafeteria plan under which an employee elected to pay for health coverage for the employee on a pre-tax basis, and if the employee purchased coverage on an after-tax basis for the employee's same-sex spouse under the employer's health plan, the employee may claim a refund of income taxes paid on the premiums for the coverage of the employee's spouse. This claim for a refund generally would be made through the filing of an amended Form 1040. For information on filing an amended return, go to Tax Topic 308, Amended Returns, at http://www.irs.gov/taxtopics/tc308.html. For a discussion regarding refunds of Social Security and Medicare taxes, see Q&A #12 and Q&A #13.

Example. Employer sponsors a group health plan as part of a cafeteria plan with a calendar year plan year. The full cost of spousal and dependent coverage is paid by the employees. In the open enrollment period for the 2012 plan year, Employee C elected to purchase self-only health coverage through salary reduction under Employer's cafeteria plan. On March 1, 2012, Employee C was married to same-sex spouse D. Employee C purchased health coverage for Spouse D through Employer's group health plan beginning March 1, 2012. The premium paid by Employee C for Spouse D's health coverage was $500 per month.

The amount in Box 1, "Wages, tips, other compensation," of the 2012 Form W-2 provided by Employer to Employee C included the $5,000 ($500 per month x 10 months) of premiums paid by Employee C for Spouse D's health coverage. Employee C filed Form 1040 for the 2012 taxable year reflecting the Box 1 amount reported on Form W-2.

Employee C's salary reduction election is treated as including the value of the same-sex spousal coverage purchased for Spouse D. Employee C may file an amended Form 1040 for the 2012 taxable year excluding the premiums paid for Spouse D's health coverage ($5,000) from gross income.

Q12. In the situations described in Q&A #10 and Q&A #11, may the employer claim a refund for the Social Security taxes and Medicare taxes paid on the benefits?

A12. Yes. If the period of limitations for filing a claim for refund is open, the employer may claim a refund of, or make an adjustment for, any overpayment of Social Security taxes and Medicare taxes. The requirements for filing a claim for refund or for making an adjustment for an overpayment of the employer and employee portions of Social Security and Medicare taxes can be found in the Instructions for Form 941-X, Adjusted Employer's QUARTERLY Federal

Tax Return or Claim for Refund. Notice 2013-61 provides special administrative procedures for employers to file claims for refunds or make adjustments for overpayments of Social Security taxes and Medicare taxes paid on same-sex spouse benefits.

Q13. In the situations described in Q&A #10 and Q&A #11, may the employer claim a refund or make an adjustment of income tax withholding that was withheld from the employee with respect to the benefits in prior years?

A13. No. Claims for refund of overwithheld income tax for prior years cannot be made by employers. The employee may file for any refund of income tax due for prior years on Form 1040X, provided the period of limitations for claiming a refund has not expired. See Q&A #10 and Q&A #11.

Employers may make adjustments for income tax withholding that was overwithheld from an employee in the current year provided the employer has repaid or reimbursed the employee for the overwithheld income tax before the end of the calendar year.

Q14. If an employer cannot locate a former employee with a same-sex spouse who received the benefits described in Q&A #10 and Q&A #11, may the employer still claim a refund of the employer portion of the Social Security and Medicare taxes on the benefits?

A14. Yes, if the employer makes reasonable attempts to locate an employee who received the benefits described in Q&A #10 and Q&A #11 that were treated as wages but the employer is unable to locate the employee, the employer can claim a refund of the employer portion of Social Security and Medicare taxes, but not the employee portion. Also, if an employee is notified and given the opportunity to participate in the claim for refund of Social Security and Medicare taxes but declines in writing, the employer can claim a refund of the employer portion of the taxes, but not the employee portion. Employers can use the special administrative procedure set forth in Notice 2013-61 to file these claims.

Q15. If a sole proprietor employs his or her same-sex spouse in his or her business, can the sole proprietor get a refund of Social Security, Medicare and FUTA taxes on the wages that the sole proprietor paid to the same-sex spouse as an employee in the business?

A15. Services performed by an employee in the employ of his or her spouse are excluded from the definition of employment for purposes of the Federal Unemployment Tax Act (FUTA). Therefore, for all years for which the period of limitations is open, the sole proprietor can claim a refund of the FUTA tax paid on the compensation that the sole proprietor paid his or her same-sex spouse as an employee in the business. Services of a spouse are excluded from Social Security and Medicare taxes only if the services are not in the course of the employer's

trade or business, or if it is domestic service in a private home of the employer.

Q16. What rules apply to qualified retirement plans pursuant to Rev. Rul. 2013-17?

A16. Qualified retirement plans are required to comply with the following rules pursuant toRev. Rul. 2013-17:

1. A qualified retirement plan must treat a same-sex spouse as a spouse for purposes of satisfying the federal tax laws relating to qualified retirement plans.
2. For purposes of satisfying the federal tax laws relating to qualified retirement plans, a qualified retirement plan must recognize a same-sex marriage that was validly entered into in a jurisdiction whose laws authorize the marriage, even if the married couple lives in a domestic or foreign jurisdiction that does not recognize the validity of same-sex marriages.
3. A person who is in a registered domestic partnership or civil union is not considered to be a spouse for purposes of applying the federal tax law requirements relating to qualified retirement plans, regardless of whether that person's partner is of the opposite or same sex.

Q17. What are some examples of the consequences of these rules for qualified retirement plans?

A17. The following are some examples of the consequences of these rules:

1. Plan A, a qualified defined benefit plan, is maintained by Employer X, which operates only in a state that does not recognize same-sex marriages. Nonetheless, Plan A must treat a participant who is married to a spouse of the same sex under the laws of a different jurisdiction as married for purposes of applying the qualification requirements that relate to spouses.
2. Plan B is a qualified defined contribution plan and provides that the participant's account must be paid to the participant's spouse upon the participant's death unless the spouse consents to a different beneficiary. Plan B does not provide for any annuity forms of distribution. Plan B must pay this death benefit to the same-sex surviving spouse of any deceased participant. Plan B is not required to provide this death benefit to a surviving registered domestic partner of a deceased participant. However, Plan B is allowed to make a participant's registered domestic partner the default beneficiary who will receive the death benefit unless the participant chooses a different beneficiary.

Q18. As of when do the rules of Rev. Rul. 2013-17 apply to qualified retirement plans?

A18. Qualified retirement plans must comply with these rules as of Sept. 16, 2013. AlthoughRev. Rul. 2013-17 allows taxpayers to file amended returns that relate to prior periods in reliance on the rules in Rev. Rul. 2013-17 with respect to many matters, this rule does not extend to matters relating to qualified retirement plans. The IRS has not yet provided guidance regarding the application of *Windsor* and these rules to qualified retirement plans with respect to periods before Sept. 16, 2013.

Q19. Will the IRS issue further guidance on how qualified retirement plans and other tax-favored retirement arrangements must comply with *Windsor* and Rev. Rul. 2013-17?

A19. The IRS intends to issue further guidance on how qualified retirement plans and other tax-favored retirement arrangements must comply with *Windsor* and Rev. Rul. 2013-17. It is expected that future guidance will address the following, among other issues:

1. Plan amendment requirements (including the timing of any required amendments).
2. Any necessary corrections relating to plan operations for periods before future guidance is issued.

Q20. Can a same-sex married couple elect to treat a jointly owned and operated unincorporated business as a Qualified Joint Venture?

A20. Yes. Spouses that wholly own and operate an unincorporated business and that meet certain other requirements may avoid Federal partnership tax treatment by electing to be a Qualified Joint Venture. For more information on Qualified Joint Ventures, see the tax topic "Husband and Wife Business" at http://www.irs.gov/Businesses/Small-Businesses-&-Self-Employed/Husband-and-Wife-Business.

Q21. In the situations described in FAQ #10 and FAQ #11, may the employee claim a refund for the social security and Medicare taxes paid on the benefits if the employer will not?

A21. Yes. If the period of limitations for filing a claim for refund is open and the employee has not been reimbursed by the employer for the Social Security and Medicare taxes and has not authorized the employer to file a claim for refund of those taxes on his or her behalf, the employee may claim a refund. The employee should seek a refund of Social Security and Medicare taxes from his or her employer first. However, if the employer indicates an intention not to file a claim or adjust the overpaid Social Security and Medicare taxes, the employee may claim a refund of any overpayment of employee Social Security and Medicare taxes by filing Form 843, Claim for Refund and Request for Abatement. The requirements for an employee filing a claim for refund of the employee portions of Social Security and Medicare taxes can be found in the Instructions for Form 843. Employees should write "Windsor Claim" in dark, bold letters across the top margin of Form 843.

Q22. Is an employer that repays or reimburses an employee on or before Dec. 31, 2013, for an overpayment of Social Security and Medicare taxes and income tax withholding with respect to same-sex spouse benefits provided in 2013 required to obtain a written statement from the employee confirming the employee did not make a claim for refund of the

overcollected taxes (or the claim was rejected) and will not make any future claim for refund or credit of the overcollected taxes?

A22. No. An employer using the first special administrative procedure under Notice 2013-61(i.e., employer repays or reimburses an employee for 2013 overpayments of taxes on or before Dec. 31, 2013, and corrects the overpayment on the fourth quarter 2013 Form 941) does not need to obtain the written statement from its employee with respect to the 2013 overpayments. However, an employer using the second special administrative procedure under Notice 2013-61 (i.e., employer does not repay or reimburse an employee for an overpayment of taxes on or before Dec. 31, 2013, and corrects the overpayment on a Form 941-X) is required to obtain such written statement from each affected employee.

Q23. If an individual employed his or her same-sex spouse to perform domestic (household) services in the individual's private home, can the individual get a refund of Social Security, Medicare and FUTA taxes on wages that the individual paid to the spouse for such service? If so, which forms should the individual use to claim refunds?

A23. Yes, if the period of limitations for filing a claim for refund is open, the individual can get a refund of Social Security, Medicare and FUTA taxes paid on remuneration for domestic services in the individual's private home that were performed by his or her same sex spouse as the individual's employee. If the taxes for these services were reported on Schedule H (Form 1040), Household Employment Taxes, and taxes were paid in connection with the Form 1040, the individual should file an amended Form 1040 to claim refund of those taxes together with an amended Schedule H. For information on filing an amended return, go to Tax Topic 308, Amended Returns, at http://www.irs.gov/taxtopics/tc308.html. If the Social Security and Medicare taxes for the domestic service were reported on Form 941, Employer's QUARTERLY Federal Tax Return, the individual employer can use Form 941-X, Adjusted Employer's QUARTERLY Federal Tax Return or Claim for Refund, to claim a refund of these taxes. The requirements for filing a claim for refund or making an adjustment of the employer and employee portions of Social Security and Medicare taxes can be found in the Instructions for Form 941-X. Notice 2013-61 provides special administrative procedures for employers to file claims for refunds or make adjustments for an overpayment of social security taxes and Medicare taxes on same-sex spouse benefits. If the FUTA taxes for the domestic service were reported on Form 940, Employer's Annual Federal Unemployment (FUTA) Tax Return, the individual employer can file an amended Form 940 for the prior year to obtain a refund. The previous year's Form 940 should be used to claim a refund of FUTA taxes for that prior year. (Forms 940 for prior years may also be found at IRS.gov.)

Related Items:

- Forms and Publications

- IR-2013-72, Treasury and IRS Announce That All Legal Same-Sex Marriages Will Be Recognized For Federal Tax Purposes; Ruling Provides Certainty, Benefits and Protections Under Federal Tax Law for Same-Sex Married Couples

Page Last Reviewed or Updated: 20-Nov-2013

Rev. Rul. 2013-17

ISSUES

1. Whether, for Federal tax purposes, the terms “spouse,” “husband and wife,” “husband,” and “wife” include an individual married to a person of the same sex, if the individuals are lawfully married under state[1] law, and whether, for those same purposes, the term “marriage” includes such a marriage between individuals of the same sex.

2. Whether, for Federal tax purposes, the Internal Revenue Service (Service) recognizes a marriage of same-sex individuals validly entered into in a state whose laws authorize the marriage of two individuals of the same sex even if the state in which they are domiciled does not recognize the validity of same-sex marriages.

3. Whether, for Federal tax purposes, the terms “spouse,” “husband and wife,” “husband,” and “wife” include individuals (whether of the opposite sex or same sex) who have entered into a registered domestic partnership, civil union, or other similar formal relationship recognized under state law that is not denominated as a marriage under the

[1] For purposes of this ruling, the term “state” means any domestic or foreign jurisdiction having the legal authority to sanction marriages.

laws of that state, and whether, for those same purposes, the term “marriage” includes such relationships.

LAW AND ANALYSIS

1. Background

In Revenue Ruling 58-66, 1958-1 C.B. 60, the Service determined the marital status for Federal income tax purposes of individuals who have entered into a common-law marriage in a state that recognizes common-law marriages.[2] The Service acknowledged that it recognizes the marital status of individuals as determined under state law in the administration of the Federal income tax laws. In Revenue Ruling 58-66, the Service stated that a couple would be treated as married for purposes of Federal income tax filing status and personal exemptions if the couple entered into a common-law marriage in a state that recognizes that relationship as a valid marriage.

The Service further concluded in Revenue Ruling 58-66 that its position with respect to a common-law marriage also applies to a couple who entered into a common-law marriage in a state that recognized such relationships and who later moved to a state in which a ceremony is required to establish the marital relationship. The Service therefore held that a taxpayer who enters into a common-law marriage in a state that recognizes such marriages shall, for purposes of Federal income tax filing status and personal exemptions, be considered married notwithstanding that the

[2] A common-law marriage is a union of two people created by agreement followed by cohabitation that is legally recognized by a state. Common-law marriages have three basic features: (1) A present agreement to be married, (2) cohabitation, and (3) public representations of marriage.

taxpayer and the taxpayer's spouse are currently domiciled in a state that requires a ceremony to establish the marital relationship. Accordingly, the Service held in Revenue Ruling 58-66 that such individuals can file joint income tax returns under section 6013 of the Internal Revenue Code (Code).

The Service has applied this rule with respect to common-law marriages for over 50 years, despite the refusal of some states to give full faith and credit to common-law marriages established in other states. Although states have different rules of marriage recognition, uniform nationwide rules are essential for efficient and fair tax administration. A rule under which a couple's marital status could change simply by moving from one state to another state would be prohibitively difficult and costly for the Service to administer, and for many taxpayers to apply.

Many provisions of the Code make reference to the marital status of taxpayers. Until the recent decision of the Supreme Court in United States v. Windsor, 570 U.S. ___, 133 S. Ct. 2675 (2013), the Service interpreted section 3 of the Defense of Marriage Act (DOMA) as prohibiting it from recognizing same-sex marriages for purposes of these provisions. Section 3 of DOMA provided that:

> In determining the meaning of any Act of Congress, or of any ruling, regulation, or interpretation of the various administrative bureaus and agencies of the United States, the word 'marriage' means only a legal union between one man and one woman as husband and wife, and the word 'spouse' refers only to a person of the opposite sex who is a husband or a wife.

1 U.S.C. § 7.

In Windsor, the Supreme Court held that section 3 of DOMA is unconstitutional because it violates the principles of equal protection. It concluded that this section "undermines both the public and private significance of state-sanctioned same-sex marriages" and found that "no legitimate purpose" overcomes section 3's "purpose and effect to disparage and to injure those whom the State, by its marriage laws, sought to protect[.]" Windsor, 133 S. Ct. at 2694-95. This ruling provides guidance on the effect of the Windsor decision on the Service's interpretation of the sections of the Code that refer to taxpayers' marital status.

2. Recognition of Same-Sex Marriages

There are more than two hundred Code provisions and Treasury regulations relating to the internal revenue laws that include the terms "spouse," "marriage" (and derivatives thereof, such as "marries" and "married"), "husband and wife," "husband," and "wife." The Service concludes that gender-neutral terms in the Code that refer to marital status, such as "spouse" and "marriage," include, respectively, (1) an individual married to a person of the same sex if the couple is lawfully married under state law, and (2) such a marriage between individuals of the same sex. This is the most natural reading of those terms; it is consistent with Windsor, in which the plaintiff was seeking tax benefits under a statute that used the term "spouse," 133 S. Ct. at 2683; and a narrower interpretation would not further the purposes of efficient tax administration.

