



Going Beyond the Basics: Expanding Paternity to Parentage Establishment for Modern Families

Speakers:

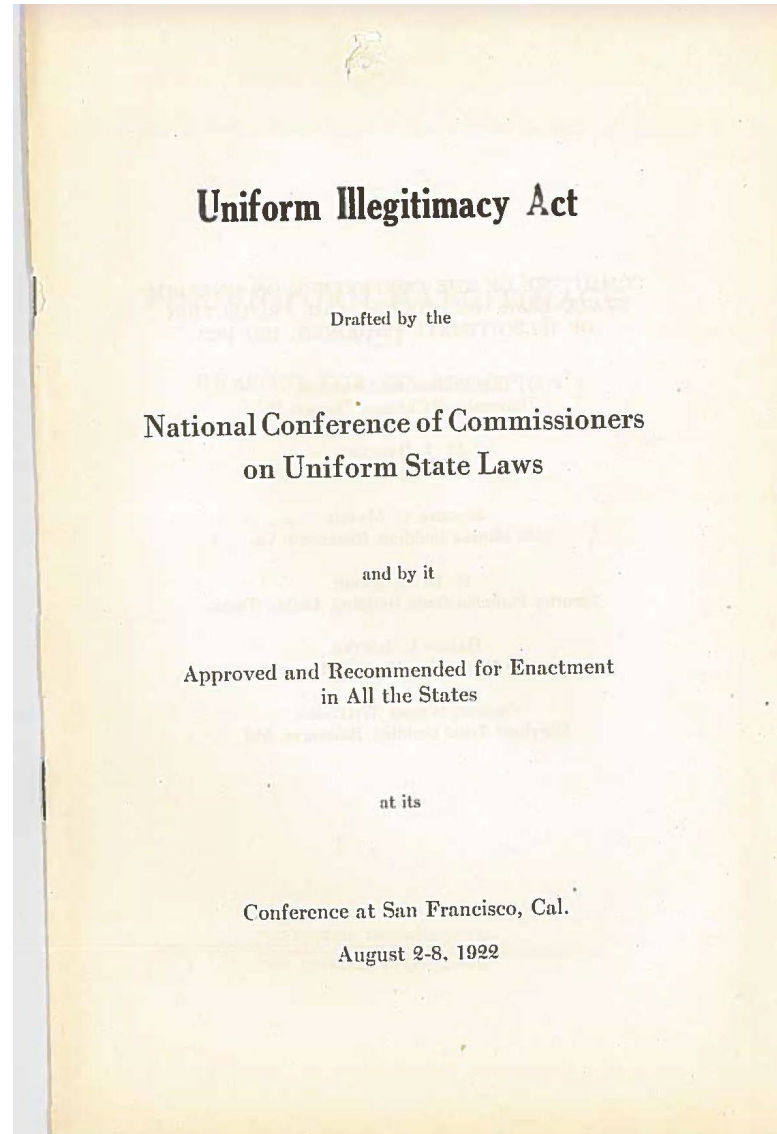
Courtney Joslin

Kristen Donadee

Diane Potts



The law has evolved enormously in 96 years.





The Uniform Parentage Act over time

UPA (1973)

- Banned discrimination based on marital status of parents
- Recognized presumptions of parentage
- Silent on rights of nonmarital father

UPA (2000/2002)

- Voluntary acknowledgement of paternity
- Paternity registry
- Genetic testing
- Rules for adjudicating parentage





Constitutional Mandates from SCOTUS

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

- Under the Equal Protection Clause, states may not “exclude same-sex couples from civil marriage on the same terms and conditions as opposite-sex couples.”



***V.L. v. E.L.*, 136 S. Ct. 1017 (2016) (per curiam)**

- Reversing Alabama’s refusal to recognize same-sex adoption from another state

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

- Reversing Arkansas court decision that refused to place both parents’ names on birth certificates of children born into same-sex marriage



Highlights of 2017 Revisions

- **Gender neutralization** throughout UPA
- Implementation of ***Obergefell*** in parentage presumptions – Section 204
- Reordering of **routes to parentage** in Article 6
- Addition of **de facto** parentage – Section 609
- New multi-factor assessment to resolve **competing parentage claims** – Section 613
- Optional recognition of **more than two parents**
- Revised framework for **genetic and gestational surrogacy** – Article 8
- New requirements for retention of **genetic information** in assisted reproduction – Article 9



UPA Presumptions of Parentage

The **marital presumptions** of parentage apply **equally** to the spouse of the woman who gives birth, regardless of the gender of the spouse.



