LGBTQIA+ & ART Parentage Law Updates

(aka Same-sex Parentage with a Focus on Glover)

Nicholas Cipriani American Inn of Court
May 7, 2025

Overview of Program

1. Evolution of parentage laws
2. Discussion of in loco parentis – including recent caselaw and third-party status
3. Review the pathways to establish parentage prior to *Junior* with case law information:
    - Marital presumption
    - Parentage by Estoppel
    - Contract

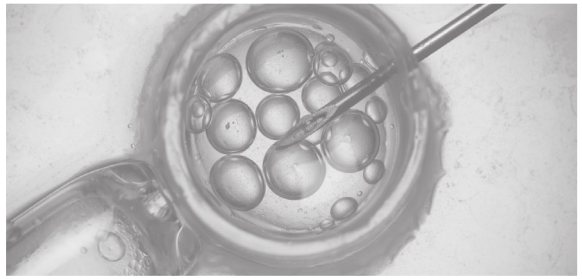
1. Details of *Glover v. Junior* & Analysis of the final decision
2. Questions & Discussion

Common law has created the legal framework in PA

- Pennsylvania has not adopted any form of the Uniform Parentage Act
- Pennsylvania has no statutes regulating or defining Assisted Reproductive Technology
- Pennsylvania has no statute that defines the word “Parent”
- Administrative Law through the Department of Health has created procedures for birth registrations for ART

Major Events Shaping the Law

These advances medically, legally, and socially helped shape families and the law



ASSISTED REPRODUCTIVE TECHNOLOGY medical advances become more available to LGBTQ families

ADOPTION creates a legal procedure to establish two full legal parents for children parented by LGBTQ couples

SAME-SEX MARRIAGE makes LGBTQ families more socially acceptable and legally protected

Evolution of LGBTQ+/ART Parentage Laws in Pennsylvania

2001

TB v. LRM

PA Supreme Court rules in **loco parentis standing in custody** applies to former same-sex partner of the biological mother

2002

In Re RBF & RCF

PA Supreme Court rules the PA Adoption Act permits **second-parent adoption** for same-sex couples

2002

LSK v. HAN

PA Superior Court found former partner of biological mother liable for child support under **doctrine of equitable estoppel** after she was awarded custodial rights

2007 & 2015

Fergusen v. McKiernan & In Re Baby S

Appellate courts rule **parentage by contract** applies to sperm donor contracts (Fergusen) and surrogacy contracts (Baby S)

2019

In Re AM

PA Superior Court rules **presumption of paternity** is equally applicable to same-sex marriages as it is to opposite-sex marriages

2025

Glover v. Junior

PA Supreme Court adopts **parentage by intent** for children conceived through ART

Categories of Methods of Establishing Parentage

1. In Loco Parentis
2. Marital Presumption
3. Estoppel
4. Contract
5. Intent

In Loco Parentis

FOR ANY THIRD PARTY (NON-PARENT)

23 Pa.C.S. § 5324

In loco parentis (ILP) as a basis of standing is the second option and can apply to any person, whether or not the person has a biological or other documented legal parentage.

To have ILP Standing a third party must show the following:

1. the assumption of parental status;
2. the discharge of parental duties; and
3. the consent and knowledge of the parent.

Important Considerations

FOR IN LOCO PARENTIS

- These cases are VERY fact specific
- ILP cannot occur without the consent of the parent.
- Implied consent is not permissible.
- Presumption remains in favor of a Parent vis-a-vis a Third Party.
- Definition of “lawful” parent has evolved over time (same-sex couple and reproductive technology options) but it remains a stringent test to overcome a parental presumption.

Standing Challenges

Pa. R.C.P. 1915.5

(a) Question of Jurisdiction, Venue, or Standing

(1) A party shall raise jurisdiction of the person or venue by preliminary objections.

(2) A party may raise standing by preliminary objections or at a custody hearing or trial.

(3) The court may raise standing sua sponte.

(4) In a third-party plaintiff custody action in which standing has not been resolved by preliminary objections, the court shall address the third-party plaintiff's standing and include its standing decision in a written opinion or order

* Subsections (3) and (4) were added after the 2020 amendment of 23 Pa.C.S. Sec. 5324

In Loco Parentis

MAJOR CASES

1. *Gradwell v. Strausser*, 610 A.2d 999 (Pa. Super. 1992) - Grandparent
2. *J.A.L. v. E.P.H.*, 682 A.2d 1314 (Pa. Super. 1996) - Same-sex Partner
3. *Argenio v. Fenton*, 703 A.2d 1042 (Pa.Super. 1997) - Grandparent
4. *R.M. v. Baxter*, 777 A.2d 446 (Pa. 2001) - Grandparent
5. *T.B. v. L.R.M.*, 786 A.2d 913 (Pa. 2001) - Same-sex Partner
6. *Peters v. Costello*, 891 A.2d 705 (Pa. 2005) - Non-biological Grandparent
7. *K.W. v. S.L. & M.L.*, 157 A.3d 498 (Pa.Super. 2017) - Pre-adoptive Parents
8. *M.J.S. v. B.B. v. B.B.*, 172 A.3d 651 (Pa.Super. 2018) - Grandparent
9. *A.J.B. v. A.G.B.*, 180 A.3d. 1263 (Pa. Super. 2018) - Same-sex Ex-wife
10. *C.G. v. J.H.*, 193 A.3d 891 (Pa. 2018)

Marital Presumption

HISTORY

Legal principle that assumes a child born to a married woman is the child of her spouse.

Based on the policy justification of preserving the marriage and the family unit.

Over the years, the courts have generally been narrowing the application of the marital presumption.

Marital Presumption

Presumption of paternity prevails if:

1. No proof of non-access and/or impotency AND
2. The family remains intact up to and beyond the birth of the child

GOOD LAW UNTIL 12 DAYS AGO

Marital Presumption

APPLICATION TO SAME SEX COUPLES

In the Interest of A.M., 223 A.3d 691 (Pa. Super. 2019)

Holding: marital presumption applies to same-sex couples too.

Marital Presumption

Sitler v. Jones, No. 37 MAP 2024 (decided April 25, 2025)

“The rigidity and irrefutability of the presumption is nonetheless overinclusive, an ill fit for modern social and scientific realities.”

****NEW TEST ****

Potential Father may rebut presumption by proving:

1. Reasonable possibility he is the father.
2. Paternity test will serve the best interest of the child, “with due consideration for the interests of the adults whose parental rights are at stake.”

CLEAR AND CONVINCING EVIDENCE STANDARD

TAKEAWAYS: Easier to rebut the presumption

Best interest of the child analysis added

Parentage By Estoppel

Major cases:

1. *Brinkley v. King*, 701 A.2d 176 (Pa. 1997)
2. *Fish v. Behers*, 741 A.2d 721 (Pa. 1999)
3. *S.M.C. v. C.A.W.,* 221 A.3d 1214 (Pa. Super. 2019)
4. *K.E.M. v. P.C.S.,* 38 A.3d 798 (Pa. 2012)
5. *L.S.K. v. H.A.N.*, A.2d 87 (Pa. Super. 2002)

Parentage by Estoppel

“The doctrine of estoppel embodies the fiction that, regardless of biology, in the absence of marriage, the person who cared for the child is the parent.” Citing *Trojak,* 634 A.2d.

While the court may have called this a “fiction” the doctrine boils down to the idea that a child who has had an adult act as, and put themselves out as a child’s parent deserves to have a continued right to contact with and support from that parent.

This doctrine works well with the “best interest of the child” standard.

Parentage By Contract

CONTRACT CASES & PUBLIC POLICY

“Generally, a clear and unambiguous contract provision must be given its plain meaning unless to do so would be contrary to a clearly expressed public policy”
Eichelman v. Nationwide Ins. Co.

What is contrary to public policy?

- Judiciary says it has very limited power here and that this is really a legislative task.
- Only when a given policy is so against public health, safety, morals, or welfare can the court step in and make a policy judgment.
- Universally adopted changes; only the clearest of cases.

Whether a contract is void as against public policy is a question of law

Ferguson v. McKiernan

Facts: Mr. McKiernan and Ms. Ferguson enter into a verbal agreement that he would donate sperm through a clinic for Ms. Ferguson's donor insemination. They agree that Mr. McKiernan will remain anonymous to the kids, and would not seek custody and that Ms. Ferguson would not file for support.

Superior Court: This verbal agreement violates public policy

Supreme Court: No it doesn't.

Important Reasoning: This verbal agreement is not a violation of public policy because that claim is "unsustainable in the face of the evolving role played by alternative reproductive technologies in contemporary American society"

But for this contract, these kids would not have been born.

In Re Baby S.

Sherri Shepherd Surrogacy Case

- SS + LS contract with a company to begin surrogacy process. JB becomes their surrogate and they all enter into a contract that SS + LS will be the legal parents of the baby, JB will have no custodial rights. Very specific provisions for terminating this contract.
- At 5 months pregnant, SS and LS begin having marital problems. SS refuses to sign documents. Atty withdraws.
- JB files a *Pet. For Assisted Conception Birth Registration and to Establish Parentage* to name SS and LS on birth certificate as legal parents. Trial court grants request. (July 17, 2014)
- JB has Baby S, gets listed as Mother. LS not listed as Father. He takes Baby S and moves back to California. (Aug 5, 2014)
- SS then files a reply and new matter saying that this gestational carrier agreement is unenforceable. (Aug 12, 2014)
- Trial court has two days of hearings and says that SS and LS are Baby S's legal parents, SS is in breach of contract, atty fees (March/April 2015)

Is the gestational carrier agreement a violation of public policy?

SS: Argues that applying Ferguson here is misplaced because it had nothing to do with establishing parentage. Parentage can only be established in two ways: biological or adoption. The legislature is the only one who can establish a third way and they declined to do so in 2005 when a potential law was proposed. The only way for SS to become Baby S's mom is to terminate JB's rights and move through formal adoption.

Superior Court: upholds Trial Ct. - Contract is valid.

Dept of Health has a 20 year old directive designed to facilitate assisted conception birth certificates (what JB filed while pregnant). This admin procedure exists, the Commonwealth routinely enters orders authorizing this, it's a ubiquitous practice.

Not contrary to public policy since there is a vastly growing acceptance of ART.

Intent-Based Parentage

Adopted by Pennsylvania Supreme Court in Glover v. Junior

Precursor to Glover v. Junior – C.G. v. J.H.

- C.G. v. J.H., 193 A.3d 891
- Judge Palmer and attorneys for C.G. argued for intent-based parentage on behalf of non-biological parent
- Same sex partner, C.G., who was not biologically related to her partner's child, sought parental custody rights to the child after they separated. The child was conceived and born while the parties were in a relationship, though not married, and the child lived with both parties for the first 5 years of her life.
- PA Supreme Court did not adopt this pathway to parentage, as they were bound by factual findings of trial court, which determined that the parties did not intend that C.G. be a parent to the child

C.G. v. J.H.

[N]othing in today's decision is intended to absolutely foreclose the possibility of attaining recognition as a legal parent through other means. However, under the facts before this Court, this case does not present and opportunity for such recognition, **as the trial court found as fact that the parties did not mutually intend to conceive and raise a child, and the parties did not jointly participate in the process.**

C.G. v. J.H.

"...Although S.S. was married to biological Father, the court grounded its reasoning in the principles espoused in the case law involving surrogacy agreements, not the presumption of parentage married persons enjoy. *Id.* **There is nothing to suggest in our case law that two partners in a same-sex couple could not similarly identify themselves each as intended parents, notwithstanding the fact that only one party would be biologically related to the child**. However, this issue is not before the Court, and we are not tasked with defining the precise parameters of contracts regarding assistive reproductive technology. Likewise, the doctrine of parentage by estoppel, which Justice Wecht contends heterosexual-sex couples may avail themselves of to seek standing but which same-sex couples may not, is not implicated by the facts before this Court."

C.G. v. J.H.

Justice Wecht Concurrence

But suppose that the members of a same-sex couple decide that one partner will become pregnant *via* ART and sperm donation; it is entirely foreseeable that only the partner being impregnated would contract with the ART facility. The second partner, who would have no biological connection to the child, would have no contract establishing a claim to parentage. Suppose further that no adoption is formalized, and that the couple separates after years in which both parties diligently raise and lovingly support the resulting child. Under the Majority's approach, the second partner has no claim to parent status and no standing to pursue any custody rights. Such a result is by no means dictated by the terms or spirit of our custody standing statute, which speaks in this regard only of "[a] parent of the child", thus begging the question now at hand. *See* 23 Pa C.S. § 5324 (1). As well, such a result supplants the best interests analysis, eliminates the focus on the child's needs, and fails entirely to comport with contemporary family realities and especially the circumstances of Pennsylvanians who are parenting in same-sex relationships…

C.G. v. J.H.

Justice Wecht Concurrence Continued

… But, wait, you say. The second partner in the scenario imagined above almost certainly would enjoy standing in custody under an *in loco parentis* theory. *See* 23 Pa C.S. § 5324(2). The problem is not so simple. First, if the couple separates shortly after (or before) the child's birth, the second partner -- who fully intended to be a parent (and this with the first partner's knowledge and consent) -- will have no claim to *in loco parentis* standing, there having been insufficient time for assumption of parental status and discharge of parental duties. *See T.B.* , 786 A.2d at 916-17. Second, and more significantly, resort to an *in loco parentis* approach concedes the parentage claim, which is the very issue that is at bar here. The point is that the second partner in these scenarios should be considered a parent for purposes of standing in custody. *In loco parentis* generally is considered a species of standing sought by *third* parties.

Glover v. Junior

Facts:

- Same-sex couple
- Married and conceived via IVF
- Chose sperm donor together
- Junior, non-biological parent, named on all contracts as “partner” or “co-intended parent”
- Attended all appointments and did some hormone injections
- Parenting plan
- Baby announcement/shower/name
- Began procedures for second parent adoption and executed affidavits
- In March 2022, Glover informs Junior she no longer intends to proceed with adoption
- Glover files for divorce April 18, 2022
- Child is due May 2022

Glover

Procedure:

Junior filed (1) petition for pre-birth establishment of parentage and (2) emergency petition for pre-birth establishment of parentage

- Confirmed as legal parent
- Notification of labor/meet child at hospital (agreed)
- Junior to be named parent on birthing parent worksheet and appear on child's birth certificate

Granted by trial court on May 4, 2022 after hearing

Glover Appeals

- Did the trial court err as a matter of law when it found that Glover waived any challenges to the court's exercise of its jurisdiction and to its being a proper forum for a decision regarding Junior's rights as a legal parent?
- Did the trial court err when it found that the issue of parentage was ripe for determination?
- Did the trial court act within its discretion and err as a matter of law when it confirmed pre-birth legal parentage of Junior?
- Application for Stay
- Trial court opinion – Junior is a parent based on contract principles and urged appellate courts to adopt intent-based parentage, without addressing other pathways to parentage; stated jurisdictional challenges were waived and/or the court had jurisdiction based on equity powers of the family court; and the case was ripe because there was an actual case and controversy between the parties, citing *Baby S.* regarding specific scenario of pre-birth establishment of parentage between married couple.

Superior Court

- 3 judge panel
  - Reversed trial court opinion
    - No contract existed
  - Dissenting opinion
    - Oral contract, estoppel principles, opportunity for intent-based parentage
- Reargument *En Banc*
  - Trial court had jurisdiction and authority
  - Contract established parentage
  - Adopted intent-based parentage
  - Essentially unanimous with 3 judges concurring in the result and joining a concurring opinion
    - Contract-based parentage was sufficient and there was no authority to adopt intent-based parentage

American Academy of Matrimonial Lawyers
GLBTQ Legal Advocates & Defenders
National Center for Lesbian Rights
ACLU
ACLU of Pennsylvania
Family Equality
Mazzoni Center
Philadelphia Family Pride
COLAGE
Allegheny County Bar Association
Pennsylvania Bar Association
Philadelphia Bar Association
Cordell & Cordell, P.C.

Supreme Court

1. Did the Superior Court's *en banc* decision conflict with the holding of the Supreme Court of Pennsylvania in *C.G. v. J.H.,* 193 A.3d 891 (Pa. 2018), by concluding the spouse of the biological mother of a child conceived through Assisted Reproductive Technology, who bore no biological relationship to the child, had a right to parentage of the child, where no contract term establishing the spouse as a legal parent existed and the Superior Court applied "intent-based" parentage, to reach its conclusion that an oral contract established the spouse as a legal parent?
2. Should the doctrine of "intent-based" parentage be adopted in Pennsylvania in the context of a child conceived through Assisted Reproductive Technology?
3. Did the Superior Court err in holding the spouse of the biological parent of a child conceived through Assisted Reproductive Technology, who bore no biological relationship to the child, had a right to legal parentage of the child as a matter of equity under the circumstances of this case?

Supreme Court Decision

- March 20, 2025

- Addressed contract first and found lacking evidence of required offer and acceptance and notes a “bargained-for exchange” is not common practice in deciding to conceive a child
- Marital presumption did not apply
- Equitable estoppel was not developed & no best interests analysis
- And…

Supreme Court Decision

- Adoption of intent-based parentage
  - In line with evolving case law precedent
  - Protects rights of parents
  - Protects children
  - Consistent with public policies of Commonwealth
  - Fills gaps from prior 4 pathways to parentage (biology, adoption, contract, equity)
  - In line with case law in other states
  - Consistent with equitable estoppel and other parentage doctrines, already driven by intent

Glover

“[C]ourts undertaking an intent-based parentage analysis should consider all evidence from all relevant time periods – including, when applicable, pre-conception, during conception, during gestation, during birth, and post-birth – to determine whether the parties jointly undertook ART intending to conceive and co-parent the child together.”

Questions & Discussion

[J-58-2024] [MO: Wecht, J.]
IN THE SUPREME COURT OF PENNSYLVANIA
MIDDLE DISTRICT

STEVEN M. SITLER,	:	No. 37 MAP 2024
	:	
Appellant	:	Appeal from the Order of the
	:	Superior Court at No. 1402 MDA
	:	2023, entered on March 5, 2024,
v.	:	Affirming the Order of the
	:	Columbia/Montour County Court of
	:	Common Pleas, Civil Division, at No.
ALEXAS JONES,	:	2023-MV-22-MV entered on
	:	September 11, 2023
Appellee	:	
	:	SUBMITTED: July 31, 2024

CONCURRING AND DISSENTING OPINION

JUSTICE DONOHUE **DECIDED: April 25, 2025**

I agree with the Majority's decision to overrule decades of this Court's jurisprudence that made the presumption of paternity irrebuttable in the context of an intact marriage. However, I dissent from its perpetuation of this Court's steadfast refusal to accept the policy decision of the General Assembly that the presumption of paternity is rebuttable by scientific evidence. I would follow the direction of our Legislature and, when and if appropriate, instruct the trial court to conduct genetic testing on Sitler and the child. If the genetic testing establishes that Sitler is the biological father, his standing in the custody matter that he commenced is established. The custody court must then determine, based on the best interests of the child, whether Sitler will enjoy custody or visitation rights.

Instead, the Majority continues to legislate by devising a multifactor test to determine whether genetic testing will be permitted to rebut the presumption based on

some notion that this Court should be in the business of hiding the truth about genetic parentage. In doing so, the Majority conflates establishing genetic paternity with the right to custody or visitation. I cannot join this opinion. Over sixty years ago, in the Uniform Act on Blood Tests to Determine Paternity ("Uniform Act on Blood Tests"),[1] the General Assembly announced its intention that scientific testing shall be available to litigants in civil and criminal matters to establish paternity. The General Assembly established absolutely that the result of scientific testing overcomes the presumption of paternity. 42 Pa.C.S. § 5104 (c), (g). The time is long overdue that we abide by the will of the Legislature on this policy choice and abandon our arrogant adherence to the common law of this Court.

Historically, the law presumed that a child born to a married woman is the child of the woman and her husband. *Dennison v. Page*, 29 Pa. 420, 422 (1857) ("A child born in wedlock, though born within a month or a day after marriage, is legitimate by presumption of law," and "this presumption can only be rebutted by clearly proving that no sexual intercourse occurred between the two at any time when the child could have been begotten."). It is a concept originally tied to coverture, the notion that "once a woman married, her legal existence disappeared[,]"[2] with one Justice crassly comparing it to the "plain Saxon[,] … 'who bulleth my cow the calf is mine.'" *Page v. Dennison*, 1 Grant 377 (Pa. 1856) at 380 (Lowrie, J., dissenting).[3] The presumption was formerly referred to as the "presumption of legitimacy," and was thought of as "a tremendously strong

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[1] Act of July 13, 1961, P.L. 587, No. 286, §§ 1-9, recodified and adopted as 23 Pa.C.S. § 5104.

[2] *Allegheny Reproductive Health Center v. DHS*, 309 A.3d 808, 870 (Pa. 2024) (internal citation omitted).

[3] *See also Brinkley v. King*, 701 A.2d 176, 185 (Pa. 1997) (Newman, J., concurring and dissenting) (expressing the view that "the presumption that a child born during **coverture** is a child of the marriage has lost its place in modern society") (emphasis added).

presumption that children are legitimate[,]" which could be overcome "only by proof of facts establishing non-access or that the husband was impotent or had no sexual intercourse with his wife at any time when it was possible in the course of nature for the child to have been begotten." *Cairgle v. Am. Radiator & Standard Sanitary Corp.*, 77 A.2d 439, 442 (Pa. 1951) (internal citations omitted). Underlying the legal fiction were two rationales: shielding children from the stigma attached to illegitimacy and "the preservation of the marriage and the family unit." *B.C. v. C.P.*, 310 A.3d 721, 730 (Pa. 2024) (collecting cases). This Court opined in 1957 that "[t]his presumption is essential in any society in which the family is the fundamental unit." *Commonwealth ex rel. O'Brien v. O'Brien*, 136 A.2d 451, 453 (Pa. 1957).

In 1978, the General Assembly announced that "all children shall be legitimate," and thus marked a significant departure from the legal disadvantages that previously attached to being born "out of wedlock." Act of November 26, 1978, P.L. 1216, Section 1; *see* 23 Pa.C.S. § 5102. Once the General Assembly eliminated the "illegitimacy" designation, this Court avoided using the term "legitimacy" as well. This logic carried over into consideration of the presumption of legitimacy, and in 1990, the Court stated that the "phrase 'presumption of legitimacy' is now meaningless." *John M. v. Paula T.*, 571 A.2d 1380, 1383 n.2 (Pa. 1990). Though the Court deemed the phrase meaningless, it retained the principle underlying the presumption of legitimacy and rebranded it. As then-Justice Saylor explained in *Strauser v. Stahr,* 726 A.2d 1052, 1054 n.1 (Pa. 1999), this Court now refers to the "presumption that a child born to a married woman is a child of the marriage" as the presumption of **paternity**. *Id*. (citing *John M.*, 571 A.2d at 1383 n.2); *see also B.C.*, 310 A.3d at 730.

As early as 1951, the General Assembly established statutory authority for a trial court to order blood tests to determine paternity. Act of May 24, 1951, P.L. 402, § 1. The

provision applied to "proceeding[s] to establish paternity," authorized courts to order "blood grouping tests by a duly qualified physician[,]" and provided for the admissibility of the test results "but only in cases where definite exclusion of the defendant is established." *Id*. This Court read the provision narrowly to allow requests for testing from defendant-husbands seeking to raise defenses of non-paternity to charges for "fornication and bastardy" or "actions for neglect to support a bastard." *O'Brien*, 136 A.2d at 452-53 (stating that the provision applies only to proceedings "brought to **establish** paternity"). It did not, the Court explained in the *O'Brien* case in 1957, apply to the action for support of a child born during wedlock because "paternity has already been established in the eyes of the law by operation of the presumption of the legitimacy of children born during wedlock." *Id.* at 453. The Court justified the narrow reading of the authority to order "blood grouping tests" on the language of the provision, which it contrasted with the "Uniform Act on [B]lood [T]ests to [D]etermine [P]aternity" (which had not yet been adopted in Pennsylvania) and was viewed as having much greater breadth. *Id*.

In 1961, the General Assembly adopted the Uniform Act on Blood Tests,[4] thus eliminating the *O'Brien* Court's rationale for treating the legislative command as a narrow one. It applies to actions where "paternity, parentage or identity of a child is a relevant fact," and it authorizes the court to order the "mother, child and alleged father to submit to blood tests." *Id*. The Uniform Act on Blood Tests was recodified in its same form as part of the Judiciary Act of 1976,[5] then again recodified and consolidated in 1990 as 23 Pa.C.S. § 5104, and provides:

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[4] Act of July 13, 1961, P.L. 587, No. 286, §§ 1-9.

[5] Act of July 9, 1976, P.L. 586, No. 142, § 2, as amended 28 P.S. §§ 6131-6137.

§ 5104. Blood tests to determine paternity

(a) Short title of section.--This section shall be known and may be cited as the Uniform Act on Blood Tests to Determine Paternity.

(b) Scope of section.--

(1) Civil matters.--This section shall apply to all civil matters.

* * *

(c) Authority for test.--In any matter subject to this section in which paternity, parentage or identity of a child is a relevant fact, the court, upon its own initiative or upon suggestion made by or on behalf of any person whose blood is involved, may or, upon motion of any party to the action made at a time so as not to delay the proceedings unduly, shall order the mother, child and alleged father to submit to blood tests. If any party refuses to submit to the tests, the court may resolve the question of paternity, parentage or identity of a child against the party or enforce its order if the rights of others and the interests of justice so require.

(d) Selection of experts.--The tests shall be made by experts qualified as examiners of blood types, who shall be appointed by the court. The experts shall be called by the court as witnesses to testify to their findings and shall be subject to cross-examination by the parties. Any party or person at whose suggestion the tests have been ordered may demand that other experts qualified as examiners of blood types perform independent tests under order of court, the results of which may be offered in evidence. The number and qualifications of experts shall be determined by the court.

(e) Compensation of experts.--The compensation of each expert witness appointed by the court shall be fixed at a reasonable amount. It shall be paid as the court shall order. Subject to general rules, the court may order that it be paid by the parties in such proportions and at such times as it shall prescribe or that the proportion of any party be paid by the county and that, after payment by the parties or the county, or both, all or part or none of it be taxed as costs in the action. Subject to general rules, the fee of an expert witness called by a party but not appointed by the court shall be paid by the party calling him, but shall not be taxed as costs in the action.

> **(f) Effect of test results.--**If the court finds that the conclusions of all the experts as disclosed by the evidence based upon the tests are that the alleged father is not the father of the child, the question of paternity, parentage or identity of a child shall be resolved accordingly. If the experts disagree in their findings or conclusions, the question shall be submitted upon all the evidence.
>
> **(g) Effect on presumption of legitimacy.[6]--**The presumption of legitimacy of a child born during wedlock is overcome if the court finds that the conclusions of all the experts as disclosed by the evidence based upon the tests show that the husband is not the father of the child.

23 Pa.C.S. § 5104.

The Majority recognizes the Uniform Act on Blood Tests, but finds that case law and science require the Court to continue to disregard not only its text but also the express public policy stated in it that scientific testing trumps the presumption of paternity.

Historically, our case law virtually ignored the saliency of the Uniform Act on Blood Tests. It is ironic that the Majority finds no problem in overruling decades of precedent in order to reach its framework for rebutting the presumption of paternity in an intact

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6 Technical "phrases and such others as have acquired a peculiar and appropriate meaning or are defined in this part, shall be construed according to such peculiar and appropriate meaning or definition." 1 Pa.C.S. § 1903(a). The "presumption of legitimacy" is a technical phrase that was given a peculiar and appropriate meaning over time. At the time this statute was first enacted in 1961, the presumption of legitimacy was that a child born to a married woman was a child of the spouse of the mother. *Cairgle*, 77 A.2d at 442; *see also John M.*, 571 A.2d at 1383 n.2 (referring to it as presumption that "a child born to a married woman is a child of the marriage"). As described, supra pp. 3-4, following the legislative announcement that no child shall be illegitimate, in 1978 the Court determined that the phrase "presumption of legitimacy" was rendered meaningless, *John M.*, 571 A.2d at 1383 n.2, and rebranded it as the presumption of paternity. Although this Court was free to re-name the presumption, whether it is called a presumption of legitimacy or a presumption of paternity, as used in Section 5104(g), it clearly relates to the presumption that a child born in wedlock is the child of the mother's husband. That is the presumption that is rebutted by definitive scientific blood testing. According to Section 5104, the question of whether the presumption of paternity is rebutted is answered by the results of the scientific tests.

marriage,[7] but finds itself bound to the deeply flawed case law that arrogantly disregards an act of the Legislature establishing the method to rebut the presumption of paternity. A brief review of this problematic jurisprudence makes the case for this Court to abrogate it and finally follow the lead of our legislative branch.

In continuing to disregard the clear statutory command, the Majority states that *John M.* "rendered the Uniform Act on Blood Tests substantially irrelevant[,]" Majority Op. at 9 n.36, as if it is legitimate for this Court to do so. In *John M.*, this Court addressed the Uniform Act on Blood Test's application to a case involving an assertion of the presumption of paternity. *John M.*, 571 A.2d 1380.[8] This Court acknowledged that the Uniform Act on Blood Tests had relaxed the presumption of paternity to the extent that it established that the presumption is overcome "if the court finds that the conclusions of all the experts as disclosed by the evidence based upon the tests show that the husband is not the father of the child." *Id*. at 1385. The *John M*. majority confined its holding to the

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[7] *John M.,* 571 A.2d 1380; *Strauser*, 726 A.2d 1052; *Jones*, 634 A.2d 201; *B.C.*, 310 A.3d 721.

[8] John, an asserted biological father, sought custody and visitation of a three-year-old child, when the child's mother suddenly restricted his access. Based on the mother's voluntary consent, Human Leukocyte Antigen ("HLA") blood testing was performed on the mother, the child, and the asserted biological father as provided in the Uniform Act on Blood Tests. *John M.*, 571 A.2d at 1382. Although by 1989 the Legislature was addressing paternity testing in terms of genetic testing, 23 Pa.C.S. § 4343, blood type testing including HLA testing was still prevalent. *Cable v. Anthou*, 699 A.2d 722, 723 (Pa. 1997) (addressing request for HLA testing and referring to testing by buccal swab as "relatively new"). The results of the HLA testing in *John M.* were inconclusive, and pursuant to the statute, the presumption that the mother's husband was the father of the child was not rebutted. John sought a court order to compel the husband (i.e., the presumptive father) to submit to blood testing, relying on Pa.R.C.P. 4010(a) regarding court orders for parties to submit to physical and mental examinations and the Uniform Act on Blood Tests. This Court held that John failed to establish "good cause" because he "had introduced no evidence that would come close to overcoming the presumption that the [child] was a child of the marriage under the traditional standards." *John M.*, 571 A.2d at 1383.

"precise issue raised by the parties"[9] and held that the Uniform Act on Blood Tests could not allow John (the putative father) to compel the presumptive father to submit to blood tests because it only envisions ordering "'the mother, child **and alleged father** to submit to blood tests.'" *Id*. at 1385 (citing 42 Pa.C.S. § 6133 (1976) (repealed and reenacted as 23 Pa.C.S. § 5104 in 1990)) (emphasis in original).[10]

In open defiance of the mandate of the General Assembly in the Uniform Act on Blood Tests, Chief Justice Nix authored a concurring opinion garnering unanimous support to state, in dicta, that the presumption of paternity is absolute, "the statutory provision … notwithstanding." *John M.*, 571 A.2d at 1389 (Nix, C.J., concurring). He stated that "[i]t would also follow that [John] is not entitled to **compel** either the mother or the child to undergo testing." *Id*. at 1389 n.1. The unanimous concurrence thereby announced in dicta that the legislative branch could not provide the mechanism to overrule the common law presumption, an astounding proposition of law, but one that we unfortunately continue to follow.

When the *John M.* Court subordinated the Uniform Act on Blood Tests to the common law presumption of paternity, Majority Op. at 8, it engaged in the type of judicial legislation that had been decried, over a century earlier, with regard to the presumption

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[9] The *John M.* majority opinion starts with a caveat that the author "agrees with the views expressed" in Chief Justice Nix's Concurring Opinion, but that the Majority's holding "is confined to the precise issues raised by the parties[.]" *John M.*, 571 A.2d at 1381, at n.*.

[10] The Uniform Act on Blood Tests as codified in 42 Pa.C.S. §§ 6133-6137 was at issue in *John M.*, which was decided in 1990. In the same year, under the auspices of Judiciary Act Repealer Act, the Uniform Act on Blood Tests was recodified at 23 Pa.C.S. § 5104. The recodification contained minor grammatical and organizational changes. Its operative language remained the same. It is true that "when a court of last resort has construed the language used in a statute, the General Assembly in subsequent statutes on the same subject matter intends the same construction to be placed upon such language." 1 Pa.C.S. § 1922(4). The Legislature's recodification of the Uniform Act on Blood Tests in 1990, though it technically occurred after the *John M.* opinion was announced, was not a "subsequent statute on the same subject matter." It was the same statute, repositioned without the General Assembly's reconsideration of its content.

of paternity. *Page*, 1 Grant at 383 (Lowrie, J., dissenting) (criticizing the Majority's interpretation of the presumption by stating, "If this is not judicial legislation, then I do not understand the term"). The ongoing modern legislation from the bench is more troubling than that of a century ago given the brazenness of applying the presumption of paternity as a threshold question notwithstanding the Uniform Act on Blood Tests which expresses a clear policy in favor of the rebuttal of the presumption by way of scientific testing.

Based on *John M.*, this Court eradicated the trial court's statutory authority to order blood tests as established in the Uniform Act on Blood Tests in order to rebut the presumption of paternity. Despite the clear language of the statute, over the past thirty-five years, this Court has read into the Uniform Act on Blood Tests two threshold determinations: a "court may order blood tests to determine paternity only when the presumption of paternity has been overcome[,]" and "[o]nly when the doctrine of estoppel does not apply[.]" *Jones v. Trojak*, 634 A.2d 201, 206 (Pa. 1993) (citing *John M.*, 571 A.2d at 1380);[11] *see also Strauser*, 726 A.2d at 1054 (holding that because the alleged biological father could not overcome the presumption of paternity, blood tests establishing a 99.9% probability of the paternity for the alleged biological father were irrelevant). In *Strauser*, Justice Newman (joined by Justice Castille) dissented to express the view that the Majority's rejection of blood testing conflicts with the clear and express language of

[11] In *Jones*, without even mentioning the Uniform Act on Blood Tests, this Court addressed an appeal relating to the admissibility of blood test results, which the trial court had ordered to address a mother's claim for support. The mother sought support from the asserted biological father (Trojak), and he raised the presumption of paternity to argue that the mother's ex-husband was the presumptive father of the child. Trojak also argued that the mother was estopped from seeking support from him because she and her ex-husband had held the ex-husband out as the father. On appeal, this Court decided that the presumption of paternity must be rebutted before the trial court may order blood tests. There, the mother rebutted the presumption of paternity on the facts by showing that the marriage vows had been repudiated, and estoppel did not apply because the ex-husband/presumptive father did not accept the child as his own. *Jones*, 634 A.2d at 206-07. Therefore, the blood tests were necessary to resolve the child support claim.

the Uniform Act on Blood Tests providing that a court may compel blood testing and that the testing can rebut the presumption of paternity. *Strauser*, 726 A.2d at 1058 (Newman, J., dissenting). In response, the Majority retorted:

> In her dissenting opinion, Madame Justice Newman discerns a conflict between this holding and the Uniform Act on Blood Tests to Determine Paternity, now codified at 23 Pa.C.S. § 5104, which she views as codifying the public policy that blood testing may always be employed to rebut the presumption of paternity. Such position, however, has never commanded a majority of this Court. *See John M.,* 571 A.2d at 1385 (stating that "section 6133 of the Act [now 23 Pa.C.S. § 5104(c)] does not give the putative father the **right** to compel a presumptive father (husband) to submit to blood tests"); *see also John M.,* 571 A.2d at 1389 (Nix, C.J., concurring, and joined by all others) (declaring that "a third party who stands outside the marital relationship should not be allowed, for any purpose, to challenge the husband's claim of parentage").

Id. at 1056 n.2. While this is a true statement of the position of the Court, the explanation does nothing more than clarify that this Court has refused to follow the dictates of the statute that not only makes the presumption rebuttable, but also provides the mechanism for the rebuttal by way of blood tests.

The Uniform Act on Blood Tests obviated the need for this Court to struggle to determine when and how the presumption of paternity is rebutted. The structure of the provision illustrates the General Assembly's intention for courts to order testing, then to consider the effect of the results on the presumption of paternity. The General Assembly issued a clear command to use scientific testing to rebut the presumption of paternity. This Court has persistently ignored the mandate.

With regard to science, the Majority justifies disregarding the legislative mandate because Section 5104 "has not been amended to reflect scientific advances in genetic testing." Majority Op. at 8 & n.33 (citing *B.C.*, 310 A.3d 739-40 (Wecht, J., concurring)).