In light of the Windsor decision and for the reasons discussed below, the Service also concludes that the terms "husband and wife," "husband," and "wife" should be interpreted to include same-sex spouses. This interpretation is consistent with the

Supreme Court's statements about the Code in Windsor, avoids the serious constitutional questions that an alternate reading would create, and is permitted by the text and purposes of the Code.

First, the Supreme Court's opinion in Windsor suggests that it understood that its decision striking down section 3 of DOMA would affect tax administration in ways that extended beyond the estate tax refund at issue. See 133 S. Ct. at 2694 ("The particular case at hand concerns the estate tax, but DOMA is more than simply a determination of what should or should not be allowed as an estate tax refund. Among the over 1,000 statutes and numerous Federal regulations that DOMA controls are laws pertaining to . . . taxes."). The Court observed in particular that section 3 burdened same-sex couples by forcing "them to follow a complicated procedure to file their Federal and state taxes jointly" and that section 3 "raise[d] the cost of health care for families by taxing health benefits provided by employers to their workers' same-sex spouses." Id. at 2694-2695.

Second, an interpretation of the gender-specific terms in the Code to exclude same-sex spouses would raise serious constitutional questions. A well-established principle of statutory interpretation holds that, "where an otherwise acceptable construction of a statute would raise serious constitutional problems," a court should "construe the statute to avoid such problems unless such construction is plainly contrary to the intent of Congress." Edward J. DeBartolo Corp. v. Fla. Gulf Coast Bldg. & Constr. Trades Council, 485 U.S. 568, 575 (1988). "This canon is followed out of respect for Congress, which [presumably] legislates in light of constitutional limitations," Rust v.

Sullivan, 500 U.S. 173, 191 (1991), and instructs courts, where possible, to avoid interpretations that "would raise serious constitutional doubts," United States v. X-Citement Video, Inc., 513 U.S. 64, 78 (1994).

The Fifth Amendment analysis in Windsor raises serious doubts about the constitutionality of Federal laws that confer marriage benefits and burdens only on opposite-sex married couples. In Windsor, the Court stated that, "[b]y creating two contradictory marriage regimes within the same State, DOMA forces same-sex couples to live as married for the purpose of state law but unmarried for the purpose of Federal law, thus diminishing the stability and predictability of basic personal relations the State has found it proper to acknowledge and protect." 133 S. Ct. at 2694. Interpreting the gender-specific terms in the Code to categorically exclude same-sex couples arguably would have the same effect of diminishing the stability and predictability of legally recognized same-sex marriages. Thus, the canon of constitutional avoidance counsels in favor of interpreting the gender-specific terms in the Code to refer to same-sex spouses and couples.

Third, the text of the Code permits a gender-neutral construction of the gender-specific terms. Section 7701 of the Code provides definitions of certain terms generally applicable for purposes of the Code when the terms are not defined otherwise in a specific Code provision and the definition in section 7701 is not manifestly incompatible with the intent of the specific Code provision. The terms "husband and wife," "husband," and "wife" are not specifically defined other than in section 7701(a)(17), which provides, for purposes of sections 682 and 2516, that the terms "husband" and "wife" shall be

read to include a former husband or a former wife, respectively, and that "husband" shall be read as "wife" and "wife" as "husband" in certain circumstances. Although Congress's specific instruction to read "husband" and "wife" interchangeably in those specific provisions could be taken as an indication that Congress did not intend the terms to be read interchangeably in other provisions, the Service believes that the better understanding is that the interpretive rule set forth in section 7701(a)(17) makes it reasonable to adopt, in the circumstances presented here and in light of Windsor and the principle of constitutional avoidance, a more general rule that does not foreclose a gender-neutral reading of gender-specific terms elsewhere in the Code.

Section 7701(p) provides a specific cross-reference to the Dictionary Act, 1 U.S.C. § 1, which provides, in part, that when "determining the meaning of any Act of Congress, unless the context indicates otherwise, . . . words importing the masculine gender include the feminine as well." The purpose of this provision was to avoid having to "specify males and females by using a great deal of unnecessary language when one word would express the whole." Cong. Globe, 41st Cong., 3d Sess. 777 (1871) (statement of Sen. Trumbull, sponsor of Dictionary Act). This provision has been read to require construction of the phrase "husband and wife" to include same-sex married couples. See Pedersen v. Office of Personnel Mgmt., 881 F. Supp. 2d 294, 306-07 (D. Conn. 2012) (construing section 6013 of the Code). The Dictionary Act thus supports interpreting the gender-specific terms in the Code in a gender-neutral manner "unless the context indicates otherwise." 1 U.S.C. § 1. "'Context'" for purposes of the Dictionary Act "means the text of the Act of Congress surrounding the word at issue, or

the texts of other related congressional Acts." Rowland v. Cal. Men's Colony, Unit II Men's Advisory Council, 506 U.S. 194, 199 (1993). Here, nothing in the surrounding text forecloses a gender-neutral reading of the gender-specific terms. Rather, the provisions of the Code that use the terms "husband and wife," "husband," and "wife" are inextricably interwoven with provisions that use gender-neutral terms like "spouse" and "marriage," indicating that Congress viewed them to be equivalent. For example, section 1(a) sets forth the tax imposed on "every married individual (as defined in section 7703) who makes a single return jointly with his spouse under section 6013," even though section 6013 provides that a "husband and wife" make a single return jointly of income. Similarly, section 2513 of the Code is entitled "Gifts by Husband or Wife to Third Party," but uses no gender-specific terms in its text. See also, e.g., §§ 62(b)(3), 1361(c)(1).

This interpretation is also consistent with the legislative history. The legislative history of section 6013, for example, uses the term "married taxpayers" interchangeably with the terms "husband" and "wife" to describe those individuals who may elect to file a joint return, and there is no indication that Congress intended those terms to refer only to a subset of individuals who are legally married. See, e.g., S. Rep. No. 82-781, Finance, Part 1, p. 48 (Sept. 18, 1951). Accordingly, the most logical reading is that the terms "husband and wife" were used because they were viewed, at the time of enactment, as equivalent to the term "persons married to each other." There is nothing in the Code to suggest that Congress intended to exclude from the meaning of these terms any couple otherwise legally married under state law.

Fourth, other considerations also strongly support this interpretation. A gender-neutral reading of the Code fosters fairness by ensuring that the Service treats same-sex couples in the same manner as similarly situated opposite-sex couples. A gender-neutral reading of the Code also fosters administrative efficiency because the Service does not collect or maintain information on the gender of taxpayers and would have great difficulty administering a scheme that differentiated between same-sex and opposite-sex married couples.

Therefore, consistent with the statutory context, the Supreme Court's decision in Windsor, Revenue Ruling 58-66, and effective tax administration generally, the Service concludes that, for Federal tax purposes, the terms "husband and wife," "husband," and "wife" include an individual married to a person of the same sex if they were lawfully married in a state whose laws authorize the marriage of two individuals of the same sex, and the term "marriage" includes such marriages of individuals of the same sex.

3. Marital Status Based on the Laws of the State Where a Marriage Is Initially Established

Consistent with the longstanding position expressed in Revenue Ruling 58-66, the Service has determined to interpret the Code as incorporating a general rule, for Federal tax purposes, that recognizes the validity of a same-sex marriage that was valid in the state where it was entered into, regardless of the married couple's place of domicile. The Service may provide additional guidance on this subject and on the application of Windsor with respect to Federal tax administration. Other agencies may

provide guidance on other Federal programs that they administer that are affected by the Code.

Under this rule, individuals of the same sex will be considered to be lawfully married under the Code as long as they were married in a state whose laws authorize the marriage of two individuals of the same sex, even if they are domiciled in a state that does not recognize the validity of same-sex marriages. For over half a century, for Federal income tax purposes, the Service has recognized marriages based on the laws of the state in which they were entered into, without regard to subsequent changes in domicile, to achieve uniformity, stability, and efficiency in the application and administration of the Code. Given our increasingly mobile society, it is important to have a uniform rule of recognition that can be applied with certainty by the Service and taxpayers alike for all Federal tax purposes. Those overriding tax administration policy goals generally apply with equal force in the context of same-sex marriages.

In most Federal tax contexts, a state-of-domicile rule would present serious administrative concerns. For example, spouses are generally treated as related parties for Federal tax purposes, and one spouse's ownership interest in property may be attributed to the other spouse for purposes of numerous Code provisions. If the Service did not adopt a uniform rule of recognition, the attribution of property interests could change when a same-sex couple moves from one state to another with different marriage recognition rules. The potential adverse consequences could impact not only the married couple but also others involved in a transaction, entity, or arrangement. This would lead to uncertainty for both taxpayers and the Service.

A rule of recognition based on the state of a taxpayer's current domicile would also raise significant challenges for employers that operate in more than one state, or that have employees (or former employees) who live in more than one state, or move between states with different marriage recognition rules. Substantial financial and administrative burdens would be placed on those employers, as well as the administrators of employee benefit plans. For example, the need for and validity of spousal elections, consents, and notices could change each time an employee, former employee, or spouse moved to a state with different marriage recognition rules. To administer employee benefit plans, employers (or plan administrators) would need to inquire whether each employee receiving plan benefits was married and, if so, whether the employee's spouse was the same sex or opposite sex from the employee. In addition, the employers or plan administrators would need to continually track the state of domicile of all same-sex married employees and former employees and their spouses. Rules would also need to be developed by the Service and administered by employers and plan administrators to address the treatment of same-sex married couples comprised of individuals who reside in different states (a situation that is not relevant with respect to opposite-sex couples). For all of these reasons, plan administration would grow increasingly complex and certain rules, such as those governing required distributions under section 401(a)(9), would become especially challenging. Administrators of employee benefit plans would have to be retrained, and systems reworked, to comply with an unprecedented and complex system that divides married employees according to their sexual orientation. In many cases, the tracking of

employee and spouse domiciles would be less than perfectly accurate or timely and would result in errors or delays. These errors and delays would be costly to employers, and could require some plans to enter the Service's voluntary compliance programs or put benefits of all employees at risk. All of these problems are avoided by the adoption of the rule set forth herein, and the Service therefore has chosen to avoid the imposition of the additional burdens on itself, employers, plan administrators, and individual taxpayers. Accordingly, Revenue Ruling 58-66 is amplified to adopt a general rule, for Federal tax purposes, that recognizes the validity of a same-sex marriage that was valid in the state where it was entered into, regardless of the married couple's place of domicile.

4. Registered Domestic Partnerships, Civil Unions, or Other Similar Formal Relationships Not Denominated as Marriage

For Federal tax purposes, the term "marriage" does not include registered domestic partnerships, civil unions, or other similar formal relationships recognized under state law that are not denominated as a marriage under that state's law, and the terms "spouse," "husband and wife," "husband," and "wife" do not include individuals who have entered into such a formal relationship. This conclusion applies regardless of whether individuals who have entered into such relationships are of the opposite sex or the same sex.

HOLDINGS

1. For Federal tax purposes, the terms "spouse," "husband and wife," "husband," and "wife" include an individual married to a person of the same sex if the

individuals are lawfully married under state law, and the term “marriage” includes such a marriage between individuals of the same sex.

2. For Federal tax purposes, the Service adopts a general rule recognizing a marriage of same-sex individuals that was validly entered into in a state whose laws authorize the marriage of two individuals of the same sex even if the married couple is domiciled in a state that does not recognize the validity of same-sex marriages.

3. For Federal tax purposes, the terms “spouse,” “husband and wife,” “husband,” and “wife” do not include individuals (whether of the opposite sex or the same sex) who have entered into a registered domestic partnership, civil union, or other similar formal relationship recognized under state law that is not denominated as a marriage under the laws of that state, and the term “marriage” does not include such formal relationships.

EFFECT ON OTHER REVENUE RULINGS

Rev. Rul. 58-66 is amplified and clarified.

PROSPECTIVE APPLICATION

The holdings of this ruling will be applied prospectively as of September 16, 2013.

Except as provided below, affected taxpayers also may rely on this revenue ruling for the purpose of filing original returns, amended returns, adjusted returns, or claims for credit or refund for any overpayment of tax resulting from these holdings, provided the applicable limitations period for filing such claim under section 6511 has not expired. If an affected taxpayer files an original return, amended return, adjusted

return, or claim for credit or refund in reliance on this revenue ruling, all items required to be reported on the return or claim that are affected by the marital status of the taxpayer must be adjusted to be consistent with the marital status reported on the return or claim.

Taxpayers may rely (subject to the conditions in the preceding paragraph regarding the applicable limitations period and consistency within the return or claim) on this revenue ruling retroactively with respect to any employee benefit plan or arrangement or any benefit provided thereunder only for purposes of filing original returns, amended returns, adjusted returns, or claims for credit or refund of an overpayment of tax concerning employment tax and income tax with respect to employer-provided health coverage benefits or fringe benefits that were provided by the employer and are excludable from income under sections 106, 117(d), 119, 129, or 132 based on an individual's marital status. For purposes of the preceding sentence, if an employee made a pre-tax salary-reduction election for health coverage under a section 125 cafeteria plan sponsored by an employer and also elected to provide health coverage for a same-sex spouse on an after-tax basis under a group health plan sponsored by that employer, an affected taxpayer may treat the amounts that were paid by the employee for the coverage of the same-sex spouse on an after-tax basis as pre-tax salary reduction amounts.

The Service intends to issue further guidance on the retroactive application of the Supreme Court's opinion in Windsor to other employee benefits and employee benefit plans and arrangements. Such guidance will take into account the potential

consequences of retroactive application to all taxpayers involved, including the plan sponsor, the plan or arrangement, employers, affected employees and beneficiaries. The Service anticipates that the future guidance will provide sufficient time for plan amendments and any necessary corrections so that the plan and benefits will retain favorable tax treatment for which they otherwise qualify.

DRAFTING INFORMATION

The principal authors of this revenue ruling are Richard S. Goldstein and Matthew S. Cooper of the Office of Associate Chief Counsel (Procedure & Administration). For further information regarding this revenue ruling, contact Mr. Goldstein and Mr. Cooper at 202-622-3400 (not a toll-free call).

U.S. Department of Labor Employee Benefits Security Administration
Washington, DC 20210

TECHNICAL RELEASE 2013-04

DATE: SEPTEMBER 18, 2013

SUBJECT: GUIDANCE TO EMPLOYEE BENEFIT PLANS ON THE DEFINITION OF "SPOUSE" AND "MARRIAGE" UNDER ERISA AND THE SUPREME COURT'S DECISION IN UNITED STATES V. WINDSOR.

I. INTRODUCTION

On June 26, 2013, the Supreme Court of the United States ruled, in *United States v. Windsor*, that section 3 of the Defense of Marriage Act (DOMA) is unconstitutional. Section 3 provides that, in any Federal statute, the term "marriage" means a legal union between one man and one woman as husband and wife, and that "spouse" refers only to a person of the opposite sex who is a husband or a wife. The Supreme Court concluded that section 3 of DOMA "undermines both the public and private significance of state-sanctioned same sex marriages" and found that "no legitimate purpose" overcomes Section 3's "purpose and effect to disparage and to injure those whom the State, by its marriage laws, sought to protect[.]" The President has directed the Attorney General to work with other members of the Cabinet to review all relevant federal statutes to ensure the Supreme Court's decision, including its implications for federal benefits and obligations, is implemented swiftly and smoothly. Following consultation with the Department of Justice, the Department of the Treasury and other appropriate federal executive agencies, the Department of Labor (Department) is issuing this Technical Release to provide guidance to employee benefit plans, plan sponsors, plan fiduciaries, and plan participants and beneficiaries on the meaning of "spouse" and "marriage" as these terms appear in the provisions of the Employee Retirement Income Security Act of 1974 (ERISA), and the Internal Revenue Code that the Department interprets.[1]

II. GUIDANCE

In general, where the Secretary of Labor has authority to issue regulations, rulings, opinions, and exemptions in title I of ERISA and the Internal Revenue Code, as well as in the Department's regulations at chapter XXV of Title 29 of the Code of Federal Regulations, the term "spouse" will be read to refer to any individuals who are lawfully married under any state law, including individuals married to a person of the same sex who were legally married in a state that recognizes such marriages, but who are domiciled in a state that does not recognize such marriages.[2] Similarly, the term "marriage" will be read to include a same-sex marriage that is legally recognized as a marriage under any state law. This is the most natural reading of those terms; it is consistent with *Windsor*, in which the plaintiff was seeking tax benefits under a statute that used the term "spouse"; and a narrower interpretation would not further the purposes of the relevant statutes and regulations.