The **“holding out” presumption**, which typically is used for unmarried parents, applies gender neutrally.

- A person who resides with the child for the first two years of the child’s life, including temporary absences, and openly holds the child out as his or her own child has a presumption of parentage.





UPA – Overcoming the Presumptions

- Clarifies that a lack of a genetic tie **does not necessarily** overcome a presumption of parentage and requires the court to consider the **best interests** of the child.
- Where the presumed parent is a genetic parent and there is no competing claim for parentage, parentage is established and cannot be overcome.

presumption



Conclusive marital presumption--Cal. Fam. Code § 7540

(a) Except as provided in [Section 7541](#), the child of spouses who cohabited at the time of conception and birth is conclusively presumed to be a child of the marriage. ...



Rebuttable marital presumption--Cal. Fam. Code § 7611(a)

A person is presumed to be the natural parent of a child if ...:

(a) The presumed parent and the child's natural mother are, or have been, married to each other and the child is born during the marriage, or within 300 days after the marriage is terminated by death, annulment, declaration of invalidity, or divorce, or after a judgment of separation is entered by a court.



Cal. Fam. Code § 7611(d)

A person is presumed to be the natural parent of a child if ... :

...

(d) The presumed parent receives the child into * * * their home and openly holds out the child as * * * their natural child.



De facto Parentage – Background

- The vast **majority of states** already recognize some form of *de facto* parentage (often using different terms), by statute or in equity.
- **By caselaw**, many of these states recognize that a *de facto* parent is a **legal parent** or at least stands in legal parity with a parent.
- **By statute**, Maine and Delaware treat *de facto* parents as legal parents in their UPAs.





UPA § 609

- ★ Under Section 609, an individual who alleges themselves to be a de facto parent can be adjudicated to be a legal parent who stands in parity with all other legal parents.



UPA – *De Facto* Parentage

- Provides that a person claiming to be a *de facto* parent can **petition** to be recognized.
- **Heightened** pleading standards.
- Must prove by **clear and convincing evidence** a number of factors related to functioning as a parent and establishing a bond with the child with the support of a legal parent.
- Pleadings must be **verified**.
- A *de facto* parent is a **legal parent**.



Requirements – proof by clear-and-convincing evidence that:

“(1) the individual resided with the child as a regular member of the child’s household for a significant period;

(2) the individual engaged in consistent caretaking of the child;

(3) the individual undertook full and permanent responsibilities of a parent of the child without expectation of financial compensation;

(4) the individual held out the child as the individual’s child;

(5) the individual established a bonded and dependent relationship with the child which is parental in nature;

(6) another parent of the child fostered or supported the bonded and dependent relationship required under parentage (5); and

(7) continuing the relationship between the individual and the child is in the best interest of the child.”



UPA – Resolving Multiple Claims of Parentage

- As with the UPA of 2002, it is possible to have more than two possible parents. The UPA of 2002 did **not** provide a test for how to resolve these claims.
- UPA 2017 provides that competing claims should be resolved based on the **best interests of the child** and provides a number of **factors** for the court to consider.





- ✦ Generally, presumptions of parentage cannot be overcome after the child's second birthday.

- ✦ Within the first two years:
 - ✦ If the presumed parent is a genetic parent and there is no competing claim for parentage, the presumption cannot be overcome.
 - ✦ If there is a competing claim to parentage, the court must adjudicate parentage based on the best interest of the child based on enumerated factors in Section 613.



[I]n a proceeding to adjudicate competing claims of . . . parentage of a child by two or more individuals, the court shall adjudicate parentage in the best interest of the child, based on:

- (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; and
- (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.



Cal. Fam. Code §§ 7541 & 7630

- ✦ The conclusive marital presumption, § 7540, cannot be overcome after the child's second birthday. § 7541(b)
- ✦ The other presumptions have more flexible time limitations:
 - ✦ The holding-out presumption can be challenged at any time. § 7630(3)(b).
 - ✦ The rebuttable marital presumption must be challenged within a "reasonable time." § 7630(a)(2).



