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A Mother Should Not Have to Adopt Her Own Child: Parentage Laws for Children of Lesbian Couples in the Twenty-First Century

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ARTICLE

A MOTHER SHOULD NOT HAVE TO ADOPT HER OWN CHILD: PARENTAGE LAWS FOR CHILDREN OF LESBIAN COUPLES IN THE TWENTY-FIRST CENTURY

Nancy D. Polikoff[†]

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[†] Professor of Law, American University Washington College of Law. I would like to thank Emily Stark, Class of 2009, and Emily Ames, Class of 2011, Washington College of Law, for their research assistance. I am deeply appreciative of the work on these issues by current and former attorneys at the National Center for Lesbian Rights, especially Shannon Minter, Liz Seaton, and Courtney Joslin. I also thank Courtney Joslin for her careful and important comments on a draft of this article and Susan Appleton for her review and insights. Portions of Part I of this article have been adapted from Nancy D. Polikoff, *Beyond (Straight and Gay) Marriage* (2008), reprinted by permission of Beacon Press, Boston.

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INTRODUCTION

*Susan Love and Helen Cooksey
Joyfully Announce the Birth of Their
Daughter
Katherine Mary Love-Cooksey
"Katie"
April 30, 1988
Eight Pounds, ½ Ounces
21 Inches
Boston, Mass.¹*

The year after Katie's birth I used this announcement of her arrival to frame an article about the lack of legal protections for families consisting of lesbian couples and their children.² Twenty years later, in this article, I consider briefly how the law has developed for families like Katie's and then present the additional reforms necessary to ensure the economic and emotional security that all children born to lesbian couples deserve.

In 1989, families like Katie's were little known in culture or law. No appellate court had ruled on the ability of a mother's same-sex partner to adopt the child they planned for together. No appellate court had ruled on a nonbiological mother's claim that she should be allowed to raise the child if the biological mother died, or have rights to custody and visitation with the child if the two mothers separated.

Lesbian mothers had been in the courts for well over a decade, but in cases arising after their heterosexual marriages ended. In those cases, they argued that their ex-husbands should not be able to deny them custody of their children based on their sexual orientation.³ Those cases raised the first generation of lesbian mother legal issues. Early scholarship urged a legal standard requiring proof of harm to a child before a mother's lesbianism could result in a loss of custody.⁴ Scholars and lawyers debunked pervasive myths about gay and

1. GAY COMMUNITY NEWS (Boston), June 19-25, 1988, at 3, col. 4, *reprinted in* 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, 461 (1990) [hereinafter Polikoff, *This Child Does Have Two Mothers*].

2. Polikoff, *This Child Does Have Two Mothers*, *supra* note 1, at 461.

3. *See, e.g.*, O'Harra v. O'Harra, No. 73-384 E (Or. Cir. Ct., June 18, 1974), *aff'd*, 530 P.2d 877 (Or. Ct. App. 1975); Townend v. Townend, 1 Fam. L. Rep. 2830 (Ohio Ct. Com. Pl. 1975).

4. *See* Nan D. Hunter & Nancy D. Polikoff, *Custody Rights of Lesbian Mothers: Legal Theory and Litigation Strategy*, 25 BUFF. L. REV. 691, 693 (1976); Rhonda R. Rivera, *Our Straight-Laced Judges: The Legal Position of Homosexual Persons in the United States*, 30 HASTINGS L.J. 799, 888 (1978); Julie Shapiro, *Custody and Conduct: How the Law Fails*

lesbian parents and urged rulings grounded in which parent could best meet a child's needs rather than in assumptions of the harm caused by living with a gay or lesbian parent.⁵

By the time Katie was born, however, lesbian couples in many parts of the country had begun having children using assisted conception or adoption. The phenomenon was new enough that I spent the first two sections of my article documenting and describing such families.⁶ I also documented the handful of trial courts that had granted second-parent adoptions, all in Alaska, California, and Washington, and described several pending cases in which the couple had separated and the nonbiological mother was challenging the biological mother's refusal to permit her any contact with their child.⁷

In the article, I argued that existing adoption statutes should be interpreted to permit adoption by a mother's same-sex partner, and I articulated a number of theories that would support continuation of the relationship between a child and the nonbiological parent if the couple's relationship ended.⁸ In the ensuing years, second-parent adoption has become available in several states, but remains impossible in others; in some states, such adoptions have been granted by particular trial judges but never tested on appeal.⁹ In numerous cases where there has been no second-parent adoption, lawyers have urged courts to recognize intended, functional parental relationships and to reject narrow definitions of parentage dependent upon biology, heterosexual marriage, or

Lesbian and Gay Parents and Their Children, 71 IND. L.J. 623, 643 (1996).

5. More recent scholarship articulates the proper test differently, urging a rule that a parent's sexual orientation is irrelevant to a custody determination. See Michael S. Wald, *Adults' Sexual Orientation and State Determinations Regarding Placement of Children*, 40 FAM. L.Q. 381, 386 (2006). Additionally, the American Law Institute (ALI) Principles of the Law of Family Dissolution prohibit a court from considering the sexual orientation of a parent, except upon a showing that such conduct causes harm to the child. See ALI PRINCIPLES OF THE LAW OF FAMILY DISSOLUTION § 2.12(1)(d) (ALI 2002).

6. Polikoff, *This Child Does Have Two Mothers*, *supra* note 1, at 459-68.

7. *Id.* at 522-25, 533-42. I also described three cases in which the biological mother had died and her relatives were litigating against the nonbiological mother for custody of the child. *Id.* at 527-34.

8. *Id.* at 483-522.

9. See FAMILY EQUALITY COUNCIL, STATE-BY-STATE: SECOND PARENT ADOPTION LAWS (2008), http://www.familyequality.org/resources/publications/secondparent_withcitations.pdf. There is a technical distinction between joint and second-parent adoption. The term "joint adoption" generally refers to a couple adopting together a child who is not the child of either of them. The term "second-parent adoption" generally refers to the partner of a parent (either biological or adoptive) adopting that parent's child without terminating the parental rights of the partner who is already a parent. Some courts interpret their adoption statutes to require joint adoption, even when one partner is already a parent. See *In re Adoption of Tammy*, 619 N.E.2d 315, 321 (Mass. 1993) (reading the "termination provision" in the Massachusetts adoption statute as inapplicable when the natural parent and her partner jointly file the adoption petition). For purposes of this article, I use the term "second-parent adoption" whenever one partner is already a child's parent, even if the legal theory that permits both of them to become the child's legal parents is joint adoption.

adoption.¹⁰ Over the past twenty years, they have met with mixed success.¹¹

Katie Love-Cooksey's infancy and youth corresponded with the earliest years of these second-generation lesbian mother legal issues. Katie herself played a feature role in the development of the law. In 1993, the Massachusetts Supreme Judicial Court ruled that Susan, Katie's biological mother, and Helen, her nonbiological mother, could file a joint adoption petition that would enable Helen to become Katie's legal parent.¹² It was the first such ruling in Massachusetts and only the second appellate opinion approving second-parent adoption in the country.¹³

Second-parent adoption has proved a powerful legal device for gay and lesbian families. It is modeled on step-parent adoption, a statutory scheme that allows a biological (or adoptive) parent's spouse to adopt a child without terminating that parent's rights, thereby leaving the child with two parents. However critical this method of securing the family's legal protection remains—and will remain for the foreseeable future—there is a conceptual flaw in analogizing same-sex couples to a step-family.

A step-family forms after a child already exists. The child lives with one

10. Two of the earliest cases showing the obstacles facing legally unrecognized mothers were *Alison D. v. Virginia M.*, 572 N.E.2d 27 (N.Y. 1991), and *Nancy S. v. Michele G.*, 279 Cal. Rptr. 212 (Ca. Ct. App. 1991). Among the earliest successful cases drawing upon these theories were *V.C. v. M.J.B.*, 748 A.2d 539 (N.J. 2000), and *In re H.S.H.-K.*, 533 N.W.2d 419 (Wis. 1995). Another set of issues arose involving disputes over the legal status of a known semen donor. See, e.g., *Thomas S. v. Robin Y.*, 618 N.Y.S.2d 356 (N.Y. App. Div. 1994); *Leckie v. Voorhies*, 875 P.2d 521 (Or. Ct. App. 1994).

11. For a review of cases going both ways, see NATIONAL CENTER FOR LESBIAN RIGHTS, STATE BY STATE LIST OF SAME-SEX CUSTODY CASES, available at http://www.nclrights.org/site/PageServer?pagename=issue_families_docsDownloads. First-generation lesbian mother legal issues have not disappeared. Women still come out as lesbians after they have married and had children. In parts of the country, they still face discrimination if their ex-husbands seek to restrict their contact with their children. See, e.g., *Burns v. Burns*, 560 S.E.2d 47 (Ga. Ct. App. 2002) (awarding custody of Susan Burns's three children to her ex-husband and stating that the children could not visit her if at any time during their stay she was living with or spending overnights with a person to whom she was not legally married).

12. Adoption of Tammy, 619 N.E.2d 315, 321 (Mass. 1993). Although Susan and Helen's first names are used in the court's opinion, Katie's name is changed to Tammy, in keeping with the general practice of redacting names in adoption rulings, a custom designed to preserve the child's privacy. Because Katie herself has spoken publicly about her family and the court ruling that allowed Helen to adopt her, I identify her here. See Guianna Henriquez, *A Teen with Two Moms*, LA YOUTH, Mar.-Apr. 2005, available at <http://www.layouth.com/modules.php?op=modload&name=Issue&action=IssueArticle&aid=950&nid=58>.

13. The first was *In re Adoptions of B.L.V.B. & E.L.V.B.*, 628 A.2d 1271 (Vt. 1993) (granting second-parent adoption). The first trial court ruling reported in any legal publication was an opinion from the District of Columbia. *In re Petitions of L.S. and V.L.*, 17 Fam. L. Rep (BNA) 1523 (1991). But see *In re Angel Lace M.*, 516 N.W.2d 678 (Wis. 1994) (holding second-parent adoption impermissible under Wisconsin's adoption statute).

parent. That person marries or remarries. If the child has no second parent, the step-parent adoption is relatively simple. If there is a second parent, that person must consent to a termination of his parental rights, or the termination must be obtained through a judicial proceeding, and only then can the adoption take place.

A lesbian couple, on the other hand, plans for a child together. From before birth, the child-to-be has two parents. The nonbiological mother is not a step-parent. The closest analogy to her situation is that of an infertile husband whose wife, with his consent, conceives using donor semen. *That husband does not have to adopt his child.*

Thus, there is now a third generation of lesbian mother legal issues, raised by the question that nonbiological lesbian mothers often ask: "Why should I have to adopt my own child?" In this article I describe what statutes would need to be in place for that mother to be a legal parent-to-be from the moment of conception and a legal parent from the moment of birth. No adoption necessary.

In Part I of this article, I briefly describe the historical relationship between marriage, biology, and legal parenthood. I do this to imbue the project I undertake here with a sense of ordinariness. The effort to determine when and how a lesbian couple becomes the legal parents of a child born to one of them is not an effort to fit the square peg of two mothers into the round hole of the "natural" way of becoming a parent, because there is not, and never has been, a "natural" way of becoming a legal parent.

In Part II, I turn specifically to lesbian couples. I describe existing American statutes under which a lesbian partner of a biological mother is the legal parent of their child. These fall into two groups: statutes extending the legal consequences of marriage to same-sex couples who marry or enter civil unions or domestic partnerships; and general parentage statutes, enacted without contemplating lesbian couples, that courts have applied to find the partner of a biological mother a parent. Neither of these frameworks addresses all the issues necessary to a comprehensive approach to parentage determinations in these families. Even a recent Delaware statute, which was written with same-sex couples in mind, falls short because it likely requires a court determination that the partner of the biological mother is a parent.

From there, I describe what a statutory scheme might encompass if written with lesbian couples specifically in mind. In Part III, I explain statutory reforms in Quebec and other Canadian provinces, in Australia, and in a number of European countries that specifically establish parentage for both mothers when a child is born using assisted conception.

In Part IV, I present the complete package of law reform necessary to protect children of lesbian couples. Those reforms should include a gender-neutral and marital status-neutral provision creating parentage for the partner of a woman who conceives using donor insemination; a presumption of parentage based on a couple's marriage, civil union or domestic partnership; the basis for

rebutting that presumption; and instructions for proper registration of parentage on a child's birth certificate.

The recently enacted District of Columbia Domestic Partnership Judicial Determination of Parentage Act of 2009 contains provisions that can serve as a model for other jurisdictions.¹⁴ This legislation borrowed heavily from recent model statutes that contemplate two mothers for a child born of assisted conception.

With these statutes in place, the child of a lesbian couple begins life with two legally recognized parents. In Part V, I address the possibility that, if the family moves, a different state might try to deprive that child of one of her parents. Litigation surrounding any such effort will be part of this third generation of lesbian mother legal issues.

Katie Love-Cooksey had two parents, whose last names she shared, from the moment she was born. Until Helen's adoption petition was granted when Katie was 5, however, Katie and Helen were legal strangers. Even where second-parent adoption is available today, the couple must hire a lawyer and participate in what can be both a lengthy and expensive legal process. Until a judge signs the adoption decree, the nonbiological mother and her child are legal strangers. For families unfamiliar with these procedures, without the resources to pursue them, or without full comprehension of the ramifications of failure to do so, the nonbiological mother and her child remain legal strangers.

To a child, in daily life, the absence of an adoption decree makes no difference. In the hearing about Katie's adoption, numerous witnesses testified that she had always related to both Susan and Helen as her parents.¹⁵ The legal status becomes crucial, however, when the child's economic and emotional security are challenged. Then many rights—such as support and custody, public benefits and inheritance—turn not on the child's perception but on the existence of a legally recognized parent-child relationship.¹⁶ For the law to catch up to families like Katie's, it needs to acknowledge that children of lesbian couples have two mothers from the beginning and that no legal proceeding is necessary to establish that fact.

I. THE REVOLUTION IN LEGAL PARENTAGE HAS ALREADY OCCURRED

Legal parentage has always been a matter of law. I state something that sounds so obvious because it is easy to forget. We have testing that can determine genetic parenthood to a virtual certainty. It may seem a small step

14. DOMESTIC PARTNERSHIP JUDICIAL DETERMINATION OF PARENTAGE ACT OF 2009, D.C. A18-0084 (D.C. 2009), 56 D.C. Reg. 4269 (June 5, 2009), *available at* <http://www.dccouncil.us/images/00001/20090511122621.pdf>. The law went into effect July 18, 2009, as D.C. Law 18-33. *See* 56 D.C. Reg. 6135 (Aug. 7, 2009).

15. *In re* Adoption of Tammy, 619 N.E.2d 315, 317 (Mass. 1993).

16. *Id.* at 321.

from that to an instinctive notion that a child's "real" parents are those individuals whose genetic material produced that child. Many laws retain the term "natural parent," which sounds like it must be a reference to biology.¹⁷

The historical relationship between biology and legal parenthood, however, is more complex. This Part describes that history, highlighting the most revolutionary development in family law in the last half of the twentieth century: the end of the legal distinction between children born to married women and those born to unmarried women. Although that development increased the legal significance of a biological connection to a child, biology has not become the singular determinant of legal parentage.

A. Parentage Without Marriage: The End of the Stigmatized Legal Status of "Illegitimacy"

For most of our history, not just in America but in the common law tradition from which we get our laws, a child's legal parents were the mother who gave birth to that child and the man to whom she was married.¹⁸ As a matter of law, that man's biological connection to the child was irrelevant. If the child's mother was unmarried, then the child had no legal father. Again, a man's biological connection to the child was irrelevant. While biology looms large today in colloquial discussions of who a child's parents are,¹⁹ the law had little interest in that question until the last half-century.

It is true that only recently has science provided the tools to ascertain biological parenthood to a virtual certainty, but that does not account for all of the law's past indifference to biology as a determinant of parenthood. A man "openly and notoriously" cohabiting with a woman, holding himself out as the father of her child for all the community to see, was not a legal parent unless he was married to the child's mother.²⁰ Until modern times, it was *a man's relationship to a child's mother*, not his biological relationship to the child, that determined his legal status.

17. See, e.g., CAL. FAM. CODE § 7601 (1994) (defining "parent-child relationship" as the legal relationship existing between a child and the child's natural or adoptive parents).

18. See, e.g., Mary R. Anderlik & Mark A. Rothstein, *DNA-Based Identity Testing and the Future of the Family: A Research Agenda*, 28 AM. J.L. & MED. 215, 222 (2002) (discussing the development of the English "marital presumption," and noting that "[i]f a husband, not physically incapable, was within the four seas of England during the period of gestation, the court would not listen to evidence casting doubt on his paternity").

19. There is no greater illustration of this than the massive amount of media speculation after Michael Jackson's death about who was the "father" of his children. See, e.g., *Larry King Live* (CNN television broadcast July 8, 2009), <http://www.cnn.com/video/#/video/showbiz/2009/07/08/sot.klein.mj.dr.cnn?iref=videosearch> (showing CNN's Larry King asking Dr. Arnold Klein if he was the father of the Jackson children).

20. See e.g., *In re Stanley*, 256 N.E.2d 814 (Ill. 1970). Though later overturned by the United States Supreme Court, see *infra* note 31, *In re Stanley* illustrates the role of marriage in determining legal paternity.

No change I propose here to the American law of parentage could have nearly as much revolutionary impact as the end of the legal distinction between children born to married women and those born to unmarried women. Discrimination against children born outside marriage and their mothers was the primary method of enforcing the prohibition on nonmarital sex. Although sex outside marriage was largely unlawful, criminal prosecution was uncommon. What was common was the social stigma and legal disadvantage attached to nonmarital birth.²¹

A revolution in sexual mores was among the cultural changes that accompanied the social and political movements of the 1960s. The birth control pill was introduced in 1960, providing women for the first time with a reliable means of being sexually active and avoiding pregnancy. "Make love, not war" was the refrain of a generation. Although a sexual "double standard" lingered between women and men, this was decried by a robust second-wave feminist movement. Researchers William Masters and Virginia Johnson conducted groundbreaking studies of sexuality.²² They identified women's sources of sexual satisfaction and demonstrated, among other things, that women could achieve sexual fulfillment without men.²³ As hostility to nonmarital sex decreased, legal doctrine reflecting condemnation of such sex became less defensible.

Some distinctions between children born to a married mother and those born to an unmarried mother abated over time, but those remaining were out of step with the social and political changes of the 1960s. In 1966, Illinois law professor Harry Krause published an article voicing the idea, radical at its time, that U.S. law should further reduce this distinction. Krause argued that the

21. For centuries such children had been *filius nullius*, the child of no one, meaning they had no legally recognized relationship with, including no right to support from, their mother or father. HARRY D. KRAUSE, *ILLEGITIMACY: LAW AND SOCIAL POLICY* 25-28 (1971). There were once places where a "bastard" could not hold public office or testify in court, could be denied burial, and could be murdered with only minimal criminal consequences. Harry D. Krause, *Equal Protection for the Illegitimate*, 65 MICH. L. REV. 477 (1967). Until the 1960s, pregnancy and childbirth were hard-to-avoid consequences of sex; abortion was illegal and effective contraception was either illegal or difficult to obtain. Teenage pregnancy rates peaked in the 1950s, but births outside marriage were relatively rare, due to "shotgun weddings" pressed by the woman's family. Of those who did not marry, over 25,000 a year went to more than 200 "unwed-mother" homes where they gave birth secretly and almost always surrendered their children for adoption. Women who kept their children, including the black women who were excluded from most of the unwed-mother homes, faced harsh state policies, including denial of public assistance and eviction from public housing. Doctors sometimes sterilized them without their knowledge or consent. Their children's birth certificates were sometimes stamped "bastard." See generally ANN FESSLER, *THE GIRLS WHO WENT AWAY* (2006); RICKIE SOLINGER, *WAKE UP LITTLE SUSIE* (1992).

22. See WILLIAM MASTERS & VIRGINIA JOHNSON, *HUMAN SEXUAL RESPONSE* (1966); WILLIAM MASTERS & VIRGINIA JOHNSON, *HUMAN SEXUAL INADEQUACY* (1970). See also JOHN D'EMILIO & ESTELLE B. FREEDMAN, *INTIMATE MATTERS: A HISTORY OF SEXUALITY IN AMERICA* 312 (1988).

23. MASTERS & JOHNSON, *HUMAN SEXUAL RESPONSE*, *supra* note 22, at 133-34.

second-class status of nonmarital children came from “ancient prejudice based on religious and moral taboos that properly are losing their taboo status.”²⁴

Krause took his ideas to the U.S. Supreme Court, where children and parents harmed by the different status given marital and nonmarital children invoked the Equal Protection Clause to argue that the distinctions were unconstitutional. In 1968, in *Levy v. Louisiana*, surviving nonmarital children challenged a Louisiana statute that denied them the ability to recover for the wrongful death of their mother.²⁵ The state court upheld the statute because “based on morals and general welfare” it discouraged “bringing children into the world out of wedlock.”²⁶

Louisiana defended its laws by arguing that it was not trying to punish or discriminate. Rather, the law was trying to encourage marriage. The state’s brief read:

Louisiana’s purposes . . . are positive ones: the *encouragement* of marriage as one of the most important institutions known to law, the preservation of the legitimate family as the preferred environment for socializing the child . . .