In *B.C.*, the same author indicated that "the current statute … is hopelessly outdated[]" because the statutory language commands court ordered blood tests and appointment of "experts qualified as examiners of blood types[.]" *B.C.*, 310 A.3d at 739 (citing 23 Pa.C.S. § 5104(d)). Justice Wecht opined that this was not "the most efficient scientific method for determining paternity." *Id*. Likewise, today, the Majority writes that the Uniform Act on Blood Tests "has not been amended to account for modern DNA testing" and cites to statutory language authorizing the court to order "**blood tests**[,]" Majority Op. at 9 n.37 (citing 23 Pa.C.S. § 5104(c) (emphasis added)), presumably contrasting the blood tests provided for under the Uniform Act on Blood Tests with DNA tests by buccal swabs. *See* Majority Op. at 14 (stating that DNA testing today is more accurate and "less intrusive than the blood tests of the 1980s"). The Majority also states its preference for genetic testing by buccal swab rather than by blood draw, but it does not explain how these considerations render obsolete the General Assembly's stated **policy** to use scientific testing to rebut the presumption of paternity.

The Majority is correct that the testing described in Section 5104 is not state of the art science for determining paternity. Blood type testing as is referred to in Section 5104(d) (referring to appointment of "experts qualified as examiners of blood types"), is no longer the most effective method to determine paternity. As explained by the Superior Court in *Reed v. Boozer*, 693 A.2d 233, 236 (Pa. Super. 1997), traditional blood type testing is less certain than DNA testing. *See also Stahli v. Wittman*, 603 A.2d 583, 585-86 (Pa. Super. 1992) (observing that genetic tests which specifically look at DNA "differ significantly from the blood cell antigen typing performed in the instant case[,]" and they have greater certainty than blood cell antigen tests). Generally, even advanced blood typing tests that include consideration of multiple inherited factors such as "ABO and R.H. factors, [and] M.N.S.," *Reed*, 693 A.2d at 238, are best used to exclude potential genetic

fathers whereas current marker-based methods of DNA analysis confirm the parental relationship with 99.99% accuracy.

Nonetheless, even if blood type testing as contained in Section 5104 does not reflect state of the art testing for paternity, the public policy espoused in Section 5104(g) is unambiguous. The General Assembly has not repealed Section 5104 or otherwise withdrawn its affirmative reliance on scientific testing to rebut the presumption of paternity. 23 Pa.C.S. § 5104(g). In light of this announced mandate that scientific testing rebuts the presumption of paternity, this Court does not have the authority to avoid scientific testing as the threshold mechanism to rebut the presumption. To effectuate the intention of the General Assembly, scientific testing must be used to rebut the presumption of paternity.

Today, scientific testing means marker-based methods of DNA analysis which can be accomplished through the use of buccal swabs. The Majority correctly concludes that the presumption of paternity should be rebuttable in the intact marriage scenario. In my view, instead of perpetuating the judicial preference for placing obstacles in the way of scientific proof of actual paternity, we are bound by the Legislature's statement of policy in the Uniform Act on Blood Tests to simply use science, i.e., genetic testing, to rebut the presumption.

Despite clear direction from the legislature, the Majority proceeds as if the Legislature has not spoken on the obstinate **judicial** preference for children being raised by married couples. Majority Op. at 19-20 ("In the absence of legislative action,[12] the presumption of paternity can protect the formation of families by married couples."). Instead of relying on genetic testing to rebut the presumption of paternity, the Majority

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[12] What the Majority actually means is the absence of its preferred "comprehensive statutory scheme to govern paternity determinations." Majority Op at 6. Again, this is based upon the misplaced notion that the Legislature cannot decide that scientific proof of paternity is enough to rebut the presumption.

enacts the following test to rebut the presumption of paternity when an asserted biological father, such as Sitler, seeks genetic testing to establish his paternity of a child born in wedlock for purposes of seeking custody:

> In order to determine the paternity of a child born in wedlock, courts first must determine whether the marriage is intact at the time of the paternity challenge. If so, then the presumption of paternity applies, and dictates that, regardless of biology, the mother's spouse will be the child's parent. However, the presumption may be rebutted if the putative father produces clear and convincing evidence that: (1) there is a reasonable possibility that DNA testing would reveal him to be the child's biological father; and (2) determining parentage based upon DNA testing serves the best interests of the child, with due consideration for the interests of the potential father as well as the interests of the wife and husband. If the court finds no threshold possibility of paternity, or determines that adjudicating paternity by DNA testing would disserve the relevant interests, then the presumption governs. But if the court finds a threshold possibility of paternity, and determines that the balance of interests lies in assigning paternity based upon the biological truth, the presumption must yield, and the court should order appropriate genetic testing to determine paternity of the child.

Majority Op. at 25-26. The Majority therefore vacates and remands for further proceedings consistent with its newly announced framework. *Id*. at 26.

At its core, the Majority's approach conflates the determination of genetics with the determination of custody. A genetic parent of a child may not have a viable claim entitling him to custody or requiring support payments. *See Ferguson v. McKiernan*, 940 A.2d 1236 (Pa. 2007) (holding that the mother's contractual release of known sperm donor—genetic father—from responsibility for support was enforceable). And a non-genetic parent of a child may have custody rights. *Id*. In a heterosexual monogamous family structure, the genetic parents to a child are often the only two persons entitled to custody.

However, there are also family structures where genetic parents do not have such rights, and the parents, through adoption, surrogacy, or otherwise, are not the genetic parents.[13]

In sum, genetic testing may reveal the biological truth, but it does not necessarily control the legal rights of the parties. *See, e.g.*, *In re Papathanassiou*, 671 S.E.2d 572, 577 (N.C. Ct. App. 2009) (stating that the genetic testing and "legitimation of a child is a separate and distinct issue from who shall have custody and control of the child"). It would be misguided to focus on extreme situations where a determination of genetic parentage may seem detrimental.[14] As the North Carolina Court of Appeals explained, these concerns "can be, and properly are, addressed in other proceedings, such as custody, adoption or termination of parental rights, where the best interest of the child is paramount." *Id*.

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[13] I cannot cling to the notion that it is the public policy of this Commonwealth that children's interests are necessarily served by "the stability of an intact family unit" led by married parents. Trial Court 1925(a) Opinion, 10/10/2023, at 1. I would emphasize that families regularly flourish under non-traditional configurations and that families regularly falter under traditional ones. Nowhere is it assured that a stable family unit, defined as one involving a married couple, will remain as such for any prescribed period of time let alone the entirety of a childhood. Ultimately, it is the legislative prerogative to identify and implement the Commonwealth's policy preference, especially in an arena as sensitive as marriage and child-rearing. The Legislature provided for no fault divorce, 23 Pa.C.S. § 3301(d), making severance of marriages relatively easy; it endorsed scientific testing to determine paternity allowing for the potential involvement of a third party in a married couple's family unit. As to the preferred structure of the family unit, the clearest statement of the Legislature is that in all cases, the best interests of the child must prevail in custody matters. 23 Pa.C.S. § 5328. Given the co-existence of the statutes that recognize expedient termination of marriages, the recognition of a third party's genetic paternity to a child born to a married couple and the dominance of the child's best interests in custody matters, I am hard pressed to find a legislative declaration that it is the clear public policy of the Commonwealth that marriages involving children must be preserved.

[14] For example, to conclude that a father who is a convicted murderer and in prison for life without parole should not be established as the biological father misses this point. He may never secure custody rights, but the fact of his biological parentage need not be concealed to attain this result.

That is not to say that there are not preliminary inquiries that a trial court must make prior to ordering genetic testing. Section 5104(c) of the Uniform Act on Blood Tests authorizes a court to order blood testing "upon motion of any party to the action made at a time so as not to delay the proceedings unduly." 23 Pa.C.S. § 5104(c). Because this Court steadfastly refused to follow the dictates of the statute, little case law has interpreted its language. However, in this appeal, the underlying proceeding was a custody matter and arguably, genetic testing would unduly delay its resolution if there was not a showing that Sitler had a credible basis to assert paternity. Likewise, there is no dispute that he acted diligently in commencing the custody action. Contrary conduct would interfere with established custody. Thus, the trial court should determine whether the individual seeking testing acted diligently in bringing the custody action and request for testing and whether the individual established a credible basis to assert paternity.

Finally, the Majority's test operates to subordinate parental rights of a biological parent—and in particular, the fundamental right "to make decisions concerning the care, custody, and control of their children." *Troxel v. Granville*, 530 U.S. 57, 66 (2000). The right "is among the oldest of fundamental rights." *In re Adoption of C.M.*, 255 A.3d 343, 358 (Pa. 2021). This right is often weighed against a "child's essential needs for a parent's care, protection, and support[]" in the context of an involuntary termination of parental rights proceeding. *Id*. In that context, we have observed that termination of parental rights "has far-reaching and intentionally irreversible consequences for the parent and the child." *Id*. It is of such gravity that the party seeking termination of parental rights must establish by clear and convincing evidence based on competent evidence "the existence of statutory grounds for doing so." *Id*.

Here, Sitler promptly filed a complaint for custody, and then a complaint for genetic testing, and he established a credible basis to assert biological parentage. Absent

scientific testing, the trial court indicated that it would not consider his claim for custody. In these circumstances, the denial of testing extinguishes Sitler's ability to assert his right to parent on the basis of a presumption that a husband must be the biological parent even in the face of contradictory evidence. It is a troubling proposition that courts can extinguish an asserted biological parent's chance at establishing his rights without the best evidence of his paternity, let alone evidence meeting the clear and convincing standard. While the Majority is correct that Sitler has not advanced an argument based on his potential constitutional right, this issue is patent on the fact of this case and others like it.

In my view, the Majority engages in a misguided effort to draft a legal framework to address requests for genetic testing from an asserted biological father of a child born to a married woman. Rather than legislating from the bench based on judicial policy preferences, we should be enforcing the legislatively announced public policy that scientific testing is the mechanism by which the presumption of paternity is rebutted as enshrined in the Uniform Act on Blood Tests, 42 Pa.C.S. § 5104. Absent the complication of this case as a result of the trial court's undisturbed finding that husband is the father by paternity by estoppel, I would vacate the order of the Superior Court and remand, instructing the trial court to order testing.

Remand

The trial court found that both the presumption of paternity and paternity by estoppel precluded testing in this case. The trial court concluded that paternity by estoppel applied because it was in the child's best interest to maintain the four-month bond between the husband and child.[15] Trial Court Pa.R.A.P. 1925 Opinion, 10/10/2023,

[15] Sitler brought the custody action when Child was eight days old and promptly filed the request for genetic testing thereafter. Sitler's Brief at 19. He credibly asserts that "at three … months of age, it is impossible to say that any such bond exists – that the [C]hild (continued…)

at 1. The Superior Court did not reach Sitler's challenge to the finding of preclusion of testing based on paternity by estoppel because it found that paternity by estoppel applies only when the presumption of paternity does not. Therefore, because Sitler failed to overcome the presumption of paternity, "paternity by estoppel [wa]s inapplicable here[.]" *Sitler v. Jones*, 312 A.3d 334, 340 n.5 (Pa. Super. 2024). We accepted review of the propriety of the Superior Court's failure to address the trial court's determination that paternity by estoppel precludes genetic testing here. *See Sitler v. Jones*, 318 A.3d 758 (Pa. 2024) (per curiam).

Our case law mandates that genetic testing will be performed if the presumption of paternity is rebutted **and** paternity by estoppel is inapplicable. *See Jones*, 634 A.2d at 206 ("Only when the doctrine of estoppel does not apply will the mother be permitted to proceed with a paternity claim against a putative father with the aid of a blood test"); *Freedman v. McCandless*, 654 A.2d 529, 532 (Pa. 1995) (same). The trial court found that paternity by estoppel applies. Under the law, this conclusion precludes genetic testing independently of any determination related to the presumption of paternity. Given that the trial court's undisturbed application of paternity by estoppel was an independent dispositive basis to deny genetic testing, any exercise by the trial court reconsidering the presumption of paternity, whether it is the multi-faceted test espoused by the Majority or

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has formed a bond with [H]usband – and no evidence was elicited at the hearing to indicate such a bond. In fact, it is patently apparent that at the [C]hild's age, no such bond existed in this case." *Id*. at 20; *see similarly V.E. v. W.M.*, 54 A.3d 368, 371 (Pa. Super. 2012) (stating that, "as a matter of law, it is impossible for a four month old child to suffer any damaging trauma from the performance of genetic testing … as there has been an insufficient amount of time for any bonding to have occurred between any father and child") (internal citations omitted). Moreover, Sitler raises a colorable challenge to Mother's attempt to use paternity by estoppel as a sword to preempt him and the newborn Child from the possibility of discovering and establishing a relationship simply based on her marriage. *Id*. at 20-21.

my view of rebuttal based on genetic testing in keeping with the intent of the Legislature as expressed in the Uniform Act on Blood Tests, is premature.

Given the complication of this case as a result of the trial court's undisturbed finding of paternity by estoppel, I agree with the Majority that this case must be remanded to the Superior Court with instructions to address Sitler's challenge to the trial court's finding of paternity by estoppel. Any further proceedings in the trial court will have to bide the event of the resolution of the paternity by estoppel challenge.

For the foregoing reasons, I respectfully dissent.

Justice Mundy joins this concurring and dissenting opinion, with the exception of footnote 13.

[J-58-2024]
IN THE SUPREME COURT OF PENNSYLVANIA
MIDDLE DISTRICT

TODD, C.J., DONOHUE, DOUGHERTY, WECHT, MUNDY, BROBSON, McCAFFERY, JJ.

STEVEN M. SITLER,	:	No. 37 MAP 2024
	:	
Appellant	:	Appeal from the Order of the
	:	Superior Court at No. 1402 MDA
	:	2023, entered on March 5, 2024,
v.	:	Affirming the Order of the
	:	Columbia/Montour County Court of
	:	Common Pleas, Civil Division, at No.
ALEXAS JONES,	:	2023-MV-22-MV entered on
	:	September 11, 2023
Appellee	:	
	:	SUBMITTED: July 31, 2024

OPINION

JUSTICE WECHT **DECIDED: April 25, 2025**

The presumption of paternity dictates that, regardless of biology, the child of a married woman is the child of her husband. At issue in this case is whether this longstanding principle of the common law retains force in Pennsylvania and, if so, how it is applied in our courts.

On March 25, 2022, Alexas Jones married B.J. ("Husband"), with whom she already had a child. Jones remains married to Husband, and the two have never separated. In May 2023, Jones gave birth to a second child ("Child"). Steven Sitler sought custody of Child, asserting that he is Child's biological father. Sitler brought an action seeking to compel genetic testing and establish paternity.[1] On August 21, 2023, the trial court held a hearing, which revealed the following facts.

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[1] Sitler sought to establish paternity pursuant to 23 Pa.C.S. § 4343. That section provides for paternity determinations by genetic testing only for children born out of (continued…)

Around the time of Child's conception, Jones had sex with both Husband and Sitler. In October 2022, Jones notified Sitler that she was pregnant, and that she believed that he might be the father. Sitler replied that he "wanted nothing to do" with the then unborn child.[2] Within a week, Sitler changed his mind. He reached out to Jones and asserted that he wanted to have a relationship with the then unborn child. On May 17, 2023, just over a week after Child was born, Sitler filed an action for custody. Meanwhile, Jones and Husband have been caring for Child together since Child's birth. Husband's name appears on Child's birth certificate, and the couple has held Child out as Husband's to "everybody," including their friends, family members, and co-workers.[3] At the August 2023 hearing, Husband testified that he would continue to love and care for Child regardless of whether testing reveals that he is Child's biological father.

On these facts, the trial court denied Sitler's request for genetic testing.[4] The court found that both the presumption of paternity and paternity by estoppel applied, thus precluding genetic testing. The court determined that the presumption applied because Child is part of an intact family unit: Jones and Husband were married at the time of conception, and they remain married. The two continue to live with and care for Child, along with their older child. The trial court found that Sitler had not presented clear and

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wedlock. *See* 23 Pa.C.S. § 4343(a); *Cable v. Anthou*, 699 A.2d 722, 724 (Pa. 1997). Section 4343 does not apply to children born in wedlock. Moreover, Section 4343 pertains to genetic testing for purposes of determining paternity in child support actions, not in actions for child custody. *See generally* 23 Pa.C.S. §§ 4301-96. Though Sitler incorrectly cites Section 4343 as the source of his cause of action, a determination of parentage is a necessary predicate to standing in custody actions. 23 Pa.C.S. § 5324. Hence, Sitler's claim is cognizable.

2 Trial Court Opinion and Order, 9/11/2023 ("TCO 1"), at 2.

3 *Id.*

4 No testing has been performed, and the identity of the biological father has not been scientifically determined.

convincing evidence of Husband's sterility, impotence, or non-access to Jones, and hence had failed to overcome the presumption. The trial court concluded that the intactness of the family rendered the presumption of paternity irrebuttable.[5]

The court determined that paternity by estoppel also applied, for two reasons: (1) Sitler had "flip-flopped" with respect to his intentions, first stating that he did not want a relationship with Child, but later seeking custody; and (2) Husband and Child had become emotionally bonded during the first four months of Child's life.[6] Based on the latter finding, the trial court held that the law prohibits "pulling the carpet out from under" Child by upsetting the existing parent-child relationship.[7] The court deemed this concern relevant notwithstanding that Child was still an infant, and opined that "emotional bonding begins at birth and becomes very strong, very quickly."[8] The trial court reasoned that "a relationship of father and child [had] been established between Husband and Child due to the emotional bonding and the stability of the family unit," and that maintaining this relationship serves Child's best interests.[9]

Sitler appealed from the dismissal of his complaint. He challenged the trial court's reliance upon the presumption of paternity and paternity by estoppel. Sitler asserted that the presumption of paternity is no longer sound policy, because the Commonwealth's interest in protecting the family unit is outweighed by the interest of the child in knowing his or her parent's identity.[10]

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5 Opinion per Pa.R.A.P. 1925, 10/10/2023 ("TCO 2"), at 2.

6 TCO 1, at 4.

7 *Id.* at 5.

8 *Id.*

9 TCO 2, at 1.

10 Concise Statement of Errors Claimed on Appeal, ¶ 7(a)-(g) (R.R. at 25a-26a).

The Superior Court affirmed, basing its decision exclusively on the presumption of paternity.[11] Sitler maintained in that court that applying the presumption did not further the underlying policy goal of preserving marriages here, because the marriage in this case had proven its strength in overcoming an affair, and because of Husband's testimony that he would continue to care for Child even in the event that Child was not his biological offspring. Sitler also argued that Jones' own admission to him that she believed Sitler was the biological father should rebut the presumption of paternity.

The Superior Court deemed these arguments unavailing. The intermediate panel cited this Court's very recent restatement of the presumption in *B.C. v. C.P.*[12] The *B.C.* Court explained that the presumption, though no longer premised on children's need for "legitimacy," continues to serve the preservation of marriage and the family unit. Traditionally, the presumption could be overcome only by clear and convincing evidence either that the husband did not have access to the wife when the child was conceived or that the husband was impotent or sterile. In recent decades, we have held that the presumption applies only to an intact marriage[13]—a circumstance that nonetheless renders the presumption irrebuttable.[14] The Superior Court observed that the married couple in *B.C.*, like Jones and her husband here, had overcome an affair and managed to stay together. On that basis, this Court in *B.C.* deemed the marriage to be intact and afforded it the protection of the presumption. The Superior Court held that the

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11 *Sitler v. Jones*, 312 A.3d 334 (Pa. Super. 2024). The Superior Court held that, because the presumption applied, the doctrine of paternity by estoppel did not. *Id.* at 340 n.5.

12 310 A.3d 721 (Pa. 2024).

13 *Id.* at 731 (citing *Brinkley v. King*, 701 A.2d 176, 180-81 (Pa. 1997) (plurality)).

14 *Id.* at 735.

presumption therefore applies in this case as well, and that the presumption is irrebuttable.[15]

The Superior Court then turned to Sitler's claim that the presumption is no longer supported by public policy. Sitler argued that the presumption is ill-suited to the realities of the modern age, emphasizing the ease and accuracy of DNA testing by oral swab, and citing criticisms of the doctrine by various former Justices of this Court.[16] The Superior Court cited *B.C.*'s refusal to upset the presumption, and this Court's accompanying instruction that, unless and until we choose to abrogate the presumption in a case where the issue is properly preserved and developed, courts remain bound to apply it. Adhering to that directive, the Superior Court refused to set aside or otherwise alter the presumption of paternity.[17]

We accepted two issues in Sitler's appeal: first, whether, in contemporary society, the presumption of paternity has outlived its usefulness; and second, in the event that we choose to abridge the presumption of paternity, whether the Superior Court erred in failing to address the trial court's holding that paternity by estoppel also precludes genetic testing.[18]

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15 *Sitler*, 312 A.3d at 339-40.

16 *See id.* at 340; *see also* Sitler's Brief, at 11-15.

17 *See Sitler*, 312 A.3d at 340-41.

18 *Sitler v. Jones*, 318 A.3d 758 (Pa. 2024) (*per curiam*). Based on pre-existing law, the Superior Court held that the presumption of paternity precluded DNA testing. It did not reach the question of estoppel. *Sitler*, 312 A.3d at 340 n.5. In light of our rulings today regarding the presumption, the Superior Court should consider on remand whether estoppel would preclude DNA testing in this case. Inasmuch as the Superior Court did not reach the issue, we do not address the merits of the trial court's estoppel ruling at this time.

This Court reviews a lower court's determination of paternity for an abuse of discretion.[19] Whether the lower courts properly applied our case law with respect to the presumption is a question of law, over which our standard of review is *de novo* and our scope of review plenary.[20]

To date, our General Assembly has not enacted any comprehensive statutory scheme to govern paternity determinations.[21] In the absence of legislative action, paternity law rests upon two principles that have developed at common law: the presumption of paternity and paternity by estoppel. Our decision today turns upon the first of these. The presumption of paternity dates back centuries, with roots in English precedent.[22] The presumption of paternity stands for the proposition that, when a child is born to a married woman, her husband is presumed to be the child's father.[23] The presumption rested originally on two policy rationales. First, the presumption sought to protect children from the social stigma and legal discrimination that accompanied a child's

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19 *B.C.*, 310 A.3d at 729 n.7 (citing *H.Z. v. M.B.*, 204 A.3d 419, 425 (Pa. Super. 2019)).

20 *See id.* (citing *K.E.M. v. P.C.S.*, 38 A.3d 798, 803 (Pa. 2012)).

21 *See* Jacinta M. Testa*, Finishing Off Forced Fatherhood: Does It Really Matter If Blood or DNA Evidence Can Rebut the Presumption of Paternity?*, 108 PENN ST. L. REV. 1295, 1311 (2004). A bill seeking enactment of the Uniform Parentage Act was introduced last year. H.R. 350, 2023-2024 Gen. Assembly, Reg. Sess. (Pa. 2024). The Act has been adopted, in one form or another, in twenty-five states. *2017 Parentage Act, Enactment History*, UNIFORM LAW COMMISSION, https://www.uniformlaws.org/committees/community-home?CommunityKey=c4f37d2d-4d20-4be0-8256-22dd73af068f%20(last%20visited%20Apr.%203,%202019) (last visited Apr. 24, 2025).

22 *Commonwealth v. Shepherd*, 6 Binn. 283, 286 (Pa. 1814) (citing *Pendrell v. Pendrell*, 2 Stra. 925, 93 Eng. Rep. 495 (K.B. 1732)).

23 *B.C.*, 310 A.3d at 730.

status as "illegitimate."[24] This policy rationale was rendered obsolete in Pennsylvania when the General Assembly eliminated the legal distinction between "legitimate" and "illegitimate" children.[25] Second, the presumption of paternity served the goal of preserving marriages and family units.[26] Since the eclipse of legitimacy-based distinctions in the law, this latter rationale has been the sole pillar on which the presumption rests.

The presumption of paternity has been called "one of the strongest [presumptions] known to the law."[27] Traditionally, it could be overcome only by clear and convincing evidence that: (1) the presumed father lacked access to the mother at the time of conception; (2) the presumed father was impotent; or (3) the presumed father was sterile.[28]

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[24] *See John M. v. Paula T.*, 571 A.2d 1380, 1383 n.2 (Pa. 1990); Jessica Feinberg, *Restructuring Rebuttal of the Marital Presumption for the Modern Era*, 104 MINN. L. REV. 243, 249-50 (2019) (noting the social stigma and legal consequences of being deemed "illegitimate"). Due to such concerns, the presumption was once known as the "presumption of legitimacy." *See John M.*, 571 A.2d at 1383 n.2.

[25] *See John M.*, 571 A.2d at 1386-87 (citing Act of June 17, 1971, P.L. 175, *as amended*, 48 P.S. § 167 (repealed)); 20 Pa.C.S. § 2107(c)(2).

[26] *B.C.*, 410 A.3d at 730; *see Brinkley*, 701 A.2d at 180 (plurality) ("The public policy in support of the presumption of paternity is the concern that marriages which function as family units should not be destroyed by disputes over the parentage of children conceived or born during the marriage."); *John M.*, 571 A.2d at 1386 ("The Commonwealth recognizes and seeks to protect [that] basic and foundational unit of society, the family, by the presumption that a child born to a woman while she is married is a child of the marriage.").

[27] *Cairgle v. Am. Radiator & Standard Sanitary Corp.*, 77 A.2d 439, 442 (Pa. 1951).

[28] *See B.C.*, 310 A.3d at 730. Older articulations of the rule dictated that the presumption could not be overcome except by proof of "the absence of the husband beyond the seas immediately prior to and during the whole period of gestation." *Cairgle*, 77 A.2d at 442. That formulation, however, was deemed "so contrary to human experience" that it gave way over time to the traditional set of rebuttals. *See id.* (citing *Shepherd*, 6 Binn. at 286).

In 1997, this Court reviewed the presumption of paternity in light of the increasing commonality of separation and divorce. The Court held that the presumption should apply only when doing so furthers the underlying goal of preserving marriages that serve as family units.[29] As such, the presumption applies only if the court determines that the marriage is intact at the time that the husband's paternity is challenged.[30] The fact that a married couple has experienced one or more periods of separation prior to commencement of a paternity action, while relevant, is not conclusive on the question of whether the marriage is intact.[31]

This Court has held that, if the presumption of paternity applies, courts may not order blood tests unless that presumption has been overcome.[32] In *John M. v. Paula T.*, a child had been born to a married woman. A man claiming to be the child's biological father sought custody, filed a motion seeking court-ordered blood testing of the husband. The putative ("alleged") father, John M., cited the Uniform Act on Blood Tests, which required courts, upon motion, to order the "mother, child, and alleged father" to submit to blood tests in an action to determine paternity.[33] The Act stated that the presumption of

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[29] *See Brinkley*, 701 A.2d at 181 (plurality). Although *Brinkley* was a plurality decision, a majority endorsed the principal holding: that the presumption should be limited to situations in which it serves the underlying policy of preserving families. *See Brinkley*, 701 A.2d at 190 (Newman, J., concurring and dissenting).

[30] *B.C.*, 310 A.3d at 735.

[31] *Id.* at 737.

[32] *Jones v. Trojak*, 634 A.2d 201, 206 (Pa. 1993) (citing *John M.*, 571 A.2d 1380).

[33] *John M.*, 571 A.2d at 1385 (citing 42 Pa.C.S. § 6133 (repealed 1990)). The Uniform Act on Blood Tests has existed in one form or another since 1951. *See B.C.*, 310 A.3d at 739 (Wecht, J., concurring); *Commonwealth ex rel. O'Brien v. O'Brien*, 136 A.2d 451, 453 (acknowledging apparent intent by the legislature to aid "blameless" defendants to support actions, who otherwise could not refute paternity except by "protestations of innocence") (Pa. 1957). The Act remains on the books, *see* 23 Pa.C.S. § 5104 (1990), but has not been amended to reflect scientific advances in genetic testing. *See B.C.*, 310 A.3d at 739-40 (Wecht, J., concurring); *see infra* nn. 37, 53, 57.

paternity was "overcome if . . . the tests show that the husband is not the father of the child."[34] This Court held that the Act did not give a putative father the right to compel the presumptive father (*i.e.*, the husband) to submit to testing.[35] Determining that the Act afforded no such right to putative fathers, this Court proceeded to consider whether denying that right violated John M.'s "procedural and substantive due process rights."[36] The Court concluded that it did not. This Court balanced the privacy rights of the presumed father and the Commonwealth's interest in preserving marriages on the one hand against the interest of the putative father in securing the test results on the other. The Court came down on the side of the Commonwealth.[37] As such, our precedent to

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[34] 42 Pa.C.S. § 6137 (repealed 1990).

[35] *John M.*, 571 A.2d at 1385. With the mother's consent, the putative father (John M.) already had obtained test results as to himself and the child. The tests revealed a 97.47 percent probability that John M. was the biological father. *See id.* at 1382.

[36] *Id.* at 1385.

[37] *Id.* at 1385-88. This Court has interpreted the holding in *John M.* to render the Uniform Act on Blood Tests substantially irrelevant. *See Trojak*, 634 A.2d at 206. Though it remains on the books, the Uniform Blood Tests Act has not been amended to account for modern DNA testing. Even now, the Act continues to provide as follows:

> In any matter subject to this section in which paternity, parentage or identity of a child is a relevant fact, the court, upon its own initiative or upon suggestion made by or on behalf of any person whose blood is involved, may or, upon motion of any party to the action made at a time so as not to delay the proceedings unduly, shall order the mother, child and alleged father to submit to **blood tests**.

23 Pa.C.S. § 5104 (emphasis added).

The Dissent criticizes this Court's precedents prioritizing the common law presumption of paternity over the Uniform Blood Tests Act. The Dissent would overrule that line of cases and would invoke the Uniform Blood Tests Act as a basis to compel testing here. The Dissent concedes that the testing referred to in the Act—blood type testing—is not synonymous with modern DNA testing, *see* Diss. Op. at 11-12, but asserts nonetheless that the "public policy espoused in Section 5104[] is unambiguous," and insists that we should "enforc[e]" that policy, *see id.* at 12, 16. In pressing this argument, (continued…)

date has ordained that, if the marriage is intact, the presumption applies. Where the presumption applies, testing cannot be obtained unless and until the party seeking testing has rebutted the presumption.[38]

This Court has gone as far as to state that, where the marriage is intact, the presumption of paternity is irrebuttable.[39] In other words, the same condition that triggers the application of the presumption in the first place—an intact marriage—renders the presumption conclusive. This Court has restricted the applicability of the doctrine to a limited circumstance (intact marriage), while implicitly abandoning the old avenues for rebuttal (non-access to the wife, impotence, or sterility). As things stand, if the marriage

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the Dissent attempts to stretch the statute well beyond its text in order to pave a path to DNA testing that the General Assembly has yet to create.

The Dissent also suggests that this Court has erroneously read the holding in *John M.* too broadly to foreclose the right of putative fathers to secure blood testing under the Act in every case. *See* Diss. Op. at 7-8. We need not explore the merits of this proposition. Assuming *arguendo* that this is correct—*i.e.*, that the Act entitles a putative father to compel blood testing of the mother or child, just not testing of the presumptive father—the Act is nonetheless obsolete. At best, such a rubric would afford putative fathers a right to blood type testing. A putative father still would not be entitled to the DNA testing sought by Sitler in this case.

To the extent that the Dissent suggests that we should interpret the "blood testing" permitted under the Act, *see* 23 Pa.C.S. § 5104(g), to include DNA testing via blood sample, as opposed to DNA testing via buccal swab, *see* Diss. Op. at 11, the remainder of the statutory text makes clear that the Act contemplates blood *type* testing—an outdated method of determining paternity that relies on comparing blood types, rather than on DNA analysis. *See infra* nn. 53, 57.

[38] This Court also requires that a party seeking testing first overcome the doctrine of paternity by estoppel. *See Trojak*, 634 A.2d at 206.

[39] *See Strauser v. Stahr*, 726 A.2d 1052, 1054 (Pa. 1999) ("[I]n one particular situation, no amount of evidence can overcome the presumption: where the family (mother, child, and husband/presumptive father) remains intact at the time that the husband's paternity is challenged, the presumption is irrebuttable."); *B.C. v. C.P.*, 310 A.3d at 735 ("[T]here is a single circumstance under which the presumption of paternity continues to apply, and, indeed, is irrebuttable—where there is an intact marriage to preserve.").

is intact, the presumption applies, and the presumption is rendered irrebuttable by virtue of the intact marriage.[40]

To summarize: The presumption only applies when the marriage at issue is found to be intact.[41] To the extent that the marriage is intact, the presumption is irrebuttable, and cannot be overcome.[42] A court may not order genetic testing unless and until that presumption is overcome.[43] But an intact marriage renders the presumption both applicable and irrebuttable, rendering the old avenues for rebuttal—non-access to the wife, impotence, sterility—irrelevant. Under the operative regime, the only way to secure court-ordered testing is to prove that the marriage is no longer intact.

Sitler does not challenge the results that obtain from application of the presumption. If we decline to disturb the existing paradigm, the presumption prevents him from securing court-ordered testing. Even voluntary testing confirming his belief that he is Child's biological father would be futile. The trial court concluded that Jones and her husband are in an intact marriage, and Sitler does not challenge that factual determination.[44] Instead, Sitler challenges the paradigm. He asks us to step back and reconsider the presumption's place in our jurisprudence. In his view, the presumption

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[40] Our cases to date have not acknowledged the circularity of this framework nor the abandonment of the traditional grounds for rebuttal. Evidently, this has caused some confusion in the lower courts as to whether access, impotence, and sterility are still relevant to the analysis. *See, e.g.*, TCO 2, at 2 (explaining that the presumption had not been rebutted by evidence of non-access, impotence, or sterility, and that the presumption was irrebuttable because the marriage was intact).

[41] *See Brinkley*, 701 A.2d at 251 (plurality); *B.C.*, 310 A.3d at 735.

[42] *B.C.*, 310 A.3d at 735; *Strauser*, 726 A.2d at 1054.

[43] *See John M.*, 571 A.2d at 1388; *Trojak*, 634 A.2d at 206 ("A court may order blood tests to determine paternity only when the presumption of paternity has been overcome.").

[44] TCO 1, at 4. *See also* N.T, 8/21/2023, at 30-31 (R.R. at 60a-61a) ("As a factual finding . . . I'm going to find that this is an intact marriage. I don't have a choice. Everyone inside it says it's intact.").

has outlived its usefulness. Sitler asserts that the interests of an alleged biological parent, together with the best interests of the child, "must prevail over the Commonwealth's interest in the preservation of marriage."[45] In *B.C.*, this Court chose not to reassess the continued viability of the presumption of paternity, opining that the issue had not been preserved and fully developed.[46] Having preserved and developed the issue below, Sitler asks us now to reevaluate the presumption.

At the time that *Brinkley* was decided, and in the twenty-six years since, some have questioned the enduring wisdom of the presumption, and its place in paternity determinations. We review the major criticisms of the presumption, its surviving justifications, and the presumption's place in our jurisprudence.

Over the last century, some grounds upon which the presumption of paternity rests have begun to erode. The legitimacy rationale for the presumption dissipated with the fall of legitimacy-based classifications in the law.[47] More recently, some have questioned the remaining foundation on which the presumption rests: preserving marriages and, by extension, family units. For one thing, it is uncertain that the prevailing policy of the Commonwealth remains determined above all to prevent the dissolution of marriages.[48] In 1980, the General Assembly embraced no-fault divorce,[49] and, in the decades since,

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45 Sitler's Brief, at 9. Jones did not brief or otherwise participate in the proceedings before this Court or the Superior Court.

46 *B.C.*, 310 A.3d at 737.

47 *See id.* at 730 (citing *John M.*, 571 A.2d at 1383 n.2).

48 *See Brinkley*, 701 A.2d at 253 (Nigro, J., concurring and dissenting) ("In light of the changed, and increasingly fluid, nature of the family, and the increased rates of divorce and separation, [the presumption of paternity and paternity by estoppel] have become less reflective of social reality."); *Id.* at 258 n.5 (Newman, J., concurring and dissenting) (citing rising incidence and growing social acceptance of divorce).

49 The Divorce Code, Act of April 2, 1980, P.L. 63 (repealed 1990).

the General Assembly has reduced the time period that married persons must wait to obtain a divorce decree.[50] As well, on a practical level, some have questioned whether the presumption of paternity does, in fact, serve the interest of keeping families intact.[51]

As the social and legal landscape around family dissolution has changed, the science of determining paternity has evolved. An unheralded but patent historical justification for the presumption was that—unless a husband was "beyond the four seas"—there was no sure way to ascertain who, in fact, was a child's biological father.[52] In the early days of paternity testing, blood tests had emerged that could sometimes exclude a man as a potential biological father. At the outset, these tests were not accurate enough to confirm a father's identity.[53] By the 1980s, some sixty-two different blood-typing procedures were in use, and these could be applied in combination to yield a more

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50 *See id.* § 201(d)(1) (three years); Act of Dec. 19, 1990, P.L. 1240, § 3301(d) (two years); Act of Oct. 4, 2016, P.L. 865, § 3301(d) (one year).

51 *See Brinkley*, 701 A.2d at 254 (Nigro, J., concurring and dissenting) (questioning whether "judicious use of blood testing will necessarily result in any more strain on a marriage" than forcing a husband to care for a child he knows is not his, and noting that the use of testing would eliminate instances where a man is deceived into believing that a child is his).

52 *See* Feinberg, *supra* n.24, at 250 (noting that the presumption provided a solution to the "evidentiary impasses" involved in determining paternity before scientific testing became available).