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[1] Reorganization Plan No. 4 of 1978 transferred the authority to interpret certain provisions of title I of ERISA that have parallel language in the Internal Revenue Code from the Secretary of Labor to the Secretary of the Treasury. At the same time, the authority to interpret certain provisions, such as section 4975 of the Internal Revenue Code, which parallels provisions in ERISA, was transferred to the Secretary of Labor. 5 U.S.C. App. 237 (2006). In addition, under 26 U.S.C. 414(p)(3), the Secretary of Labor has rulemaking authority for certain other provisions of the Code that use the term "spouse."

[2] This definition of the term "spouse" also applies as the term is used in 5 U.S.C. § 8477(a)(4)(F).

For purposes of this guidance, the term "state" means any state of the United States, the District of Columbia, Puerto Rico, the Virgin Islands, American Samoa, Guam, Wake Island, the Northern Mariana Islands, any other territory or possession of the United States, and any foreign jurisdiction having the legal authority to sanction marriages.

The terms "spouse" and "marriage," however, do not include individuals in a formal relationship recognized by a state that is not denominated a marriage under state law, such as a domestic partnership or a civil union, regardless of whether the individuals who are in these relationships have the same rights and responsibilities as those individuals who are married under state law. The foregoing sentence applies to individuals who are in these relationships with an individual of the opposite sex or same sex.

A rule that recognizes marriages that are valid in the state in which they were celebrated, regardless of the married couple's state of domicile, provides a uniform rule of recognition that can be applied with certainty by stakeholders, including employers, plan administrators, participants, and beneficiaries.

A rule for employee benefit plans based on state of domicile would raise significant challenges for employers that operate or have employees (or former employees) in more than one state or whose employees move to another state while entitled to benefits. Furthermore, substantial financial and administrative burdens would be placed on those employers, as well as the administrators of employee benefit plans. For example, the need for and validity of spousal elections, consents, and notices could change each time an employee, former employee, or spouse moved to a state with different marriage recognition rules. To administer employee benefit plans, employers (or plan administrators) would need to inquire whether each employee receiving plan benefits was married and, if so, whether the employee's spouse was the same sex or opposite sex from the employee. In addition, the employers or plan administrators would need to continually track the state of domicile of all same-sex married employees and former employees and their spouses. For all of these reasons, plan administration would grow increasingly complex, administrators of employee benefit plans would have to be retrained, and systems reworked, to comply with an unprecedented and complex system that divides married employees according to their sexual orientation. In many cases, the tracking of employee and spouse domiciles would be less than perfectly accurate or timely and would result in errors or delays.

Such a system would be burdensome for employers and would likely result in errors, confusion, and inconsistency for employers, individual employees, and the government. In addition, given the interconnectedness of statutory provisions affecting employee benefit plans, recognition of marriage based on domicile could prevent qualification for tax exemption, lead to loss of vested rights if spouses move, and complicate benefits determinations if spouses live in different states. All of these problems are avoided by the adoption of a rule that recognizes marriages that are valid in the state in which they were celebrated. That approach is consistent with the core intent underlying ERISA of promoting uniform requirements for employee benefit plans. In addition, Congress requires that the Department, the Department of Treasury/Internal Revenue Service (IRS) and the Department of Health and Human Services (HHS) coordinate policies with respect to the Health Insurance Portability and Accountability Act (HIPAA), which has parallel provisions in ERISA, the Code and the Public Health Service Act. HIPAA § 104. The Departments operate under a Memorandum of Understanding that implements section 104 of HIPAA, and subsequent amendments, and provides that requirements over which two or more Secretaries have responsibility (''shared provisions'') must be administered so as to have the same effect at all times. HIPAA section 104 also requires the coordination of policies relating to enforcing the shared provisions in order to avoid duplication of enforcement efforts and to assign priorities in enforcement. Congress also provided that, whenever the Departments of Treasury and Labor are required to carry out provisions relating to the

same subject matter under ERISA, they shall consult with each other in order to, among other things, reduce conflicting requirements. ERISA § 3004(a); 29 U.S.C. § 1204(a). The Department has coordinated with Treasury/IRS and HHS in developing this Technical Release, and agreed with those agencies that recognition of "spouses" and "marriages" based on the validity of the marriage in the state of celebration, rather than based on the married couple's state of domicile, promotes uniformity in administration of employee benefit plans and affords the most protection to same-sex couples.

III. FOR FURTHER INFORMATION

The terms "spouse" and "marriage" appear in numerous provisions of title I of ERISA and the Department's regulations. In addition to the above general guidance, the Department's Employee Benefits Security Administration (EBSA) intends to issue future guidance addressing specific provisions of ERISA and its regulations. Additional information will be made available at www.dol.gov/ebsa.

The State of New Hampshire
Supreme Court

No. 2013-0403

In Re Guardianship of Madelyn B.

On Appeal from The Circuit Court For The 10th Circuit,
Family Division, Derry

BRIEF AMICI CURIAE OF LAW PROFESSORS IN SUPPORT OF APPELLANT

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STATEMENT OF INTEREST OF *AMICI*

Law professor *amici* are law professors with extensive expertise in parentage law and children's rights, and are particularly well-situated to provide this Court with information about the history of parentage law, as well as how courts across the country have decided cases involving non-biological parents and same-sex parents. As family law and child welfare scholars, *Amici* have a strong interest in ensuring that the law protects the parent-child relationships that children form with their parents, regardless of whether there is a biological or adoptive relationship between the parent and child. Law professor *amici* include:

- Susan Frelich Appleton, Washington University School of Law[1]
- Carlos A. Ball, Rutgers University School of Law
- Katharine K. Baker, Chicago-Kent College of Law
- Katharine T. Bartlett, Duke University School of Law
- Cynthia Grant Bowman, Cornell Law School
- Naomi Cahn, George Washington University Law School
- Nancy E. Dowd, University of Florida Fredric G. Levin College of Law
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- Joan Heifetz Hollinger, University of California, Berkeley School of Law
- Melanie B. Jacobs, Michigan State University College of Law
- Courtney Joslin, University of California, Davis School of Law
- Ellen Musinsky, University of New Hampshire School of Law (Professor Emeritus)
- Nancy D. Polikoff, American University Washington College of Law

[1] Law school identification is provided for informational purposes only.

- Katharine Silbaugh, Boston University School of Law
- Julie Shapiro, Seattle University School of Law
- Richard F. Storrow, City University of New York School of Law
- Michael S. Wald, Stanford University (Professor of Law Emeritus)
- Rhonda Wasserman, University of Pittsburgh School of Law
- Barbara Bennett Woodhouse, Emory University Law School

Amicus the Center on Children and Families (CCF) at the University of Florida Fredric G. Levin College of Law in Gainesville, Florida is an organization whose mission is to promote the highest quality teaching, research and advocacy for children and their families. CCF's directors and associate directors are experts in children's law, constitutional law, criminal law, family law, and juvenile justice, as well as related areas such as psychology and psychiatry. CCF supports interdisciplinary research in areas of importance to children, youth and families, and promotes child-centered, evidence-based policies and practices in dependency and juvenile justice systems. Its faculty has many decades of experience in advocacy for children and youth in a variety of settings, including the Virgil Hawkins Civil Clinics and Gator Team Child juvenile law clinic.

INTRODUCTION

New Hampshire's parentage law, like the law in other states, recognizes and protects established parent-child relationships even when the parent and child lack a biological connection. *Amici* submit that the court below erred by dismissing Appellant Susan Brackett's ("Susan") petition to establish her parental relationship with the child she raised since birth for eleven years. As explained more fully in Appellant's Opening Brief, Susan and Appellee Melissa DeMarco ("Melissa") were a same-sex couple who decided to have and raise a child together,

Madelyn Brackett ("Madelyn"), who was born in 2002. (Consolidated Record Appendix ("CRA") at 4-7, ¶¶ 1-20.) For the next six years, Susan and Melissa raised Madelyn together as parents until 2008 when the parties separated. (CRA at 7-10, ¶¶ 21-32.) After the parties separated, Susan continued to parent Madelyn for another five years, until March of 2013. (CRA at 10-11, ¶¶ 33-41.) At this point, after parenting Madelyn together for eleven years, Melissa began refusing to allow Susan to have contact with Madelyn. (CRA at 11-12, ¶¶ 42-54.) Until this time, Susan functioned as one of Madelyn's parents, caring for her as an infant (CRA at 7-8, ¶¶ 21-8), being listed as a parent at Madelyn's school and with Madelyn's physician (CRA at 9, ¶ 29; 8, ¶ 25), vacationing with her as a family (CRA at 9, ¶ 31), providing sole financial support for the family while Melissa and Susan were together, (CRA at 8, ¶ 24), and paying regular child support after the parties ended their relationship (CRA at 10, ¶ 37). Madelyn has Susan's middle and surname (CRA at 7, ¶ 18), and Susan was Madelyn's guardian until Melissa sought termination of that guardianship after she and Susan separated. (CRA at 7, ¶ 20; 13, ¶ 54.)

While legal parentage may be established on the basis of a biological connection under the parentage statutes of New Hampshire and in all other states, biological ties are not and never have been the only way to establish parentage. Courts across the country have explained that a rigid rule relying only on biology would sever children's actual parental relationships with non-biological parents, thereby preventing courts from protecting children's best interests. *See, e.g., Chatterjee v. King*, 280 P.3d 283, 295 (N.M. 2012) (biology is not the exclusive means of establishing parentage because courts have an obligation to protect the best interests of children by protecting them from the detriment of losing an established parent child relationship (quoting *Tedford v. Gregory*, 959 P.2d 540, 545 (N.M. Ct. App. 1998)).

In a variety of circumstances, legal parentage can be established based on a person's conduct, even in the absence of a genetic connection. For example, New Hampshire and many other states recognize that a person who receives a child into his or her home and holds that child out as his or her own can be a legal parent. Many states also recognize that a person can be a legal parent if he or she consented to the conception of the child through assisted reproduction, even in the absence of a biological tie. A holding that biology is the only way to establish one's parentage is not only directly inconsistent with this State's statutory provisions, but it would put New Hampshire dramatically out of step with the law in all other states.

In this case, Susan is one of Madelyn's legal parents under both of these tests because she received Madelyn into her home and held her out as her own and because she consented to Melissa's insemination with the intention of parenting the resulting child. In the alternative, this court should recognize, as many other states have done, that a person who has participated in the decision to conceive a child through assisted reproduction, and then raised that child as a parent with the consent and encouragement of the child's other parent should be given the rights and responsibilities of a parent as a person *in loco parentis*.

ARGUMENT

I. THERE ARE MANY PATHWAYS TO ESTABLISHING PARENTAGE IN ADDITION TO BIOLOGY AND ADOPTION.

While biology and adoption are two common means of establishing a legal parent-child relationship, these are not the *only* ways that a person may establish legal parentage. To the contrary, in New Hampshire and across the country, there are many circumstances where a person who is not a child's biological or adoptive parent can be recognized under the parentage statutes as the child's legal parent. For example, every state recognizes that a husband is

presumed to be a legal parent even if he is not the child's biological father, and that a man who completes a voluntary acknowledgement of paternity may be the child's legal parent even if he lacks a biological connection to the child. Additionally, relevant to this case, New Hampshire and many states provide that (1) a person who receives a child in to his or her home and holds the child out as his or her own can be a parent without limiting this protection to biological parents, and that (2) a person who consents to assisted reproduction with the intent to parent is a legal parent even if that person lacks a biological connection to the resulting child. In this case, Susan is a legal parent based on either of these principles because she received Madelyn into her home and held Madelyn out as her own child, and because she consented to Madelyn's conception through insemination with the intent to be a parent.

A. Every State Recognizes That a Husband Is Presumed to Be a Parent of a Child Born During the Marriage, and That an Unmarried Man Can Become a Legal Parent by Executing a Voluntary Acknowledgment of Paternity.

For example, in New Hampshire, as is true in all other states, a husband is presumed to be the legal parent of a child born to his wife, regardless of his biological connection to the child. RSA § 168-B:3(I)(a); *Saunders v. Fredette*, 84 N.H. 414 (1930) (husband is a father of a child born to his wife, and this presumption is only rebutted if there is proof that the husband was incompetent or absent). This is the oldest parenting presumption. Under English common law, the marital presumption was conclusive unless the husband was impotent or beyond the "four seas." Homer H. Clark, Jr., *The Law of Domestic Relations in the United States* § 5:4, at 341 (2d ed. 1987). Today in the U.S., the marital presumption remains, "one of the strongest presumptions known to the law." *John M. v. Paula T.*, 571 A.2d 1380, 1384 (Pa. 1990).

Although it is rebuttable in certain limited circumstances, many states, including New Hampshire, do not permit the presumption to be automatically rebutted by evidence that the

husband is not a child's biological father. In *Watts v. Watts*, 115 N.H. 186 (1975), for example, this Court refused to allow a former husband to disprove his paternity through blood testing. In that case, the former husband had acknowledged the couple's two children as his own for fifteen years. *Id.* at 188-89. This Court held that "[t]o allow [the] defendant to escape liability for support by using blood tests would be to ignore his lengthy, voluntary acceptance of parental responsibilities." *Id.* at 189. *See also McRae v. McRae*, 115 N.H. 353, 355 (1975) ("To permit the husband to raise the question of paternity after an eight-year period of uninterrupted acquiescence, with several opportunities to raise the issue, would contravene the policy of this State's law to protect the child and the spouse from the belated resort to scientific proof in an effort to escape parental responsibility." (citing *Watts*, 115 N.H. 186)). Courts in many other states have reached similar conclusions. *See, e.g.*, *Ex Parte Presse*, 554 So.2d 406, 411 (Ala. 1989) (under the marital presumption, husband was a father even though he was not the biological father); *N.A.H. v. S.L.S.*, 9 P.3d 354, 357 (Colo. 2000) (same); *Evans v. Wilson*, 382 Md. 614, 624 (Md. 2004) (same). As the Supreme Court of Alabama explained, in some circumstances, it is not appropriate to rebut a husband's presumption of paternity based solely on evidence of a lack of biological connection because "to sever or curtail this father-child relationship would frustrate the benevolent purpose of the legislative expression of public policy" of protecting established family relationships and the "psychological stability and general welfare of the child." *Ex parte Presse*, 554 So. 2d at 418. In *Evans*, 382 Md. at 624, the Maryland high court held that an alleged biological father of the child could not challenge the mother's husband's paternity where the child was in a bonded, stable family relationship with the mother and her husband and had no relationship with the alleged biological father. The court explained that if a man who claimed to be the child's biological father could challenge the

husband's paternity just because the husband was not biologically related to the child, "the consequences to intact families could be devastating," disrupting the family the child has known. *Id.* at 636. *See also Godin v. Godin*, 725 A.2d 904, 910 (Vt. 1998) ("the financial and emotional welfare of the child, and the preservation of an established parent-child relationship, must remain paramount . . . . Whatever the interests of the presumed father in ascertaining the genetic 'truth' of a child's origins, they remain subsidiary to the interests of the state, the family, and the child in maintaining the continuity, financial support, and psychological security of an established parent-child relationship"); *Turner v. Whisted*, 607 A.2d 935, 940 (Md. 1992) (holding that proof that the husband is not the biological father does not rebut his presumption of paternity, and that in a contest between the biological father and the husband of a woman who gave birth to the child during their marriage, the court must consider the best interests of the child, focusing on the child's need for stability and the child's emotional and psychological needs).

