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Response: And Baby Makes . . . How Many? Using *In re M.C.* To Consider Parentage of a Child Conceived Through Sexual Intercourse and Born to a Lesbian Couple

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* Professor of Law, American University Washington College of Law; 2011–12 Visiting McDonald/Wright Chair in Law, UCLA School of Law. © 2012, Nancy D. Polikoff. I appreciate the research assistance of Emily Reitz, UCLA School of Law class of 2012, and the comments provided by students and faculty at the 2012 Midwest LGBT Law Conference, Washington University School of Law, and by Cathy Sakimura, Staff Attorney, National Center for Lesbian Rights, and Deborah Wald, who has represented numerous gay and lesbian parents in California courts.

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Melissa C. and Irene V. began living together in California in 2006. They registered as domestic partners in February 2008. Melissa became pregnant in June 2008. In October 2008, during the window in which marriage for same-sex couples was permitted in California, Melissa and Irene married. Melissa assumed Irene's surname. M_i was born in March 2009 and named M.C.V. Irene was present at the birth and cut the umbilical cord.

When you imagine this family interacting with the legal system, perhaps you think of the plaintiffs in cases arguing for access to marriage—as a lesbian couple with a child conceived through donor insemination seeking recognition and protection for the family they have formed out of love and a desire to build a life together.¹ Perhaps you wonder, if Melissa dies, will Irene be able to keep custody in the face of a challenge from, say, Melissa's parents?² Or if Irene dies, will M. be entitled to child benefits from Social Security every month until she turns eighteen?³ If you imagine discord between Melissa and Irene down the road, perhaps you wonder if Melissa might someday take M. to a state that does not recognize her marriage and claim that she is M.'s only legal parent.⁴

1. See *Goodridge v. Dep't of Pub. Health*, 798 N.E.2d 941, 948 (Mass. 2003). Hillary and Julie Goodridge were lead plaintiffs in the first successful challenge to excluding same-sex couples from marriage. *Id.* For a discussion of their family, see Susan Schindehette, *Here Come the Brides*, PEOPLE (May 31, 2004), <http://www.people.com/people/archive/article/0,,20150204,00.html>.

2. See Nancy D. Polikoff, *This Child Does Have Two Mothers: Redefining Parenthood To Meet the Needs of Children in Lesbian-Mother and Other Nontraditional Families*, 78 GEO. L.J. 459, 529–31 (1990) (discussing *In re Pearlman*, No. 87-24, 926 DA (Fla. Cir. Ct. Mar. 31, 1989)).

3. See Maria Newman, *Survivor in Gay Union Appeals Denial of Benefits to Boy*, N.Y. TIMES (Oct. 15, 2003), <http://www.nytimes.com/2003/10/15/nyregion/survivor-in-gay-union-appeals-denial-of-benefits-to-boy.html> (describing a child's inability to obtain survivor benefits from his mother's same-sex partner who had not adopted him).

4. See, e.g., *Miller-Jenkins v. Miller-Jenkins*, 637 S.E.2d 330, 337 (Va. Ct. App. 2006).

All of these scenarios are plausible. But the real Irene and Melissa have a different sort of lesbian family, with a story we have not heard before, at least in reported cases.

Everything I told you about Melissa and Irene is true.⁵ The following is also true. Their relationship was stormy from the beginning, marked by verbal and physical abuse. Melissa abused drugs and alcohol.⁶ According to Melissa, Irene struck her with a closed fist, kicked her, and pushed her.⁷ Melissa also had a bipolar-disorder diagnosis and a history of involuntary hospitalizations based on suicidal ideations.⁸ The couple separated in May 2008, three months after registering as domestic partners.⁹

Melissa began a sexual relationship with Jesus, by whom she became pregnant.¹⁰ Melissa filed to dissolve her domestic partnership with Irene in July 2008 and requested a temporary restraining order (TRO) on the basis of various incidents of physical violence.¹¹ The TRO was granted by the court but was never served on Irene.¹²

Melissa lived with Jesus and his family until September 2008, the first three-to-four months of her pregnancy, and during that time, Jesus assisted her with prenatal care and other financial support.¹³ In early September 2008, Melissa and Irene reconciled and Melissa left Jesus.¹⁴ On October 15, 2008, Melissa and Irene were married, and it was into this marriage that M. was born on March 26, 2009, and brought into Melissa and Irene's home.¹⁵

The likelihood of the above scenario—not necessarily the violence but that a woman in a same-sex relationship might have sexual intercourse with a man and thereby become pregnant—is greater than popular narratives of lesbians having children might suggest.¹⁶ According to demographer Gary Gates, the 2008–2010 General Social Survey shows that 13% of women who identify as

5. *In re M.C.*, 123 Cal. Rptr. 3d 856, 861 (Cal. Ct. App. 2011).

6. *Id.* at 864.

7. *Id.*

8. *Id.*

9. *Id.* at 861.

10. *Id.*

11. *Id.*

12. *Id.* at 861–62.

13. *Id.* at 861.

14. *Id.* at 862.

15. *Id.* The exact date of M.'s birth is found in Appellant Jesus P.'s Opening Brief at 4, *In re M.C.*, 123 Cal. Rptr. 3d 856 (Cal. Ct. App. 2011) (No. CK79091).

16. Although not relevant to the issues on appeal, a lesbian mother conceived a child through sexual intercourse with her ex-boyfriend in *In re Adoption of T.A.M. & E.J.M.*, 791 N.W.2d 573, 576 (Minn. Ct. App. 2010). A revision of parentage statutes in Quebec in 2002 explicitly addressed the circumstance of a lesbian couple planning to raise a child together and conceiving the child through sexual intercourse of one partner with a man. Under the law, if the intent of all concerned is that the two women will be the child's parents, then the law recognizes them as parents and does not consider the man a legal parent. See Nancy D. Polikoff, *A Mother Should Not Have To Adopt Her Own Child: Parentage Laws for Children of Lesbian Couples in the Twenty-first Century*, 5 STAN. J. C.R. & C.L. 201, 226–29 (2009).

lesbian have had sex with a man in the last five years; 2% have had sex with a man in the last year.¹⁷ Given Gates's estimate of 1.36 million lesbians in the United States, that latter figure translates into 27,200 lesbians who have slept with a man in the last twelve months. Adding in the data for bisexual women, whom Gates numbers at 2.6 million,¹⁸ 96% say they have had sex with a man in the last five years, and 89%—over 2.3 million—say they have had sex with a man in the last year.¹⁹

In the 2008–2010 American Community Survey, 2% of women in same-sex couples reported giving birth to a child in the previous year.²⁰ The 2010 Census data count 332,887 female same-sex couples,²¹ which translates to an estimate of over 6,600 children born to lesbian couples in a year. While some number of those births are certainly the result of assisted conception, the General Social Survey data suggest that many of those children were conceived—intentionally or unintentionally, with or without a same-sex partner's consent—through sex with a man.²²

So who are M.'s parents? This Response examines that question as a means of considering the impact of same-sex couples raising children on parentage presumptions. First, I elaborate on the *In re M.C.* case by reviewing the facts of her conception, birth, and infancy²³ and analyzing the court rulings on her parentage. Then I consider, to use the terminology of Professor William Eskridge, the “default” and the “override” rules for determining the parentage of a child born to a married lesbian couple.²⁴

The structure of default and override already exists in the presumptions that a married woman's husband is her child's father and that, in some states, a man's actions make him a presumptive parent even in the absence of marriage. Those default rules should apply equally to the female spouse/partner of a lesbian, as

17. E-mail from Gary J. Gates, Williams Distinguished Scholar, UCLA Sch. of Law, to author (Feb. 10, 2012) (on file with author). A 1999 study of 6,935 self-identified lesbians found that 5.7% reported one or more male sexual contacts in the preceding year. Alison L. Diamant et al., *Lesbians' Sexual History with Men; Implications for Taking a Sexual History*, 159 ARCHIVES INTERNAL MED. 2730, 2732 (Dec. 13/27, 1999). Women who were not white, were younger than fifty, had not graduated from college, and had annual income of less than \$20,000, were more likely to be in this category. *Id.*

18. GARY J. GATES, WILLIAMS INST., HOW MANY PEOPLE ARE LESBIAN, GAY, BISEXUAL, AND TRANSGENDER? 6 (2011), available at <http://williamsinstitute.law.ucla.edu/wp-content/uploads/Gates-How-Many-People-LGBT-Apr-2011.pdf>.

19. E-mail from Gary J. Gates, *supra* note 17.

20. *Id.*

21. GARY J. GATES & ABIGAIL M. COOKE, WILLIAMS INST., UNITED STATES CENSUS SNAPSHOT: 2010, at 2 (2011), available at <http://williamsinstitute.law.ucla.edu/wp-content/uploads/Census2010Snapshot-US-v2.pdf>.

22. E-mail from Gary J. Gates, *supra* note 17.

23. The facts are taken from the reported appellate opinion and the briefs filed by the parties which, in several instances, provide information omitted from the trial court ruling.

24. See generally William N. Eskridge Jr., *Family Law Pluralism: The Guided-Choice Regime of Menus, Default Rules, and Override Rules*, 100 GEO. L.J. 1881 (2012).

Professor Susan Appleton has thoroughly analyzed.²⁵ The notion of override also exists in the varying state standards for rebutting the parentage presumption in heterosexual marriages. While Professor Appleton briefly considered when one of the lesbian spouses might rebut the presumption, she did not address how the law should respond when the child was conceived through one woman's sexual relationship with a man and that man attempts to claim parentage. This Response tackles that question, specifically in the context of *In re M.C.*—the first time this issue has arisen in a reported appellate opinion.

Part I presents a detailed account of the *In re M.C.* facts, relying on the briefs filed by the parties as well as the contents of the appellate decision. This Part also explains the reasoning of the trial court, which found that Melissa, Irene, and Jesus were all M.'s presumed parents, as well as that of the appeals court, which reversed on that point, holding that a child could not have three parents and remanding to the trial court to determine who M.'s *two* parents were. Part II describes the general principles that should apply to determining M.'s parentage, emphasizing that the principles must apply equally to same-sex and different-sex couples. Part III examines how Melissa, Irene, and Jesus would be assessed under some existing laws, and concludes by proposing the best answer I can discern to the question that drives this Response: who are M.'s parents?

I. A DETAILED ACCOUNT OF *IN RE M.C.*

This Part presents an in-depth analysis of *In re M.C.*, first going through the facts and the trial court's finding that M. had three presumed parents and then examining how the appeals court reversed and remanded to determine which two of the three possible parents were actually M.'s parents.

A. TRIAL COURT FINDS THREE PRESUMED PARENTS

M.'s time as part of Irene and Melissa's marital family was short lived. The couple stayed together for only a few weeks after M.'s birth, until April 25, after which Melissa moved out with the baby.²⁶ On May 1, Melissa filed for an order

25. See Susan Frelich Appleton, *Presuming Women: Revisiting the Presumption of Legitimacy in the Same-Sex Couples Era*, 86 B.U. L. REV. 227, 232, 237–59 (2006).