53 *See Commonwealth v. English*, 186 A. 298, 300 (Pa. 1936) (blood tests requested by alleged father could exonerate a man roughly 15% of the time, "but in no case [do they] incriminate"); 1 MCCORMICK ON EVID. § 205.2 (8th ed.) ("[U]nder the early [blood grouping] system, a positive test result merely meant that the accused was, on average, one of the 87% of the male population possessing the requisite genotypes. Such evidence is not very probative, and the fear that the jury would give it more weight than it deserved, cloaked as it was in the garb of medical expertise, prompted many courts to exclude it as unduly prejudicial.").

accurate probability of paternity.[54] But blood tests were, by nature, invasive,[55] and running multiple different tests in order to secure a more accurate result was costly.[56]

Today, DNA testing is more accurate, more affordable, and less intrusive than the blood tests of the 1980s.[57] The DNA test sought by Sitler obtains a sample by means of an oral swab rather than a blood draw. A sample from the alleged father presumably would establish his own biological relationship to the child, or lack thereof, without need for a sample from the presumed father.[58] These tests are now readily available for purchase by anyone, whether online or at a drugstore.[59]

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[54] John P. Luddington, *Admissibility and Weight of Blood-Grouping Tests in Disputed Paternity Cases*, 43 A.L.R. 4th 579 § 2(a) (1986); *see* 4 MOD. SCI. EVIDENCE § 31:2 (2023); 1 MCCORMICK ON EVID. § 205.2 (8th ed.).

[55] *See John M.*, 571 A.2d at 1385-86 ("The person whose blood is sought has clear privacy interests in preserving his or her bodily integrity.").

[56] John P. Luddington, *Admissibility and Weight of Blood-Grouping Tests in Disputed Paternity Cases*, 43 A.L.R. 4th 579 § 2(a) (1986).

[57] *See* 4 MOD. SCI. EVIDENCE § 31:3 (2023); *B.C.*, 310 A.3d at 740 (Wecht, J., concurring); *Brinkley*, 701 A.2d at 186 n.9 (Newman, J., concurring and dissenting) (explaining that "blood grouping tests provide circumstantial evidence of paternity whereas DNA test results provide direct evidence of biological parentage, because DNA matches establish affirmative identification of biological parentage" (citing *Reed v. Boozer*, 693 A.2d 233, 238 (Pa. Super. 1997)).

[58] Sitler's complaint requests court-ordered testing of Child only. Complaint, at 1 (R.R. at 3a).

[59] *See, e.g.*, *Express DNA Paternity Testing for Child and Father*, AMAZON, https://www.amazon.com/HomePaternity-Paternity-Confidence-Included-Overnight/dp/B0BWQV4ZSR/ref=sr_1_6?crid=2B1Q30X4EHTE&dib=eyJ2IjoiMSJ9.kgC31sWF5uwdmCRAq77dI17_YmSE4w4sUDUB5bMi0jEGSrAD8xfaw579V_Yv6dXzXTuE9eEf0gOXpcc74ZJsfjDDtFjWmNOULFpocwxqpgjMEYnriV672XsNSlii1whWMhFyicr7XPc7-wGVhyneQMVdzzMxGvKmbv2HbyC_rwMazqVUHwqI94uKROrmBftch1E3Yp7HH9xopn-4Vvncq9LmFOWrLsRkNSAIE77JUC6cplMCrtIwwElX4vM5UapfUj13ZC3Q0u7LH8JDAoVfmQoC_04jBnKJWydXIjnQXqE.ej4uu7A6ULh2vbg8Sd-FXgXqHDiDEOlWhuzPEd_jnPU&dib_tag=se&keywords=paternity+dna+test&qid=17265 (continued…)

At its inception, the presumption supplied a fact that, otherwise, could not be categorically determined. The traditional avenues for rebuttal reflect only those factual indicia available before the dawn of genetic testing: whether the husband could not have "accessed" the wife at the time of conception, and whether the husband was impotent or sterile. With the emergence of *in vitro* fertilization and advances in treatment for men's reproductive health, these traditional avenues for rebuttal no longer reflect insurmountable obstacles to conception. In the past, the presumption helped fill in a critical blank. Today, the presumption forces courts to turn a blind eye to a fact that can be determined readily by empirical evidence, and that consenting parties may discover on their own in any event.[60]

Critics have warned that, in prioritizing the Commonwealth's interest in preserving marriages, the presumption categorically ignores or discounts the interests of both the child and the alleged father. This Court has acknowledged that an alleged father has a right to assert a paternity claim and to seek recognition as a parent in a court of law.[61] At the same time, we have categorically and conclusively placed the interest of the

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20434&sprefix=paternity+dna+test%2Caps%2C106&sr=8-6 (last visited Sept. 16, 2024); *At-Home DNA Paternity Test Kit*, WALGREENS, https://www.walgreens.com/store/c/walgreens-at-home-dna-paternity-test-kit/ID=300440078-product?ext=gooFY-24_LB-RDG_CH-SEARCH_CN-RDG-OwnBrand_CA-FOS_MT-PLA_LG-EN1_RE-NA_MK-GM_OB-SALES_PK-OMNIREV_KT-NA_KM-NA_AS-GOO__pla_local&gclsrc=aw.ds&gclsrc=aw.ds&gad_source=4&gclid=EAIaIQobChMIuLm7wMCdiAMVsXBHAR1CzAa1EAQYAiABEgLQYfD_BwE (last visited Aug. 30, 2024).

[60] *See B.C.*, 310 A.3d at 740 (Wecht, J., concurring); *Brinkley*, 701 A.2d at 188 (Newman, J., concurring and dissenting); *see also id.* at 181-82 (Zappala, J., concurring) (arguing that testimony establishing that the married couple did not have sex during the period when the child was conceived should suffice to overcome the presumption); *id.* at 186 n.8 (Newman, J., concurring and dissenting) (same).

[61] *See John M.*, 571 A.2d at 1385 (citing *Adoption of Walker*, 360 A.2d 603 (Pa. 1976); *Stanley v. Illinois*, 405 U.S. 645 (1972)).

Commonwealth in preserving marriages above the interests of a potential father who seeks to discover the truth of his biological relationship with a child and who attempts to assume the attendant rights and responsibilities of legal parenthood.[62] Dissenting in *Strauser*, Justice Nigro asserted that a couple's marital status "should [not] serve as a license to completely disregard a biological father's interest in having a relationship with his child."[63] In *Brinkley*, Justice Newman went so far as to opine that the existing scheme terminates the rights of biological fathers without due process.[64]

Some have urged that the child at the center of a paternity dispute has an interest in knowing the identity of his or her biological father, and, by extension, the child's own paternal background, health profile, and ethnic heritage.[65] The news that the man whom a child believed to be his or her father is in fact a biological stranger can be damaging to a child's relationships and sense of identity. This concern is much less compelling with respect to a child as young as the one in the instant case, to whom the result of an oral swab means nothing. The distress that such news may cause when it breaks later in a child's life may argue for testing when it is sought early on. Early testing also may serve the interests of the presumed father. In today's case, Husband has testified that he would continue to parent Child regardless of the biological truth. In other cases, early testing

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62 *See John M.* at 1386 ("There are other interests at stake in this case besides those of appellant-husband and appellee-putative father . . . There is, in short, a family involved here."); *id.* at 1388 (Nix, J., concurring) ("Whatever interests the putative father may claim, they pale in comparison to the overriding interests of the presumed father, the marital institution and the interests of this Commonwealth in the family unit.").

63 *Strauser*, 726 A.2d at 1057 (Nigro, J., dissenting).

64 *Brinkley*, 701 A.2d at 187 (Newman, J., concurring and dissenting). Sitler has not asserted that the presumption violates his due process rights. Accordingly, any such issue is not presently before us.

65 *See B.C.*, 310 A.3d at 741 n.26 (Wecht, J., concurring); *Strauser*, 726 A.2d at 1057 (Nigro, J., dissenting) ("[F]or medical and other reasons, it may very well be in the best interests of [the child] to know the identity of her biological father.").

may prevent a presumed father from being deceived into raising and supporting a child that is not his.[66]

On the other hand, the presumption of paternity may serve to shield a child from the upheaval that can result from the introduction of a new legal parent, particularly when the child already has established a close bond with the man whose paternity is challenged. In such instances, the work of the presumption is not to protect a marriage against the conduct of its own constituents, but rather to protect an existing family unit, a unit to which the child belongs.[67]

Some have expressed consternation that the common law privileges the Commonwealth's interest in the institution of marriage over the best interests of the child. Conversely, a rule that would discard the presumption and that would privilege the results of DNA testing above all might often disserve the child's best interests, especially in view of the reality of the relationships involved in any given case. A case-by-case approach, sensitive to individualized facts and contexts, is best-suited to the task of resolving paternity disputes.[68]

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[66] *See Brinkley*, 701 A.2d at 182 (Nigro, J., concurring and dissenting) ("Blood testing would also work to eliminate situations where a man is deceived into believing he is the father and is then made to bear legal responsibility, by reason of estoppel, for a child that is not his.").

[67] *See B.C.*, 310 A.3d at 736 (explaining that the presumption "protects against the potential insertion of a third party into the functioning family unit upon resolution of the paternity action").

[68] *See id.* at 741 (Wecht, J., concurring) ("[T]he General Assembly could—and should—implement a multi-factor statutory test for paternity determinations. This legislative test could take into account the various considerations, such as the DNA test results, the child's relationship with the parties, the emotional well-being of the child, and the child's bond with the parties." (citing David N. Wecht & Jennifer H. Forbes, *A Multi-Factor Test Would Aid Paternity Decisions*, 82 Pa.B.A.Q. 3, 118 (2011))); *Brinkley*, 701 A.2d at 253-54 (Nigro, J., concurring and dissenting) ("Abandoning the strict use of the [presumption of paternity and the doctrine of paternity by estoppel] would allow our courts to examine the situation presented, to compel blood testing if the appropriate showing is (continued…)

The presumption of paternity has proven highly durable in Pennsylvania law. Its lingering justification—keeping families intact—though weakened in the age of no-fault divorce, still carries great weight in many circumstances. The rigidity and irrefutability of the presumption is nonetheless overinclusive, an ill fit for modern social and scientific realities. In *K.E.M.*, this Court made clear that the doctrine of paternity by estoppel should apply only when estoppel serves the best interest of the child.[69] Today, we hold that the presumption of paternity must be subordinated to the best interests of the child as well. The presumption of paternity once vindicated the worthy goal of sparing "illegitimate" children the harms that they would otherwise suffer by virtue of that stigmatic status.[70] Today, the presumption aims to serve the Commonwealth's interest in preserving marriages that function as families. The balancing of that interest—as against the interests of the child involved, the putative father, the mother, and the mother's husband—has become more complex and nuanced. Our jurisprudence must evolve accordingly.

In the past, so long as the mother and her husband remained in an intact marriage, no amount of DNA evidence could ever overcome the husband's presumed paternal status. Where an intact marriage was concerned, an outsider attempting to establish his paternity in a court of law could not even discover whether his suspicions were true, absent consent of all parties. In *John M.*, we explained that subjecting an unwilling presumed father to blood tests implicated his constitutional right to privacy, and we balanced the competing interests to determine whether an invasion of such privacy was

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made, and to weigh the competing factors in order to reach a just result in each case."); *K.E.M.*, 38 A.3d at 813 (Orie Melvin, J., concurring) ("Protection of the child is paramount, and I lend my voice to those calling for the Legislature to specify factors to consider in making paternity determinations.").

69 *K.E.M.*, 38 A.3d at 809.

70 *See John M.* 571 A.2d at 1383 n.2; Feinberg, *supra* n.24, at 249-50.

justified. On one hand, we acknowledged the interest of the alleged father in securing test results, and we noted that "the needs and interests of the child [were] of paramount concern."[71] But we found that these interests were outweighed by the husband's privacy interest, and, perhaps more emphatically, the Commonwealth's interest in preserving the family unit by rejecting the "unwanted intrusions of outsiders."[72]

Decades later, advances in the field of DNA technology have combined with legal and social developments to alter the landscape. Modern DNA testing has reduced concerns over intrusions upon the privacy interest of a presumed father (like Husband here). Science has evolved such that there is no need to invade the presumed father's privacy with a blood draw. An oral swab of the child and of a willing, alleged biological father like Sitler can either eliminate or confirm that third party's biological connection to the child, without any intrusion on the husband's privacy rights. Moreover, while this Commonwealth retains its interest in preserving marriages and family units, it also has manifested a recognition that divorce is not uncommon and an awareness that divorce decrees, when sought, should be available without stigma or undue delay. Judicial refusal to order testing appears increasingly unlikely to prevent a marriage from dissolving. In the era of commercial DNA testing, it would be naive to suppose that our courts have the power to prevent the facts from coming to light, or to inoculate marriages against the ensuing consequences.

At the same time, to discard the presumption of paternity outright, as Sitler urges, would foster disruption of critical relationships between some children and their caregivers, in blind service of aligning biological with legal parentage in all cases. In the absence of legislative action, the presumption of paternity can protect the formation of

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71 *John M.*, 571 A.2d at 1386.

72 *Id.*

families by married couples. If nothing else, it can offer a sound place to begin the inquiry: who's the father? Where no other contender emerges, the presumption places legal parentage with the mother's husband.

Contemporary courts must balance the interests of the Commonwealth in protecting intact families alongside the best interests of the child, while accounting as well for the interests of the person seeking to establish paternity and the interests of the wife and husband. The question of paternity begins—but does not end—with the presumption of paternity. If the marriage is intact at the time that the husband's paternity is challenged, the husband is presumed to be the father by virtue of the presumption. However, a third party challenger may rebut that presumption. In light of the competing interests involved, a challenger may rebut the presumption—and secure DNA testing that will determine paternity—by adducing clear and convincing evidence showing that: (1) there is a reasonable possibility that he is the father; and (2) determining parentage based upon the results of DNA testing will serve the best interests of the child, with due consideration for the interests of the adults whose parental rights are at stake. Upon meeting that burden, a challenger may secure court-ordered DNA testing, which will then determine legal parentage.[73]

At common law, the presumption of paternity could be overcome only if the husband was "beyond the seas" immediately before and during the pregnancy.[74] Over two centuries ago, we abandoned that rule on the ground that it was "contrary to human experience."[75] Human experience has evolved, and the narrow path to overcome the

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[73] We leave undisturbed the doctrine of paternity by estoppel. *See supra* n.18. Suffice it to say that both "fictions" are now subordinate to the best interests of the child, which will vary widely from case to case. *See K.E.M.*, 38 A.3d at 809.

[74] *Cairgle*, 77 A.2d at 442.

[75] *Id.*

presumption is once again at odds with the world in which we live. The traditional bases to overcome the doctrine were rational in a society in which the only knowable facts germane to a child's parentage revolved around the physical possibility that the father could have impregnated the mother at the relevant time. And the narrowness of these grounds aligned with the serious threat of illegitimacy, the limited availability of divorce, and the social stigma associated with both. Scientific advancements have brought about a new way to discover the truth of a child's biological paternity. The General Assembly has shielded children from the once harsh consequences attending "illegitimacy," while enabling married persons to divorce more easily. In light of the changed landscape around separation and divorce, and the scientific revolution precipitated by the rise of DNA evidence, an irrebuttable presumption of paternity rests on outdated assumptions.

Paternity disputes, like other controversies involving a child's future, implicate the best interests of the child.[76] All else being equal, where two or more adults claim paternity, a child's best interests ultimately may lie in having the truth of the matter discovered. At the same time, an alleged biological father like Sitler may have an interest in establishing legal parentage, thereby becoming eligible for all of the rights and responsibilities that attend that status.[77] The genetic connection between father and child is not everything, and assigning biological relationships categorical primacy over substantive parent-child bonds would work an injustice of a different kind.[78] We will not

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[76] *See* 23 Pa.C.S. § 5328 (child custody to be determined based on the best interest of the child).

[77] *See, e.g.*, 23 Pa.C.S. § 5324(1) (providing that a "parent of the child" has standing to pursue custody); *id.* § 4321(2) ("Parents are liable for the support of their children . . . .").

[78] In more recent years, commentators have observed that, even as the old justifications underlying the presumption have fallen away, new ones have arisen. Same-sex couples and couples relying on assisted reproductive technologies ("ART") might look to the marital presumption to establish parentage of a child to whom one spouse is not (continued…)

gainsay the interests of the mother and of the presumed father, whose rights the trial court also must weigh. If, however, the court finds that a putative father has established, by clear and convincing evidence, a reasonable possibility that testing would reveal him to be the biological father and that the best interests of the child lie in uncovering and assigning paternity based upon the biological connections involved, DNA evidence is warranted.

We already have limited the doctrine of paternity by estoppel to situations in which the best interests of the child are served.[79] Upon a threshold showing that a putative father might be the biological father, the presumption of paternity must be subject to the same considerations. In reaching this conclusion, we join the majority of states in lifting our near-absolute embargo on DNA evidence in paternity disputes involving married mothers. In almost every state, some variation on the presumption of paternity remains.[80] However, many states have allowed the presumption to be overcome by DNA evidence

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biologically related. *See* Feinberg, *supra* n.24, at 254-57 (noting that the marital presumption remains the most common way of identifying a person other than the individual who gave birth as a child's legal parent and that most courts that have addressed the issue have held that the presumption extends to a non-birthing spouse in a same-sex couple); Marisa S. Fein, *An Inequitable Means to an Equitable End: Why Current Legal Processes Available to Non-Biological, LGBTQ+ Parents Fail to Live Up to Obergefell v. Hodges*, 14 DREXEL L. REV. 165 (2022) (proposing a marital presumption not overcome by a lack of biological connection); Douglas NeJaime, *The Nature of Parenthood*, 126 YALE L.J. 2260, 2340-41 (2017) (proposing a gender-neutral marital presumption to afford equal treatment to same sex couples and couples using ART). As well, this Court has recognized parentage by contract in these circumstances. *C.G. v. J.H.*, 193 A.3d 891, 904 (Pa. 2018).

79 *K.E.M.*, 38 A.3d at 810.

80 *See* Douglas NeJaime, *The Nature of Parenthood*, 126 YALE L.J. 2260, 2339 (2017) ("Presently all but one state maintain a marital presumption that derives a spouse's parentage from marriage to 'the woman giving birth' or 'the natural mother.'"); James J. Vedder & Brittney M. Miller, *Presumptions in Paternity Cases: Who Is the Father in the Eyes of the Law?*, 40 FAM. ADVOC. 26 (2018) (noting that "[m]ost states have enacted paternity laws that create some form of the marital presumption of paternity.").

under at least some circumstances.[81] Some hold that DNA evidence affirming an alleged biological relationship definitively rebuts the presumption.[82] Others, with an eye to the natural complexity of these disputes, consider the best interests of the child in determining whether the presumption should yield to DNA testing.[83] We embrace the spirit of the latter approach: courts must consider the best interests of the child within the complex and varied contexts in which paternity disputes arise, in order to determine whether legal parentage should be judged by the results of DNA testing.

Paternity cases, like most disputes in the area of family law, are highly fact-sensitive. As such, they are rarely amenable to resolution through bright line rules. Our attempts to bind the question of paternity to wooden questions about the status of the marriage are futile, and can work a great disservice upon both the child and the adult parties. Our trial courts are well-equipped to consider and weigh a multitude of complex

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81 Feinberg, *supra* n.24, at 252.

82 *Id.*; *see, e.g.*, *Est. of Smith v. Smith ex rel. Rollins*, 130 So. 3d 508, 513 (Miss. 2014); *Rydberg v. Rydberg*, 678 N.W.2d 534, 541 (N.D. 2004); *Bartlett v. Com. ex rel. Calloway*, 705 S.W.2d 470, 473 (Ky. 1986) ("When the advances of science serve to assist in the discovery of the truth, the law must accommodate them. The law cannot pick and choose when truth will prevail.").

83 *See* June Carbone & Naomi Cahn, *Nonmarriage*, 76 MD. L. REV. 55, 87 (2016) ("In many states, even proof that the husband is not the biological father does not solely rebut the presumption; instead, doing so may involve the consideration of the child's interests, the degree to which the husband assumed a paternal role, and/or the biological father's ability and willingness to provide support."); *see, e.g.*, *Simmonds v. Perkins*, 247 So. 3d 397, 401 (Fla. 2018) (holding that a biological father has standing to rebut the presumption if he has "manifested a substantial and continuing concern for the welfare of the child," and that the presumption may be overcome in the best interests of the child (internal quotation marks omitted)); *Greer ex rel. Farbo v. Greer*, 324 P.3d 310, 318 (Kan. Ct. App. 2014) (explaining that Kansas' statutory scheme creates competing presumptions based on marriage and genetics, to be resolved based on the best interests of the child); *D.W. v. R.W.*, 52 A.3d 1043, 1057 (N.J. 2012) (listing eleven factors, beyond the best interests of the child, to determine whether to grant or deny genetic testing); *R.N. v. J.M.*, 61 S.W.3d 149, 157 (Ark. 2001) (directing courts to consider the best interests of the child before ordering testing).

factors in family controversies.[84] Sensitivity to the facts is critical to the fair adjudication of parentage disputes, and so we relieve trial courts of the burden of blind adherence to a rigid, irrebuttable presumption of paternity. If the marriage is intact, courts should begin with the presumption. But if a challenger presents clear and convincing evidence that he might be the father, courts should consider the individual circumstances before them, and should hew with meticulous sensitivity to the best interests of the child at hand in determining whether to order DNA testing. Courts should also consider the interests of the party seeking to establish paternity as well as those of the mother and her husband.[85] The Supreme Court of the United States has long recognized that parents have a fundamental right "to make decisions concerning the care, custody, and control of their children."[86] In adjudicating who a child's legal parents are, the adults vying for paternity also have significant interests at stake.

The question of how to adjudicate paternity when multiple adults vie for legal parentage continues to beg comprehensive legislative action. The General Assembly could yet choose to determine how to assess, weigh, and compare changes that modernity has wrought in science and society, and how to prioritize competing paternity

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84 *See, e.g.*, 23 Pa.C.S. § 5328 (identifying factors to consider in custody); *id.* § 3502 (identifying factors for equitable distribution); *id.* § 3701 (factors for determining alimony).

85 As the Supreme Court of New Jersey has explained, there is more at issue in a paternity dispute than the interests of the child alone:

> Although the best-interests-of-the-child standard governs most determinations involving children, more is at stake here. The party seeking testing also has an interest in a determination of paternity. Indeed, it may be that in many, if not most, cases where genetic testing is ordered to refute a presumption of paternity, some destabilization of the child's life is inevitable. If this were the only concern, genetic testing would never be ordered to rebut a presumption of paternity.

D.W. v. R.W., 52 A.3d 1043, 1057 (N.J. 2012) (citations omitted).

86 *Troxel v. Granville*, 530 U.S. 57, 66 (2000).

claims. In the absence of legislative direction, we entrust the courts to resolve these disputes on a case-by-case basis, within the framework announced herein. In that process, courts should accrue and apply the wisdom of the common law, now focused upon the best interests of the child, and with due respect as well to the interests of the various adults attempting to establish and/or maintain legal parentage.[87]

To summarize: In order to determine the paternity of a child born in wedlock, courts first must determine whether the marriage is intact at the time of the paternity challenge. If so, then the presumption of paternity applies, and dictates that, regardless of biology,

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[87] *Cf. K.E.M.*, 38 A.3d at 809 ("Implementation of a common law scheme encompassing paternity by estoppel vindicating the best interests of children in paternity disputes on an individualized basis will obviously require development through multiple cases as different fact patterns arise.").

Unless and until the legislature acts, we entrust the contours of the best interests inquiry for purposes of determining legal parentage to the lower courts to develop on a case-by-case basis. For present purposes, we note that the factors included in Section 613 of the Uniform Parentage Act appear well-aligned with the standard we announce today, insofar as they account for both the best interests of the child and the interests of potential parents. Those factors include:

> (1) the age of the child;
> (2) the length of time during which each individual assumed the role of parent of the child;
> (3) the nature of the relationship between the child and each individual;
> (4) the harm to the child if the relationship between the child and each individual is not recognized;
> (5) the basis for each individual's claim to parentage of the child;
> (6) other equitable factors arising from the disruption of the relationship between the child and each individual or the likelihood of other harm to the child; . . .
> (7) the facts surrounding the discovery [that] the individual [might or] might not be a genetic parent of the child; and
> (8) the length of time between the time that the individual was placed on notice that the individual [might or] might not be a genetic parent and the commencement of the proceeding.

See UNIF. PARENTAGE ACT § 613(a), (b)(1)-(2) (UNIF. L. COMM'N 2017) (renumbered).

the mother's spouse will be the child's parent. However, the presumption may be rebutted if the putative father produces clear and convincing evidence that: (1) there is a reasonable possibility that DNA testing would reveal him to be the child's biological father; and (2) determining parentage based upon DNA testing serves the best interests of the child, with due consideration for the interests of the potential father as well as the interests of the wife and husband. If the court finds no threshold possibility of paternity, or determines that adjudicating paternity by DNA testing would disserve the relevant interests, then the presumption governs. But if the court finds a threshold possibility of paternity, and determines that the balance of interests lies in assigning paternity based upon the biological truth, the presumption must yield, and the court should order appropriate genetic testing to determine paternity of the child.[88]

In applying and affirming an irrebuttable presumption of paternity here, the lower courts did not have the benefit of our reconsideration of the presumption. Therefore, we vacate and remand to the Superior Court for further proceedings consistent with this opinion.[89]

Chief Justice Todd and Justices Dougherty, Brobson and McCaffery join the opinion.

Justice Donohue files a concurring and dissenting opinion in which Justice Mundy joins, with the exception of footnote 13.

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[88] Estoppel may yet, of course, independently preclude DNA testing, even if the presumption does not. *See Trojak*, 634 A.2d at 206.

[89] Upon consideration, Sitler's Petition for Leave to File Designation of the Record *Nunc Pro Tunc* is granted.

C.G. v. J. H.

Supreme Court of Pennsylvania

May 15, 2018, Argued; September 21, 2018, Decided

No. 2 MAP 2018

Reporter
648 Pa. 418 *; 193 A.3d 891 **; 2018 Pa. LEXIS 4952 ***; 2018 WL 4537278

C.G., Appellant v. J. H., Appellee

Prior History: [*1]** Appeal from the Order of the Superior Court at No. 1733 MDA 2016 dated October 11, 2017 Affirming the Order of the Centre County Court of Common Pleas, Civil Division, at No. 2015-4710 dated September 22, 2016.

C.G. v. J.H., 2017 PA Super 320, 172 A.3d 43, 2017 Pa. Super. LEXIS 786 (Pa. Super. Ct., Oct. 11, 2017)

Core Terms

loco parentis, trial court, post-separation, parentage, partner, custody, donor, parties, couple, biological, third party, birth, gestational, parental duty, conceived, carrier, same-sex, parental status, sperm donor, cases, reproductive technology, surrogacy, courts, natural parent, public policy, principles, contracts, attended, Baby, ex-wife

Case Summary

Overview

HOLDINGS: [1]-A former same-sex, unmarried partner (UP) of a biological mother (BM) did not have standing to pursue custody as a parent under *23 Pa.C.S. § 5324(1)*, as the child was conceived via assistive reproductive means, that contract was not signed by the UP, she did not adopt the child, and she did not intend to conceive and raise the child; [2]-The UP also lacked standing as a person who stood in loco parentis under *§ 5324(2)*, as prior to the couple's separation, the UP did not assume a parental status or discharge parental duties; [3]-For purposes of in loco parentis standing, although post-separation conduct was not determinative of standing, the conduct by either parent or partner could shed light on whether the person was ever viewed as a parent-like figure.

Outcome
Order affirmed.

LexisNexis® Headnotes

Civil Procedure > Preliminary Considerations > Justiciability > Standing

Family Law > Child Custody > Child Custody Procedures

HN1[] **Justiciability, Standing**

In Pennsylvania, standing requirements limit who may seek physical or legal custody of a child to the following individuals: (1) a parent; (2) a person who stands in loco parentis to the child; or (3) under certain conditions, a grandparent of the child who does not stand in loco parentis. *23 Pa.C.S. § 5324*.

Civil Procedure > Preliminary Considerations > Justiciability > Standing

Family Law > Child Custody > Child Custody Procedures

HN2[] **Justiciability, Standing**

The fundamental concept of standing ensures that a party seeking to litigate a matter has a substantial, direct, and immediate interest in the subject-matter of the litigation. In the area of child custody, principles of standing have been applied with particular scrupulousness. This stringent application of standing

principles serves to protect both the interest of the court system by ensuring that actions are litigated by appropriate parties and the interest in keeping a family unit free from intrusion by those that are merely strangers, however well-meaning. The United States Supreme Court has recognized the significant interest at stake in the context of persons seeking judicial intervention to gain visitation or custody of children. The liberty interest of parents in the care, custody and control of their children-is perhaps the oldest fundamental liberty interest recognized by the Court.

Civil Procedure > Appeals > Standards of Review > De Novo Review

Family Law > Child Custody > Child Custody Procedures

Civil Procedure > Preliminary Considerations > Justiciability > Standing

HN3 **Standards of Review, De Novo Review**

In Pennsylvania, § 5324 of the Domestic Relations Code limits the classes of persons deemed to have a substantial, direct, and immediate interest in the custody of children by conferring standing only upon: (1) a parent of the child; (2) a person who stands in loco parentis to the child; and (3) a grandparent of the child who is not in loco parentis to the child, under certain circumstances. 23 Pa.C.S. § 5324. Determining standing in custody disputes is a threshold issue that must be resolved before proceeding to the merits of the underlying custody action. It is a conceptually distinct legal question which has no bearing on the central issue within the custody action-who is entitled to physical and legal custody of a child in light of his or her best interests. Issues of standing are questions of law; thus, the standard of review is de novo and the scope of review is plenary.

Civil Procedure > Preliminary Considerations > Justiciability > Standing

Family Law > Child Custody > Child Custody Procedures

Governments > Legislation > Interpretation

HN4 **Justiciability, Standing**

Section 5324 of the Domestic Relations Code, 23 Pa.C.S. § 5324, does not define the term parent. Absent a definition in the statute, statutes are presumed to employ words in their popular and plain everyday sense, and the popular meaning of such words must prevail. The popular and everyday meaning of the term parent plainly encompasses a biological mother and a biological father and persons who attain custody through adoption, and Pennsylvania case law supports those applications. Well-settled Pennsylvania law provides that persons other than a child's biological or natural parents are "third parties" for purposes of custody disputes.

Family Law > Paternity & Surrogacy > Surrogacy > Assisted Reproduction Parentage

Family Law > Parental Duties & Rights

HN5 **Surrogacy, Assisted Reproduction Parentage**

Case law from the past decade reflects a growing acceptance of alternative reproductive arrangements in the Commonwealth.

Family Law > Paternity & Surrogacy > Surrogacy > Assisted Reproduction Parentage

Family Law > Child Custody > Child Custody Procedures

Family Law > Parental Duties & Rights

HN6 **Surrogacy, Assisted Reproduction Parentage**

It is beyond cavil that parentage is established either through a formal adoption pursuant to the Adoption Act, 23 Pa.C.S. § 2101 et seq., or when two persons contribute sperm and egg, respectively, either through a sexual encounter or clinical setting, and an embryo is formed that is carried to term and results in a child. However, cognizant of the increased availability of reproductive technologies to assist in the conception and birth of children, the courts are recognizing that arrangements in this latter context may differ and thus should be treated differently than a situation where a

child is the result of a sexual encounter. Specifically, the willingness of persons to act as sperm donors, egg donors, and gestational carriers, is at least somewhat dependent on the extinguishment of the donor or carrier's parental claim to any resulting child and the intended parent's release of any obligation to support the child. Given this, and especially in the absence of legislative guidance surrounding this intimate and sensitive undertaking, it seems obvious that contracts regarding the parental status of the biological contributors-whether one is an anonymous contributor or known to the intended parent to the child be honored in order to prohibit restricting a person's reproductive options.

Family Law > Paternity & Surrogacy > Surrogacy > Agreements

Family Law > Paternity & Surrogacy > Surrogacy > Assisted Reproduction Parentage

Family Law > Parental Duties & Rights

HN7 **Surrogacy, Agreements**

The Superior Court recognized that after a child is conceived through the use of a surrogate and an egg donor, both of whom contracted away any parental rights to the child, the non-biologically related intended parent's contract to assume the role of legal parent is enforceable. Consequently, there appears to be little doubt that the case law of the Commonwealth of Pennsylvania permits assumption or relinquishment of legal parental status, under the narrow circumstances of using assistive reproductive technology, and forming a binding agreement with respect thereto. The courts of the Commonwealth, when faced with the issue and without legislative guidance, have expressly declined to void such contracts as against public policy.

Family Law > Paternity & Surrogacy > Surrogacy > Assisted Reproduction Parentage

Family Law > Parental Duties & Rights

HN8 **Surrogacy, Assisted Reproduction Parentage**

Other jurisdictions have legislatively addressed the issue of parentage where assistive reproductive technology is employed.

Evidence > Burdens of Proof > Allocation

Family Law > Parental Duties & Rights > In Loco Parentis

HN9 **Burdens of Proof, Allocation**

In loco parentis is a legal status and proof of essential facts is required to support a conclusion that such a relationship exists. The phrase "in loco parentis" refers to a person who puts oneself in the situation of a lawful parent by assuming the obligations incident to the parental relationship without going through the formality of a legal adoption. The status of in loco parentis embodies two ideas; first, the assumption of a parental status, and second, the discharge of parental duties. The rights and liabilities arising out of an in loco parentis relationship are, as the words imply, exactly the same as between parent and child. The third party in this type of relationship, however, can not place himself in loco parentis in defiance of the parents' wishes and the parent/child relationship.

Evidence > Burdens of Proof > Allocation

Family Law > Child Custody > Child Custody Procedures

Family Law > Parental Duties & Rights > In Loco Parentis

HN10 **Burdens of Proof, Allocation**

23 Pa.C.S. § 5324(2) permits a person who stands in loco parentis to a child to petition the court for custody of a child. Gaining in loco parentis status requires the petitioning individual to demonstrate two elements: the assumption of parental status and the discharge of parental duties. The ability to marry the biological parent and the ability to adopt the subject child have never been and are not now factors in determining whether the third party assumed a parental status and discharged parental duties.

Civil Procedure > Preliminary

Considerations > Justiciability > Standing

Evidence > Inferences & Presumptions > Presumptions > Rebuttal of Presumptions

Family Law > Child Custody > Child Custody Procedures

Family Law > Parental Duties & Rights > In Loco Parentis

HN11 **Justiciability, Standing**

The in loco parentis basis for standing recognizes that the need to guard the family from intrusions by third parties and to protect the rights of the natural parent must be tempered by the paramount need to protect the child's best interest. Thus, while it is presumed that a child's best interest is served by maintaining the family's privacy and autonomy, that presumption must give way where the child has established strong psychological bonds with a person who, although not a biological parent, has lived with the child and provided care, nurture, and affection, assuming in the child's eye a stature like that of a parent. Where such a relationship is shown, Pennsylvania courts recognize that the child's best interest requires that the third party be granted standing so as to have the opportunity to litigate fully the issue of whether that relationship should be maintained even over a natural parent's objection.

Civil Procedure > Preliminary Considerations > Justiciability > Standing

Family Law > ... > Custody Awards > Standards > Best Interests of Child

Family Law > Child Custody > Child Custody Procedures

Family Law > Parental Duties & Rights > In Loco Parentis

HN12 **Justiciability, Standing**

The paramount concern in child custody cases is the best interests of the child. The important screening functions of standing requirements protect the child and the family from unnecessary intrusion by third parties. The appellate courts of the Commonwealth of Pennsylvania have consistently described the prerequisites to in loco parentis standing as assumption of parental status and discharge of parental duties. Of course, it is a concern to the courts whether a child has developed strong psychological bonds, however, such bonds must necessarily be based on the assumption of parental status and discharge of parental duties in order to achieve this legal status. Indeed, if the determining factor were the child's development of a bond with the person seeking standing, it would be of no moment to the court if the bond was forged contrary to the natural parent's wishes. Acceptance of such a rule would undermine well-established principles of in loco parentis analyses. The in loco parentis test has been applied in the same fashion regardless of whether the person seeking in loco parentis is a former step-parent or a former same-sex partner who had not married the child's biological parent.

Civil Procedure > ... > Justiciability > Standing > Third Party Standing

Family Law > Parental Duties & Rights > In Loco Parentis

HN13 **Standing, Third Party Standing**

The relevant time frame to determine whether a party stands in loco parentis is when the party developed the relationship with the child with the acquiescence or encouragement of the natural parent. Indeed, it is fundamental that a party must have discharged parental duties and assumed parental status in order to gain standing as a third party. The question is of what relevance, if any, is the conduct of the party after there has been some separation between the party and the child. The rights and liabilities arising out of in loco parentis are the same as that between child and parent and its status is conferred upon a person who puts him or herself in the situation of a lawful parent.

Civil Procedure > Preliminary Considerations > Justiciability > Standing

Family Law > Parental Duties & Rights > In Loco Parentis

HN14 **Justiciability, Standing**

The post-separation conduct of a non-biological partner

should not be determinative of the issue of standing; however, the conduct by either parent or partner may shed light on the analysis of whether the person seeking standing was ever viewed as a parent-like figure. Courts recognize that in some situations a natural parent may seek to withhold a child from a person who has assumed parental status (or another natural parent). However, this potential for misconduct does not render the actions of the person seeking in loco parentis status immune from review following a separation.