The U.S. Supreme Court has held that it is constitutionally permissible for a state to protect an established parent-child relationship between a child and her mother's husband over a competing parentage claim by the child's biological father. *Michael H. v. Gerald D.*, 491 U.S. 110 (1989). In reaching this conclusion, the Court explained that such rules protect children and preserve family integrity. *Id.* at 120, 124.

Additionally, all fifty states recognize that a man may establish his legal parentage by completing a voluntary acknowledgement of paternity or voluntary affidavit of paternity ("VAP"), as required by federal law. 42 U.S.C.A. § 666. *See also, e.g.*, RSA § 168-A:2 (I)(b); Unif. Parentage Act of 2002, § 302. Pursuant to federal law, these acknowledgements have the force of a judgment and must be accorded full faith and credit in all other states. 42 U.S.C.A. § 666(a)(11); RSA § 168-A:2(II). While a VAP is based on a presumed biological relationship,

genetic testing is not required. *See* RSA § 5-C:24 (setting out the procedures for voluntary affidavits of paternity). Moreover, New Hampshire law and the law of many other states do not provide that proof of a lack of a biological relationship automatically invalidates a VAP. *See*, RSA § 5-C:28 (after 60 days, a VAP may only be challenged in a court proceeding); Unif. Parentage Act of 2002, § 608 (in an action challenging a voluntary acknowledgement of paternity, the court must consider the best interests of the child before ordering genetic testing).

Courts in New Hampshire and many states have refused to set aside a determination of parentage where a man signed a VAP but thereafter alleges he was not the biological father. *See*, *e.g.*, *In re J.B.*, 157 N.H. 577, 581 (2008) (unmarried man who had executed a voluntary affidavit of paternity was a parent and could seek custody even though he was not the biological father); *In re Gendron*, 157 N.H. 314, 321 (2008) (holding that "the acknowledgement established the father as the child's legal father" and that the "trial court erred in ordering genetic marker testing"); *Cosgrove v. Hughes*, 941 N.E.2d 706, 746 (Mass. Ct. App. 2011) (under statute allowing for VAPs, whether child was biologically related to the man who signed the VAP was immaterial); *Warfield v. Warfield*, 815 A.2d 1073, 1077 (Pa. Super. Ct. 2003) (refusing to allow a collateral attack on a VAP and holding that "the law does not allow a person to challenge his role as a parent once he has accepted it, even with contrary DNA and blood tests" (citations omitted)).

B. New Hampshire, Along With Many Other States, Recognizes That a Parent Who Receives a Child into His or Her Home and Holds That Child Out as His or Her Own Can Be a Legal Parent, Regardless of Biological Ties.

New Hampshire, like many states, also recognizes that a person can be legally recognized as a parent if he or she receives a child into his or her home and holds that child out as his or her own child. New Hampshire RSA § 168-B:3(I)(d) provides that a man is a presumed parent if he

"receives the child into his home and openly holds out the child as his child." RSA § 168-B:3(I)(d) was based on § 4(a) of the Uniform Parentage Act of 1973 ("1973 UPA"), which similarly provides that "[a] man is presumed to be the natural father of a child if . . . while the child is under the age of majority, he receives the child into his home and openly holds out the child as his natural child."). *See also* Unif. Parentage Act of 2002, § 204(a)(5) ("A man is presumed to be the father of a child if . . . for the first two years of the child's life, he resided in the same household with the child and openly held out the child as his own"). The language of RSA § 168-B:3(I)(d) and the UPA demonstrate that the focus of this presumption is on the person's conduct and on the person's relationship with the child, not on whether a biological connection exists.

Although this court has not yet decided a case involving a claim under RSA § 168-B:3(I)(d) by a non-biological parent, this Court has explained that the parentage provisions in the New Hampshire code are not limited to biological parents. *In re J.B.*, 157 N.H. at 581 ("the legislature has set forth too many alternative routes to establish parental status that do not require proof of biological ties" to hold that a non-biological father who had executed a voluntary affidavit of paternity was not a father). Courts from other states with statutory provisions similar to New Hampshire's have held that people can be presumed parents under this "holding out" provision regardless of the fact that they lack a biological connection to the children they parented. For example, in *In re Nicholas H.* 46 P.3d 932, 937 (Cal. 2002), the California Supreme Court applied an almost identical provision[2] and held that "a man does not lose his status as a presumed father [under the holding out provision] by admitting he is not the biological

[2] California's provision, also based on the 1973 UPA, provides in relevant part: "A man is presumed to be the natural father of a child if ... [h]e receives the child into his home and openly holds out the child as his natural child." Cal. Fam. Code § 7611(d).

father." *See also In re A.D.*, 240 P.3d 488, 491 (Colo. Ct. App. 2010) ("[N]othing in the statutory provisions, whether read separately or together, provides that an admission by a man seeking parental rights that he is not the child's biological father conclusively rebuts the presumption under [Colorado's holding out provision]."). Courts have explained that biology should not automatically rebut a presumption of parentage under the holding out provision because courts must consider the best interests of children in determining parentage, focusing on protecting children's existing parent-child relationships. *In re Welfare of C.M.G.*, 516 N.W.2d 555, 560-61 (Minn. Ct. App.1994) (explaining that the court must consider the best interests of the child in making parentage determinations and upholding a finding that the non-biological father was the legal father where he had bonded with the child and wanted to continue to parent her, the child viewed the non-biological father as her father, and the biological father was not interested in developing a parent-child relationship). As the California Supreme Court has explained, "A man who has lived with a child, treating it as his son or daughter, has developed a relationship with the child that should not be lightly dissolved . . . This social relationship is much more important, to the child at least, than a biological relationship of actual paternity." *In re Nicholas H.*, 46 P.3d at 938 ("courts have repeatedly held, in applying paternity presumptions, that the extant father-child relationship is to be preserved at the cost of biological ties") (quoting *Susan H. v. Jack S.*, 30 Cal. App. 4th 1435 (1994)). *See also In re A.D.*, 240 P.3d at 490 (upholding a finding that a non-biological father was a legal father where the trial court found that he "shared a preexisting bond of love and affection [with the child] and that the child would face possible trauma if she lost all contact with him").

Although RSA § 168-B:3(I)(d), like the related provisions in the UPA of 1973 and 2002 adopted in numerous other states, uses male terminology, it must be applied equally to women.

First, New Hampshire statutory construction rules provide that masculine terminology in New Hampshire statutes also apply to women. RSA § 21:3 ("words importing the masculine gender may extend and be applied to females"). Second, the purpose of the parentage provisions is to protect and recognize established parent-child relationships. *See, e.g.*, RSA § 461-A:2. These relationships are no less important for the child when the presumed parent is a woman rather than a man. Finally, applying this provision only to fathers and not to mothers would raise serious equal protection concerns. Either a man or a woman can receive a child into his or her home and hold a child out as his or her own; from an equal protection perspective, there is no rational reason, let alone an important one, to limit this provision to men. *See United States v. Virginia*, 518 U.S. 515, 532-33 (1996) (statutes that discriminate based on gender must be "substantially related" to an "important governmental objective").

Numerous courts have recognized that similar holding out provisions must be applied equally to women based on statutory interpretation rules requiring statutes to be read as gender neutral. These courts have also explained that applying the holding out provision to women furthers the statutory purposes of protecting the best interests of children and allows courts to avoid violating the equal protection rights of mothers and their children. For example, in *Elisa B. v. Superior Court*, 117 P.3d 660, 664-65 (Cal. 2005), the California Supreme Court held that a woman who had co-parented the biological children of her same-sex partner was a legal parent under the holding out provision of California's UPA. As is true with respect to men, a woman's lack of a biological connection does not necessarily rebut a presumption of parentage arising under the holding out provision. *Id. See also In re Salvador M.*, 111 Cal. App. 4th 1353, 1357 (2003) ("Though most of the decisional law has focused on the definition of the presumed father, the legal principles concerning the presumed father apply equally to a woman seeking presumed

mother status"). Courts in other states likewise have held that women can be presumed parents under the holding out provision. *See, e.g., In re S.N.V.*, 284 P.3d 147, 150-51 (Colo. App. 2011) (non-biological mother who raised her husband's child as her own for two years was a presumed parent under the holding out provision); *Chatterjee*, 280 P.3d 283 (woman who raised a child adopted by her same-sex partner could be a presumed parent under the holding out provision); *Frazier v. Goudschaal*, 295 P.3d 542, 553 (Kan. 2013) (non-biological mother who raised two children with her same-sex partner could be a parent under a Kansas statute providing a presumption of paternity for a man who "notoriously or in writing recognizes paternity of the child"). As the Kansas Supreme Court explained, applying the holding out provision to women furthers the public policy directing courts to protect the best interests of children. *Id.*

Some states have recognized that other paternity provisions must also be applied equally to women even if they use male terminology. *See, e.g., St. Mary v. Damon*, 309 P.3d 1027, 1032 (Nev. 2013) (holding that the paternity provisions can be applied to determine maternity); *D.M.T. v. T.M.H.*, SC12-261, 2013 WL 5942278 (Fla. Nov. 7, 2013) (statutes addressing children born through assisted reproduction must be read gender neutrally to include same-sex couples using assisted reproduction to avoid due process and equal protection concerns); *Shineovich v. Kemp*, 214 P.3d 29, 40 (Or. App. 2009) (statute imposing legal parentage on a man who consents to a woman's insemination applies equally to a woman who does so); *Rubano v. DiCenzo*, 759 A.2d 959, 966-67 (R.I. 2000) (applying Rhode Island's UPA to a former same-sex partner); *In re Roberto D. B.*, 923 A.2d 115, 124-25 (Md. App. 2007) ("the paternity statutes in Maryland must be construed to apply equally to both males and females").

As explained more fully in Appellant's Opening Brief, Susan may bring a claim for parentage under RSA § 168-B:3(I)(d). Susan received Madelyn both into the parties' joint home

during their relationship and into her sole home after the parties separated. In addition, for over eleven years, Susan openly held herself out as one of Madelyn's parents by giving Madelyn her last name, listing herself as a parent at Madelyn's school and with Madelyn's pediatrician, paying child support for her as her parent after the parties separated, and by serving as her parent in all ways since Madelyn's birth.

C. Many States Recognize That a Non-Biological Parent Who Consents to the Conception of a Child Through Assisted Reproduction Is a Legal Parent.

New Hampshire recognizes that a spouse of a birth mother who consents to conception of a child through assisted reproduction is a parent even though he is not biologically related to the child. RSA § 168-B:3 (a husband is a parent of a child conceived through assisted reproduction and born during the marriage unless the husband does not consent). This rule – recognizing a husband who consents to his wife's artificial insemination as a legal father – "is one of the well-established rules in family law." *In re Marriage of Buzzanca*, 61 Cal. App. 4th 1410, 1418 (1998). *See also* Alaska Stat. § 25.20.045 (a husband who consents in writing to his wife's insemination is a father if the sperm was provided to a physician); Mass. Gen. Laws Ann. ch. 46, § 4B (a husband who consents to his wife's insemination is a father). These rules apply equally to married same-sex couples. *Della Corte v. Ramirez*, 961 N.E.2d 601, 602-04 (Mass. Ct. App. 2012) (woman who consented to her wife's insemination was a parent under the statutory provision providing that a husband who consents to his wife's insemination is a father).

Even in states that do not have statutory provisions directly on point, or in cases where the parties did not comply with the statutory requirements, courts have recognized the parental status of the husband so long as he consented to the insemination. *In re Baby Doe*, 353 S.E.2d 877, 878 (S.C. 1987) (husband who consented to his wife's insemination could be a father despite absence of a statute addressing consent to insemination); *Laura WW. v. Peter WW.*, 51

A.D.3d 211, 217 (N.Y. Sup. Ct. App. 2008) (husband who consented to his wife's insemination could be a father under common law where the requirements of the consent to insemination statute were not satisfied).

While many states' statutes providing parentage for a husband who consents to his wife's insemination, like New Hampshire's, only explicitly address married couples, courts in many states have applied the same principle to unmarried partners who have children through assisted reproduction. Some courts have held that these statutes must be applied equally to children born through assisted reproduction to unmarried couples, even though they only explicitly address married couples. For example, an appellate court in Oregon held that a statute providing that a husband who consents to his wife's insemination is a father must be applied equally to an unmarried woman who consented to her female partner's insemination in order to avoid equal protection concerns. *Shineovich*, 214 P.3d at 40. The court noted that although same-sex couples who conceived a child through donor insemination could become parents through adoption, denying them the automatic recognition granted to married couples would be unconstitutional. *Id.* As the *Shineovich* court recognized, when a couple engages in a deliberate, conscious process to bring a child into the world through assisted reproduction, both members of the couple should have the rights and the obligations of parenthood, regardless of their marital status.

Other courts have reached the same substantive conclusion – that all persons who consent to assisted reproduction with the intention of parenting the resulting child must be recognized as parents – under their equitable jurisdiction. For example, although Illinois' assisted reproduction statute addresses only married couples, the Illinois Supreme Court held that an unmarried male partner who consented to his female partner's insemination was responsible to support the

resulting children under common law principles. *In re Parentage of M.J.*, 787 N.E.2d 144, 152 (Ill. 2003) ("Thus, if an unmarried man who biologically causes conception through sexual relations without the premeditated intent of birth is legally obligated to support a child, then the equivalent resulting birth of a child caused by the deliberate conduct of artificial insemination should receive the same treatment in the eyes of the law. Regardless of the method of conception, a child is born in need of support."). *See also Dunkin v. Boskey*, 82 Cal. App. 4th 171, 188 (2000). The Illinois Court explained that where the legislature "fails to address the full spectrum of legal problems facing children born as a result of artificial insemination and other modern methods of assisted reproduction," courts should act in equity to recognize and protect the parentage of the resulting children. *In re Parentage of M.J.*, 787 N.E.2d at 150. More recently, an Illinois appellate court applied this rule equally to a female unmarried partner. *In re T.P.S.*, 978 N.E.2d 1070, 1079-80 (Ill. Ct. App. 2012) (holding that an unmarried woman who consented to her female partner's insemination was a parent under common law).

Whether based on equal application of the statutory provisions regardless of gender or marital status, or based on equitable theories, these decisions recognize that when a person intentionally brings a child into the world through assisted reproduction, that person should be recognized as a parent just as a biological parent would be. *See Dunkin*, 82 Cal. App. 4th at 189 (recognizing the parentage of a man who consents to the conception of a child through assisted reproduction furthers "the compelling public policies of family law to legitimate children, provide for their support, foster the best interests of the child, and promote familial responsibility"). These cases also recognize that it is just as important to hold unmarried couples who use assisted reproduction responsible for the resulting child as it is to hold married couples responsible.

Here, Susan should be recognized as a parent because she consented to Madelyn's conception by Melissa through donor insemination, as explained more fully in Appellant's Opening Brief. This Court should construe RSA § 168-B:3 to apply regardless of gender or marital status in order to avoid raising serious constitutional concerns. Alternatively, this Court should exercise its equitable obligation to protect all children and recognize that an unmarried woman who consents to the insemination of another woman with the intent to co-parent the child is a parent in equity.

II. COURTS ACROSS THE COUNTRY HAVE ALSO RECOGNIZED THAT THEY HAVE EQUITABLE POWERS TO ALLOW FUNCTIONAL PARENTS TO SEEK CUSTODY.