UPA – Children with More Than Two Parents



- Contains an optional provision allowing courts to recognize that a child can have **more than two legal parents**.
- Applies where there are more than two people with a claim to parentage under the UPA and it would be **detrimental to the child** to recognize only two parents.
- **States** that recognize more than 2 parents:
 - California, Maine, and Washington have provisions in their UPAs explicitly recognizing that a child can have more than two parents
 - A number of states have cases recognizing more than two parents



Cal. Family Code § 7612(c)

(c) In an appropriate action, a court may find that more than two persons with a claim to parentage under this division are parents if the court finds that recognizing only two parents would be detrimental to the child. ...



Scenario 1

- ★ Aliyah gives birth to baby Brandon. At the time of birth and at the time of conception, Aliyah is married to and cohabitating with Carlos.
- ★ One year later, Aliyah's ex-boyfriend David files a petition to establish his parentage for Brandon claiming that he is Brandon's genetic father.

Who are Brandon's parents?



Scenario 2

- Gina gives birth to her son Fitz
- Although Gina knows that her ex-boyfriend Harry is Fitz's father, she does not tell him about the pregnancy or birth
- Shortly after Fitz's birth, Harry commits a crime and is sentenced to 15 years in prison
- Gina meets Ian and moves in with him when Fitz is 1 year old
- Ian raises Fitz as his own son for the next 5 years
- Gina and Ian break up when Fitz is 6 years old





Scenario 2

- Under UPA 2017:
 - Can Ian seek to establish parentage for Fitz?
 - Does Harry have any rights?
- Under California law:
 - Can Ian seek to establish parentage for Fitz?
 - Does Harry have any rights?





UPA – Voluntary Acknowledgments of Parentage

- Expands acknowledgment process beyond alleged genetic fathers to **intended** and **presumed parents**
- Gender neutral
- Intended parent defined as an individual, married or unmarried, who manifests an intent to be legally bound as a parent of a child conceived by assisted reproduction

LDSS-4418 (Rev. 1/14)

New York State Office of Temporary and Disability Assistance

New York State Department of Health

Pursuant to Section 4135-b of Public Health Law

Recorded District _____
Hospital Code (PFI Number) _____
Register Number _____

ACKNOWLEDGMENT OF PATERNITY

(Please type or print clearly in blue or black ink.)

Check where signed: ☒ Hospital ☐ Child Support Office ☐ Birth Registrar ☐ Other

CHILD	First name	John	Middle name	James
	Last name	Lewis	Sex	☒ Male ☐ Female
	Date of birth (MM/DD/YYYY)		12 / 08 / 2013	
	Facility of birth	City of birth	County of birth	
	Albany Memorial Hospital	Albany	Albany	
If the child's birth certificate was already filed and you wish to change the child's last name, complete the following section:				
Last name on original birth certificate		New last name		



UPA – Voluntary Acknowledgments of Parentage

Clarifies that acknowledgments are **void** if:

- Child has acknowledged or adjudicated parent
- Child has presumed parent and that parent has not signed denial of parentage



Takes effect upon **filing**



FILE

Changes **rescission** process from judicial proceeding to filing signed record of rescission with state agency



UPA — Voluntary Acknowledgments of Parentage

Challenges after rescission period

- **2 year** limitation for both signatories and non-signatories

Non-signatory governed by section 610

- Court must find proceeding in **best interest of child**

Signatory governed by section 310 and procedures in Article 6

- **Challenge** must be based on fraud, duress, or material mistake of fact





Starting 1/1/2020, the following people can establish parentage through a Voluntary Declaration of Parentage (VDOP) in California:

(a) The following persons may sign a voluntary declaration of parentage to establish the parentage of the child:

(1) An unmarried woman who gave birth to the child and another person who is a genetic parent.

(2) A married or unmarried woman who gave birth to the child and another person who is a parent under Section 7613 of a child conceived through assisted reproduction.