Civil
Procedure > ... > Justiciability > Standing > Third Party Standing

Family Law > Parental Duties & Rights > In Loco Parentis

Evidence > Relevance > Relevant Evidence

HN15[] **Standing, Third Party Standing**

It would be incongruous to ignore all post-separation conduct between a third-party and a child for the purpose of assessing whether the party stood in loco parentis, when the Adoption Act provides that a petition seeking involuntary termination of a natural or adoptive parent's rights may be filed if the parent has evidenced a settled purpose of relinquishing parental claim to a child and has refused or failed to perform parental duties for a period of at least six months preceding the filing of the petition. *23 Pa.C.S. § 2511*. To render all post-separation conduct irrelevant would be to afford a person seeking in loco parentis standing, at any time, a greater advantage to a natural or adoptive parent even in the event the third party had demonstrated his or her relinquishment of parental claims to a child.

Judges: SAYLOR, C.J., BAER, TODD, DONOHUE, DOUGHERTY, WECHT, MUNDY, JJ. JUSTICE MUNDY. Chief Justice Saylor and Justices Baer and Todd join the opinion. Justice Dougherty files a concurring opinion. Justice Wecht files a concurring opinion in which Justice Donohue joins.

Opinion by: MUNDY

Opinion

[*422] [892] JUSTICE MUNDY**

HN1[] In Pennsylvania, standing requirements limit who may seek physical or legal custody **[**893]** of a child to the following individuals: (1) a parent; (2) a person who stands in loco parentis to the child; or (3) under certain conditions, a grandparent of the child who does not stand in loco parentis. *23 Pa.C.S. § 5324*. We granted allowance of appeal to explore whether a former same-sex, unmarried partner of a biological parent may have standing to pursue custody either as a parent or as a person who stood in loco parentis to the Child, and to what extent post-separation conduct is relevant in an in loco parentis analysis.

I.

Appellant C.G. and Appellee J.H. were a same-sex couple living together in Florida. In October 2006, J.H. gave **[***2]** birth to Child. Child was conceived via intrauterine insemination using an anonymous sperm donor. J.H. is the biological mother of Child. C.G. shares no genetic connection with Child, and did not adopt Child.[1] Following Child's birth, the couple continued to live together for approximately five years before separating. J.H. and Child moved to a separate residence in Florida in February 2012, and they relocated to Pennsylvania in July 2012.

On December 8, 2015, C.G. filed a custody complaint seeking shared legal and partial physical custody of Child alleging she "acted (and acts) as a mother to the minor child as well, as the minor child was conceived by mutual consent of the parties, with the intent that both parties would co-parent and act as mothers to the minor child." Custody Compl., 12/8/15, at ¶ 3. She averred further that "[i]t is in child's best interests **[*423]** and permanent welfare to have a relationship with both parents." *Id.* at ¶ 7. C.G. continued that she "mutually agree[d] to have a child with [J.H.], and both participated in selecting a sperm donor in order for [J.H.] to conceive their minor child." *Id.* C.G. claimed she served daily as Child's mother from the time **[***3]** of conception and birth until 2011 by, for example, appearing at pre-natal appointments, participating in the birth of Child, and cutting his umbilical cord. *See id.* With respect to her relationship with Child following the dissolution of her

[1] The parties agree that at the time of Child's birth in 2006, same-sex second-parent adoption was not legal in Florida, and although it became legal in 2010, the parties did not discuss pursuing adoption. *See* N.T., 2/5/16, at 8 (C.G. testified the parties did not talk about adoption following its legalization in Florida); *id.* at 57(J.H testified the issue of adoption "was never raised."); *see also* N.T., 4/12/16, at 310.

relationship with J.H., C.G. claimed that J.H. began withholding Child from C.G. in February 2012,[2] allowing only once a week contact, despite C.G.'s requests for more; J.H. moved Child to Pennsylvania without notifying or consulting C.G.; C.G. has had minimal and inconsistent contact with Child, via telephone and one physical contact since J.H. and Child relocated to Pennsylvania; J.H. represented to C.G. she could have more regular contact with Child following the parties' settling financial matters attendant to their separation, but following the parties' resolution of those matters, J.H. did not permit C.G. to see or have contact with Child. *See id.*

On January 6, 2016, J.H. filed preliminary objections to the complaint asserting that C.G. lacked standing to bring an action **[**894]** for any form of custody under *23 Pa.C.S. § 5324* because C.G. is not a parent, does not and did not ever stand in loco parentis to Child, and is not a grandparent. *See* Prelim. Objections, **[***4]** 1/6/16, at ¶¶ 7-11. J.H. disputed that Child was conceived by mutual consent with the intent to co-parent. Rather, she contended that "the decision to have a child was solely that of [J.H.] . . . [C.G.] made it clear to [J.H.] that [C.G.] did not want another child (having two children of her own from a prior relationship) and that [J.H.] would bear responsibility for the child she conceived[.]" *Id.* at ¶ 12. J.H. continued that she bore all costs of Child with the exception of **[*424]** limited situations in which C.G. contributed "minimally," and "since the child's birth [J.H.] has acted as the sole parent for the child. [C.G.'s] involvement was solely that of [J.H.'s] girlfriend from the child's birth until November 2011[.]" *Id.* Additionally, she asserted that pursuant to C.G.'s desire not to be a parent to Child, J.H. "made all decisions regarding the child's education, medical care, growth and development, and attended to all of his daily, educational and medical needs with the exception of limited times during which [C.G.] babysat for [J.H.]" *Id.* J.H. claimed that, in December 2011, C.G. asked J.H. to move out of the shared residence by February 2012 because C.G. wanted to continue a romantic **[***5]** relationship with a woman with whom she was having an affair. *See id.* J.H. agreed that she and Child moved out of the house in February 2012, and moved to Pennsylvania in July of that year. *See id.* She additionally agreed that C.G. "has spoken with the child only minimally and seen him only one time, which was in March 2014." *Id.* She continued that since the move, C.G. has not provided financial support to Child except for one week of camp and one month of before and after school care, and has occasionally sent nominal gifts. *See id.* She sought dismissal of the complaint based on legal insufficiency and lack of capacity to sue. *See Pa.R.C.P. 1028(a)(4)* and *(5)*.

C.G. filed a response to the preliminary objections on January 25, 2016, in which she claimed standing as a parent under *Section 5324(1)* or "at the very least" as a person in loco parentis to Child under *Section 5324(2)*. *See* Response to Prelim. Objections, 1/25/16, at ¶¶ 7-11. She generally disputed the factual representations in J.H.'s preliminary objections in support of her own account of the decision to conceive and parent Child. *See id.* at 12.

The trial court held hearings over three days at which a number of witnesses testified and conflicting evidence was presented. Consistent with **[***6]** the assertions in the complaint and responses, the gravamen of the parties' respective presentations was C.G.'s participation in the conception, birth, and raising of Child, the intent of the parties with respect thereto, and the perception others held of the household or family **[*425]** dynamic. For example, C.G. testified she and J.H. "planned to have a child together[;]" that J.H. did not begin the process of trying to become pregnant until C.G. consented; the couple would look for donors together on a donor site; and she considered Child her son from the time he was born. N.T., 4/12/16, at 38-55. Following his birth, C.G. described her relationship with Child as a parent/child relationship. *See id.* at 103. J.H., by contrast, testified the decision to have a child was hers alone, she did not consider C.G. to be a parent to Child, or hold her out to others as such. *See* N.T., 2/5/16, at 28-29 ("[C.G. did not want a child[,]" but "tolerated the idea" of J.H. having one.); *see also* N.T.,4/12/16, at 207-08 ("I wanted to have a child. [C.G.] did not want that, and I let her know I made an appointment with a fertility doctor, and I was moving forward with that **[**895]** for myself."); *id.* at 222 ("I am [Child's] mom, and [C.G.] **[***7]** is not.").

In all, the trial court heard from 16 witnesses, offering differing testimony on issues bearing on the parties' relationship between and among J.H., Child, C.G., and

[2] C.G. lists the dates of J.H. and Child's move from the shared residence and their move to Pennsylvania as occurring in February and July of 2011, respectively. *See* Custody Compl., 12/8/15, at ¶ 12. However, the record indicates that the relevant time of separation began in 2012. *See, e.g.* N.T., 2/5/16, at 5-6 (C.G. testified that she and J.H. separated in February 2012 and that J.H. moved to Pennsylvania in July 2012, and acknowledged the error in the custody complaint.).

her daughters (who were, at the relevant time, college age), the intent of the parties prior to and after Child's conception and birth, and parental duties performed for Child. C.G. offered a number of witnesses supporting her position that she acted as a mother to Child and that she and J.H. undertook jointly to conceive and raise child. *See, e.g.*, N.T., 2/5/16, 85-91 (C.G.'s daughter, Christine Comerford, testifying she understood J.H. and C.G. were having a baby together, she was told the Child was her brother, C.G. performed day-to-day activities for Child including picking him up from school, bathing him, and preparing meals); *id.* at 118-130 (C.G.'s daughter, Lauren Comerford, testifying she understood her mother and J.H. were having a baby together, her mother tended to Child and attended his activities as he grew older, and they took vacations together as a family); N.T., 6/20/16, at 123-28 (Terri Michaels, friend and work colleague of C.G., former colleague of J.H., testifying she understood J.H. and C.G. were having **[***8]** a baby together, C.G. would arrange for Terri and her daughter to babysit Child, and she observed C.G. perform parental duties such as preparing **[*426]** Child's meals, playing with him, or correcting him). J.H., by contrast, offered a number of witnesses who testified that J.H. decided unilaterally to have a child and was Child's primary caregiver. *See, e.g.*, N.T., 4/12/16, at 7-11 (Katina Gray, one of Child's babysitters in Florida, testifying J.H. hired her and would discuss Child's needs with her and perceiving C.G.'s involvement with Child akin to "a babysitter"); N.T., 6/20/16, at 17-22 (Dr. Alicia Chambers, J.H.'s friend, testifying to her discussions with J.H. about her commitment to becoming a mother despite the fact that C.G. "didn't want that," "wanted to be free[,] and had her own children" and her understanding that C.G. did not want to have a child. She explained that C.G. and J.H. had an arrangement "that this was [J.H.'s] child, and therefore, [J.H.] was going to do the work that was involved..."); N.T., 6/20/16, at 48 (J.H.'s brother testifying "it was clear" C.G. did not desire to have a baby, J.H. performed the parental caretaking of Child, and J.H. asked him and his wife **[***9]** to be Child's godparents and "take care of [Child] if anything would happen to [J.H.]").

A number of exhibits, including handwritten notes, e-mails, Child's medical records, and Christmas cards were also admitted into evidence by the parties attempting to evidence or refute C.G.'s status as a parental figure to Child.

On September 22, 2016, the trial court issued an opinion and order sustaining J.H.'s preliminary objection as to C.G.'s standing to pursue custody.[3] The trial court concluded that C.G. was not a parent pursuant to *Section 5324(1)* because both parties agreed that at the time and place of Child's birth, same-sex marriage and second-parent adoptions were not recognized. Thus, it proceeded to determine whether C.G. stood in loco parentis to Child.

In its analysis, the trial court outlined certain undisputed facts, i.e, that Child was conceived while the parties were in a relationship, Child referred to C.G. as "Mama C[.]," the parties **[*427]** had a commitment ceremony, and C.G. was present for **[**896]** the birth and christening of Child. *See* Trial Ct. Op. at 5. It then made a number of findings of fact regarding the disputed evidence and testimony of the parties which are supported by the record. First, the **[***10]** trial court looked to whether any documentation existed evidencing the parties' intent that C.G. be viewed as a co-parent to Child. The court noted that C.G. is not listed on Child's birth certificate nor does he bear her name, and notwithstanding the fact that Florida did not allow second-parent adoption at the time Child was born, neither party suggested adoption following its legalization in 2010 nor executed or memorialized a co-parenting agreement. *See id.* at 6. The trial court considered a note written by J.H. to C.G. that referenced the hope of "having a child together" and one expressing J.H.'s happiness following her baby shower, as well as the fact that Child was a beneficiary on C.G.'s life insurance policy and was carried on her medical and dental insurance plans, prior to separation. *Id.* at 6. However, in weighing the evidence, it concluded "[t]wo letters and one policy" did not overcome J.H.'s testimony that C.G. did not agree to have a child, but merely acquiesced to J.H. having one. *Id.* Moreover, it credited J.H.'s testimony that following the couple's separation, C.G. removed J.H. and Child from her medical and dental policies and would not continue to provide coverage for Child. **[***11]** The trial court found other documentation similarly demonstrated that C.G. was not a parent, and that J.H. did not hold her out to be a parent to others. Specifically, on school and medical forms, C.G. was listed as an emergency contact or as "partner" to J.H., rather than as a parent or mother, and on certain paperwork for activities, she was omitted entirely. *See id.* at 7.

Focusing on the pre-separation period of time, the court

[3] Because the trial court sustained the preliminary objection regarding standing, it did not rule on J.H.'s preliminary objection in the nature of a demurrer.

evaluated the various and conflicting testimony on C.G.'s discharge of parental duties toward Child. The trial court found it significant that J.H. did not consult C.G. when choosing Child's doctor, preschool, and extra-curricular activities, and J.H. was responsible for the scheduling of Child's appointments, events, and made the childcare arrangements. The **[*428]** court found C.G. occasionally attended activities, appointments, and provided care; however, it further found that such contributions did not amount to the discharge of parental duties, and that J.H. did not encourage C.G. to assume the status of a parent. *See id.* at 8. Turning to the couple's finances, the trial court highlighted that J.H. testified that she solely purchased the items necessary for Child's care, and **[***12]** the couple split household expenses. The court found C.G. financially contributed to the household overall which created a tangential benefit to Child. *Id.*

With respect to C.G.'s family and testimony offered by her daughters and father reflecting familial titles, such as, in the case of C.G.'s parents, "Grandma A[.]" and "Grandpa J[.]," the court found the interactions were incidental to J.H. and C.G.'s relationships and titles were created for convenience rather than demonstrating an actual familial bond or connection. *See id.* at 8.

The court briefly touched on whether a parent/child bond existed between C.G. and Child. It acknowledged that because the hearings were pursuant to preliminary objections and not a custody determination, evidence was not offered directly on the subject of a bond. It found, nevertheless, that testimony elicited at the hearing demonstrated that Child is well-adjusted and does not request to see C.G. *See id.* at 9.

Finally, the court reviewed evidence regarding the post-separation conduct of C.G. It noted that C.G. did not request to be involved in the educational, medical, or **[**897]** day-to-day decisions concerning Child, C.G. sent nominal care packages, but has only seen Child once **[***13]** since July 2012, in March 2014, when he and J.H. visited Florida. *See id.* The court found that the level of contact for a period of approximately four years is not consistent with a person who has discharged parental duties or assumed parental status. *Id.* at 10. It did not credit C.G.'s assertion that J.H. withheld Child; rather it found J.H. permitted occasional phone contact, provided updates via text messages and email, and accepted gifts for Child. *See id.* It noted J.H.'s account that such interactions were consistent with C.G.'s overall involvement in Child's life and the same as **[*429]** the type of involvement she permitted other friends to have. *Id.* The court concluded that "the parties' post-separation conduct is consistent with the finding that [C.G.] was not a parent to the child." *Id.*

C.G. filed a direct appeal arguing, inter alia, the trial court erred in ruling she was not a parent under Section 5324(1) because she and J.H. jointly conceived and raised Child. The Superior Court concluded the trial court did not err because Pennsylvania "case law has consistently treated same-sex life partners who have not adopted a child as third parties for purposes of custody matters" and C.G. has failed to cite to **[***14]** a statute or case law establishing a non-biological, non-adoptive former partner can be a parent. ***C.G. v. J.H.**, 2017 PA Super 320, 172 A.3d 43, 51-52. (Pa. Super. 2017)*. C.G alternatively argued the trial court erred in finding that she did not stand in loco parentis to Child. The Superior Court concluded that the trial court's holding was based "on the unique facts of this case" and it's opinion "reflect[ed] a careful, thorough, and proper consideration of the evidence presented by ***both*** parties, and did not, as C.G. alleges, simply disregard the evidence in her favor." *Id. at 58-59*. Because the decision of the trial court rested on credibility determinations made within the trial court's discretion, the Superior Court affirmed the ruling that C.G. did not stand in loco parentis to Child. *See id. at 59*. Finally, the Superior Court addressed and dismissed C.G.'s argument that the trial court erred by affording too much weight to the post-separation conduct of the parties in its analysis. It observed that the trial court did not find that C.G. was denied standing based on her post-separation conduct; rather, the trial court viewed all of the evidence, including pre-and post-separation conduct, when it evaluated whether C.G. ever stood in loco parentis to Child. *Id. at 60*.

In a concurring **[***15]** opinion, Judge Musmanno questioned whether C.G. should be treated as a third-party for the purpose of custody and suggested "it may be time to re-visit the issue of the appropriate standard and presumptions to be applied in determining standing where a child is born during a same-sex relationship." *Id. at 60* (Musmanno, J., concurring). **[*430]** He further notes that same-sex marriage was not allowed in Florida at the time, and suggests that if C.G. were a male, she would have standing as a parent, seemingly assuming that J.H. and C.G. would have formally married had it been legal or had they been in a heterosexual relationship. *See id.* n. 1.

We granted C.G.'s petition for allowance of appeal to consider the following question.

> Whether the Superior Court erred in affirming the decision of the trial court that a former same-sex partner lacked standing both 1) as a parent and 2) as a party who stood in loco parentis to seek custody of the child born during her relationship with the birth mother where the child was conceived via assisted reproduction with an anonymous sperm donor and the parties lived together as a **[**898]** family unit for the first five years of the child's life.

C.G. *v.* ***J.H.****, 179 A.3d 440 (Pa. 2018)* (per curiam).

II.

Before addressing **[***16]** the arguments of the parties, we outline some general principles regarding standing in custody matters. ***HN2***[⬆] The fundamental concept of standing ensures that a party seeking to litigate a matter has a substantial, direct, and immediate interest in the subject-matter of the litigation. *Ken R. on Behalf of C.R. v. Arthur Z., 546 Pa. 49, 682 A.2d 1267, 1270 (Pa. 1996)*; *see D.G. v. D.B., 2014 PA Super 93, 91 A.3d 706, 708 (2014)*. "In the area of child custody, principles of standing have been applied with particular scrupulousness[.]" *D.G., 91 A.3d at 708*. This stringent application of standing principles serves to protect both the interest of the court system by ensuring that actions are litigated by appropriate parties and the interest in keeping a family unit free from intrusion "by those that are merely strangers, however well-meaning." *Id.* (citation omitted). Indeed, in evaluating whether a Washington state statute conferring standing to "any person" to seek visitation of children, the United States Supreme Court has recognized the significant interest at stake in the context of persons seeking judicial intervention to gain visitation or custody of children. "The liberty interest . . . of parents in the **[*431]** care, custody and control of their children-is perhaps the oldest fundamental liberty interest recognized by this Court." *Troxel v. Granville, 530 U.S. 57, 65, 120 S. Ct. 2054, 147 L. Ed. 2d 49 (2000)*. ***HN3***[⬆] In Pennsylvania, **[***17]** *Section 5324* of the Domestic Relations Code limits the classes of persons deemed to have a substantial, direct, and immediate interest in the custody of children by conferring standing only upon "(1) a parent of the child[;] (2) a person who stands in loco parentis to the child[; and] (3) a grandparent of the child who is not in loco parentis to the child[,]" under certain circumstances. *23 Pa.C.S. § 5324*. Determining standing in custody disputes is a threshold issue that must be resolved before proceeding to the merits of the underlying custody action. *K.C. v. L.A., 633 Pa. 722, 128 A.3d 774, 779 (Pa. 2015)*. It "is a conceptually distinct legal question which has no bearing on the central issue within the custody action-who is entitled to physical and legal custody" of a child in light of his or her best interests. *Id.* Issues of standing are questions of law; thus, the standard of review is de novo and the scope of review is plenary. *K.W. v. S.L., 2017 PA Super 56, 157 A.3d 498, 504 (Pa. Super. 2017)*. With that in mind, we turn to the question of C.G.'s standing in the instant case.

III.

A. *Standing as a parent*

C.G. argues that she is a "parent" to Child under *23 Pa.C.S. § 5324(1)* because Child was conceived via assistive reproductive means using an anonymous sperm donor; Child was born to C.G.'s partner, J.H., during their relationship; C.G. participated **[***18]** in parenting Child; and C.G., J.H., and Child lived together as a family unit for the first five years of Child's life. C.G.'s Brief at 19, 24. She contends the Superior Court erred when it held the term "parent" is limited to the biological or adopted parents of a child. She urges this Court to hold that legal parentage under *Section 5324(1)* should include those who intend to bring a child into the world with the use of assistive reproductive technology and then co-parent the child subsequently born through that process, in addition to the traditional concepts of parentage by biology and adoption. **[*432]** *See id.* at 21. She highlights that **[**899]** medical options to conceive are varied and open to a variety of intended parents.[4] Moreover, same-sex couples, in particular, necessarily feature non-biological parent/child relationships because the couple "must turn to donor gametes to conceive." *Id.* at 25. C.G. reasons that reading this Court's decision in *Ferguson v. McKiernan, 596 Pa. 78, 940 A.2d 1236 (Pa. 2007)* with the Superior Court's decisions in *In re Baby S., 2015 PA Super 244, 128 A.3d 296 (2015)*; *J.F. v. D.B., 2006 PA Super 90, 897 A.2d 1261 (Pa. Super. 2006)*; and *L.S.K. v. H.A.N., 2002 PA Super 390, 813 A.2d 872 (Pa. Super. 2002)*, illustrates that a genetic connection to a child is not determinative of legal parentage in cases involving assistive reproductive technologies. *See id.* at 27-35.

Consequently, C.G. advocates for an intent-based

[4] C.G. notes that in 2014, for example, there were 60,000 live births that were the result of in vitro fertilization and the number of children born as a result of donor gametes and gestational carriers has increased. *See* C.G.'s Brief at 25.

approach to determining legal **[***19]** parentage when a child is born through the use of assistive reproductive technology. *See id.* at 27-35. C.G. also posits that this intent-based approach is consistent with how other jurisdictions and the *Uniform Parentage Act* (2017) have addressed related issues.[5] C.G.'s Brief at 35-38.[6]

[*433] J.H. emphasizes the stringent test applied in determining who has standing in child custody matters is essential to preventing unnecessary intrusion into a family. *See* J.H.'s Brief at 38-42. She continues that the cases C.G. relies on for the proposition that parentage may be determined by intent do not support that reading of the case law because those cases do not relate to parentage by intent, but parentage by mutual assent of the parties. *Id.* at 49. She continues that "it would be wrong to allow [C.G] to be deemed a legal parent **[**900]** in the absence of [J.H.'s] assent, especially when [C.G.] outwardly voiced objections to the pregnancy and thereafter failed to discharge parental duties." *Id.* J.H. notes that although C.G. accuses the trial court of relying on discriminatory laws in concluding she was not a parent, the court undertook an examination of the evidence to evaluate the intent of the parties in the conception **[***20]** of Child and C.G.'s discharge of parental duties, in its in loco parentis analysis, which is the same standard C.G. advocates for in determining parentage when a child is born via assistive reproductive technology. *Id.* at 50. She emphasizes the factual findings made by the trial court regarding C.G.'s participation in Child's life and asks this Court to disregard C.G.'s factual assertions that were not credited by the trial court.[7] *See id.* at 50-57. She maintains **[*434]** that C.G. is not a parent based on the credible evidence accepted as fact by the trial court. *See id.* at 60.

HN4[↑] *Section 5324* does not define the term parent. "Absent a definition in the statute, statutes are presumed to employ words in their popular and plain everyday sense, and the popular meaning of such words must prevail." *Centolanza v. Lehigh Valley Dairies, Inc., 540 Pa. 398, 658 A.2d 336, 340 (Pa. 1995)* (citing *Harris-Walsh, Inc. v. Borough of Dickson City, 420 Pa. 259, 216 A.2d 329 (Pa. 1966))*. The popular and everyday meaning of the term parent plainly encompasses a biological mother and a biological father and persons who attain custody through adoption, and our case law supports those applications. *See J.F., 897 A.2d at 1273* ("Well-settled Pennsylvania law provides that persons other than a child's biological or natural parents are 'third parties' for purposes of custody disputes." (citation omitted)*; Faust v. Messinger, 345 Pa. Super. 155, 497 A.2d 1351, 1353 (Pa. 1985)* (Recognizing, "[t]he entire body of law **[***21]** pertaining to adoption harmonizes in order to place an adopted

[5] C.G. devotes a portion of her argument to the state of law in Florida at the time of her relationship with and separation from J.H., in particular its restrictions on same-sex marriage and adoption around the time of Child's birth. *See* C.G.'s Brief at 39-47. She argues the trial court's analysis and Superior Court's affirmance did not give due consideration to these legal barriers and instead "the courts below considered the state of law in Florida as a legal conclusion that C.G. is not a parent." *Id.* at 46. She posits to allow these legal impediments to serve as evidence that she lacked intent is unfair to C.G., and others similarly situated "as it allows the discriminatory treatment of LGBT parents-even where the treatment has been held to be unconstitutional-to continue to injure litigants in perpetuity." *Id.*

C.G. seems to suggest she is entitled to a presumption of parentage based on, inter alia, the uncontested fact that she and J.H. participated in a commitment ceremony in Florida prior to Florida's recognition of same-sex marriage. *See, e.g. Brinkley v. King, 549 Pa. 241, 701 A.2d 176, 177 (Pa. 1997)* (OAJC) ("One of the strongest presumptions in Pennsylvania law is that a child conceived or born in marriage is a child of the marriage."). However, addressing whether a commitment ceremony in another state should be considered a marriage for purposes of applying presumptions of parentage is beyond the scope of the legal issue presented and the facts of this case. The trial court explained in its *Pa.R.A.P. 1925(a)* opinion that it wished to clarify that the focus of its analysis was on C.G.'s "actions and/or lack of actions. This finding in no way unconstitutionally restricts persons in a same-sex relationship from being able to reproduce and share legal parentage." Trial Ct. Op., 10/31/16. Moreover, it is not disputed that the parties declined to register with their county as domestic partners or pursue adoption once it became legal.

[6] Academy of Adoption and Assisted Reproduction Attorneys has submitted an amicus curiae brief in support of C.G. Amicus argues the trial court erred by concluding that biology and adoption are the only means to achieve legal parentage in Pennsylvania, the word "parent" is not sufficiently defined, and Pennsylvania should broaden the concept of parentage to determine who a parent is through the eyes of the child.

[7] J.H. further contends that presumptions of parentage are not implicated in this case, despite Judge Musmanno's suggestion in his concurring opinion. *See* J.H.'s Brief at 57-60. Specifically, she acknowledges the unavailability of marriage, but highlights the parties did not formalize their union by registering as domestic partners in their county, an option available to them, and further that Child was born because of the unilateral decision of J.H. *Id.* at 58-59.

child in the shoes of a natural child in all legal respects[.]" However, the reality of the evolving concept of what comprises a family cannot be overlooked. *See* Troxel, 530 U.S. at 63 ("The composition of families varies greatly from household to household."); J.A.L. v. E.P.H., 453 Pa. Super. 78, 682 A.2d 1314, 1320 (Pa. Super. 1996) (Observing, "increased mobility, changes in social mores and increased individual freedom have created a wide spectrum of arrangements, filling the role of the traditional nuclear family[.]"). Thus, C.G. directs our attention to cases that specifically involve the use of alternative means of conceiving and or reproducing through assistive reproductive technologies, and asks this Court to revisit and expand the definition of parent to include persons involved in the process but bearing no biological connection to the resulting child.[8]

[*435] **[**901]** *J.F. v. D.B.*, involved the relative rights of parties to a surrogacy agreement vis-à-vis the resulting triplets. In that case, an unmarried couple used the services of a surrogate, an egg donor, and the father's sperm to reproduce. The gestational carrier, who bore no genetic relation to the triplets she delivered, began misinforming **[***22]** Father and his partner, the intended-mother of the children, about the pregnancy and ultimately took them home and assumed them as her own. The trial court voided the surrogacy contract, and concluded the gestational carrier stood in loco parentis and was the children's legal mother. On appeal, the Superior Court held that the gestational carrier was a third party and had not established in loco parentis as she "took custody of the children in flagrant defiance of Father's wishes," it further held the trial court erred in voiding the surrogacy contract and concluding the gestational carrier was the legal mother. Id. at 1280. The surrogacy contract at issue identified Father as "Biological Father or Adoptive Father" and his partner as "Biological Mother or Adoptive Mother." J.F., 897 A.2d at 1265. Although Father's partner was not named in the action, the Superior Court concluded the trial court erred in voiding the surrogacy contract. The court declined to rule on the propriety of surrogacy contracts in general, leaving that task for the General Assembly to address. J.F., 897 A.2d at 1280. It is undisputed that C.G. was not a party to a contract in connection **[*436]** with Child's birth, and her reliance on *J.F.* to support the intent-based approach **[***23]** to parentage is misplaced.

This Court addressed a situation involving contracting for release of parental rights in the context of assistive reproductive conception in *Ferguson v. McKiernan*. Mother in that case sought the assistance of a former paramour (Donor) in conceiving a child. Although reluctant initially, Donor agreed to provide his sperm for purposes of in vitro fertilization after Mother agreed to release him from any rights and or obligations attendant to paternity. *See* Ferguson, 940 A.2d at 1239. His identity was intended to remain confidential, and following the birth of the twins, Mother acted in accordance with the agreement for approximately five years at which time she filed a support action against Donor. The trial court specifically found that Mother and Donor had formed a binding oral contract to release Donor from parental obligations in exchange for his participation in conception; however, it voided the contract reasoning a parent cannot bargain away children's right to support, as allowing such agreement would violate public policy. *See* id. at 1241. This Court disagreed that enforcing such an agreement violated public policy, particularly "in the face of the evolving role played by alternative reproductive **[***24]** technologies in contemporary American society." Id. at 1245. The focus of our analysis was the enforceability of what was determined to be a binding oral contract. Our reasoning, in part, follows.

> **[**902]** [W]e cannot agree with the lower courts that the agreement here at issue is contrary to the sort of manifest, widespread public policy that generally animates the court's determination that a

[8] C.G. argues *L.S.K* stands for the proposition that Pennsylvania courts have recognized that "a person who intends to create children through assistive reproductive technology ought to be held legally responsible" for the children on the same basis as a parent. C.G.'s Brief at 29. In that case, Mother, L.S.K., and H.A.N. were in a same-sex relationship and Mother eventually bore five children conceived through artificial insemination. L.S.K., 813 A.2d at 874. The couple separated after approximately seven years of living as a family, and H.A.N. filed a complaint for custody. The trial court granted H.A.N. shared legal and partial physical custody, ruling that she stood in loco parentis to the children, *see* 23 Pa.C.S. § 5324(2), not that she was a parent to the children under Section 5324(1). H.A.N. attempted to avoid paying child support for the children, which the trial court denied. The Superior Court affirmed the trial court's determination based on equitable principles: "equity mandates that H.A.N. cannot maintain the status of *in loco parentis* to pursue an action as to the children, alleging she has acquired rights in relation to them, and at the same time deny any obligation for support merely because there was no agreement to do so." Id. at 878. However, it did not conclude that H.A.N. was a parent for the purpose of standing requirements. Rather, she was a third party who stood in loco parentis to the children.

> contract is unenforceable. The absence of a legislative mandate coupled to the constantly evolving science of reproductive technology and the other considerations highlighted above illustrates the very opposite of unanimity with regard to the legal relationships arising from sperm donation, whether anonymous or otherwise. This undermines any suggestion that the agreement at issue violates a "dominant public policy" or "obvious ethical standards" **[*437]** sufficient to warrant the invalidation of an otherwise binding agreement.

Id. at 1248 (internal citations omitted). We found it noteworthy that but for the agreement between Donor and Mother, the children at the center of the issue would not have come into being. *Id.* Thus, we concluded that the agreement obviating Donor of his legal parental rights and obligations was indeed enforceable. **[***25]** *Id.*

More recently, the Superior Court addressed establishing parentage by contract in the context of a surrogacy arrangement where the intended mother was not biologically related to the resulting child in *In re Baby S.* In that case, S.S. and her Husband decided to become parents, and S.S. underwent fertility treatments to achieve that end. Eventually, the couple entered into a service agreement with a company that coordinates gestational carrier arrangements, identifying S.S. and Husband as the intended parents. The agreement provided that the intended parents could terminate the agreement provided gestational carrier had not undergone the necessary procedure to produce pregnancy; in the event she had, the intended parents could still terminate the agreement, but only after confirmation the gestational carrier was not pregnant. *See In re Baby S., 128 A.3d at 298*. S.S. and Husband were matched with a gestational carrier in Pennsylvania. They next entered into a service agreement with an egg donation agency, and entered into an ovum donation agreement with an anonymous egg donor providing, in part, "that the Intended Mother shall enter her name as the mother and the Intended Father shall enter his name as the father **[***26]** on the birth certificate of any Child born from such Donated Ova. . . . Donor understands that the Intended Parents shall be conclusively presumed to be the legal parents of any Child conceived pursuant to this Agreement." *Id. at 299-300* (citations omitted). Following the selection of the egg donor, the couple entered into a gestational contract with gestational carrier providing the intended parents were to assume legal responsibility for any child born pursuant to the agreement and that intended mother wished to be the mother of a child who was biologically **[*438]** related to intended father. *See id.* The gestational carrier became pregnant with an embryo created from Husband's sperm and the anonymous egg donor's egg. S.S. expressed gratitude and largely financed the procedure, and she and Husband attended the twenty-week ultrasound. *Id.* However, prior to the child's birth, S.S. refused to sign the necessary paperwork to have her named on the child's birth certificate because she and Husband were experiencing marital problems. While pregnant, the gestational carrier sought a court order declaring S.S. and Husband to be the legal parents of the child. In the meantime, Baby S. was born, and gestational carrier **[***27]** was named as the mother, and no name was listed for the father. Husband took custody of Baby S. S.S. filed a response and new matter arguing the gestational carrier contract was unenforceable. Following hearings, the trial **[**903]** court entered an order declaring S.S. and Husband as the legal parents, and resolving other ancillary matters. *Id. at 301*. S.S. appealed to the Superior Court arguing inter alia, the legislature has evidenced its reluctance to sanction surrogacy contracts in the Commonwealth by declining to enact laws recognizing their validity; Pennsylvania provides only two mechanisms to parentage, biology and adoption, and neither situation applies to surrogacy agreements; the Court cannot authorize a new means by which legal parentage is established, and the contract violates public policy by creating a parent/child relationship without an adoption or judicial oversight. *See id. at 303*. Drawing largely from our decision in *Ferguson*, the court concluded that S.S. failed to demonstrate the surrogacy contract was against public policy. *See id. at 306*. The court disagreed with the position of S.S. that the lack of legislative direction regarding surrogacy agreements implies disapproval. Rather, the court reasoned, **[***28]** "the absence of a legislative mandate one way or the other 'undermines any suggestion that the agreement at issue violates dominant public policy...'" *Id.* The court acknowledged, as this Court did in *Ferguson*, that ***HN5***[] "case law from the past decade reflects a growing acceptance of alternative reproductive arrangements in the Commonwealth." *Id.* Finally, the court expressly disagreed with S.S.'s assertion that a biological relationship or **[*439]** formal adoption are the only ways to attain the status of a legal parent in Pennsylvania:

> Further, the Adoption Act is not the exclusive means by which an individual with no genetic connection to a child can become the legal parent; and nothing in the *Adoption Act* evinces a

> "dominant public policy" against the enforcement of gestational contracts. The legislature has taken no action against surrogacy agreements despite the increase in common use along with a [Department of Health] policy to ensure the intended parents acquire the status of legal parents in gestational carrier arrangements. Absent an established public policy to void the gestational carrier contract at issue, the contract remains binding and enforceable against [S.S.].

Id. at 306 (citation omitted). **[***29]**

HN6[↑] It is beyond cavil that parentage is established either through a formal adoption pursuant to the Adoption Act[9] or when two persons contribute sperm and egg, respectively, either through a sexual encounter or clinical setting, and an embryo is formed that is carried to term and results in a child. However, cognizant of the increased availability of reproductive technologies to assist in the conception and birth of children, the courts are recognizing that arrangements in this latter context may differ and thus should be treated differently than a situation where a child is the result of a sexual encounter. Specifically, the willingness of persons to act as sperm donors, egg donors, and gestational carriers, is at least somewhat dependent on the extinguishment of the donor or carrier's parental claim to any resulting child and the intended parent's release of any obligation to support the child. *See, e.g., In re Baby S., 128 A.3d at 298-300* (Egg Donor and Gestational Carrier's respective contracts outlining intended parents were to be deemed legal parents). Given this, and especially in the absence of legislative guidance surrounding this intimate and sensitive undertaking, it seems obvious that contracts regarding the **[***30]** parental status of the biological contributors-whether one is an anonymous contributor or known **[*440]** to the intended parent to the **[**904]** child be honored in order to prohibit restricting a person's reproductive options. *See Ferguson, 940 A.2d at 1247-48* (opining, "where a would-be donor cannot trust that he is safe from a future support action, he will be considerably less likely to provide his sperm to a friend or acquaintance who asks, significantly limiting a would-be mother's reproductive prerogatives." (footnote omitted)).