Since marriage as an institution is fundamental to our existence as a free nation, it is the duty of . . . Louisiana to encourage it. One method of encouraging marriage is granting greater rights to legitimate offspring than those born of extra-marital unions. Superior rights of legitimate offspring are inducements or incentives to parties to contract marriage, which is preferred by Louisiana as the setting for producing offspring.²⁷

The Supreme Court rejected such reasoning. In a companion case, the Court struck down a statute denying a mother the right to recover for the wrongful death of her nonmarital child.²⁸ Illegitimate children were human beings, “persons” within the Constitution’s Equal Protection Clause. In the *Levy* case, they had been dependent on their mother, who had died as a result of medical malpractice. The Court refused to allow the wrongdoers to escape responsibility for their negligence simply because the children were born outside of marriage.²⁹ Encouraging marriage and expressing disapproval of nonmarital sex were no longer constitutionally sufficient reasons to deny rights to children and their parents.

In 1972, the Court found unconstitutional a state scheme that awarded worker’s compensation death benefits to a father’s four legitimate children but not his two “illegitimate” ones, even though he lived in one household with all

24. Harry D. Krause, *Bringing the Bastard into the Great Society: A Proposed Uniform Act on Legitimacy*, 44 TEX. L. REV. 829, 830 (1966).

25. 391 U.S. 68 (1968).

26. *Levy v. State*, 192 So.2d 193, 195 (La. App. 1966).

27. Brief for the Attorney General, State of Louisiana as Amicus Curiae, *Levy v. Louisiana*, 391 U.S. 68 (1968).

28. *Levy*, 391 U.S. at 72; *Glonn v. Guarantee & Liab. Ins. Co.*, 391 U.S. 73 (1968).

29. *Levy*, 391 U.S. at 72.

of them.³⁰ That same year, the Supreme Court further reduced the legal significance of marriage.

In *Stanley v. Illinois*, Peter Stanley challenged an Illinois law that automatically made his children wards of the state when their mother died.³¹ If Peter Stanley and the mother of his children had been married, the state would not have stepped in to take custody. The Court ruled that the state could not presume Stanley unfit simply because he was never married to the children's mother.³² Stanley had a constitutional right to raise his children; marriage was irrelevant. In so ruling, the Court overturned centuries of law that created a father-child relationship only for a man married to a child's mother.

By the time of *Stanley*, the sexual revolution was well underway. The rule disregarding Stanley as the parent of his nonmarital children was consistent with established law, but it was clearly not good for the children. If the state had removed the children from their home after their mother died, it would have deprived them of their sole remaining parent. The Court dispensed with centuries of law to avoid an unwise result.

The outcome of *Stanley v. Illinois* may seem obvious today—how could it possibly be in children's best interests to lose their father after they had lost their mother? But it was extraordinary in 1972. The decision required *every* state to revise its laws. That is as close as it gets to a legal revolution. The next year, the Court ruled that children's right to support payments from their father could not turn on whether their father had been married to their mother.³³

Harry Krause also influenced the National Conference of Commissioners on Uniform State Laws (NCCUSL) to address the issue of nonmarital children. His work led to the Uniform Parentage Act (UPA), written between 1969 and 1972.³⁴ It was adopted in some form in nineteen states, and it greatly influenced new laws in every state.³⁵ In less than a decade, the legal doctrine of

30. *Weber v. Aetna Cas. & Sur. Co.*, 406 U.S. 164 (1972). By now Associate Justice (and future Chief Justice) William Rehnquist had joined the Court. He alone dissented, accepting the state's interest in discouraging "illicit family relationships." *Id.* at 177 (Rehnquist, J., dissenting).

31. 405 U.S. 645 (1972).

32. *Id.* at 658.

33. *Gomez v. Perez*, 409 U.S. 535 (1973).

34. UNIF. PARENTAGE ACT (1973) [hereinafter UPA].

35. See Prefatory Note, UNIF. PARENTAGE ACT (2002) ("As of December, 2000, UPA (1973) was in effect in 19 states stretching from Delaware to California; in addition, many other states have enacted significant portions of it.") The influence of Harry Krause and the relevance of his analysis for the parentage of children born to same-sex couples is discussed in Mary Patricia Byrn, *From Right to Wrong: A Critique of the 2000 Uniform Parentage Act*, 16 UCLA WOMEN'S L. J. 163, 208-09, 214-20 (2007). There is reason to believe that Harry Krause would approve of reforms that recognize the parentage rights of same-sex couples. Writing on the occasion of the 16th International Congress of Comparative Law, he said, "rational law should differentiate between intimate associations on the basis of actual differences in social functions that are or can be fulfilled by particular unions. In those rational terms, far fewer differences appear between heterosexual and same-sex couples, and

“illegitimacy” had all but disappeared. Except when conception occurred with assisted reproductive technology, marriage no longer divided the country’s children into two classes, the privileged one whose parents were married and the subordinate one whose parents were not.

B. Parentage Without Biological Connection

The end of “illegitimacy” opened the door to the modern era of parentage issues. Lesbians, gay men, and single heterosexual women proudly form families that would have been both legally and socially unthinkable in an earlier era. No one—even the most ardent opponents of parenting by same-sex couples—wants to reinstate the second-class legal status historically imposed on all children born to unmarried women. But once marriage does not determine parental rights and responsibilities, the law must decide what does.

Importantly, the role once played by marriage has not been replaced by biology, even in the face of the ability to determine biological connection to a virtual certainty.³⁶ A simple fact proves this point. We do not do genetic testing of every child born to a married woman to determine if that child is the biological child of her husband, although it would be easy to do so. Instead, we name the husband the legal parent of her child, based solely upon their marriage.³⁷

The number of children born to a mother and a nonbiological father is not

far greater differences appear between child-rearing and childless couples, than many traditionalists see.” Harry D. Krause & David D. Meyer, *What Family for the 21st Century?*, 50 AM. J. COMP. L. 101, 111 (2002).

36. See Elizabeth Bartholet, *Guiding Principles for Picking Parents*, 27 HARV. WOMEN’S L.J. 323, 326-27 (2004) (“The dominant trend in law today is in the direction of reducing the importance of biology as a factor in defining parentage. Increasing emphasis is being placed on established and intended parenting relationships, with these factors sometimes weighing equally with or even outweighing biology.”). See also Deborah H. Wald, *The Parentage Puzzle: The Interplay Between Genetics, Procreative Intent, and Parental Conduct in Determining Legal Parentage*, 15 AM. U. J. GENDER SOC. POL’Y & L. 379, 381 (2007) (explaining that courts are now looking to intent and conduct as much as to marriage and biology in creating legal parent-child relationships).

37. Some scholars have pointed out that the information obtained from such testing would eliminate an entire category of litigation that now plagues family courts. No longer would men later seek disestablishment of paternity to terminate their child support obligations. Nor would a mother be able to disestablish a father’s parentage should she later desire that result. Such litigation is troublesome for children, who face an upheaval in their understanding of their family. It has produced widely disparate court decisions around the country. Biological certainty at birth would facilitate a definitive determination of legal parentage that would remain constant throughout the child’s life. See June Carbone & Naomi Cahn, *Which Ties Bind? Redefining the Parent-Child Relationship in an Age of Genetic Certainty*, 11 WM. & MARY BILL RTS. J. 1011, 1012 (2003) (suggesting that “[i]n an era when children are likely to discover the truth of their biological origins whether all of the concerned adults wish it or not, testing for biological certainty ought to be made a routine part of the birth process”).

trivial. Every year, tens of thousands of children are born to married mothers who have conceived through sexual intercourse with men other than their husbands.³⁸ Many thousands are born after insemination of the mother with donor semen.³⁹ Rather than assess biology at the child's birth and use that to assign legal parentage, our laws facilitate the formation of legal parental relationships within the context of adult relationships that are recognized by the law.⁴⁰ This method of assigning legal parentage is grounded in the expectation that the two members of the legally cognizable adult relationship will raise the child.

Beyond donor insemination of married women, there are numerous assisted reproduction methods that result in legal parentage for genetically unrelated individuals. For example, in *Buzzanca v. Buzzanca*, a California appeals court named a married couple the legal parents of a child conceived using both donor

38. One analysis of numerous studies of nonpaternity estimates that when American men have a high degree of certainty that they are the biological fathers of their children, a group that includes married fathers, nonpaternity rates are about two percent. See Kermyt G. Anderson, *How Well Does Paternity Confidence Match Actual Paternity? Results from Worldwide Nonpaternity Rates*, 47 CURRENT ANTHROPOLOGY 513, 516 (2006); see also Leslie Joan Harris, *A New Paternity Law for the Twenty-First Century: Of Biology, Social Function, Children's Interests, and Betrayal*, 44 WILLAMETTE L. REV. 297 (2007). In 2005, there were 4,138,349 births in the United States, 63.1% of which were to married women, for a total of 2,611,298. See National Center for Health Statistics, *Births/Nativity*, <http://www.cdc.gov/nchs/fastats/births.htm>. When applied to 2005 births, the two-percent estimate suggests that 52,226 children were born that year to married women who were not the biological children of the mother's husband. A recent article, describing a genealogical DNA project that uncovered many relatives whose genetic ancestors were not their identified family members, reported a 2005 analysis of seventeen studies that averaged a nonpaternity rate of four percent. See Alan Zarembo, *DNA Reveals Secrets, Lies*, L.A. TIMES, Jan. 18, 2009, at A1.

39. The country's largest sperm bank, California Cryobank, shipped 9600 vials of sperm, each good for one insemination, to single women in 2005. This accounted for one third of its business. Thus, it sent almost 20,000 vials to married women. Jennifer Egan, *Wanted: A Few Good Sperm*, N.Y. TIMES MAGAZINE, Mar. 19, 2006, at 46. Lisa Mundy writes that there are a total of 30,000 sperm donor babies a year. LISA MUNDY, EVERYTHING CONCEIVABLE: HOW ASSISTED REPRODUCTION IS CHANGING MEN, WOMEN AND THE WORLD 12 (2007).

40. Law professor Lynn Wardle writes prolifically that lesbian and gay couples should not raise children because children should be raised by their married, biological parents. After his presentation at a symposium sponsored by the *American University Journal of Gender, Social Policy, & the Law*, I asked Professor Wardle how he would rule if a married woman bore a child who was the biological child of a man with whom she had had an affair, and if the biological father, immediately after the child's birth, filed a paternity action, but the mother and her husband wished to raise the child as their own. Although he thought such a circumstance would occur rarely, he did choose the married couple as the child's parents, to the exclusion of the biological father. Thus, when family life does not comport with the ideal that Prof. Wardle professes, and a child will not be raised by her married, biological parents, Prof. Wardle prefers that the law recognize the mother's husband, not the biological father, as the child's legal parent. For a video of our exchange, see <http://media.wcl.american.edu/Mediasite/Viewer/?peid=8e6a9b7c-9521-44ad-8398-2075507b0391>.

sperm and donor eggs and born to a gestational surrogate.⁴¹ Parentage turned on the intent of all those involved in the reproductive effort. Professor Susan Appleton, in an article rejecting biology as the necessary basis of parentage, points out that, if legal parentage were dependent upon a genetic connection, we would have to do genetic testing of a birth mother as well as her husband, since the woman might have conceived using a donated egg.⁴²

Today, adoption is also a well-accepted means of becoming a parent in the absence of biology. This was not always so. Adoption was unknown at common law and therefore in the United States it required statutory authorization. The first adoption statute was not enacted until 1851 in Massachusetts.⁴³ Well into the twentieth century, adoption was a second-class legal status that did not create a parent-child relationship for all purposes.⁴⁴ Adoption still does not exist in all legal systems worldwide.⁴⁵

The question in the twenty-first century is not *whether* to recognize legal parentage in the absence of biology but *when* to do so. This Article answers that question for lesbian couples who choose to have a child together.⁴⁶

41. 72 Cal. Rptr. 2d. 280 (Cal. Ct. App. 1998).

42. Susan Appleton, *Presuming Women: Revisiting the Presumption of Legitimacy in the Same-Sex Couples Era*, 86 B.U. L. REV. 227, 270-71 (2006) [hereinafter Appleton, *Presuming Women*].

43. See Naomi Cahn, *Perfect Substitutes or the Real Thing?*, 52 DUKE L.J. 1077, 1102-05 (2003).

44. See Jan Ellen Rein, *Relatives by Blood, Adoption and Association: Who Should Get What and Why*, 37 VAND. L. REV. 711 (1984) (detailing the numerous ways in which succession laws did not keep up with adoption as a fact of modern life).

45. See D. MARIANNE BLAIR & MERLE H. WEINER, FAMILY LAW IN THE WORLD COMMUNITY 867-68 (2003) (discussing kafala, a type of legal fostering present in Islamic nations, and noting that although kafala requires fulfilling parental duties and caring for a child “in the same way a father would do for his son,” a child fostered through kafala may not use the name of the fostering family or inherit from them).

46. I deliberately limit this Article to lesbian couples. Gay male couples have children together, and the law needs to address parentage for them as well. In part, I limit this Article because surrogacy is unlawful in the District of Columbia. See D.C. CODE §§ 16-401 to -402, (2001). Those of us involved in drafting the legislation discussed in this article decided that revisiting the surrogacy ban would raise additional issues that were best left for separate consideration. See Appleton, *Presuming Women*, *supra* note 42, at 260-90 (asserting that because gestation must be viewed as performance of a parenting function, parental presumptions for gay male couples employing surrogacy must be viewed differently from parental presumptions for lesbian couples in which one partner gives birth). In the District of Columbia, the partner of a man who has a biological child with the assistance of a surrogate can be recognized as a de facto parent if he meets the statutory requirements for that status. As a de facto parent under D.C. law, he would have the same right to custody and obligation to pay child support as the child’s biological father. See notes 182-83 *infra* and accompanying text.

II. LESBIAN COUPLES UNDER CURRENT AMERICAN LAW

At the moment, the lesbian partner of a woman who bears a child can become a parent without adopting the child under two different statutory schemes. The first derives from a formalized relationship between the two women that provides the couple with all the state-based legal consequences of marriage, including the marital parentage presumption. The second occurs when a court determines that its existing statutes confer parentage on a biological mother's partner.

Neither of these paths is entirely satisfactory. The first, even in the minority of states in which it is available, leaves unanswered a number of important questions about when and by whom the presumption can be rebutted. It also leaves unprotected children born to couples who have not formalized their status. The second path consists of a handful of cases, and a newly enacted statute, that amount to the exceptions that prove the rule—that current law fails to protect most lesbian couples and their children.

A. Presuming Parentage in a Formalized Couple Relationship

Ten states and the District of Columbia allow (or are set to allow) same-sex couples to enter a formal legal status that grants the couple all or virtually all the state-based legal consequences of marriage. Massachusetts, Connecticut, Iowa, Vermont, and New Hampshire call this status marriage; the District of Columbia, California, Oregon, Washington, and Nevada call it domestic partnership; New Jersey calls it civil union.⁴⁷ In all instances, a female spouse or domestic/civil union partner of a woman who bears a child receives the same presumption of parentage that a husband receives. For example, Vermont law reads that “the rights of parties to a civil union, with respect to a child of whom either becomes the natural parent during the term of the civil union, shall be the same as those of a married couple, with respect to a child of whom either spouse becomes the natural parent during the marriage.”⁴⁸

This should mean that a civil union partner of a woman who gives birth is the child's presumptive parent, and Vermont does issue birth certificates with both women listed as parents. But the one Vermont Supreme Court case on the issue considered many facts other than the couple's civil union in determining that the nonbiological mother was a parent.⁴⁹ In a recent article in the *Des Moines Register*, a spokesperson for the Iowa attorney general suggested that the presumption of parentage does not attach to a married lesbian couple and

47. See Human Rights Campaign, *Marriage Equality and Other Relationship Recognition Laws* (Nov. 6, 2009), http://www.hrc.org/documents/Relationship_Recognition_Laws_Map.pdf.

48. VT. STAT. ANN. tit. 15, § 1204(f) (2001). Civil unions existed in Vermont from July 1, 2000, until September 1, 2009, when same-sex couples became able to marry in Vermont.

49. *Miller-Jenkins v. Miller-Jenkins*, 912 A.2d 951 (Vt. 2006).

that the nonbiological mother would still have to adopt the child.⁵⁰ An Oregon appeals court recently ruled that a female partner becomes a legal parent by consenting to her partner's insemination, but in dicta it also indicated that the presumption of parentage arising from a marriage exists only where there is the possibility that the husband is the biological parent and that therefore it cannot apply to a lesbian couple.⁵¹

The presumption should attach based on the couple's status, and all reasoning to the contrary is flawed.⁵² A husband gets the presumption regardless of his biological connection to the child. The presumption can be challenged by specified parties on specified grounds, but a husband does not have to prove his fertility and a history of sexual intercourse with his wife to show the *possibility* of biological connection—and thereby get the presumption—in the first instance.

The primary goal of the law reform urged in this article is certainty and stability of a child's relationship with both parents without requiring those parents to spend the money or time necessary for a court proceeding. Parentage based on presumption requires no court involvement; that is its strength. The Social Security Administration, for example, considers a child born to a couple in a Vermont civil union the child of both partners for the purpose of eligibility for child insurance benefits.⁵³ This is because such a child inherits without a will as the child of both partners under Vermont state law, and that satisfies the definition of "child" under the relevant federal law.⁵⁴

But the lack of a court judgment—of adoption or parentage—also renders presumptive parenthood deriving from the status of the couple vulnerable to challenge in other jurisdictions. The full faith and credit that states are mandated to afford *judgments* from the courts of other states does not extend to the operation of *statutes* from those states.⁵⁵ If the family relocates, the new

50. Jennifer Jacobs, *Gay Marriage Law's Impact on Iowans Subtle, Yet Powerful*, DES MOINES REG., June 14, 2009, at 1 (quoting Bob Brammer, spokesman for the Iowa attorney general, saying that a woman's same-sex spouse will still have to adopt because the Iowa Supreme Court's opinion does not authorize placing that spouse's name automatically on the birth certificate). The gay rights group Lambda Legal disagrees with this interpretation and is advocating a change in policy. E-mail from Camilla Taylor, Staff Attorney, Lambda Legal, to author (July 16, 2009, 09:51) (on file with author).

51. *Shineovich v. Kemp*, 214 P.3d 29, 36 (Or. Ct. App. 2009), *rev. denied*, __P.3d__ (2009).

52. See Appleton, *Presuming Women*, *supra* note 42, at 252-55.

53. Steven A. Engel, Deputy Assistant Attorney General, U.S. Dep't of Justice, Memorandum Opinion, *Whether the Defense of Marriage Act Precludes the Non-biological Child of a Member of a Vermont Civil Union from Qualifying for Child's Insurance Benefits Under the Social Security Act*, 31 Op. Off. Legal Counsel (2007), available at <http://www.justice.gov/olc/2007/saadomaopinion10-16-07final.pdf>.

54. *Id.*

55. See Courtney G. Joslin, *Interstate Recognition of Parentage in a Time of Disharmony: Same-Sex Parent Families and Beyond*, 70 OHIO ST. L.J. 563, 570-71 (2009) [hereinafter Joslin, *Interstate Recognition*].

state may not recognize the presumptive parentage of the nonbiological mother deriving from the couple's relationship, especially if the state, by its constitution or by statute, does not recognize the couple's relationship.⁵⁶

Because of this uncertainty, lawyers in the states that do have the parentage presumption for couples who marry, enter civil unions, or register domestic partnerships urge their clients to nonetheless complete a second-parent adoption or obtain an order of parentage.⁵⁷ But uncertain is not the same as valueless. The parentage presumption does confer parentage, and advocates for lesbian couples and their children are prepared to defend that status against challenges.

The parentage presumption for a same-sex spouse/partner, however, goes only part of the way in settling the child's parentage. The law of the state creating the presumption needs to settle when, by whom, and on what grounds the presumption can be rebutted. Sometimes state law is unsettled about when, by whom, and on what grounds the presumption in a *husband* is rebutted.⁵⁸ Even if that standard is clear, it may be a poor fit to apply the identical standard to a presumption attaching to a same-sex partner. If lack of a biological tie *always* rebuts the presumption, or if lack of biology is the *only* way to rebut the presumption, a court does not have adequate tools to assess the parentage of the child of a lesbian couple. The recently enacted District of Columbia parentage legislation, discussed later in this Article, fills in the gaps that presently exist in the marital presumption provisions of other jurisdictions.⁵⁹

B. Obtaining an Order of Parentage or Parental Rights Under Existing State Laws

A presumption based on a couple's formal status is not the only method of extending parentage to the partner of a woman who gives birth. All states

56. See *infra* Part V.B. For a thorough discussion of this issue, including the many arguments that support recognition of the parent-child relationship in other states, see COURTNEY G. JOSLIN & SHANNON P. MINTER, *LESBIAN, GAY, BISEXUAL AND TRANSGENDER FAMILY LAW* §§ 6:10-6:14 (2009).

57. See GAY & LESBIAN ADVOCATES & DEFENDERS (GLAD), *HOW TO GET MARRIED IN MASSACHUSETTS* 26, available at <http://www.glad.org/uploads/docs/publications/how-to-get-married-ma.pdf>. The publication states:

In Massachusetts, a child born into a marriage is presumed to be the child of both parties, and both parents' names are listed on the birth certificate. Nonetheless, this is just a presumption and does not have the same effect as a court judgment. It is subject to being challenged and overturned.

In addition, the marriage could encounter a lack of respect in some states, so relying on the fact of the marriage alone to protect your children is not the best approach. Therefore, GLAD strongly recommends that you consult a lawyer and continue the practice of securing a second-parent adoption in order to obtain a decree of legal parenthood that should be recognized broadly outside of Massachusetts, independent of the marriage.