Cal. Fam. Code § 7573 (eff. 1/1/2020)



★ **VDOPs are void if, at the time of signing:**

- Child has acknowledged or adjudicated parent
- Child has presumed parent (other than a holding out parent, aka birth parent is married) and the signatory is not the presumed parent (aka the spouse)
- Child conceived through assisted reproduction (surrogacy or non-surrogacy) has a parent other than the signatories.
- The signatory is a gamete donor under §7613(b) or (c).
- **Cal. Fam. Code § (eff. 1/1/2020)**



- ✦ VDOPs take effect upon filing with DCSS (Cal. Fam. Code § 7573 (eff. 1/1/2020)).
- ✦ Rescission is an administrative rather than a judicial process



- ★ **2-year limitations period for all challenges (by signatories and non-signatories)**
- ★ **Challenges by non-signatory:**
 - Governed by § 7577 (eff. 1/1/2020)
 - Court can grant petition to set aside only if the court finds that doing so is in the best interests of the child § 7577(g) (eff. 1/1/2020)
- ★ **Challenges by signatory:**
 - Governed by § 7576(a) (eff. 1/1/2020)
 - Challenge must be based on fraud, duress, or material mistake of fact





California Parentage Website

- Created a new website solely for the voluntary acknowledgement program, that is separate and distinct from the Department website.
 - Calparentage.org automatically directs to parentage.dcss.ca.gov.
 - Simple, visually pleasing, informative.

Welcome to the Parentage Opportunity Program

Bienvenido a el Programa de Oportunidades de Paternidad, para español, [haga clic aquí.](#)

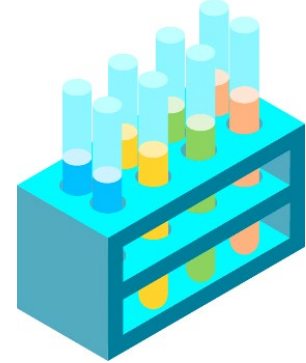
The Parentage Opportunity Program offers eligible parents the opportunity to establish a legal parent-child relationship free of charge by signing and filing a Voluntary Declaration of Parentage. The Program is only one of two ways to legally establish parentage, and the program significantly decreases the time and money required to establish legal parentage through the lengthy and expensive court process. A filed Declaration has the same force and effect as a judgment for parentage issued by a court. A name on the birth certificate does not establish legal parentage.



This website is managed by DCSS, a department of the [California Health and Human Services Agency](#).



UPA – Genetic Testing



- New definitions in Section 501
- **Limits use** of genetic testing
 - Cannot be used to challenge parentage for **intended parents**
 - Cannot be used to establish parentage of a **donor**
- Genetic testing may be used where **competing claims** of parentage or to **challenge** acknowledgment
- But genetic testing cannot be used where statute of limitations **bars** claim



UPA – Implementing the Rape Survivor Child Custody Act

Section 614:

- Permits **victim** of sexual assault to block claim of parentage by perpetrator
- Child support obligation **continues** unless woman requests otherwise and court finds is in best interest of child

Exceptions:

- If man has been adjudicated to be parent
- If man established bonded and dependent parental relationship with child





Scenario 3

- After Jane gives birth to her son Ken, Joe and Jane (who are not married) sign an acknowledgment for Ken at the hospital
- 1 year later, Jane's ex-boyfriend Larry files a petition to establish his parentage for Ken
- Under California law:
 - Can Larry challenge the acknowledgment and what procedure is contemplated?
 - Would the procedure be any different if Joe and Jane were married at the time Ken was born and did not sign an acknowledgment?
- What about under UPA 2017?





UPA – Assisted Reproduction

Assisted Reproduction – Article 7

- Applies **equally** to same-sex couples
- Recognizes parentage of individual who **consents to assisted reproduction** by woman with intent to be parent.
- *If not in writing*, must show **express pre-conception consent** by clear and convincing evidence – or – **holding out** for first 2 years of child's life.





Nonsurrogacy ART – UPA, Article 7

UPA § 703:

An individual who consents . . . to assisted reproduction by a woman with the intent to be a parent of a child conceived by the assisted reproduction is a parent of the child.

- ✦ Applies equally without regard to sex, sexual orientation, or marital status
- ✦ Recognizes parentage of individual who consents to assisted reproduction with intent to be parent.



Nonsurrogacy ART – Cal. law

Cal. Fam. Code § 7613(a)(1):

If a woman conceives through assisted reproduction with semen or ova or both donated by a donor not her spouse, with the consent of another intended parent, that intended parent is treated in law as if he or she were the natural parent of a child thereby conceived.

- ✦ Applies equally without regard to sex, sexual orientation, or marital status
- ✦ Recognizes parentage of individual who consents to assisted reproduction with intent to be parent.