Likewise, ***HN7***[↑] the Superior Court recognized that after a child is conceived through the use of a surrogate and an egg donor, both of whom contracted away any parental rights to the child, the non-biologically related intended parent's contract to assume the role of legal parent is enforceable. *In re Baby S., 128 A.3d at 298*. Consequently, there appears to be little doubt that the case law of this Commonwealth permits assumption or relinquishment of legal parental status, under the narrow circumstances of using assistive reproductive technology, and forming a binding agreement with respect thereto.[10] The courts of this Commonwealth, when faced with the issue and without legislative guidance, have expressly declined to void such contracts **[***31]** as against public policy.

However, this narrow judicial recognition of legal parentage by contract-where a child is born with the assistance of a donor who relinquishes parental rights and/or a non-biologically related person assumes legal parentage-does not afford C.G. the relief she seeks. There was no dispute that C.G. was not party to a contract or identified as an intended-parent when J.H. undertook to become pregnant through intrauterine insemination. Therefore, she is clearly not a parent under any bases that have been recognized by our jurisprudence.[11]

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[9] *23 Pa.C.S. § 2101 et seq.*

[10] We do not wish to imply that a biological parent may bargain away his or her child's right to support. *See Kesler v. Weniger, 2000 PA Super 2, 744 A.2d 794, 796 (Pa. Super. 2000)* (rejecting Father's argument that he had a sexual relationship with Mother in order to help her conceive, under the impression she would not hold him responsible for child support).

[11] Notwithstanding the fact that Pennsylvania has not recognized a definition of parent that is based on the mere intentions of two people to be viewed as parents, Justice Dougherty expresses his concern that the failure to now recognize a broader definition results in "a cramped interpretation of 'parent'" that will inevitably inflict continued hardship on non-traditional families, particularly same-sex couples undertaking to start a family. *See* Concurring Opinion, Dougherty, J., *slip op*. at 4. In that regard, Justice Dougherty contends under today's decision "it remains impossible" for both partners in a same-sex couple to have standing as legal parents in the absence of marriage or adoption, "as only one can be biologically related to the child or contract to assume legal parentage." Id. at 1-2. Similarly, Justice Wecht acknowledges that the case law in this area has focused on a contractual relationship among intended parents (or persons who wish to renounce parental claims) but concludes the decision today "does not go far enough" and should draw from earlier decisions an intent-based recognition of parentage. *See* Concurring Opinion, Wecht., J., *slip op*. at 2-5. Justice

[*442] **[**905]** C.G. contends our case law stands for the broad proposition that parentage can be established by intent in situations where a child is born with the aid of assistive reproductive technology. It does not. The jurisprudence in this Commonwealth has declined to void contracts involving surrogacy and/or the donation of sperm or ova recognizing a separate mechanism by which legal parentage may be obtained (or relinquished). The facts of C.G.'s case do not place her into this narrow class of cases where legal parent rights and responsibilities have been relinquished or assumed via contract.[12]

C.G. also **[***32]** points to recent decisions in Vermont and Massachusetts to support her intent-based approach. In *Sinnott v. Peck, 180 A.3d 560 (Vt. 2017)*, the Vermont Supreme Court addressed whether a person who is not biologically related to a child, has not adopted a child, and is not married to the child's parent may be the legal parent of the child. In that case, Mother had a one-year-old child, whom she had adopted, when she began her relationship with Partner. When Mother's child was two years old, Mother and Partner jointly decided to adopt another child from Guatemala, where Mother's first child was born. The couple sought to adopt using the same agency Mother had used to facilitate her first adoption; however the agency did not permit same-sex parent adoption. Mother presented herself as the adoptive parent, and ultimately, the **[**906]** second child, M.P., was brought home to Vermont **[*443]** in February 2006 and lived as a family unit together with the couple until 2010. *See Sinnott, 180 A.3d at 561-63*. Following the couple's separation, the family division dismissed Partner's petition to establish parentage based on her assertion that she was the intended mother of both children. *Id. at 563*. The Vermont Supreme Court affirmed the decision with respect to the older child, but concluded **[***33]** the family division erred with respect to the child the parties mutually agreed to adopt. It reasoned that its past case

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Wecht further imagines a scenario wherein a same-sex partner may be foreclosed from seeking standing as a parent. *See id.* at 5. Respectfully, we disagree, and clarify that nothing in today's decision is intended to absolutely foreclose the possibility of attaining recognition as a legal parent through other means. However, under the facts before this Court, this case does not present an opportunity for such recognition, as the trial court found as fact that the parties did not mutually intend to conceive and raise a child, and the parties did not jointly participate in the process. Indeed, despite the disapproval expressed by the concurring opinions over the development of case law thus far on the evolving definition of the term parent for purposes of standing, Justice Dougherty views it "unnecessary at this juncture to endorse any particular new test for establishing standing as a parent." Concurring Opinion, Dougherty, J., *slip op*. at 4. We agree that "we must await another case with different facts before we may properly consider the invitation to expand the definition of 'parent.'" *See id.* at 4-5.

Justice Dougherty hypothesizes that it is impossible for both partners in a same-sex marriage to attain legal parentage absent marriage or adoption. With respect for this perspective, we must disagree. We do not view today's decision or the case law as developed to compel such a result. For example, in *J.F.*, Biological Father's unmarried partner was the intended mother of the children they sought to have via use of a surrogate. Although the issue in that case was not Partner's standing, but rather the non-biologically related surrogate's standing to the children she bore, the Superior Court expressly declined to void the surrogacy contract. *J.F., 897 A.2d at 1280*. Likewise, in *In re Baby S.*, the Superior Court concluded that S.S., identified as the Intended Mother, in the surrogacy agreement was to be deemed the legal mother. *In re Baby S., 128 A.3d at 298*. Although S.S. was married to biological Father, the court grounded its reasoning in the principles espoused in the case law involving surrogacy agreements, not the presumption of parentage married persons enjoy. *Id.* There is nothing to suggest in our case law that two partners in a same-sex couple could not similarly identify themselves each as intended parents, notwithstanding the fact that only one party would be biologically related to the child. However, this issue is not before the Court, and we are not tasked with defining the precise parameters of contracts regarding assistive reproductive technology. Likewise, the doctrine of parentage by estoppel, which Justice Wecht contends heterosexual-sex couples may avail themselves of to seek standing but which same-sex couples may not, is not implicated by the facts before this Court.

[12] We recognize that C.G. was unable to adopt Child at the time of his birth under Florida law. However, her argument is that adoption should not be the sole means by which a non-biologically related person may obtain legal parentage of a child, and that the intent of the parties should be determinative of the issue of parentage. We note C.G. acknowledged in her complaint for custody that Child was born out of wedlock. Custody Compl., 12/8/15, at ¶ 3. Although she now suggests a presumption should apply, she does not focus her argument on why an informal commitment ceremony, without registering her relationship in her municipality as domestic partners, should compel application of the presumption of parentage that married persons enjoy. We decline to speculate on what actions the parties may have taken had Florida law been different at the time of Child's birth; however, as we have noted, the parties declined to seek recognition of their union by registering as domestic partners and likewise declined to pursue adoption when it became available, while the relationship was still intact.

law has "created a legal framework in which parental status is viewed in the absence of marriage, civil union, or biological or adoptive relationship with the child in a narrow class of cases in which the parents intended to bring a child into their family and raise the child together, and did in fact do." *Id. at 563* (footnote omitted). As we have expressed, our case law has acknowledged a much narrower framework for establishing parentage in the absence of adoption, biology, or a presumption attendant to marriage, and the facts of C.G.'s case do not fit into such a paradigm.[13]

Similarly, C.G.'s reliance on Massachusetts's case law is inapposite to her claim. By statute, Massachusetts, unlike Pennsylvania, provides a presumption that a man is the father of a child born out of wedlock "if he jointly, with the mother received the child into their home and openly held out the child as their child." *Partanen v. Gallagher, 475 Mass. 632, 59 N.E.3d 1133, 1135 (Mass. 2016)*. In *Partanen*, the undisputed facts were that two women were in a committed relationship and jointly undertook to conceive and have children via in vitro fertilization. The **[***34]** couple welcomed two children. Ultimately, the parties separated and the non-biologically related party sought to be declared the presumptive parent. The Supreme **[*444]** Judicial Court of Massachusetts concluded that the statute may be applied in a gender-neutral manner despite the gendered terms it employed and "may be construed to apply to children born to same-sex couples, even though at least one member of the couple may well lack biological ties to the children." *Id. at 1138* (footnote omitted).

The instant case is not one where a statutory presumption would be bestowed on a similarly-situated male based on cohabitation in the absence of marriage, and as highlighted throughout, the factual findings of the trial court determined that C.G. did not jointly participate in Child's conception and hold him out as her own. Accordingly, this case does not provide this Court with a factual basis on which to further expand the definition of the term parent under *Section 5324(1)*.[14]

[907]** III.

B. *Standing as in loco parentis*

Before outlining the arguments of the parties, this Court has explained in loco parentis as follows:

> ***HN9***[] *In loco parentis* is a legal status and proof of essential facts is required to support a conclusion that such **[***35]** a relationship exists. . . .
>
> The phrase "*in loco parentis*" refers to a person who puts oneself in the situation of a lawful parent by assuming the **[*445]** obligations incident to the parental relationship without going through the formality of a legal adoption. The status of *in loco parentis* embodies two ideas; first, the assumption of a parental status, and second, the discharge of parental duties. The rights and liabilities arising out of an *in loco parentis* relationship are, as the words imply, exactly the same as between parent and child. The third party in this type of relationship, however, can not place himself *in loco parentis* in defiance of the parents' wishes and the parent/child relationship.

T.B., 786 A.2d at 916-17 (citations omitted).

C.G. argues the trial court erred in its in loco parentis analysis in two respects. First, C.G. contends the Superior Court failed to take into account the presence

[13] We recognize the view of the concurring Justices favoring a definition of parent that would focus on the intent of the parties as the operative fact in determining who is a parent under *Section 5324(1)*; however the concurrences likewise recognize that this case does not fall into such a framework. *See* Concurring Opinion, Dougherty, J., *slip op*. at 3; Concurring Opinion, Wecht, J., *slip op*. at 7. Accordingly, as expressed *supra*, we agree with Justice Dougherty that it is unnecessary at this time to expand the definition of parent or endorse a new standard under the facts before this Court. *See* Concurring Opinion, Dougherty, J., *slip op*. at 4-5.

[14] We note ***HN8***[] other jurisdictions have legislatively addressed the issue of parentage where assistive reproductive technology is employed. *See, e.g.*, *13 Del.C. § 8-201*(Delaware statute explaining that a mother-child relationship is established between a woman and a child under a number of circumstances, including, the "woman having consented to assisted reproduction by another woman ... which resulted in the birth of a child" and also outlining the scenarios by which one is deemed a de facto parent); *DC Code § 16-407* (Washington, D.C. statute establishing parentage in "collaborative reproduction" in different contexts including gestational surrogacy arrangements and defining parent as the intended parent regardless of a genetic connection to the child). As we have observed, however, in this case C.G. was not a party to an agreement to conceive Child and did not intend to be a parent. Thus, even if this Court or the General Assembly expanded the definition of parent, she would not be entitled to the relief she seeks.

or absence of a parent-like bond between C.G. and Child. C.G.'s Brief at 50-52, 55. She continues that the primary determinant in establishing in loco parentis standing is whether the third-party lived with the child and the natural parent in a family-setting and developed a bond with the child as a result of **[***36]** the natural parent's participation and acquiescence. *Id.* at 52. She highlights cases where in loco parentis has been conferred on a former-partner based on the parties' decision to have a child together and subsequently living together as a family unit and cases where courts declined to confer in loco parentis status where the petitioning party was more akin to a babysitter, or the parties never lived as a family unit, or where the party assumed a parental status in defiance of the parent's wishes. *Id.* at 54-56. C.G. posits that the trial court failed to focus on the existence of a bond and instead created a new test in its analysis by its categorization of the evidence, i.e., it looked to documents, the parties' finances, and who took primary responsibility for Child. *See id.* at 57.

Next, C.G. contends the trial court erroneously held that the post-separation conduct of the parties was determinative of whether she stood in loco parentis. She continues that concluding that the post-separation conduct of a party disaffirms an in loco parentis relationship runs contrary to appellate case law on the matter. *See* C.G.'s Brief at 61-63. Specifically, she **[*446]** claims the trial court's analysis regarding the post-separation **[***37]** period of time violated three principles of the in loco parentis doctrine, that once attained, the status cannot be lost; post-separation conduct cannot be used to deny a person in loco parentis status; and post-separation conduct may be used to support a finding that a person stood in loco parentis. *See id.*at 63-74. She asks this Court to "hold that the relevant time period in which to examine bonding between the party and the child is the time during which the natural **[**908]** parent fostered or acquiesced to the relationship between the child and the third party."[15] *Id.* at 62.

J.H. counters that C.G.'s position emphasizing the existence of a bond as the determinant factor is misplaced. Rather, to gain in loco parentis status a person must first demonstrate that he or she assumed parental status and discharged parental duties, a fundamental requirement which C.G. failed to establish. *See* J.H.'s Brief at 61-63. She continues that notwithstanding C.G.'s claim, the trial court examined the nature of C.G.'s relationship with Child. J.H. highlights that C.G.'s current view is the trial court erred by failing to conduct a bonding evaluation, appoint a guardian ad litem, or interview Child, despite not making any of these **[***38]** requests before the trial court. *Id.* at 65.

Responding to C.G.'s argument that the trial court placed too much weight on her post-separation conduct, J.H. notes that the trial court and Superior Court recognized that C.G. did not lose her status based on post-separation conduct; rather, her post-separation conduct was consistent with her pre-separation conduct, i.e., she did not act or hold herself out as a parent to Child. *See id.* at 66-67. Finally, J.H. argues that a rule preventing courts from evaluating post-separation conduct would elevate the rights of former partners over the rights of natural parents because under 23 Pa.C.S. § 2511(a)(1), **[*447]** parental rights are subject to termination when a parent fails to perform parental duties for a period of at least six months. *See id.* at 68-69. Thus, she maintains post-separation conduct is a relevant factor in looking to whether a party stands in loco parentis.

HN10[↑] Section 5324(2) permits a person who stands in loco parentis to a child to petition the court for custody of a child. As noted, gaining in loco parentis status requires the petitioning individual to demonstrate two elements: the assumption of parental status and the discharge of parental duties. *See* T.B., 786 A.2d at 916-17.

In *T.B.*, on which C.G. relies, a former same-sex partner **[***39]** sought custody rights to a child born during her relationship with the child's Mother. This Court agreed with the conferral of in loco parentis standing on the former partner. Factually, Partner and Mother agreed to have a child together with Mother carrying the child and the Partner choosing the sperm donor. They shared day-to-day parental duties such as taking the child to appointments, the Partner was designated as guardian of child in Mother's will, and she had exclusive responsibility for child when Mother was not present. *See* id. at 914-15. We concluded that the facts demonstrated Partner assumed a parental status and discharged parental duties with the consent of

[15] The American Academy of Matrimonial Lawyers (AAML), Pennsylvania Chapter has submitted an amicus curiae brief in support of C.G. AAML argues that C.G. has standing as a person in loco parentis to the Child, and the consideration of post-separation conduct is irrelevant and may encourage bad behavior on the part of the parent with custody to withhold the child.

Mother. *Id. at 920*. We also rejected Mother's argument at the time that the legal impossibility of Mother and Partner marrying prohibited the court from conferring on Partner standing based on in loco parentis. "The ability to marry the biological parent and the ability to adopt the subject child have never been and are not now factors in determining whether the third party assumed a parental status and discharged parental duties." *Id. at 918*.

In *J.A.L*, the Superior Court reversed the trial court's denial of in loco parentis standing to a former same-sex **[***40]** partner. In that case, Mother and Partner agreed to **[**909]** raise a child together and together selected the sperm donor. Mother and Partner executed a nomination of guardian document, which included a statement reflecting the parties' intent to **[*448]** raise the child together, and an authorization for consent to medical treatment, allowing Partner to consent to treatment for the child. Following the parties' separation, the trial court concluded Partner lacked standing. The Superior Court disagreed and noted the following.

> ***HN11***[] The in loco parentis basis for standing recognizes that the need to guard the family from intrusions by third parties and to protect the rights of the natural parent must be tempered by the paramount need to protect the child's best interest. Thus, while it is presumed that a child's best interest is served by maintaining the family's privacy and autonomy, that presumption must give way where the child has established strong psychological bonds with a person who, although not a biological parent, has lived with the child and provided care, nurture, and affection, assuming in the child's eye a stature like that of a parent. Where such a relationship is shown, our courts recognize **[***41]** that the child's best interest requires that the third party be granted standing so as to have the opportunity to litigate fully the issue of whether that relationship should be maintained even over a natural parent's objection.

Id. at 1319-20.

The court applied the principles of in loco parentis to the facts and concluded that "[t]he inescapable conclusion to be drawn from this evidence is that in both [Mother's and Partner's] minds, the child was to be a member of their nontraditional family, the child of both of them and not merely the offspring of [Mother] as a single parent. The intention is born out by the documents executed by the parties before the child's birth and by [Mother] giving the child [Partner's] surname as a middle name on the birth certificate." *Id. at 1321*. The Superior Court closely examined the record and concluded that the parties' conduct after the child's birth and pre-separation, established the Mother and Partner's intent to create a parent-like relationship with the Partner. It then turned to post-separation conduct, finding that the "contact was reinforced after the parties' separation, visits which occurred with a frequency and regularity similar to that of post- **[*449]** separation visits **[***42]** by many noncustodial natural parents and thus must be considered adequate to maintain any bond previously created." *Id. at 1322*. Thus, the Superior Court concluded Partner had standing to challenge custody.

HN12[] The paramount concern in child custody cases is the best interests of the child. *K.C. v. L.A., 128 A.3d at 775*. The important screening functions of standing requirements protect the child and the family from unnecessary intrusion by third parties. *See D.G., 91 A.3d at 708*; *K.W., 157 A.3d at 503-04*. C.G. seeks to have this Court adopt a rule that the decisive factor in this assessment is the existence of a bond between the third party and the child. Our case law does not support such a loose application of standing principles. The appellate courts of this Commonwealth have consistently described the prerequisites to in loco parentis standing as assumption of parental status and discharge of parental duties.[16] *See Peters v. **[**910]** Costello, 586 Pa. 102, 891 A.2d 705, 710 (Pa. 2005)*; *K.W., 157 A.3d at 505*. Here, the trial court found C.G.'s evidence lacking in these important regards based on its credibility determinations, faced with conflicting testimony. Of course, it is a concern to the courts whether a child has developed strong psychological bonds, however, such bonds must necessarily be based on the assumption of parental status and discharge of **[***43]** parental duties in order to achieve this legal status. *See J.A.L., 682 A.2d at 1319-20*. Indeed, if the determining factor were the child's development of a bond with the person seeking standing, it would be of no moment to the court if the bond was forged contrary to the natural parent's wishes. Acceptance of such a rule would undermine well-established principles of in loco parentis analyses. *See T.B., 786 A.2d at 917* (explaining

[16] The in loco parentis test has been applied in the same fashion regardless of whether the person seeking in loco parentis is a former step-parent or a former same-sex partner who had not married the child's biological parent. *See, e.g. Bupp v. Bupp, 718 A.2d 1278, 1281-82 (Pa. Super. 1998)*; *J.A.L., 682 A.2d at 1318-19*.

that a third party "can not place himself *in loco parentis* in defiance of the parent's wishes and the parent/child relationship").

[*450] Finally, we turn to the question of the court's treatment of C.G.'s post-separation conduct and its bearing on an in loco parentis analysis. As an initial point, we do not disagree with C.G.'s position that ***HN13***[↑] the relevant time frame to determine whether a party stands in loco parentis is when the party developed the relationship with the child with the acquiescence or encouragement of the natural parent. Indeed, it is fundamental that a party must have discharged parental duties and assumed parental status in order to gain standing as a third party. The question is of what relevance, if any, is the conduct of the party after there has been some separation between the **[***44]** party and the child. The Superior Court dismissed a mother's argument that her former paramour lost his in loco parentis standing after the parties separated and she remarried in *Liebner v. Simcox, 2003 PA Super 377, 834 A.2d 606, 611 (Pa. Super. 2003)* (explaining mother had cited no case law to support the proposition that once attained, in loco parentis status could be lost due to change in circumstances). In *J.A.L.*, the Superior Court acknowledged the post-separation conduct of partners to buttress its conclusion that the former-partner of the mother stood in loco parentis. *See J.A.L., 682 A.2d at 1322* ("This early contact was reinforced by visits after the parties' separation, visits which occurred with a frequency and regularity to that of post-separation visits by many noncustodial natural parents and thus must be considered adequate to maintain any bond previously created."). We reiterate, the rights and liabilities arising out of in loco parentis are the same as that between child and parent and its status is conferred upon a person who puts him or herself in the situation of a lawful parent. *See T.B., 786 A.2d at 916-17*. In *J.A.L.*, the court found the post-separation conduct of both parties supported the in loco parentis determination because it was akin to post-separation conduct of many natural **[***45]** parents.

In the instant matter, we agree with C.G. that ***HN14***[↑] the post-separation conduct should not be determinative of the issue of standing; however, the conduct by either parent or partner may shed light on the analysis of whether the person seeking standing was ever viewed as a parent-like figure. We **[*451]** recognize that in some situations a natural parent may seek to withhold a child from a person who has assumed parental status (or another natural parent). *See, e.g., Jones v. Jones, 2005 PA Super 337, 884 A.2d 915, 919 (Pa. Super. 2005)* (awarding primary physical custody to former-partner of natural mother who gained in loco parentis status and disapproving of mother's continued attempts to exclude her former-partner following the couple's separation). However, this potential for misconduct **[**911]** does not render the actions of the person seeking in loco parentis status immune from review following a separation. We note in the instant case, despite characterizing the court's analysis of the post-separation contact determinative of whether or not C.G. stood in loco parentis to Child, it was not. The trial court found, and the record supports, that prior to the couple's separation, C.G. did not assume a parental status or discharge parental duties. The trial court **[***46]** simply concluded that the post-separation conduct of C.G. was consistent with its initial determination, as the Superior Court did in *J.A.L.* In loco parentis analyses are necessarily fact-intensive and case-specific inquiries, and we decline to foreclose a trial court from reviewing all relevant evidence in making this important determination that so greatly will impact the family unit.[17]

IV.

In sum, we conclude that C.G. is not a parent under *Section 5324(1)* for the purpose of seeking custody of Child. We further conclude that the trial court did not commit error by failing to consider the existence of a bond between C.G. and **[*452]** Child as the decisive factor of whether C.G. stood in loco parentis to Child. Indeed, the trial court undertook to examine all of the evidence of record to determine whether C.G. assumed parental status and discharged parental duties, and we discern no legal error in its analysis. The order of the Superior Court is affirmed.

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[17] Indeed, we find persuasive J.H.'s position that ***HN15***[↑] it would be incongruous to ignore all post-separation conduct between a third-party and a child for the purpose of assessing whether the party stood in loco parentis, when the Adoption Act provides that a petition seeking involuntary termination of a natural or adoptive parent's rights may be filed if the parent has "evidenced a settled purpose of relinquishing parental claim to a child and has refused or failed to perform parental duties" for a period of at least six months preceding the filing of the petition. *23 Pa.C.S. § 2511*. To render all post-separation conduct irrelevant would be to afford a person seeking in loco parentis standing, at any time, a greater advantage to a natural or adoptive parent even in the event the third party had demonstrated his or her relinquishment of parental claims to a child.

Chief Justice Saylor and Justices Baer and Todd join the opinion.

Justice Dougherty files a concurring opinion.

Justice Wecht files a concurring opinion in which Justice Donohue joins.

Concur by: DOUGHERTY; WECHT

Concur

CONCURRING OPINION

JUSTICE DOUGHERTY

The trial court's credibility **[***47]** findings in this case compel the conclusion C.G. lacks standing to seek custody of Child. But in my respectful view, nothing warrants, much less necessitates, the majority's cramped interpretation of "parent" under 23 Pa.C.S. §5324(1), the inevitable result of which will be the continued infliction of disproportionate hardship on the growing number of nontraditional families — particularly those of same-sex couples — across the Commonwealth. I therefore concur in the result only.

According to the majority, our precedent supports a conclusion parentage for standing purposes may be proven in only four ways: biology, adoption, a presumption attendant to marriage, or "legal parentage by contract — where a child is born with the assistance of a donor who relinquishes parental rights and/or a non-biologically related person assumes legal parentage[.]" Majority Opinion, slip op. at 21. Unfortunately, even under this paradigm of parentage, it remains impossible — absent marriage or adoption — for both partners of a same-sex couple to have standing as a parent, as only one can be biologically related to the **[**912]** child or contract to assume legal parentage. I see no good reason why the Court should continue to impose such an overly-restrictive formulation, **[***48]** which fails to take into account equitable principles and may ultimately **[*453]** frustrate the paramount concern of protecting a child's best interests. *See* Douglas NeJaime, *The Nature of Parenthood*, 126 Yale L.J. 2260, 2289 (2017) ("[E]ven as principles of gender and sexual-orientation equality have animated shifts in parental recognition, parentage law continues to draw distinctions that carry forward legacies of inequality embedded in frameworks forged in earlier eras.").

The majority correctly observes the reality that what comprises a family is an evolving concept. *See* Majority Opinion, slip op. at 15, *citing* Troxel v. Granville, 530 U.S. 57, 63, 120 S. Ct. 2054, 147 L. Ed. 2d 49 (2000) ("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."); J.A.L. v. E.P.H., 453 Pa. Super. 78, 682 A.2d 1314, 1320 (Pa. Super. 1996) ("In today's society, where increased mobility, changes in social mores and increased individual freedom have created a wide spectrum of arrangements filling the role of the traditional nuclear family, flexibility in the application of standing principles is required in order to adapt those principles to the interests of each particular child."). Yet despite recognizing the diverse range of parental configurations that now exist, the majority interprets our case law **[***49]** in a manner that continues to primarily tether parentage to traditional notions of biology and adoption. There is a very real and grave risk to this approach, to children and putative parents alike. *See* Matter of Brooke S.B. v. Elizabeth A.C.C., 28 N.Y.3d 1, 39 N.Y.S.3d 89, 61 N.E.3d 488, 499 (N.Y. 2016) ("A growing body of social science reveals the trauma children suffer as a result of separation from a primary attachment figure — such as a de facto parent — regardless of that figure's biological or adoptive ties to the children[.]") (collecting sources); NeJaime, 126 Yale L.J. at 2322 ("The harms of nonrecognition are not only practical but expressive. Courts routinely term those who serve as parents but lack biological ties "nonparents" — casting them as third parties who are otherwise strangers to the family.").[1]

[*454] Cognizant of these potential harms, I would not interpret our case law so narrowly. Instead, I believe there is room in our precedent — particularly in the absence of any guidance from the legislature — to conclude an individual who lacks biological, adoptive, or

[1] I do not intend to minimize the significant and fundamental right of biological or adoptive parents to control the upbringing of their children. As the majority properly appreciates, the interest of parents in the care, custody, and control of their children "is perhaps the oldest [of the] fundamental liberty interest[s.]" Majority Opinion, slip op. at 11, *quoting* Troxel, 530 U.S. at 65. This fundamental right necessarily militates caution in expanding the category of those who may be identified as a "parent." However, in my respectful view, the law need not deny the salience of biological or adoptive bonds to recognize the validity of additional indicia of parenthood.

marital ties may nevertheless establish standing as a parent to seek custody under 23 Pa.C.S. §5324(1). *See* Sinnott v. Peck, 180 A.3d 560, 573 (Vt. 2017) ("[T]he Legislature's inaction to date is not an impediment to our own obligation to resolve the specific cases before us by developing **[***50]** a consistent and coherent approach to defining parenthood within the construct that the Legislature has given us and our prior case law; in fact, it creates a more urgent need for us to act."). Such is certainly the trend in other states. *See* id. at 569-72 **[**913]** (detailing cases that "reinforce the modern trend" of analyzing non-biological, non-adoptive, and non-marital parenthood by "focusing on the parties' agreement and intentions at the time they brought a child into their home"); NeJaime, 126 Yale L.J. at 2260 (explaining "the law increasingly . . . recognizes parents on not only biological but also social grounds" and offering comprehensive analysis of legal trends).

In line with this trend in other jurisdictions, C.G. asks this Court "to clarify that parentage may not only be determined by biology or adoption, but also by the intent of parties who create a child together using assisted reproductive technology, and then co-parent that child together." C.G.'s Brief at 21. In her view, parentage "turns on whether the party in question had agreed to the conception of the child and whether that party had intended to parent the child following the child's birth." *Id.* at 34. Justice Wecht would similarly "embrace an intent-based test **[***51]** for parentage for persons pursuing parentage **[*455]** through" assisted reproductive technology. Concurring Opinion, slip op. at 7 (Wecht, J.).

In my view, it is unnecessary at this juncture to endorse any particular new test for establishing standing as a parent. As noted, the nature of the family in the modern era continues to evolve, and the various alternative tests proffered above, as well as the tests adopted by other jurisdictions, strongly suggest there may not be a one-size-fits-all approach to adequately address each unique familial situation. *See* Brooke S.B., 61 N.E.3d at 500-01 (rejecting premise it must "declare that one test would be appropriate for all situations" and thus declining to decide whether, in a case where a biological or adoptive parent consented to the creation of a parent-like-relationship between his or her partner and child after conception, the partner would have standing).

In any event, I am constrained to agree with the majority that "the trial court found as fact that the parties did not mutually intend to conceive and raise a child, and the parties did not jointly participate in the process." Majority Opinion, slip op. at 21 n.11. Those findings — which this Court is bound to accept, no matter how seemingly harsh their effect — preclude a holding that C.G. has standing **[***52]** as a parent under any of the proffered definitions of intent-based parentage. Accordingly, I agree that C.G. is not entitled to the relief she seeks, and we must await another case with different facts before we may properly consider the invitation to expand the definition of "parent" under 23 Pa.C.S. §5324(1).[2]

[*456] JUSTICE WECHT

Governed by our well-settled standard of review, I join in today's result. Along the way to this conclusion, my analytical journey diverges twice from the path that the learned Majority takes. First, for purposes of adjudicating standing to sue as a parent in cases involving assisted reproductive **[**914]** technologies ("ART"),[1] courts must probe the intent of the parties. Reliance solely upon biology, adoption and contracts is insufficient. Second, for purposes of deciding *in loco parentis* standing, courts should consider post-separation conduct only when they first are able to determine that the custodial parent has not withheld the child from the other party. Otherwise, custodial parents effectively can preclude most *in loco parentis* claims by non-custodial parties. My thinking on these two points

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[2] Parenthetically, I note my agreement with the majority that the bond between a third party and a child is not dispositive of *in loco parentis* standing. Furthermore, with regard to the issue of post-separation conduct, I agree "the relevant time frame to determine whether a party stands in loco parentis is when the party developed the relationship with the child with the acquiescence or encouragement of the natural parent." Majority Opinion, slip op. at 31. I depart from the majority, however, to the extent it implies post-separation conduct can be used **against** a party seeking *in loco parentis* status. *See, e.g.*, Liebner v. Simcox, 2003 PA Super 377, 834 A.2d 606, 611 (Pa. Super. 2003) (rejecting argument "that once *in loco parentis* status has been obtained, it can be lost" due to post-separation conduct); J.A.L., 682 A.2d at 1322 (considering post-separation conduct only to "reinforce" finding third party stood *in loco parentis*).

[1] For purposes of the discussion at hand, I include within the ART rubric the full variety of medical interventions designed to allow for reproduction through means other than sexual intercourse, including *in **[***53]** vitro* fertilization, sperm and egg donation, gestational surrogacy, and artificial insemination. *See generally*, Jillian Casey, Courtney Lee, & Sartaz Singh, *Assisted Reproductive Technologies*, 17 GEO. J. GENDER & LAW 83, 83-85 (2016).

follows.

Parentage and Intent

In affirming the Superior Court, the Majority correctly notes that the appellate panel's cramped definition of parentage as including only biological and adoptive parents overlooked the recognition of parentage by contract expounded in *Ferguson v. McKiernan, 596 Pa. 78, 940 A.2d 1236 (Pa. 2007)* and *In re Baby S., 2015 PA Super 244, 128 A.3d 296 (2015)*.[2] This is fine as far as it goes. But it does not go far enough. The Majority draws too narrowly upon *Ferguson* and *Baby S.*, validating **[*457]** solely their contractual jurisprudence but declining to proceed further.[3] While a measured approach to standing is always appropriate,[4] the Majority's analysis , while reasonable in the main, nonetheless fails to imagine and embrace the intent-based paradigm that ART-related child custody disputes require.

Consider *Ferguson*. There, the trial court found, and this Court accepted, that the mother approached her former intimate partner with a request for sperm donation so that she could conceive a child via *in vitro* fertilization. *Ferguson, 940 A.2d at 1239*. Only after the mother convinced the sperm donor that he would bear no legal or financial responsibility for the prospective child did the donor agree to **[***54]** the arrangement. *Id.* The donor did not pay for the *in vitro* fertilization, did not complete most of the paperwork, and did not attend prenatal appointments. *Id. at 1240*. After mother went into premature labor, she requested the sperm donor to **[**915]** join her at the hospital, where she delivered twins. Afterward, with the mother's agreement, the sperm donor maintained anonymity, assumed no financial responsibility, and was not listed on the birth certificates. *Id.* Indeed, the donor had little contact with the mother or twins following the birth, provided no financial support, and assumed no paternal duties. *Id.* Rejecting the mother's public policy arguments, this Court decided that the oral contract between the mother and the sperm donor was enforceable and held that the mother was foreclosed from seeking child support from the donor. *Id. at 1247-48*.

[*458] Viewing *Ferguson* from the perspective of the parties' intent, the same adjudication would result. The sperm donor's actions bore all the hallmarks of a clinical donation of gametes calculated and designed to result in no parental role for the donor. The mother acted in accordance with that intention for approximately the first five years following the twins' births. She **[***55]** did not seek financial support, and she did not attempt to involve the sperm donor in the lives of her children. Neither the mother nor the sperm donor ever manifested any intent for the latter to be a parent to the twins at any time before or after the birth; in fact, both the mother and the donor expressed and acted upon the opposite intention. And then, some five years on, the mother sued the sperm donor for child support. It was this volte-face that our Court declined to approve. By intention, as well as by contract, the mother's case for support was a non-starter.

Now, consider *Baby S.*. There, in determining that the ex-wife was the legal parent of the child born through ART, the Superior Court focused upon the existence of a contract. But the appellate panel just as easily could have ruled based upon the parties' intent. The father and ex-wife signed a contract to enter into a surrogacy with a gestational carrier and evidenced their intent to be the legal parents of the resulting child. *Baby S., 128 A.3d at 298*. The ex-wife's communications with the gestational carrier demonstrated the ex-wife's intent to be a parent to the child. *Id. at 299*. The father and the

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[2] *See* Maj. Op. at 21. To this list, I would add that one can be found to be a parent, regardless of biology or adoption, through the presumption of paternity, *see Brinkley v. King, 549 Pa. 241, 701 A.2d 176, 178-79 (Pa. 1997)* (stating that a child conceived or born during a marriage is presumed to be the husband's child), and paternity by estoppel. *See Freedman v. McCandless, 539 Pa. 584, 654 A.2d 529, 532-33 (Pa. 1995)* ("Estoppel in paternity actions is merely the legal determination that because of a person's conduct (*e.g.*, holding out the child as his own, or supporting the child) that person, regardless of his true biological status, will not be permitted to deny parentage.").

[3] *See* Maj. Op. at 21 & n.11.

[4] At the time that C.G. filed for custody, the applicable statute provided standing to pursue custody to a parent, a person who stands *in loco parentis*, or a grandparent in certain specified circumstances. *23 Pa.C.S. § 5324* (2011). In response to J.H.'s preliminary objections, C.G. asserted standing as a parent or, alternatively, as someone who stood *in loco parentis* to Child. As the Majority notes, standing in custody cases is governed by statute. *See T.B. v. L.R.M., 567 Pa. 222, 786 A.2d 913, 916 (Pa. 2001)* (stating that standing exists in custody cases when authorized by statute). Standing for custody purposes implicates the fundamental liberty issue of a parent's ability to direct the care and custody of his or her child. *See generally Troxel v. Granville, 530 U.S. 57, 66, 120 S. Ct. 2054, 147 L. Ed. 2d 49 (2000)*.

ex-wife chose a gestational carrier in Pennsylvania **[***56]** because the ex-wife could be listed on the birth certificate without having to go through the adoption process. *Id. at 298*. When the pregnancy was confirmed, the ex-wife and the father moved to a new home in order to accommodate a larger family. They attended the twentieth-week ultrasound and acted in a way that suggested that they intended to parent the child. *Id. at 300*. Only when the father and ex-wife began to experience marital difficulties did the ex-wife begin to act in a manner contrary to that joint intention. *Id. at 301*. Because the ex-wife gave every indication that she was the parent of the child conceived through ART, the Superior Court could have relied upon her **[*459]** expressed and manifest intentions in order to find that she was the child's legal parent. That the Superior Court relied instead upon the existence of a contract is no contradiction of this principle.