58. See *infra* text accompanying notes 194-95, 222-29.

59. See discussion *infra* Part IV.B.1-2.

establish legal parentage by statute. Courts have been asked to apply existing law to parentage questions, and, in a few instances, they have found that a nonbiological mother is a parent. Delaware also recently amended its parentage statute with same-sex couples in mind. Its new law has numerous strengths but is still unlikely to confer parentage from birth without court involvement.

1. The California Uniform Parentage Act

California courts have interpreted two standard provisions of the Uniform Parentage Act (UPA) to find a biological mother's same-sex partner the parent of a child. The California UPA includes the provision that a man is the presumed parent of a child if he "receives the child into his home and openly holds out the child as his natural child."⁶⁰ It also includes the provision that, in determining the existence of a mother-child relationship, "[i]nsofar as practicable, the provisions of this part applicable to the father and child relationship apply."⁶¹

In *Elisa B. v. Superior Court*,⁶² the El Dorado County District Attorney brought a parentage action after the biological mother, Emily, sought public assistance for herself and her twin children.⁶³ The California Supreme Court ruled that Emily's former partner, Elisa, was a parent of the twins. The court concluded that Elisa both received the children into her home and held them out as her natural children; had she been a man, this would have made her a presumed father.⁶⁴ Applying this means of establishing a father-child

60. CAL. FAM. CODE § 7611(d) (West 2009).

61. *Id.* § 7650.

62. 117 P.3d 660 (Cal. 2005).

63. Political scientist Anna Marie Smith critiques the *Elisa B.* decision from a very important perspective. While recognizing the value of defining parenthood to include a nonbiological mother, she argues that advocates for LGBT parents should not ignore the other important context of the case—poverty law's imposition of mandatory child-support enforcement obligations on welfare recipients. She distinguishes a case brought by Emily herself because she chose to pursue support from Elisa from the actual case in which Emily had no choice in the matter because poverty law removes that choice for mothers who need public assistance. She writes:

Poverty law is not a neutral legal context for advancing LGBT rights and the rights of assisted reproduction families since its rules mandating cooperation with child support enforcement are punitive for poor mothers on welfare, violate their rights to privacy and self-determination, and expose them to a substantial risk of domestic violence. Any enhancement of TANF's child support rules that strengthens the grip of the post-welfare state on poor women and men in cases involving non-heterosexual parties or the children born as a result of assisted reproductive technologies contributes one more piece of ammunition to the neoliberal attack on the poor.

Anna Marie Smith, *Reproductive Technology, Family Law and the Postwelfare State: The California Same-Sex Parents' Rights "Victories" of 2005*, 34 SIGNS 4 (2009).

64. The court had held previously that a nonbiological *father* could be a parent under the "holding out" provision of the statute. See *In re Jesusa V.*, 85 P.3d 2 (Cal. 2004); *In re Nicholas H.*, 46 P.3d 932 (Cal. 2002).

relationship to the determination of a mother-child relationship, the court found that Elisa was a presumed parent.⁶⁵ It further found that the case was an inappropriate one for rebutting the presumption of parentage.⁶⁶

The court found that a child can have two parents, both women.⁶⁷ Although not applicable in the case, the court cited the state's newly enacted domestic partnership law, making those who register the parents of a child born to either of them, as support for such a finding.⁶⁸ The court also noted the availability of second-parent adoption.⁶⁹ Importantly, the *Elisa B.* holding established that neither formal registration nor adoption is necessary to a determination of parentage.

In a subsequent case, a California appeals court applied *Elisa B.* in the context of an action by a nonbiological mother, Charisma, to be declared a legal parent and obtain visitation rights with her daughter, Amalia; the biological mother, Kristina, opposed her petition.⁷⁰ These facts emerged in the case: the couple had jointly selected an anonymous semen donor from a sperm bank; Charisma was there when Amalia was born, and she cut the umbilical cord; the parents gave the child a last name consisting of their two names hyphenated; Charisma was listed as a parent on a birth announcement, a gift registry, an online message board for women trying to conceive, at a baby shower, and to everyone; and the parents took their daughter home and cared for her together for six weeks, after which Kristina returned to work and Charisma cared for Amalia full-time during the day for seven weeks.⁷¹

Then Kristina moved out with Amalia and denied Charisma access to her. The appeals court affirmed the trial court's order that Charisma was Amalia's parent, rejecting Kristina's argument that Charisma had not received the child into her home and held her out as her own long enough to meet the statutory test as applied in *Elisa B.*⁷²

No reported appellate opinion besides *Elisa B.* and *Charisma R.* so clearly names the nonbiological mother a parent of her children under a statute derived

65. *Elisa B.*, 117 P.3d at 670.

66. *Id.* at 668-69.

67. *Id.* at 666.

68. *Id.* (citing CAL. FAM. CODE § 297.5).

69. *Id.* at 666, n.5 (citing *Sharon S. v. Superior Ct.*, 73 P.3d 554 (Cal. 2003)).

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

71. *Id.* at 32-33. Kristina and Charisma were also registered domestic partners, although that was before that status conferred the parentage presumption in California.

72. *Id.* at 39-45. The court also rejected Kristina's argument that the trial court order violated her constitutional right to raise her child. Rather, the court ruled, the U.S. Supreme Court has not told states how to define parentage, and the trial court ruling that Charisma was a parent meant that the case concerning visitation with Amalia was a case between two parents, not, as Kristina argued, a case between a parent and a third party. *Id.* at 47-52. I develop this same argument in *The Impact of Troxel v. Granville on Lesbian and Gay Parents*, 32 RUTGERS L.J. 825 (2001).

from the Uniform Parentage Act.⁷³ The reasoning and holdings of these cases are important and should guide courts in other states with similar statutes. But they are incomplete. For example, the “receives the child into his home” requirement may mean that the partner is not a parent until the child is born.⁷⁴ And the fact-specific nature of the parentage determination means that court involvement will almost certainly be necessary to establish parentage, thereby defeating the law reform goal I urge—stable and certain recognition of a child’s relationship with both parents without spending time or money on judicial proceedings.

2. The Oregon donor insemination statute

In July 2009, the Oregon Court of Appeals held that a woman who consents to her partner’s insemination is the parent of the child that results from that insemination.⁷⁵ Sondra Shineovich and Sarah Kemp began living together in 1997. They decided to have a child, and Sarah conceived using donor semen. Their first child was born in early 2004.⁷⁶ In 2006, the couple decided to have another child, and again Sarah conceived using donor insemination. The couple split up in November 2006. Their second child was born in March 2007.

Sarah denied Sondra access to the children. When the younger child was five days old, Sondra filed an action to be declared the parent of the children. The trial court dismissed her petition. On appeal, the court declared unconstitutional Oregon’s donor insemination statute because it made a mother’s consenting husband, but not a mother’s consenting same-sex partner, the parent of a child born using donor semen.⁷⁷ Sexual orientation is a suspect classification in Oregon, and the court applied to this case the holding of a decade-old case that discrimination on the basis of marital status is sexual orientation discrimination because same-sex couples cannot marry.⁷⁸ The court

73. As early as 1999, some California trial courts and at least one Colorado trial court had issued parentage orders sought by both mothers. See Kyle C. Velte, *Towards Constitutional Recognition of the Lesbian Parented Family*, 26 N.Y.U. REV. L. & SOC. CHANGE 245, 252-53 (2000-2001) (noting such orders). Other such California parentage orders are discussed in Courtney G. Joslin, *Interstate Recognition*, *supra* note 55, at 585-86, 598. See also Joslin, *The Legal Parentage of Children Born to Same-Sex Couples: Developments in the Law*, 39 FAM. L. Q. 683, 698-703 (2005).

74. In two cases in other states, the couple split up before the child was born and the courts refused to order the nonbiological mother to support the child. See *T.F. v. B.L.* 813 N.E.2d 1244 (Mass. 2004) and *State ex re/D.R.M.*, 34 P.3d 887 (Wash. App. 2001).

75. *Shineovich v. Kemp*, 214 P.3d 29 (Or. Ct. App. 2009).

76. They married shortly before the child’s birth, during the short period when Multnomah County was issuing marriage licenses to same-sex couples. Their marriage—as were all the Multnomah County marriages—was declared void ab initio the following year. *Id.* at 32.

77. *Id.* at 39-40.

78. *Id.* at 37 (applying *Tanner v. Oregon Health Scis. Univ.*, 971 P.2d 435 (Or. Ct. App. 1998)).

reasoned, therefore, that

because same-sex couples may not marry in Oregon, that privilege is not available to the same-sex domestic partner of a woman who gives birth to a child conceived by artificial insemination, where the partner consented to the procedure with the intent of being the child's second parent. We can see no justification for denying that privilege on the basis of sexual orientation, particularly given that same-sex couples may become legal coparents by other means—namely, adoption. There appears to be no reason for permitting heterosexual couples to bypass adoption proceedings by conceiving a child through mutually consensual artificial insemination, but not permitting same-sex couples to do so.⁷⁹

By way of remedy, the court extended the statute's coverage to include children of mothers in lesbian relationships.⁸⁰ No other state appeals court has extended to lesbian couples the parentage provisions of a statute denominating a consenting husband the parent of a child born to his wife using donor insemination.⁸¹ The ruling is especially significant because it acknowledges a nonbiological mother's parentage even if the child is born before the couple separates, as happened with the younger child in this case.

It is too soon to know if this ruling will change the way Oregon maintains its vital records so that the name of both mothers can appear on a child's birth certificate. The recently enacted District of Columbia legislation contains a mechanism for recording both mothers' names on the birth certificate when they have a child using donor insemination.⁸²

3. Orders of parentage and determinations of parental rights in other states

A handful of other jurisdictions have produced judicial determinations of parentage. Couples in several states have obtained orders of parentage for both mothers when conception occurs through in vitro fertilization using donor semen and an egg from the mother who will not give birth. The embryo is then implanted in the uterus of the birth mother. In these instances, one woman is the genetic parent of the child and the other is the gestating parent. Because the law could recognize a mother-child relationship in a woman who bears the child and in a woman who is a biological parent, judges have determined they have the authority to issue a parentage order naming both women parents.⁸³

79. *Id.* at 40.

80. *Id.*

81. For a discussion of a New Jersey trial court opinion extending the reach of the state's donor insemination statute, see *infra* text accompanying notes 84-89.

82. See *infra* Part IV.A.1.d.

83. Among the states are: Washington, E-mail from Janet Helson, Attorney, Skellenger Bender, to author (Jan. 14, 2009, 11:48) (on file with author); New Jersey, E-mail from William S. Singer, Attorney, Singer & Fedun, to author (Jan 14, 2009, 14:33) (on file with author); and Texas, E-mail from Connie Moore, Attorney, Moore & Hunt, to author (Jan. 15,

Some couples use this extraordinary, invasive, and expensive process because they both want a biological connection to the child. But others go this route primarily for legal reasons, precisely because they believe this method of childbearing is the best protection of their joint parentage. A statutory framework creating legal parentage for a lesbian couple regardless of biological connection would allow such couples to pursue parenthood with less medical intervention and at much less cost.

A New Jersey trial court used a different legal basis to issue a parentage order for a child born of donor insemination.⁸⁴ The lesbian couple, LoCicero and Robinson, had registered as domestic partners and had married in Canada.⁸⁵ They agreed to raise a child together and Robinson conceived through donor insemination, using the services of a physician. They recognized that second-parent adoption was available, but stated that the process would take two years and that they did not want the child in limbo during that time.

The court did not decide the validity of the Canadian marriage but used it as one factor supporting the couple's commitment to each other. Although New Jersey's insemination statute assigns parentage explicitly only to a husband who consented to his wife's insemination,⁸⁶ the court interpreted the statute to designate LoCicero a parent of the child.

Although the opinion in *Robinson* came from a trial court, its validity was given a boost when it was cited by the New Jersey Supreme Court in *Lewis v. Harris*, the case that held that the exclusion of same-sex couples from the legal consequences of marriage was a violation of the state constitution.⁸⁷ The *Lewis* court identified lack of dual parentage as a problem for a lesbian couple under

2009, 08:31 EST) (on file with author). See generally Rylah Lilith, *The G.L.F.T. of Two Biological and Legal Mothers*, 9 AM. U. J. GENDER SOC. POL'Y & L. 207 (2001); Kyle C. Velte, *Egging on Lesbian Maternity: The Legal Implications of Tri-Gametic In Vitro Fertilization*, 7 AM. U. J. GENDER SOC. POL'Y & L. 431 (1998-99); JOSLIN & MINTER, *supra* note 56, § 3.13.

84. *In re* Parentage of Robinson, 890 A.2d 1036 (N.J. Super. Ct. Ch. Div. 2005). In the context of a heterosexual unmarried couple, the Tennessee Supreme Court ruled that both partners were legal parents of triplets born to the woman using donor eggs. *In re* C.K.G., 173 S.W.3d 714 (Tenn. 2005). The court acknowledged that the woman did not fall within the definition of a mother under the state's parentage statutes and called for legislative reform, but in the meantime it ruled based on the specific set of facts before it that the woman was the children's legal mother.

85. At the time, New Jersey did not extend parental rights to domestic partners. See *In re* Parentage of Robinson, 890 A.2d at 1040 ("[D]omestic partners is a status distinct from marriage . . . [and] the status of domestic partnership neither creates nor diminishes individual partners' rights and responsibilities toward children . . .") (citing N.J. STAT. ANN. § 26:8A-1). In 2006, New Jersey enacted civil unions, which extend all the legal consequences of marriage, including presumptive parenthood, to civil union partners. *Id.* § 37:1-31(a), (e) (West 2009). The legislation was enacted December 21, 2006, and took effect sixty days later. 2006 N.J. Laws 103.

86. N.J. STAT. ANN. 9:17-44 (West 2009).

87. 908 A.2d 196 (N.J. 2005).

the existing law, but in a footnote the court said, “But see *In re Parentage of Child of Robinson* . . . (declaring that same-sex partner was entitled to statutory presumption of parenthood afforded to husbands).”⁸⁸ Seen as a seal of approval on the reasoning of *Robinson*, this reference resulted in New Jersey’s willingness to put the names of both mothers on a child’s birth certificate.⁸⁹

In the context of ruling on the ability of a nonbiological mother to maintain a relationship with her child after the couple splits up, some courts have invoked parentage statutes or otherwise denominated the nonbiological mother a parent.⁹⁰ In *In re L.B.*, for example, the Washington Supreme Court ruled that if Sue Carvin could show she was a *de facto* parent of L.B. then she would stand in “legal parity” to the child’s biological mother, Page Britain.⁹¹ The couple had planned for the child together and raised her as two mothers for six years.

After the couple split and Britain denied Carvin access to their child, Carvin filed a petition for the establishment of parentage. Although the court found that the state’s statutes, modeled on the Uniform Parentage Act, did not apply to Carvin, it identified a common law basis for declaring that a “*de facto*” parent stands in legal parity with “an otherwise legal parent.” The court concluded that “reason and common sense support recognizing the existence of *de facto* parents and according them the rights and responsibilities which attach to parents in this state.”⁹² Lawyers now use the *L.B.* decision to obtain judgments of parentage, and one lawyer reports a case in which a judge ordered that the *de facto* parent’s name be added to the child’s birth certificate.⁹³

4. The Delaware *de facto* parent statute

A novel statute enacted in Delaware in July 2009 creates legal parentage for the partner of a woman who gives birth to or adopts a child under many circumstances.⁹⁴ The statute was a direct response to a decision some months earlier by the Delaware Supreme Court. In that case, *Smith v. Gordon*, the court reversed a trial court order granting joint custody to both partners when only

88. *Id.* at 216, n.19.

89. Telephone Interview with William Singer, Attorney in New Jersey (Dec. 19, 2008). There is some ambiguity about this, however, as the state’s form indicating consent to artificial insemination appears to be limited to married and civil union partners. See New Jersey Department of Health and Senior Services, Consent for Artificial Insemination (2008), <http://www.state.nj.us/health/forms/reg-64.pdf>.

90. See, e.g., *Rubano v. DiCenzo*, 759 A.2d 959 (R.I. 2000).

91. *In re Parentage of L.B.*, 122 P.3d 161, 175 (Wash. 2005).

92. *Id.* at 176.

93. E-mail from Janet Helson, Attorney, Skellenger Bender, to author (Feb. 4, 2009, 14:54) (on file with author).

94. The bill is codified in DEL. CODE ANN. tit. 13, § 8-201(a)(4), (b)(6), (c) (2009).

one had legally adopted the child in Kazakhstan.⁹⁵ The court found that the Delaware legislature had enacted comprehensive parentage statutes in 2004, and that had it wanted to codify the concept of “de facto” parent it could have done so at that time. The court refused to do what the legislature had failed to do.

The legislature responded by amending the state’s Uniform Parentage Act. A man or a woman who meets the statutory definition of de facto parent is a parent, with a legal status identical to that of a woman who gives birth to or adopts a child.⁹⁶ The statute defines de facto parent as follows:

De facto parent status is established if the Family Court determines that the de facto parent:

- (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.⁹⁷

This statute makes a substantial contribution to law reform affecting same-sex couples having children. Unlike California or Oregon, whose advances came from appellate court interpretation of statutes that did not explicitly contemplate two mothers for a child, Delaware now has a statute passed with same-sex couples in mind. The statute’s strength is that it creates legal parity between the two partners.

It also has some unique characteristics. The statute creates parental status when one parent has adopted, rather than given birth to, the child. It also can create parental status, without necessitating adoption, for a person who does not plan for a child’s birth or adoption but comes into the child’s life at a later date.⁹⁸ Finally, it authorizes three parents for a child, as a child may have two

95. 968 A.2d 1 (Del. 2009).

96. DEL. CODE ANN. tit. 13, § 8-201(a)(4), (b)(6) (2009). The legislature made the statute retroactive and also stated that “[n]o Court decision based upon a finding that Delaware does not recognize de facto parent status shall have collateral estoppel or res judicata effect.” 77 Del. Laws ch. 97 §§ 5-6. This explicitly authorizes the mother who lost in *Smith v. Gordon* to relitigate her action for custody of the child.

97. DEL. CODE ANN. tit. 13, § 8-201(c) (2009). The Delaware Code defines “parental responsibilities” 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.” *Id.* § 1101(10).

98. The District of Columbia has a statute that confers de facto parent status on a partner in both these circumstances. The de facto parent becomes equally entitled to custody or visitation and equally obligated to support the child, but she does not become a full legal parent of the child. See *infra* Part IV.A.2.b. The Delaware statute can also confer parental status on the male partner of a man who becomes a parent using a surrogate.

legal parents and a de facto parent who, by court order, also becomes the child's parent.⁹⁹

The statute's weakness is that it seems not to confer parentage automatically at the child's birth, even when the child is born through assisted conception and the couple planned for the child together.¹⁰⁰ Rather, the statute refers to establishment of de facto parent status through a determination made by the Family Court. At the very least, that suggests that a nonbiological mother must petition for a parentage order and will not appear as a parent on the child's birth certificate absent such an order.

Further, a court might determine that it cannot issue such an order until some period of time has elapsed after the child's birth. The statutory criteria stem in part from the Delaware Supreme Court's discussion in *Smith* of how a legislature might define de facto status.¹⁰¹ While a strong argument can be made that a partner's pre-birth actions in caring for her pregnant partner and participating in prenatal care meet the test of "exercis[ing] parental responsibilities," it will be more difficult to argue that the partner has parented "for a length of time sufficient to have established a bonded and dependent relationship with the child," until some time after birth.

C. Concluding Thoughts on the Inadequacy of Existing Laws

The legislative and judicial determinations of parentage discussed in this section are positive but incomplete responses to the phenomenon of lesbian couples bearing a child together. The states that afford recognition to married/unioned/partnered same-sex couples have created a presumption of the spouse's or partner's parentage, but this is inadequate on two grounds. The lack of statutory clarity on when, by whom, and on what basis the parentage presumption can be rebutted results in an unacceptable level of uncertainty

99. For a discussion of three parents in the context of the District of Columbia's law reform, see *infra* Part IV.A.2.b.

100. Delaware does create parentage for a *man* who consents to a woman's insemination with the intent to be a parent, even if he is not married to the woman. DEL. CODE ANN. tit. 13, § 8-703 (2009); *id.* § 8-201(b)(5). A court should apply this provision to create parentage for a *woman* who consents to a woman's insemination, by means of DEL. CODE ANN. tit. 13, § 8-106 (2009), which states that "[p]rovisions of this chapter relating to determination of paternity apply to determinations of maternity." The Court in *Smith v. Gordon* approved an expansive and gender-neutral reading of the state's parentage act when it 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." 968 A.2d 1, 16-17. In that case, however, Gordon had lived with the child for only thirteen months. An argument that distinguishing between a man who consents to a woman's insemination and a woman who consents to a woman's insemination is unconstitutional sex discrimination should also succeed. For discussion of conferring parentage through a marital status-neutral and gender-neutral consent to insemination statute, see *infra* Part IV.A.

101. See *Smith v. Gordon*, 968 A.2d 1, 8-16 (Del. 2009).

threatening the stability of a child's family. In addition, such a scheme offers no protection to the children of couples who have not married or entered civil unions or domestic partnerships. The law should not countenance a second-class status for those children whose parents do not formalize their status. That throwback to the bad old days of "illegitimacy"¹⁰² should have no place in the twenty-first century world of the children of lesbian couples.