26. There is some uncertainty about the date of separation. Irene originally told the Department of Children and Family Services (DCFS) that she, Melissa, and M. lived together for three months. Appellant Melissa V.'s Opening Brief at 14, *In re M.C.*, 123 Cal. Rptr. 3d 856 (Cal. Ct. App. 2011) (No. CK79091). She then testified on January 29, 2010 that her relationship with Melissa ended on April 25, 2009. *Id.* at 24. Melissa reported that she and Irene separated in June 2009. *Id.* at 3. But the DCFS brief on appeal reports that in the earlier custody proceeding between Melissa and Irene, Melissa executed a declaration stating that Irene had resided with M. only for three weeks. Respondent's Brief at 12, *In re M.C.*, 123 Cal. Rptr. 3d 856 (Cal. Ct. App. 2011) (No. CK79091). The court ruling says the couple lived together for three to four weeks. *In re M.C.*, 123 Cal. Rptr. 3d at 862 (Cal. Ct. App. 2011). Because the court proceeding to change M.'s last name and Irene's petition for custody began the first week in May, the late April separation date is more plausible and I use it here. Whether the couple lived together for one month or three does not change my analysis of the case.

changing her daughter's last name to "C."²⁷ On May 5, Irene filed for custody and visitation with M.²⁸ Melissa opposed her request.²⁹ On May 19, Melissa's lawyer—who was also her aunt—wrote a letter to Jesus, who had moved to Oklahoma before M's birth, and asked for his help in Melissa's effort to keep Irene from obtaining joint custody.³⁰ On May 26, he was specifically asked to sign a voluntary declaration of paternity and a statement that he agreed to have the baby's last name changed to Melissa's.³¹ He signed it on June 11, and the court issued the name-change order the next day.³² In June, Melissa obtained a restraining order against Irene.³³ On July 13, Irene and Melissa both testified at a court hearing on Irene's petition for custody and visitation.³⁴ The court issued a new restraining order against Irene and ordered weekly monitored visitation between Irene and M.³⁵

Melissa asked Jesus, who had a full-time job as a grocery store assistant produce manager, for financial support. In July and August, he sent her a total of \$300. Melissa also began taking M. to see Jesus's family.³⁶

So far, this was a private custody dispute between Melissa and Irene. That changed on September 21.³⁷

Melissa had a new boyfriend, Jose. Together they planned for Jose to confront and scare Irene—and use physical violence if necessary—to get her to drop her court action over M.³⁸ That day, Jose boarded a bus that Irene was on and pretended to befriend her. He followed her off the bus and then stabbed her with a knife in the neck and back, causing critical injuries that required hospitalization.³⁹ Melissa was arrested and charged as an accessory to the attempted murder of Irene.⁴⁰ M. was turned over to the Los Angeles County Department of Children and Family Services (DCFS) and placed in foster care.⁴¹

27. Appellant Jesus P.'s Opening Brief, *supra* note 15, at 4.

28. *In re M.C.*, 123 Cal. Rptr. 3d at 862. The date is found in Appellant Jesus P.'s Opening Brief, *supra* note 15, at 4.

29. *In re M.C.*, 123 Cal. Rptr. 3d at 862.

30. Appellant's Opening Brief at 7, *In re M.C.*, 123 Cal. Rptr. 3d 856 (Cal. Ct. App. 2011) (No. CK 79091).

31. Jesus P.'s Respondent's Brief at 5, *In re M.C.*, 123 Cal. Rptr. 3d 856 (Cal. Ct. App. 2011) (No. CK 79091).

32. Appellant Jesus P.'s Opening Brief, *supra* note 15, at 5.

33. *In re M.C.*, 123 Cal. Rptr. 3d at 862.

34. Appellant's Opening Brief, *supra* note 30, at 9.

35. *Id.* at 10.

36. *In re M.C.*, 123 Cal. Rptr. 3d at 862.

37. Appellant's Opening Brief, *supra* note 30, at 10.

38. *In re M.C.*, 123 Cal. Rptr. 3d at 863. From a police interview room, Melissa called Jose and told him, among other things, "that bitch got what she deserved." She did not realize it, but she was being taped at the time. *Id.*

39. *Id.*

40. *Id.*

41. *In re M.C.*, 123 Cal. Rptr. 3d at 862.

Two days later, at the first court hearing, Irene was present and requested that M. be released to her. The court declined, but it did find her to be a presumed mother. It also found Jesus to be an alleged father, a status carrying different, and lesser, legal consequences from those afforded presumed parents.⁴²

DCFS conducted an investigation of M.'s family situation. The DCFS worker decided that Irene was not a suitable placement for M. for a combination of reasons. Some of the reasons seem illegitimate, but there was sufficient information to decline releasing M. to Irene at this point.⁴³ Jose had not been arrested in conjunction with the attack on Irene, and the DCFS worker believed Irene needed to get a restraining order against him, calling this a "major factor" against placement with her.⁴⁴ This conclusion seems especially inappropriate given that with Melissa in custody, there was no reason to believe that Jose would independently go after Irene. The worker also was unfamiliar with the legal significance of Melissa and Irene's marriage and inquired why Irene did not adopt M.⁴⁵

While the above concerns are questionable, other factors did suggest caution in placing M. with Irene. She did not have her own place to live; she was sleeping on a living room sofa in the apartment of her mother's female companion, whom Irene called her step-mother; the apartment might not have complied with the relevant regulations; and Irene was unemployed and lacked transportation.⁴⁶

Also, Melissa had told the DCFS worker of numerous incidents of Irene's violence toward her. Irene disputed Melissa's accusations, claiming that one alleged instance occurred because Melissa had fallen down a flight of stairs after drinking and that, in general, Melissa had a history of fabricating allegations; a judge did, however, issue a restraining order against Irene.⁴⁷ Irene also reported that she thought Jesus had been a one-night stand; she had no idea that Melissa had temporarily lived with him or sought his financial support, and she said that she and Melissa had made a plan to raise the child together as a family.⁴⁸

DCFS also contacted Jesus in Oklahoma, and they learned he had a full-time job and a pregnant fiancée.⁴⁹ He said he wanted to provide a loving and

42. *Id.* at 863.

43. *See id.* at 863–64; Appellant's Opening Brief, *supra* note 30, at 13–15.

44. Appellant's Opening Brief, *supra* note 30, at 13–15.

45. *In re M.C.*, 123 Cal. Rptr. 3d at 863.

46. Appellant's Opening Brief, *supra* note 30, at 13–15. The appellate opinion notes that there was no working refrigerator. *In re M.C.*, 123 Cal. Rptr. 3d at 864. There is some discrepancy in the information about Irene's residence. The Respondent DCFS's brief says that the DCFS report found that Irene was living with her mother, who had a history of PCP and methamphetamine use and whose younger children, Irene's siblings, had been removed from her care. Brief for Respondent, *supra* note 26, at 11.

47. *In re M.C.*, 123 Cal. Rptr. 3d at 861–62, 864–65.

48. *Id.* at 865.

49. *Id.*

nurturing home for M., something his fiancée concurred in.⁵⁰ He appeared at a court hearing on October 26, 2009, along with several relatives.⁵¹ Melissa's parents also appeared in court.⁵² Jesus had signed a voluntary declaration of paternity on October 22, asking to be declared M.'s presumed father, and Melissa's attorney concurred in this request.⁵³ Irene's counsel objected, and the court asked for the matter to be briefed.⁵⁴ Briefs on this issue were submitted on November 20. Melissa continued to support Jesus; Irene continued to object; both the county counsel and the attorney for the child took no definitive position on the issue.⁵⁵

While the case was pending, M. was in foster care. Both Melissa's and Jesus's parents visited her there. Irene also had monitored visitation of two hours twice a week.⁵⁶

DCFS convened a meeting in January 2010 attended by Jesus and his mother, Melissa's parents, and Irene.⁵⁷ DCFS arranged for supervised visits for Jesus while he was in California, his first contact with now-ten-month-old M. At the meeting, everyone agreed to temporary placement of M. in the home of Melissa's parents.⁵⁸

Just before a February court hearing, DCFS changed its recommendation and advocated that Jesus and Melissa receive joint legal custody, Jesus receive sole physical custody, and Melissa and Irene receive supervised visitation.⁵⁹ Melissa's early support of Jesus's parentage came in the context of her efforts to defeat Irene's parentage claim.⁶⁰ Now it was apparent that Jesus's parentage could result in M.'s placement in Oklahoma. Melissa had obtained a new attorney in December;⁶¹ at the February hearing, Melissa changed her position and argued that Irene was M.'s presumed mother and Jesus was not a presumed father.⁶²

The court sustained several counts of the petition concerning M. Specifically, it found that Melissa and Irene had a history of domestic violence that endangered M.'s physical and emotional health and safety; that Melissa remained incarcerated on charges in conjunction with the attempted murder of Irene and could not care for M.; and that Melissa had a history of illegal drug use, was a current marijuana user, and was under the influence of marijuana on the day of

50. *Id.*

51. Appellant Jesus P.'s Opening Brief, *supra* note 15, at 10.

52. *Id.*

53. *Id.* at 10–11. Melissa did not sign the voluntary declaration of paternity, likely because the form states that a married woman should not sign it. *Id.* at 11.

54. *Id.* at 11–12.

55. *Id.* at 13.

56. *In re M.C.*, 123 Cal. Rptr. 3d 856, 866 (Cal. Ct. App. 2011).

57. Appellant's Opening Brief, *supra* note 30, at 27.

58. *In re M.C.*, 123 Cal. Rptr. 3d at 866.

59. *Id.*

60. Appellant's Opening Brief, *supra* note 30, at 7.

61. *Id.* at 26.

62. Brief for Respondent, *supra* note 26, at 25.

her arrest.⁶³ These facts placed M. at risk of physical and emotional harm and damage.⁶⁴

The court rejected DCFS's placement recommendation and placed M. with Melissa's parents. The court found Melissa to be M.'s biological mother and Irene to be her presumed mother based on her marriage to Melissa and because she received M. into her home and held her out as her own.⁶⁵ The court also found Jesus to be M.'s presumed father, although to do so the court had to make the debatable finding that he had promptly stepped forward to assume full parental responsibility but was thwarted from doing so by the mother or another third party.⁶⁶

The trial court's parentage ruling meant that Melissa, Irene, and Jesus were all entitled to reunification services.⁶⁷ Melissa was given visitation while in jail. Irene was given supervised visits, and Jesus and his mother were given unsupervised, and potentially overnight, visits.⁶⁸ California law requires placement with a presumed parent who was not living with the child at the time of the conditions placing the child at risk "unless it finds that placement with that parent would be detrimental to the safety, protection, or physical or emotional well-being of the child."⁶⁹ The court found that a placement with Jesus would be against M.'s interest in pursuing reunification with Melissa and Irene.⁷⁰ Melissa and Irene appealed the trial court's finding that Jesus was a presumed parent, and Jesus appealed the trial court's refusal to place M. with him.⁷¹

B. THE APPEALS COURT REVERSES AND REMANDS TO DETERMINE ONLY TWO PARENTS

In addition to the briefs filed on behalf of the three adults, which furthered the positions each had asserted at trial, the California Court of Appeal received briefs from an attorney representing M., and an amicus curiae, the Children's Advocacy Institute (CAI), located at the University of San Diego School of Law. The brief filed on behalf of M. agreed that Jesus was a presumed father.⁷² It expressed some skepticism about whether Irene could be a presumed parent "when there is a very plausible candidate for the role of 'presumed father' in addition to the biologically presumed mother."⁷³ M. did not directly challenge

63. *Id.* at 27 & n.11.