Viewed through the lens of the parties' intentions, the *Ferguson* and *Baby S.* cases arrive at the same destination reached *via* a contract-based analysis. This is unsurprising, inasmuch as the contract evidences the intent. But the point of this exercise is that ART requires us to hypothesize other scenarios, cases in which an intent analysis would **[***57]** not foreclose a valid claim to parentage while a contract-based approach would. Under the Majority's formulation of parentage by contract, one becomes a parent through use of ART and the formation of a binding contract regarding ART. Maj. Op. at 21. Fair enough. But suppose that the members of **[**916]** a same-sex couple decide that one partner will become pregnant *via* ART and sperm donation; it is entirely foreseeable that only the partner being impregnated would contract with the ART facility. The second partner, who would have no biological connection to the child, would have no contract establishing a claim to parentage. Suppose further that no adoption is formalized, and that the couple separates after years in which both parties diligently raise and lovingly support the resulting child. Under the Majority's approach, the second partner has no claim to parent status and no standing to pursue any custody rights. Such a result is by no means dictated by the terms or spirit of our custody standing statute, which speaks in this regard only of "[a] parent of the child", thus begging the question now at hand. *See 23 Pa C.S. §5324 (1)*. As well, such a result supplants the best interests analysis, eliminates the focus **[***58]** on the child's needs, and fails entirely to comport with contemporary family realities and especially the circumstances of Pennsylvanians who are parenting in same-sex relationships.

But, wait, you say. The second partner in the scenario imagined above almost certainly would enjoy standing in custody under an *in loco parentis* theory. *See 23 Pa C.S. § 5324(2)*. The problem is not so simple. First, if the couple **[*460]** separates shortly after (or before) the child's birth, the second partner -- who fully intended to be a parent (and this with the first partner's knowledge and consent) -- will have no claim to *in loco parentis* standing, there having been insufficient time for assumption of parental status and discharge of parental duties. *See T.B., 786 A.2d at 916-17*. Second, and more significantly, resort to an *in loco parentis* approach concedes the parentage claim, which is the very issue that is at bar here. The point is that the second partner in these scenarios should be considered a parent for purposes of standing in custody. *In loco parentis* generally is considered a species of standing sought by *third* parties.[5]

In the past, Pennsylvania courts have found that same-sex partners have standing under **[***59]** the *in loco parentis* rubric. This paradigm has evolved with time and with the forward march of humanity. As a matter of law, a same-sex partner who participated in the decision to bring a child into the world, to raise, to educate, to support and to nurture that child, is no longer a third party. He or she is a parent. *See* Douglas NeJaime, *The Nature of Parenthood*, *126 Yale L.J. 2260, 2317-23 (June 2017)* (discussing the practical and expressive harms attending non-recognition of parentage); Jillian Casey, Courtney Lee, & Sartaz Singh, *Assisted Reproductive Technologies*, 17 GEO. J. GENDER & LAW 83, 117 (2016) (identifying "judicial parentage tests that consider factors beyond intent" as a primary source of disparate treatment of same-sex couples seeking parentage). At this late date, there is no defensible reason that partners in scenarios like the one sketched above should not be recognized as parents under the standing statute. It bears emphasis that nothing in the custody statute promulgated by our General Assembly bars such an intent-based approach. Only the judiciary stands in the way.

[*461] Observe that members of an opposite-sex

[5] *See T.B., 786 A.2d at 916* ("A third party has been permitted to maintain an action for custody . . . where that party stands *in loco parentis* to the child "); *Morgan v. Weiser, 2007 PA Super 128, 923 A.2d 1183, 1186 (Pa. Super. 2007)* ("As a general rule, third parties, other than grandparents, usually do not have standing to participate as parties in child custody actions. An exception to this general rule exists when the third party stands *in loco parentis* to the child.").

couple availing themselves of ART in a **[**917]** situation identical to the one described above would not be consigned to such limbo. If the **[***60]** female partner contracts for ART with a sperm donor and the male partner is not a party to that contract and does not adopt the child, the male partner nonetheless can find shelter (and, more importantly, standing) in the paternity by estoppel doctrine in the event of a separation.[6] The male partner would need only to show that he held the child out as his own. He would not have to attempt intervention as a third party who seeks to stand in the shoes of a parent. I perceive no need or reason for treating these hypothetical parties differently when both intended fully to be parents and when both acted in accordance with those intentions.

While I would embrace an intent-based test for parentage for persons pursuing parentage through ART, I nonetheless concur with the Majority's determination that C.G. was not a parent under the facts of this case as found by the trial court.[7] As the Majority notes, the trial court found that J.H. was credible when she testified that C.G. never intended to be a parent to Child and that C.G. did not act as a parent. Further, the trial court credited testimony that C.G. and J.H. reached no mutual decision to become parents. Given that there was no **[***61]** documentary evidence of C.G.'s intent to parent, and given that the trial court found, consistent with the record, that C.G.'s actions were not those of a parent, I join the Majority's conclusion that C.G. did not have standing as a parent pursuant to *23 Pa.C.S. § 5324*.[8]

[*462] In Loco Parentis

Turning to the issue of *in loco parentis* standing, I agree with the Majority that the bond between a child and a third party is not dispositive. Maj. Op. at 30. I further agree that "post-separation conduct [of the third party] should not be determinative of the issue of [*in loco parentis*] standing." *Id.* at 32. Nonetheless, the Majority would (and in fact does) permit the consideration of post-separation conduct as "shed[ding] light on . . . whether the person seeking standing was ever viewed as a parent-like figure." *Id.* I differ with the Majority as to how post-separation conduct should be considered and as to the manner in which such conduct plays a role in this case.

The Majority recognizes that there is "potential for misconduct" inasmuch as a parent can withhold the child from the third party in an attempt to destroy an *in loco parentis* relationship. *Id.* Though it acknowledges this concern, the Majority deems **[***62]** it no bar to consideration of C.G.'s post-separation conduct, and "decline[s] to foreclose a trial court from reviewing all relevant evidence. . . ." *Id.* The elasticity of this standard gives me pause. If there is evidence that the third party has assumed parental status and discharged parental duties during the relationship, and if there is evidence that the custodial parent purposefully **[**918]** withheld the child, then post-separation conduct should not be considered for purposes of denying standing to the third party. This Court should not countenance even the suggestion that a parent unilaterally can erase from a child's life a third party who, in all material respects, acted as a parent.

The Majority maintains that the trial court in this case did not premise C.G.'s lack of standing upon her post-separation conduct. *Id.* Instead, the Majority opines, the trial court "simply concluded" that the post-separation conduct was "consistent" with the trial court's conclusion that C.G. did not act **[*463]** as a parent. *Id.* In ruling that C.G. did not act *in loco parentis*, the trial court considered that C.G. removed J.H. and Child from C.G.'s health insurance after separation and reasoned that doing so was **[***63]** consistent with C.G.'s post-separation conduct of ending any financial support and arranging for J.H. and Child to leave the shared residence. Trial Court Opinion at 6-7. The trial court also emphasized the fact that C.G.'s extended family did not maintain a relationship with Child following separation. *Id.* at 8. Finally, the trial court devoted one of the six categories it considered in determining *in loco parentis*

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[6] *See supra* n.2.

[7] "We must accept findings of the trial court that are supported by competent evidence of record, as our role does not include making independent factual determinations. In addition, with regard to issues of credibility and weight of the evidence, we must defer to the presiding trial judge who viewed and assessed the witnesses first-hand." *D.K. v. S.P.K., 2014 PA Super 218, 102 A.3d 467, 478 (Pa. Super. 2014)*.

[8] With respect both to this issue and to the *in loco parentis* analysis, as the trial court noted, the testimony of the parties and the witnesses was "in direct conflict." T.C.O. at 5. The record provides testimony that, if found credible, would support C.G.'s claims that she intended to be a parent and that she assumed a parental role and discharged parental duties. Similarly, there is testimony that supports J.H.'s claims to the opposite effect. Because we are bound as a reviewing court by the trial court's credibility findings, we must accept the testimony of J.H. and her witnesses.

standing to post-separation conduct. *Id.* at 9-10. In fact, the trial court began that portion of its analysis with: "Perhaps most telling that [C.G.] did not assume the role of a parent is her conduct post-separation." *Id.* at 9. Given that this case hinged upon credibility findings — in that the parties and their witnesses agreed upon very few facts — it appears that C.G.'s post-separation conduct weighed heavily in the trial court's finding that C.G. lacked standing to pursue custody.

The standard that Pennsylvania courts should follow is to foreswear consideration of any post-separation conduct until after they determine whether the custodial parent withheld the child from the third party. Only if the trial court decides that the parent did not withhold the child should the court consider post-separation **[***64]** conduct. This will prevent post-separation conduct from being deployed as a thumb upon the scale unless and until the trial court determines that it was the third party, rather than the custodial parent, who decided to limit post-separation contact. Unlike the Majority, I do not view the trial court's consideration of post-separation conduct here as merely confirming its decision on standing. Instead, it appears that this consideration figured significantly as a distinct and influential factor in the trial court's analysis.

That said, I recognize and respect the reality that the trial court made a finding that J.H. did not withhold the child from C.G. *Id.* at 10. Accordingly, even under the test that I advance here, the trial court would have been free to consider the post-separation conduct.

[*464] * * * *

In sum, I think that today's case is a missed opportunity for this Court to address the role of intent in analyzing parental standing in ART cases. I differ as well with the Majority's assessment of the manner in which post-separation conduct can be considered in weighing *in loco parentis* claims. These differences notwithstanding, we are bound on appellate review by the trial court's fact-finding and **[***65]** credibility determinations. Under that familiar standard, regardless of my divergences from the Majority's rationale, C.G. lacked standing to pursue custody here. Accordingly, I concur in the result.

Justice Donohue joins the concurring opinion.

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[J-50-2024] [MO: Dougherty, J.]
IN THE SUPREME COURT OF PENNSYLVANIA
EASTERN DISTRICT

CHANEL GLOVER,	:	No. 9 EAP 2024
	:	
Appellant	:	Appeal from the Order of the
	:	Superior Court entered on
	:	December 11, 2023, at No. 1369
v.	:	EDA 2022, affirming the Order of
	:	the Court of Common Pleas of
	:	Philadelphia County, Domestic
NICOLE JUNIOR,	:	Relations Division, entered on
	:	May 4, 2022, at No. D22048480.
Appellee	:	
	:	ARGUED: September 11, 2024

CONCURRING OPINION

JUSTICE BROBSON **DECIDED: March 20, 2025**

"In the instant matter, it is undisputed that the parties, a married couple, mutually agreed to utilize IVF for the purpose of having a child together." (Trial Ct. Op., 8/1/2022, at 9.) Based upon the totality of the undisputed evidence of record, "the trial court concluded that Junior was a legal parent based upon principles of contract law." *Glover v. Junior*, 306 A.3d 899, 911 (Pa. Super. 2023). The Superior Court reviewed the record and likewise determined that "[t]he certified record demonstrates the parties' mutual assent, actions in furtherance of the sufficiently definite terms of the agreement, and consideration." *Id.* at 916. Consequently, the Superior Court concluded that "Junior has an enforceable right to parentage under principles of contract law." *Id.*

In reaching that conclusion, the Superior Court examined the documents and testimony relied upon by the trial court and presented a compelling analysis. The Superior Court explained that the evidence established that the parties "*intended* to collectively

assume legal parentage of the child born via artificial reproductive technology." *Id.* at 914 (emphasis added). The Superior Court, however, did not stop its analysis there. Applying well established contract principles—*i.e.*, the elements of a contract: "(1) mutual assent; (2) consideration; and (3) sufficiently definite terms"—to the facts adduced at trial, it opined that, "[i]n addition to the parties' mutual intent," the parties' "conduct . . . evinces the existence of an oral contract between them." *Id.* The Superior Court supported its conclusion as to the first and third elements by citing evidence, including the conduct of the parties, the contracts to which Junior was an essential party, and the statements of the parties in sworn affidavits. *Id.* at 913-14, 916. Turning to this Court's definition of "consideration," the Superior Court concluded that Junior's payment of "one-half of all the expenses" and "the shared emotional role" of accompanying Glover and assisting with her medical treatment throughout her pregnancy constituted consideration for the contract. *Id.* at 915 (citing *Pa. Env't Def. Found. v. Com.*, 255 A.3d 289, 305 (Pa. 2021) ("Consideration is defined as a benefit to the party promising, or a loss or detriment to the party to whom the promise is made."). To the extent the Majority criticizes the lower court's conclusion for lacking sufficient evidence to prove the elements of a contract, I am unpersuaded. It is apparent to me that the abundant evidence of record clearly demonstrates an oral contract or, in the least, a contract implied in fact. *See Cameron v. Eynon*, 3 A.2d 423, 424 (Pa. 1939) ("[A] contract implied in fact . . . is an actual contract . . . which arises where the parties agree upon the obligations to be incurred, but their intention, instead of being expressed in words, is inferred from their acts in the light of the surrounding circumstances.").

With due respect to "the evolving role played by alternative reproductive technologies," I do not believe the present matter requires this Court to create a new precept of law to justly resolve this dispute. *Ferguson v. McKiernan*, 940 A.2d 1236, 1245

(Pa. 2007). Because the Superior Court appropriately concluded that the record amply supported the trial court's finding of a contract between Junior and Glover to share equal parental rights of the child at the center of this dispute, I would affirm the order of the Superior Court on that basis alone. When existing law is sufficient to provide a resolution to a controversy, it is imprudent for a court to expand existing law to reach the same result. The Majority's recognition of intent-based parentage in circumstances that evidence contract-based parentage is an unnecessary expansion of the law, blurs the lines between the two theories of parentage, and creates confusion as to the future relevance of contract-based parentage entirely.

For these reasons, I respectfully concur in the result only.

Justice Mundy joins this concurring opinion.

[J-50-2024]
IN THE SUPREME COURT OF PENNSYLVANIA
EASTERN DISTRICT

TODD, C.J., DONOHUE, DOUGHERTY, WECHT, MUNDY, BROBSON, McCAFFERY, JJ.

CHANEL GLOVER,	:	No. 9 EAP 2024
	:	
Appellant	:	Appeal from the Order of the
	:	Superior Court entered on
	:	December 11, 2023, at No. 1369
v.	:	EDA 2022, affirming the Order of the
	:	Court of Common Pleas of
	:	Philadelphia County, Domestic
NICOLE JUNIOR,	:	Relations Division, entered on May
	:	4, 2022, at No. D22048480.
Appellee	:	
	:	ARGUED: September 11, 2024

OPINION

JUSTICE DOUGHERTY **DECIDED: March 20, 2025**

I. Introduction

Our law in this Commonwealth presently recognizes four pathways to establish legal parentage: biology, adoption, equity (*i.e.*, parentage by a marital presumption or estoppel), and contract where a child is born using Assistive Reproductive Technology (ART). As we explain below, none of these existing paths applies to the facts of this case, which involves a married same-sex couple who conceived a child using a sperm donor and ART but did not enter into a contract and separated before the child was born. We believe the time has come for our law to embrace a fifth pathway to parentage to account for the situation at hand. We thus adopt the doctrine of intent-based parentage into our common law and affirm the Superior Court *en banc* to the extent it found parentage was established under that theory.

II. Background

Chanel Glover and Nicole Junior met in 2019, and they got married in California in January 2021. The couple discussed starting a family using ART, even before marriage. The month they got married, they reached out to a fertility clinic, RMA South California (RMA), to learn about their options. The parties attended a consultation about different ART options and later underwent blood testing. They eventually decided to pursue conception using *in vitro* fertilization (IVF).

On February 3, 2021, the couple entered into a contract with Fairfax Cryobank for donated sperm. The contract listed Glover as the "Intended Parent[]" and Junior as the "Co-Intended Parent[]." Fairfax Cryobank Contract at 1. The contract had a signature line for the "Intended Parent" but not the "Co-Intended Parent," and only Glover signed the document. *See id.* at 5.[1] Thereafter, the couple jointly selected a sperm donor. Junior testified the couple chose the specific sperm donor because he shared resemblances with Junior, who would not be biologically related to the Child, and the couple believed the similarities to be "kismet." *See* N.T. 5/3/2022, at 25-26 (explaining like Junior, the donor had dark skin, almond-shaped eyes, a wide smile, high cheekbones, was a Sagittarius, traced his ancestry to Benin, and had an appreciation for the arts).

Subsequently, the couple decided to move to Pennsylvania to be closer to family, and in April 2021, they moved to Philadelphia. There, they continued to work with RMA at its Philadelphia-area location. On July 11, 2021, both parties entered into an IVF contract with RMA, the "CareShare Agreement," wherein Glover signed as "Patient" and Junior signed as "Partner." RMA CareShare Agreement at 9. That contract explained RMA's CareShare program operates differently than a traditional IVF program, as it

[1] Junior was further identified as a "Designated Individual" who was given access to Glover's client account information and the ability to authorize shipment of Glover's vials to the identified physician. Fairfax Cryobank Contract at 7.

"allows for the possibility of multiple IVF cycles for a single fee and, under certain circumstances, provides a refund[,]" rather than requiring patients to pay for individual IVF treatment cycles. *Id.* at 1. Within the contract, Glover and Junior agreed to (among other things) payment of RMA's fees and waiver of related health insurance claims. *See id.* at 3.[2] In August of 2021, Child was conceived *via* IVF using Glover's egg and the sperm from Fairfax Cryobank. As part of that process, Junior accompanied Glover to King of Prussia for the medical procedure to retrieve her eggs and waited in the parking garage with Glover's mother. Junior also administered to Glover various hormone injections into her abdomen and buttocks over a period of three months before and after conception. After Glover became pregnant, she and Junior jointly attended obstetrics appointments.

In November 2021, both Glover and Junior signed a Representation Agreement with Jerner Law Group, P.C., in anticipation of Junior's "Confirmatory Step-Parent Adoption" of Child. *See* Jerner Representation Agreement (Oct. 13, 2021 email from Rebecca L. Nayak to Glover and Junior); Confirmation of Representation Agreement (signed by Junior and Glover 11/1/2021 and 11/2/2021, respectively). In the contract with Jerner, the parties agreed to joint representation and terms of payment. On December 5, 2021, both parties signed affidavits expressing their intent for Junior to adopt Child. In Glover's affidavit, she attested, *inter alia*: "I am married to [Junior] and we intend to remain a committed couple"; "I am seeking to have my spouse, [Junior,] adopt this child in order to provide this child with the legal stability of two parents"; "I understand that this means

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[2] The CareShare contract further provided:

> You and your partner, if applicable, must jointly sign this Agreement. If during the term of this Agreement there occurs a change in legal or other status (i.e. divorce, legal separation or annulment), you are required to immediately notify RMAPHL and you will be deemed to have self-withdrawn from the Program, and you will not be entitled to a refund.

RMA CareShare Agreement at 6.

[Junior] will become a legal parent, with rights **equal** to my rights as a biological parent"; "I understand that this means [Junior] will have custody rights and child support obligations to this child if we ever separate in the future"; "I understand that an adoption decree is intended to be a permanent court order, which cannot be changed or undone in the future"; "I understand that, because I have chosen not to seek outside counsel, I am waiving my right to confidentiality with respect to [Junior]. . . . In the event of future litigation between me and [Junior], I consent to the release of this Affidavit to [Junior]"; and "I want [Junior] to become a legal parent to this child because I believe it is in the best interests of the child." Glover Aff., 12/5/2021 (emphasis in original). Junior attested to the same. *See* Junior Aff., 12/5/2021. Additionally, the parties jointly entered into a contract with a doula in January 2022. In the doula contract, the parties agreed to the doula's terms of service, fees, and payments. Both Glover and Junior were listed as "Client[s]," and they both signed the contract. Doula Contract at 4 (unpaginated). Together, the parties also picked out a name for the child, which included a hyphenated last name combining "Glover" and "Junior."[3]

Over the next few months, the parties' relationship deteriorated. In early January of 2022, Junior moved out of the couple's shared bedroom into the basement of their residence. On March 17, 2022, Glover learned Junior (who was in Washington state attending multiple writers' residencies) would be returning to Philadelphia two days later and intended to move out of the shared residence when the lease expired on July 31, 2022. At some point, Glover stopped sharing her Google calendar with Junior (which included obstetrics appointments), ended joint appointments with the doula, and cancelled the baby shower that the parties planned together. In March of 2022, Glover

[3] The trial court found that "[e]ven after separation, Glover advised Junior that she intended to use the agreed upon name for the expected child." Trial Court Op. at 3.

informed Junior that she no longer intended to proceed with Junior's second-parent adoption. On April 18, 2022, Glover filed the underlying complaint in divorce.

Then, on April 27, 2022, Junior filed a petition for special relief for pre-birth establishment of parentage and an emergency petition for the same. In the petitions (which were the impetus for the present appeal), Junior sought an order (1) confirming Junior as a legal parent to the child, (2) requiring that Junior be informed as soon as Glover went into labor and that Junior be given access to the hospital and the child after birth, and (3) ordering that Junior's name appear as the second parent on the child's birth certificate. Glover filed an answer challenging the petition, and the family court held an evidentiary hearing on May 3, 2022.

The next day, the family court entered an order in Junior's favor:

> It is hereby ordered and decreed that: (1) [Junior] is confirmed as the legal parent of the child conceived during [Junior's] marriage to [Glover] via [IVF] and due to be born in May of 2022; (2) [Glover] shall advise Junior when she goes into labor; (3) Both [Glover] and Junior shall have access to the child after birth consistent with [Glover's] medical privacy rights and the hospital's policies regarding newborn children. However, this paragraph shall not in any way be construed as a custody order; ([4]) [Glover] shall execute the Commonwealth of Pennsylvania's Birthing Parent's worksheet indicating that [Junior] is the child's other parent; and ([5]) the name of Nicole S. Junior shall appear on the child's birth certificate as a second parent.
>
> When appropriate, a custody complaint may be filed under a custody case number.

Trial Court Order, 5/4/2022 at 1. Glover timely appealed, questioning, *inter alia*,[4] "[d]id the trial court act within its discretion and err as a matter of law when it confirmed pre-birth legal parentage of [Junior?]" Glover's Superior Court Brief at 5.[5]

The trial court issued a Rule 1925(a) opinion in support of its order. Primarily, the court held "Junior is the legal parent of the child pursuant to the law of contracts." Trial Court Op. at 7 (capitalization omitted). The trial court explained "Pennsylvania courts have recognized the validity and enforceability of contracts involving [ART]." *Id.* at 8, *citing C.G. v. J.H.*, 193 A.3d 891, 904 (Pa. 2018) ("there appears to be little doubt that the case law of this Commonwealth permits assumption or relinquishment of legal parental status, under the narrow circumstances of using [ART], and forming a binding agreement with respect thereto"); *Ferguson v. McKiernan*, 940 A.2d 1236 (Pa. 2007) (enforcing oral contract between biological birth mother and sperm donor for release of donor's parental

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[4] Glover also raised the following questions:

> 1. Did the trial court err as a matter of law when it found that [Glover] waived any challenges to the [c]ourt's exercise of its jurisdiction and to its being a proper forum for a decision regarding [Junior's] rights as a legal parent[?]
>
> 2. Did the trial court err when it found that the issue of parentage was ripe for determination[?]

Glover's Superior Court Brief at 5. The Superior Court disposed of these issues in Junior's favor, Glover does not challenge those holdings on appeal to this Court, and we do not discuss them further.

[5] Glover also filed an application for emergency relief requesting a stay of the court's May 4, 2022 order. Initially, the Superior Court temporarily stayed the trial court's order pending the filing of related pleadings, and then issued a *per curiam* order granting in part and denying in part the emergency petition for a stay. Specifically, the Superior Court stayed the May 4, 2022 order only insofar as it directed that Junior's name appear on the birth certificate. Additionally, after Child's birth on May 25, 2022, Junior filed a Complaint for Shared Physical Custody. The parties have not elaborated on the status of the custody litigation, but during oral argument before this Court, counsel mentioned that Junior has not had contact with the Child. *See also Glover v. Junior*, 306 A.3d 899, 905 n.3 (Pa. Super. 2023) (*en banc*).

rights/obligations); *In re Baby S.*, 128 A.3d 296 (Pa. Super. 2015) (enforcing written contract eliminating parental rights of gestational carrier and imposing parental rights/obligations on intended non-biological mother).[6]

Considering that precedent, the trial court found a contract existed under the facts of this case. It looked at the evidence showing Glover and Junior, as a married couple, mutually agreed to conceive a child using ART, including the various written agreements and the parties' affidavits. The court then determined "the undisputed evidence . . . conclusively established that the parties, a married couple, formed a binding agreement for Junior, as a non-biologically related intended parent, to assume the status of legal parent to the Child [conceived] through the use of [ART]." *Id.* at 9-10.[7]

On appeal, a three-judge panel of the Superior Court initially reversed the trial court's decision, holding Junior's parentage was not established by contract. Although the majority recognized parentage contracts in the ART context are enforceable, it held no contract existed in this case to confer parental rights on Junior. Looking at the written contracts, it determined none of the documents identify Junior as the legal parent to Child. Judge Bowes dissented, reasoning that beyond the terms of the written contracts discussed by the panel majority, an oral contract existed between Junior and Glover, or alternatively, that parentage could be established using estoppel principles. Finally,

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[6] The trial court further recognized that in *C.G.*, three Justices (including this author) expressed their belief in two concurring opinions that the *C.G.* majority's conception of parentage was too narrow, and that parentage may be determined by the intent of parties who conceive a child together using ART. *See* Trial Court Op. at 9. The trial court agreed and "urge[d] the appellate courts, when presented with a factually appropriate scenario, [to] adopt an intent-based analysis for persons pursuing parentage through [ART]." *Id.*

[7] The trial court also specifically stated it did not apply the doctrines of paternity by estoppel or presumption of paternity when considering Junior's legal parentage. *See* Trial Court Op. at 12-13.

Judge Bowes noted this case presents a perfect opportunity for this Court to delineate the proper application of intent-based parentage as discussed in *C.G*.

Junior filed an application for re-argument *en banc*, which the Superior Court granted. The *en banc* panel affirmed the trial court, with Judge Bowes now writing for the majority. *See Glover v. Junior*, 306 A.3d 899 (Pa. Super. 2023) (*en banc*). As an initial matter, the court held the marital presumption of parentage did not apply. It explained the marital presumption doctrine provides that "generally, a child conceived or born during the marriage is presumed to be the child of the marriage; this presumption is one of the strongest presumptions of the law of Pennsylvania[.]" *Id.* at 908, *quoting Brinkley v. King*, 701 A.2d 176, 179 (Pa. 1997) (plurality). The Superior Court elaborated that while the presumption is equally applicable to same-sex and opposite-sex spouses, *see Int. of A.M.*, 223 A.3d 691, 695 (Pa. Super. 2019), its purpose is "to preserve the inviolability of the intact marriage," and thus it is inapplicable if there is no intact family or marriage to preserve. *Glover*, 306 A.3d at 908. The court recognized "the onset of the divorce proceedings is not determinative" of whether the doctrine's purpose can be served, but it looked to the trial court's factual findings and held "the certified record demonstrates that the marriage was over at the time parentage was placed at issue." *Id.* at 910.

The *en banc* majority next turned to the crux of the trial court's holding — whether a contract existed. Addressing the standard of review, the court stated, "[w]hether individuals can enter into an enforceable agreement to determine parentage and parental rights involves a legal question that we review *de novo*." *Id.*, *citing Ferguson*, 940 A.2d at 1242. It further determined its "scope of review is plenary." *Id.*[8] The court then

[8] We note the Superior Court earlier stated it "review[s] orders relating to parentage for an abuse of discretion or an error of law." *Glover*, 306 A.3d at 908. But it appears to have applied the broader *de novo* standard of review and plenary scope of review to the contract analysis.

provided foundational principles underlying contract law. It explained the "policy behind contract law is to protect the parties' expectation interests by putting the aggrieved party in as good a position as he would have been had the contract been performed." *Id.* (citation omitted). The court explained that regardless of whether a contract is oral or written, it must have three elements: (1) mutual assent; (2) consideration; and (3) sufficiently definite terms. *Id.* at 911. It further observed:

> [N]ot every term of a contract must always be stated in complete detail. If the parties have agreed on the essential terms, the contract is enforceable even though recorded only in an informal memorandum that requires future approval or negotiation of incidental terms. In the event that an essential term is not clearly expressed in their writing but the parties' intent concerning that term is otherwise apparent, the court may infer the parties' intent from other evidence and impose a term consistent with it.

Id., *quoting Helpin v. Trustees of Univ. of Pa.*, 969 A.2d 601, 610-11 (Pa. Super. 2009). The Superior Court then undertook a thorough review of the preeminent cases in this area — *Ferguson*, *Baby S.*, and *C.G.*

In *Ferguson*, we held an oral contract for sperm donation was enforceable in Pennsylvania. There, the mother and her former paramour (sperm donor) orally agreed he would furnish sperm in a manner akin to anonymous sperm donation: "it would be carried out in a clinical setting; [s]perm [d]onor's role in the conception would remain confidential; and neither would [s]perm [d]onor seek visitation nor would [m]other demand from him any support, financial or otherwise." *Ferguson*, 940 A.2d at 1238. Mother became pregnant with twins, and both parties abided by the agreement until the twins were about five years old. At that point, mother filed a lawsuit against sperm donor seeking child support. The lower courts held the parties' oral contract was unenforceable pursuant to public policy. On appeal, we reversed.

Despite recognizing the Commonwealth's general policy that parents cannot bargain away their children's right to support, we held the oral ART contract did not violate

public policy considering "the evolving role played by [ART] in contemporary American society." *Id.* at 1245. "[T]he inescapable reality[,]" we observed, "is that all manner of arrangements involving the donation of sperm or eggs abound in contemporary society, many of them couched in contracts or agreements of varying degrees of formality." *Id.* (recognizing an "increasing number of would-be mothers" are using ART, and neither the public nor the General Assembly had chosen to proscribe these arrangements). We further reasoned that holding otherwise would limit a would-be mother to using only anonymous sperm donation to ensure legal protections, even if she had a preference for using the sperm of someone she knows. Moreover, we posited that holding such contracts unenforceable would discourage would-be donors from providing sperm because they would be at risk of future support liability and would "significantly limit[] a would-be mother's reproductive prerogatives." *Id.* at 1247. We recognized our holding denied the twins a second source of support, but we noted that, in the absence of the parties' agreement, "the twins would not have been born at all, or would have been born to a different and anonymous sperm donor, who neither party disputes would be safe from a support order." *Id.*

Nearly a decade later, the Superior Court similarly upheld multiple ART contracts in *Baby S.*, but there, the contracts **imposed** parental obligations on a non-biological, non-gestational mother. In that case, a wife and her husband decided to use an egg donor and a gestational carrier to conceive a child. They entered into various written contracts identifying them as "Intended Parents." *See Baby S.*, 128 A.3d at 298-300. Most relevantly, wife and husband entered into a contract with the gestational carrier, which provided "[t]he Gestational Carrier shall have no parental or custodial rights or obligations of any Child conceived pursuant to the terms of this Agreement" and that "the Intended Parents agree to assume legal responsibility for any Child born pursuant to this

Agreement[.]" *Id.* at 300. The parties went through with the embryo transfer, and the gestational carrier became pregnant. Before the baby was born, husband and wife started having marital difficulties, and wife refused to do the necessary paperwork to be listed on the child's birth certificate. The gestational carrier filed a petition seeking a court order declaring wife and husband the legal parents and directing that they be named as parents on the birth certificate. Wife attempted to avoid parentage, arguing the gestational carrier contract was unenforceable.

Relying on *Ferguson*, the Superior Court held the contract was enforceable. The court rejected wife's arguments that *Ferguson* did not address whether parentage can be established *via* contract and that it can be established biologically or by adoption only. It emphasized that wife's actions before and during the pregnancy "were consistent with her declared intention to be Baby S.'s mother," and highlighted that as in *Ferguson*, "Baby S. would not have been born but for [wife's] actions and express agreement to be the child's legal mother." *Id.* at 306. The Superior Court then reasoned *Ferguson* "expressly recognized the enforceability of a contract that addressed parental rights and obligations in the context of [ART]," and "the evolving role played by [ART] in contemporary American society." *Id.* The Superior Court explained our "language and focus [in *Ferguson*] on the parties' intent" was "at odds" with wife's contention that gestational carrier contracts violated dominant public policy. *Id.* It added that "the Adoption Act is not the exclusive means by which an individual with no genetic connection to a child can become the child's legal parent" and the Act did not evince a public policy against the enforcement of gestational carrier contracts. *Id.* Thus, the court held the contract was binding and enforceable against wife to establish her legal parentage.

Then, in *C.G.*, this Court reaffirmed that parentage can be established by contract, but we did not go so far as to adopt an intent-based parentage doctrine. In that case,

C.G. and J.H. were a same-sex couple who never married.[9] During their relationship, J.H. got pregnant by intrauterine insemination using an anonymous sperm donor and her own ovum. C.G. shared no genetic relationship with the resulting child and never adopted him, but C.G. lived with J.H. and the child for about five years before the couple separated, at which point J.H. and the child relocated to Pennsylvania. A few years later, C.G. filed a custody complaint seeking shared legal and partial physical custody, arguing she had standing as a "parent" under 23 Pa.C.S. §5324 (or alternatively stood *in loco parentis* under that provision), and claiming the child was conceived with the mutual intent of both parties. J.H. refuted that claim. After considering the parties' conflicting testimony and evidence about C.G.'s role in the child's conception, birth, and upbringing, the trial court found as fact that the parties did not share an intent to conceive and raise the child together, but that C.G. merely acquiesced to J.H. having the child. The trial court held C.G. did not have standing (as a "parent" or otherwise), and the Superior Court affirmed.

On appeal, we affirmed that C.G. lacked standing. We first recognized Section 5324 does not provide a definition of "parent," but it plainly encompasses biological mothers and fathers as well as adoptive parents. *See C.G.*, 193 A.3d at 900. We acknowledged, however, "the reality of the evolving concept of what comprises a family cannot be overlooked." *Id.* In that regard, we explained our courts had recognized parentage could also be established (or relinquished) by contract in the ART context. *See id.* at 901-04, *citing Ferguson* and *Baby S. See also id.* at 904 ("there appears to be little doubt that the case law of this Commonwealth permits assumption or relinquishment of legal parental status, under the narrow circumstances of using [ART], and forming a binding agreement with respect thereto"). We held "this narrow judicial recognition of

[9] When the child was born, the couple resided in Florida, where same-sex marriage and second-parent adoptions were not recognized. They did not seek a second-parent adoption once it was legalized in that state a few years later.

legal parentage by contract" did not afford C.G. relief, as there was no dispute that C.G. was "not party to a contract or identified as an intended-parent when J.H. undertook to become pregnant[.]" *Id.* We likewise rejected C.G.'s argument our case law stood "for the broad proposition that parentage can be established by intent in situations where a child is born with the aid of [ART]." *Id.* at 905. We determined C.G. did not fit within the existing "framework for establishing parentage in the absence of adoption, biology, or a presumption attendant to marriage." *Id.* at 906.

The *C.G.* majority opinion spoke to the status of our case law at that time and in the context of the specific facts of that case, but it also acknowledged the concurring opinions (by this author and Justice Wecht) advocated for a more flexible definition of parentage focused on the intent of the parties. The majority clarified "nothing in [its] decision is intended to absolutely foreclose the possibility of attaining recognition as a legal parent through other means." *Id.* at 904 n.11. It held, however, "under the facts before this Court, this case does not present an opportunity for such recognition, as the trial court found as fact that the parties did not mutually intend to conceive and raise a child, and the parties did not jointly participate in the process." *Id.* Rather, it determined "we must await another case with different facts before we may properly consider the invitation to expand the definition of 'parent.'" *Id.*, *quoting id.* at 913 (Dougherty, J., concurring).

As noted, this author concurred in the result, agreeing with the majority that the issue was not then properly before us. *See id.* at 913 (Dougherty, J., concurring) (it is "unnecessary at this juncture to endorse any particular new test for establishing standing as a parent" as the facts "preclude a holding that C.G. has standing as a parent under any of the proffered definitions of intent-based parentage"). But this author argued the *C.G.* majority offered a "cramped interpretation of 'parent'" in light of "the diverse range

of parental configurations that now exist," and thus presented "a very real and grave risk" of inflicting disproportionate hardship on nontraditional families, namely those of same-sex couples. *Id.* at 911-12 (Dougherty, J., concurring). *See also id.* at 912 ("Instead, I believe there is room in our precedent — particularly in the absence of any guidance from the legislature — to conclude an individual who lacks biological, adoptive, or marital ties may nevertheless establish standing as a parent to seek custody under 23 Pa.C.S. §5324(1).").