The California and Oregon courts are to be commended for interpreting their existing statutes to protect parent-child relationships in lesbian families under certain factual circumstances. The Delaware statute is also an enormous advance. But the *Elisa B.* doctrine cannot confer parentage before the child's birth, and the Delaware law may apply only after a period of co-parenting has elapsed. All of these states seem to require case-by-case determinations. None provides the clear and simple establishment of parenthood—without court invention—that constitutes the norm for heterosexual couples. After presenting examples of statutory developments in other countries, I turn to a description of the recent District of Columbia parentage legislation and offer it as a model for law reform efforts in other states.

III. INTERNATIONAL EXAMPLES OF STATUTES ESTABLISHING TWO MOTHERS FROM BIRTH

A number of Canadian provinces, Australia, and several European countries have legislation extending parental status to lesbian couples. Establishing parentage does not require a judicial proceeding. In most instances, the couple need not be married or in a registered relationship, even if the country affords such an option.¹⁰³ While some state lawmakers may be indifferent to these international developments, others will be pleased to learn that a larger context exists for the changes sought by advocates for lesbian couples in the United States.

A. Quebec

In 2002, Quebec became the first jurisdiction in the world to enact legislation explicitly extending parental status to both members of a lesbian couple upon the birth of a child. Although Vermont's civil union status dates to 2000, Vermont did not otherwise rewrite its parentage statutes to address the circumstances of same-sex couples. Quebec, in 2002, instituted civil union

102. *See supra* Part I.A.

103. For both Canada and Australia this approach is consistent with the rest of their law, which makes marrying virtually irrelevant in determining the legal consequences of living as a couple. *See* NANCY D. POLIKOFF, *BEYOND (STRAIGHT AND GAY) MARRIAGE: VALUING ALL FAMILIES UNDER THE LAW* 111-15 (2008) [hereinafter POLIKOFF, *BEYOND MARRIAGE*].

status *and* changed its parentage laws.¹⁰⁴ Quebec also is unique in that it has the only law that explicitly addresses assisted conception through sexual intercourse as well as donor insemination.

Quebec enacted a new chapter into its filiation code to address children born of assisted procreation. It begins:

A parental project involving assisted procreation exists from the moment a person alone decides or spouses by mutual consent decide, in order to have a child, to resort to the genetic material of a person who is not party to the parental project.¹⁰⁵

The person who contributed the genetic material does not become the child's parent. If a woman is unmarried, she is the child's sole parent. "Spouses" includes married couples, same-sex couples in civil unions, and same- and different-sex couples who are "de facto" spouses.¹⁰⁶ A "spouse," so defined, becomes a presumed parent of the child from birth. The presumption is rebutted "if there was no mutual parental project or if it is established that the child was not born of assisted procreation."¹⁰⁷

Both women are registered as the child's parents using the customary administrative mechanism for establishing parents; no judicial process is necessary. The only difference between couples who are married/in civil unions and those who are not (the ones called "de facto") is that one married/civil union partner may register the other as well as herself; each "de facto" partner must register herself. But if a "de facto" partner fails to register after consenting to a parenting project she is still liable for supporting the child.¹⁰⁸

Under the Quebec statute, assisted procreation can occur both through insemination with donor semen and through sexual intercourse. Professor Robert Leckey explains that the legislature knew of the history of discrimination against lesbians seeking medical assistance with assisted reproduction and deliberately sought to minimize professional involvement in parenting by same-sex couples. He states that the lack of required formalities, such as notarized writings, "evidences the legislature's wish not to encumber same-sex couples with administrative burdens not borne by opposite-sex

104. Although the statutes themselves are in French, as well as almost all of the commentary, McGill University law professor Robert Leckey has written in English about these legal reforms. My account here is taken from his translation and analysis. Robert Leckey, *Where the Parents Are of the Same Sex: Quebec's Reforms to Filiation*, 23 INT'L J. L., POL'Y & FAM. 62 (2009) [hereinafter Leckey, *Where the Parents*].

105. QUEBEC CIV. CODE, S.Q., art. 538 (2002).

106. At the time the law was enacted, same-sex couples could not marry in Canada, but they could enter civil unions in Quebec. Same-sex couples obtained the option to marry in 2005. For the history of Canada's treatment of same-sex couples and its approval of marriage for same-sex couples in 2005, see Nicolas Bala, *The Debates About Same-Sex Marriage in Canada and the United States*, 20 BYU J. PUB. L. 195, 209-21 (2006).

107. QUEBEC CIV. CODE, S.Q. art. 539 (2009).

108. *Id.* at art. 540.

couples when they procreate.”¹⁰⁹

There is one difference in Quebec law based on method of conception. When there has been sexual intercourse, the man’s parentage may be established during the first year of the child’s life. The biological mother’s same-sex partner can declare herself a parent when the child is born, but if the biological father seeks parentage during the child’s first year he will simultaneously eliminate the partner’s legal bond to the child.¹¹⁰ The statute does not permit three persons—the mother, her partner, and the biological father—to be recognized as a child’s parents.¹¹¹

U.S. courts have consistently maintained a sharp legal line based on method of conception. If conception occurs through sexual intercourse, an agreement to treat the conception as though it had been through donor insemination will not be enforced.¹¹² The intent of the two participants is key under the Quebec law, but in the United States it has relevance only if

109. Robert Leckey, *Filiation and the Translation of Legal Concepts*, in LEGAL ENGINEERING AND COMPARATIVE LAW (Cashin Ritaine et al. eds. 2008), available at <http://ssrn.com/abstract=1308626> at 5 [hereinafter Leckey, *Filiation*].

110. The statute is unclear as to who may establish parentage during this year. While it seems written with an eye towards the man who might decide to claim parentage, it could be read as enabling the mother or a legal representative of the child to establish the man’s parentage. Scholars have pointed out that if the purpose of this provision was to allow a man to change his mind, the class of those eligible to claim parentage during the child’s first year should have included all donors known to the mother, including known semen donors, rather than only those who participated in conception through sexual intercourse. See Leckey, *Where the Parents*, *supra* note 104, at 68. Nonetheless, it is the method of conception that matters under the law. This aspect of the law is discussed in a 2007 case, *Droit de la famille—07527*, [2007] R.J.Q. 493, 2007 QCCA 362 (Can.), available at <http://www.canlii.org/en/qc/qcca/doc/2007/2007qcca362/2007qcca362.html>. It was clear in the case that two women were in a relationship and that they were planning to raise a child together when they selected a man as a sperm donor. When conception through insemination was not successful, the biological mother, unbeknownst to her partner, had sexual intercourse with the donor. A child was born, the couple later split up, and eventually the biological mother denied the nonbiological mother access to the child. After the “parental project” legislation was enacted, but before it went into effect, the nonbiological mother informed the biological mother that she would file an action for filiation. In order to thwart that effort, the biological father, at the request of the biological mother, obtained an order of filiation as the father of the child. The parentage law could apply to already born children, and the trial court did find that when the child was conceived the intent of all involved was that the man would not be a father but would be a sperm donor for the purpose of the couple having a child. The trial court ruled in the nonbiological mother’s action, however, that because conception occurred through sexual intercourse the biological father had one year from the effective date of the law to file his filiation action. The nonbiological mother appealed, and the appeals court affirmed on the different ground that the consent to judgment of filiation filed before the effective date of the new law resulted in a judgment that could not be disturbed once the new law became effective.

111. An Ontario court interpreted its common law *parens patriae* power to declare that a child had three parents in *A.A. v. B.B.*, [2007] 83 O.R. 3d 561, 2007 ONCA 2 (Can.). Leave to appeal to Supreme Court of Canada was refused.

112. See, e.g., *Straub v. B.M.T.*, 645 N.E.2d 597 (Ind. 1994).

insemination is the method of conception.

B. Other Canadian Provinces

Manitoba has amended its birth registration statutes in a way that recognizes lesbian couples as parents. Manitoba's 2002 Charter Compliance Act created equality between same-sex and different-sex, married and unmarried, couples.¹¹³ It amended the portion of its Vital Statistics Act that already recognized the parentage of a husband whose wife bears a child using assisted conception to include both same-sex and different-sex partners. The biological and nonbiological mother follow the procedures to both be registered as the child's parents. Birth certificates now list parents as "parents," rather than as "mother" and "father."

There is no other legislation clearly delineating that birth registration establishes parentage. Professor Karen Busby has reported that most advocates believe that registration does establish parentage.¹¹⁴ She knows of no instance since the law went into effect where a nonbiological mother's parentage has been challenged when her name appeared on the birth certificate. Nonetheless, Professor Busby considers it possible that parentage based on the birth registration alone may be still less secure than that achieved through adoption.¹¹⁵

As a result of a court decision, lesbian couples in Ontario can register as parents of a child born to either of them. In *Rutherford v. Ontario*, four lesbian couples sought parentage orders.¹¹⁶ They argued that refusing to recognize both partners as parents violated the Canadian Charter's equality guarantee. The court agreed. Subsequently, new administrative regulations were promulgated to permit the names of both mothers to be registered on the child's birth certificate, when birth occurs through assisted conception.

C. Australia

In 2002, Australian states began recognizing a lesbian couple as parents of a child born to either of them.¹¹⁷ In 2008, Australian federal law reform built on these efforts and established that the de facto partner of a woman who bears a

113. The Charter Compliance Act, S.M. 2002, c. 24 (2002).

114. See E-mail from Karen Busby, Professor of Law, University of Manitoba Faculty of Law to author (Feb. 23, 2009, 18:54) (on file with author).

115. *Id.*

116. *Rutherford v. Ontario* (2006) 270 D.L.R. (4th).

117. The first state was Western Australia in 2002. The Northern Territory (2003), Australian Capital Territory (2004), Victoria (2008) and New South Wales (2008) followed. See Jenni Millbank, *Recognition of Lesbian and Gay Families in Australian Law—Part Two: Children*, 34 FED. L. REV. 261 (2006). For New South Wales reforms, see <http://gfrl.org.au/index.php/Rights/Parenting/New-Lesbian-Parenting-Laws>.

child conceived through donor insemination is the legal parent of the child if she consented to the insemination.¹¹⁸ The law is retroactive. Therefore, all existing children born to lesbian couples through donor insemination, where the partner of the birth mother consented to the insemination, now have two parents. In those instances, the couple can apply for a new birth certificate listing both women as parents.¹¹⁹ The retroactivity of the law encompasses all families, including those where the couple has since separated. A semen donor is not a parent under the Australian law, and a child cannot have three parents.¹²⁰

The new federal statutes contain a unique provision concerning adopted children. Adoption is governed by state law in Australia, and some states do not permit a lesbian couple to jointly adopt a child. The new law addresses this by recognizing the partner of a woman who adopts as a second parent if she consented to the adoption.¹²¹

D. European Countries

Iceland, Norway, Spain, Sweden, and the United Kingdom establish the partner of a lesbian who conceives through donor insemination as the parent of the resulting child.¹²² All five countries allow same-sex couples to either marry (Norway, Spain, and Sweden) or enter a registered partnership (Iceland and Great Britain). Spain and Sweden extend automatic parentage only to married lesbian couples; in the other countries all consenting partners are included.

118. De facto partnership is a well-established concept in Australian family law, for both different-sex and same-sex couples. *See generally* Millbank, *Recognition of Lesbian and Gay Families in Australian Law—Part One: Couples* (2006), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=910138. For a comprehensive description of the 2008 Australian federal law reforms, see Jenni Millbank, *De Facto Relationships, Same-Sex, and Surrogate Parents: Exploring the Scope and Effects of the 2008 Federal Relationship Reforms*, 23 AUST J. FAM. LAW 160 (2009) [hereinafter Millbank, *2008 Federal Relationship Reforms*].

119. *See* Millbank, *2008 Federal Relationship Reforms*, *supra* note 118; Gay and Lesbian Rights Lobby, *Federal Same Sex Parenting Reforms*, <http://glrl.org.au/index.php/Rights/Parenting/Federal-Same-Sex-Parenting-Reforms> (last visited Dec. 22, 2009).

120. Australia does, however, allow a court to order visitation between a child and a person who has an existing relationship with that child. That would include a known donor if the mothers permitted a relationship to develop between him and the child.

121. The relevant statute reads: “For the purposes of this Act, a child is the child of a person who has, or had, a de facto partner if . . . the child is adopted by the person and the person’s de facto partner or by either of them with the consent of the other.” FLA s60HA(1)(b). In the United States, the only statute that confers parental status on the partner of a woman who adopts without that partner concluding a second-parent adoption is the recent Delaware statute. *See supra* Part II.B.4.

122. Kees Waaldijk, *Overview of Forms of Joint Legal Parenting Available to Same-Sex Couples in European Countries*, 72 DROIT EN SOCIÉTÉ 383, 384 (2009) (Fr.). The information about the United Kingdom’s Human Fertilisation and Embryology Act 2008 is available online at <http://www.hfea.gov.uk/2992.html>.

Unlike Canada and Australia, all the European countries limit application of the law to inseminations that take place using the services of a medical facility. In other words, children of lesbians who conceive without medical assistance are unprotected; their nonbiological mothers must complete a second-parent adoption.¹²³

The initial American laws on donor insemination of married women in the 1970s specified physician involvement because that was the practice at the time, and many of those laws, unfortunately, remain in effect today. The twenty-first century U.S. model laws, however, explicitly reject such a restriction.¹²⁴ Any law designed to be comprehensive should include all of the ways that people form families using assisted conception, and that must include those who do inseminations without medical participation.

IV. PARENTAGE STATUTES FOR CHILDREN OF LESBIAN COUPLES IN THE TWENTY-FIRST CENTURY

This Article focuses on protecting the child of a lesbian couple by recognizing her relationship with both her parents. Since Harry Krause's transformative efforts of the 1960s and 1970s, the guiding tenet of parentage law reform has been equality for children born to married and unmarried parents.¹²⁵ That principle must extend to the children of lesbian couples. It is a principle distinct from the gains achieved by the marriage-equality movement, whose focus lies on recognition of the couple relationship. Law reform for the children of lesbian couples must encompass both parents who marry or enter civil unions/domestic partnerships (when those options are available) and those who don't.

This Part advocates two distinct paths to legal parentage for lesbian couples. The first is available when conception occurs through donor insemination and is not dependent upon the legal relationship of the two women to each other. Where marriage, civil union, or domestic partnership is available to same-sex couples, it would be unnecessary for the couple to formalize their relationship through these mechanisms.

123. All five countries, as well as Belgium, Denmark, Finland, Germany, and the Netherlands allow a nonbiological mother to become a second parent of her partner's child through adoption. Waaldijk, *supra* note 122, at 384.

124. The Comment to Section 702 of the Uniform Parentage Act (2002) reads:

UPA (1973) § 5(b) specified that a male donor would not be considered the father of a child born of artificial insemination if the sperm was provided to a licensed physician for use in artificial insemination of a married woman other than the donor's wife. The new Act does not continue the requirement that the donor provide the sperm to a licensed physician.

Neither the 2002 UPA nor the 2008 American Bar Association Model Act Governing Assisted Reproductive Technology contain any requirement that a physician must be involved in the insemination for a consenting partner to be considered the child's parent. See *infra* notes 134-43 and accompanying text.

125. See *supra* notes 24-35 and accompanying text.

While Quebec's "parental project" laws make legal status entirely dependent upon the intent of those participating in the project, regardless of method of conception, such an approach would find no support in U.S. state legislatures. No state will want to open its courts to men arguing they should not have to support their biological children because sexual intercourse occurred with the intent that only the woman would be the parent of the resulting child.¹²⁶ It is entirely plausible, however, that U.S. law would make parentage without a judicial proceeding possible for lesbian couples who use donor insemination rather than sexual intercourse to conceive. The District of Columbia and New Mexico did so in 2009.

The second path to parentage is dependent upon the couple's status rather than the method of conception. It starts with the presumption as it exists now in the states that grant a formal status to same-sex couples, but, unlike the current framework in those states, it articulates when and by whom the presumption can be rebutted.

The 2009 District of Columbia legislation contains both these paths.¹²⁷ This Part describes D.C.'s statutory scheme, including both its substantive law of parentage and the related statutes on birth certificates that guarantee that parentage is properly recorded without court involvement.

A. Parentage Arising from Assisted Reproduction

Lesbian couples commonly conceive through insemination of one partner with donor semen. If the couple uses semen from an unknown donor, as is usual when the semen comes from a sperm bank or other medical facility, the primary legal issue a statute must address is the status of the birth mother's partner. If the couple uses semen from an identified donor, the law must also clarify that person's legal status. The existence of a known donor raises the

126. I have argued elsewhere that when both parties do have this intent, they should be able to consensually terminate the man's parental rights after the child is born. See Nancy D. Polikoff, *The Deliberate Construction of Families Without Fathers: Is It an Option for Lesbian and Heterosexual Mothers?*, 36 SANTA CLARA L. REV. 375 (1996) [hereinafter Polikoff, *Deliberate Construction*]. In states that permit second-parent adoption, this happens routinely as part of the adoption process. I propose the same availability when there is no second parent but there is agreement that the mother will be the child's only legal parent. Law reform to facilitate this result requires a statute that allows a private party, including a parent, to petition for termination of parental rights and that identifies consent as a substantive basis for terminating parental rights. A minority of states now allow this. *Id.* Of course this does not achieve the goal in the Quebec law of identifying a child's legal parent(s) without a judicial proceeding.

127. DOMESTIC PARTNERSHIP JUDICIAL DETERMINATION OF PARENTAGE ACT OF 2009, D.C. Law 18-33 (D.C. 2009), 56 D.C. Reg. 4269 (June 5, 2009), available at <http://www.dccouncil.us/images/00001/20090511122621.pdf>. The New Mexico statute, effective January 1, 2010, gives parental status to the female partner of a woman who bears a child through donor insemination. New Mexico Uniform Parentage Act, 2009 N.M. Laws 215, §§ 7-703, 7-704. See discussion *infra* Part IV.A.1.

questions of whether a child may have three legal parents and whether a donor who is not a child's legal parent may have some rights or obligations with respect to that child. This section focuses on each of these issues.

1. The status of a partner

a. Consent is the key

When a lesbian couple decides to have a child, one woman commonly conceives using donor semen. A statute delineating that her consenting partner is also the child's parent is a simple means of establishing her parentage, and this is exactly what recent legislation in New Mexico and the District of Columbia accomplishes. The D.C. legislation reads: "A person who consents to the artificial insemination of a woman as provided in subparagraph (A) or (B) with the intent to be the parent of her child, is conclusively established as a parent of the resulting child."¹²⁸ The New Mexico statute reads: "A person who . . . consents to assisted reproduction as provided in Section 7-704 . . . with the intent to be the parent of a child is a parent of the resulting child."¹²⁹

States that grant the consequences of marriage to lesbian couples who marry or enter civil unions or domestic partnerships need such a statute *in addition* to the parentage presumption that arises from the couple's relationship. Two Massachusetts cases, *T.F. v. B.L.* and *A.H. v. M.P.*, illustrate why.¹³⁰

Consistent with the Uniform Parentage Act as originally written in 1973, Massachusetts law makes a husband who consents to his wife's insemination the father of the resulting child.¹³¹ In *T.F. v. B.L.*, a woman, B.L., consented to her partner T.F.'s insemination but left the relationship before the child was born and refused to support the child. At the time, Massachusetts did not allow same-sex couples to marry, but by the time this case reached the Supreme Judicial Court it did allow such marriages. Had the couple been married, B.L. would have been the child's parent; the court stated this explicitly.¹³² In the

128. See D.C. CODE § 16-909(e)(1) (2001).

129. New Mexico Uniform Parentage Act, 2009 N.M. Laws 215 § 7-703.

130. *A.H. v. M.P.*, 857 N.E.2d 1061 (Mass. 2006); *T.F. v. B.L.*, 813 N.E.2d 1244 (Mass. 2004).

131. MASS. GEN. LAWS ch. 46, § 4B (2009).

132. *T.F. v. B.L.*, 813 N.E.2d at 1249. Courts have repeatedly held that a husband who consents to his wife's insemination is the parent of the resulting child even if the couple splits up before the child is born. See, e.g., *Laura W.W. v. Peter W.W.*, 856 N.Y.S.2d 248 (N.Y. App. Div. 2008) (so holding). For additional cases, see Courtney G. Joslin, *Assisted Reproductive Technology and the Marriage Requirement: Harming the Well-Being of Children Through Exclusionary Parentage Rules* 40 n.150 and accompanying text (October 29, 2009) (unpublished manuscript, on file with author) [hereinafter Joslin, *Assisted Reproductive Technology*].

absence of marriage, the court found neither statutory nor common law authority for determining that B.L. had responsibility for supporting the child.

In *A.H. v. M.P.*, the couple used in vitro fertilization which resulted in M.P.'s pregnancy. Both women signed the consent forms at the fertility clinic. A.H.'s surname became the child's middle name, and the child called M.P. "Mommy" and A.H. "Mama." The couple's relationship ended when the child was almost two years old, and M.P. refused A.H. access to the child. A.H. instituted a court proceeding asking for joint custody and for an order requiring her to pay child support. The Massachusetts Supreme Judicial Court rejected every theory she advanced as a basis for maintaining her relationship with the child. Had the couple been married, the decades old statute on donor insemination of married couples would have secured A.H.'s parentage.¹³³

Thus, today, in Massachusetts—the first state granting same-sex couples the opportunity to marry—children of lesbian couples fall into the same two-tier legal structure that, for centuries, plagued children born to unmarried heterosexual women. Those whose parents marry have a legally recognized relationship with both parents; those whose parents don't marry are denied access to the emotional and economic security that all children need. Such a tragic result can be avoided by enactment of a gender-neutral and marital status-neutral statute assigning parentage based on consent to the insemination with the intent to parent.

b. Model laws approve consent as the basis for assigning parentage

A brief history of the law of assisted reproduction demonstrates that the groundwork for a statute making consent the key to parentage, as New Mexico and the District of Columbia have done, is in place and has support from the mainstream of the legal profession.