Courts across the country have long recognized that even when an individual is not a legal parent under the relevant parentage statutes, he or she may be recognized as an equitable, psychological, or de facto parent, or person *in loco parentis*. Courts retain residual equitable powers to protect children's relationships with individuals who have established a parental bond with a child in circumstances where the legal parent has consented to and encouraged the formation of that bond. Throughout our history, state courts have applied equitable doctrines such as *in loco parentis,* psychological parent, and de facto parent[3] to protect children's relationships with functional parents. *See, e.g., Whitaker v. Warren*, 60 N.H. 20, 26 (1880) (a person who had raised a child from infancy could seek damages for injuries to the child as a person *in loco parentis*); *Lord v. Dall*, 11 Tyng 115, 118 (Mass. 1815) (recognizing that brother who supported his younger sister stood *in loco parentis*); *Stambaugh v. Price*, 532 S.W.2d 929, 932 (Tenn. 1976) (chancery court has inherent jurisdiction to act in relation to interests of

[3] Courts have used different terminology in recognizing these relationships, but the underlying principles remain the same. *See, e.g., V.C. v. M.J.B.*, 748 A.2d 539, 546 n.3 (N.J. 2000) ("The terms psychological parent, *de facto* parent, and functional parent are used interchangeably").

minors). More recent decisions in numerous states have affirmed the principle that courts have equitable authority to protect the relationship between a child and a person who has raised that child as his or her own with the consent and encouragement of the legal parent. *See, e.g.*, *Latham v. Schwerdfegger*, 802 N.W.2d 66, 74-75 (Neb. 2011); *Bethany v. Jones*, 378 S.W.3d 731, 736 (Ark. 2011); *Pickelsimmer v. Mullins*, 317 S.W.3d 569, 576-77 (Ky. 2010); *In re Parentage of A.B.*, 837 N.E.2d 965, 967 (Ind. 2005); *In re Parentage of L.B.*, 122 P.3d 161, 173-76 (Wash. 2005); *In re Clifford K.*, 619 S.E.2d 138, 157-59 (W.Va. 2005); *C.E.W. v. D.E.W.*, 845 A.2d 1146, 1149-51 (Me. 2004); *Kinnard v. Kinnard*, 43 P.3d 150, 153-54 (Alaska 2002); *In re Bonfield,* 780 N.E.2d 241, 247-48 (Ohio 2002); *T.B. v. L.R.M.*, 786 A.2d 913, 914 (Pa. 2001); *V.C. v. M.J.B.*, 748 A.2d 539, 551-52 (N.J. 2000); *Rubano v. DiCenzo*, 759 A.2d 959, 974-75 (R.I. 2000); *E.N.O. v. L.M.M.*, 711 N.E.2d 886, 888 (Mass. 1999); *Logan v. Logan*, 730 So.2d 1124, 1126 (Miss. 1998); *Mason v. Dwinnell*, 660 S.E.2d 58, 67-69 (N.C. Ct. App. 2008); *Middleton v. Johnson*, 633 S.E.2d 162, 167-68 (S.C. Ct. App. 2006).

New Hampshire has likewise recognized that a person standing *in loco parentis* to a child has standing to seek custody of the child. This Court has explained that "[i]n certain circumstances . . . an individual who is not the natural parent of the child may assert legal rights with respect to that child" under the court's "*parens patriae* power to protect the interests of the child in custody determinations." *Bodwell v. Brooks*, 141 N.H. 508, 512 (1996) (holding that a man who was married to the mother but who was not the biological father could seek custody as a person *in loco parentis*). *See also In re R.A.*, 153 N.H. 82, 99 (2005) (in determining whether a person who is not a legal parent may seek custody, "[a] controlling factor [is] . . . the nature of the relationship between them and the child."). Although this Court has explained that the *in loco parentis* doctrine does not automatically apply to every person who has cared for a child, *see In*

re Nelson, 149 N.H. 545, 549 (2003) (mother's boyfriend could not seek custody as a person *in loco parentis* to children the mother had adopted), this Court has not yet addressed the question of whether a person who intentionally participated in the conception of a child through assisted reproduction and then raised the child can stand *in loco parentis* to that child if no statutory protections apply. Here, Susan jointly participated in the decision to conceive Madelyn through assisted reproduction and then co-parented her for eleven years. The purpose of the court's *parens patriae* power is to protect the best interests of children whose rights have not been addressed by the legislature. If this Court finds that Susan cannot be recognized as one of Madelyn's parents, this Court should exercise its *parens patriae* power to protect Madelyn from the harm of losing a parent who has raised her from birth for eleven years.

Courts across the country have appreciated that it is appropriate to grant the full range of parental rights and responsibilities to functional parents who do not satisfy the statutory requirements of presumed parentage. Fifteen years ago, the court in *J.A.L. v. E.P.H.*, 682 A.2d 1314 (Pa. Super. Ct. 1996), held that the biological mother's former partner stood *in loco parentis* with a child and, therefore, had standing to seek partial custody. Since then, many courts have recognized that same-sex partners who function as parents should be granted the same array of rights to custody and visitation as opposite-sex parents. For example, the Maine Supreme Judicial Court held in 2004 that a woman who used artificial insemination to have a child with her lesbian partner was an equitable parent entitled to full parental rights and responsibilities. *C.E.W.*, 845 A.2d at 1150-51. The Washington Supreme Court joined this trend in 2005 when it held that an equitable parent – again a former same-sex co-parent – was entitled to all the "rights and responsibilities which attach to parents." *In re Parentage of L.B.*, 122 P.3d at 176. From a child's perspective, it makes no difference whether he or she has a biological or adoptive

relationship with his or her parents. *See V.C.*, 748 A.2d at 550 (the purpose of the psychological parent doctrine is to protect the actual parent-child bonds that children form regardless of biological ties). These decisions appropriately recognize that courts should exercise their *parens patriae* powers to protect children from the harm of severing these parent-child bonds where statutes have not provided adequate protections for these relationships.

These holdings are consistent with the American Law Institute's *Principles of the Law of Family Dissolution* ("ALI Principles"). The ALI Principles use the term "parent by estoppel" to describe a person in Susan's circumstances.[4] Once a person meets the stringent requirements and is a "parent by estoppel," she has all of the rights of a legal parent, including standing to bring an action for custody or visitation on an equal footing with the other parent: "A parent by estoppel is afforded all the privileges of a legal parent . . . including standing to bring an action [for custody or visitation] ... , the benefit of the presumptive allocation of custodial time . . . , [and] the advantage of the presumption in favor of a joint allocation of decision making responsibility" ALI Principles, § 2.03 cmt.

Courts have appropriately used their equitable powers to protect children in a broad range of circumstances where, as here, a child has developed a parent-child relationship with another adult. This Court should clarify that New Hampshire law is in line with this strong national trend by holding that functional parents are entitled to seek the full range of parental rights and responsibilities, including both custody and visitation.

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[4] The ALI Principles defines a "parent by estoppel" as a person who, although not a biological or adoptive parent lived with the child for at least two years, holding out and accepting full and permanent responsibilities as a parent, pursuant to an agreement with the child's parent (or, if there are two legal parents, both parents), when the court finds that recognition of the individual as a parent is in the child's best interests.

American Law Institute, *Principles of the Law of Family Dissolution* § 2.03(1)(b)(iv).

CONCLUSION

This case offers this Court the opportunity to affirm its commitment to protecting and recognizing the importance of intended and established parent-child relationships and to allow trial courts to legally recognize the realities of a child's life. *Amici* respectfully urge this Court to reverse the trial court's dismissal of Appellant's petition below and recognize that she is a legal parent of Madelyn.

Respectfully Submitted,

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THE STATE OF NEW HAMPSHIRE

SUPREME COURT

No. 2013-0403

In re Guardianship of Madelyn B.

Brief of *Amici Curiae*

American Academy of Assisted Reproductive Technology Attorneys, American Fertility Association, Reproductive Science Center of New England, New Hampshire Civil Liberties Union, COLAGE, Family Equality Council, Human Rights Campaign, Lambda Legal Defense and Education Fund, Inc., National Center for Lesbian Rights, and National Gay and Lesbian Task Force

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On Appeal (No. 2013-0445) from a Final Order of the Circuit Court, 10th Circuit, Derry Family Division

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INTEREST OF AMICI CURIAE

The *American Academy of Assisted Reproductive Technology Attorneys* (AARTA) is a Specialty Division of the American Academy of Adoption Attorneys, and is a credentialed, professional organization dedicated to the advancement of best legal practices in the area of assisted reproduction and to the protection of the interests of all parties, including the children, involved in assisted reproductive technology matters. While AAARTA did not participate in the drafting of this brief, the Academy supports its purpose and urges the Court to make the findings, reach the conclusions, and issue the order as requested herein.

Founded in 1999, the *American Fertility Association* (AFA) is a national non-profit organization that provides information about infertility causes and treatments, and reproductive and sexual health. The AFA assists people in building families, including through adoption and third party solutions, serving as a resource to hopeful parents as well as to health care professionals and public officials. When individuals or couples create families with children, the AFA believes that the law needs to protect that child by ensuring those who planned to and will raise them are determined to be their parents, ideally before their birth.

Reproductive Science Center of New England (RSC New England) was founded in 1988 and is one of the largest IVF centers in New England and the nation. With clinics in New Hampshire, Massachusetts, and Rhode Island, RSC New England's skilled fertility specialty physicians and embryology scientists have helped to conceive over 30,000 babies. RSC New England believes that when a couple endeavors to bring a child into the world, the child's interests are best served when the law recognizes the intended parents regardless of any genetic or biological tie to the child.

The *New Hampshire Civil Liberties Union* (NHCLU) is the New Hampshire affiliate of the American Civil Liberties Union (ACLU), a nationwide, nonpartisan, public interest

organization with approximately 500,000 members (including over 3,000 New Hampshire members) dedicated to advancing civil liberties throughout the United States. The NHCLU and ACLU have a long history of legal advocacy for equal protection under the law for all citizens, including lesbian, gay, bisexual, and transgender (LGBT) people. The ACLU has participated in many cases involving the rights of lesbians and gay men to form and raise families and to have those parent-child relationships protected in law, including *V.C. v. M.J.B.*, 748 A.2d 539 (N.J. 2000), and *T.B. v. L.R.M.*, 786 A.2d 913 (Pa. 2001).

COLAGE is the only national organization led for and by people with a lesbian, gay, bisexual, transgender or queer (LGBTQ) parent. COLAGE unites people with LGBTQ parent/s into a network of peers and supports them as they nurture and empower each other to be skilled, self-confident, and just leaders in their collective communities; helping children of LGBTQ families gain the rights, recognition and respect that every family deserves. In its direct experience working with thousands of youth and adults with LGBTQ parents over the past 20 years, COLAGE has learned and can attest to the act that it is imperative for children to have their families recognized and respected on every level- socially, institutionally, politically, and legally.

Family Equality Council, founded in 1979, is the national organization working to achieve social and legal equality for LGBT families by providing direct support, educating the American public, and advancing policy reform that ensures full recognition and protection under the law. The organization has more than 50,000 supporters, thousands of whom are located in New Hampshire, and partnerships with over 200 local parent groups nationwide. Family Equality Council and its supporters are deeply concerned with protecting the rights of LGBT parents and their children in New Hampshire and across the nation, and urge this Court to ensure

that children can maintain relationships with the adults who have functioned as parents to them in every way.

Human Rights Campaign (HRC), the largest national LGBT political organization, envisions an America where LGBT people are ensured of their basic equal rights, and can be open, honest and safe at home, at work and in the community. LGBT families often include parents whose relationships with their children, while loving and committed, are not fully recognized by state law. HRC believes that the rights of such a parent should be protected and that he or she should have the ability to seek custody and visitation, as determined to be in the best interests of the child, when his or her relationship with the biological or legal parent ends.

Lambda Legal Defense and Education Fund, Inc. (Lambda Legal) is the nation's oldest and largest non-profit legal organization committed to achieving full recognition of the civil rights of LGBT people and people living with HIV through impact litigation, education, and public policy work. Lambda Legal has participated as counsel or *amicus* in numerous cases around the country addressing the best of interests of children conceived through assisted reproductive technology in legally securing their relationships with parents to whom they are genetically unrelated.

The *National Center for Lesbian Rights* (NCLR) is a national legal nonprofit organization founded in 1977 that is committed to advancing the rights of LGBT people and their families through litigation, public policy advocacy, and public education. NCLR is well suited to offer amicus assistance to this Court in this matter, as NCLR attorneys have litigated numerous cases across the country arguing for the equal application of statutory, equitable, and common-law protections to children born to same-sex parents through assisted reproduction.

The *National Gay and Lesbian Task Force* (The Task Force) is the oldest national organization advocating for the rights of LGBT people and their families. As a longtime supporter of the legal recognition of all family relationships, The Task Force is concerned about the impact the Court's decision may have on the best interests of children who face an uncertain future by not being permitted to form a legally recognized relationship with a second parent.

In the consolidated matters before this Court, *amici curiae* submit this brief specifically in case no. 2013-0445, *In the Matter of Susan Brackett and Melissa DeMarco*, in support of Appellant Susan Brackett's appeal of the Family Court's *sua sponte* dismissal of her petition to establish parentage.[1]

STATEMENT OF FACTS

For purposes of this brief, the *amici curiae* adopt and incorporate by reference the Statement of Facts contained within the Brief of Appellant Susan Brackett.

SUMMARY OF ARGUMENT

The child at issue in this case, like thousands of other children in New Hampshire and across the country, was conceived through assisted reproductive technology (ART) by a committed couple who intended to be and functioned as equal parents. For the many couples — heterosexual, lesbian, and gay alike — who use ART to bring a child into their family, at least one intended parent may have no genetic connection to the child. From the child's perspective, the strength of the bonds between child and parent do not depend on genetics. Children born through ART develop profound attachments with their parents, regardless of genetics or the

[1] Both parties have consented to the filing of this brief.

sexual orientation of their parents, and like all other children, need the physical, emotional, social, and financial support that both of their parents provide.

Statutory efforts to define and secure the parentage of children born through ART have lagged behind the rapid advances in and increased use of ART. Failing to protect the relationships between these children and their genetically unrelated parents, however, places the children at serious risk of emotional harm and financial insecurity. Without legal recognition of the relationships, the deep bonds between children and their non-birth parents may be disrupted, which social science plainly demonstrates causes significant harm to children's emotional wellbeing and social development. Children born through ART also risk economic hardship when they cannot rely on the financial safety nets that flow from legally-recognized parentage.

This Court has multiple routes under New Hampshire law to protect children born through ART by securing their legal relationships with both of the adults who brought them into the world and function as their parents, regardless of the marital status, gender, or sexual orientation of those adults. First, the Court can apply to families like Madelyn's — the child in this case — New Hampshire's existing statutes addressing the parentage of children conceived using donor insemination. *See* RSA 168-B:3(II). The Court alternatively can extend as a matter of common law the same principles underlying these statutes, and hold that a partner who consents with the birth mother to parent a child conceived using donor insemination is the legal parent of that child, as many other courts around the nation have done.

Second, a non-birth mother who welcomes a child into her family and holds the child out as her own should also be recognized as a legal parent under the "holding out" provision of New Hampshire's parentage laws. Interpreting RSA 168-B:3(d) to apply here is consistent with authorities across the country emphasizing the importance of securing the child's relationship

with both intended parents from the time the child enters their lives, and which recognize that these provisions are based on conduct rather than genetics.

Finally, even in the absence of explicit statutory protections, this Court's long-standing *in loco parentis* doctrine should nonetheless apply to recognize the parental status of an intended non-birth parent who jointly welcomes a child into her family with the legal parent, acts as a parent in every way, and, with the consent and support of the legal parent, develops a parent-child bond. This Court has not yet considered the application of *in loco parentis* protections to a family intentionally created through ART by a couple with only one parent genetically related to the resulting child. Other courts around the nation have exercised their *parens patriae* authority in precisely those circumstances to preserve the child's relationship with one of the two people who was intended to be and functioned as a parent from the beginning of the child's life.

Under any of these approaches, recognizing the legal relationship between a child conceived using ART and her intended, functional parent appropriately balances constitutional considerations and furthers the Court's primary responsibility to protect the best interests of the child.

ARGUMENT

I. The Many Children Conceived Through ART Need Legal Protections For Their Bonded Relationships With Parents Unrelated To Them Genetically Or Through Adoption Or Marriage.