In his concurring opinion, Justice Wecht (joined by Justice Donohue) expressed his view that the Court should "imagine and embrace the intent-based paradigm that ART-related child custody disputes require." *Id.* at 914 (Wecht, J., concurring). Justice Wecht explained that *Ferguson* and *Baby S.* would have resulted in the same holding if an intent-based principle applied rather than a contract theory. *See id.* at 915 ("This is unsurprising, inasmuch as the contract evidences the intent."). But he also predicted a contract theory would not be helpful in all circumstances:

> [S]uppose that the members of a same-sex couple decide that one partner will become pregnant via ART and sperm donation; it is entirely foreseeable that only the partner being impregnated would contract with the ART facility. The second partner, who would have no biological connection to the child, would have no contract establishing a claim to parentage. Suppose further that no adoption is formalized, and that the couple separates after years in which both parties diligently raise and lovingly support the resulting child. Under the Majority's approach, the second partner has no claim to parent status and no standing to pursue any custody rights. Such a result is by no means dictated by the terms or spirit of our custody standing statute, which speaks in this regard only of "[a] parent of the child", thus begging the question now at hand. *See* 23 Pa.C.S. §5324(1). As well, such a result supplants the best interests analysis, eliminates the focus on the child's needs, and fails entirely to comport with contemporary family realities and especially the circumstances of Pennsylvanians who are parenting in same-sex relationships.
>
> But, wait, you say. The second partner in the scenario imagined above almost certainly would enjoy standing in custody under an *in loco parentis* theory. . . . The problem is not so simple. First, if the couple separates shortly after (or before) the child's birth, the second partner — who fully

> intended to be a parent (and this with the first partner's knowledge and consent) — will have no claim to *in loco parentis* standing, there having been insufficient time for assumption of parental status and discharge of parental duties. . . . Second, and more significantly, resort to an *in loco parentis* approach concedes the parentage claim, which is the very issue that is at bar here. The point is that the second partner in these scenarios should be considered a parent for purposes of standing in custody. *In loco parentis* generally is considered a species of standing sought by third parties.

Id. at 915-16. According to Justice Wecht, "[a]s a matter of law, a same-sex partner who participated in the decision to bring a child into the world, to raise, to educate, to support and to nurture that child, is no longer a third party. He or she is a parent." *Id.* at 916. Bound by the trial court's fact-finding, however, he concurred C.G. was not a parent.

After explaining the stage set by *Ferguson*, *Baby S.*, and *C.G.*, the *en banc* Superior Court majority in the present case held Junior established parentage by three alternative means: (1) a contract-based right; (2) equitable estoppel; and (3) intent-based parentage. Starting with the contract-based right, the Superior Court determined the record revealed "a sufficient basis, as evidenced by the agreements and the conduct of the parties, to confer parentage on Junior." *Glover*, 306 A.3d at 913. It observed Junior was either referenced as a party or beneficiary in the RMA CareShare Agreement, the Fairfax Cryobank Contract, the Doula Contract, and the Jerner Representation Agreement. *See id.* at 913-14. According to the Superior Court, these contracts "served as evidence that Junior and Glover intended to collectively assume legal parentage of the child born via [ART]." *Id.* at 914.

In addition to this proven "mutual intent," the *en banc* panel reasoned, the parties' conduct established the existence of an oral contract between them. *Id.* It explained "there are three elements of a contract: (1) mutual assent; (2) consideration; and (3) sufficiently definite terms." *Id.* Since the panel determined "the certified record is replete with evidence of the parties' mutual assent to conceive a child of their marriage using

ART, bestow upon Junior legal parent status, and raise the child together as co-parents[,]" it turned to whether the contract was supported by consideration. *Id.* at 914-15. It explained "[c]onsideration is defined as a benefit to the party promising, or a loss or detriment to the party to whom the promise is made." *Id.* at 915, *quoting Pa. Envtl. Def. Found. v. Commonwealth*, 255 A.3d 289, 305 (Pa. 2021). Ultimately, the court below held the oral contract was supported by consideration because Junior paid for half of all the expenses and shared in the emotional burdens by administering fertility injections into Glover's abdomen and attending medical appointments.

The *en banc* panel further highlighted that "Glover not only agreed to the shared financial and emotional burdens, she continued to assent to the arrangement even after doubting whether she was still committed to co-parenting with Junior." *Id.* It explained:

> [Glover] offered the following explanation for why, despite her apprehensions about continuing her romantic relationship with Junior, she nevertheless executed the fertility contracts identifying Junior as a co-parent rather than proceeding alone or forgoing the IVF program entirely: "I could've moved forward without having to do the [IVF] program. . . . Financially—it was the best decision." [N.T., 5/3/22] at 65.

Id. at 915-16 (alterations to quotation supplied by Superior Court). Thus, the Superior Court reasoned, "the certified record bears out that, **in exchange for** the consideration of the shared emotional burden and equally-divided financial cost of the [ART] procedure and birth, Glover agreed that her spouse, Junior, would possess parental rights to the child conceived through their combined efforts." *Id.* at 916 (emphasis added). The court rejected Glover's claims she did not knowingly and intentionally bestow legal rights upon Junior by taking these actions, citing her Affidavit statement she wanted Junior to "become a legal parent, with rights **equal** to [Glover's] rights as a biological parent." Glover Aff., 12/5/2021 at ¶4 (emphasis in original). The Superior Court therefore recognized an enforceable oral contract between Junior and Glover concerning Junior's parentage.

In a footnote, the court also held that even "assuming *arguendo*" Junior did not have a contract-based right to parentage, Glover was barred by the doctrine of equitable estoppel from challenging Junior's parentage. *Glover*, 306 A.3d at 916 n.10. It explained equitable estoppel is a "doctrine of fundamental fairness" which "applies to prevent a party from assuming a position or asserting a right to another's disadvantage inconsistent with a position previously taken[,]" and upon which the other party detrimentally relied. *Id.* The Superior Court reasoned Glover repeatedly demonstrated her assent to Junior's parentage, and held "[t]he record bears out Junior's detrimental reliance and endurance of severe prejudice if Glover were permitted to deny parentage at this juncture." *Id.*

Lastly, the *en banc* panel held in the alternative it would affirm based on principles of intent-based parentage, even if the record did not establish the three elements of a contract. It opined this Court was unable to adopt the doctrine under the facts in *C.G.* but emphasized the rationales of the concurring opinions. It further reasoned the facts of the present case provide another opportunity to address intent-based parentage; it specifically noted "the certified record in this appeal easily supports a finding of parentage by intent." *Id.* at 918 (reiterating the extensive facts described above that Glover and Junior intended to conceive and raise Child together). "Stated plainly," the Superior Court explained, "this appeal is the paradigm of intent-based parentage in cases involving ART, where the couple not only evidenced their mutual intent to conceive and raise the child, but they also participated jointly in the process of creating a new life." *Id.* at 919. "Thus, in addition to affirming the trial court order establishing Junior's parentage based on contract principles," the *en banc* panel "affirm[ed] it upon . . . application of the principles of intent-based parentage that the concurring justices highlighted in *C.G.*" *Id.*[10]

[10] Judge King authored a concurring opinion (joined by President Judge Panella and Judge Murray), wherein she agreed Junior had a contract-based right to parentage and that the facts of this case would "fit squarely within an 'intent-based' parentage approach," (continued…)

Glover filed a petition for allowance of appeal, and we granted review on the following issues:

> (1) Did the Superior Court's *en banc* decision conflict with the holding of the Supreme Court of Pennsylvania in *C.G. v. J.H.*, 193 A.3d 891 (2018), by concluding the spouse of the biological mother of a child conceived through Assistive Reproductive Technology, who bore no biological relationship to the child, had a right to parentage of the child, where no contract term establishing the spouse as a legal parent existed and the Superior Court applied "intent-based" parentage, to reach its conclusion that an oral contract established the spouse as a legal parent?
>
> (2) Should the doctrine of "intent-based" parentage be adopted in Pennsylvania in the context of a child conceived through Assistive Reproductive Technology?
>
> (3) Did the Superior Court err in holding the spouse of the biological parent of a child conceived through Assistive Reproductive Technology, who bore no biological relationship to the child, had a right to legal parentage of the child as a matter of equity under the circumstances of this case?

Glover v. Junior, 314 A.3d 815, 815-16 (Pa. 2024) (*per curiam*).

III. Parties' Arguments and Discussion

We take the above issues out of order, first reviewing the contract issue, second the equitable estoppel issue, and finally the intent-based parentage doctrine. We review questions of law *de novo* and apply a plenary scope of review. *See, e.g.*, *C.G.*, 193 A.3d at 898. To the extent we must consider the facts of this case, we will not disturb the trial court's fact findings so long as they are supported by competent evidence of record. *See In re Doe*, 33 A.3d 615, 624 (Pa. 2011).

A. Oral Contract

1. Parties' Arguments

Glover argues the lower courts erred in finding an enforceable oral contract, stressing Junior had not signed a contract clearly assuming the rights and responsibilities

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but asserted "adoption of an intent-based approach is a task better left for our legislature or Supreme Court[.]" *Glover*, 306 A.3d at 919 (King, J., concurring).

of a parent. She acknowledges under Pennsylvania case law, ART contracts regarding parental status are honored "to prohibit restricting a person's reproductive options." Glover's Brief at 18, *quoting C.G.*, 193 A.3d at 903-04. But, Glover asserts, those contracts are strictly construed, and their purpose is to protect gestational carriers and donors from being legally obligated to the child born using ART. She posits the courts enforce those contracts to promote the willingness of gestational carriers and donors to provide those services. According to Glover, this promotes the institutions of marriage and family, eliminates uncertainty, and reduces the likelihood of unwilling parents for children born by ART.

Glover argues the Superior Court erred when it found a contract existed that conferred parental rights on Junior, and that the court's analysis improperly centered on the parties' intent, which it then inserted into the existing agreements. She claims the Superior Court ignored the plain meaning of the actual, written contracts with Fairfax, RMA, and Jerner Law — none of which included terms granting Junior parentage — and improperly found consideration for a contract between Glover and Junior. Glover argues the written contracts here were not vague: they established Glover as the sole legal parent, and under the Jerner contract, Junior would later become a legal parent only "when and if an adoption occurred and the parties were in an intact family." *Id.* at 27. Thus, she insists *Ferguson* and *Baby S.* are inapposite, and the Superior Court was not free to read additional terms into these unambiguous contracts based on its assumed intent of the parties.

In response, Junior argues the Superior Court's holding an oral contract existed accorded with settled precedent, including *C.G.* Junior stresses Pennsylvania courts have enforced different kinds of ART contracts, including oral contracts. *See* Junior's Brief at 11-12, *citing Ferguson*, 940 A.2d at 1241, 1245 ("The inescapable reality is that

all manner of arrangements involving the donation of sperm or eggs abound in contemporary society, many of them couched in contracts."). In these contract cases, Junior explains, courts routinely consider evidence of the parties' intent. Junior claims the purpose of applying contract principles in ART cases is not just to relieve gestational carriers and donors of unwanted parental responsibilities, but to give effect to the parties' intent. *See id.* at 13-14, *citing J.F. v. D.B.*, 897 A.2d 1261 (Pa. Super. 2006) (holding gestational carrier who did not originally intend to be a parent did not have standing to bring a custody action); *Baby S.*, 128 A.3d at 306 (parentage imposed upon mother seeking to escape its obligations where she entered into surrogacy contract). Even in *C.G.*, Junior notes, the courts considered the parties' intent when determining whether a contract existed; the Court deferred to the trial court's findings that the parties did not mutually intend to conceive and raise the child together, and thus, we held the parties did not enter into a contract. Junior avers the difference in the outcomes between this case and *C.G.* lies in the factual distinctions — here, like in *Ferguson*, the parties formed a legal agreement to raise Child as co-parents.

Junior argues the Superior Court properly held all three elements of a contract were satisfied and that Glover focuses incorrectly on the terms of the written contracts with third parties, which for purposes of this case, serve as evidence of the more important **oral** contract between the **parties.** Junior reiterates the Superior Court's reasoning that the record amply supplies evidence of an oral contract, and rebuts Glover's argument the lower courts' analyses of the parties' intent improperly incorporated intent-based parentage principles into the contract analysis. According to Junior, an analysis of the

parties' intent is independently relevant to determining the existence of a contract, *i.e.*, to establish the parties' mutual assent.[11]

2. Analysis

To address whether the lower courts correctly determined an oral contract established Junior's parentage and parental rights, we must first consider the proper standard of review. Certainly, "the **interpretation** of a contract is a question of law" subject to a *de novo* standard of review and plenary scope of review. *Vinculum, Inc. v. Goli Technologies, LLC*, 310 A.3d 231, 242 (Pa. 2024) (emphasis added). And, as the Superior Court recognized, we established in *Ferguson* that "[w]hether individuals can enter into an enforceable agreement to determine parentage and parental rights involves a legal question that we review *de novo*." *Glover*, 306 A.3d at 910, *citing Ferguson*, 940 A.2d at 1242. Here, however, the question is not whether Glover and Junior **could have** entered into a contract — it is whether they did, in fact, enter into a contract.

Accordingly, before we can review the courts' interpretation of the supposed oral contract, we must determine whether one even existed. Such a determination implicates questions of fact, for which our standard of review is deferential to the factfinder. *See, e.g.*, *City of Philadelphia, to Use of Faith v. Stewart*, 51 A. 348, 349 (Pa. 1902) ("What the parties said and what they meant by what they said was for the jury to answer. It was not

[11] *Amici* American Academy of Matrimonial Lawyers, Pennsylvania Chapter, Academy of Adoption & Assisted Reproduction Attorneys, and Pennsylvania Interbranch Commission for Gender, Racial, & Ethnic Fairness agree with Junior, and emphasize the Fairfax Cryobank contract designated Junior as a "Co-Intended Parent," demonstrating Glover's intent to bestow upon Junior the terms and conditions of that agreement. *Amici* GLBTQ Legal Advocates & Defenders, National Center for Lesbian Rights, ACLU, ACLU of Pennsylvania, Family Equality, Mazzoni Center, Philadelphia Family Pride, and COLAGE also agree, and add context that LGBTQ+ parents are often advised to do a confirmatory adoption (even if they agree to parentage) to ensure full faith and credit of parentage in other jurisdictions, not to establish parentage in the home state. *Amicus* Cordell & Cordell, P.C., agree a contract existed.

a written contract which one party maintained and the other sought to alter or contradict as argued. It was a mixed written and oral contract, the terms of which were disputed. . . . 'The construction of an oral agreement belongs to the jury[.]'") (citation omitted); *Wilson v. Lyle*, 16 A. 861, 861 (Pa. 1889) (where terms of oral contract were in dispute it raised a question for the jury); *Berry v. Eastman*, 40 A.2d 102, 103 (Pa. Super. 1944) ("The right of a broker to a commission is a matter of contract, express or implied, but whether there was such a contract was a question of fact to be determined by the trial judge."). *See also Field v. Golden Triangle Broadcasting, Inc.*, 305 A.2d 689, 691 (Pa. 1973) ("when the evidence is conflicting as to whether the parties intended that a particular writing would constitute a complete expression of their agreement it has been held that it is a question of fact for the trier of fact to determine whether a contract exists").

In contract cases, then, the fact-finder must evaluate whether the evidence establishes facts that could meet the requisite elements of a contract.[12] Here, the Superior Court recited those elements as "(1) mutual assent; (2) consideration; and (3) sufficiently definite terms." *Glover*, 306 A.3d at 911, *citing Helpin*, 969 A.2d at 610. By contrast, we have stated "[g]enerally, in order for a contract to be formed, there must be three requisite elements: an offer, acceptance, and consideration." *Estate of Caruso v. Caruso*, 322 A.3d 885, 896 (Pa. 2024), *citing Muhammad v. Strassburger, McKenna, Messer, Shilobod & Gutnick*, 587 A.2d 1346, 1349 (Pa. 1991). *See also Farren v. McNulty*, 121 A. 501, 502 (Pa. 1923) ("It is a requisite of every contract that there must be an offer and acceptance"). These two different articulations of the requirements of a contract are not necessarily incompatible — Pennsylvania courts have explained that "[t]he principle that a contract is not binding unless there is an offer and an acceptance is

[12] Of course, once those facts are found, it becomes a question of law whether they satisfy the requisite legal elements.

to ensure that there will be mutual assent." *Hahnemann Med. College & Hosp. of Phila. v. Hubbard*, 406 A.2d 1120, 1122 (Pa. Super. 1979), *citing Farren*, 121 A. 501. But certainly, the Superior Court's articulation of the elements as requiring "mutual assent" cannot gut the requirements for an offer and an acceptance. General acquiescence to a course of conduct is not sufficient "mutual assent" to establish an oral contract; the parties must each know the terms of the contract and they must both assent to those terms, *i.e.*, there must be an "offer" and an "acceptance" as defined by our common law contract principles. *See, e.g.*, *Essner v. Shoemaker*, 143 A.2d 364, 366 (Pa. 1958) ("before preliminary negotiations ripen into contractual obligations, there must be manifested mutual assent to the terms of a bargain").

Also relevant, we review the concept of contractual consideration. We have explained "[c]onsideration is defined as a benefit to the party promising, or a loss or detriment to the party to whom the promise is made." *Stelmack v. Glen Alden Coal Co.*, 14 A.2d 127, 128 (Pa. 1940) (citation omitted). We elaborated in *Stelmack* that "[t]he terms 'benefit' and 'detriment' are used in a technical sense in the definition, and have no necessary reference to material advantage or disadvantage to the parties." *Id.* We continued: "[i]t is not enough, however, that the promisee has suffered a legal detriment at the request of the promisor. **The detriment incurred must be the '*quid pro quo*', or the 'price' of the promise, and the inducement for which it was made.** 'Consideration must actually be bargained for as the exchange for the promise.'" *Id.* at 128-29, *quoting* Restatement Contracts §75 cmt. b (emphasis added). Thus, detriment alone does not establish consideration. *See id.* (distinguishing how detriment can be given gratuitously as a gift).

Mindful of these standards, we hold the lower courts erred in holding there was an oral contract in this case. In its Rule 1925(a) opinion, the trial court found a binding

agreement existed between the parties, but in explaining its rationale, addressed only the parties' shared intent:

> In the instant matter, it is undisputed that the parties, a married couple, mutually agreed to utilize IVF for the purpose of having a child together. The parties jointly consulted with and executed contracts with a fertility clinic (RMA), a sperm bank (Fairfax Cryobank) and later a doula in preparation for childbirth. The Care Share contract signed by the parties with RMA identifies them as "Patient" and "Partner", while the contract with Fairfax Cryobank identifies them as "Intended Parent" and "Co-Intended Parent". Additionally, both Glover and Junior signed affidavits which memorialized their joint intent to have Junior adopt the child "in order to provide this child with the legal stability of two parents", intent for Junior to "become a legal parent, with rights equal to" Glover's, and the intent for Junior to have custodial rights and a child support obligation should the parties separate (N.T. at 31-35; *See also*, Exhibit "K").
>
> Based upon the undisputed evidence presented, the [c]ourt determined that it conclusively established that the parties, a married couple, formed a binding agreement for Junior, as a non-biologically related intended parent, to assume the status of legal parent to the Child through the use of [ART].

Trial Court Op. at 9-10. The trial court did not find any specific facts establishing an offer, acceptance, or consideration between Glover and Junior.

The *en banc* Superior Court similarly erred. Its first misstep was defining the contract issue as a pure legal question subject to a *de novo* standard and plenary scope of review. *See Glover*, 306 A.3d at 910. It then viewed the record anew through that broad lens to find facts supporting the essential elements of a contract, which it defined as "(1) mutual assent; (2) consideration; and (3) sufficiently definite terms." *Id.* at 911. *See also id.* at 913 ("An examination of the documents and testimony presented during the evidentiary hearing reveals a sufficient basis, as evidenced by the agreements and the conduct of the parties, to confer parentage on Junior.").

However, the Superior Court did properly affirm the trial court's finding the parties mutually intended to conceive and raise a child together based on the extensive evidence, including the various written contracts and statements indicating the expectation Junior

would be a parent. To be clear, we take no issue with that portion of its analysis, and agree the record abounds with evidence of the parties' shared intent. But, the Superior Court incorrectly used the fact of the parties' shared intent alone to satisfy the "mutual assent" element for an oral contract. *See id.* at 914-15 ("the certified record is replete with evidence of the parties' mutual assent to conceive a child of their marriage using ART, bestow upon Junior legal parent status, and raise the child together as co-parents"), *citing* Trial Court Op. at 9-10. Like the trial court, the Superior Court did not point to any fact establishing an offer or an acceptance of specific terms of an oral contract for shared parentage between Glover and Junior.

The Superior Court's next error was in its analysis of consideration. Initially, it defined consideration "as a benefit to the party promising, or a loss or detriment to the party to whom the promise is made." *Id.* at 915, *quoting Pa. Envtl. Def. Found.*, 255 A.3d at 305. It then determined Junior gave consideration to Glover based on testimony that: (1) "Junior confirmed paying for one-half of all the expenses, including fees associated with the preliminary medical tests, IVF, and hiring a doula to assist Glover during the birth[,]" *id.*, *citing* N.T. 5/3/2022, at 17, 44; and (2) "Junior also described the shared emotional role," including that Junior administered daily fertility injections into Glover's abdomen for three months and attended doctors' appointments, *id.* The Superior Court then dove further into the hearing transcript to find "Glover not only agreed to the shared financial and emotional burdens, she continued to assent to the arrangement even after doubting whether she was still committed to co-parenting with Junior." *Id.* It observed:

> Glover addressed this apparent dichotomy during the evidentiary hearing. She offered the following explanation for why, despite her apprehensions about continuing her romantic relationship with Junior, she nevertheless executed the fertility contracts identifying Junior as a co-parent rather than proceeding alone or forgoing the IVF program entirely: "I could've moved forward without having to do the [IVF] program. . . . Financially—it was the best decision."

Id. at 915-16 (alteration supplied by Superior Court), *quoting* N.T. 5/3/2022, at 65. From that portion of the transcript, the Superior Court determined: "[h]ence, the certified record bears out that, **in exchange for** the consideration of the shared emotional burden and equally-divided financial cost of the assistive reproductive procedure and birth, Glover agreed that her spouse, Junior, would possess parental rights to the child conceived through their combined efforts." *Id.* (emphasis added). Beside the point that the Superior Court essentially reached this finding of fact on its own (presumably using its self-declared plenary scope of review), its determination is questionable.

A closer look at Glover's statement at the hearing reveals the Superior Court's quotation lacks important context. The relevant exchange began with a discussion of the various written agreements, during which Glover testified she did not believe they would be binding to establish Junior's parentage. *See* N.T. 5/3/2022, at 64. Her counsel then asked: "Did you feel like you had any options within the sperm bank or with the fertility clinic, if you didn't sign those documents, to be able to move forward with the process?" *Id.* Glover responded affirmatively, and then clarified: "we could've moved forward without the program. I could've moved forward without having to do the CareShare program." *Id.* at 65. Counsel asked: "But you decided to do CareShare just to make sure you were getting —" to which Glover responded, "Financially . . . it was the best decision." *Id.* It is apparent from this context Glover was discussing how the CareShare program — which "allows for the possibility of multiple IVF cycles for a single fee and, under certain circumstances, provides a refund" — provided the most cost-effective means for the parties to conceive. RMA CareShare Agreement at 1. It is a reach to derive from this testimony that Glover entered into the CareShare program **in exchange for** the establishment of Junior's parentage. And while Junior certainly suffered the detriments

noted by the courts below, the trial court never found as fact that those detriments were part of a bargained-for exchange in order to establish shared parentage.

Despite finding the existence of an oral contract, the *en banc* Superior Court did not point to any evidence of a conversation between Glover and Junior where one party offered the deal (that Junior would support Glover financially and emotionally with conception and pregnancy and in exchange would have parental rights with respect to Child) and the other party accepted it. We do not fault the lower courts for this shortcoming, however, because it is entirely likely such a conversation never occurred. Common experience teaches that when married couples decide to have a baby together, whether by ART or not, they typically do not enter into contracts with each other. The same goes for the lack of evidence of consideration in this case; while couples who have a child together generally share the financial and emotional burdens, they do not do so as a **bargained-for exchange** for parentage and parental rights. A couple's decision to have a baby together is often profoundly intimate and may not be so easily reduced to a transaction.[13]

Operating within the existing framework established by our precedent, the lower courts (understandably) attempted to fit the facts of this case into the confines of contract law. But the present matter is inapposite to scenarios where parties conceive using

[13] We note the parties do not argue and the lower courts did not analyze whether a contract implied in fact existed. Although contracts implied in fact account for situations where parties did not communicate the terms of the contract expressly, such contracts must still be supported by consideration. *See, e.g.*, *Liss & Marion, P.C. v. Recordex Acquisition Corp.*, 983 A.2d 652, 659 (Pa. 2009) ("A contract implied in fact is an actual contract which arises where the parties agree upon the obligations to be incurred, but their intention, instead of being expressed in words, is inferred from acts in the light of the surrounding circumstances.") (citation omitted); *Thomas v. R.J. Reynolds Tobacco Co.*, 38 A.2d 61, 63 (Pa. 1944) ("The consideration necessary to establish a valid contract, express or implied in fact, must be an act, a forbearance, or a return promise, bargained for and given in exchange for the promise."). Our holding here does not affect our case law on implied contracts.

gamete donation or gestational carriers, which are more transactional in nature and thus more easily amenable to analysis using the legal elements of contract. *See Ferguson*, 940 A.2d at 1248[14]; *Baby S.*, 128 A.3d at 306-07. Although the lower courts ably concluded the parties shared a mutual intent that Junior would be a parent to Child, contract law simply does not account for the situation. We therefore reverse the lower courts' holdings that Junior established parentage through a contract.[15]

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[14] In *Ferguson*, we explained the parties made clear their "mutual intention to preserve all of the trappings of a conventional sperm donation," thereby eliminating the sperm donor's parentage. We described how:

> the parties could have done little more than they did to imbue the **transaction** with the hallmarks of institutional, non-sexual conception by sperm donation and IVF. They negotiated an agreement **outside the context of a romantic relationship**; they agreed to terms; they sought clinical assistance to effectuate IVF and implantation of the consequent embryos, taking sexual intercourse out of the equation; they **attempted to hide [s]perm [d]onor's paternity from medical personnel, friends, and family**; and for approximately five years following the birth of the twins both parties behaved in every regard consistently with the intentions they expressed at the outset of their arrangement, **[s]perm [d]onor not seeking to serve as a father** to the twins, and [m]other not demanding his support, financial or otherwise.

Ferguson, 940 A.2d at 1246 (footnote omitted) (emphasis added). The facts of this case are, as explained, not a direct analogue to the sperm donation context. But it is striking to contrast the facts considered by the *Ferguson* Court to determine the sperm donor was not a parent. Here, the decision to conceive **was** made inside the context of a romantic relationship, Junior's identity as an intended parent **was** publicized to friends, family, and medical personnel, and Junior **did** seek to serve as a parent. This further undergirds our determination Junior's and Glover's joint decision to have a child was not a "transaction," it was far more akin to the decision to conceive a child naturally.

[15] We briefly note that we also reject Glover's argument the Jerner contract/affidavit reflect a binding agreement that Junior would become a parent only upon adoption and only if the parties remained married. While the affidavits stated they "intend[ed] to remain a committed couple[,]" this documentation of the parties' intentions did not condition Junior's parentage on an intact marriage. Glover Aff., 12/5/2021; Junior Aff., 12/5/2021. In fact, the affidavits contemplated what would happen if the parties were to split up in the future: "I understand that this means [Junior] will have custody rights and child support obligations to this child if we ever separate in the future[,]" and "[i]n the event of future litigation between me and [Junior], I consent to the release of this Affidavit to [Junior]." *Id.*

B. Equitable Estoppel

1. Parties' Arguments

Glover argues the Superior Court exceeded its role by looking beyond the trial court's contract determination to hold in the alternative that relief was warranted under equitable estoppel principles. She argues the cases the Superior Court relied on were inapt: *L.S.K. v. H.A.N.* involved a situation where a person sought and obtained a court order for custody but tried to deny the duty of support. *See* 813 A.2d 872 (Pa. Super. 2002). And, in *C.T.D. v. N.E.E.*, the Superior Court remanded for a determination of whether a putative father abandoned his potential paternal responsibilities by waiting almost two years to try to establish paternity. *See* 653 A.2d 28 (Pa. Super. 1995). Glover argues *C.T.D.* weighs in her favor, as she claims Junior abandoned the marriage and Child after conception. Alternatively, Glover claims, the Superior Court did not support its finding of Junior's reasonable reliance, and that equity could easily be applied the opposite way to preclude Junior from claiming parentage. Lastly, Glover argues, equitable estoppel doctrines in the context of parenting and custody are based in the preservation of intact marriages; here, there is no intact marriage to protect.

In reply, Junior argues the Superior Court correctly applied equitable principles to hold Junior is a parent, in line with *C.T.D.* and *L.S.K.* Junior adds that under "principles of estoppel, 'a person might be estopped from challenging paternity where that person has by his or her conduct accepted a given person as the [parent] of the child.'" Junior's Brief at 35, *quoting Brinkley*, 701 A.2d at 179. Junior asserts the "record is replete with examples of Glover's conduct accepting Junior as parent of the child." *Id.* at 35-36 (including the joint actions of the parties of conceiving Child and preparing for Child's arrival by, *e.g.*, picking out a name, taking pregnancy classes, announcing the pregnancy to family and friends, creating a registry, and making a co-parenting plan). According to

Junior, the record also demonstrates Junior's detrimental reliance and prejudice if Glover were allowed to deny parentage now; Junior paid for half of the expenses, entered the various contracts, and took on emotional burdens. *See id.* at 36-37.[16]

2. Analysis

Two equitable doctrines predominate in our law on parentage: the presumption of paternity/parentage and paternity/parentage by estoppel.[17] All agree the presumption of parentage does not apply here because the parties' marriage is no longer intact, and "[w]hen there is no longer an intact family or a marriage to preserve, then the presumption . . . is not applicable." *Glover*, 306 A.3d at 908, *quoting Vargo v. Schwartz*, 940 A.2d 459, 463 (Pa. Super. 2007). The Superior Court's cursory conclusion Glover was equitably estopped from challenging Junior's parentage appears to have been grounded in broad

[16] *Amici* American Academy of Matrimonial Lawyers *et al*. supplement with specific actions Glover took on which Junior detrimentally relied, including Glover's acceptance of financial and emotional support, Glover's agreement to use specific sperm based on the donor's commonalities with Junior, and Glover's affidavit stating she wanted Junior to be a legal parent. *Amici* GLBTQ Legal Advocates & Defenders *et al.* agree estoppel should bar Glover from contesting Junior's parentage and add that although the marital presumption has been limited to cases where the goal is to preserve an intact marriage, it also serves to protect children's parentage. Those *amici* remind the Court that in *Obergefell v. Hodges*, 576 U.S. 644 (2015), the United States Supreme Court recognized that the profound commitment of marriage plays a vital role in safeguarding children, and they ask the Court to revisit the limit on the marital presumption in this case where, without Junior's parentage, Child will not have a second parent. *Amicus* Cordell & Cordell, P.C. also agrees with Junior, adding that the family court is a court of equity and Pennsylvania has long applied equitable principles to determine parentage for the purpose of protecting children from harm and trauma.

[17] We note the Superior Court has applied the presumption of paternity to same-sex couples. *See Int. of A.M.*, 223 A.3d at 697 ("We . . . have no difficulty in holding that the presumption of paternity is equally as applicable to same-sex marriages as it is to opposite-sex marriages."). Because we do not dispose of this case on these equitable grounds, we need not decide whether the presumption of paternity or paternity by estoppel can apply under these circumstances. We do, however, recognize the broader terms "parentage by estoppel" and "presumption of parentage" are better suited to cases like this one, and use them in this opinion as necessary.

principles of equitable estoppel. Importantly, however, we have held "paternity by estoppel continues to pertain in Pennsylvania, but it will apply only where it can be shown, on a developed record, that it is in the best interests of the involved child." *K.E.M. v. P.C.S.*, 38 A.3d 798, 810 (Pa. 2012). Here, the lower courts did not perform a best interests analysis, or address *K.E.M.* at all. They certainly did not evaluate whether, in light of *K.E.M.*, a best interests analysis is necessary when determining parentage under an estoppel theory in these circumstances.

We observe, however, that a best interests analysis (as contemplated by the Court in the context of paternity by estoppel) would be difficult to engage in here, since this litigation commenced before Child was even born. *See id.* at 809 (in discussing best interests, noting the relevance of the child's closeness with the challenged parent and whether harm would befall the child if parental status were to be undone). Junior has not had the opportunity to build a relationship with Child. Thus, as with the contract-based analysis *supra*, the present situation does not fit neatly within the estoppel box. Although we do not foreclose the possibility that estoppel principles could apply more flexibly to establish parentage than our precedent currently reflects — indeed, these equitable principles inform our intent-based parentage analysis below — we cannot affirm the Superior Court's alternate holding given its fleeting discussion of equitable estoppel. We proceed to the final question of intent-based parentage.

C. Intent-based Parentage

1. Parties' Arguments

According to Glover, "[t]his Court in *C.G.* made clear that it does not stand for the proposition that parentage can be established merely by intent in the setting of [ART] in the absence of specific contract provisions outlining the responsibilities and legal obligations of the non-related third party." Glover's Brief at 24. She claims intent was not

the focus of *Ferguson* or *Baby S.* because the parties in those cases formed "clear binding agreements with terms that left no doubt as to the rights and responsibilities of the parties." *Id.* at 25. She posits the Superior Court exceeded its authority when it reached its intent-based parentage holding, claiming its scope was limited to correcting errors regarding the trial court's determination a contract existed. Moreover, Glover argues, the lower courts focused on the wrong time period when finding mutual intent that Junior would be a parent. Glover claims that instead of focusing on the time around conception, the court should have considered Junior's conduct later in the pregnancy (when Junior moved into the basement, left for the West Coast for several months, then moved out of the marital residence). Glover argues the facts of this case are akin to *C.G.*, where the courts held the parties did not mutually intend to have and raise the child together. She claims the Superior Court ignored *C.G.* by using an intent-based approach.

Glover further contends the Court should refrain from adopting a doctrine of intent-based parentage, claiming it "is a slippery slope by which the role of parent would be potentially subjected to result-oriented applications." *Id.* at 38. Especially in cases like this one where the child was not yet born, Glover claims, the doctrine fails to protect the best interests of the child. She argues this area of the law requires certainty and consistency, and a nebulous intent-based standard will require case-by-case determinations, resulting in chaos, protracted litigation, and uncertainty for the children.

Junior responds that the Superior Court's examination of intent-based parentage does not conflict with *C.G.* Junior frames the lower court's opinion as "based on contract principles, referring to intent-based parentage only as a secondary reason[.]" Junior's Brief at 22-23. Nevertheless, Junior argues, the Court in *C.G.* did not "reject" intent-based parentage across the board, and this case is distinguishable on its facts. *Id.* at 23-24. Junior urges us to adopt an intent-based parentage doctrine for children conceived

through ART, noting "this case fits squarely in the situation anticipated by . . . *C.G.*" *Id.* at 24. Junior highlights the discussions of intent-based parentage in the *C.G.* concurrences, citing Justice Wecht's observation that in most cases, an intent-based analysis would reach the same result as a contract-based analysis, while providing refuge in circumstances where the specific requirements of contract could not be met. *See id.* at 26 (reciting Justice Wecht's hypothetical as nearly identical to this case). Junior concludes "it is time to expand the determination of parentage and adopt an intent-based approach" to fully recognize families created through alternative means. *Id.*

Junior avers this case is the perfect opportunity to adopt the doctrine of intent-based parentage. Junior recaps Glover's continuous representations of her intent to co-parent with Junior even after the parties separated, the references to Junior as "Co-Intended Parent" and "Partner" in the written contracts, the various decisions the parties made together regarding the conception and raising of Child, and the fact Junior acted like a parent. Junior agrees with the Superior Court that "this appeal is the paradigm of intent-based parentage in cases involving ART, where the couple not only evidenced their mutual intent to conceive and raise the child, but they also participated jointly in the process of creating a new life." *Id.* at 28, *quoting Glover*, 306 A.3d at 919.

Junior rebuffs Glover's arguments that intent-based parentage would create a "slippery slope" or lead to "chaos," explaining under Glover's view of the law, the pregnant parent would have complete control and could unilaterally strip the other of their parental rights, leaving the child with only one parent, contrary to public policy. *Id.* at 29-30. Junior asserts such a result would be "tragically unjust" for both the parent and child and would be "shocking in an opposite-sex marriage." *Id.* at 30. Junior then proposes a two-step standard for finding intent-based parentage: First, the court would ask if the parties are married and were married while they undertook ART. If so, Junior believes there should

be a rebuttable presumption that both parties intended to be the parents. Second, Junior continues, if the parties are not married, the court should ask whether there is proof of intent for the non-carrying party to serve as the other parent, which can be proved by evidence of (a) significant participation during the ART process (*e.g.*, attending doctors' appointments, signing contracts, giving injections, financially contributing); and (b) how the parties held themselves out to family, friends, and the public regarding the upcoming birth of the child (*i.e.*, whether they acted like they were having a baby together). According to Junior, such a "clear, reasonable standard" would protect against the situation at hand, where Child has been deprived of Junior's love and care, and Junior has been denied the ability to parent and know Child. *Id.* at 34.[18]

Amici American Academy of Matrimonial Lawyers, Pennsylvania Chapter *et al.* provide the Court with additional, exceptionally helpful arguments supporting the adoption of intent-based parentage. They first argue the doctrine would fill a significant gap in our law. *Amici* explain that our existing precedent allows "parentage for standing purposes [to] be proven in only four ways: biology, adoption, a presumption attendant to marriage, or 'legal parentage by contract [in ART cases].'" *Amici* Brief of Am. Acad. of Matrimonial Lawyers *et al.* at 6-7, *quoting C.G.*, 193 A.3d at 911 (Dougherty, J., concurring). But they

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[18] *Amicus* Cordell & Cordell, P.C. argues for a similar two-step analysis:

> First, a marital presumption: if the parties are married during ART procedures, and at the time the child was conceived via ART, both parties are presumed to be the parents of the resultant child. Second, if the marital presumption does not apply, the party claiming parentage by intent must provide clear and convincing evidence demonstrating both a mutual intent to conceive and raise the child (such as communications between the parties, how they held themselves out, documents they executed, etc.) as well as joint participation in the process of creating new life (such as the party's name listed on paperwork, assistance for hormone injections, attendance at and/or payment for related medical services, etc.).