When a married woman bears a child conceived using donor semen, her husband is the father of the child if he consented to the insemination procedure. The 1973 UPA contained such a provision,¹³⁴ settling an issue that had arisen in certain cases in which a husband argued that his wife's insemination was adultery or that he was otherwise not the child's father.¹³⁵ Currently, more than half the states have statutes that explicitly delineate this result.¹³⁶ In others it is likely that a court would apply the principle of estoppel to prevent either the

133. A.H. could have secured her status through a second-parent adoption. It is the fundamental premise of this article, however, that a woman in A.H.'s position is a parent by virtue of her consent to her partner's insemination with the intent to parent, and that as a parent she should not have to adopt her own child.

134. UNIF. PARENTAGE ACT § 5 (1973).

135. See Walter Wadlington, *Artificial Insemination: The Danger of a Poorly Kept Secret*, 64 NW. U. L. REV. 777, 788 (1970).

136. Professor Joslin lists approximately thirty-five jurisdictions with such statutes. Joslin, *Assisted Reproductive Technology*, *supra* note 132, at 9 n.21 and accompanying text.

husband or the wife from later challenging the presumption of parentage that attaches to every man whose wife bears a child.¹³⁷

The 1973 UPA was drafted early in the family law revolution that equalized the status of children born to married and unmarried women, and drafters limited the donor insemination provision to husbands and wives. But when the subsequent UPA, promulgated in 2000, contained the same limitation, numerous scholars and lawyers objected.¹³⁸ They persuaded the National Conference of Commissioners on Uniform State Laws (NCCUSL) to revise the law to extend the principle of equal treatment to both married and unmarried parents who conceive using donor semen.¹³⁹

Thus, the 2002 UPA reads:

A man who . . . consents to assisted reproduction by a woman as provided in [this statute] with the intent to be the parent of her child, is a parent of the resulting child.¹⁴⁰

The accompanying comment states that:

This provision reflects the concern for the best interests of nonmarital as well as marital children of assisted reproduction demonstrated throughout the Act. Given the dramatic increase in the use of ART in the United States during the past decade, it is crucial to clarify the parentage of all of the children born as a result of modern science.¹⁴¹

NCCUSL in 2002 did not explicitly address the circumstance of a lesbian couple bearing a child together using donor semen.¹⁴² Within a few years,

137. See, e.g., *Dews v. Dews*, 632 A.2d 1160, 1169 (D.C. 1993) (“A husband even belatedly consenting to artificial insemination may well consider himself, and be considered by the courts, to have a duty to support that child. At the very least, he would most likely be estopped in many cases to deny that duty.”).

138. See John J. Sampson, *Preface to the Amendments to the Uniform Parentage Act (2002)*, 37 FAM. L.Q. 1, 2-3 (2003) (summarizing the history of these objections).

139. The preface to the 2002 UPA reads:

The amendments of 2002 are the end-result of objections lodged by the American Bar Association Section of Individual Rights and Responsibilities and the ABA Committee on the Unmet Legal Needs of Children, based on the view that in certain respects the 2000 version did not adequately treat a child of unmarried parents equally with a child of married parents. Because equal treatment of nonmarital children was a hallmark of the 1973 Act, the objections caused the drafters of the 2000 version to reconsider certain sections of the Act. Through extended discussion and a meeting of representatives of all the entities involved, a determination was made that the objections had merit.

Preface to UPA (2002).

140. UPA § 703 (2002). Delaware, North Dakota, and Wyoming have enacted this provision into law. DEL. CODE ANN. tit. 13, § 8-703 (2009); N.D. CENT. CODE § 14-20-61 (2009); WYO. STAT. ANN. § 14-2-903 (2009). A statute that extends parental status to a man who consents to a woman’s insemination but not to a woman who consents to a woman’s insemination may run afoul of the 14th amendment equal protection clause.

141. UPA § 703, cmt. (2002).

142. The reporter for the revised UPA noted that “issues relating to same-sex couples were left to another day.” Sampson, *supra* note 138, at 3. This is not entirely accurate. Section 106 reads, “The provisions of this Act relating to the determination of paternity apply to determination of maternity.” The comment that follows notes that much of the Act

however, the legal mainstream acknowledged such families and extended their children the same safeguards available to children with heterosexual parents. In 2008, the American Bar Association approved a Model Act Governing Assisted Reproductive Technology (ABA Model Act). Section 603 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.¹⁴³

The ABA Model Act thus explicitly creates parentage in the partner of a lesbian who gives birth.

Although the Uniform Parentage Act has not been revised since 2002, another uniform act, the Uniform Probate Code (UPC), was amended in 2008 to recognize parentage for a lesbian partner. According to section 2-120(f) of the Uniform Probate Code:

[A] parent-child relationship exists between a child of assisted reproduction and an individual other than the birth mother who consented to assisted reproduction by the birth mother with intent to be treated as the other parent of the child.¹⁴⁴

The comments to this section explicitly reference same-sex couples and state that by its operation a woman who is not the birth mother becomes the child's parent.

The Uniform Probate Code affects wills and intestate succession, and therefore its definition of parent-child relationship applies only in that context. To date, Colorado and North Dakota have adopted these amendments,¹⁴⁵ which means that a child born using donor insemination to a lesbian couple in those states inherits from his or her nonbiological mother. That child will also qualify as a child of the nonbiological mother for purposes of benefits that extend eligibility to those defined by state law as able to inherit by intestate succession.¹⁴⁶

does not logically apply to the establishment of maternity, but it concludes that "in an actual case, a judge facing a claim for the determination of the mother-child relationship should have little difficulty deciding which portions of the Act should be applied." UPA § 106, cmt. (2002). Indeed, it was a similar provision that allowed the California court in *Elisa B.* to extend the "holding out" basis for determining parentage to a mother's female partner. *Elisa B. v. Super. Ct.*, 117 P.3d 660, 666 (Cal. 2005), *supra* Part II.B.1. If a state enacts both Section 106 and Section 703 of the 2002 UPA, Section 703 should confer maternity on the consenting female partner of a woman who conceives through assisted conception.

143. MODEL ACT GOVERNING ASSISTED REPRODUCTIVE TECHNOLOGY § 603 (2008) [hereinafter ABA MODEL ACT] (emphasis added), *available at* <http://www.abanet.org/family/committees/artmodelact.pdf>.

144. UNIF. PROBATE CODE § 2-120(f) (2008) [hereinafter UPC].

145. N.D. CENT. CODE § 30.1-04-19(6) (2009); An Act Concerning Changes to the Colorado Probate Code, ch. 310, 2009 Colo. Sess. Laws 1670.

146. One such example is Social Security child insurance benefits. *See supra* text accompanying note 53.

The significance of this change to the Uniform Probate Code goes beyond its limited subject area. Both the Uniform Probate Code and the Uniform Parentage Act go through the same NCCUSL process before being promulgated, including section-by-section consideration at two annual meetings by the over 300 Commissioners sitting as a Committee of the Whole. Then a majority of states present, no fewer than twenty, must approve the act before it can be officially adopted.¹⁴⁷

That process has now produced a definition of parentage consistent with the gender-neutral formulation in the ABA Model Act. This understanding of parentage, therefore, reflects a level of approval among the mainstream of the legal profession that should support state advocacy groups seeking reform. It should also reassure state legislators that the time has come, as New Mexico and the District of Columbia have already determined, to acknowledge the families formed by lesbian couples and their children.

c. Proof of consent

The uniform and model acts discussed above include two methods of establishing a partner's consent to the insemination with the intent to parent. The 2002 Uniform Parentage Act requires that the consent be in writing signed by both the man and the woman.¹⁴⁸ The gender-neutral ABA Model Act says that "consent by an individual who intends to be a parent of a child born by assisted reproduction must be in a signed record."¹⁴⁹ The Uniform Probate Code also uses the word "individual."¹⁵⁰

All three acts recognize the reality that a couple will not always sign a written consent. The law needs a mechanism for adjudicating consent and intent, and thereby parentage, independent of such a writing. The UPA and Model ABA Act permit a finding of parentage, in the absence of a writing, if the two people¹⁵¹ live with the child and hold the child out as their own "during the first two years of the child's life."¹⁵²

147. For the procedures of NCCUSL, see <http://www.nccusl.org/Update/DesktopDefault.aspx?tabindex=0&tabid=11>.

148. UPA § 704a (2002).

149. ABA MODEL ACT § 604(1) (2008).

150. UPC § 2-120(f) (2008) ("Consent to assisted reproduction by the birth mother with intent to be treated as the other parent of the child is established if the individual: (1) before or after the child's birth, signed a record that, considering all the facts and circumstances, evidences the individual's consent . . .").

151. The UPA refers to the "man and woman." UPA § 704b. The ABA Model Act refers to the "woman and the intended parent." ABA MODEL ACT § 604(2).

152. See UPA § 204(a)(5) (2002); ABA MODEL ACT § 604(2). The general UPA presumption of paternity extends to a man who lives with a child and holds that child out as his own "for the first two years of the child's life." UPA § 204(a)(5) (2002). The drafters explicitly intended that the presumption kick in only *after* the child's second birthday. UPA § 204 cmt. (2002) The use of the word "during" rather than "for" in the ART context

The UPC contains a slightly different formulation. It establishes consent in the absence of a signed record if the individual “functioned as a parent of the child no later than two years after the child’s birth,” defined as:

[B]ehaving toward a child in a manner consistent with being the child’s parent and performing functions that are customarily performed by a parent, including fulfilling parental responsibilities toward the child, recognizing or holding out the child as the individual’s child, materially participating in the child’s upbringing, and residing with the child in the same household as a regular member of that household.¹⁵³

But it also finds a parent-child relationship if the person “intended to function as a parent of the child no later than two years after the child’s birth but was prevented from carrying out that intent by death, incapacity, or other circumstances.”¹⁵⁴ This latter provision is especially important in the context of inheritance as it establishes a means to secure a child’s right to inherit if the partner dies before the child’s birth, even if the couple had no written consent.

The gender- and marital status-neutral version of the Uniform Parentage Act adopted in New Mexico contains the reference to the child’s first two years.¹⁵⁵ The D.C. statute omits this. If the couple lives with the child and openly holds the child out as their own, then the court can find the requisite intent and therefore parentage. This is the correct result because parentage flows from the consent to the insemination with the intent to parent. The written consent is the best form of evidence to prove intent, but it is the intent that properly results in the legal consequences of parenthood.¹⁵⁶

d. Registering both parents on the child’s birth certificate

A birth certificate is ordinarily the official record of a child’s parentage. While it is only evidence of parentage, not definitive proof, it is the one piece

suggests that legal parenthood attaches to the conduct of living with/holding out the child *at any time* before the child’s second birthday.

153. UNIF. PROBATE CODE § 2-115 (2008).

154. *Id.* § 2-120(f)(2)(B).

155. “Failure of a parent to sign a consent required by Subsection A of this section does not preclude a finding of parentage if the parent, during the first two years of the child’s life, resided in the same household with the child and openly held out the child as the parent’s own.” UNIF. PARENTAGE ACT, ch. 215 § 7-704(B), 2009 N.M. LAWS 215 (2009).

156. *See* *Charisma R. v. Kristina S.*, 96 Cal. Rptr. 3d 26 (Cal. Ct. App. 2009), discussed *supra* text accompanying notes 70-72. In *Charisma R.*, the court refused to read into the parentage statute a minimum duration of receiving the child into one’s home and holding the child out as one’s own. Professor Courtney Joslin advocates a presumption of consent when the two people “were living an interdependent life together at the time of conception.” Joslin, *Assisted Reproductive Technology*, *supra* note 132, at 68. Professor Joslin lists a number of factors a court could consider in determining whether the couple lived an interdependent life together. Drafters of the D.C. legislation did not discuss such a provision, and it does merit consideration.

of commonly accepted evidence.¹⁵⁷ Statutory reform recognizing the parentage of the consenting partner of a woman who gives birth using donor insemination should be accompanied by a provision mandating that the name of the second parent appear on the child's birth certificate.

The District of Columbia amended its law governing birth certificates in this fashion. A partner's name goes on the birth certificate as long as the couple has signed a written consent to the insemination with the intent to parent.¹⁵⁸ Written consent can occur after the child's birth, so that if the couple seeks a birth certificate with both names but did not sign a consent form before the child's birth, they can be instructed to sign one at that time. Thus, the couple does not need to go to court to ensure that the child's birth certificate accurately reflects the child's legal parents. Birth certificate in hand, in conformity with the underlying statutory framework, the child will have two parents without the need for adoption by the nonbiological mother.

The New Mexico statute makes no provision for the issuance of a birth certificate with the name of a female partner who consents to a woman's insemination. This oversight should be addressed through regulation or agency practice so that lesbian couples in New Mexico do not need a judge's order to obtain of a birth certificate with both names listed as parents. An attorney with a gay and lesbian family law practice in Albuquerque reports that New Mexico has recently decided that it will issue a birth certificate with two women's

157. In every state, after an adoption, the appropriate agency issues a new birth certificate. Lawyers for same-sex couples in some states do report difficulty in obtaining a new birth certificate after a second-parent or joint adoption. In Virginia, a split decision from the state's supreme court required the state registrar to issue a new birth certificate after a second-parent adoption was granted in another state. *Davenport v. Little-Bowser*, 611 S.E.2d 366 (Va. 2005). The court ruled that the statute on amending a birth certificate after adoption contained mandatory language. In 2008, a U.S. District Court judge in Louisiana ordered that state to issue a new birth certificate for a child born there who had been jointly adopted by a gay male couple in New York. *Adar v. Smith*, 591 F. Supp. 2d 857 (E.D. La. 2008). The state refused to issue the new birth certificate because the attorney general had concluded it violated public policy to allow two unmarried people to jointly adopt. The state has appealed the District Court ruling. See American Civil Liberties Union of Alabama, *ACLU Urges Federal Appeals Court to Require Louisiana to Issue Birth Certificate to Adopted Child of Gay Couple*, July 7, 2009, <http://www.aaclu.org/newsArchive.php?id=344#n344>. In Texas, state law permits only the name of a female mother and a male father to appear on a child's birth certificate after an adoption. In April 2009, the legislature held a hearing on a bill that would repeal the gender-specific language. See Equality Texas, <http://www.equalitytexas.org/content.aspx?id=593/>; see generally JOSLIN & MINTER, *supra* note 56, § 5:30.

158. The statute reads: "If the mother was not married or in a domestic partnership at the time of either conception or birth, or between conception and birth, the name of the other parent shall only be entered on the certificate if: . . . The parents have signed a consent to parent a child born by artificial insemination pursuant to § 16-909(e) and paragraph (3A) of this subsection." See D.C. CODE § 7-205(e)(3) (2001). Section 7-205(e)(3A) of the statute requires the Vital Records Registrar to furnish a form to the couple requiring, among other things, notarized consent and written notice that the legal consequences of parenthood arise from signing the form. *Id.* § 7-205(e)(3A).

names when the couple has married in a state that permits same-sex marriage and presents documentation that there is no other legal parent.¹⁵⁹ This suggests that the state will be open to instituting an appropriate procedure for recording the parentage of both mothers of a child born of donor insemination.

The omission of birth certificate law reform in New Mexico was likely a byproduct of the circumstances that produced the state's parentage law. The new donor insemination parentage provisions became law in the context of adopting a version of the 2002 Uniform Parentage Act, and the UPA is silent on birth certificates. The model law on birth certificates comes not from NCCUSL or the ABA but from the National Center for Health Statistics at the Centers for Disease Control and Prevention.

The Model State Vital Statistics Act and Regulations was last revised in 1992, long before any state recognized two same-sex parents in the absence of an adoption decree.¹⁶⁰ A working group is now in the early stages of a new revision of this model act.¹⁶¹ That revision should include language guaranteeing that when substantive law makes a same-sex couple the parents of a child born to one of them then the resulting birth certificate accurately records that information. The new D.C. statute can serve as an example of how states can implement such a law.

2. The status of a known semen donor

When insemination occurs using semen from an unknown donor, a statute creating parentage for the lesbian partner who consents to the insemination with the intent to parent resolves all issues of parentage. The child has two mothers, and they are the child's only parents.

When there is an identifiable semen donor, other issues may arise. Lesbians may choose a known donor to have maximum control over who the child's other genetic parent will be, to afford the child the opportunity to know that person at a later date, or to avoid the costs associated with using unknown donor semen from a doctor or sperm bank. Sometimes there is the expectation that the donor will play some role in the child's life. Because a dispute can later arise among the parties, a comprehensive parentage law must address the legal status of a known donor.

159. E-mail from N. Lynn Perls, Attorney in Albuquerque, N.M., to author (Feb. 16, 2009, 13:37) (on file with author).

160. The model act is available online at <http://www.cdc.gov/nchs/data/misc/mvsact92b.pdf>.

161. Conversation with Julia Kowaleski, Office of the Director, Division of Vital Statistics, June 30, 2009.

a. Not a parent absent written agreement

Many states address the status of a semen donor, but older laws limit their application to circumstances in which a doctor is involved in the insemination, and some apply only when the recipient is a married woman.¹⁶² Both these limitations were removed in the 2000 and 2002 revisions of the Uniform Parentage Act.¹⁶³ Just as the status of a biological mother's partner should not turn on whether the couple is married or in a civil union or domestic partnership, neither should that of a semen donor.

Many current donor statutes apply to both married and unmarried recipients, and they divide into two models. In thirteen states, a donor is not a parent.¹⁶⁴ There is no distinction between known and unknown donors and no statutory mechanism for producing a different result even if the parties intend a different outcome.¹⁶⁵ This model reflects the vast majority of donor

162. The original UPA limited the donor insemination provisions to circumstances in which a doctor was involved in the insemination and the recipient was married: "If, under the supervision of a licensed physician and with the consent of her husband, a wife is inseminated artificially with semen donated by a man not her husband, the husband is treated in law as if he were the natural father of a child thereby conceived. . . . The donor of semen provided to a licensed physician for use in artificial insemination of a married woman other than the donor's wife is treated in law as if he were not the natural father of a child thereby conceived." UPA §§ 5(a)-(b) (1973). This provision reflected the common circumstances that the procedure was used primarily by a married couple who sought medical help with infertility and ultimately used semen from an unknown donor to compensate for the husband's infertility. Because the 1973 provision exists in many current statutes, when a lesbian uses a known donor the legal status of the donor can depend entirely upon whether a doctor was involved in the insemination. In *Jhordan C. v. Mary K.*, an early case concerning a lesbian couple's use of donor semen, the mother could not prevail in her argument that the donor was not a father because conception took place without the use of a physician. 224 Cal. Rptr. 530 (Ct. App. 1986).

163. See UPA § 702, cmt. (2002) ("UPA (1973) § 5(b) specified that a male donor would not be considered the father of a child born of artificial insemination if the sperm was provided to a licensed physician for use in artificial insemination of a married woman other than the donor's wife. The new Act does not continue the requirement that the donor provide the sperm to a licensed physician").

164. ARK. CODE ANN. §§ 9-10-201 to -202 (2009); CAL. FAM. CODE § 7613 (West 2009); COLO. REV. STAT. § 19-4-106 (West 2009); CONN. GEN. STAT. ANN. §§ 45a-774 to -775 (2004); FLA. STAT. ANN. § 742.14 (West 2009); IDAHO CODE ANN. § 39-5405 (LexisNexis 2009); 750 ILL. COMP. STAT. 40/2, 40/3 (2009); OHIO REV. CODE ANN. § 3111.95 (West 2009); OR. REV. STAT. § 109.239 (2009); UTAH CODE ANN. § 78B-15-702 (2009); VA. CODE ANN. § 20-158(A)(3) (2009); WASH. REV. CODE § 26.26.705 (2009); WIS. STAT. ANN. § 891.40 (West 2009). In five of these states—Arkansas, California, Colorado, Illinois and Wisconsin—the insemination statute applies only when a physician is involved in the insemination. In 2008, California amended its statute so that it would likewise apply in instances where the man gave his semen to a sperm bank. Act of Sept. 28, 2008, ch. 534, 2008 Cal. Stat. 93 (codified at CAL. FAM. CODE § 7613(b) (West 2009)).

165. At least one court, however, has held that a donor nonpaternity provision was inapplicable when the donor was known to the recipient. See *JOSLIN & MINTER*, *supra* note 56, § 3:17.

insemination situations. It ensures both that the man cannot be looked to for financial support and that the woman can raise the child in a household free from disruption caused by a dispute over parentage.

Eight states, however, present a better model. In those states, the donor is not a parent unless the donor and recipient agree in writing to the contrary.¹⁶⁶ This makes it possible for the two participants to memorialize their intent that the donor will in fact be a father to the child. This is the choice made in the D.C. statute. If the donor and the recipient plan to raise the child together but do not put this in writing, the donor is still a parent if he and the recipient live together with the child and hold the child out as their own.¹⁶⁷

The statutory framework that makes a donor not a parent absent written agreement was approved by the Kansas Supreme Court in the 2007 case, *In re K.M.H.*¹⁶⁸ Kansas has such a statute, and a known donor sought paternity of twins even though he and the children's mother had no written agreement. The donor asserted the existence of an oral agreement that he would be a parent and argued that the statute was unconstitutional as applied to him.

