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# PRESUMPTION OF PATERNITY, BUT NOT EQUALITY

**IN LATE JUNE**, a friend shot me a text: “Let me know if you want to march with [me] on Pride here in NYC.” I grappled with the question, the shame it brought to the fore. In my inbox was an email from my attorney sent just days before: “Nicole—attached is the notice of the argument en banc. It is scheduled for Harrisburg on August 9th.” At the time of year when I and other queer folks parade pride in ourselves, communities, and families, I was involved in another kind of spectacle. One in which the Pennsylvania Superior Court would determine whether the child my wife and I brought into this world is mine.

**I SPENT A DECADE** prosecuting intimate partner violence and police. While in law school, I learned that, in our courts, presumptions are tools judges use consistently to decide tough legal questions. There are legal presumptions we widely accept: a criminal defendant is presumed innocent until proven guilty; a missing person who has not been heard from for seven years is presumed dead; a child born of a married couple is presumed to be the husband’s, regardless of biological relation. In the context of family law, this is the most significant legal presumption there is.

This presumption, though, only applies to cis-men. It does not apply to cis-women wives who, though not biologically or gestationally related to a child, have taken on the full breadth of financial responsibilities, emotional devotion, and medical actions necessary to bring that child into the world. I learned this unfair truth not as a lawyer or law student but as a litigant.

In the early months of our marriage, my wife (“NJG” for our purpose here) and I began taking affirmative steps to grow our family. We spoke with our friends who started their own families through Alternative Reproductive Technologies (ART) such as artificial insemination, surrogacy, and in vitro fertilization (IVF). Both former lawyers, we read recommendations made by local and national LGBTQIA+ organiza-

tions about best practices to ensure my standing as a non-biological and non-gestational parent would be legally recognized. Through our research, we learned we should use an unknown sperm donor and, later, work with a family lawyer to begin a second-parent adoption while our child was still in utero. The second-parent adoption would ensure that my parentage would be recognized in all U.S. states, even Texas, my wife's childhood home.

We identified a donor through a cryobank. His childhood photo revealed he and I share a similar complexion, much darker than NJG. We both have high cheekbones and a toothy smile. According to his online profile, we even have the same zodiac sign, writing obsession, and place of ancestry. After friends warned us about the paucity of Black donors, NJG and I celebrated our catch, his proximity to my likeness. Because of him, we exalted, we'd see me in our child. We bought his sperm and hired an attorney who specialized in LGBTQIA+ second-parent adoptions. We contracted with an IVF treatment facility my best friend recommended. We both were probed with needles and tested for disease, even though my genetic material would not be used. After just one IVF round, we got pregnant. I followed our doctor's instructions for when and how to inject NJG with progesterone helping diminish our chances of miscarriage, which are higher in IVF pregnancies than traditional ones. For months, I inserted needles as long as a finger into NJG's abdomen and buttocks daily. Sometimes twice a day.

NJG and I threw ourselves into our family's expansion. We attended birth and parenting workshops together. We held doll babies both Black and white, learning the proper techniques for providing skin-to-skin contact, supporting the head, and bottle feeding. After three months, when we felt more confident that miscarriage would not befall us, we were delighted to share the news of our pregnancy: "We're expecting our son, Mikhail Moon J-G," a hyphen to represent who he truly is—ours. When reading to our son while he was still in NJG's belly, I called him Mr. Moon. My mom, whom NJG had taken to calling Glam-Ma since finding out we were pregnant, called him Moonchild. NJG's best friend nicknamed him "M&M."

## **THINGS CHANGED.**

The communication between NJG and I became contentious, then nonexistent, and our relationship suffered. I moved out of our marital bedroom and into our basement in-law suite. We spoke candidly about

divorce and the possibility of co-parenting over the meals we still shared; remote workers during the pandemic, even after I moved out of our bedroom, we ate lunch and dinner together daily. NJG and I had spent over a year in therapy early on in our relationship, before our marriage. Because of that experience, we decided to hire a therapist to help us with the next steps. “If we decide to divorce, we’d also like . . . to develop, execute, and maintain a healthy co-parenting plan,” NJG emailed a potential therapist. I emailed another therapist the same. Nothing changed; communication only worsened. Two months after our emails to therapists and one therapy session later, against NJG’s wishes, I made a decision: I was moving out of our home, altogether.

After we talked about it, I sent a message to capture all we discussed: “I’ll continue to live in Philadelphia and I’ll be fully available to co-parent Mikhail. I’ll be available for round-the-clock support for you . . . But I will reside in a separate location close to you and Mikhail in Philadelphia. I believe this is the best course of action for us to co-parent and support Mikhail’s personal, spiritual, intellectual, and emotional development.” NJG replied, “I’m on board.” She was, and wasn’t. She filed for divorce, as we had discussed. However, instead of following our co-parenting plan, she removed all of our obstetrician appointments and pediatrician interviews from my Google calendar. Worst of all, she claimed our son was no longer mine. “You’re right!” my attorney deadpanned. “I just spoke to her lawyer. She’s trying to cut you out of Mikhail’s life. Here are your options . . .”

According to family law expert Helen Casale, “There really isn’t anything more these parties could have done to try to secure the non-biological partner’s rights.” Nonetheless, it’s now been more than a year since our son was born and my battle for legal parentage began. After NJG cut me out of our child’s life, a Pennsylvania family court trial judge found I was our son’s parent not based on the presumption of parentage but on contract law; because I am a cis-woman, the court didn’t presume my parentage. Indeed, my case is one of first impression here in this commonwealth. In response, NJG appealed, which led a majority on a three-judge panel of the Pennsylvania Superior Court to overturn the trial court’s decision, effectively declaring our child was not mine.