Amicus Brief of Cordell & Cordell, P.C. at 23-24.

note the *C.G.* majority recognized the possibility of future expansion of the meaning of "parent," and they argue that even these four categories represent a significant expansion of the term as it was understood at the end of the last century. *See id.* at 7-11 (describing how the courts' development of parentage by contract, and the Superior Court's expansion of the presumption of parentage to the ART context, including for same-sex married couples,[19] moved the law forward).

Amici explain, however, these doctrinal developments are still too narrow to cover all families who conceive through ART. They observe that express contracts regarding parental rights typically occur in only two contexts: gamete donation and surrogacy. "But there is little perceived need for two intended parents to enter into a written contract **with each other** to provide that the non-biological parent will have parental rights." *Id.* at 11 (emphasis in original). And while the marital presumption could apply if the parties were married, *amici* explain it would not apply if the marriage dissolves before an action is filed challenging the non-biological parent's status (as in this case). To fill this gap, *amici* ask the Court to adopt an intent-based standard for determining parentage, "under which Pennsylvania courts probe the intent of the person undergoing ART and their partner, and to ask whether, at the time of the conception, that couple intended to bring a child into the world together and to serve as co-parents to that child." *Id.* at 13. They assert the courts should be permitted to look at evidence from all relevant time periods (including conception, pregnancy, or after birth if applicable), and make factual determinations on a case-by-case basis. According to *amici*, intent-based parentage is a logical continuation of our ART jurisprudence. They explain the existing doctrines (especially the contract-

[19] *See Int. of A.M.*, 223 A.3d at 694-95.

based approach) already aim to capture the parties' intent, but they do so imperfectly in certain situations.[20]

Next, *amici* argue an intent-based parentage doctrine would best serve the Commonwealth's public policies. First, they explain the Commonwealth aims to protect the stability of children's family lives. *See id.* at 15-16, *citing* 23 Pa.C.S. §5328(a)(4) (custody court should consider "[t]he need for stability and continuity in the child's education, family life and community life"). *Amici* elaborate that to serve that aim, Pennsylvania law (1) limits instances where a single-parent family is created, and (2) facilitates the addition of a parent so a child has two parents. *See id.* at 16-18.[21] Second, they argue it is the Commonwealth's policy to recognize Pennsylvanians may exercise a diverse range of parental configurations without undue intrusion from the courts. *See id.* at 19, *citing* 23 Pa.C.S. §2312 ("Any individual may become an adopting parent."); *Ferguson*, 940 A.2d at 1248 (recognizing a single-parent family where it was mindfully created). Third, *amici* argue a prevalent common law policy is to encourage predictability of legal outcomes. *Amici* believe intent-based parentage would support all three policy

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[20] *Amici* Philadelphia Bar Association, Pennsylvania Bar Association, and Allegheny County Bar Association agree that a gap exists in Pennsylvania law, which creates uncertainty for families. They recognize there is currently pending legislation in the General Assembly to adopt the Uniform Parentage Act (and thus recognize intent-based parentage). But *amici* nonetheless urge the Court to adopt a common law intent-based parentage doctrine in this case, reasoning the question is too urgent to await legislative action.

[21] *Amici* explain the Adoption Act does not permit a parent to move to involuntarily terminate the other parent's parental rights without another person willing and available to adopt the child, *see Amici Brief* of Am. Academy of Matrimonial Lawyers *et al.* at 16 (citing, *e.g.*, 23 Pa.C.S. §2512(b)); the Adoption Act permits stepparent and second-parent adoptions, *see id.* at 17 (citing, 23 Pa.C.S. §2903; *In re Adoption of R.B.F.*, 803 A.2d 1195, 1196 (Pa. 2002)); and the courts that have refused to apply the marital presumption in cases of marital breakdown have done so with the intention a person other than the husband will be identified as the child's father, not to strip the child of a second parent, *see id.* at 18 (citing, *e.g.*, *Minnich v. Rivera*, 506 A.2d 879, 882 (Pa. 1986)).

goals by: establishing parentage for those who, in their own view, are best positioned to care for a child; ensuring children born by ART are not disadvantaged relative to children born in non-ART situations when a marriage is irretrievably broken (noting in the ART context, there is no other substitute parent); thwarting the use of parentage proceedings by an embittered party to a breakup; and fostering predictable outcomes, especially for lay-parents who would not need to understand the complexities of contract law to know where they stand (thereby discouraging protracted, exploitative litigation over ambiguous contracts).

Finally, *amici* observe intent-based parentage is a settled doctrine used by other states in their common law and in the Uniform Parentage Act (UPA), and Pennsylvania would not be an outlier by adopting it. *Amici* urge the Court to join the growing ranks of states that use intent-based parentage, and argue this is the perfect case to do so. *Amici* GLBTQ Legal Advocates & Defenders *et al.* supplement this point with more statistics from other jurisdictions. They explain it is "the overwhelming consensus across the states" that "mutual consent to [ART] leads to conclusive legal parentage." *Amici* Brief of GLBTQ Legal Advocates & Defenders *et al.* at 13-14. They identify certain cases from other jurisdictions applying intent-based reasoning (discussed further *infra*) and assert many states have enacted intent-based parentage statutes. *See id.* at 14 n.7 (arguing sixteen states have intent-based parentage provisions, and nineteen have ART parentage provisions), *citing* Courtney G. Joslin *et al.*, *Lesbian, Gay, Bisexual & Transgender Family Law* §3:3 (2018).[22]

[22] *Amici* further explain the UPA provisions have evolved to establish parentage in the context of ART, first applying to consenting spouses, then protecting nonmarital children born through ART and expanding the ways consent can be established, as well as updating provisions with gender-neutral language to make clear they apply to children born to LGBTQ+ parents who use ART. *See Amici* Brief of GLBTQ Legal Advocates & Defenders *et al.* at 14-16.

2. Analysis

After considering the thorough advocacy described above, we adopt a doctrine of intent-based parentage, not out of whole cloth, but as an extension of our existing parentage jurisprudence. As we explained in *C.G.*, our precedent up to this point recognizes parentage through four paths: biology, adoption, equity (*i.e.*, parentage by a marital presumption or estoppel), or by contract where the child is born using ART. *See C.G.*, 193 A.3d at 906. But in *C.G.*, we acknowledged "the reality of the evolving concept of what comprises a family cannot be overlooked." *Id.* at 900, *citing J.A.L. v. E.P.H.*, 682 A.2d 1314, 1320 (Pa. Super. 1996) ("increased . . . changes in social mores and increased individual freedom have created a wide spectrum of arrangements, filling the role of the traditional nuclear family"). In conformity with that observation, we made clear "nothing in [the Court's] decision is intended to absolutely foreclose the possibility of attaining recognition as a legal parent through other means." *Id.* at 904 n.11. Thus, while an intent-based analysis did not suit the facts in *C.G.*, our decision there did not preclude intent-based parentage in Pennsylvania. *See id.* ("we must await another case with different facts before we may properly consider the invitation to expand the definition of 'parent'"), *quoting id.* at 913 (Dougherty, J., concurring). We are now presented with the appropriate opportunity to apply these principles.

As illustrated, none of the four paths to parentage recognized in *C.G.* account for the factual scenario in this case. Junior does not share genetics with and did not gestate Child, so there is no biological relationship. Junior's relationship with Glover broke down and this litigation commenced before Child was born, so there was no opportunity to adopt. Likewise, the presumption of parentage attendant to marriage applies only to intact marriages, so Junior could not establish parentage through the marital presumption. And application of parentage by estoppel is problematic in this case since our precedent

requires a best interests analysis, and Junior has been prevented from forming a relationship with Child. Finally, contract principles are inapt because married couples generally do not engage in a transaction involving offer, acceptance, and consideration when deciding to have children. Nonetheless, we are presented with a situation where a formerly married couple endeavored — while still married — to conceive and raise a child together, and they invested many months and significant financial, emotional, and physical resources to jointly bring a child into the world. Indeed, this case is a near-exact materialization of Justice Wecht's prescient hypothetical in *C.G.* *See id.* at 915-16 (imagining a same-sex couple who used ART to conceive, where the non-biological parent lacks a contract establishing parentage, the parties separate before an adoption is formalized, and even third-party *in loco parentis* standing cannot be established because the parties separated before or shortly after birth).

To determine whether parentage in such situations accords with our current law, it is helpful to consider what our law concerning legal parentage aims to accomplish in the first place. Foremost, Pennsylvania law plainly seeks to protect children. *Cf. C.G.*, 193 A.3d at 909 ("The paramount concern in child custody cases is the best interests of the child."). In *K.E.M.*, for example, when discussing paternity by estoppel, we adopted the stance that "the law cannot permit a party to renounce even an assumed duty of parentage when by doing so, the innocent child would be victimized[,]" and took into account whether the child would "be denied the love, affection and support" of a parent. 38 A.3d at 807-08, *quoting Commonwealth ex rel. Gonzalez v. Andreas*, 369 A.2d 416, 419 (Pa. Super. 1976); *see also id.* at 808-09 ("we are of the firm belief — in terms of common law decision making — [the best interest of the child] remains the proper, overarching litmus, at least in the wider range of cases. . . . The legal determination of parentage is a hollow one where the accoutrements do not inure to a child's benefit.").

In furtherance of that goal, we have emphasized the importance of love and stability for the child. *See, e.g.*, *Int. of K.T.*, 296 A.3d 1085, 1106 (Pa. 2023) (in the context of termination proceedings, statutory considerations of emotional needs and welfare include "intangibles such as love, comfort, security, and stability"), *quoting In re T.S.M.*, 71 A.3d 251, 267 (Pa. 2013); *see also K.E.M.*, 38 A.3d at 809 ("The legal fictions perpetuated through the years . . . retain their greatest force where there is truly an intact family attempting to defend itself against third-party intervention."). And, of course, our law aims to protect children by providing private sources of financial support. *See, e.g.*, *Knorr v. Knorr*, 588 A.2d 503, 505 (Pa. 1991) (Parents' "right to bargain for themselves is their own business. They cannot in that process set a standard that will leave their children short. . . . When [their bargain] gives less than required or less than can be given to provide for the best interest of the children, it falls under the jurisdiction of the court's wide and necessary powers to provide for that best interest.").

On the other hand, legal parentage also serves the rights of parents themselves. "The liberty interest . . . of parents in the care, custody, and control of their children []is perhaps the oldest of the fundamental liberty interests recognized by this Court." *Troxel v. Granville*, 530 U.S. 57, 65 (2000); *see also Pierce v. Soc'y of Sisters*, 268 U.S. 510, 534-35 (1925) ("liberty of parents and guardians" includes "direct[ing] the upbringing and education of children under their control"). Recently, in *Caldwell v. Jaurigue*, we considered what it means to be a "parent" for purposes of the child support statute in 23 Pa.C.S. §4321(2). *See* 315 A.3d 1258 (Pa. 2024). In that case, a deceased mother's paramour had formed a close, step-parent-like relationship with her child, and he sought and obtained partial physical custody after the mother's death, while the child's biological father shared physical custody and retained full legal custody. The father brought a support action against the paramour, relying on a case, *A.S. v. I.S.*, 130 A.3d 763 (Pa.

2015), where we held an ex-step-father owed a duty to support where he "litigated and obtained full legal and physical custody rights . . . [and] ha[d] insisted upon and bec[o]me a full parent in every sense of that concept." *Id.* at 1267, *quoting A.S.*, 130 A.3d at 770. Analyzing relevant statutes, dictionary definitions, and case law, we held the paramour was not a "parent" for purposes of a support obligation under Section 4321(2) because he did not have legal custody of the child, even though he was awarded substantial physical custody. We explained that without legal custody — *i.e.*, "[t]he right to make major decisions on behalf of the child, including, but not limited to, medical, religious and educational decisions[,]" 23 Pa.C.S. §5322 — the paramour did not have all the rights and corresponding obligations of parentage. *Id.* at 1273-74. We held "without the power to decide the monumental facets of a child's life such as their medical treatment, religion, or course of education, the non-parent's role is plainly subordinate to that of a parent." *Id.* at 1275. Thus, Pennsylvania law primarily aims to protect the interests of children, and accordingly recognizes parentage encompasses duties and obligations as well as privileges.[23]

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[23] As explained by *amici* American Academy of Matrimonial Lawyers *et al.*, our law furthers these broad interests (and others) in various ways. *Amici* are correct that while our law respects single-parent households, *see, e.g.*, *Ferguson*, *supra*, there are quite a few instances where the law acts to promote two legal parents as a means of providing stability and more support for the child. *See, e.g.*, 23 Pa.C.S. §2512(b) (requiring a parent moving to involuntarily terminate the other parent's parental rights to aver they will assume custody of the child until the child is adopted); *In re Adoption of M.R.D.*, 145 A.3d 1117, 1120 (Pa. 2016) ("petitioning parent must demonstrate that an adoption of the child is anticipated in order for the termination petition to be cognizable"); 23 Pa.C.S. §2903 (permitting second parent adoption by spouse without requiring recognized parent to terminate their parental status); *In re Adoption of R.B.F.*, 803 A.2d at 1196 (allowing second-parent adoption among non-spouses in some situations where section 2903 is inapplicable). *Amici* are likewise correct our law aims to encourage predictable outcomes and account for even non-traditional family formations and structures. *See, e.g.*, *C.G.*, 193 A.3d at 903 ("cognizant of the increased availability of reproductive technologies to assist in the conception and birth of children, the courts are recognizing that arrangements . . . may differ and thus should be treated differently than a situation where (continued…)

An intent-based parentage analysis in ART cases would not conflict with these public policies; indeed, it would further them. In terms of stability and support, intent-based parentage in the ART context could provide a second source of love, care, and support — both emotional and financial. Unlike in estoppel cases, in the ART context, there is typically no second biological parent since a gamete donor would have contracted away parental rights. And it is apparent that in some ways, parents who conceive using ART essentially demonstrate their stability and dedication to a child by going through a more rigorous, time consuming, and expensive process to conceive a child than do many parents who conceive through sexual intercourse. At the same time, it is difficult to see how intent-based parentage would undermine more "naturally" derived parental rights. Parental rights are legally shared in the most ordinary circumstances of conception; in this more unusual context, the biological parent cannot reasonably expect to have sole parental rights when she and her partner plan to conceive and co-parent a child, and work together to bring that child into the world using ART. As we explained in *Caldwell* (albeit in the context of the support statute), parentage involves "the power to decide the monumental facets of a child's life such as their medical treatment, religion, or course of education." 315 A.3d at 1275. Certainly, one of the most monumental decisions a parent can make for their child is whether to conceive them in the first place.

Thus, an intent-based analysis aligns with the purposes of establishing parentage that pervade our law. And as demonstrated, cases like this one slip through the cracks

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a child is the result of a sexual encounter"); *J.A.L.*, 682 A.2d at 1320 ("In today's society, where increased mobility, changes in social mores and increased individual freedom have created a wide spectrum of arrangements filling the role of the traditional nuclear family, flexibility in the application of standing principles is required in order to adapt those principles to the interests of each particular child.").

that separate the four paths to parentage named in *C.G.*[24] *See* Douglas NeJaime, *The Nature of Parenthood*, 126 YALE L.J. 2260, 2289 (2017) ("[E]ven as principles of gender and sexual-orientation equality have animated shifts in parental recognition, parentage law continues to draw distinctions that carry forward legacies of inequality embedded in frameworks forged in earlier eras."). It is time our precedent evolves to fill in the gap.

Addressing similar issues, courts in other jurisdictions have used intent-based considerations when determining parentage. In *Sinnott v. Peck*, for example, the Supreme Court of Vermont considered a family court's dismissal of a plaintiff's petition to establish parentage of two children legally adopted by her same-sex domestic partner. *See* 180 A.3d 560, 561 (Vt. 2017). It affirmed the dismissal as to the older child the defendant partner adopted before the parties' relationship began, but reversed as to the younger child the couple decided to adopt and raise together during the course of their relationship. *See id.* at 561-62 (explaining the adoption agency did not allow same-sex adoptions, so only defendant legally adopted the child). The Vermont court explained its "past decisions with respect to the definition of 'parent,' and access to the rights and responsibilities that come from that status, have created a legal framework in which parental status is viewed in the absence of a marriage, civil union, or biological or adoptive relationship with the child in a narrow class of cases **in which the parents intended to bring a child into their family and raise the child together**, and in fact did so." *Id.* at 563 (emphasis added). It explained "[t]his approach is not only consistent with [its] caselaw concerning parental rights, but it also furthers the core purpose of Vermont's

[24] Of course, this case is not the only scenario where rightful parentage could fall through those cracks. Imagine, for example, a couple (same- or opposite-sex) who uses ART to conceive a child, but one intended parent changes their mind after conception, and attempts to avoid all parental responsibilities and leave the other partner holding the proverbial bag. Or imagine a scenario where a couple uses ART to conceive, but the partner who is pregnant dies during childbirth. Such cases would implicate the same roadblocks encountered here.

statutes relating to parent-child relationships, which is promoting the welfare of children, and it is supported by the weight of persuasive authority on this issue." *Id.*

To reach that conclusion, Vermont's high court examined its existing precedent, which it determined stood for "the proposition that in a narrow class of cases in which there is no competing claimant, parental status can flow from the mutual agreement and actions of the established legal parent and a putative second parent even in the absence of a marriage or a civil union between the parents or a biological connection between putative parent and child." *Id.* at 564. It relied on its earlier decision establishing unmarried same-sex couples could avail themselves of second-parent adoptions without one parent having to terminate parental rights, explaining the precedent established legal parent status may arise from mutual agreement and joint conduct of a legally recognized parent and intended second parent, and Vermont statutes are intended to promote the welfare of children. *See id.* at 564-65, *citing In re B.L.V.B.*, 628 A.2d 1271 (Vt. 1993).

Sinnott also relied on *Miller-Jenkins v. Miller-Jenkins*, 912 A.2d 951 (Vt. 2006), a case where a same-sex couple who conceived a child through donor insemination during their civil union disputed the nonbiological mother's parentage. The *Sinnott* court explained how *Miller-Jenkins* did not provide mere parent-like rights to the nonbiological mother based on equitable grounds but rather full-on legal parentage. It reasoned *Miller-Jenkins* established important analytical steps, *i.e.*, that Vermont's statutes did not limit parentage in these situations, and that parentage here was not dependent upon marital or civil union status alone, but was supported by a series of factors including: mutual intention that both parties would co-parent the child, the nonbiological mother's participation in the decision to conceive the child, that they both treated the nonbiological mother as a parent, and there was no other person claiming to be a parent. The *Sinnott*

court explained, on the other hand, that it had also rejected broad theories of *de facto* parentage that would allow **any** former domestic partner to establish parentage.

From that line of case law, the Vermont court derived a narrow framework allowing for non-biological parentage where "a child would otherwise have only one legally recognized parent, the legally recognized parent (usually a biological parent) and the other intended parent have mutually agreed to bring a child into their family to raise the child together as equal co-parents, and the parents have in fact done so." *Id.* at 567-68. It explicitly distinguished its precedent disallowing broad, *de facto* parentage for non-biological third parties based on "the joint decision of . . . parents to bring a child into their home in the first place and their joint conduct in doing so." *Id.* at 568. It explained this "focus[] on the pre-conception agreement of the parents would promote the welfare of children without undermining parental rights[,]" elaborating that limiting parentage to only the biological parent "would have dire consequences for many children," who could be denied a continued relationship and financial support from the second parent. *Id.* at 568-69. It further explained the biological parent's rights would not be diminished, reasoning "where a parent jointly plans and conceives a child with a partner, with the mutual intent and agreement to raise that child together, that parent has no reasonable expectation of sole parental rights in the event of a breakup." *Id.* at 569. Finally, the *Sinnott* court recognized its framework accorded with the modern trend of other jurisdictions. *See id.* at 569-72.[25]

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[25] *See also, e.g.*, *In re Baby Doe*, 353 S.E.2d 877, 878 (S.C. 1987) ("a husband who consents for his wife to conceive a child through artificial insemination, **with the understanding** that the child will be treated as their own, is the legal father of the child born as a result of the artificial insemination and will be charged with all the legal responsibilities of paternity, including support") (emphasis added); *People v. Sorenson*, 437 P.2d 495, 499 (Cal. 1968) ("[A] reasonable man who, because of his inability to procreate, actively participates and consents to his wife's artificial insemination in the hope that a child will be produced whom they will treat as their own, knows that such (continued…)

Much like the *Sinnott* court, we hold the gap in our law is properly filled by an analysis of parentage focused on intent, since intent already serves as a beacon in our existing jurisprudence. Our current law clearly establishes biology is not the end-all-be-all when it comes to furthering the interests of legal parentage.[26] Although the proliferation of DNA testing offers an increasingly easy way to identify biological parentage, adoption, ART contracts, and the presumption/estoppel doctrines provide for (if not encourage) parentage that explicitly ignores genetics in some cases.[27] In the

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behavior carries with it the legal responsibilities of fatherhood and criminal responsibility for nonsupport. One who consents to the production of a child cannot create a temporary relation to be assumed and disclaimed at will, but the arrangement must be of such character as to impose an obligation of supporting those for whose existence he is directly responsible. As noted by the trial court, it is safe to assume that without defendant's active participation and consent the child would not have been procreated."); *Brooks v. Fair*, 532 N.E.2d 208, 213 (Ohio Ct. App. 1988) ("we do not believe that when [mother] became artificially inseminated she intended the relationship between [non-biological father] and [child] to be temporary").

[26] *Cf. Lehr v. Robertson*, 463 U.S. 248, 260 (1983) ("Parental rights do not spring full-blown from the biological connection between parent and child. They require relationships more enduring."), *quoting Caban v. Mohammed*, 441 U.S. 380, 397 (1979) (Stewart, J., dissenting); NeJaime, 126 YALE L.J. at 2290 ("tethering parenthood to biological ties perpetuates the exclusion of same-sex couples, who necessarily include a parent without a gestational or genetic connection to the child").

[27] In addition to these common law precepts, our General Assembly has enacted statutes reflecting that biological truth can be overlooked in some circumstances, even in the absence of marriage. As discussed, there are limited instances where parties can obtain second-parent adoptions even if they are not married. *In re Adoption of R.B.F.*, 803 A.2d at 1196; *cf. Sinnott*, 180 A.3d at 565 (reasoning prior case holding second-parent adoptions available to unmarried couples established, *inter alia*, "the [c]ourt's recognition that biology and marriage are not the only indicia of family formation that are worthy of judicial recognition[,] . . . and that our statutes should be construed to bring the recognized framework of our domestic relations laws to families as we find them"). Also, for example, 23 Pa.C.S. §5103 allows for voluntary acknowledgment of paternity of children born to unmarried women, providing:

> The father of a child born to an unmarried woman may file with the Department of Public Welfare, on forms prescribed by the department, an acknowledgment of paternity of the child which shall include the consent of the mother of the child, supported by her witnessed statement subject to 18

(continued…)

absence of that default biological tether between parent and child, all of these doctrines countenance the parties' intent, at least to some extent. For instance, a person seeking to adopt a child must file a petition for adoption, which "shall set forth . . . [t]hat it is the desire of the petitioner or the petitioners that the relationship of parent and child be established between the petitioner or petitioners and the adoptee." 23 Pa.C.S. §2701. Accordingly, the prospective adoptive parent must confirm an intention to parent the child.

Intent also informs application of the doctrine of parentage by estoppel. We have acknowledged "estoppel in paternity actions is aimed at achieving fairness as between the parents by holding them, both mother and father, to their prior conduct regarding the paternity of the child." *Fish v. Behers*, 741 A.2d 721, 723 (Pa. 1999) (quotation marks and citation omitted). Parentage by estoppel accounts for the parties' intentions by looking at their past conduct in relation to the child: "the doctrine of estoppel embodies the fiction that, regardless of biology, in the absence of a marriage, the person who has

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> Pa.C.S. §4904 (relating to unsworn falsification to authorities). In such case, the father shall have all the rights and duties as to the child which he would have had if he had been married to the mother at the time of the birth of the child, and the child shall have all the rights and duties as to the father which the child would have had if the father had been married to the mother at the time of birth.

23 Pa.C.S. §5103(a) (footnote omitted). The statute further provides:

> Notwithstanding any other provision of law, an acknowledgment of paternity shall constitute conclusive evidence of paternity without further judicial ratification in any action to establish support. The court shall give full faith and credit to an acknowledgment of paternity signed in another state according to its procedures.

Id. at §5103(d). The form itself instructs parents: "By signing this Acknowledgment of Paternity form, you give up the right to genetic testing to determine paternity, unless you cancel the Acknowledgment in writing within 60 days of signing the form." Acknowledgment of Paternity, Form PA/CS 611, *available at* https://www.humanservices.state.pa.us/CSWS/csws/forms/PA-CS-611%20Form.pdf#page=1.

cared for the child is the parent." *Brinkley*, 701 A.2d at 180; *see also Jones v. Trojak*, 634 A.2d 201, 206 (Pa. 1993) ("under certain circumstances, a person might be estopped from challenging paternity where that person has by his or her conduct accepted a given person as the father of the child"); *John M. v. Paula T.*, 571 A.2d 1380, 1386 (Pa. 1990) ("estoppel cases indicate that where the principle is operative, blood tests may well be irrelevant, for the law will not permit a person in these situations to challenge the status which he or she has previously accepted") (emphasis omitted).[28]

In fact, a handful of other jurisdictions have used equitable estoppel principles to incorporate the parties' intent into questions of parentage in ART cases. For example, in *Strickland v. Day*, the Supreme Court of Mississippi considered a case where a married same-sex couple, Kimberly and Christina, decided to conceive using artificial insemination and an anonymous sperm donor, and Kimberly served as the gestational mother and provided the ovum. *See* 239 So.3d 486, 487-88 (Miss. 2018). After the parties split up and disputed the status of Christina's parentage, the Mississippi court determined Kimberly was equitably estopped from arguing Christina was not a legal parent. It relied on evidence implicating the parties' intent, including that "Kimberly made numerous representations that Christina was an equal coparent . . . [and] signed an agreement at the clinic acknowledging the couple's joint intention to undergo the AI procedure." *Id.* at 493. Additionally, "the couple sent out birth announcements that read: 'Hatched by Two Chicks. Chris[tina] and Kimberly proudly announce the birth of their son.'" *Id.* The court rejected Kimberly's arguments she was planning on having a child on her own regardless of her marital circumstances, citing evidence that Kimberly allowed

[28] To a lesser extent, the presumption of parentage attendant to marriage also accounts for the parties' intent. Since the presumption applies only in cases with an intact marriage, for it to attach the biological/recognized parent and putative parent must intend to continue raising the child together as a cohesive family unit.

Christina to take part in the conception process, the couple discussed the possibility of Christina carrying the baby, and the birth announcement represented them both as parents. The court explained "[t]his further evidence[d] the couple's plan to undertake the role of parenthood together," and that there was "strong evidence of Kimberly's position regarding Christina's coparent status." *Id.* at 494. Thus, the Mississippi high court held equitable estoppel applied "where there was ample evidence the then-married couple **jointly and intentionally agreed** to have [a child] through the use of [artificial insemination]." *Id.* (emphasis added).[29] Like the *Strickland* court, we see estoppel principles as directly related to parties' intent.

The parties' intent is also the crux of the analysis when assessing parentage by contract in the ART context. The whole point of contract law is to effectuate the intent of

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[29] *See also Levin v. Levin*, 645 N.E.2d 601, 603-04 (Ind. 1994) (husband equitably estopped from denying legal parentage where he and wife agreed to conceive using ART, reasoning, *inter alia*, he induced wife to go forward with ART and consented orally and in writing to procedure); *Laura WW. v. Peter WW.*, 856 N.Y.S.2d 258, 262 (N.Y. App. Div. 2008) ("situations will arise where not all of the[] statutory conditions are present, yet equity and reason require a finding that an individual who participated in and consented to a procedure intentionally designed to bring a child into the world can be deemed the legal parent of the resulting child"); *Brown v. Brown*, 125 S.W.3d 840, 841-43 (Ark. Ct. App. 2003) (father equitably estopped from denying parentage/support obligation for twins conceived using ART during marriage even though he did not sign statutorily required consent, relying on trial court findings: "(1) that [father] knew [mother] was going to get the sperm; (2) that [father] never said he would not consent to the procedure being performed and he signed the documents that were placed in front of him; (3) that [father] helped pick out the donor for the sperm; (4) that he allowed his name to be used on the birth certificate; (5) that after the children were born, he recognized them as his children; [and] (6) that it was only after [mother] began to talk about divorce that he decided he should not be responsible for the children"); *In re Marriage of Buzzanca*, 72 Cal. Rptr. 2d 280, 287 (Cal. Ct. App. 1998) ("Estoppel is an ungainly word . . . expressing the law's distaste for inconsistent actions and positions — like consenting to an act which brings a child into existence and then turning around and disclaiming any responsibility."); *R.S. v. R.S.*, 670 P.2d 923, 928 (Kan. Ct. App. 1983) ("[A] husband who with his wife orally consents to the treating physician that his wife be heterologously inseminated 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.").

the parties. *See, e.g.*, *Kripp v. Kripp*, 849 A.2d 1159, 1163 (Pa. 2004) ("It is . . . well established that under the law of contracts, in interpreting an agreement, the court must ascertain the intent of the parties."); *C.G.*, 193 A.3d at 915 (Wecht, J., concurring) ("Viewed through the lens of the parties' intentions, the *Ferguson* and *Baby S.* cases arrive at the same destination reached *via* a contract-based analysis."). Applying contract law to establish parentage in cases where parties have used ART, this Court has explicitly recognized the intent of the parties may override biological realities. In *Ferguson*, by holding ART contracts enforceable, we established Pennsylvania public policy accounts for "the evolving role played by alternative reproductive technologies in contemporary American society." 940 A.2d at 1245. Our analysis in *Ferguson* makes clear Pennsylvania public policy does not forbid the prioritization of parents' intent over genetics and biology in the context of ART. We recognized that allowing Pennsylvanians flexibility to use "all manner of arrangements . . . couched in contracts or agreements of varying degrees of formality" better allows the "increasing number of would-be mothers who find themselves either unable or unwilling to conceive and raise children in the context of marriage [to] turn[] to donor arrangements to enable them to enjoy the privilege of raising a child or children[.]" *Id.* *See also Baby S.*, 128 A.3d at 306 (imposing legal parentage on nonbiological mother who contracted with gamete donor and gestational carrier in accordance with recorded intent to parent the child).

We acknowledged in *Ferguson* that when parties act upon their intentions to conceive a child, they create real-world consequences. We explained, "[t]his Court takes very seriously the best interests of the children of this Commonwealth, and we recognize that to rule in favor of [s]perm [d]onor in this case denies a source of support to two children who did not ask to be born into this situation." *Ferguson*, 940 A.2d at 1248. We recognized the fact that, "[a]bsent the parties' agreement, however, the twins would not

have been born at all, or would have been born to a different . . . sperm donor." *Id.* *See also Baby S.*, 128 A.3d at 306 ("Baby S. would not have been born but for [a]ppellant's actions and express agreement to be the child's legal mother."). Similarly here, Child would not have been born if Glover and Junior had not intentionally endeavored together to conceive and raise a child. Indeed, the parties chose their specific sperm donor based on his similarities to Junior, and conceived Child at a specific time and place based on the context of their relationship and joint contributions to the ART process. Even if Glover chose to conceive a child by herself, it is highly unlikely the same exact sperm and ovum would have been used. Thus, Child exists because of **both** Glover and Junior. And unlike in *Ferguson*, allowing for intent-based parentage does not require the Court to reckon with the denial of a source of support for the child; it has the exact opposite effect, imposing parental rights **and duties** on both parents.

Having demonstrated that intent drives the analysis when applying our existing parentage doctrines, and that intent-based parentage accords with public policy, we hold that parentage may be established by proof of intent shared by two parties to use ART to conceive and co-parent a child together, even without meeting all the formalities of contract law. *Cf. Sinnott*, 180 A.3d at 563 ("This approach is not only consistent with our caselaw concerning parental rights, but it also furthers the core purpose of Vermont's statutes relating to parent-child relationships, which is promoting the welfare of children, and it is supported by the weight of persuasive authority on this issue."). We will not require those parents who use ART to transact or bargain **with each other**. The decision made within a loving couple to have a baby is generally not a *quid pro quo*, and we decline to put courts in the position of parsing through couples' actions to determine whether they were done gratuitously or as an exchange for consideration. We prefer to recognize a more dignified means to establish parentage for couples who use ART to conceive.

Contrary to the two-step standard Junior advocates for, however, we do not go so far as to adopt a new marital presumption for purposes of the intent-based parentage analysis. Certainly, the fact a couple is married at the time they decide to conceive a child will typically weigh in favor of finding they intended to conceive and raise the child together. And we do not foreclose the possibility that as our common law develops pursuant to this doctrine, intent in those situations may be deemed so prevalent as to warrant the adoption of a presumption. But we need not make that pronouncement today, where the record contains extensive evidence of the parties' intent. Instead, it is enough to say that courts undertaking an intent-based parentage analysis should consider all evidence from all relevant time periods — including, when applicable, pre-conception, during conception, during gestation, during birth, and post-birth — to determine whether the parties jointly undertook ART intending to conceive and co-parent the child together.

We reiterate the record here is replete with evidence to support the lower courts' holdings the parties mutually intended to bring Child into the world and raise him together, and that Junior participated in that process. Among other things, Glover and Junior jointly entered into multiple contracts pertaining to the conception and birth of Child, and Junior was even listed as a "Co-Intended Parent" in the Fairfax Cryobank contract. Junior played an active role in selecting the sperm donor, and the couple chose a donor based on his similarities to Junior. Junior shared equally in the costs of conceiving Child and assisted Glover with the IVF process by administering injections and attending doctors' appointments. They planned a baby shower together and picked out a name for the baby. But perhaps most cogently, both Glover and Junior signed affidavits stating their intentions plainly. Glover attested, *inter alia*, "I am seeking to have my spouse, [Junior,] adopt this child in order to provide this child with the legal stability of two parents"; "I understand that this means [Junior] will become a legal parent, with rights **equal** to my

rights as a biological parent"; "I understand that this means [Junior] will have custody rights and child support obligations to this child if we ever separate in the future"; and "I want [Junior] to become a legal parent to this child because I believe it is in the best interests of the child." Glover Aff., 12/5/2021 (emphasis in original). Junior's affidavit reflects the same plan and purpose. Even if the parties' intent were not apparent from their conduct, it was spelled out in black and white in the affidavits. Thus, the record amply supports the conclusion the parties mutually intended to conceive and raise Child together. But rather than view that intent as part of a contract between spouses, we affirm the Superior Court's holding it establishes, without more, Junior's parentage of Child.

Despite our acceptance of intent-based parentage in the ART context, we nevertheless encourage couples in similar circumstances to document their intentions in writing. While not necessarily dispositive, such writings (like the affidavits in this case) provide strong evidence of intent should a dispute arise, even if the writings do not meet the elements of a contract. We do not foreclose the possibility that partners in a couple **could** contract with each other to have a child together. But the point is that we do not require them to do so, and in any event, under this intent-based doctrine, the additional elements required by contract law need not be proved. Furthermore, we emphasize our decision today does not obviate the other paths to parentage already recognized in our case law.[30]

[30] For instance, ART contracts are still enforceable to establish parentage among intended parents and gamete donors or gestational carriers — since intent-based parentage is limited to resolving disputes between the intended parents, it would not suffice to establish parentage when the dispute is between the intended parents and the donors/carriers. Additionally, as *amici* GLBTQ Legal Advocates & Defenders *et al.* note, LGBTQ+ parents are often advised to complete a confirmatory adoption to ensure full faith and credit of parentage in other jurisdictions; while these parents who use ART can now rely on intent-based parentage if a dispute arises in Pennsylvania, the Court does not discourage them from taking other measures to preserve their rights in other states.

IV. Conclusion

For all the foregoing reasons, we adopt the doctrine of intent-based parentage into our common law, and we affirm the Superior Court's decision Junior is Child's legal parent based on that ground only.

Chief Justice Todd and Justices Donohue and Wecht join the opinion.

Justice Brobson files a concurring opinion in which Justice Mundy joins.

Justice McCaffery did not participate in the consideration or decision of this matter.

Judgment Entered 03/20/2025

DEPUTY PROTHONOTARY