The court upheld the statute. It reviewed numerous other court challenges by known donors and distinguished this case from those in states whose laws contained an absolute bar on a donor's paternity. The Kansas statute was constitutional because it did recognize a donor as a parent if the parties so agreed. The requirement that the agreement be in writing enhanced "predictability, clarity, and enforceability" and encouraged early resolution of the donor's status. "Encouraging careful consideration of entry into parenthood is admirable," the court wrote. "Avoidance of the limbo in which [the donor] finds himself is a worthy legislative goal."¹⁶⁹

The court found that requiring the agreement in writing did not make the

166. DEL. CODE ANN. tit. 13, §§ 8-702 to -704 (2004); KAN. STAT. ANN. § 38-1114(f) (West 2008); N.H. REV. STAT. ANN. §§ 168-B:11, 168-B:12 (2009); N.J. STAT. ANN. § 9:17-44 (West 2009); N.M. STAT. ANN. § 40-11-6 (West 2009); N.D. CENT. CODE §§ 14-20-60 to -62 (2008); TEX. FAM. CODE §§ 160.702, 160.7031 (Vernon 2007); WYO. STAT. ANN. §§ 14-2-902 to -904 (2008). In five of these states—Kansas, New Hampshire, New Jersey, New Mexico, and Texas—the statute applies only when a doctor is involved in the insemination. In *Mintz v. Zoernig*, 198 P.3d 861, 863 (N.M. Ct. App. 2008), a man donated semen directly to a lesbian, who bore two children. Although the parties agreed he would have no financial obligation to the children, the mother subsequently did file for child support. Because the semen had not been provided to a licensed physician, the statute stating that he was not a father did not apply. The court acknowledged the possibility that a sperm donor might agree to relinquish any parental rights or responsibilities, but in this case, because the donor had visitation with the children and was registered in the vital statistics bureau as the children's father, he could not avoid his obligation to support them. The 2000/2002 UPA and the Model ABA Act eliminate the requirement of physician involvement. New Mexico has amended its statute to remove the requirement of physician involvement, effective January 1, 2010. 2009 N.M. A.L.S. 215, §§ 7-703, 7-704.

167. D.C. CODE § 16-909(e) (2001).

168. 169 P.3d 1025 (Kan. 2007).

169. *Id.* at 1039-40.

statute unconstitutional. Rather, the statute “ensures no *attachment* of parental rights to sperm donors in the absence of a written agreement to the contrary; it does not *cut off* rights that have already arisen and attached.”¹⁷⁰ Both the majority and the concurrence noted that the statute appropriately protected a donor from obligations towards a child absent the required written agreement.

b. Can a child have more than two parents?

Three legal parents are unusual, but not unheard of. One of the first “second-parent” adoptions ever granted was actually a third-parent adoption. In 1985, an Alaska judge granted an adoption to the mother’s partner without terminating the parental rights of the child’s biological father.¹⁷¹ Other such adoptions have been granted in Alaska as well as in Massachusetts and Washington.¹⁷² A California lawyer reports that she has obtained “second-parent” adoptions without terminating a biological father’s rights, but that she does not bring such cases unless the child is at least five years old, the child considers all the adults parents, and there is a solid pattern of effective co-parenting.¹⁷³ The recently enacted Delaware statute makes it possible for a court to declare that a child with two parents has a third parent who meets certain statutory criteria.¹⁷⁴

Two recent reported cases leaving a child with three parents have also received substantial attention. In *A.A. v. B.B.*, an Ontario court used its equitable powers to decree a five-year-old boy’s nonbiological mother a legal parent.¹⁷⁵ The two biological parents both retained their parental status. In *Jacob v. Shultz-Jacob*, a Pennsylvania appeals court approved a ruling giving a biological mother and her former partner shared legal custody of their children.¹⁷⁶ The biological mother received primary physical custody, with partial physical custody to the other mother. The semen donor, who had been involved in the children’s lives, received partial physical custody and was ordered to pay child support. There are also several cases of heterosexual

170. *Id.* at 1041.

171. See Polikoff, *This Child Does Have Two Mothers*, *supra* note 1, at 522-23 (discussing *In re Adoption of A.O.L.*, in which an adoption order explicitly left the child with three legal parents: two mothers, who primarily raised her, and a father, who had some limited contact with her).

172. E-mail from Joyce Kauffman, Attorney, Law Office of Joyce Kauffman, to author (Jan. 30, 2009, 13:10) (on file with author); E-mail from Allison Mendel, Attorney, Mendel and Associates, to author (Jan. 31, 2009, 16:35) (on file with author); E-mail from Julie Shapiro, Professor of Law, Seattle University Law School, to author (Jan. 30, 2009, 13:32) (on file with author).

173. E-mail from Deborah Wald, Attorney, Wald Law Group, to author (Jan. 30, 2009, 12:01) (on file with author).

174. See discussion *supra* Part II.B.4.

175. (2007) 83 O.R. 3d 561 (Can.).

176. 923 A.2d 473 (Pa. Super. 2007)

families not involving assisted conception where the court has allocated the rights and responsibilities of parenthood among more than two parents.¹⁷⁷

In recent years, a number of scholars have considered the question of whether a child can have three parents.¹⁷⁸ After in-depth research, Professor Susan Appleton concluded that family law is already well-equipped to recognize multiple parents.¹⁷⁹ “Parenting plans,” now a common feature of divorces, subdivide and assign numerous aspects of parenting. The Missouri statutory framework, for example, requires parents to specify time with each person, including every weekday, weekend day, holiday, and vacation; the time and place of transfers; responsibility for transportation; telephone access times; how extracurricular activity decisions and educational, medical, and dental decisions will be made; how child care providers will be chosen; how disputes will be resolved; and how each distinct category of the child’s expenses will be paid for.¹⁸⁰ “With so many discrete elements of ‘parenting’ listed,” Professor Appleton concludes, “a plan could easily accommodate two, three, or more parents.”¹⁸¹

By the time D.C. enacted its parentage act, the jurisdiction had already recognized that more than two persons may have a right to custody or visitation

177. Louisiana has recognized dual paternity since *Smith v. Cole*, 553 So.2d 847 (La. 1989). See also *Geen v. Geen*, 666 So.2d 1192 (La. App. 1995). In *J.R. v. L.R.*, the child’s nonbiological father, who had raised the child for almost ten years, and the child’s biological father who had no relationship with the child, were both ordered to pay child support. 902 A.2d 261 (N.J. Super. 2006).

178. See, e.g., Laura Nicole Althouse, *Three’s Company? How American Law Can Recognize a Third Social Parent in Same-Sex Headed Families*, 19 HASTINGS WOMEN’S L.J. 171 (2008); Nancy E. Dowd, *Multiple Parents/Multiple Fathers*, 9 J.L. & FAM. STUD. 231 (2007); Melanie B. Jacobs, *Why Just Two? Disaggregating Traditional Parental Rights and Responsibilities to Recognize Multiple Parents*, 9 J.L. & FAM. STUD. 309 (2007). Professor Brian Bix has rebuked conservative commentators who respond to the possibility of multiple parenthood with “bogeyman” arguments such as “once we cross the border into legalized multiple parenthood, we have virtually arrived at the abolition of marriage and the family.” Brian Bix, *The Bogeyman of Three (or More) Parents*, U. OF MINN. L. SCH. LEGAL STUD. RES. PAPER SERIES NO. 08-22, available at <http://ssrn.com/abstract=1196562>. Bix concludes:

The slippery slope and the parade of horrors are standard forms of argument, both inside law and elsewhere. However, as often as not, the horrors never come, or, when they do, they turn out to be not so horrible. Whether multiple parenting is a good idea, either as a social reality or as a legal possibility, is, at best, a difficult question, and one that comes up as often with more conventional family forms, like step-parents, as with the more unconventional family forms that seem to be evoking the visceral reaction of some commentators. I hope that we can address these issues (as a number of academic writers already are) in a more considered manner, rather than in a full bogeyman panic.

Id. at 8.

179. Susan Frelich Appleton, *Parents by the Numbers*, 37 HOFSTRA L. REV. 11(2009) [hereinafter Appleton, *Numbers*].

180. *Id.* at 25.

181. *Id.*

with a child and a support obligation towards that child. D.C. recognizes “de facto” parents by statute. A de facto parent is one:

(A) Who:

- (i) Lived with the child in the same household at the time of the child’s birth or adoption by the child’s parent;
- (ii) Has taken on full and permanent responsibilities as the child’s parent; and
- (iii) Has held himself or herself out as the child’s parent with the agreement of the child’s parent or, if there are 2 parents, both parents; or

(B) Who:

- (i) Has lived with the child in the same household for at least 10 of the 12 months immediately preceding the filing of the complaint or motion for custody;
- (ii) Has formed a strong emotional bond with the child with the encouragement and intent of the child’s parent that a parent-child relationship form between the child and the third party;
- (iii) Has taken on full and permanent responsibilities as the child’s parent; and
- (iv) Has held himself or herself out as the child’s parent with the agreement of the child’s parent, or if there are 2 parents, both parents.¹⁸²

A person who can prove that she or he is a de facto parent by clear and convincing evidence has a right to seek custody or visitation and an obligation to pay child support on the same basis as a legal parent.¹⁸³ Under these statutes, a child may have two legal parents plus a de facto parent who obtains visitation rights.

The new D.C. parentage statute could result in three parents for a child. A lesbian couple may sign a written document stating consent to insemination and an intent that both will parent. And the couple could also sign an agreement with the donor that he will be a parent. The statute conclusively establishes the partner as a parent. The agreement with the donor means that he, too, is a parent. The statute does not contain a means to choose one person over the other as the child’s only other parent. Should such a case arise, the court should find that the child has three parents.

The D.C. statute is silent on the legal status of an agreement signed with the donor that contemplates a role in the child’s life but explicitly eschews

182. D.C. CODE § 16-831.01 (2001).

183. *Id.* § 16-831.03. Until the passage of the new D.C. parentage law, de facto parent status was the only mechanism for protecting the relationship between a child and a legally unrecognized parent. This status will still be important because it will protect that relationship when one mother has adopted a child or when the couple establishes their relationship after conception. In addition, this status protects a child’s relationship with a legally unrecognized father when a gay male couple has a child using a surrogate mother. See *supra* note 46 for the explanation of why the new D.C. parentage law does address such children.

parental rights. A court should not find that the donor is a parent absent specific language to that effect in the agreement. It should, however, enforce provisions concerning contact with the child.

Elsewhere I have argued that the law should facilitate a family form in which a child has two legal mothers but also has a legally protected relationship with a semen donor that falls short of legal parenthood.¹⁸⁴ Legal recognition of such a family form is important because it reflects a common arrangement that lesbian couples make with a donor. All parties agree at the outset that the man should have a relationship with the child, but that he will not have parental rights. That arrangement is vulnerable in most places because, if a dispute arises, a court is likely to find either that the donor is a parent and has full rights, or that he is not a parent and therefore has no rights.

The result of enforcing an agreement for visitation rights will be similar to the arrangement authorized by D.C.'s *de facto* parent statute—a child with two parents and another person with visitation rights. A court need not enforce the exact visitation terms, as the contours of the visitation should serve the child's best interests. What the court should not do, however, is interpret the writing as an agreement for full parentage or decline to recognize the donor as entitled to claim any visitation rights at all.

3. Summing up the status of children born using donor insemination to lesbian couples in the District of Columbia

The time has come to update state statutes to reflect the families formed by lesbian couples who have a child through assisted reproduction with donor semen. The District of Columbia has taken the lead. Its legislation establishes the parentage of both mothers, confirms the nonparentage of the donor in the absence of a written agreement, and provides for proper registration of the child's parents at birth. The District of Columbia allows the couple to register as domestic partners, but the status of a couple is distinct from their status as parents. The nonbiological mother's legal status depends solely upon the couple's intention towards the child as reflected in their written consent or their behavior. Also, the District of Columbia permits second-parent adoption,¹⁸⁵ but a woman whose partner bears a child conceived through donor insemination no longer must pursue that time-consuming and potentially costly method of establishing her legal status.¹⁸⁶

184. This can be accomplished in states that allow agreements for visitation after a second-parent adoption terminates any parental rights a donor might have. *See* Polikoff, *Deliberate Construction*, *supra* note 126.

185. *See In re M.M.D.*, 662 A.2d 837 (D.C. 1995).

186. For a discussion of extraterritorial recognition of parentage and the value of nonetheless obtaining a court judgment establishing parentage, see *infra* Part V.

B. Presumptive Parentage

Ten states and the District of Columbia have extended (or are set to extend) the “marital” parentage presumption to same-sex couples in the formalized relationship of marriage, civil union, or domestic partnership.¹⁸⁷ Indeed, gay marriage advocates often invoke protection of the relationship between a child and both of her same-sex parents as a reason for allowing same-sex couples to marry. But presumptive parentage without further law reform produces an unacceptable amount of legal uncertainty.

The parentage presumption, by definition, gets a biological mother’s female spouse or domestic/civil union partner a legal status identical to that which a biological mother’s husband gets. If the state has an assisted conception statute limited to married couples, the provisions of the statute will apply to married/domestically partnered/civil unioned lesbian couples when conception occurs through donor insemination. But when a state has no statute on assisted conception, and when, in all states, conception occurs through sexual intercourse,¹⁸⁸ the parentage presumption is inadequate unless accompanied by legislation settling *when, by whom, and on what basis* the presumption can be rebutted. Of the eleven jurisdictions that have, or are about to have, the parentage presumption, only the District of Columbia simultaneously rewrote its laws to resolve these issues.

Perhaps these questions would not be so complex if all states were in agreement as to when, by whom, and on what basis the parentage presumption can be rebutted in a *man* who is not the biological parent of his wife’s child. But there is no such uniformity. The matter is addressed, however, in the 2002 Uniform Parentage Act, and that influenced the drafting process in the District of Columbia.

This Part first examines when and on what basis a lack of biological connection should be able to rebut the parentage presumption in a biological mother’s female spouse or domestic/civil union partner when there is no

187. For the most recent map of the states affording these means of formal recognition, see Human Rights Campaign, *supra* note 47.

188. The circumstances under which conception may occur through sexual intercourse will vary. The lesbian couple may decide together that one woman will have sexual intercourse because it is more likely to produce pregnancy than is insemination. Pregnancy may also occur when one woman has sexual intercourse while under the influence of drugs or alcohol, when one woman engages in an extramarital relationship with a man, or as a result of sexual assault. For two examples of cases in which conception occurred through sexual intercourse, see *supra* note 110, describing the Quebec case where the nonbiological mother believed conception was occurring through insemination, and *In re Hatzopoulos*, 4 Fam. L. Rep. (BNA) 2075 (Denver Juv. Ct. July 8, 1977), in which the child was conceived through casual sexual intercourse while the lesbian couple was on vacation and, after the death of the biological mother, a dispute arose between the nonbiological mother and the sister and brother-in-law of the biological mother. The case is discussed in Polikoff, *This Child Does Have Two Mothers*, *supra* note 1, at 527-29.

competing claim by an identifiable biological father. It then examines the same questions when there is such a claim.

In the context of the parentage reform process in D.C., lawyers with the D.C. Office of the Attorney General (OAG) raised concerns about whether recognizing a parentage presumption in a mother's female partner would violate the *paternity* establishment statutes that affect federal funding of local child support enforcement efforts. This Part briefly describes the objections put forth and their ultimate resolution, including explicit approval of the same-sex domestic partner presumption by the federal Office of Child Support Enforcement.

1. The biological mother's female spouse/partner

When a married woman bears a child, her husband is the presumptive father of the child from birth regardless of his biological connection to the child. Because this status is a derivative of the couple's marriage, it is appropriate to derive the same status for a lesbian couple who marries or enters a civil union or domestic partnership.¹⁸⁹ In the new D.C. statute, such a presumption attaches when the couple is in a domestic partnership at the child's birth.¹⁹⁰ The partner's name goes on the child's birth certificate.¹⁹¹

If such a presumption could be rebutted by anyone at any time on the basis of lack of biological connection between the spouse/partner and the child, then the presumption would be meaningless for a lesbian couple.¹⁹² A nonbiological mother would always be able to disestablish her parentage and thereby end her support obligation, and a biological mother would always be able to disestablish her partner's parentage, potentially eliminating contact between the nonbiological parent and her child.¹⁹³

189. For an extensive analysis of why the presumption should extend to a lesbian couple, see Appleton, *Presuming Women*, *supra* note 42, at 285-86 ("We can now see the presumption not as assumption of the husband's probable genetic connection to the child. Instead, [it] 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 . . . during the pregnancy, in turn supporting the expected child.")

190. D.C. CODE § 16-909(a)(1) (2001). It also applies if the couple has married in a jurisdiction that allows same-sex couples to marry. Effective July 7, 2009, the District of Columbia recognizes such marriages for all purposes. *Id.* § 46-405.01.

191. *Id.* § 7-205(e)(2A).

192. Only when a woman gives birth to a child conceived using her partner's egg will the partner have a biological relationship to the child. *See generally* K.M. v. E.G., 117 P.3d 673 (Cal. 2005); *supra* note 83 and accompanying text.

193. A court might apply estoppel principles to avoid such a result. *See* Kristin H. v. Lisa R., 117 P.3d 690 (Cal. 2005) (estopping a biological mother who had participated in obtaining a judgment of parentage for her partner from arguing that the court did not have the authority to grant the judgment). The nonbiological mother in the District of Columbia would also likely qualify as a *de facto* parent. *See supra* text accompanying notes 182-83.

In considering the relationship between biology and presumptive parenthood for lesbian couples, a logical first inquiry is how states, by statute or court rulings, determine legal parentage when a husband is not the biological father of his wife's child. In many such instances, men have asked courts to relieve them of the obligations of legal parenthood.¹⁹⁴ In others, women have sought declarations of nonpaternity, hoping to eliminate their ex-husbands from their children's lives.¹⁹⁵ There is no uniformity of outcomes across the country.

The Uniform Parentage Act addresses this matter in the first instance by establishing a rigid time frame for challenging the parental status of a presumed father. With very limited exception, an action to adjudicate the parentage of a child with a presumed father must be brought within two years of the child's birth.¹⁹⁶ After that time, the presumption cannot be rebutted by anyone. The drafters admit that this provision deals with "difficult issues."¹⁹⁷

The District of Columbia accepted the time frame contained in the UPA. The presumptive parenthood of a male or female spouse or domestic partner of a woman who gives birth to a child must be challenged before the child's second birthday.¹⁹⁸ The only exception to this time frame occurs when the couple did not live together during the 300 days before the birth of the child and the presumed parent never openly held out the child as his or her own. If both those criteria are established, a proceeding to disprove the parent-child relationship may be maintained at any time.¹⁹⁹

The substantive basis for challenging a man's presumed parentage is his lack of genetic connection to the child.²⁰⁰ The statute allows the court to nonetheless find that a genetically unrelated husband is a child's parent, even in the first two years, taking into account the child's interests, whether the conduct of either the mother or the presumed parent should preclude that party from denying parentage, and the duration and stability of the relationship between the child, the presumed parent, and the genetic parent (if there is one).²⁰¹

The basis for rebutting a woman's presumed parentage needs to consider a fundamental factual distinction. A husband does not always know at the time of a child's conception that he may not be the child's biological father. For a lesbian couple, both women know from the moment of pregnancy that the partner is not the child's biological parent. The decisions the two women make at that point have consequences for the child and should have legal

194. See Paula Roberts, *Truth and Consequences: Part II. Questioning the Paternity of Marital Children*, 37 FAM. L.Q. 55, 58, 64-65 (2003) (detailing statutory and judicial approaches).

195. *Id.* at 61 n.23 (detailing cases).

196. UPA § 607(a) (2002).

197. *Id.* § 607, cmt.

198. D.C. CODE § 16-2342(c) (2001).

199. *Id.* § 16-2342(d).

200. *Id.* § 16-909(b)(1).

201. *Id.* § 16-909(b)(1)(A-C).

consequences.

A woman whose partner becomes pregnant through sexual intercourse may not want a parental relationship with the child; the pregnant woman may not contemplate a parenting role for her partner. On the other hand, the couple may decide to raise the child as their own.

The D.C. statute addresses this by including an additional basis for rebutting a female domestic partner's presumed parentage. That presumption may be overcome by clear and convincing evidence that the presumed parent did not hold herself out as a parent of the child.²⁰² With such a provision in place, neither the state nor the mother would be able to impose a support responsibility on a partner who never holds the child out as her own.²⁰³

If a domestic partner *does* hold the child out as her own, however, neither she nor the biological mother would be able to automatically disestablish parentage on the basis of biology. Rather, the court would weigh the factors of the child's interest, whether the conduct of either the mother or the presumed parent should preclude that party from denying parentage, and the duration and stability of the relationship between the child and the presumed parent. The court then could find that the partner is the child's legal parent.

A court would be required to interpret the "holding out" standard, and this is admittedly more subjective than biology. But that language appears in the original UPA as a basis for determining whether a man is a child's presumed parent, and it remains in the 2002 UPA.²⁰⁴ Courts have experience with the standard and should be able to apply it in the circumstance contemplated here.²⁰⁵

Furthermore, this language approximates the standard that a court must apply in determining whether a partner who did not consent in writing to a woman's insemination is the parent of the resulting child. As contained in the model laws and the D.C. statute, she is a parent if the couple "resided together in the same household with the child and openly held the child out as their own."²⁰⁶ From the child's perspective, the functional parental relationships do not vary with method of conception.