64. *Id.*

65. Appellant's Opening Brief, *supra* note 30, at 30.

66. See discussion *infra* section III.C.

67. See *In re M.C.*, 123 Cal. Rptr. 3d 856, 866–67 (Cal. Ct. App. 2011) (finding only mothers and "presumed" parents are entitled to reunification services).

68. *Id.* at 866.

69. CAL. WELF. & INST. CODE § 361.2(a) (West 2012).

70. Brief for Respondent, *supra* note 26, at 30.

71. *In re M.C.*, 123 Cal. Rptr. 3d at 867.

72. Brief of Respondent, M.C. at 17, *In re M.C.*, 123 Cal. Rptr. 3d 856 (Cal. Ct. App. 2011) (No. CK79091).

73. *Id.* at 28.

the trial court's finding that Irene was a presumed parent, but she did deem that issue "not a settled question and . . . one on which reasonable minds may differ."⁷⁴ M.'s brief concluded that Irene has "a more than colorable claim . . . to status as [M.'s] presumed mother."⁷⁵

Assuming both Jesus and Irene were presumed parents, M. argued that the claims were complimentary and not in conflict⁷⁶ and that M. was "content to accept the somewhat unprecedented situation of having two presumed mothers and one presumed father for a total of three presumed parents."⁷⁷ M. stated that if the court nonetheless determined that the presumptions of Irene and Jesus were in conflict, the case should be sent back to the trial court to resolve the dispute based on the "weightier considerations of policy and logic" in light of further evidence to be presented by the parties.⁷⁸ If the court determined, on the other hand, to resolve the conflict on the present record, M. argued that the record supported Jesus's claim over Irene's.⁷⁹

Amicus curiae CAI urged an unequivocal affirmance of the trial court ruling that M. had three parents, "each of whom has legal rights and obligations with respect to her, and with each of whom she is entitled to have a parent-child relationship."⁸⁰ CAI argued that the parentage statute left open the possibility that "two or more presumptions may arise *that do not conflict with each other*."⁸¹ "In order to determine whether or not two parental presumptions are, in fact, in conflict with each other, the Court must look at whether or not it is in the child's best interest to limit the number of parents available to the child."⁸²

Ultimately, CAI argued that the trial court had properly determined that M.'s best interests were served by having three parents and that "[c]ourts must be allowed flexibility to consider the unique factual circumstances presented in each case, and to recognize and respect the rights of all such individuals who can establish a legally cognizable parental relationship to a child."⁸³

The appeals court disagreed, stating that the California Supreme Court had consistently refused to find two mothers or two fathers for a child if to do so would result in three parents.⁸⁴ Under California Family Code § 7610, Melissa is a parent because the parent and child relationship between a child and the natural mother "may be established by proof of her having given birth to the

74. *Id.*

75. *Id.* at 31.

76. *Id.* at 32.

77. *Id.* at 33–34.

78. *Id.* at 34 (internal quotation marks omitted).

79. *Id.* at 36.

80. *Amicus Curiae* Brief of the Children's Advocacy Institute in Support of Respondent M.C. at 1, *In re M.C.*, 123 Cal. Rptr. 3d 856 (Cal. Ct. App. 2011) (No. CK79091).

81. *Id.* at 5.

82. *Id.* at 6.

83. *Id.* at 7–8.

84. *In re M.C.*, 123 Cal. Rptr. 3d at 877.

child.”⁸⁵ The appeals court agreed with the lower court that both Jesus and Irene were presumed parents.⁸⁶

Because the court held that the child could not have three parents, it remanded the case and instructed the trial court to reduce M.’s parents from three to two, using the statutory mandate for resolving conflicting parentage presumptions.⁸⁷ That mandate—deriving from the original 1973 Uniform Parentage Act (UPA) on which California based its law—tells the court that “the presumption which on the facts is founded on the weightier considerations of policy and logic controls.”⁸⁸ Notably, the appeals court did not say that the trial court had to choose between Jesus and Irene. Rather, it characterized Melissa as a “presumed parent”⁸⁹ and implied that the trial court, in reducing M.’s parents from three to two, could eliminate Melissa and retain Irene and Jesus.⁹⁰

This characterization of Melissa was possible because California law extends the “policy and logic” standard for resolving conflicting parentage claims beyond that provided in the 1973 UPA. In 2006, in *Amy G. v. M.W.*, a California appeals court ruled that the parentage of a biological mother, Kim, could not be challenged by Amy, the woman who was married to the child’s biological father and had lived with the child and held her out as her own.⁹¹ Amy had asked the court to choose between her and Kim under California Family Code § 7612(b), which instructed the court to weigh “policy and logic” based on the facts.⁹² The court ruled that § 7612(b) could not be used against a mother who is a legal parent because she gave birth to the child; that parent’s status derives from California Family Code § 7610.⁹³ In direct response, the California legislature amended § 7612(b) so that the same weighing of policy and logic applies to a conflict between a presumptive parent and a person claiming parentage under § 7610—in other words, a birth mother.⁹⁴ Because Melissa’s parentage derives from California Family Code § 7610, § 7612(b) as currently written does appear to give the trial court the authority to weigh “policy and logic” when presumptive parentage, such as that of Jesus and Irene, conflicts with her claim. *In re M.C.* says as much.⁹⁵

Thus, the appeals court remanded the case to the juvenile court to apply the “policy and logic” standard “to resolve the conflicting fact-intensive presumptions as between the three parents.”⁹⁶ The trial court was also instructed to

85. CAL. FAM. CODE § 7610(a) (West 2012).

86. *In re M.C.*, 123 Cal. Rptr. 3d at 877.

87. *Id.* at 878.

88. CAL. FAM. CODE § 7612(b) (West 2012).

89. “M.C. does have three presumed parents . . .” *In re M.C.*, 123 Cal. Rptr. 3d at 877.

90. *Id.*

91. *Amy G. v. M.W.*, 47 Cal. Rptr. 3d 297, 304–06 (Cal. Ct. App. 2006).

92. *Id.* at 305–06.

93. *Id.*

94. CAL. FAM. CODE § 7612(b) (West 2012).

95. *In re M.C.*, 123 Cal. Rptr. 3d 856, 877 (Cal. Ct. App. 2011).

96. *Id.* at 877.

consider the circumstances as they had developed in the fifteen months since M. was placed with her maternal grandparents.⁹⁷

So who are M.'s parents? And who should they be? Borrowing the language of Professor Eskridge's template, when a lesbian couple is married and one spouse bears a child, what is the default rule and what is the override?

II. GENERAL PRINCIPLES

Before answering this question, I offer general principles of determining parentage that transcend this particular factual situation.

A. A CHILD CAN HAVE THREE PARENTS

The *In re M.C.* court believed it was bound by California Supreme Court precedent to hold that a child could not have two fathers or two mothers where a determination of dual maternity or paternity would result in the child having three parents.⁹⁸ As a broad statement that a child cannot have three parents, this is an incorrect reading of California law. California trial courts have granted adoptions that result in a child having three parents.⁹⁹ Although there is no appellate court ruling on the issue, there is also nothing in California statutes or case law that precludes a judge from allowing an adoption that does not terminate the rights of either biological parent when such an arrangement is in the child's best interests.

Also, although uncommon, statutes and case law in other jurisdictions acknowledge that a child may have three parents.¹⁰⁰ The *In re M.C.* court could have ruled that *this* child did not have three parents without characterizing the law over broadly.

B. THE RULES FOR DETERMINING PARENTAGE SHOULD BE THE SAME FOR DIFFERENT-SEX AND SAME-SEX COUPLES

Every year, tens of thousands of children are born to married women who have conceived through sexual intercourse with men other than their husbands.¹⁰¹ State statutes and case law, model statutes, and constitutional law all must take account of this fact. There is no uniformity in approaches to determining a child's parentage under this circumstance. In other words, it is by no means clear or consistent across the country who would be M.'s parents if Irene had been Ivan and he had been Melissa's spouse.

As a general principle, the response to this question must be the same whether the couple is heterosexual or lesbian. It is of course true that a female

97. *Id.*

98. *Id.*

99. See Polikoff, *supra* note 16, at 243.

100. See *id.* at 243–46.

101. See *id.* at 213 & n.38.

spouse will always know that she is not the biological parent of her spouse's child. A male spouse will not always know this. When a husband does know this fact, however, the law considers it relevant in numerous contexts. At the very least there must be parity of treatment between a female spouse and a male spouse who knows he is not his child's biological parent.

C. GENETIC CONNECTION IS NEITHER NECESSARY NOR SUFFICIENT
FOR LEGAL PARENTAGE

Assisted conception produces parents with no genetic connection to their child. So does adoption. Statutes and case law recognize a nonbiological parent based on that person's marriage to a woman who bears a child or that person's consent to a woman's insemination with the intent that both persons will be the parents of the resulting child.¹⁰² The principle that a genetic connection to a child is not necessary to find someone a legal parent means that Irene and M. cannot be denied a parent-child relationship on the basis of a lack of genetic connection.

The U.S. Supreme Court has approved state statutes that deny parentage when the link to the child is based on biology alone.¹⁰³ As a constitutional matter, it is clear that genetic connection is not sufficient to find legal parentage. Although some states do allow a biological father to claim parentage on that basis alone when the mother is married to another man, that is not the right answer.¹⁰⁴ If biology rebuts a parentage presumption, then a couple—gay or straight—committed to raising a child together in a family unit can be denied the opportunity to provide that stable structure for the child. It would mean that even if Irene and Melissa comprised a family unit of two fit parents, Jesus would have the ability to disrupt that unit.

California itself rejects this approach. In *Dawn D. v. Superior Court*, the mother, Dawn, left her husband, Frank, in January and moved in with another man, Jerry, until April, when she returned to her husband.¹⁰⁵ In August, Jerry filed a petition to establish a parental relationship with Dawn's unborn child. Dawn gave birth to a son in November.¹⁰⁶

102. See *Dawn D. v. Superior Court*, 952 P.2d 1139, 1140 (Cal. 1998) (supporting the marital presumption). For consent to insemination, see CAL. FAM. CODE § 7612(b) (West 2012) and *In re Parentage of M.J.*, 787 N.E.2d 144, 152 (Ill. 2003).

103. See *Lehr v. Robertson*, 463 U.S. 248, 261–62 (1983) (approving state law requiring more than “the mere existence of a biological link” for parental rights of nonmarital putative father who lacked any other relationship with the child).

104. Compare *J.S.A. v. M.H.*, 797 N.E.2d 705, 708 (Ill. App. Ct. 2003) (allowing alleged biological father to seek paternity of three-year-old child being raised by mother and her husband), with *Merkel v. Doe*, 635 N.E.2d 70, 72 (Ohio Ct. Com. Pl. 1993) (holding statute that allowed alleged biological father to bring paternity action for child born to mother married to another man unconstitutional as a violation of the married couple's right as a family unit).

105. *Dawn D.*, 952 P.2d at 1140.