Nonsurrogacy ART – UPA, Article 7

UPA § 704(b)

(b) Failure to consent in a record ... does not preclude the court from finding consent ... if: (1) the woman or the individual proves by clear-and-convincing evidence the existence of an express agreement entered into before conception that the individual and the woman intended they both would be parents of the child...”

- ★ *If no written consent*, individual must show express pre-conception consent by clear-and-convincing evidence – or – holding out for first 2 years of child’s life.



Nonsurrogacy ART – Cal. law

Cal. Fam. Code § 7613(a)(2):

(2) Failure to consent in writing, as required by paragraph (1), does not preclude the court from finding that the intended parent consented if the court finds by clear and convincing evidence that, prior to the conception of the child, the woman and the intended parent had an oral agreement that the woman and the intended parent would both be parents of the child.

- ★ *If no written consent*, individual must show express pre-conception consent by clear-and-convincing evidence – or – holding out for first 2 years of child's life.



Scenario 4

- Alison is in a relationship with Carol and they agree to have a child together
- Alison and Carol take out a Craigslist ad for sperm donation
- Barry contacts the couple and provides them with sperm
- Through an at-home procedure, Alison uses the sperm with Carol's assistance and conceives a child



Scenario 4

- Alison gives birth to Dylan
- Under UPA 2017:
 - Is Carol a legal parent to Dylan?
 - Is Barry a legal parent to Dylan ?
 - What should a court consider?
- Under California law:
 - Is Carol a legal parent to Dylan?
 - Is Barry a legal parent to Dylan ?
 - What should a court consider?





UPA Surrogacy Agreements – Article 8

- Surrogacy provisions of UPA (2002) were enacted by only **two** states
- More states today have statutory provisions permitting surrogacy, but most permit only gestational agreements.
- Separate rules for gestational and genetic surrogacy agreements
- Under UPA (2017), state may opt **not** to enact Article 8





Common eligibility requirements – UPA § 802:

- All parties must be at least 21 years old.
- The surrogate must have given birth to at least one child.
- All parties must complete a medical evaluation and a mental health consultation.
- All parties must have “independent legal representation of [their choice] throughout the surrogacy arrangement regarding the terms of the surrogacy agreement and the potential legal consequences of the agreement.”



Common process requirements -- UPA § 803:

- “At least one party must be a resident of this state or, if no party is a resident of this state, at least one medical evaluation or procedure or mental-health consultation under the agreement must occur in this state.”
- The “intended parent or parents must pay for independent legal representation for the surrogate.”
- The “agreement must be executed before a medical procedure occurs related to the surrogacy agreement[.]”



Common content requirements – UPA § 804:

- Unless properly terminated, the intended parent(s) are the legal parents “regardless of number ... or gender or mental or physical condition of each child.” § 804(a)(4).
- Agreement “must include information disclosing how each intended parent will cover the surrogacy-related expenses of the surrogate and the medical expenses of the child.” § 804(a)(6)
- The agreement “must permit the surrogate to make all health and welfare decisions regarding herself and her pregnancy.” § 804(a)(7)
- The agreement may provide for: “(1) payment of consideration and reasonable expenses; and (2) reimbursement of specific expenses if the agreement is terminated.” § 804(b)



Distinct requirements – Gestational Surrogacy:

- The agreement cannot be terminated after pregnancy has occurred. § 808(a).
- A child born pursuant to a compliant gestational surrogacy agreement is the legal child of the intended parent(s) at birth, by operation of law. § 809(a).
- If a child is born pursuant to a noncompliant gestational surrogacy agreement, “the court shall determine the rights and duties of the parties to the agreement consistent with the intent of the parties at the time of the execution of the agreement.” § 812(b).



Distinct requirements – Genetic Surrogacy:

- Unless properly terminated by the surrogate, a compliant genetic surrogacy agreement is binding on the intended parents after pregnancy has occurred, § 814(a), and the intended parents are the legal parents of the resulting child.
- A genetic surrogate can withdraw consent to agreement “any time before 72 hours after the birth of a child conceived by assisted reproduction under the agreement.” § 814(b).
- If the genetic surrogacy agreement does not comply with the rules and if the genetic surrogate does not withdraw her consent within 72 hours after the birth of the child, “the court shall adjudicate parentage of the child based on the best interests of the child ...” § 816(d).



California law only regulates gestational surrogacy.