"The demographic changes of the past century make it difficult to speak of an average American family. The composition of families varies greatly from household to household." *Troxel v. Granville*, 530 U.S. 57, 63 (2000). In increasing numbers, heterosexual and same-sex couples alike use ART, and specifically alternative insemination (AI), to create their families. As a result, more and more children born through ART are reared in New Hampshire and around the nation. Many of these children are conceived using donor sperm or eggs, and lack a genetic

relationship to one or both of their intended parents. From the perspective of these children, their families are no different from any other, and their need legally to secure their bonds with each of their parents is no different. Moreover, social science research demonstrates that these children would be seriously harmed if their bonds with the adults who parent them are severed — a very high risk where the law does not recognize their parent-child relationships. Without legal recognition, these children cannot look to one of their intended parents for the financial supports the law attaches to parent-child relationships. Children, however brought into the world, have a paramount interest in the security and integrity of their families.

A. Numerous Children In Diverse Families Are Born Through ART.

ART encompasses a wide range of fertility treatments in which gametes (sperm or eggs) are combined by medical procedure to conceive children. AI is among the oldest and most common of these procedures; the first human insemination using donor sperm recorded in the United States occurred in 1884.[2] Although initially controversial, ART treatment today is widely accepted and utilized. As of October 2013, the estimated total number of children born through ART worldwide surpassed five million — half born in the past six years alone.[3] An estimated one million adults in this country are the biological children of sperm donors.[4] Currently an

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[2] *See* Naomi Cahn & The Evan B. Donaldson Adoption Institute, *Old Lessons for a New World: Applying Adoption Research and Experience to ART*, 24 J. Am. Acad. Matrimonial L. 3, 6 n.2 (2011).

[3] Press Release, American Society for Reproductive Medicine, *Five Million Babies Born with Help of Assisted Reproductive Technologies* (Oct. 14, 2013), *available at* http://www.asrm.org/Five_Million_Babies_Born_with_Help_of_Assisted_Reproductive_Technologies/.

[4] *See* Ross Douthat, Op-Ed., *The Birds and the Bees (via the Fertility Clinic)*, N.Y. Times, May 30, 2010, *available at* http://www.nytimes.com/2010/05/31/opinion/31douthat.html.

estimated 30,000 to 60,000 children are born annually in this country as the result of AI.[5] By comparison, an estimated 14,000 domestic infant adoptions occur each year.[6]

Many New Hampshire residents use ART to form their families. According to the Centers for Disease Control (CDC), in 2009 New Hampshire residents had 773 reported ART procedures, not including AI, resulting in the birth of 282 infants.[7] That figure equates to roughly 2 percent of all infants born in the state that year,[8] and does not even encompass the number of children born through AI.

Same-sex couples are increasingly using ART (and specifically AI) to form their families. *See* Marsha Garrison, *Law Making for Baby Making: An Interpretive Approach to the Determination of Legal Parentage*, 113 Harv. L. Rev. 835, 846 (2000) (noting "remarkable change in parenting norms" that "has greatly expanded the number of would-be parents who seek" donor insemination "for reasons unrelated to infertility," including many women who "have no male partner").[9] An estimated nearly 64,000 adults in New Hampshire identified as lesbian, gay, or bisexual (LGB) in 2006, putting New Hampshire among the states with the

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[5] Cahn, *supra*, at 8.

[6] *Id.* at 8-9.

[7] *See* Saswati Sunderam *et al.*, *Assisted Reproductive Technology Surveillance — United States, 2009*, 61 CDC MMWR Surveillance Summaries 1, 12 (Nov. 2, 2012), http://www.cdc.gov/mmwr/pdf/ss/ss6107.pdf. The CDC collects data regarding ART procedures in which both eggs and sperm are handled in the laboratory, such as with *in vitro* fertilization. The CDC does not collect data regarding treatments in which only sperm is handled. *See id.* at 3. Consequently, these statistics would not include AI procedures by doctors or self-administered by women.

[8] *See id.* at 17.

[9] In 13.9 percent of ART cases reported to the CDC in 2010, no medical cause of infertility was found, which could encompass same-sex couples seeking to start a family. CDC, *2010 Assisted Reproductive Technology National Summary Report* 23 (Dec. 2012).

highest percentages of LGB-identifying individuals in the nation.[10] As of the 2010 Census, at least 3,260 same-sex couples were living in New Hampshire.[11] In 2005, an estimated 1,614 of New Hampshire's children were living in households headed by same-sex couples.[12]

B. Children Born Through ART Form Critical Parent-Child Bonds Of Attachment With Their Non-Genetically Related Parents And Risk Severe Harm When Those Bonds Are Unprotected.

Nationwide, legislative responses to define and secure the parentage of children born through ART have not kept pace with the rapid advances in and increased use of such technologies. "Approximately one million families have been created over the past half-century through the use of donor sperm or eggs, yet legal doctrine has adjusted slowly to donor-created families." Naomi Cahn, *The New Kinship*, 100 Geo. L. J. 367, 368-69 (2012). *See* Part II, *infra*. These gaps in the law leave children's relationships with their non-genetically related parents vulnerable to disruption, with resulting risk to the children of grave emotional, social, and economic harm.

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[10] *See* Gary J. Gates, The Williams Institute, *Same-sex Couples and the Gay, Lesbian, Bisexual Population: New Estimates from the American Community Survey* 11 (Oct. 2006), http://williamsinstitute.law.ucla.edu/wp-content/uploads/Gates-Same-Sex-Couples-GLB-Pop-ACS-Oct-2006.pdf; *see also* Gary J. Gates and Frank Newport, *LGBT Percentage Highest in D.C., Lowest in North Dakota*, Gallup.com (Feb. 15, 2013), *available at* http://www.gallup.com/poll/160517/lgbt-percentage-highest-lowest-north-dakota.aspx (estimating that 3.7% of adult New Hampshire residents identified as LGB or transgender in 2012).

[11] *See* Gary J. Gates and Abigail M. Cooke, The Williams Institute, *New Hampshire Census Snapshot: 2010* 1, http://williamsinstitute.law.ucla.edu/wp-content/uploads/Census2010Snapshot_New-Hampshire_v2.pdf.

[12] *See* Adam P. Romero *et al.*, The Williams Institute, *Census Snapshot: New Hampshire* 2 (2007).

1. Children born through ART develop profound attachments with their parents, regardless of genetics or sexual orientation, and disruption of those attachments causes significant emotional harm.

The social science research makes crystal clear that (a) children's attachments to their parents are critically important, (b) these attachments are just as profound and essential with parents unrelated genetically or who are lesbian or gay, and (c) disruption of these parent-child relationships can permanently harm children emotionally.

Child development research consistently demonstrates that children form strong bonds of attachment with their parents early in life, bonds that grow only stronger as children age.[13] An "attachment relationship" is defined as a "reciprocal, enduring, emotional, and physical affiliation between a child and a caregiver" through which a child forms "concepts of self, others, and the world." Beverly James, *Handbook for Treatment of Attachment-Trauma Problems in Children* 1-2 (1994). As the research demonstrates, attachment relationships profoundly shape the child's physiological, psychological, and sociological development.[14]

Social science research also makes abundantly clear that attachment bonds do not depend on a genetic or legal relationship between child and adult. Instead, attachment relationships derive from the quality of interaction between adult and child. *See, e.g.*, Joseph Goldstein *et al.*,

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[13] *See, e.g.*, Melvin Konner, *Childhood* 84-87 (1991); Inge Bretherton, *The Origins of Attachment Theory: John Bowlby and Mary Ainsworth*, 28 Dev. Psychol.. 759 (1992).

[14] *See, e.g.*, Daniel J. Siegel, *The Developing Mind: Toward A Neurobiology Of Inerpersonal Experience* 67-120 (1999); Nat'l Research Council & Inst. of Med., *From Neurons To Neighborhoods: The Science Of Early Childhood Development* 226 (Jack P. Shonkoff & Deborah A. Phillips eds., 2000) ("what young children learn, how they react to the events and people around them, and what they expect from themselves and others are deeply affected by their relationships with parents."); James G. Byrne *et al.*, *Practitioner Review: The Contribution of Attachment Theory to Child Custody Assessments*, 46 J. Child Psychol. & Psychiatry 115, 118 (2005) (observing that secure attachment relationships give children emotional security and ability to cope with stress); Am. Acad. of Pediatrics, *Developmental Issues for Young Children in Foster Care*, 106 Pediatrics 1145, 1146 (Nov. 2000) ("Attachment to a primary caregiver is essential to the development of emotional security and social conscience.").

Beyond the Best Interests of the Child 19 (2d ed. 1979) ("Whether any adult becomes the psychological parent of a child is based . . . on day-to-day interaction, companionship, and shared experiences."); *id.* at 27; Nicole M. Onorato, *The Right to Be Heard*, 4 Whittier J. Child & Fam. Advocacy 491, 495 (2005) ("research suggests that it is the proximity to the caretaker and the consistent, stable pattern of responses from the caregiver that is essential for the development of attachment.").

The findings demonstrating that the quality of interactions, rather than genetic or legal relationships, establish parent-child bonds of attachment apply as well to children like Madelyn, reared by same-sex couples. As a representative study of lesbian couples concluded, "quality of care was the salient factor in the establishment of an attachment hierarchy," and "legal parent status" was not a "defining factor[] contributing to the attachment hierarchy." Susanne Bennett, *Is There a Primary Mom? Parental Perceptions of Attachment Bond Hierarchies Within Lesbian Adoptive Families*, 20 Child & Adolescent Soc. Work J. 159, 167-68 (2003). These studies make clear that a child's well-being turns more on a family's parenting and relationship practices than on household make-up or demographics.[15]

This is unsurprising, given the overwhelming, longstanding, and consistent research showing that, in all relevant respects, lesbians and gay men are as fit and capable parents as their heterosexual counterparts. *See, e.g.*, Am. Acad. of Pediatrics, *Technical Report: Coparent or Second-Parent Adoption by Same-Sex Parents*, 109 Pediatrics 341, 343 (Feb. 2002) ("[T]he weight of evidence gathered during several decades using diverse samples and methodologies"

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[15] *See* Raymond W. Chan *et al.*, *Psychosocial Adjustment Among Children Conceived Via Donor Insemination by Lesbian and Heterosexual Mothers*, 69 Child Dev. 443, 454 (1998).

demonstrates "that there is no systemic difference between gay and nongay parents in emotional health, parenting skills, and attitudes towards parenting.").[16]

Notably, the lack of a genetic link to a parent — as is the case with children conceived with ART by same-sex couples — does not alter the quality or strength of the child's attachment to a lesbian or gay parent. *See, e.g.*, A. Brewaeys et al., *Donor Insemination: Child Development and Family Functioning in Lesbian Mother Families*, 12 Hum. Reprod. 1349, 1354 (1997)("Among the lesbian mothers, the quality of the parent-child interaction did not differ significantly between the biological and the [non-biological] mother."); Susan Golombok *et al.*, *The European Study of Assisted Reproduction Families: Family Functioning & Child Development*, 11 Hum. Reprod. 2324, 2330 (1996) (no negative impact on parent-child relationships from lack of genetic link).

Research further demonstrates that children suffer severe emotional distress and lasting damage from disruption of these parent-child bonds. "[N]umerous empirical findings ... provide a solid research basis for predictions of long-term harm associated with disrupted attachment and loss of a child's central parental love objects." Frank J. Dyer, *Termination of Parental Rights in Light of Attachment Theory*, 10 Psychol. Pub. Pol. & L. 5, 11 (2004). Children whose attachment bonds are disrupted commonly develop a deep-seated reluctance to trust and depend on others, and may fear that they were to blame for the severed attachment bonds.[17] These feelings can lead to "aggression, ... academic problems in school, and ... elevated

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[16] *See also* T.J. Biblarz & J. Stacey, *How Does the Gender of Parents Matter?*, 72 J. Marriage & Fam. 3 (2010) (reviewing empirical literature published in respected peer-reviewed journals and academic books); A.E. Goldberg, *Lesbian And Gay Parents And Their Children: Research On The Family Life Cycle* (2010) (same).

[17] *See, e.g.*, Byrne *et al.*, *supra*, at 118; Joseph S. Jackson & Lauren G. Fasig, *The Parentless Child's Right to a Permanent Family*, 46 Wake Forest L. Rev. 1, 27-28 (2011).

psychopathology," Ana H. Marty *et al.*, *Supporting Secure Parent-Child Attachments*, 175 Early Childhood Dev. & Care 271, 274 (2005), along with a host of other problems.[18]

Research on children in lesbian and gay households demonstrate that they face the same risk of harm from disruption of their attachment relationships. *See, e.g.*, Fiona L.Tasker & Susan Golombok, *Growing Up in a Lesbian Family: Effects on Child Development* 12 (1997), (finding that disruption of parent-child bond with lesbian non-biologically related parent "can cause [the child] extreme distress"); Martha Kirkpatick *et al.*, *Lesbian Mothers & Their Children: A Comparative Study*, 51 Am. J. Orthopsychiatry 545, 550 (1981).

2. Children born through ART risk economic hardship if they cannot rely on their non-genetic parents for financial support and security.

Children born through ART also face an increased likelihood of economic hardship from their inability to access the financial protections the law provides through legally recognized parentage. Limiting the financial resources and security a child would otherwise receive from a second parent compounds the harm to the child from disruption of, or lack of legal recognition for, the parent-child relationship. "One of the most consistent associations in developmental science is between economic hardship and compromised child development." Nat'l Research Council & Inst. of Med., *supra*, at 275.

The failure to recognize and legally protect the relationship between a child born through ART and a non-genetically related parent can thus significantly impact a child's financial security and wellbeing. Safeguarding the legal status of a non-biologically related parent ensures

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[18] *See, e.g.*, Joan B. Kelly Mark D. Simms *et al.*, *Health Care Needs of Children in the Foster Care System*, 106 Pediatrics 909, 912 (Oct. 2000); Michael E. Lamb & Joan B. Kelly, *Using Child Development Research to Make Appropriate Custody and Access Decisions for Young Children*, 38 Fam. & Conciliation Cts. Rev. 297, 303 (2000) ("[T]here is a substantial literature documenting the adverse effects of disrupted parent-child relationships on children's development and adjustment.").

that the child can rely on that adult for child support,[19] intestate succession rights,[20] Social Security child's benefits,[21] and other critical financial safety nets, regardless of the marital status of the child's parents. As one legal expert summarized,

> without a legally recognized parent-child relationship, many nonmarital children born through alternative insemination have no right to crucial financial protections — such as child support and children's Social Security benefits — from and through their functional parents. . . . [I]n the vast majority of states, unless a child has a legally cognizable parent-child relationship, he or she is not entitled to sue for the wrongful death of a functional parent. . . . Children often are denied health insurance through their functional but nonlegal parents as most employer-sponsored plans that cover dependents cover only children with whom the employee has a legally recognized parent-child relationship. Similarly, children who are not considered legal children also may be denied workers' compensation benefits in the event of the death of the nonbirth parent. . . . [T]he denial of these benefits can have a particularly acute impact on the children where the functional but nonlegal parent is or was the primary wage earner for the family, which is often the case.

Courtney G. Joslin, *Protecting Children(?): Marriage, Gender, and Assisted Reproductive Technology*, 83 S. Cal. L. Rev. 1177, 1216-17 (2010).

II. This Court Has the Power To Protect Children Born Through ART By Securing Their Legal Relationships With Both Adults Who Have Brought Them Into The World And Functioned As Their Parents.

Children born through ART need this Court's protection from the risks of harm they face if their parent-child relationships are legally insecure. Whether by construing existing parentage and ART statutes to apply to families formed by intent and function, or by bridging the gaps between those statutes pursuant to *parens patriae* powers, this Court has the authority and

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[19] *See* RSA ch.168-A (providing for enforcement of child support for non-marital children); *Hansen v. Hansen*, 116 N.H. 329 (1976).

[20] *See* RSA 561:1.

[21] *See* 42 U.S.C. § 416(h)(2) (2000) (defining eligibility of child for Social Security benefits based on whether child would inherit as son or daughter under state law if parent were to die intestate).

responsibility to ensure that children born through ART to unmarried parents have protected legal relationships with both of the adults who brought them into the world.