106. *Id.*

Frank was the presumed father of the child both because he was married to Dawn when the child was born and because he received the child into his home and held the child out as his natural child.¹⁰⁷ California statutes denied Jerry standing to challenge Frank's paternity. Jerry argued that the statutes were unconstitutional because they denied him the opportunity to develop a relationship with his biological child.¹⁰⁸

In a 5–2 ruling, the California Supreme Court rejected this argument and held that Jerry did not have a constitutionally protected liberty interest in developing a relationship with the child.¹⁰⁹ Three of the justices, in a concurrence, emphasized that this child was born to a woman who was part of an intact marital family.¹¹⁰ The concurrence admonished that “[a man who] fathers a child with a woman married to another man takes the risk that the child will be raised within that marriage and that he will be excluded from participation in the child's life.”¹¹¹

D. MARRIAGE IS NEITHER NECESSARY NOR SUFFICIENT FOR LEGAL PARENTAGE

For most of history, the marriage of a man to a woman bearing a child was both necessary and sufficient to make him a legal parent. That is no longer the law. Without being married to the woman bearing the child, a man can be the child's legal parent because, among other reasons, he is a genetic parent, he held the child out as his own, he signed an acknowledgement of parentage, he commissioned a child born to a surrogate, or he consented to the woman's insemination in writing with the intent to parent the resulting child.¹¹²

The same pathways should be available to a woman who is not married to a woman who bears a child. Numerous states, including California, provide such pathways.¹¹³ Irene was M.'s presumed parent based on her marriage to Melissa, but she was also M.'s presumed parent because M. lived with her and she held M. out as her child.¹¹⁴ Although this case concerns a married lesbian couple, I am a vehement critic of any scheme for determining parentage in lesbian-couple families that produces two legal parents when the couple is married but only one legal parent when they are not.¹¹⁵

107. *Id.* at 1141.

108. *Id.* at 1142.

109. *Id.* at 1146.

110. *Id.* at 1147–48 (Kennard, J., concurring).

111. *Id.* at 1148.

112. Nancy D. Polikoff, *The New “Illegitimacy”: Winning Backward in the Protection of the Children of Lesbian Couples*, 20 AM. U. J. GENDER SOC. POL'Y & L. 721, 729–30 (2012) (citations omitted).

113. See *Elisa B. v. Superior Court*, 117 P.3d 660, 670 (Cal. 2005).

114. See *id.* (concluding that lesbian partner was the presumed mother of nonbiological children because she received children into her home and held them out as her own).

115. See Polikoff, *supra* note 112, at 722–23.

III. WHO ARE M.'S PARENTS? EVALUATING MELISSA, IRENE, AND JESUS

This section assesses the claims to parentage of Melissa, Irene, and Jesus. I consider the above principles, existing California law, and the range of approaches that might govern such an assessment in other states.

A. MELISSA

Under California Family Code § 7610, Melissa is M.'s parent because she gave birth to her.¹¹⁶ She is both the genetic and the birth mother of the child. She did not conceive the child under a contractual surrogacy arrangement to relinquish the child, even if such an agreement would be enforceable.

The *In re M.C.* appeals court, however, gave Melissa no greater claim to M. than that of Irene or Jesus.¹¹⁷ Rather, the appeals court instructed the trial court to follow California Family Code § 7612(b) and resolve the conflicting claims of the three adults based on the "weightier considerations of policy and logic."¹¹⁸

This appears to be an error of constitutional proportion. Melissa may be a drug addict and she may be guilty of a felony for planning an action that resulted in a serious assault on Irene, but her legal status as M.'s mother should be altered only if a court terminates her parental rights pursuant to a statutory scheme designed (rightfully) to make that difficult.¹¹⁹ Melissa is a parent, not a presumed parent. A presumption of parentage can be rebutted; if it is, then the person is not a parent and cannot assert constitutional rights as a parent. Parentage, as opposed to presumptive parentage, is not something that can be rebutted; it is a status that carries the full weight of constitutional protection.

Proof of unfitness by clear and convincing evidence can result in a termination of parental rights, but the *In re M.C.* trial court did not find Melissa unfit. The appeals court did not disturb that finding, noting that "no individual claiming parental status has been shown by clear and convincing evidence to be unfit to retain his or her status."¹²⁰ It may be that the facts presented on remand, well over a year after the trial court's initial determination of parentage, would show Melissa unfit by clear and convincing evidence. By that time the court would know the disposition of the criminal charges against her, her amenability to substance abuse and mental-health treatment, and the extent and quality of her contact with M. But the appeals court, denominating all three adults presumed parents, did not instruct the trial court to judge Melissa according to that standard.

116. CAL. FAM. CODE § 7610(a) (West 2012).

117. *In re M.C.*, 123 Cal. Rptr. 3d 856, 877 (Cal. Ct. App. 2011).

118. *Id.*

119. *See Santosky v. Kramer*, 455 U.S. 745, 766–70 (1982) (holding that parental rights could not be terminated without proving the substantive standard by clear and convincing evidence).

120. *In re M.C.*, 123 Cal. Rptr. 3d at 877.

B. IRENE

1. California

The trial and appeals courts agree that Irene is M.'s presumed parent because she was married to Melissa when M. was born. The trial court also held that she was a parent because she received M. into her home and held her out as her own.

California adopted the 1973 Uniform Parentage Act (UPA), which includes a presumption of parentage for a man who "receives the child into his home and openly holds out the child as his natural child."¹²¹ The statute also makes provisions for determining paternity applicable to determining a mother-child relationship "[i]nsofar as practicable."¹²²

Interpreting this latter section in *Elisa B. v. Superior Court*, the California Supreme Court read its "holding out" provision in a gender-neutral fashion and found a lesbian birthmother's ex-partner a presumptive parent of the children they had raised together.¹²³ The court subsequently ruled in *Charisma R. v. Kristina S.* that a holding-out parent need not have lived with the child for any set minimum of time for the presumption to attach.¹²⁴ Finding Irene a presumed parent was an unexceptional application of the above cases. No one challenged this finding on appeal.¹²⁵

2. The Legal Framework in Other Jurisdictions

Across the United States, there are a small number of other states where the "holding out" standard would make Irene a legal parent and fifteen where her formalized status, called marriage, civil union, or domestic partnership, would also make her a presumed parent. There are two other legal regimes that turn a birth mother's same-sex partner into a legal parent in the absence of an adoption. In four states both women are legal parents when they jointly plan for a child conceived through donor insemination. In at least two states, legal parentage derives from meeting specified de facto parentage criteria. Although I review these in this section, Irene would not qualify as a parent under either of these theories. M. was not born through donor insemination, and the short period of time Irene lived with M. makes a finding of de facto parentage unlikely.

a. Holding Out. Reasoning identical to that of California is plausible in any state containing both the "holding out" presumption and the gender-neutral

121. CAL. FAM. CODE § 7611(d) (2005).

122. *Id.* § 7650(a).

123. *Elisa B. v. Superior Court*, 117 P.3d 660, 670 (Cal. 2005).

124. *Charisma R. v. Kristina S.*, 96 Cal. Rptr. 3d 26, 45 (Cal. Ct. App. 2009).

125. In apparent contradiction of the reasoning of *Elisa B.*, the *In re M.C.* appeals court expressed in a footnote substantial skepticism about whether the UPA should be read in a gender-neutral fashion. *See In re M.C.*, 123 Cal. Rptr. 3d at 872.

application provision of the 1973 UPA. The UPA was revised in 2002. It continues the holding out presumption in a modified form. The 2002 UPA presumes that a man is the father of a child if “for the first two years of the child’s life, he resided in the same household with the child and openly held out the child as his own.”¹²⁶ The gender-neutral-reading provision has been simplified to state, “Provisions of this [Act] relating to determination of paternity apply to determinations of maternity.”¹²⁷

Although no other state court has adopted the reasoning of *Elisa B.* in a case involving a lesbian couple, Colorado, which has adopted the 1973 UPA, has applied its holding-out presumption to an unmarried man who raised a child with his female partner knowing that he was not the child’s biological father.¹²⁸ In a subsequent case, a Colorado court applied the gender-neutral-reading provision to find that the wife of a biological father could be a presumptive parent.¹²⁹ Irene would therefore be a presumed parent in Colorado.

The Delaware Supreme Court indicated that it would make such a finding as well in an appropriate case. In *Smith v. Gordon*, a woman had raised an adopted child with her partner, but the partner was the only person who had legally adopted the child.¹³⁰ Delaware had adopted the 2002 UPA. The couple split up thirteen months after the child came into their home, so the nonadoptive mother had not held out the child as her own for two years as required in the 2002 UPA. The court noted that “had Gordon resided with [the child] for at least two years after the adoption and held [the child] out as her child during that time, she apparently would have been able to establish a *legal* parent-child relationship.”¹³¹

In those states with the holding-out presumption but not the gender-neutral-reading provision, a court could read the holding-out provision as gender neutral as a matter of statutory interpretation or could find it an unconstitutional gender-based classification and extend the provision to female holding-out parents as a remedy.

b. Formalized Relationship. In a jurisdiction that recognizes a formal status between two women that grants all the state-based consequences of marriage, whether it is called marriage, civil union, or domestic partnership, the birth mother’s partner/spouse is a presumed parent. Seven jurisdictions allow same-

126. UNIF. PARENTAGE ACT § 204(a)(5) (amended 2002).

127. *Id.* § 106 (alteration in original). Five states have adopted both portions of the 2002 UPA. *See* DEL. CODE ANN. tit. 13, § 8-106 (West 2012); DEL. CODE ANN. tit. 13, § 8-204 (West 2012); N.M. STAT. ANN. § 40-11A-106 (West 2012); N.M. STAT. ANN. § 40-11A-204 (West 2012); N.D. CENT. CODE § 14-20-06 (West 2011); N.D. CENT. CODE § 14-20-10 (West 2011); TEX. FAM. CODE ANN. § 160.106 (West 2012); TEX. FAM. CODE ANN. § 160.204(a)(5) (West 2012); WYO. STAT. ANN. § 14-2-406 (West 2011); WYO. STAT. ANN. § 14-2-504 (West 2011).

128. *See In re the Parental Responsibilities of A.D.*, 240 P.3d 488, 490–92 (Colo. App. 2010).

129. *See In re S.N.V.*, No. 10CA1302, 2011 WL 6425562, at *2 (Colo. App. Dec. 22, 2011).

130. *Smith v. Gordon*, 968 A.2d 1, 3 (Del. 2009).

131. *Id.* at 7–8.

sex couples to marry.¹³² Nine have civil unions or statewide domestic partnership.¹³³ A typical civil union or comprehensive domestic-partnership statute contains the following language:

The rights and obligations of domestic partners with respect to a child of either of them are the same as those of spouses. The rights and obligations of former or surviving domestic partners with respect to a child of either of them are the same as those of former or surviving spouses.¹³⁴

Irene and Melissa were registered as domestic partners. Although Melissa petitioned to dissolve it, she did not follow through on that. When they reconciled, they married. Their marriage made Irene a presumed parent, but even if they had not married, their domestic partnership would have made her a presumed parent.