- Requirements for permissible gestational surrogacy agreement are:
 - Execution prior to pregnancy;
 - Independent legal counsel for all parties;
 - Proper venue. Cal. Fam. Code § 7962.
- A compliant genetic surrogacy agreement is binding after pregnancy has occurred and the intended parents are the legal parents of the resulting child. Cal. Fam. Code § 7962.



Genetic Information about Donor – Article 9

- Clinics must **retain** donor's identifying information and medical history
- Clinics must obtain **declaration** from donor regarding donor's choice as to identity disclosure once child turns 18
- Donor may **not** withdraw declaration agreeing to identity disclosure
- Child may obtain **nonidentifying medical history** on request





OCSE Guidance for IV-D Child Support Programs

PIQ-22-02 issued March 29, 2022

OCSE stated: “Our goal in issuing this PIQ is to emphasize the flexibility that title IV-D of the Social Security Act affords states in enacting laws and policies to best serve diverse families.”

Question 1: Do the provisions in title IV-D of the Social Security Act mandating paternity establishment laws preclude states from adopting parentage laws for same-sex parents?

Answer 1: No. Sections 454 and 466 of the Act require states to have certain laws for paternity establishment in cases involving traditional father-mother families. The Act does not preclude states from adopting additional laws on parentage, surrogacy, and assisted reproduction that define and afford parental rights to same-sex parent families. As long as a state has the parentage establishment laws that include establishment of paternity for traditional father-mother families as required under title IV-D, states may enact broader or additional parentage laws for same-sex parent families without risking state plan compliance.



OCSE Guidance for IV-D Child Support Programs

Question 2: Do the provisions in title IV-D of the Act mandating that states have a voluntary acknowledgment of paternity procedure preclude states from adopting a gender-neutral acknowledgment process?

Answer 2: No. Section 466(a)(5)(C) of the Act requires that states have procedures for a simple civil process for a mother and putative father to voluntarily acknowledge paternity; section 466(a)(5)(D) requires that the acknowledgment, if not timely rescinded, is considered a legal finding of paternity that can be challenged only on the basis of fraud, duress, or material mistake of fact; and section 466(a)(5)(E) bars ratification of the acknowledgment. Such procedures need not include gender-specific terms. States may adopt a single set of gender-neutral voluntary acknowledgment of parentage provisions consistent with title IV-D, including a gender-neutral acknowledgment process and forms, provided such provisions, process and forms also encompass the voluntary paternity acknowledgment procedures required under title IV-D.



OCSE Guidance for IV-D Child Support Programs

Question 3: How do the genetic testing provisions in title IV-D of the Act apply to children born to same-sex couples?

Answer 3: Title IV-D contains provisions related to genetic testing in traditional paternity cases involving a father and mother that generally will not be applicable to parentage establishment for same-sex parent families.

For same-sex parent families, parentage may be established under state law through *de facto*, holding out, or intended parent laws—not genetic test results—thereby rendering section 466(a)(5)(G) inapplicable. As OCSE recognized in its final rule implementing section 466(a)(5)(G), “States may have laws which establish additional presumptions [of parentage] and rules for resolving apparent conflicts.” In addition, section 454(4)(A) of the Act requires states to provide paternity establishment services “as appropriate.” Such laws and policies allow states flexibility to fulfil the core functions of the child support program for establishment of the legal parent-child relationships as necessary under state law to secure and enforce child support obligations.



OCSE Guidance for IV-D Child Support Programs

Question 4: Can a state child support agency provide parentage establishment services for same-sex parent families? Is federal financial participation (FFP) available for such activities?

Answer 4: Yes. While title IV-D and federal regulations require state child support agencies to have procedures for “paternity” establishment, as stated in the response to Question 1, title IV-D does not preclude states from having parentage establishment laws and procedures for same-sex parent families. OCSE recognizes that all children are entitled to child support regardless of the gender or sexual orientation of their parents, and that the main purpose of the program is to ensure that assistance in obtaining support is available to all children for whom such assistance is requested. We also recognize that establishment of the parent-child relationship is a matter of state law and state child support programs need flexibility to provide core child support services, which include establishing support orders against the parent who, under state law, has a duty to provide support. Therefore, parentage establishment services provided to same-sex parent families, though not required under title IV-D, are permissible and eligible for FFP under 45 CFR 304.20(a)(1), which authorizes FFP for reasonable and necessary expenses related to the core title IV-D program functions of establishing and enforcing support orders.



Questions?



Thank you for your time!