Because rebuttal based on biology would render the presumption meaningless, and because no rebuttal at all would result in legal parenthood

202. *Id.* § 16-909(b)(2). This provision applies to a *female* domestic partner because the D.C. domestic partnership law is available to different-sex as well as same-sex couples, and rebuttal of a father-child parentage presumption for a man in a domestic partnership with the mother is addressed elsewhere. *See id.* § 16-909(b).

203. Professor Appleton does not explore this issue in depth, but she does consider the similar possibility of rebutting the presumption when the presumed parent "never performed any parental functions." *Presuming Women*, *supra* note 42, at 291.

204. *See* UPA § 4(4) (1973); UPA § 204 (2002). *See also* UPA § 204, cmt. (2002).

205. *See, e.g., Elisa B. v. Super. Ct.*, 117 P.3d 660, 667 (Cal. 2005) (discussing and applying the holding out provision to the matter before the court).

206. D.C. CODE § 16-909(c)(1)(B) (2001).

when it is inappropriate, the standard carved out in the D.C. statute offers a good solution. States whose laws now contain the parentage presumption need an additional statute to achieve this result.

2. The biological father

a. Statutory framework

A comprehensive statute establishing a parentage presumption for a mother's same-sex partner should also address the legal status of the biological father. When he is a semen donor, a statute that he is not a parent absent an agreement in writing to the contrary settles the issue. At least two states, Vermont and Iowa, have the parentage presumption for same-sex couples but no statute on assisted conception. In all states, if conception occurs through sexual intercourse, a court may have to resolve competing claims to parenthood.²⁰⁷

A case pending in Vermont raises this issue.²⁰⁸ A child was born to a lesbian couple in a civil union using donor insemination with a known donor, and the couple raised the child together. By virtue of the civil union, both women are her legal parents.²⁰⁹ The couple separated, however, and the biological mother and the known semen donor are together challenging the parental status of the nonbiological mother.

If Vermont had a statute establishing that a donor of semen to a married woman is not a parent, or is not a parent without an agreement in writing, that statute would apply equally to a woman in a same-sex civil union.²¹⁰ But Vermont has no donor insemination statute at all. It does, of course, have a statute that creates a rebuttable presumption that "[a] person alleged to be a parent" is a parent if the "child is born while the husband and wife are legally married to each other."²¹¹

There is no explicit statement in the Vermont code as to when a biological father can rebut a husband's presumptive parentage, and the civil union law does not answer that question for a civil union partner. Vermont law gives the family court jurisdiction over actions brought by a person to establish parentage.²¹² An action may be brought by "a person alleged or alleging

207. See *supra* note 188 for examples of conception by sexual intercourse.

208. Gay & Lesbian Advocates & Defenders, *C.P. v. R.D.*, GLAD BRIEFS 11 (Winter 2009), available at <http://www.glad.org/current/reports/> (discussing GLAD's representation of the nonbiological parent in *C.P. v. R.D.*).

209. VT. ST. ANN. tit. 15, § 1204(f) (2008).

210. See *id.*

211. *Id.* § 308.

212. *Id.* § 303.

himself or herself to be the natural parent of a child.”²¹³ A code section does state that “results of genetic testing are relevant . . . in order to prove [or disprove] parentage,” but the court has the power to exempt a party from genetic testing “for good cause.”²¹⁴

There is no reported Vermont case law on whether and when a biological parent may claim parentage of a child born to a woman married to another man. In *Godin v. Godin*, the significance of biology arose in a different context; the court refused to allow genetic testing, and consequent paternity disestablishment, of a child born to a married couple when the challenge was brought by the former husband years after a divorce decree named him the father of the child and ordered him to pay child support.²¹⁵ In other words, the only guiding case in Vermont falls in the context of a challenge by one of the spouses, not a claim by the biological father.

If Vermont allows the donor’s biological tie to rebut the presumption of parentage in a nonbiological mother, it will make the presumption virtually worthless. If the court wants to distinguish based on method of conception, it will have to use its equitable powers, since there is no donor insemination statute.²¹⁶ A comprehensive statute must address this issue.²¹⁷

Aware of the need for such statutory guidance, drafters of D.C.’s recent reforms gave careful consideration to how a court should resolve competing claims when a child is born to a woman with a male or female spouse or domestic partner and the child’s other biological parent is not that presumed parent.

Before the most recent statutory changes, D.C. law gave a man claiming genetic parentage an unlimited opportunity to file an action for legal parentage, even when the mother’s husband had always held the child out as his own.²¹⁸ Proof of genetic testing always rebutted the marital presumption.²¹⁹ As written, a D.C. court, if asked, had to disestablish the parentage of a husband and establish the genetic father as the child’s other parent. The disruption to the child such a finding could provoke counseled in favor of reforming the relevant law for married heterosexual couples, and then applying the same standard to same-sex partners/spouses.

213. *Id.* § 302.

214. *Id.* § 304(a)-(b).

215. 725 A.2d 904 (Vt. 1998).

216. The Vermont Supreme Court has already demonstrated a willingness to develop criteria for parentage in the absence of complete statutory guidance. See *Miller-Jenkins v. Miller-Jenkins*, 912 A.2d 951, 968-69 (Vt. 2006).

217. If Vermont had the two-year limit on challenges to the legal status of a presumed parent contained in the UPA, even in the absence of a donor insemination statute, the court in the pending case would dismiss an action to grant parentage to the biological father, as long as the child was at least two years old.

218. D.C. CODE § 16-909(b-1)(1), (a)(1) (2001).

219. *Id.* § 16-909(b-1).

At one stage in developing the D.C. statute, drafters chose to leave a judge with maximum discretion to resolve parentage. When a child had a presumed second-parent because the mother was married or in a domestic partnership, but another person was the child's genetic parent, the bill would have allowed the judge to determine legal parentage, "giving due consideration to the child's interests and the duration and stability of the relationship between the child and the presumed parent."²²⁰

During conferences on the D.C. bill, the lawyers in the D.C. OAG expressed concern that this standard would give a judge too much leeway to disestablish parentage. Therefore, all involved in the drafting agreed on the almost absolute two-year limit contained in the UPA, with the possibility that even within the two-year period a judge could determine that the presumed parent was indeed the child's legal parent after considering the child's interest.²²¹

b. Constitutional considerations

The Supreme Court has imbued a man not married to a child's mother with constitutional rights with respect to his biological child if he has "grasped the opportunity" and developed a relationship with the child.²²² But the man may not have constitutional parental rights if the child is born to a woman married to another man and the married couple wants to raise the child as their own.²²³ This principle stems from the case of *Michael H. v. Gerald D.*, in which the Supreme Court left intact a California law denying a biological father who had functioned as a father the right to seek paternity of a child born while the

220. DOMESTIC PARTNERSHIP JUDICIAL DETERMINATION OF PARENTAGE ACT OF 2009, B. 18-0066 (D.C. 2009), as introduced on January 6, 2009, *available at* <http://www.dccouncil.us/images/00001/20090109130008.pdf>. This language was adapted from a D.C. Court of Appeals case, *S.A. v. M.A.*, 531 A.2d 1246, 1249 n.2 (D.C. 1987).

221. The exact language is as follows:

A [parentage] presumption may be overcome upon proof by clear and convincing evidence, in a proceeding instituted within the time provided in § 16-2342(c) or (d), that the presumed parent is not the child's genetic parent. The Court shall try the question of parentage, and may determine that the presumed parent is the child's parent, notwithstanding evidence that the presumed parent is not the child's genetic 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.

D.C. CODE § 16-909(b)(1) (2001). The time frame referred to is within two years of the child's birth, unless the presumed parent did not live with the child's mother during the 300 days before the child was born and did not hold the child out as his or her own. *Id.* § 16-2342(c) and (d). The exception to the two-year rule assures that a spouse or domestic partner separated from the mother, who never acts as the child's parent, but who does not obtain a legal dissolution of the relationship, will not be found to be the child's parent.

222. *Lehr v. Robertson*, 463 U.S. 248, 262 (1983).

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

mother was married to another man, when the mother and her husband wished to raise the child together.²²⁴ In such a factual scenario, states have substantial discretion in determining the circumstances under which such a genetic father may challenge the presumed parental status of a mother's husband.

Without further guidance from the Supreme Court, each state has settled both the constitutional and policy issues in its own way. The variation among the states confounds the ability to generalize. In some states, only the mother or her husband can challenge the presumption; in others, rebuttal is permitted if consistent with the child's interests; and in others, the biological father has a right to challenge the husband's paternity.²²⁵

For example, an Ohio court ruled that a married couple had a constitutional right to the integrity of their family.²²⁶ As a result, the court ruled that a statute giving a man alleging biological fatherhood the right to bring a parentage action against the couple violated the married couple's constitutional rights. The court noted that "a family unit, regardless of its composition, is constitutionally protected." The opinion does not say how old the child was when the paternity action was filed, but when the case was decided, the child was seventeen months old. The court did not want to undermine the value of the child's intact family, and it cited attachment theory and the husband's psychological parenthood as significant to its ruling.

On the other hand, in *In re The Parentage of John M.*, the Illinois Supreme Court overturned a lower court ruling that the state's parentage law was unconstitutional on its face.²²⁷ The mother's extra-marital partner had filed a paternity action and sought genetic testing concerning a child born while the mother was still married. The husband argued that the statute was facially unconstitutional because it did not require a hearing on the child's best interests before ordering paternity testing. On appeal, the court held that the test of facial unconstitutionality was not met and that the lack of an evidentiary hearing made it impossible to rule that the statute was unconstitutional as applied.

In another Illinois case, the appeals court overturned a lower court order denying genetic testing after holding a "best interests" hearing.²²⁸ The trial court found that genetic testing would not be in the child's best interests and dismissed the paternity action filed by a man alleging to be the biological father of a child born to a married couple. The child was three years old when the petition was filed. The appeals court held that the alleged biological father had standing to bring the action, that the statute required the testing on the request of any party, and that the court could not read into the statute consideration of

224. *Id.*

225. See Appleton, *Presuming Women*, *supra* note 42, at 234-36 nn.31-37 (detailing cases from various jurisdictions dealing with rebuttals of parental presumptions).

226. *Merkel v. Doe*, 63 Ohio Misc. 2d (Ohio Ct. Com. Pl. 1993).

227. 817 N.E.2d 500 (Ill. 2004).

228. *J.S.A. v. M.H.*, 797 N.E.2d 705 (Ill. App. Ct. 2003).

the child's interests in deciding whether to order the testing. In the absence of a specific statutory provision, the court ruled, "[t]he law, as it exists today, fails to protect the child's best interests in parentage determinations."²²⁹

The District of Columbia has decided that when a child is born to a couple in a marriage or a domestic partnership, a biological father may bring a parentage action before the child's second birthday. The court then determines legal parentage. The court must consider the child's interests and "the duration and stability of the relationship between the child, the presumed parent, and the genetic parent."²³⁰ This framework is generally derived from the 2002 Uniform Parentage Act, which also cuts off a biological father's claim once the child is two years old and which allows a judge to reject an action even within the first two years based on specified criteria.²³¹ The Constitution mandates nothing more.

c. Concluding thoughts on two guiding principles

States that have extended the marital parentage presumption to same-sex spouses/partners need gender-neutral and marital status-neutral assisted conception statutes.²³² They also need to revisit their parentage statutes and make an explicit decision about when biology will be permitted to trump the child's intact family unit.

While there are clearly a number of approaches that a state can take to determine the parentage of a child conceived through sexual intercourse outside the marriage or domestic partnership, two principles should remain constant. When a child has a presumed parent, through a mother's different-sex or same-sex marriage or through a civil union or domestic partnership, biology should not be an automatic basis for assigning parentage when doing so would disestablish a spouse's or partner's parentage. In addition, the legal standard for choosing biology over the intact, formally recognized family unit should be the same whether that unit is a marriage, a civil union, or a domestic partnership. The District of Columbia approach incorporates both of these principles.

3. The impact of federal law

While family law is overwhelmingly a matter left to states, for more than two decades federal statutes and regulations have structured the way states establish and collect child support. There is a body of law that states must enact

229. *Id.* at 709.

230. D.C. CODE § 16-909(b)(1)(B)-(C) (2001).

231. UPA §§ 607-608 (2002). In the UPA, the principle that the judge can reject disestablishment of paternity even before the child's second birthday takes the form of authorizing the judge to deny a motion for genetic testing filed in the first two years.

232. *See supra* Part IV.A.

in order to receive federal funding for their child support enforcement programs. During discussions on the pending D.C. legislation, attorneys with the D.C. Office of the Attorney General raised the possibility that a presumption of parentage in a mother's female domestic partner might run afoul of federal requirements geared towards determinations of *paternity* for all children born "out of wedlock."²³³

OAG lawyers hypothesized that the federal government would not recognize parentage in a mother's domestic partner because of the Defense of Marriage Act (DOMA) and that a child support agency would therefore be required to establish a child's paternity. Any laws to the contrary of such a requirement, they said, might put the District of Columbia out of compliance with federal law and at risk of losing the federal funding for its child support enforcement program. OAG therefore sent the proposed legislation to the federal Office of Child Support Enforcement (OCSE) for review.²³⁴

The federal child support enforcement laws, when enacted, did not expressly contemplate a child born to two parents, both mothers. Nonetheless, a California county pursued Elisa B. for child support when her former partner began receiving public assistance, and the court ordered her to support the child that she and the biological mother planned for and raised together.²³⁵ Laws with a parentage presumption for a mother's domestic/civil union partner or same-sex spouse actually create legal parents with obligations to support their children. In that way they are consistent with the goals of the federal scheme.

DOMA does not override the power of states to define parentage, and on its face, DOMA does not apply to civil unions or domestic partnerships.²³⁶ In a different context, the federal government has already recognized a parent-child relationship for a Vermont child and her nonbiological mother who was the civil union partner of her biological mother.²³⁷ Vermont has had a civil union

233. See 42 U.S.C. § 652(g)(2)(A)(i) (2006).

234. The Gay and Lesbian Activists Alliance of Washington has placed some of the correspondence among the D.C. OAG, the federal OCSE, and supporters of the parentage law reform on its website. The letters can be found at: <http://www.glaa.org/archive/2008/OAG2Mendelson0710.html>; <http://www.glaa.org/archive/2008/polikoffrefutesoag0724.pdf>; <http://glaa.org/archive/2008/hhsonarentagebill1003.pdf>; <http://glaa.org/archive/2008/polikoffonparentagebill1007.pdf>; <http://glaa.org/archive/2009/nickles2mendelsonondpparentagebill0316.pdf>; <http://glaa.org/archive/2009/nclr2fenty0319.pdf>; <http://glaa.org/archive/2009/ocseondpparentagebill0331.pdf>; and <http://glaa.org/archive/2009/nicklesendorsesparentagebill0403.pdf>.

235. *Elisa B. v. Super. Ct.*, 117 P.3d 660, 669 (Cal. 2005).

236. See JOSLIN & MINTER, *supra* note 56, § 6:09 ("To date, every court that has considered the question has held that civil unions and registered domestic partnerships, while providing many rights and responsibilities of marriage, are not 'treated as a marriage' within the meaning of the federal DOMA.")

237. A Department of Justice Memorandum Opinion found that recognizing the legal relationship between the parent and child for purposes of the child's eligibility for Social Security benefits was not a DOMA violation. See Engel, *supra* note 53.

parental presumption since 2000. No state that has recognized the parental status of a biological mother's same-sex spouse or partner has ever been threatened with loss of federal funding.

The federal government has no interest in withholding child support enforcement funding from states. Its interest is in a well-functioning system that facilitates collection of child support from parents; federal funding necessarily helps such systems operate. Recognition of parentage for lesbian couples has not adversely affected states that permit such recognition, and the federal government is well-positioned to adapt to the definitions of parentage that emerge from assisted reproduction and parentage presumptions for same-sex couples.

In spite of the arguments set forth by advocates of the revision of D.C. parentage laws, the D.C. OAG continued to oppose the bill. After the D.C. City Council Committee on Public Safety and the Judiciary voted favorably on the bill, the OAG sent a copy to the federal Office of Child Support Enforcement and urged that the Council not take further action until the receiving an opinion from the agency. Advocates for the bill opposed further slowing down the process of enactment. Both sides were satisfied, however, when OCSE swiftly replied. Juanita De Vine, OCSE Regional Program Manager, wrote a letter stating that two changes that had been made in the final bill satisfied their concerns.²³⁸ She concluded:

While it is impossible to conceive of every scenario that might be implicated

238. Letter from Juanita De Vine, OCSE Regional Program Manager, to Peter J. Nickles, Attorney General for the District of Columbia (Mar. 31, 2009) (on file with author and online at <http://glaa.org/archive/2009/ocseondpparentagebill0331.pdf>). The first change was unrelated to parentage and concerned a matter related to enforcement of spousal support orders.

The second change was as follows. Archaically, several D.C. statutes retain use of the term "out of wedlock." D.C. CODE § 16-907(b) reads: "The term 'born out of wedlock' solely describes the circumstances that a child has been born to parents who, at the time of its birth, were not married to each other. The term 'born in wedlock' solely describes the circumstances that a child has been born to parents who, at the time of its birth, were married to each other." Bill 18-0066 as introduced amended this so it would read: "The term 'born out of wedlock' solely describes the circumstances that a child has been born to parents who, at the time of its birth, were not married to, *or in a domestic partnership with*, each other. The term 'born in wedlock' solely describes the circumstances that a child has been born to parents who, at the time of its birth, were married to, *or in a domestic partnership with*, each other." (emphasis added). This amendment to 16-907(b) was removed from the legislation before its passage. In its place, the law adds a new section as follows: "A child born to parents in a domestic partnership shall be treated for all legal purposes as a child born in wedlock." D.C. CODE § 16-907(c) (2001). The OCSE letter cited the removal of the change to the definition of "born out of wedlock" as sufficiently addressing previously stated concerns. Advocates for the legislation were satisfied that the new provision achieves the identical legal result and therefore did not object to the change. Letter from Juanita De Vine, Regional Program Manager, Department of Health and Human Services, to Peter J. Nickles, Attorney General, District of Columbia (Mar. 31, 2009), *available at* <http://glaa.org/archive/2009/ocseondpparentagebill0331.pdf>.

by the change in rights and obligations brought about by the legislation, the revised bill presents no apparent conflict with Federal requirements for the Child Support Enforcement program under title IV-D of the Social Security Act. The Office of Child Support Enforcement does not anticipate compliance issues for the DC program based on the rights and obligations acknowledged/created by the proposed legislation.²³⁹

Advocates of this legislation continue to believe that there was never any danger that D.C. would lose federal funding for its child support program as a result of the new parentage rules. Nonetheless, should advocates in other jurisdictions face similar objections, the OCSE letter approving the changes for D.C. should satisfy any concerns that may be raised.

V. EXTRATERRITORIAL RECOGNITION OF PARENTAGE

Parentage conferred by state law, whether through a donor insemination statute or a presumption based on the couple's status, will protect the relationship between a child and her nonbiological mother under that state's law. To the extent that the definition of "parent" and "child" under federal law tracks the law of the state where the family lives, the relationship will also be recognized for federal law purposes.

Parentage established through a court judgment, whether through an adoption decree or an order of parentage, is entitled to full faith and credit by other states. There is by now a substantial body of law that such judgments must be honored, even when the state would not have issued such a judgment under its own laws.²⁴⁰

239. Letter from Juanita De Vine, *supra* note 238.

240. See, e.g., *Finstuen v. Crutcher*, 496 F.3d 1139 (10th Cir. 2007) (invalidating as a violation of the Constitution's Full Faith and Credit Clause an Oklahoma law refusing to recognize same-sex couple adoptions from other states); *Russell v. Bridgens*, 647 N.W.2d 56 (Neb. 2002) (upholding second-parent adoption from Pennsylvania, even though such an adoption is unavailable in Nebraska); *Embry v. Ryan*, 11 So. 3d 408 (Fl. Dist. Ct. App. 2009) (upholding second-parent adoption by mother's lesbian partner in Washington state, even though such an adoption is prohibited in Florida); *Giancaspro v. Congleton*, 35 Fam. L. Rep. (BNA) 1201 (Mich. Ct. App. March 3, 2009) (Michigan must recognize an Illinois adoption by a same-sex couple even if the adoption would not have been granted in Michigan). Extensive analytical support for interstate recognition of adoptions by gay men and lesbians is found in Rhonda Wasserman, *Are You Still My Mother? Interstate Recognition of Adoptions by Gays and Lesbians*, 58 AM. U. L. REV. 1 (2008). Every state is required by federal law to have a statute that accords full faith and credit to judicial or administrative determinations of *paternity* by other states. 42 U.S.C. § 666 (a)(11) (2006). Should a state refuse to extend such full faith and credit to a *parentage* determination when the parent is a woman rather than a man, that would raise a serious equal protection gender-based discrimination claim. Some states already explicitly use the word *parentage* when referring to the full faith and credit requirement. See, e.g., DEL. CODE ANN. tit. 13, § 8-639 (2009); D.C. CODE § 16-909.02 (2001); OHIO REV. CODE ANN. § 3111.02 (LexisNexis 2009). For a thorough discussion of other cases and of the legal theories supporting interstate recognition of parentage orders, see Joslin, *Interstate Recognition*, *supra* note 55.