Had the couple never reconciled, Irene's status as a presumptive parent based on the domestic partnership would have been rebuttable based on their separation. The fact that they not only reconciled but also married, knowing that Melissa was pregnant, suggests that they wanted to emphasize their commitment to each other and their joint commitment to the child as well.

c. De Facto Parent. A partner can also become a parent under state schemes that assign such a status to a de facto parent. Two examples are Washington, which does so by court ruling derived from common law analysis, and Delaware, which does so by statute. Notably, qualifying as a de facto parent creates not a presumption of parentage but legal parentage itself.

In *In re L.B.*, the Washington Supreme Court held that a woman who planned for the child with her ex-partner and raised the child with her for six years stood in "legal parity" to the child's biological mother.¹³⁵ The nonbiological mother met the de-facto-parent test containing the following elements:

- (1) [T]he natural or legal parent consented to and fostered the parent-like relationship, (2) the petitioner and the child lived together in the same household, (3) the petitioner assumed obligations of parenthood without expectation of financial compensation, and (4) the petitioner has been in a

132. Connecticut, the District of Columbia, Iowa, New Hampshire, New York, Massachusetts, and Vermont. Two states, Maryland and Washington, have passed marriage-equality laws, but they are not in effect and face a possible referendum. See *Summary of Laws Regarding Same-Sex Couples*, NAT'L CTR. FOR LESBIAN RTS. (2012), http://www.nclrights.org/site/DocServer/Relationship_Recognition_State_Laws_Summary.pdf.

133. California, Delaware, the District of Columbia, Hawaii, Illinois, Nevada, New Jersey, Oregon, Rhode Island, and Washington. See *id.*

134. NEV. REV. STAT. § 122A.200(1)(d) (2009).

135. *In re Parentage of L.B.*, 122 P.3d 161, 177 (Wash. 2005).

parental role for a length of time sufficient to have established with the child a bonded, dependent relationship, parental in nature.¹³⁶

The court also limited recognition as a *de facto* parent to a person who has “fully and completely undertaken a permanent, unequivocal, committed, and responsible parental role in the child’s life.”¹³⁷

In 2009, Delaware amended its version of the Uniform Parentage Act to add a *de facto* parent. A person who meets the statutory test is a parent, with a status identical to a mother who gives birth to or adopts a child. The definition of *de facto* parent is one who:

- (1) Has had the support and consent of the child’s parent or parents who fostered the formation and establishment of a parent-like relationship between the child and the *de facto* parent;
- (2) Has exercised parental responsibility for the child as that term is defined in § 1101 of this title; and
- (3) Has acted in a parental role for a length of time sufficient to have established a bonded and dependent relationship with the child that is parental in nature.¹³⁸

“Parental responsibilities” are defined as “the care, support and control of the child in a manner that provides for the child’s necessary physical needs, including adequate food, clothing and shelter, and that also provides for the mental and emotional health and development of such child.”¹³⁹

It is unlikely that Irene would be a parent under either Washington or Delaware law. Melissa left Irene when the child was less than a month old, and Irene filed for custody shortly thereafter. The length-of-time requirement would likely prevent any same-sex partner from qualifying as a parent if she lived with the child for that period of time. In fact, it is a shortcoming of the *de-facto*-parent basis for establishing parentage that when a couple plans for a child together, and the nonbiological mother fully participates in the process—something that did not happen here—she cannot meet the test until some period after the child’s birth, leaving the child initially with only one legal parent.

The requirement of consent from the child’s parents also raises the question of whether Jesus would qualify as a parent whose support and consent would be required before a determination of *de facto* parent status could be made. That issue has yet to be decided by any court.

136. *Id.* at 176. This test was originally developed in Wisconsin as the legal standard for granting visitation to a nonbiological lesbian mother. *See In re Custody of H.S.H.-K.*, 533 N.W.2d 419, 421 (Wis. 1995).

137. *In re Parentage of L.B.*, 122 P.3d at 177 (quoting *C.E.W. v. D.E.W.*, 845 A.2d 1146, 1152 (Me. 2004)).

138. DEL. CODE ANN. tit. 13, § 8-201(c) (West 2009).

139. DEL. CODE ANN. tit. 13, § 1101(10) (West 2012).

d. Consent to Insemination. By statute in three jurisdictions—the District of Columbia,¹⁴⁰ New Mexico,¹⁴¹ and Washington¹⁴²—and by court decision in one—Oregon¹⁴³—a woman who consents to her partner’s insemination with donor semen with the intent to be a parent is a parent of the child. The statutes use language similar to that in the American Bar Association Model Act Governing Assisted Reproductive Technology (ABA Model Act). Section 603 of that Act reads: “An individual who . . . consents to . . . assisted reproduction by a woman as provided in [this Act] with the intent to be a parent of her child is a parent of the resulting child.”¹⁴⁴ The ABA Model Act improved on the similar provision of the 2002 UPA which, although marital-status neutral, used “man” rather than “individual.”¹⁴⁵

Because conception in *In re M.C.* did not occur through donor insemination, those statutes are irrelevant to a determination of Irene’s status.

3. Summary

A review of these avenues to parentage for the same-sex partner of a woman who bears a child demonstrates that, under any existing legal regime, Irene cannot be more than a *presumed* parent. This is appropriate. She did not participate in the decision to bring M. into the world. And she did not function as a parent for a long enough period to deserve the status of legal parent on that basis alone, whether that is looked at from the perspective of the biological mother’s constitutional right to raise her child or the child’s need for continuity with someone she considers a parent. Importantly, the same result would ensue if Melissa had married a man. He too would obtain no more than the status as *presumed* parent.

The status of being a presumed parent by definition means that there is some circumstance under which the presumption can be rebutted. Irene’s parentage is not absolute. Rebuttal of the presumption is fact specific, as I discuss more fully in my conclusion.¹⁴⁶ Courts are reluctant to rebut the presumption when the child will be left with only one parent, but that is not the case here.

140. D.C. CODE § 16-909(e)(1) (West 2009).

141. N.M. STAT. ANN. § 40-11A-703 (West 2010).

142. WASH. REV. CODE. § 26.26.710 (West 2011).

143. *Shineovich v. Kemp*, 214 P.3d 29, 39–40 (Or. Ct. App. 2009).

144. ABA MODEL ACT GOVERNING ASSISTED REPROD. TECH. § 603 (2008), available at <http://abanet.org/family/committees/artmodelact.pdf>.

145. UNIF. PARENTAGE ACT § 201(b)(5) (amended 2002). Of course, because § 106 of the 2002 UPA authorizes a gender-neutral reading of the Act, a court could rule that, although this section uses “man,” it must also be read to encompass a woman who consents to assisted reproduction by a woman with the intent to be a parent of the resulting child. For purposes of inheritance and intestate succession, the 2008 Uniform Probate Code has a gender- and marital-status-neutral definition of parentage of a child born through assisted conception. The comments to the section explicitly reference same-sex couples and state that the nonbirth mother becomes the child’s parent by operation of this section. UNIF. PROBATE CODE § 2-120(f) cmt. (amended 2008).

146. See *infra* Conclusion.

In her extensive analysis of the basis for the marital presumption, Professor Susan Appleton stresses the functional role played by a pregnant woman's partner during the pregnancy. She sees the presumption

not as [an] assumption of the husband's probable genetic connection to the child. Instead, the presumption today reflects the belief that someone legally connected to the woman bearing the child likely planned for the child, demonstrated a willingness to assume responsibility, or provided support (emotional and/or economic) during the pregnancy, in turn supporting the expected child.¹⁴⁷

Irene did all of the above except plan for the child with Melissa, but there is a long history of men stepping up to marry a woman pregnant by a different man with the intent to consider that child his own in every way. Irene should get as much credit as such a man would receive.

C. JESUS

1. California

Unlike many states, California statutorily defines the circumstances under which an adult is entitled to reunification services as a parent of a child placed in foster care. Specifically, the California Family Code distinguishes between "presumed fathers" and "alleged fathers." The former get reunification services and the latter do not.¹⁴⁸ That is the context in which a determination of M.'s parentage arose.

Given that Jesus's home looked like it might provide the greatest stability and nurturance to M., it is no surprise that the trial court wanted Jesus to receive reunification services. Unfortunately, and unnecessarily to achieve the possibility of M.'s placement with Jesus, the trial court, in a ruling affirmed on appeal, misapplied the prevailing legal standard to the facts of this case.

Jesus was not a presumed father under the statute. Melissa and Jesus did not marry or attempt to marry each other, before or after M.'s birth, and Jesus never received M. into his home, so he could not meet the requirement that he "receives the child into his home and openly holds out the child as his natural child."¹⁴⁹ Those are the only ways to be a presumed father.

But California also has a category of men called *Kelsey S.* fathers. In a 1992 case, the California Supreme Court ruled that the category of men whose consent to a child's adoption was required had to extend beyond presumed fathers.¹⁵⁰ In *Adoption of Kelsey S.*, a mother consented to placement of her

147. Appleton, *supra* note 25, at 285–86 (citation omitted).

148. *In re M.C.*, 123 Cal. Rptr. 3d 356, 868 (Cal. Ct. App. 2011).

149. CAL. FAM. CODE § 7611(d) (West 2005).

150. *Adoption of Kelsey S.*, 823 P.2d 1216, 1236–37 (Cal. 1992).

child for adoption immediately upon the child's birth. The alleged biological father, Rickie, disagreed with this plan from the moment he heard of it and, two days after the child's birth, filed a petition to establish his parentage. Prospective adoptive parents filed a petition to adopt the child.

Rickie was an alleged, rather than a presumed, father. He could not be a presumed father because he never received the child into his home. As an alleged father, the California Family Code gave him a hearing at which he could object to the adoption but gave the court the authority to order the adoption against his wishes upon a showing by a preponderance of the evidence that the adoption was in the child's best interests. Had he been a presumed father, the adoption could have occurred only upon proof by clear and convincing evidence of his unfitness.¹⁵¹

The California Supreme Court reviewed the constitutionality of the statutory scheme and determined that, as applied to alleged fathers who met particular criteria, the statute was unconstitutional.¹⁵² The court reasoned that the statute improperly placed the unmarried father's ability to be a parent solely within the hands of the mother; she could refuse to marry him and could place the child for adoption without ever allowing him to receive the child into his home. If a man "promptly comes forward and demonstrates a full commitment to his parental responsibilities—emotional, financial, and otherwise," the court ruled that the mother could not unilaterally block him from obtaining constitutionally protected parental status.¹⁵³

The court identified those factors relevant to determining if a father promptly demonstrated the full commitment to parent. The factors include his pre- and post-birth conduct:

Once the father knows . . . of the pregnancy, he must promptly attempt to assume his parental responsibilities as fully as the mother will allow and his circumstances permit. In particular, the father must demonstrate "a willingness himself to assume full custody of the child—not merely to block adoption by others." A court should also consider the father's public acknowledgement of paternity, payment of pregnancy and birth expenses . . . and prompt legal action to seek custody of the child.¹⁵⁴

The *Kelsey S.* criteria now serve to make an alleged father entitled to reunification services in a dependency action.¹⁵⁵ The *In re M.C.* appeals court defined a *Kelsey S.* father as: "[A]n unwed biological father who comes forward at the first opportunity to assert his paternal rights after learning of his child's existence, but has been prevented from becoming a statutorily presumed

151. *Id.* at 1218.

152. *Id.* at 1236.

153. *Id.*

154. *Id.* at 1237–38 (internal citations omitted).

