

The Parentage Problem: Recognizing and Protecting Nebraska Families with an Acknowledgment of Parentage

by Katie Vogel and Angela Lennon

Ruth Bader Ginsberg opined that “[d]epriving a parent of parental status is as devastating as a criminal conviction.” She stated this opinion in the context of terminating parental rights, but undoubtedly her words equally apply when the law fails to establish a parent’s legal status. The parent-child relationship is one of the most sacred in the world—across all cultures, geographical boundaries, and religions, the desire and ability to parent our children is fundamental.

Today, families are intentionally formed regardless of marital relationship and beyond the historically traditional male/female biological reproduction with the assistance of advancements in reproductive technology. Despite the growing recognition of rights for same sex couples through the Supreme Court’s ruling to legalize gay marriage in 2015, unmarried same sex couples still face hurdles and discrimination regarding parental rights. This holds true in Nebraska where the statutory structure and laws do not reflect the realities of how families

are formed thus leaving Nebraska children and their parents legally unprotected.

Nebraska’s current laws treat unmarried opposite-sex and unmarried same-sex couples different as to *if* and *how* they may secure their parental rights. For unwed opposite-sex couples, the process is direct and detailed, and our statutory schemes are molded to encourage the establishment of the parent-child relationship regardless of marital status. However, for unwed same-sex couples, the methods for establishing legal parental status are fraught with hurdles or completely denied.¹

Married Couples, Regardless of Sexual Orientation, May Establish Parentage

In Nebraska, when a couple is married, parentage is established through the marital presumption, or through a stepparent adoption. Nebraska Revised Statute § 42-377 provides that a child born to a married couple is presumed legitimate, and

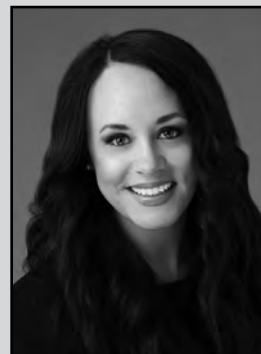


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the Supreme Court held in *Pavan v. Smith*,² that the marital presumption is applied equally to same-sex and opposite-sex couples.

Stepparent adoption, or the process by which a spouse can secure a legal parent-child relationship with their spouse's biological child, is available to same sex and opposite sex couples, and the requirement that the couple be married is equally applied and enforced.

However, when birth certificates are properly made available to same-sex married couples of a new child, organizations such as the America Civil Liberties Union still recommend that same-sex couples use the tool of stepparent adoption to secure the non-biological parent's legal relationship with their own child to ensure that the parent-child relationship is legally protected in the event there are any future changes in the law regarding the legality of the same-sex parents' marriage.³

Unmarried Couples of Opposite Sex May Establish Parentage

Nebraska's paternity statutes allow unmarried parents of the opposite sex to determine legal relationships between a mother, father, and child. Nebraska laws allows the State, the mother, or the putative—or presumed—father to bring an action for paternity.⁴ Nebraska's paternity statutes limit the timeframe in which parents can bring actions to establish paternity. Neb. Rev. Stat. § 43-1411 bars the bringing of a paternity action after the child has reached the age of eighteen.

In addition to a paternity action, in Nebraska, unwed parents can establish a man's parentage through the Voluntary Acknowledgment of Paternity (VAP) process. The VAP is a federally mandated method of establishing parentage and is the most common tool to determine legal parenting rights for unwed parents in the country. It's so widely used because it is free, simple, and efficient, and it establishes legal parentage without the complexities, costs, and barriers of a judicial court order. In Nebraska, however, unwed same-sex parents are denied access to the VAP process to establish their parental rights because of their gender and sexual orientation.

No Path to Parentage For Unmarried, Same-Sex Parents

While married parents, regardless of their gender, have the ability to establish parentage through the marital presumption or stepparent adoption procedures as discussed above, there is a gap in the path to parentage for unmarried same-sex parents.