Courts around the nation have recognized the critical importance of protecting all children, and that all children have a right to equal legal protections, regardless of the circumstances of their birth. *See, e.g.*, *Levy v. Louisiana*, 391 U.S. 68, 71-72 (U.S. 1968) (nonmarital children cannot be denied rights because of circumstances of their birth); *Woodward v. Comm'r*, 760 N.E.2d 257, 265 (Mass. 2002) ("all children [are] entitled to the same rights and protections of the law regardless of the accidents of their birth.") (quotation omitted). This is particularly true of children born through ART. *See, e.g.*, *In re Parentage of M.J.*, 787 N.E.2d 144, 151 (Ill. 2003) (protecting children born through ART is consistent with "public policy recognizing the right of every child to the physical, mental, emotional, and monetary support of his or her parents"); *Culliton v. Beth Isr. Deaconess Med. Ctr.*, 756 N.E.2d 1133, 1139 (Mass. 2001) (recognizing importance of pre-birth order establishing parentage of intended parents in "furnishing a measure of stability and protection to children born through" ART).

Legislatures nonetheless have been hard pressed to stay abreast of the rapid increase in the varieties and use of ART. As a result, even where statutes address to an extent the parentage of children born through ART, they do not always encompass the full range of those children's circumstances. *See Eng Khabbaz v. Comm'r, Soc. Sec. Admin.*, 155 N.H. 798, 805-06 (2007) (noting the need for further legislative action as "reproductive technologies will grow and advance"). Consequently, state courts across the country increasingly are being called upon to decide the legal parentage of children born through ART under circumstances not specifically addressed by legislation — as this Court must do in this case. *See In re Roberto D.B.*, 923 A.2d 115, 117 (Md. 2007) ("The law is being tested as these new techniques [of assisted reproduction]

become more commonplace and accepted"); *Woodward v. Comm'r*, 760 N.E.2d 257, 272 (Mass. 2002) (noting increasing frequency of "novel questions involving the rights of children born from assistive reproductive technologies. ... As these technologies advance, the number of children they produce will continue to multiply.").

This Court has not previously addressed the parental status of a person who consented to the insemination of her unmarried partner with the intention that they raise the resulting child together and who subsequently carried out that intention by fully acting as a parent. Yet New Hampshire law already appreciates the importance of protecting the integrity of intentional families formed through ART in certain circumstances. *See, e.g*, RSA ch. 168-B (setting rights and responsibilities related to use of ART by married couples). New Hampshire law also recognizes the relationship between a child and person who has functioned as a parent in every way. *See, e.g.*, RSA 168-B:3(d) (presuming parentage based upon holding out the child as one's own); *Bodwell v. Brooks*, 141 N.H. 508 (1996) (protecting relationship between child and person standing *in loco parentis*). Extending these principles to families like Madelyn's not only properly applies New Hampshire law, but comports with authorities across the country recognizing the parental status of those who consented to ART, intended to be parents to the resulting children, and established bonded parent-child relationships. Whether by (A) recognizing that a person is a parent if he or she consents to conception of a child through ART with the intent to be a parent either through equal application of New Hampshire's paternity statutes or through common law, (B) recognizing that this state's presumption of parentage based on holding a child out as one's own applies equally to women, or (C) recognizing that a non-birth parent in a planned family may seek custody in equity as a person *in loco parentis*, this Court can and should secure the legal relationships between children born through ART and their

non-genetic parents. Affirming these relationships in law safeguards the constitutional interests of both parents and the child, honoring the bonds of family they created together.

A. This Court Should Extend The Protections Of New Hampshire's ART Laws To Children Born To Unmarried Couples When One Party Consented To The Other's Insemination And Both Parties Intended To Raise The Child Together.

Recognizing the parentage of a person who consents to a partner's use of ART best protects the child's interest in having a protected legal relationship with both of her intended parents from the moment of birth. Whether through construction of existing paternity statutes addressing ART or extension of these statutes' underlying principles via this Court's equitable *parens patriae* authority, this Court should recognize the parentage of a person who has consented to her partner's ART with the intention of also being a parent.

1. New Hampshire's ART Statutes Should Be Construed To Apply To Non-Marital Families Who Conceive Their Children Using ART.

New Hampshire's ART laws appropriately focus on intent and consent as the most important factors in determining parentage in families created by ART. *See, e.g.,* RSA 168-B:1, VII (definition of "intended parents"); RSA 168-B:11 (sperm donor liable for support only if provided in statement of written intent). Although RSA 168-B:3(II) explicitly addresses only married couples using ART, that statute plainly establishes legal parentage for a spouse who consents to a woman's insemination or *in vitro* fertilization by providing that use of ART does not undermine that spouse's presumed parentage, even when the presumptive parent has failed to comply with all of the statutory requirements. Consent conclusively creates legal parentage under this statute.

In order to protect children born to unmarried couples through ART and avoid an unconstitutional result, these provisions should be construed to apply to families formed by unmarried parents through ART as well. In *Shineovich v. Shineovich*, 214 P.3d 29 (Or. Ct. App.

2009), the Oregon Court of Appeals analyzed Oregon's AI statute, which establishes legal parentage for men who consent to their wives' insemination, concluding that it must be interpreted to apply to an unmarried woman who consented to her same-sex partner's insemination. The court noted that the legislative objective of the statute "to protect children conceived by [alternative] insemination from being denied the right to support by the mother's husband or to inherit from him" was advanced by "extending the statute's coverage to include the children of mothers in same-sex relationships ... by providing the same protection for a greater number of children." 214 P.3d at 40. This construction was required to avoid unconstitutionally discriminating against same-sex couples, who had no way to access marital protections. 214 P.3d at 37-39. *See also D.M.T. v. T.M.H.*, No. SC12-261, 2013 Fla. LEXIS 2422 at *23 (Fla. Nov. 7, 2013) (denying ART statute's protections "to an unmarried woman who was part of a same-sex couple seeking the assistance of reproductive technology to conceive a child to jointly raise" violates state and federal Constitutions).

2. The Court Also Has *Parens Patriae* Authority To Extend The Principles Underlying The ART Statutes To Protect Children Born To Unmarried Parents.

Even if this Court were to conclude that the terms of New Hampshire's existing AI provisions cannot be construed to apply to unmarried partners, the Court should nonetheless protect children born through AI to unmarried parents under its *parens patriae* authority by applying the same principles to their families. *See In re R.A.*, 153 N.H. 82, 89 (2005) (applying principles of custody statutes that otherwise did not govern dispute between unmarried parents under Court's *parens patriae* authority); *Roberts v. Ward*, 126 N.H. 388, 392 (1985) (appropriate to exercise *parens patriae* power to further policy underlying otherwise inapplicable statute in best interest of the child). This case presents a paradigmatic opportunity for the Court to bridge a statutory gap under its *parens patriae* authority and establish a common law rule recognizing the

parentage of intended parents genetically unrelated to their children. *See Eccleston v. Bankosky*, 780 N.E.2d 1266, 1274-75 (Mass. 2003) (exercising equity power "to close an unintended gap in the comprehensive legislative scheme … to secure the welfare of children" and "to assure that the interests of justice are served"). This Court's *parens patriae* powers are intended to prevent precisely the types of harms children suffer from the failure to recognize the equal legal status of their non-genetic parents. *See In re R.A.*, 153 N.H. at 96 (State has a "compelling interest" in protecting children from harm under its *parens patriae* authority and responsibility).

Courts across the country have extended common law parental rights in AI cases in a variety of contexts. To begin with, near-universal authority recognizes the parentage of a man who consented to the insemination of his wife, even in the absence of statutes addressing the use of ART.[22] In states with AI statutes, courts have likewise recognized under common law the parentage of a person who has consented to a spouse's AI when that person has failed to comply with statutory requirements that the consent be in writing.[23]

Most importantly, courts have recognized the parentage of *unmarried* individuals who consent to their partner's insemination in the absence of any applicable statute. For example, in

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[22] *See, e.g.*, *Levin v. Levin*, 645 N.E.2d 601, 605 (Ind. 1994) (when both spouses consent to AI, resulting child is a child of the marriage); *In re Baby Doe*, 353 S.E.2d 877, 878 (S.C. 1987) (man who consented to his wife's insemination could be a father); *People v. Sorensen*, 437 P.2d 495, 499 (Cal. 1968) ("a reasonable man, who … actively participates and consents to his wife's [AI] in the hope that a child will be produced whom they will treat as their own, knows that such behavior carries with it the legal responsibilities of fatherhood and criminal responsibility for nonsupport").

[23] *See, e.g.*, *Laura WW. v. Peter WW.*, 856 N.Y.S.2d 258, 263 (N.Y. App. Div. 3d Dep't 2008) (man who consented to wife's insemination was legal parent under common law where statutory consent requirements not satisfied); *Brown v. Brown*, 125 S.W.3d 840 (Ark. Ct. App. 2003) (man whose conduct indicated consent to AI could not contend children were not his); *In re Marriage of Adams*, 528 N.E.2d 1075 (Ill. App. Ct. 2d Dist. 1988) (same), *rev'd on other grounds*, 551 N.E.2d 635 (Ill. 1990); *R.S. v. R.S.*, 670 P.2d 923, 928 (Kan. Ct. App. 1983) (man who orally consents to his wife's insemination "for the purpose of producing a child of their own is estopped to deny that he is the father of the child, and he has impliedly agreed to support the child and act as its father.").

In re Parentage of M.J., 787 N.E.2d 144 (Ill. 2003), the Illinois Supreme Court recognized under common law principles the parentage of a man who consented to his female partner's AI, concluding that "if an unmarried man who biologically causes conception through sexual relations without the premeditated intent of birth is legally obligated to support a child, then the equivalent resulting birth of a child caused by the deliberate conduct of [AI] should receive the same treatment in the eyes of the law." *Id.* at 152. *See also Dunkin v. Boskey*, 98 Cal. Rptr. 2d 44, 55 (Cal. App. 1st Dist. 2000) (man who consented to his female partner's insemination held to be a parent "by virtue of his written consent to the [AI] of respondent and voluntary consequent assumption of fatherhood duties.").

These same principles apply to an unmarried woman who consents to her female partner's insemination. In a directly analogous case, the Illinois Court of Appeals applied common law principles to hold that a woman who consented to her same-sex partner's AI is a parent. *See Catherine D.W. v. Deanna C.S. (In re T.P.S.)*, 978 N.E.2d 1070 (Ill. App. Ct. 5th Dist. 2012). Although no statute established her parentage, the court nonetheless held that "we will not assume that the legislature intended for the children born to unmarried couples through the use of reproductive technology to have less security and protection than that given to children born to married couples whose parentage falls within the purview of the Illinois Parentage Act." *Id.* at 1079. The court concluded that

> the best interests of children and society are served by recognizing that not only may parental responsibility be imposed but also parental rights may be asserted based on conduct evincing actual consent to the [alternative] insemination procedure by an unmarried couple along with active participation by the nonbiological partner as a coparent. To hold otherwise and to deny common law claims under such circumstances is to deny a child his or her right to the physical, mental, and emotional support of two parents merely because his or her parentage falls outside the terms of the Illinois Parentage Act.

Id. at 1079-80.

As one legal scholar succinctly explained, the legal doctrine

> should provide that any individual, regardless of gender, sexual orientation, or marital status, who consents to a woman's insemination with the intent to be a parent is a legal parent of the resulting child. Applying this rule equally to all children provides the child and the child's family certainty and security about their respective legal relationships and ensures that the child will not individually have to litigate his or her right to various benefits in times of family trauma.

Joslin, *supra* at 1222-1223.

Whether through statutory interpretation or common law, this Court should adopt this reasoning and establish the parentage of a non-genetically related mother who consents to her partner's use of ART.[24] Extending New Hampshire's AI-related protections to non-marital families would honor the intentions of both of the adults who bring a child into the world and ensure that the resulting child has the legal, social, and financial protections that flow from a secure legal relationship with both parents from the moment the child is born.

B. A Non-Genetic Mother Who Both Intends To Be And Functions As A Parent Should Be Recognized As Such Under New Hampshire's Statutory "Holding Out" Provision.

As discussed above, non-birth parents should be protected based upon their consent and intent to create a family through ART, with corresponding protections for their children. These legal protections are all the more important and justified when the genetically-unrelated adult has functioned as a parent in every way, and the child has developed deep parent-child bonds of attachment. Where such bonds have formed, especially after years of parenting on the part of the

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[24] Recognizing a person who consents to her partner's insemination as a parent also comports with the American Bar Association's *Model Act Governing the Use of Assisted Reproductive Technology* (Feb. 2008), http://apps.americanbar.org/family/committees/artmodelact.pdf (ABA Model Act). The ABA Model Act establishes the parental status of a person who consents to a woman's use of ART, stating, "An individual who provides gametes for, or consents to, assisted reproduction by a woman ... with the intent to be a parent of her child is a parent of the resulting child." ABA Model Act § 603.

non-genetic parent, denying legal security to the parent-child relationship would have devastating effects for the child.[25]

This Court should interpret New Hampshire's "holding out" provision, RSA 168-B:3(d), to apply to non-genetic mothers as well as to fathers in order to protect the established parent-child relationships of children born through ART with both of the adults who have functioned as their parents. This provision establishes the presumed parentage of a person who "receives the child into his home and openly holds out the child as his child." RSA 168-B:3(d). Including female functional parents within the male gendered terms of this statute is required by established principles of statutory construction regarding gender-neutral interpretations and avoidance of constitutional equal protection problems. *See* RSA 21:3 ("words importing the masculine gender may extend and be applied to females"); *State v. Smagula*, 117 N.H. 663, 666 (1977) ("It is a basic principle of statutory construction that a legislative enactment will be construed to avoid conflict with constitutional rights wherever reasonably possible."); *Cheshire Medical Ctr. v. Holbrook*, 140 N.H. 187, 189 (1995) ("Our constitution guarantees that 'equality of rights under the law shall not be denied or abridged by this state on account of . . . sex.' N.H. CONST. pt. I, art. 2.").

The holding out provision applies regardless of whether there is a biological connection between the child and the presumed parent. *Cf. In the Matter of J.B.*, 157 N.H. 577, 580 (2008) (functional father's "lack of a biological connection ... is therefore not fatal to his request for parental rights and responsibilities ... so long as he alleges sufficient facts to establish his status as a parent by other means."). Rather, recognizing the parental status of a person who has held

[25] Given the circumstances of this case, this brief focuses on the needs of children born through ART. However, the principles addressed in Parts II.B. and C. would also apply to a couple that brought a child into their family through adoption entered initially by only one of the intended parents.

the child out as her own from the moment the child entered the family furthers the underlying purpose of RSA ch. 168-B — ensuring certainty for children in their legal relationships with those who brought them into the world, and providing for their support. *See An Act Relative to Surrogacy*, 1990 N.H. Laws 87:1, I (Statement of Purpose); *cf. In the Matter of Gendron*, 157 N.H. 314, 321 (2008) (noting "stability and continuity of support, both emotional and financial, are essential to a child's welfare" and "[p]ublic policy demands that children have the right to certainty in their relationships with their parents") (quotations omitted).[26]

Courts across the country have interpreted similar provisions to apply to women and non-biological parents, particularly for parents who participated in the decision to bring children into their families. For example, in *Chatterjee v. King*, 280 P.3d 283 (N.M. 2012), the New Mexico Supreme Court ruled that a non-genetic and non-adoptive mother who "hold[s] a child out as her own by, among other things, providing full-time emotional and financial support for the child," *id.* at 285, has standing to seek custody of the child under that state's holding out provision. Noting that the holding out provision "is based on a person's conduct, not a biological connection," the court concluded that "a woman is capable of holding out a child as her natural child and establishing a personal, financial, or custodial relationship with that child. This is particularly true when, as is alleged in this case, the relationship between the child and both the presumptive and the adoptive parent occurred simultaneously." *Id.* at 288. The New Mexico court also concluded that limiting the holding out provision to presumed fathers would run afoul of constitutional prohibitions against sex discrimination because it would mean that a man in a

[26] Under other circumstances, the "holding out" provision may establish parentage for a person who comes into a child's life later. There should be no question of its applicability, however, when the putative parent has functioned as a parent from the initial decision to bring the child into the family.

same-sex relationship could claim parentage based on the holding out provision, while a woman in the exact same position could not. *Id.* Finally, the court concluded,

> [I]t is against public policy to deny parental rights and responsibilities based solely on the sex of either or both of the parents. The better view is to recognize that the child's best interests are served when intending parents physically, emotionally, and financially support the child from the time the child comes into their lives. This is especially true when both parents are able and willing to care for the child.