155. *In re M.C.*, 123 Cal. Rptr. 3d 856, 874 (Cal. Ct. App. 2011).

father . . . by the unilateral conduct of the child's mother or a third party's interference."¹⁵⁶

Jesus's provision of care and support during four months of Melissa's pregnancy certainly matter in assessing his *Kelsey S.* status. So does the \$300 he sent to Melissa in the summer of 2009. But the key fact that bumps an alleged father into the category of presumed father is that the mother or a third party unilaterally prevented the father from asserting parental rights.

Melissa had unilateral control over whether she married Jesus. The question is whether Melissa's or a third party's conduct kept Jesus from receiving M. into his home. It was obvious in *Kelsey S.* that the mother did this; she placed the child, upon birth, with adoptive parents.¹⁵⁷ Melissa and Jesus's situation is different.

Jesus did not forego filing a parentage action, which would have adjudicated his right to a relationship with M., because of Melissa's unilateral acts. Melissa did make the unilateral decision to return to Irene. She did not give Jesus an address to contact her, and she lost her phone "within weeks" of when she left him. But Jesus did not allege that he tried to call her before she lost her phone. Melissa and Jesus had met through the Internet, and Jesus did not allege that he tried and failed to reach her that way. It was uncontested that he knew where Melissa's parents lived, and he did not contact them either to reach Melissa or to obtain any information about her pregnancy or the child's birth.¹⁵⁸

If Jesus wished to have a relationship with M. upon her birth, he could have taken steps to locate Melissa. He did not. Instead, he moved to Oklahoma before the child's birth. This was *his* unilateral decision and an action that he knew would remove him from the ability to have regular contact with his child. The court considered Jesus's residence in Oklahoma as a circumstance that justified his failure to do more to establish a relationship with the child. The court considered the financial, time, and distance constraints of his job and his commitment to his pregnant fiancée as circumstances that prevented him from coming to California.¹⁵⁹ This overlooked entirely that Jesus chose to move to Oklahoma knowing full well that Melissa was pregnant with his child. His distance from the child is not a circumstance caused by any act of Melissa or anyone else.

Jesus told the trial court that "it was always his intent to be a father to [the child], regardless of his relationship with Melissa."¹⁶⁰ Although that may have been his subjective intent, his move to Oklahoma coupled with his failure to reach out to Melissa's family during the pregnancy or after the probable date of M.'s birth contradict that intent.

156. *Id.* at 869.

157. *Adoption of Kelsey S.*, 823 P.2d at 1217.

158. *In re M.C.*, 123 Cal. Rptr. 3d at 875-76.

159. *Id.*

160. Brief for Respondent Jesus P., *supra* note 31, at 15.

It well may be that Jesus was satisfied with Melissa's decision to raise the child with Irene and did not want to interfere with that. The court characterizes this possibility as follows:

While Jesus might have hunted Melissa down, and forcefully interjected himself into the relationship between Melissa and Irene, it is also possible to conclude he chose not to do so, and instead decided to allow an emotionally fragile woman the space she needed so that she could return to a relationship in which she felt "more comfortable," and complete her pregnancy as free from stress as possible.¹⁶¹

To the extent this reasoning suggests Jesus made a decision that was good for Melissa and the baby because it reduced stress during the pregnancy, it cannot justify his move to Oklahoma and his failure to contact Melissa or her family after the baby was due. To the extent this reasoning suggests Jesus made a considered and understandable decision to forego a relationship with his child, its use to support his *Kelsey S.* status is disingenuous. However reasonable this decision, it was *his*, not Melissa's or that of any third party. A decision to walk away and allow a child to be raised by her mother and a different partner is a decision to abrogate, not assert, parental responsibility.

Because Melissa's lawyer contacted Jesus when M. was less than two months old, he could not even make a claim that he did not know M.'s whereabouts from that time on.¹⁶² Wanting full custody is one element of the *Kelsey S.* standard.¹⁶³ Although Jesus sent Melissa \$300 in three installments, he gave no indication of any interest in custody at all.¹⁶⁴ He did ask that Melissa take the baby to see his family, but *Kelsey S.* is clear that it is the father's interest in full custody that counts, not his interest in having the child be a part of his extended family.

The court made something of the fact that, because Melissa asked him to sign a declaration of paternity, Jesus might have reasonably believed that he did not have to do anything more than that to establish paternity.¹⁶⁵ But nowhere does a man's belief about what makes him a legal father turn him into a legal father.¹⁶⁶ The *Kelsey S.* test justifies a man's failure to meet the statutory definition of a presumed father. If the court starts justifying a man's failure to meet the *Kelsey*

161. *In re M.C.*, 123 Cal. Rptr. 3d at 876.

162. *Id.* at 876 n.12.

163. *Id.* at 875.

164. *Id.* at 862.

165. *Id.* at 876 n.12.

166. Nor does a woman's belief about what makes her a legal mother turn her into a legal mother. For example, Michele Hobbs learned this when the Ohio Supreme Court refused to enforce the numerous documents signed by her former partner denominating Michele a parent of the six-year-old daughter they had planned for and raised together. *In re Mullen*, 953 N.E.2d 302, 308–09 (Ohio 2011). Elizabeth Stern learned it when the New Jersey Supreme Court invalidated the agreement between her husband and Melissa Whitehead in the first disputed surrogate mother case in the U.S. *In re Baby M.*, 537 A.2d 1227, 1240 (N.J. 1988).

S. standard, it makes the statutory distinction between a presumed father and an alleged father meaningless.

The court's faulty reasoning in *In re M.C.* does not lead to the conclusion that Jesus could or should have no role in M.'s life. There is a chance that further factual development would show that Jesus should have custody of the child. But the court should not have misapplied *Kelsey S.* to reach that result, and it did not have to.

Jesus could have filed a paternity action even after the child came into DCFS custody.¹⁶⁷ The California Supreme Court has held that an alleged biological father cannot challenge the parentage of a husband who is going to raise a child with his wife.¹⁶⁸ Assuming application of that principle to a woman planning to raise a child with her wife, Jesus could have filed because Melissa and Irene split up shortly after the child's birth.

The flaws in the court's reasoning are most clearly unmasked by considering what would have happened if Melissa had placed M. for adoption at the time she left Irene. No court would have found Jesus a *Kelsey S.* father. A court would not have needed to find him unfit to grant the adoption; it would have made a decision based on M.'s best interests alone. Jesus might have been successful under that standard, but not because he was a *Kelsey S.* father. The same standard would have applied had Melissa and Irene filed a petition for Irene to adopt M.; Jesus could have blocked that adoption only if he could show it would not be in the child's best interests. Irene and Melissa would not need to show Jesus's unfitness by clear and convincing evidence.

The misapplication of *Kelsey S.* is also troubling because it may derive from overvaluing not only biology but *fatherhood*. The concurring judge in *In re M.C.* agreed with the majority's reading of *Kelsey S.*, concluding that there was no evidence to support rebutting Jesus's parentage and that M. should have been placed with him immediately.¹⁶⁹ The judge noted that "M.C. has been separated from Jesus for too long already, and continuing delays do not benefit her."¹⁷⁰ The language of separation in that sentence implies that Jesus and M. were together at some point, something that is not accurate. The judge also failed to discuss at all the facts that supported a finding of parentage in Irene. This silence suggests that once a presumptive father is established the inquiry ends. I find it unlikely that the concurring judge would have reasoned in this fashion had Melissa's spouse been a man asserting his status as a presumptive father.

2. Other Legal Standards That Might Apply to Jesus

States diverge widely on whether and when they allow a biological father to file for paternity of a child born to a married woman. A full examination of the

167. CAL. WELF. & INST. CODE § 316.2(d) (2001).

168. *Dawn D. v. Superior Court*, 952 P.2d 1139, 1140 (Cal. 1998).

169. *In re M.C.*, 123 Cal. Rptr. 3d at 879–80 (Rothschild, J., concurring in part and dissenting in part).

170. *Id.* at 880.

range of state statutes and court rulings is beyond the scope of this Response.¹⁷¹ In this section, I conclude that Jesus does not have a constitutional right to be declared M.'s parent. Thus, a state may weigh the interests involved and assign parentage to best achieve those interests. First, I address the impact of the U.S. Supreme Court's ruling in *Michael H. v. Gerald D.* on whether a person in Jesus's situation has a constitutional right to raise his biological child.¹⁷² Then, I specifically argue for the value of implementing an approach derived from the 2002 UPA and implemented in the District of Columbia.

The cast of characters in *Michael H. v. Gerald D.* begins with Carole and Gerald, a married couple. Carole began an affair with Michael, and from that relationship, Victoria was born in May 1981. Gerald was named as the father on Victoria's birth certificate and held himself out as Victoria's father. For the next three years, Carole and Victoria lived in a variety of households. For part of the time, they lived with Michael, who held Victoria out as his child. They subsequently lived with yet another man, after which Carole returned to her husband, and then once again became involved with Michael. From August 1983 until May 1984, Carole, Michael, and Victoria lived together, and Michael held Victoria out as his child. In June 1984, Carole reconciled permanently with her husband, Gerald.¹⁷³

Carole and Gerald responded to Michael's action to be declared Victoria's father by invoking the California statute permitting only a husband or wife, and only until the child is two years old, to move for blood tests that might dislodge the conclusive presumption that a husband living with his wife is the father of her child.¹⁷⁴ Michael challenged the constitutionality of that statute as applied to him, arguing that he had developed a father-child relationship with Victoria and thus was constitutionally entitled to be her father.¹⁷⁵

In *Lehr v. Robertson*, a nonmarital father who had no relationship with his two-year-old child was denied the opportunity to contest the child's adoption by the man her mother subsequently married.¹⁷⁶ The Supreme Court upheld this denial, articulating the following standard:

The significance of the biological connection is that it offers the natural father an opportunity that no other male possesses to develop a relationship with his offspring. If he grasps that opportunity and accepts some measure of responsibility for the child's future, he may enjoy the blessings of the parent-child relationship and make uniquely valuable contributions to the child's develop-

171. For a more complete examination of state approaches to this issue, see Appleton, *supra* note 25, at 234-36 & nn.33-39.

172. *Michael H. v. Gerald D.*, 491 U.S. 110 (1989).

173. *Id.* at 113-15.

174. *Id.* at 115.

175. *Id.* at 124.

176. *Lehr v. Robertson*, 463 U.S. 248, 267-68 (1983).

ment. If he fails to do so, the Federal Constitution will not automatically compel a state to listen to his opinion of where the child's best interests lie.¹⁷⁷

Michael produced evidence of his relationship with Victoria, including that they had lived in the same household, he had contributed to her support, and she called him "Daddy."¹⁷⁸ Thus, he argued, he met the "biology plus" test articulated in *Lehr* and was entitled to recognition as Victoria's father.