A second-parent (or co-parent) adoption is the process in which a partner, who is not biologically related to the child, can adopt their partner's biological or adoptive child without terminating the first legal parent's rights. This type of adoption serves to secure a legal parent-child relationship to the non-biological and/or non-adoptive parent for unmarried same-sex parents. However, Nebraska, along with five other states in the United States, specially disallow second-parent adoptions

all together. In *In re Adoption of Luke*,⁵ the Nebraska Supreme Court made it clear that a decree of adoption requires, with the exception of stepparents, the biological parent to relinquish all rights to the child before the adoption is viable. This catch-22 prohibits same-sex parents from securing legal parentage rights for the non-biological parent.

The paternity statutes are also deficient in providing a mechanism for same-sex parents to establish parental legal rights with nonbiological children. Under a plain reading of Nebraska statutes, biological relation cannot be the rational because even though the Court may order genetic testing in a paternity action, there is no requirement that the putative father be confirmed as the biological father in the paternity action. Biological relationship is not required under Nebraska law but remains a barrier for same-sex parents to establish parentage.

Moreover, because unmarried same-sex couples lack a specific legal path to parenthood, some attempt to secure rights to their children though an *in loco parentis* determination. The common-law doctrine of *in loco parentis* has long been used by non-biological and non-adoptive parents to attempt to secure parenting rights where Nebraska's statutory scheme fails them. A person standing in loco parentis to a child is one who has put himself or herself in the situation of a lawful parent by assuming the obligations incident to the parental relationship, without going through the formalities necessary to a legal adoption, and the rights, duties, and liabilities of such person are the same as those of the lawful parent.⁶

However, the Nebraska Supreme Court describes *in loco parentis* status as "temporary" and "not the functional equivalent of a lawful parent."⁷ A parent can do everything in their power to "stand in the place" of a parent, but those rights are always lesser than the rights of legally acknowledged parents.⁸ *In loco parentis* is a transitory position of parenting. The person standing *in loco parentis* can sever the *in loco parentis* status to the child. Legal parents cannot. Children are also not protected based on this legal fiction of parenthood status, as an *in loco parentis* relationship does not guarantee certain rights or benefits, such as insurance, social security, or inheritance rights. This common law doctrine was created as a "work around" to protect the child-parental relationship. However, this temporary status of "standing in the place of a parent" is not enough to protect unmarried same-sex parents or their children.

Voluntary Acknowledgment of Paternity

A Voluntary Acknowledgment of Paternity (VAP) is a document signed by the child's mother and the putative father that identifies the man as the legal father. When the document is filed with the state office of vital statistics, it establishes legal paternity as the equivalent of a court order.

Historically, VAPs are a product of federal legislation

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to facilitate the financial support of children by establishing paternity through a simple and cost-effective means.⁹ To receive massive amounts of funding and to comply with Title IV-D, states must provide a mechanism to establish paternity through voluntary acknowledgment.¹⁰ VAPs have become the most common way to establish legal paternity to children born outside of marriage. In 2009, 1,693,850 children were born outside of marriage. In the same year, paternity was established by a VAP for 1,167,000 children compared to 643,000 cases in which paternity was established by court proceedings.¹¹

Though the VAP instruction form indicates that only a biological father should sign the document, absent from both the federal mandate and Neb. Rev. Stat. § 43-1409 is an explicit requirement that the signatories acknowledge that the signing father is, or that there is a reasonable belief that he is, the child's biological father. While the hesitation to extend same-sex couples the simple, efficient methods of establishing legal parentage available to opposite-sex couples likely stems from the longstanding tie between genetic connection and legal parentage status, the reality is that neither the marital presumption nor the VAP process require any genetic connection, nor is it the driving force for determining parentage.¹² Historically, the oldest presumption of paternity stems from English common law and is the "marital presumption" which assumes that a child born during the marriage is the biological child of the mother's husband. However, it is the marital relationship of the child's parents that establishes paternity, rather than any biological relationship between the child and the father.¹³