**MY CASE, UNFORTUNATELY,** is not unique.

With queer women’s rising reliance on ART, cases like mine are happening more and more. In Oklahoma, Kris Williams and Rebekah Wilson

—two married women—used a sperm donor to have a child. When the marriage dissolved, the non-biological mom asked the legal system to protect her rights as a parent. The court declined. Though she was a part of the child’s conception, birth, and early life, the court found she had no parenting rights but ruled the sperm donor did. In Idaho, less than a year after their child’s birth, Lindsay Lorine Wallace and Kylee Diane Gatsby—a married lesbian couple—had a violent altercation that resulted in a divorce. The non-biological mom filed for parentage rights with the court. The trial court ruled that while the non-biological mother had a presumption of being the child’s parent based on the couple’s marriage, the presumption was overcome because she was not the child’s biological parent.

Sure, the Idaho court did use the presumption of paternity, but its analysis did not stop there. It should have. Clearly, in cases where same-sex couples reproduce, at least one of the partners is not biologically connected to the child. But being a non-biological parent extends beyond queer women like me: a nonbiological and nongestational married mom. There are also queer married moms who only have a gestational connection to the children of their marriage but no biological connection. There are also married men who, without viable sperm of their own, utilize donor sperm to impregnate their wives. Like me, those men also have no biological or gestational ties to their children. Unlike me, though, they do have the presumption of paternity’s protection. Simply because they are men. The law and its presumptions must account for this modern inequality.

As it stands, after a successful appeal filed by my attorneys, the Superior Court withdrew the three-judge panel decision and granted us reargument. On August 9, I traveled from my Philadelphia apartment to Pennsylvania’s Capitol building in Harrisburg. Inside the courtroom and beneath opulent twentieth-century artistry, nine black-robed judges heard my case. Addressing the contract law theory, one judge asked NJG’s lawyer why I shouldn’t have the benefit of an enforceable contract, especially considering I paid half of all IVF-related costs (including the procedures and medication), half of the sperm donation and storage fees, half of our birth doula’s fees, and half of the second-parent adoption attorney’s fees. *She’s like a co-signer. She doesn’t get the benefit of the gift just because she may have put some money down*, NJG’s attorney replied. My mom’s hands breached the air, her mouth opened just short of a wail. I cradled my mother’s arm, reminding her, no matter what, to keep her

composure in that room of strangers deciding me and Mikhail's fate.

*Are you asking us to treat same-sex couples differently from heterosexual couples?* another judge asked. *I'm asking you to follow the law which does not recognize the non-biological mom as a parent,* NJG's lawyer ripped.

*Why doesn't the presumption of parentage apply here? Forget about paternity, we are in modern times. Why shouldn't we apply that presumption to this case?* My stepfather's chin dipped towards his chest over and over. The question gave me hope, too. Maybe Pennsylvania will apply the presumption to me after all, I thought. NJG's lawyer responded, *That's something only the legislature can do. That's beyond your judicial power.*

**MY CASE**—my wife's refusal to let me care for our child, her removal of Mikhail from me and my side of his family, the positioning of the courts, the lack of a presumption of parentage—has always been about power. The power of vengeance. The power over who can have children. The power over how. The power to bring a claim to court. The power to have legal status. Men's power over women. The power of a biological mother over a nonbiological mother. The power to walk away from marriage, from my seven-months-pregnant wife, who I love, though our communication had made it such that I was no longer *in* love with her.

No, I do not have clean hands. If walking away from a marriage while a wife is pregnant were a parental disqualifier for similarly situated cis-men, it would be a travesty. But equality, at least, would be maintained. That is, though, not the status quo. Married cis-male fathers who abandon their wives—even those who have no intention of caring for the children they created—have a presumption of paternity that family courts across our country concretize every day. Child support departments and law enforcement offices in every jurisdiction on this land ensure this presumption is adhered to.

### **I AM A MOTHER.**

A mother who has not seen my son. Not even a picture. *Mr. Moon, are you walking now? When did your first tooth come in?* I speak to him, aloud, though I don't know where he is. Philadelphia? Houston?

*When did you crawl for the first time, my Moon? Are you walking? How steady is your gait?* I try to imagine how he looks but can't see past the black and white static of the last ultrasound photo.

*What was your first word? How big are you, my son?* I have a cabinet full of Pampers and a closet full of clothes that, by now, are far too small. *Mr.*

*Moon, do you still know my voice? Remember me, Moonchild. Remember.*

**IT'S BEEN OVER** a month since the Superior Court heard my case en banc. Of course it hasn't yet issued a decision. Being a prosecutor taught me that these things take a while. Still, I grieve. I miss my Moon. I send NJG text messages from time to time: Moon's first birthday, Christmas, Mother's Day, random days. Just this morning I typed, "Sending love to you and [Mr. Moon]. I dreamt of him the other night. Hope you're both joyful." Star emojis ended this particular message, though a black hole still sits in my belly, as well as in the crib, high-chair, stroller, and car seat I bought almost two years ago. There is never a response. Never.

I recently perused a local clothing store's baby rack. Held in my fingers a rainbow-hearted onesie on sale for Pride. Its tag read "organic," reminding me of the contemporary truth: there is more than one way to become a mother, to bear a child. Many queer (and straight) families are created through the use of ART. Calling me a mother based on contract law—while I'll certainly accept that decision—is not enough. We must rid our laws of antiquated, gendered presumptions that knife out those of us who are married but not privileged with penises. We must presume that, like cis-men, nonbiological queer mothers are parents of children born to our (dysfunctional) marriages, too.

That would, after all, be marriage equality.