The Supreme Court upheld the California statute's applicability to Michael in a 5-4 ruling with a plurality opinion by Justice Scalia.¹⁷⁹ The plurality rejected the application of the "biology plus" test to these circumstances. Rather, it emphasized that the child was born to a married couple who wished to raise the child as their own.¹⁸⁰ Invoking history and tradition, the plurality refused to extend constitutional protection to a biological father's attempt to claim paternity of a child born to a married woman when that woman and her husband wished to raise the child in a "unitary family."¹⁸¹

The plurality noted that protecting Michael's relationship with Victoria would, by definition, deny protection to Gerald's relationship with her.¹⁸² While the dissent sought to provide Michael with the "freedom not to conform," the plurality asserted that Gerald should equivalently have a "freedom to conform."¹⁸³ Then, in a sentence of critical importance to understanding the significance of this opinion, the plurality stated, "[o]ur disposition does not choose between these two 'freedoms,' but leaves that to the people of California."¹⁸⁴

In other words, the Court did not hold that Gerald had a constitutional right to be Victoria's father. Rather, a state could *choose* to recognize either man (or both) as Victoria's father(s), and neither could raise a constitutional objection to the state's choice. This leeway suggests that a state can establish its own rules concerning the legal parentage of a child born to a married lesbian couple, conceived through a sexual relationship that one spouse has with a man. This is especially clear for a man who does not meet the "biology plus" test.

Jesus likely did not meet the "biology plus" test. He provided some prenatal assistance when Melissa asked for it, but then he acquiesced in her return to Irene and did not pursue any claim for parentage of M. when she was born. He had less of a relationship with Melissa than Jonathan Lehr had with the mother

177. *Id.* at 262.

178. *Michael H.*, 491 U.S. at 143-44.

179. *Id.* at 110.

180. *Id.* at 129.

181. *Id.* at 129 & n.7.

182. *Id.* at 130.

183. *Id.* (internal quotation marks omitted).

184. *Id.*

of his biological child.¹⁸⁵ Had Melissa chosen to place M. for adoption, Jesus would not have qualified as a presumed father and his consent to M.'s adoption would not have been required. Under *Lehr*, there would have been no constitutional infirmity in that result.

The U.S. Supreme Court has never directly decided the issue raised in *Kelsey S.*, namely whether a nonmarital biological father who comes forward at the moment of a child's birth has a constitutional right to be a parent if he is blocked from developing the "plus" part of "biology plus" by the actions of the child's mother.¹⁸⁶ Jonathan Lehr alleged that his child's mother had concealed herself and the child from him. The dissenting opinion, but not the majority, noted this allegation.¹⁸⁷ Because the Court upheld the statutory scheme under which Lehr did not receive a hearing, there was never an adjudication of the truth of this allegation. And because the majority did not need a resolution of that factual dispute to determine the constitutionality of the New York scheme, some courts have inferred that the "plus" in the "biology plus" is satisfied only by actually developing a relationship with the child.¹⁸⁸ Because Jesus did not meet the *Kelsey S.* test, it is not necessary to go that far to reject any claim Jesus might make to a constitutional right to be M.'s father

a. Uniform Parentage Act. Given the variation in existing state laws on the legal status of a biological father of a child born to a married woman, the National Conference of Commissioners of Uniform State Laws (NCCUSL) had numerous options before it during its revision of the Uniform Parentage Act. The 2002 UPA continues a parentage presumption for a man who is married to the mother as well as for a man who "for the first two years of the child's life . . . resided in the same household with the child and openly held out the child as his own."¹⁸⁹ Section 106 concerns determinations of maternity and reads as follows: "Provisions of this [Act] relating to determination of paternity apply to determinations of maternity."¹⁹⁰

The 1973 UPA on which California's statute is modeled did not contain a time requirement for presumptive parentage based on "holding out." That is why Irene met that standard. Under the 2002 UPA, Irene is not a presumptive parent based on holding M. out as her child because she did not live with M. for two years. She is, however, M.'s presumed mother by operation of her marriage to Melissa.

NCCUSL had to evaluate the marital and "holding out" presumptions in light of the fact that DNA testing can now determine with close to 100% certainty

185. Lehr lived with the mother for two years before the child was born and visited her every day she was in the hospital after the child's birth. He also saw her and the child when he could locate them and when she permitted it. *Lehr v. Robertson*, 463 U.S. 248, 269 (1983) (White, J., dissenting).

186. See *Adoption of Kelsey S.*, 823 P.2d 1216, 1217 (Cal. 1992).

187. *Lehr*, 463 U.S. at 269 (White, J., dissenting).

188. See, e.g., *In re Adoption of T.B.*, 232 P.3d 1026, 1033 (Utah 2010).

189. UNIF. PARENTAGE ACT § 204(a)(5) (amended 2002).

190. *Id.* § 106 (alterations in original).

whether a man is the biological father of a child. After weighing what it frankly deemed “difficult issues,”¹⁹¹ NCCUSL determined that when a child has a presumed parent, then the mother, presumed father, or another party who wants to challenge that parentage must bring an action before the child’s second birthday. The only exception is if the couple was not cohabiting or having sexual intercourse during the probable time of conception *and* the presumed father never held the child out as his own.¹⁹² In other words, even if the couple was not living together or having sexual intercourse, if the husband holds the child out as his own, the two-year limitation applies.

The comment to this section acknowledges that the majority of states allow an “outsider” to the marriage to challenge a husband’s parentage.¹⁹³ NCCUSL rejected that result and sought a middle ground by limiting the opportunity for challenges to two years.¹⁹⁴

No state allowed same-sex couples to marry when the 2002 UPA was ratified. Hence, there was no reason for NCCUSL to address the presumption of parentage for a same-sex spouse. But under a gender-neutral reading pursuant to § 106, a woman married to a woman who gives birth is a presumptive parent. Any challenge to her parentage must be brought before the child is two years old. The exception that would allow a challenge beyond the two years applies only if she never held the child out as her own. Because the 2002 UPA affirms the parentage of a husband even if he could not have been the child’s biological father, as long as he holds the child out as his own, the same principle should apply to a nonbiological mother.

The 2002 UPA contemplates that the parentage presumption will be rebutted if genetic testing reveals that the husband is not the biological father of the child.¹⁹⁵ But the ability to rebut the presumption, even in the first two years, is not absolute. Under § 608, the court has the authority to deny a motion for genetic testing, effectively leaving the presumption of parentage intact if, by clear and convincing evidence, “(1) the conduct of the mother or the presumed or acknowledged father estops that party from denying parentage; and (2) it would be inequitable to disprove the father-child relationship between the child and the presumed or acknowledged father.”¹⁹⁶ The court is to consider the child’s best interests, including all of the following factors:

- (1) the length of time between the proceeding to adjudicate parentage and the time that the presumed or acknowledged father was placed on notice that he might not be the genetic father;

191. *Id.* § 607 cmt.

192. *Id.* §§ 607(b)(1)–(2).

193. *Id.* § 607 cmt.

194. *Id.*

195. *Id.* § 631(1).

196. *Id.* § 608(a).

- (2) the length of time during which the presumed or acknowledged father has assumed the role of father of the child;
- (3) the facts surrounding the presumed or acknowledged father's discovery of his possible nonpaternity;
- (4) the nature of the relationship between the child and the presumed or acknowledged father;
- (5) the age of the child;
- (6) the harm that may result to the child if presumed or acknowledged paternity is successfully disproved;
- (7) the nature of the relationship between the child and any alleged father;
- (8) the extent to which the passage of time reduces the chances of establishing the paternity of another man and a child-support obligation in favor of the child; and
- (9) other factors that may affect the equities arising from the disruption of the father-child relationship between the child and the presumed or acknowledged father or the chance of other harm to the child.¹⁹⁷

The comment following this section notes that the most common situation in which it expects a motion for genetic testing to be denied is when a presumed father knows that the child is not his genetic child but both he and the mother affirmatively accept his role as the child's father.¹⁹⁸

The spirit of this section of the UPA, if not the letter, is applicable to same-sex couples. No genetic testing is necessary to disprove the biological connection between the female spouse and the child.¹⁹⁹ But the limitation on genetic testing acknowledges that even when the child is young there are instances in which the presumption of parentage should not be disturbed. Those circumstances are directly transferable to a child born to a same-sex married couple.

Running the *In re M.C.* facts through the 2002 UPA produces the following result. Irene is M.'s presumed parent based on her marriage to Melissa. Either Melissa or Jesus can file an action to rebut that presumption. The court need not rebut the presumption, however, if it is satisfied by clear and convincing evidence that the two-prong test in this section is met. Even if Melissa might be estopped from denying Irene's parentage—a debatable result—Jesus can challenge her parentage. Under the statute, he can be blocked from doing so only if Irene can show by clear and convincing evidence that it would be inequitable to

197. *Id.* § 608(b).

198. *Id.* § 608(b) cmt.

199. This is true in the ordinary situation. There are instances, however, in which one woman gives birth to a child conceived using the egg of the other woman and donor semen. *See, e.g., T.M.H. v D.M.T.*, No. 5D09-3559, 2011 WL 6437247, at *1 (Fla. Dist. Ct. App. Dec. 23, 2011).

disprove her parentage of M., considering, among other things, M.'s best interests in light of the listed factors, several of which do not apply.

Irene acted as M.'s mother for a short time, which works in Jesus's favor. But Jesus did not even meet M. until she was ten months old. Irene, on the other hand, made a commitment to M. before her birth, evidenced by her participation in prenatal care and her marriage to Melissa. The factors also demand that the court consider the chance of harm to the child. At this point, the court can properly consider that Melissa and Irene are not a family unit and that Irene has a history of violence towards Melissa. The clear and convincing standard in the 2002 UPA places the burden of proof on Irene to demonstrate that her relationship with M. should preclude Jesus's parentage. It is unlikely she can meet this burden, and the court would likely find that Jesus, and not Irene, is M.'s second parent.

b. District of Columbia. In 2009, the District of Columbia revised its parentage statutes with lesbian couples in mind. When a child is born through donor insemination, a person—including the birth mother's female partner—who consents to that insemination with the intent to be a parent is a parent of the resulting child.²⁰⁰ That provision, of course, has no relevance to determining parentage of a child conceived through sexual intercourse with a man.

An additional statutory revision created an explicit presumption of parentage for a woman who is married to, or in a registered domestic partnership with, a woman who bears a child.²⁰¹ The presumption is the same that attaches to a man who is married to or in a registered domestic partnership with a woman who bears a child.

If this presumption could be rebutted by anyone at any time on the basis of a lack of genetic connection between a woman's female spouse/partner and her child, then the presumption would be meaningless for a lesbian couple. Either spouse could disestablish the nonbiological mother's parentage on that basis, as could a biological father. The District of Columbia instead used as a jumping off point the 2002 UPA, which allows the marital presumption to be challenged, but only until a child's second birthday. Any challenge to the marital/domestic-partnership presumption, whether the spouse is male or female, must be brought before the child's second birthday.²⁰²

In the 2002 UPA, lack of genetic connection does not automatically negate the status of a presumptive parent. The UPA assumes that genetic testing is necessary to disprove a spouse's parentage. Therefore, to implement the position that the marital presumption should not automatically be rebutted based on

200. D.C. CODE § 16-909(e)(1) (2009).

201. *Id.* §§ 16-909(a-1)(1)–(2). The District of Columbia is the only jurisdiction that allows both same-sex and different-sex couples to choose either marriage or a marriage-equivalent status of domestic partnership.

202. *Id.* § 16-2342(c).

biology, the UPA gives the court the authority to deny a motion for genetic testing.