In Nebraska, the proper legal effect of a signed, notarized acknowledgment of paternity is a finding that the individual who signed as the father is in fact the legal father.¹⁴ And a father whose paternity is established by a final, voluntary acknowledgment has the same right to seek custody as the

child's biological mother, even if subsequent genetic testing shows no biological relationship.¹⁵ In other words, a voluntary acknowledgment of paternity cannot be rescinded if genetic testing shows the man who signed the VAP is not the biological father of the child.¹⁶ Rather, once the 60-day rescission period has passed, the acknowledgments can only be rescinded upon a showing of fraud, duress, or material mistake of fact.¹⁷

In *Tyler F. v. Sarah P.*, the acknowledgment of paternity established Tyler as the legal father. A subsequent genetic test determined another male was the biological father. The District Court granted both men custodial rights to the child. On appeal, the Nebraska Supreme Court held that the original acknowledgment of paternity determined Tyler to be the only father of the minor child and that the subsequent genetic test did not establish paternal rights to the other individual claiming parental rights to the child who was the biological father, without setting aside the acknowledgment of paternity.¹⁸ In both *Cesar C. v. Alicia L.*, and *Tyler F. v. Sarah P.*, the legal parent relationship established and upheld by the Nebraska Supreme Court had nothing to do with the genetic or biological relationship between the child(ren) and imputed father(s). It was based solely upon the *intentions and actions* of the parents at the time of the child's birth.

Similarly, for VAPs, the federal statutes that require states to establish VAPs do not provide that the man signing the VAP must aver that he is the child's biological father.¹⁹ Genetic testing is not a prerequisite prior to signing a VAP and pursuant to federal law, states can't require putative fathers to submit to genetic testing before signing the VAP.²⁰

Unequal Treatment

The unequal treatment of same-sex couples under current laws governing the establishment of parentage is deeply prob-



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lematic. It is unfair and discriminatory that same-sex couples who wish to establish legal parentage for the non-birth parent to expend significantly more time and resources than their opposite-sex counterparts, who have access to simple, efficient avenues to establish parentage. Further, unmarried same-sex couples are wholly denied access to any avenues to establishing legal parentage at all.²¹ As a result, children are deprived of the emotional, financial, and significant legal protections and benefits that arise out of having two legally recognized parents and the non-birth parent is deprived of the important rights and protections that arise from having a legally recognized relationship with their child.²²

Recent Legislation and Litigation

Unmarried same-sex partners who wish to establish legal parentage between children and the partner who is not the biological parent have several arguments to support the claim that VAPs should be available to them. As to women, allowing men to establish paternity but not allowing women to establish maternity constitutes prohibited gender-based discrimination. Second, for all same-sex couples, denying them access to VAPs amounts to discrimination based on sexual orientation.²³ While laws across the United States are progressing, they are not keeping pace with the changing family structure. In 2017, the Uniform Parentage Act recommended the inclusion of

intended parents and gender-neutral language in voluntary acknowledgment provisions to ensure equality for LGBTQ+ families.²⁴ And an increasing number of states have begun to expand access to VAPS to ensure that non-genetic parents and LGBTQ+ parents are able to utilize this important tool to establish legal parentage.²⁵

As of this year, 10 states have adopted VAPs in some capacity to allow same sex parents to establish parentage.²⁶ The form has been made gender-neutral in these states, so same-sex partners can establish parental rights in cases where the child was born via reproductive technology. In some states, the couple must be unmarried, while in other states married couples can use the form.

In Nebraska, for an unmarried same-sex couple who choose to conceive via using sperm provided in compliance with state donor non-paternity laws, the child will have only one legal parent upon birth.²⁷ The man who donated the sperm in compliance with state donor non-paternity laws will not be considered a legal parent and will have no obligation to support the child.²⁸ The results it that the birth mother's same-sex partner will not have an avenue to secure legal parentage. If VAPs were extended to same-sex couples who conceive children using regulated methods of reproductive technology, it would be more likely that children born to such couples would have two legal parents.



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Opening up VAPs to same-sex couples, either by interpreting existing statutes so that they apply or by enacting new statutes, reflects the reality that same-sex couples will be parents and raise children. In the 2022 legislative session, Senator Machaela Cavanaugh introduced Legislative Bill 1245 which would have enacted legislative changes to the provisions and terminology related to parentage. Specifically, it would have amended the VAP form in Nebraska so that the term “birth parent” was used rather than “child’s mother,” and “any alleged other parent” rather than “alleged father.” Using only gender-specific terminology on the VAP form denies same-sex couples the ability to efficiently establish the intended parent-child relationship, and is therefore, not inclusive of all family structures. The bill did not make it out of Committee in the 2022 legislative session.