Id. at 293.

The California Supreme Court reached the same conclusions in *Elisa B. v. Superior Court*, 117 P.3d 660, 667 (Cal. 2005), holding that California's parallel holding out provision applies equally to a woman who actively participated in her partner's ART, received the children into her home, and held them out as her natural children, thereby giving rise to a support obligation.[27] The *Elisa B.* court reaffirmed that the lack of a biological connection could not be used to undermine the presumption of Elisa's parentage when "she actively participated in causing the children to be conceived with the understanding that she would raise the children as her own together with the birth mother, she voluntarily accepted the rights and obligations of parenthood after the children were born," and no one else could present a claim under the parentage statutes. *Id.* at 670.[28]

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[27] *See also In re Salvador M.*, 111 Cal. App. 4th 1353, 1357 (Cal. App. 5th Dist. 2003) ("the legal principles concerning the presumed father apply equally to a woman seeking presumed mother status."); *In re Karen C.*, 101 Cal. App. 4th 932, 938 (Cal. App. 2d Dist. 2002) (principles underlying the holding out provision "should apply equally to women").

[28] Other courts have ruled similarly. *See, e.g.*, *St. Mary v. Damon*, 309 P.3d 1027, 1032 (Nev. 2013) (claim of maternity may be based on holding out provision); *Frazier v. Goudschaal*, 295 P.3d 542, 553 (Kan. 2013) ("a female can make a colorable claim to being a presumptive mother of a child without claiming to be the biological or adoptive mother"); *In the Interest of S.N.V.*, 284 P.3d 147, 151 (Colo. App. 2011) ("A woman's proof ... of receiving the child into her home and holding the child out as her own, also may establish the mother-child relationship.").

This Court should adopt the same reasoning, recognizing the equal parental status of non-birth mothers, who not only plan for and consent to the conception of children through ART with their same-sex partners, but also welcome those children into their family and hold those children out as their own.

C. A Non-Genetic Mother Who Both Intends To Be And Functions As A Parent Should Be Recognized As Such Under New Hampshire's Common Law *In Loco Parentis* Doctrine.

Were this Court to conclude that neither consent to insemination nor "holding out" establish legal parentage here, this Court's long-standing doctrine of *in loco parentis* should nonetheless apply to protect a child's relationship with her intended, functional parent. It is well established that a person who "admits the child into his family and treats the child as a family member" stands *in loco parentis*, and this Court has plainly held that protecting that relationship may be critical to the wellbeing of the child. *Bodwell v. Brooks*, 141 N.H. 508, 513 (1996). *See also In re R.A.*, 153 N.H. at 99-100 ("'familial relationships, aside from biological bonds, stem "from the emotional attachments that derive from the intimacy of daily association," and from the manner in which such relationships promote family life;'" denying custody where "substantial psychological parent-child relationship" exists may be "emotionally harmful to the child") (quoting *In re Shelby R.*, 148 N.H. 237, 239 (2002); *Lehr v. Robertson*, 463 U.S. 248, 261 (1983)).

This Court has addressed the contours of the *in loco parentis* doctrine in a variety of factual contexts. *See, e.g.*, *In re Diana P.*, 120 N.H. 791, 795 (1980) (*in loco parentis* foster parent can bring proceeding to terminate birth mother's parental rights), *overruled on other grounds by In re Craig T.*, 147 N.H. 739 (2002); *Bodwell*, 141 N.H. at 514 (stepparent who stood *in loco parentis* had standing as party in custody proceeding); *Whitaker v. Warren*, 60 N.H. 20, 26 (1880) (person standing *in loco parentis* can bring action for damages for injury to child). To

date, however, this Court has not considered it in the context of a planned family. The relationship between a child and the non-birth parent who jointly brought the child into the world and who has cared for and supported the child as a parent is exactly the type of relationship to which the *in loco parentis* doctrine should apply.[29]

Courts around the nation have done precisely that, exercising their equitable *parens patriae* authority to protect functional parents who have acted together with a partner to bring children into their families, especially through ART. Whether using the rubric of "psychological parent," "de facto parent," or "*in loco parentis*,"[30] these cases uniformly recognize the critical importance of preserving a child's relationship with one of the two people who intended to be and functioned as a parent from the beginning of the child's life.[31]

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[29] The Court's refusal in *In re Nelson*, 149 N.H. 545 (2003), to extend *in loco parentis* protection to a person who was never intended to be a parent and who was not part of the process of bringing the children into the family is entirely distinguishable from the Court's consideration of the claim of an intended, functional parent.

[30] As Professor Courtney Joslin explains,

> In the context of actions seeking visitation or custody, of the states that apply equitable doctrines to protect children's relationships with their functional parents, different states use different terms to describe these theories. Some states apply the doctrine of de facto parentage, while others use the doctrine of in loco parentis, or psychological parenthood. The elements of these three equitable doctrines vary to some degree, but the core principle is consistent. For a person to be entitled to some parental rights or obligations under these equitable theories, the person must demonstrate that he or she has formed an actual parent-child bond with the child with the consent and encouragement of the existing legal parent.

Joslin, *supra*, at 1199-1200.

[31] *See, e.g.*, *Latham v. Schwerdtfeger*, 802 N.W.2d 66 (Neb. 2011); *Bethany v. Jones*, 378 S.W.3d 731 (Ark. 2011); *In re Parentage of A.B.*, 837 N.E.2d 965 (Ind. 2005); *In re Parentage of L.B.*, 122 P.3d 161 (Wash. 2005); *In re Clifford K.*, 619 S.E.2d 138 (W.Va. 2005); *C.E.W. v. D.E.W.*, 845 A.2d 1146 (Me. 2004); *T.B. v. L.R.M.*, 786 A.2d 913 (Pa. 2001); *Rubano v. DiCenzo*, 759 A.2d 959 (R.I. 2000); *V.C. v. M.J.B.*, 748 A.2d 539 (N.J. 2000); *E.N.O. v. L.M.M.*, 711 N.E.2d 886 (Mass. 1999); *Mason v. Dwinnell*, 660 S.E.2d 58 (N.C. Ct. App. 2008); *In the Interest of E.L.M.C.*, 100 P.3d 546 (Colo. Ct. App. 2004).

As this Court has previously noted, the Wisconsin Supreme Court's seminal decision in *In re Custody of H.S.H.-K. (Holtzman v. Knott)*, 533 N.W.2d 419 (Wis. 1995), established a framework for evaluating when a court may intervene to safeguard the relationship between a child and his or her non-birth parent. *See In re R.A.*, 153 N.H. at 100.[32] Specifically, the Wisconsin court held that the partner of a birth parent could seek parental rights and responsibilities when (1) the legal parent consented to and fostered the development of the partner's bond with the child, (2) the partner and the child lived together, (3) the partner had taken on the responsibilities of parenthood regarding the child's care, education, development, and financial support without expectation of compensation, and (4) the relationship between adult and child is of sufficient length for a parent-child bond to have developed. *See H.S.H.-K.*, 533 N.W.2d at 435-36. In the absence of applicable statutes, the Wisconsin court exercised its equitable powers to protect the relationship between a child and the non-birth mother who actively participated in his conception by AI and who functioned as his parent with the consent of the child's birth mother. *Id.*[33]

Similarly, in *E.N.O. v. L.M.M.*, 711 N.E.2d 866, the Massachusetts Supreme Judicial Court recognized the de facto parent status of a child's non-birth mother, who had consented to

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[32] Although the *R.A.* Court declined to directly adopt the *H.S.H.-K.* factors in that case, it nonetheless acknowledged "that the factors mentioned in that test are very similar to those we have previously considered and may be instructive." 153 N.H. at 82. By contrast to the explicit statutory framework governing claims for custody by grandparents at issue in *R.A.*, *id.* at 89 (discussing applicability of RSA 458:17), the lack of a statutory context supporting a claim for *in loco parentis* protection by an intended, functional parent argues in favor of more directly adopting the *H.S.H.-K.* factors here.

[33] Many other courts have adopted or adapted the framework of *H.S.H.-K.* as well. *See, e.g.*, *In re Parentage of L.B.*, 122 P.3d 161, 176-77 (Wash. 2005) (adopting *H.S.H.-K.* factors, noting that "recognition of a de facto parent is 'limited to those adults who have fully and completely undertaken a permanent, unequivocal, committed, and responsible parental role in the child's life.'") (quoting *C.E.W.*, 845 A.2d at 1152); *V.C.*, 748 A.2d at 551-52 (*H.S.H.-K.* "provides a good framework for determining psychological parenthood"); *In the Interest of E.L.M.C.*, 100 P.3d 546, 559 (Colo. Ct. App. 2004).

her partner's insemination, with both parties intending to raise the child together. Recognizing the non-birth mother's role in raising, caring for, and supporting the child, the court concluded she was eligible for an award of parental rights and responsibilities. *Id.* at 891-93. *See also, e.g.*, *Latham*, 802 N.W.2d at 76 (emphasizing non-birth mother's role "in the decision to conceive the minor child," and performance of "parental duties such as feeding, clothing, and disciplining" the child during four years they lived together as intact family); *Bethany*, 378 S.W.2d at 738 (finding non-birth parent stood *in loco parentis* where parties jointly planned to become parents through AI, their "intentions were always to co-parent," and parent-child relationship developed between child and non-birth mother).

This Court should similarly exercise its equitable *parens patriae* authority to protect the relationship between a child and the non-birth parent who brought her into the world and fully functioned as her parent.[34]

[34] Recognizing the legal status of an intended, functional parent is also consistent with the American Law Institute (ALI)'s *Principles of the Law of Family Dissolution: Analysis and Recommendations* (2003) ("ALI *Principles*"). This Court has previously looked to the ALI *Principles* as instructive in determining whether to grant custody to a person who stands *in loco parentis* to protect a child from harm. *See In re R.A.*, 153 N.H. at 100. Under the rubric of parenthood by estoppel, the ALI *Principles* establish the equal parental status of a person who undertakes to raise a child from birth together with a legal parent, lives with the child, holds herself out as a parent, and accepts the responsibilities of parenthood. *See* ALI *Principles*, § 2.03(1)(b)(iii); *id.* at 114 (Parent by estoppel under § 2.03(1)(b)(iii) "contemplates the situation of two cohabiting adults who undertake to raise a child together, with equal rights and responsibilities."). The ALI *Principles* emphasize both the agreement to parent together and the intended parent's actions in living up to that agreement. *See id.* § 2.03(1)(b)(iii) (course of conduct of accepting full parental responsibilities pursuant to agreement to be equal parents); *id.* at 114 (this status "combines functional criteria with an agreement that the individual in question will act fully and permanently as a parent").

D. Constitutional Considerations Weigh In Favor Of Giving Legal Recognition And Protection To The Parent-Child Relationship Asserted Here.

Constitutional considerations in no way prevent recognizing the equal parental rights of an intended, functional parent. Indeed, they weigh in favor of protecting the vital parent-child relationship at stake in this case, whether under statute or common law.

First, there is no constitutional obstacle to recognizing an intentional, functional parent as a legal parent under either the ART statute or the "holding out" statute. Recognizing a second person as a legal parent does not infringe the other parent's liberty interests because their rights as parents are equal. *See In the Matter of J.B.*, 157 N.H. at 581-582 (nonbiological father who established legal parentage "enjoys rights equal to those of the [other legal parent] to raise and care for the child").

Second, there is no constitutional obstacle to recognizing an intentional, functional parent as standing *in loco parentis*. This Court has repeatedly made clear that fit parents' liberty interest in the care and custody of their children "are not absolute, but are subordinate to the State's *parens patriae* power, and must yield to the welfare of the child." *See In re Berg*, 152 N.H. 658, 661 (2005) (quotation omitted). The circumstances of a planned family — in which both partners consented to the use of ART to bring a child into the world with the intention of raising the child together, followed by the development of a parent-child relationship in fact between non-genetic parent and child — present precisely the "most unusual and serious of cases" warranting this Court's protection of the parent-child relationship. *In re Nelson*, 149 N.H. at 548.

As the Washington Supreme Court noted in *In re Parentage of L.B.*, in extending parental rights to an intended, functional parent,

> The State is not interfering on behalf of a third party in an insular family unit but is enforcing the rights and obligations of parenthood that attach to de facto

> parents; a status that can be achieved only through the active encouragement of the biological or adoptive parent by affirmatively establishing a family unit with the de facto parent and child or children that accompany the family.

122 P.3d at 179. Other courts have similarly recognized that when a legal parent jointly creates a family with her partner, and intends for that partner to assume an equal role as one of the child's two parents, she renders her own parental rights with respect to the minor child "less exclusive and less exclusory" than they otherwise would have been. *Rubano*, 759 A.2d at 976.[35] As Justice Nadeau noted in his dissent in *In re Nelson*, "A natural or adoptive parent who voluntarily consents to the formation of a relationship between the petitioner and the child is hardly in a position to complain if the natural bounty of that relationship is accorded the child or the petitioner." *In re Nelson*, 149 N.H. at 555 (Nadeau, J., dissenting).

As a result, an intended and functional co-parent stands in parity with the legal parent in every way. Thus they "*both* have a 'fundamental liberty interest[]' in the 'care, custody, and control' of [the child]." *Parentage of L.B.*, 122 P.3d at 179 (emphasis in original) (quoting *Troxel*, 530 U.S. at 65). *See also Bethany*, 378 S.W.3d at 736 ("the finding of an *in loco parentis* relationship ... concerns a person who, in all practical respects, was a parent" such that granting parental rights to such a person does not interfere with the parental rights of a legal parent).

Finally, a child also has an independent constitutionally protected interest in securing her relationship with both of her parents. *See, e.g.*, *Lehr v. Robertson*, 463 U.S. 248, 261 (1983); *see also Troxel*, 530 U.S. at 64, 66-68 (plurality) (children are not "so much chattel"); *id.* at 86

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[35] *See also V.C.*, 748 A.2d at 552 ("That parent has the absolute ability to maintain a zone of autonomous privacy for herself and her child. However, if she wishes to maintain that zone of privacy she cannot invite a third party to function as a parent to her child and cannot cede over to that third party parental authority the exercise of which may create a profound bond with the child.").

(Stevens, J., dissenting) ("There is at a minimum a third individual, whose interests are implicated in every case to which the [visitation] statute applies — the child."); *id.* at 98 (Kennedy, J., dissenting) ("Cases are sure to arise — perhaps a substantial number of cases — in which a third party, by acting in a caregiving role over a significant period of time, has developed a relationship with a child which is not necessarily subject to absolute parental veto.").

Therefore, constitutional concerns favor, rather than undermine, this Court's recognition of the legal parental relationship between a child and an intended, functional parent.

CONCLUSION

This Court should reverse the Family Court's dismissal of Appellant's parentage petition, which fails to protect the critical parent-child relationships of a child who was conceived through ART by a committed couple who intended to be and functioned as equal parents.

Respectfully submitted,

Academy of Assisted Reproductive Technology Attorneys, *et al.*

By their attorneys,
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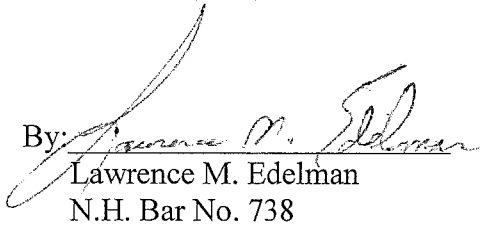
Date: November 13, 2013

By: 

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Certificate of Service

I hereby certify that two copies each of the foregoing Brief of *Amici Curiae* were e-mailed and mailed this 13th day of November, 2013, to Kysa M. Crusco, Esquire, Joshua L. Gordon, Esquire and Janson Wu, Esquire, counsel of record.

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