This is an underinclusive approach even for heterosexual couples. The parties involved can know that the child is another man's biological child without genetic testing. For a lesbian couple, the presumption exists with full knowledge that the spouse is not the biological parent. For these reasons, the D.C. statute gives substantive instruction to the trial court concerning adjudication of parentage.

Lack of genetic connection overcomes the marital presumption.²⁰³ But the court does not stop there. The court is directed to try the question of the child's parentage and can determine that the presumed parent is the child's parent after giving due consideration to:

- (A) Whether the conduct of the mother or the presumed parent should preclude that party from denying parentage;
- (B) The child's interests; and
- (C) The duration and stability of the relationship between the child, the presumed parent, and the genetic parent.²⁰⁴

Section A of this statute, like the estoppel related provisions of the UPA, is irrelevant to a dispute between Irene and Jesus over M.'s parentage; even if Melissa might be precluded from challenging Irene's parentage, Jesus can challenge her. The court would therefore consider the remaining two factors. Each claimant must present evidence of M.'s interests, a deliberately flexible standard. The only other factor the court is instructed to weigh is the duration and stability of each parent-child relationship. Unlike the UPA, the D.C. statute does not place on the presumed parent the burden of proving the substantive standard with clear and convincing evidence.

Under this standard, at the time of the trial court's parentage adjudication, Jesus had no relationship with M. He saw her for the first time when she was ten months old, just a couple of weeks before the court's hearing on parentage. Irene did have a relationship with her. She stepped up to support Melissa during the last half of her pregnancy, was present at M.'s birth, and cared for her on a daily basis until the couple split up. The relationship was of short duration and questionable stability, given that the split-up came when M. was less than a month old, but Irene did immediately file a court petition to maintain that relationship, which was all she could do after Melissa moved out.

Although Irene has an edge on that factor, the question of M.'s parentage in the District of Columbia would almost certainly come down to an assessment by the court as to what result is in M.'s best interest. Because the D.C. statute

203. *Id.* § 16-909(b)(1).

204. *Id.* §§ 16-909(b)(1)(A)–(C).

explicitly acknowledges that a child can have two mothers, the court is not free to base the child's interest on a preference for a one-mother/one-father model. Because the statute explicitly acknowledges that biology does not trump the marital presumption, the court is not free to base the child's interest on a preference for the biological parent.

Once the child turns two, in the District of Columbia as well as under the UPA, the existence of a biological parent outside the family unit is legally irrelevant. For a younger child, however, the statute acknowledges that biology does have significance, enough that it could possibly trump the parentage claim of the birth mother's spouse even if they remain an intact family unit.

During Melissa's pregnancy, Jesus and his family played a supportive role for as long as Melissa wanted. When she returned to Irene, Jesus's biological connection to the impending child was insufficient to cause him to insist that the child remain a part of his life and that of his family. He moved to Oklahoma, presumably with little thought to the distance this would put between him and the child and no expectation of a relationship with the child. Irene, on the other hand, stepped up to assume parental responsibility. She demonstrated this by marrying Melissa and by her participation in prenatal care and the birth and the care of M. at the beginning of her life. This weighs in her favor.

That Melissa and Irene are no longer a family unit properly plays a role in deciding M.'s parentage. There is no parentage determination that will provide M. with a single home. In a different situation, where a biological father challenges a female partner's parentage presumption but the lesbian couple remains together, the child's interest in a stable home life counsels against allowing biology to rebut the presumption.

The evidence of Irene's violence toward Melissa is an even more important factor in this case. Melissa's charges against Irene were credible enough to warrant a restraining order. Irene did not claim that the incidents were uncharacteristic and therefore unlikely to reoccur; rather she denied them entirely. Melissa's psychological problems might create some skepticism about the veracity of her claims, but the fact that one judge already issued a restraining order should put the burden on Irene to show at this point that the violence did not occur. Unless she can meet that burden, Irene's violence towards Melissa weighs heavily against a determination that her parentage of M. is in M.'s best interests. The court should also investigate Jesus for any evidence of domestic violence in his present or past relationships.

D. DOES M. HAVE THREE PARENTS?

The final question is whether M. has three parents. Understandably, there has been discontent among advocates for LGBT families about the holding that a child cannot have three parents.²⁰⁵ The holding is wrong and threatens to

205. Diane M. Goodman, *Why Can't Children Have Three Parents?*, L.A. LAW., Dec. 2011, at 36.

undermine family structures that can work well for children. But it is possible to overstate what the *In re M.C.* court got wrong. LGBT family law specialist Diane Goodman wrote in the December 2011 *Los Angeles Lawyer* that “as a result of [the *In re M.C.*] decision, this child will lose one of the adults that she considers a parent.”²⁰⁶ Goodman concluded that the case “caused a child to lose a relationship with a parental figure.”²⁰⁷

This suggests that the *In re M.C.* court should have found that this child had three parents. I am not convinced that is the correct result. M. is an infant. A finding that she has three parents means she will divide her time either between one home in Oklahoma and two in California, or, for as long as Melissa is in jail, a home in Oklahoma, a home in California, and visitation time with a mother in jail. If her primary residential home is in Oklahoma, she will have little contact with either mother or with any grandparents.

Three is not inherently better than two just because some children of LGBT parents are being raised successfully by three parents. I do not think we need to or should find three parents for M. as a matter of principle—either the principle that a child can have three parents or the principle that a woman’s female partner must be considered a parent. When there is evidence of agreement among three adults and reason to believe the three adults will cooperate in fostering an environment that is good for the child, LGBT family advocates should argue forcefully in favor of multiple parents. When those elements are lacking, they should be cautious. Indeed, indiscriminate support for multiple parents may undermine the strong arguments for recognizing more than two parents in those situations where it is warranted.

CONCLUSION: WHO ARE M.’S PARENTS?

Hard cases make bad law, and this was a hard case: a biological mother in jail, with a long history of impaired judgment and mental-health and substance-abuse problems; a nonbiological mother who stepped up, as countless men have done, and married a pregnant woman, but who had housing and job instability and a history of domestic violence; a biological father who, as countless men have also done, left behind a woman pregnant with his child to start a new life elsewhere.

The case also made bad law, three times over. The court ruled categorically that a child could not have three parents;²⁰⁸ it eviscerated the distinction between a man who does all in his power to raise his biological child and one

206. *Id.*

207. *Id.*

208. An effort is underway to overturn this holding through legislation. In February 2012, state senator Mark Leno, with an explicit reference to this case, introduced legislation that gives a judge the power to determine that a child has three parents. See Press Release, Senator Mark Leno, Bill Clarifies a Judge’s Ability To Protect Best Interests of a Child Who Has Relationships with More Than Two Parents (Feb. 24, 2012), available at <http://sd03.senate.ca.gov/news/2012-02-24-bill-clarifies-judge-s-ability-protect-best-interests-child-who-has-relationships-mo>.

who walks away from that child; and it implied that a woman bearing her own genetic child could be eliminated as the child's parent without complying with the statutory process for reuniting a child in foster care with his or her parents and without the constitutionally mandated standard of clear and convincing evidence of unfitness.

I have a hunch about this case, one that I will never be able to verify. I suspect that the trial court, and the appeals court reviewing the record, considered Melissa the least suitable of the three adults to care for M. Finding three parents gave the trial court the option to reduce Melissa's role in M.'s life. Once the appeals court ruled that M. could not have three parents, it needed to develop reasoning that would allow the trial court on remand to pick Irene and Jesus as the two parents. What the trial court actually did on remand remains under seal, and there has been no subsequent appeal that would reveal its determination.

Given the general principles that guide me and the legal framework I advocate, I would have a court adjudicate this case as follows: Melissa and Irene start out as M.'s parents; Jesus does not. Jesus, however, can file a parentage action on the basis of his biological connection to M. Once his biological status is established, the court must determine whether he or Irene is M.'s second parent. His biological tie should not automatically trump Irene's status as M.'s presumed parent. Rather, the court should make a frank assessment of M.'s best interests, in which Jesus and Irene have equal footing. It should look backward at the relationship—or lack thereof—between M. and each contender, and it should look forward at M.'s prospects for a stable and healthy childhood.

Because the trial court in *In re M.C.* did not follow this template, the determination of M.'s placement in early 2010 was made without developing the facts necessary to evaluate fully both Irene and Jesus. The discernible facts, however, point towards giving Jesus an opportunity to develop the relationship with M. that he once relinquished. A court determined in July 2009, before M. entered foster care, that Irene's visitation with M. should be supervised, likely because of her propensity to violence. I want to know more than the appellate opinion and briefs reveal about the quality of those visits, about Irene's job and housing status, and about the likelihood that her violence will reoccur.

I also want to know more about the quality of Jesus's relationship with his fiancée and about whether there is any reason to be concerned that he, too, may resort to violence. If there is no such reason, and because of Melissa and Irene's deficiencies, the court should withhold an ultimate determination of parentage for six months and place M. with Jesus during that period. Because Jesus is in Oklahoma, M.'s contact with Irene and Melissa will be limited during those six months. But that is the lesser evil in this case, which aims to provide M. with a permanent home that will best serve her interests. If M. thrives in those six months, and Jesus does well with responsibility for both M. and the child his fiancée will bear, he should be found M.'s parent.

During that six month period, Melissa should receive the reunification services to which she is entitled. She may be released from jail, and she should have the opportunity for the mental-health and substance-abuse treatment she needs. At the end of six months, the court has one more decision to make. Melissa's ability to parent may improve with services, or it may deteriorate in spite of those services. Assuming Irene retains an interest in parenting M. and that there is reason to believe this would be good for M., the court should have the option of continuing the status quo for an additional six months. After Melissa receives twelve months of reunification services, there will be evidence about her ability to parent, and it will be appropriate to terminate her parental rights if she can be proven unfit by clear and convincing evidence. Then, and only then, Irene could be declared M.'s second parent.

This could leave the decision on M.'s parentage in limbo for a year. That is not ideal, but if she thrives with Jesus, then the question of whether Melissa or Irene is her second parent can await determination. Once a final determination is made, the juvenile court need not stay involved; the case becomes a private dispute between Jesus and either Melissa or Irene, in which Jesus receives sole custody and Melissa or Irene has some amount of supervised or unsupervised visitation. If either Melissa or Irene is not a parent, then her continuing contact with M. lies within the discretion of M.'s parents.

To be clear, the resolution I propose here is based on the facts in this case. In a different case, a man in Jesus's position who relocated and made no effort to assert parental status until the child was over six months old would not prevail over a nonbiological mother coparenting with the child's biological mother; the court would weigh his claim based on biology with the claim of the presumed mother who had functioned pre- and post-birth as the child's parent and, if warranted on the facts, find the nonbiological mother, not the father, a parent. A statutory scheme like that provided in the District of Columbia, building on the framework of the current UPA, would allow for such a result. And under different circumstances, of course, I would find all three adults to be parents, a result the law should allow.

If I had used the facts of *In re M.C.* to develop a final exam question for my family law course, my students would have thought I had an overactive imagination. Once again, the complicated lives of real people prove a reminder that family law must account for heterogeneity rather than pretend that there is one family form that can be neatly circumscribed. Same-sex couples, male and female, will raise children conceived through sexual intercourse. Examining what the *In re M.C.* court got right, and what it got wrong, should aid in developing the guidelines, through statutes and case law, for assessing parentage in those, and other complex, families.