The ACLU of Nebraska has also filed a lawsuit requesting a declaration that DHHS must apply state law and regulations related to VAPs without regard for the gender of the acknowledging parent. The lawsuit, filed on behalf of two mothers who have been unable to establish parentage to their sons through the available methods in Nebraska, underscores the harm of laws and procedures that only work for one kind of family, and the necessity that Nebraska laws ensure the equal treatment for families with same-sex parents. Without a change, same-sex families are unable to protect their most precious rights to parent due to the gender-specific language that does not support the ever-changing face of families.

In conclusion, changing the VAP form to gender-neutral language would remove a barrier and provide a proven and effective way to protect families, and the parent-child relationship. Significant rights and obligations attach to parentage presumptions, and changes to Nebraska law to ensure clarity and alignment with modern family structures are needed. Reproductive technology permits the creation of families that look beyond gender and a child’s biological connections. It’s time to shift the focus to the parental rights and financial obligations at stake, the intended family structure, and the child’s best interests. 

Endnotes

- 1 Jessica Feinberg, *A Logical Step Forward: Extending Voluntary Acknowledgments of Parentage to Female Same-Sex Couples*, 30 YALE J.L. & FEMINISM 99, 101 (2018).
- 2 137 S.Ct. 2075 (2017).
- 3 See Abbi Swatworth, *Guidance on Same-Sex Couples Adopting*, OUTNEBRASKA (Nov. 16, 2015), <https://outnebraska.org/guidance-on-same-sex-couples-adopting/>.
- 4 Neb. Rev. Stat. § 43-1414.
- 5 263 Neb. 365, 369 (2002).
- 6 *Latham v. Schwerdtfeger*, 282 Neb. 121 (2011).
- 7 *Windham v. Griffin*, 295 Neb. 279, 286 (2016).
- 8 *Id.*

- 9 Leslie Joan Harris, *Voluntary Acknowledgments of Parentage for Same-Sex Couples*, 20 Am. U. J. Gender, Soc. Pol’y & L. 467, 475 (2012).
- 10 45 CFR § 302.70(a)(5); 45 C.F.R. § 303.5(g); 42 U.S.C. § 666(a)(5)(D)(ii)(I).
- 11 See OFF. CHILD SUPPORT ENFT, PRELIMINARY REPORT FY 2009 (2010), <https://www.acf.hhs.gov/css/report/fy-2009-annual-report-congress>.
- 12 Feinberg, *supra* note 1, at 99.
- 13 James J. Vedder & Brittney M. Miller, *Presumptions in Paternity Cases: Who Is the Father in the Eyes of the Law?*, Fam. Advoc., Spring 2018, at 26.
- 14 *Tyler F. v. Sara P.*, 306 Neb. 397, 406 (2020).
- 15 *In re Adoption of Jaelyn B.*, 293 Neb. 917 (2016).
- 16 Neb. Rev. Stat. § 43-1409; see *Cesar C. v. Alicia L.*, 281 Neb. 979 (2011); *Tyler F. v. Sara P.*, 306 Neb. 397 (2020).
- 17 Neb. Rev. Stat. § 43-1409.
- 18 *Tyler F.*, 306 Neb. 397; *Benjamin M. v. Jeri S.*, 307 Neb. 733 (2020).
- 19 Harris, *supra* note 7, at 479.
- 20 Feinberg, *supra* note 1, at 118.
- 21 *Id.* at 101.
- 22 *Id.*
- 23 Harris, *supra* note 7, at 482.
- 24 *Answers About VAP*, GLAD (Jan. 2022), https://www.glad.org/voluntary-acknowledgment-of-parentage/#_edn2.
- 25 *Id.*
- 26 *Id.*
- 27 Feinberg, *supra* note 1, at 127.
- 28 *Id.*

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