Because full faith and credit does not extend to the *statutes* of other states, however, the nonbiological mother and her child may be vulnerable to losing their parent-child relationship should the family move to a different state. The subsequent state may not recognize the validity of the couple's marriage, civil union, or domestic partnership, and may therefore refuse to recognize a parent-child relationship arising by operation of law out of the couple's status. A parent-child relationship created by a gender-neutral, marital status-neutral donor insemination statute does not require recognition of the couple's legal status. To that extent, it is a more secure basis for establishing parentage. It is possible, however, that a subsequent state might attempt to invalidate such a parent-child relationship as a violation of its own public policy.

This has never happened, but litigation raising the issue is inevitable. This Part briefly addresses these concerns. Regretfully, I conclude, as do other commentators, that a couple with the resources to do so should obtain a judgment of parentage or a second-parent adoption that will offer security across state lines.

A. Recognition for Federal Law Purposes

DOMA limits the terms "marriage" and "spouse" in federal law, respectively, to "a legal union between one man and one woman as husband and wife" and "a person of the opposite sex who is a husband or a wife."²⁴¹ In 2007, the Social Security Administration sought an opinion from the Office of Legal Counsel of the Department of Justice concerning whether DOMA precluded the award of child insurance benefits (CIB) to the nonbiological child of the biological mother's Vermont civil union partner.²⁴² The Social Security Administration sought the opinion from the Department of Justice because it questioned whether the federal DOMA prohibited federal recognition of the parent-child relationship arising out of a couple's civil union.

The DOJ opinion found no such bar. Federal law allows a child to receive CIB if, under state law, the child would inherit as a son or daughter if the parent were to die intestate. As a result of Vermont's civil union law, the child at issue met that test. The DOJ opinion concluded that DOMA was not implicated because "an individual may qualify as a 'child' . . . wholly apart from the existence of any marriage at all, as would be the case of a natural-born child of an unmarried couple, or as is the case here, where Vermont recognizes a parent-child relationship outside of the context of marriage."²⁴³

241. 1 U.S.C. § 7 (2006).

242. Engel, *supra* note 53.

243. In another, unreported, Social Security child benefits case, the administrative law judge overturned the initial, DOMA-based, denial of benefits because the parent-child relationship stemmed not from a marriage but from the nonbiological mother's order of parentage. See Joslin, *Interstate Recognition*, *supra*, note 55, at 597-98 (discussing case). A child will also qualify for benefits in states that adopt the latest amendments to the Uniform

When other federal consequences are at stake, the government is likely to follow the reasoning contained in this opinion by turning to the specific definition of “parent” and “child” in the federal statute at issue.

Parental status deriving from a gender-neutral and marital status-neutral insemination statute like that enacted in the District of Columbia raises no DOMA issue as the status is independent from the couple’s relationship to each other. The child’s birth certificate naming both parents pursuant to such a statute should establish the parent-child relationship for all federal purposes.²⁴⁴

B. Recognition in Other States

States that grant parental status to both of a child’s mothers are likely to recognize such relationships stemming from the laws of other states. A recent Massachusetts case illustrates this principle. In 2008, a nonbiological mother, A.H., filed an action in Massachusetts seeking recognition of parental status deriving from her California domestic partnership.²⁴⁵ She sought custody of the

Probate Code defining parent-child relationship. *See supra* notes 144-46 and accompanying text. The DOJ opinion elides in the first instance the question of whether DOMA is of any relevance to relationships created by civil unions or domestic partnerships, since those relationships are not “marriage.” Many advocates believe it is not. The National Center for Lesbian Rights (NCLR) appealed a denial of Social Security child benefits for the child of a disabled worker who had obtained an order of parentage of the child in California. The denial was based in part on the Defense of Marriage Act. The NCLR brief argued as follows:

As the Ninth Circuit recently held, DOMA applies only to marriages; it does not apply to domestic partnerships. In *Smelt v. County of Orange*, 447 F.3d 673, 683 (9th Cir. 2006), the court held that two men who were domestic partners in California lacked standing to challenge DOMA because DOMA applies only to marriages, not to domestic partnerships, and “a domestic partnership is not by any means a marriage.” The court explained:

Section 3 of DOMA is definitional. The word “marriage” and the word “spouse” are defined for the purposes of federal statutes, rules and regulations. Marriage, it declares, “means only a legal union between one man and one woman as husband and wife.” *It does not purport to preclude Congress or anyone else in the federal system from extending benefits to those who are not included within that definition.*

Id. (emphasis added). As *Smelt* makes clear, DOMA is concerned only with the legal definition, for federal purposes, of the term “marriage.” It does not address domestic partnership in any way.

NCLR, *Sample Brief in Support of Benefits for a Child of an Insured Worker Who Is the Same-Sex Partner of the Child’s Biological or Adoptive Parent* 5 (n.d.) (on file with author). On appeal, the Administrative Law Judge agreed. Application of L., Office of Disability Adjudication and Review, Social Security Administration (Mar. 19, 2007) (copy of decision on file with author).

244. If the couple establishes a residence in a state that does not recognize the nonbiological mother as a parent, federal law might assign the legal status that the state of residence assigns and therefore not recognize the parent-child relationship under federal law. For a discussion of recognition in other states, see *infra* Part V.B.

245. Memorandum of Decision and Order on Parties’ Motions, A.H. v. M.R., ES-08D-2586-CS, ES-08D-2741-DR, ES-08E-0132-QC (Massachusetts Trial Court, Probate and Family Court Department, Essex Division Feb. 2, 2009) (on file with author).

couple's fifteen-month-old child, J., after the biological mother, M.R., moved to Oregon with the child. M.R. filed a motion to dismiss, claiming, among other things, that A.H. lacked standing to file for custody.

The trial court denied the motion, deeming it

likely that principles of comity, or the requirements of the full faith and credit clause . . . will cause a Massachusetts court to recognize the validity of the parties' California Registered Domestic Partnership and the rights and duties flowing therefrom. If such recognition does occur, it appears incontrovertible that plaintiff would have the same parental rights and obligations with respect to custody, visitation and support of [J.] as a married spouse would have with her child.²⁴⁶

A majority of states, however, have enacted some form of a "defense of marriage" act or constitutional amendment, as authorized by the federal DOMA which says that states are not required to give effect to "a relationship between persons of the same sex that is treated as a marriage under the laws [of another state]."²⁴⁷ The reach of these acts varies. Some ban only marriage between same-sex couples; others ban recognition of a broader range of same-sex relationships, such as civil union and domestic partnership; still others ban extending legal recognition to unmarried couples, gay or straight.²⁴⁸ The contours of a legal dispute over interstate recognition of parental status deriving from the couple's relationship will vary depending on the specific wording of a state's ban.

In each of the three cases to date challenging the status of a nonbiological parent, the first court to hear the dispute was in a state willing to extend rights to the nonbiological parent. Subsequently, the biological parent initiated proceedings in a different state. That state's court had to rule in the first instance whether it could hear the merits of the case under state and federal custody jurisdiction rules. Two of the three cases are pending on appeal, but in all instances so far the courts have ruled that only a court in the state that first heard the action could determine the child's custody and visitation.

Only one of these cases involved interstate recognition of a parent-child relationship deriving from the couple's formalized status. That dispute, *Miller-Jenkins v. Miller-Jenkins*, has had years of litigation, multiple appellate opinions, and substantial public attention.²⁴⁹ The couple, Janet and Lisa, lived

246. *Id.* at 9. The appeals court refused to stay the order awarding A.H. visitation rights, ruling, among other things, that the principle of comity would result in recognition by Massachusetts of parental status deriving from the couple's California domestic partnership, and that therefore the appellant unlikely to win on appeal. M.R. v. A.H., A.C. 09-J-0084 (Mass. App. Mar. 16, 2009) (on file with author).

247. 28 U.S.C. § 1738C (2006).

248. See Human Rights Campaign, Statewide Marriage Prohibitions (June 4, 2009), http://www.hrc.org/documents/marriage_prohibitions_2009.pdf.

249. See *Miller-Jenkins v. Miller-Jenkins*, 661 S.E.2d 822 (Va. 2008); *Miller-Jenkins v. Miller-Jenkins*, 912 A.2d 951, 955-56 (Vt. 2006); Witt, *About Isabella*, WASH. POST MAG., Feb. 4, 2007, at W14.

in Virginia and, in 2000, traveled to Vermont and entered a civil union. In 2002, Lisa gave birth to a child, I.M.J., after donor insemination. Later that year, the couple moved with the baby to Vermont. About a year later, the couple split up and Lisa moved back to Virginia with IMJ. Two months later, Lisa filed in Vermont for dissolution of the civil union and for custody, with supervised visitation between the child and Janet. In June 2004, the Vermont court entered a custody and visitation order in the case.

On July 1, 2004, Lisa filed a petition in Virginia seeking a determination that she was IMJ's only parent. She argued that Virginia should not recognize Janet as a parent because of the state's Marriage Affirmation Act and the federal DOMA. She argued that because Virginia does not recognize a legal status for same-sex couples,²⁵⁰ and DOMA does not compel that recognition, and Janet's status derived from the civil union, the Virginia courts should not consider Janet to be IMJ's parent.²⁵¹

Lisa lost on the basis of Virginia's custody jurisdiction statute and the federal custody jurisdiction statute, the Parental Kidnapping Prevention Act (PKPA).²⁵² Both the Virginia and the Vermont courts held that Vermont had jurisdiction over the case and that Virginia was obligated to give full faith and credit to Vermont's orders.²⁵³ Neither the Virginia Court of Appeals nor the Virginia Supreme Court reached the merits of Lisa's argument. Lisa's final loss in the Virginia Supreme Court came on a procedural ruling about the applicable "law of the case."²⁵⁴

In *Prashad v. Copeland*, currently pending in the Virginia Court of Appeals, Prashad, a woman who bore a child as a surrogate mother for a gay male couple in North Carolina, is arguing that Virginia should not register custody orders from a North Carolina court to the extent that those orders confer parental custodial rights on the biological father's partner.²⁵⁵ The trial

250. The language of Virginia's law is very broad. It reads: "A civil union, partnership contract or other arrangement between persons of the same sex purporting to bestow the privileges or obligations of marriage is prohibited. Any such civil union, partnership contract or other arrangement entered into by persons of the same sex in another state or jurisdiction shall be void in all respects in Virginia and any contractual rights created thereby shall be void and unenforceable." VA. CODE ANN. § 20-45.3 (2009).

251. *Miller-Jenkins*, 661 S.E.2d at 825.

252. *Id.* at 826-27.

253. *Id.* at 827.

254. *Id.* at 826. Lisa Miller, represented by the anti-gay legal group Liberty Counsel, continues to fight in Virginia against enforcement of the Vermont orders. See Press Release, Liberty Counsel, Lisa Miller Case with Conflict Between States over Same-Sex Union at Court of Appeals (Dec. 10, 2009), available at <http://www.lc.org/index.cfm?PID=14100&PRID=885>. On November 20, 2009, the Vermont trial judge ordered custody of Isabella transferred to Janet Jenkins. 36 Fam. L. Rep. (BNA) 1063 (Vt. Fam. Ct. 2009).

255. The North Carolina order was the result of a consent agreement signed by the three parties awarding primary legal and physical custody to the gay male couple and secondary legal and physical custody to the surrogate mother. *Prashad v. Copeland*, JA 2008-77 (Va. Cir. Ct. Oct. 9, 2008) (on file with author). The appeal was argued before the

court ruled on a motion for summary judgment that North Carolina had jurisdiction to issue the custody orders and that, as in *Miller-Jenkins*, the PKPA required Virginia to give those orders full faith and credit. Prashad has appealed, pressing her arguments that, pursuant to Virginia's Marriage Affirmation Act and Marriage Constitutional Amendment, the North Carolina orders need not be honored.

The Alabama Supreme Court is currently considering the status of a nonbiological mother who obtained a California order of parentage and visitation rights pursuant to the test established by the California Supreme Court in *Elisa B.*²⁵⁶ The dispute originated in California one month after the biological mother, N.B., moved to Alabama with the child. Because California was still the child's "home state," California had jurisdiction to hear matters related to the child's custody. Nonetheless, N.B. subsequently began a proceeding in Alabama, and the trial court ruled that she was the child's only parent and that A.K. had no right to visitation.²⁵⁷

The Alabama appeals court reversed that trial court ruling, citing *Miller-Jenkins* for the principle that Alabama lacked jurisdiction to decide the child's custody or visitation.²⁵⁸ In her brief before the Alabama Supreme Court, N.B. argues that Alabama properly exercised jurisdiction, that Alabama should not radically redefine parentage to provide two mothers for a child, and that it is an unconstitutional infringement of her parental rights to apply *Elisa B.* to a child who was born before that opinion was issued.²⁵⁹

Miller-Jenkins, *Prashad*, and *N.B.* raise custody jurisdiction issues. No court, other than in gay-friendly Massachusetts, has been asked in the first instance to recognize the legal status of a nonbiological parent created by another state's statutes, including the marital presumption that extends to a female spouse or civil union/domestic partner. Because state "defense of marriage" acts make such recognition uncertain, advocates for same-sex couples and their children encourage a nonbiological mother to adopt her child.²⁶⁰

Virginia Court of Appeals on June 16, 2009. *Prashad v. Copeland*, No. 2609-08-4 (Va. Ct. App. June 16, 2009). See http://www.courts.state.va.us/courts/cav/dockets/Merit_Dockets-Alexandria/06-16-09_WEB_Alexandria_Writ-Merit_Docket.pdf. As this article went to print, the Virginia Court of Appeals upheld the registration of the North Carolina orders. *Prashad v. Copeland*, 2009 Va. App. LEXIS 525 (Va. App. Nov. 24, 2009).

256. *A.K. v. N.B.*, No. 2070086, 2008 Ala. Civ. App. LEXIS 316 (Ala. Civ. App. May 23, 2008). For a discussion of California's *Elisa B.* doctrine, see *supra* Part II.B.1.

257. *A.K. v. N.B.*, 2008 Ala. Civ. App. LEXIS 316, at *6-7.

258. *Id.* at *14-16.

259. Brief of Petitioner at 42-45, 51-59, *N.B. v. A.K.*, No. 1080440 (Ala. Apr. 1, 2009) (on file with author).

260. See, GLAD, *supra* note 57. For analysis of the interplay between state "defense of marriage" acts and interstate recognition of a marital parentage presumption deriving from a same-sex marriage, civil union, or domestic partnership, see Deborah L. Forman, *Interstate Recognition of Same-Sex Parents in the Wake of Gay Marriage, Civil Unions, and Domestic*

Parentage without court order by operation of a gender-neutral and marital status-neutral insemination statute is too new to have generated any dispute about interstate recognition. The first such law, in the District of Columbia, went into effect in July 2009. But such parentage does not derive from the couple's status with respect to each other, and therefore another state's "defense of marriage" act is not implicated. Because the parental status derives from a *statute*, however, it is still not entitled to the same full faith and credit accorded *judgments*, and it may be attacked on public policy grounds.

There are solid policy and constitutional arguments why a state should recognize the parent-child relationship such a statute creates. Although this article does not develop these in detail, the constitutional arguments begin with the Substantive Due Process rights inherent in parental status. The Supreme Court has repeatedly protected those rights against infringement by the state.²⁶¹ A biological tie to a child is neither a necessary nor a sufficient determinant of who is a parent.²⁶² A state defines parentage by statute. Once parentage attaches, the accompanying constitutional rights also attach. If a different state refuses to recognize the nonbiological mother's parentage, it is, in effect, terminating her parental rights. That course of action is constitutionally impermissible without numerous substantive and procedural safeguards.²⁶³

Furthermore, a litigant seeking to maintain a parent-child relationship deriving from an assisted reproduction statute should be able to argue that recognizing such a relationship only when the biological mother is married to the other parent is unconstitutional discrimination against children born outside marriage²⁶⁴ and that recognizing such a relationship only when the biological mother's partner is male is unconstitutional discrimination on the basis of gender.²⁶⁵

Even if litigation ultimately sustains the parent-child relationship created by presumption or by an assisted conception statute, protracted court cases are always unwelcome. That is why lawyers advise that a couple obtain a judgment entitled to full faith and credit. An overwhelming amount of authority backs the

Partnerships, 46 B.C. L. REV. 1 (2004).

261. *Troxel v. Granville*, 530 U.S. 57, 65 (2000) (plurality opinion) (calling "the interest of parents in the care, custody, and control of their children . . . perhaps the oldest of the fundamental liberty interests recognized by this Court").

262. It was not necessary in *Michael H. v. Gerald D.*, where the mother's husband, who was not the child's biological parent, was recognized as the child's legal parent. 491 U.S. 110, 124 (1989). It was not sufficient for the child's biological father in the same case. *Id.* at 126-27.

263. *See Santosky v. Kramer*, 455 U.S. 745 (1982).

264. *See supra* text accompanying notes 25-33. Such a distinction between marital and nonmarital children is what NCCUSL rejected in its 2002 amendments to the Uniform Parentage Act. *See supra* text accompanying notes 138-41.

265. For a constitutional critique of the argument that children must be raised by parents of different genders, see Carlos A. Ball, *Lesbian and Gay Families: Gender Nonconformity and the Implications of Difference*, 31 CAP. U. L. REV. 691, 724-47 (2003).

universal validity of parentage created through adoption, which makes that process the gold standard for unassailable parental status between a nonbiological mother and her child.²⁶⁶ Court orders of parentage should be equally unassailable, although they have been tested in fewer circumstances and have not yet been the subject of extensive scholarly attention.²⁶⁷

A New York court recently acknowledged the appropriateness of exercising an abundance of caution. In *In re Sebastian*, the New York Surrogate's Court granted a second-parent adoption to the partner who did not give birth to the child even though there were two bases for determining that she was already the child's parent.²⁶⁸ The couple had married in the Netherlands (one was a Dutch citizen), thus creating the presumption that the birth mother's spouse was the child's parent. In addition, the partner's egg was used and fertilized in vitro with anonymous donor semen, with the resulting fertilized egg then being implanted in the birth mother.

The court reasoned that this genetic connection to the child also entitled the partner to be considered the child's parent. The court determined, however, that other states would accord full faith and credit only to a court order of parentage or an adoption decree. Because the Surrogate's Court did not have jurisdiction to grant a parentage decree, a power vested only in the state's Family Court, the judge issued the requested adoption. The opinion notes that "although . . . an adoption should be unnecessary because Sebastian was born to parents whose marriage is legally recognized in this state, the best interests of this child require a judgment that will ensure recognition of both [women] as his legal parents throughout the entire United States."²⁶⁹

CONCLUSION

The third generation of lesbian mother family law issues is in its infancy. The vast majority of states ban recognition of same-sex marriage or its functional equivalent, most by constitutional amendment. In those states there is no prospect of a parentage presumption deriving from a couple's legal status. Those same states, however, will be called upon to recognize parental status established by such presumptions elsewhere.

Enactment of a gender-neutral, marital status-neutral statute governing conception through donor insemination, along the lines of the Model ABA Act, is a plausible strategy to protect lesbian couples and their children. It comes

266. See Joslin, *Interstate Recognition*, *supra* note 55, at 589 ("Case law, legal scholarship, and relevant treatises overwhelmingly reach [the conclusion that] adoptions by lesbian and gay people must be respected by sister states, regardless of whether the adoption violates the public policy of the forum."). For additional authorities, see *supra* note 240.

267. Joslin, *Interstate Recognition*, *supra* note 55, at 563-600.

268. *In re Adoption of Sebastian*, 879 N.Y.S.2d 677 (N.Y. Sur. Ct. 2009).

269. *Id.* at 692-93.

with the imprimatur of the American Bar Association. It addresses the situation that the National Conference of Commissioners on Uniform State Laws in 2002 did not explicitly address, but which that body has since recognized in the context of wills and intestate succession under the Uniform Probate Code.

Such a statute furthers economic and emotional security for children. The parent-child relationship derives from consent to a woman's insemination, without regard to the marital status or gender of the parents. This avoids the potential for simultaneous invalidation of the couple's relationship and the parent-child relationship by a state with a "defense of marriage" act.

In March 1998, a decade after Katie Love-Cooksey's birth to Susan Love and Helen Cooksey,²⁷⁰ Nicolaj Caracappa was born to New Jersey couple Eva Kadray and Camille Caracappa.²⁷¹ Like Susan and Helen, Eva and Camille used donor insemination to conceive. Eva gave birth to Nic, who was given Camille's last name and baptized in Camille's Catholic faith. Eva became a stay-at-home mom while Camille continued working as an oncology nurse.²⁷² The couple wanted a second child. They consulted a lawyer about completing a second-parent adoption of Nic by Camille, but they decided to wait until their second child was born and to do both together.²⁷³ They never had that chance. When Nic was two years old, Camille left for work one day and never came home. She suffered a brain aneurysm and was dead by nightfall.²⁷⁴ She was 38 years old.

Eva applied for child Social Security survivors' benefits for Nic. Those benefits—many thousands of dollars a year—are designed to compensate a child for the economic loss of a parent. The benefits were denied because Camille had not been Nic's legal parent.²⁷⁵ If New Jersey had enacted a gender-neutral, marital status-neutral donor insemination statute, the result would have been different. Nic's emotional catastrophe—the loss of a parent—would not have been exacerbated by economic catastrophe—the loss of all the family's income.

270. See *supra* pp. 203-05, 207.

271. Maria Newman, *Survivor in Gay Union Appeals Denial of Benefits to Boy*, N.Y. TIMES, Oct. 15, 2003, at B1.

272. *Id.*

273. Deb Price, *Kids in Same-Sex Marriages Need Help*, DETROIT NEWS, Oct. 27, 2003, at 9A. A separate adoption proceeding for each child would have cost the couple twice as much as a single proceeding for both children.

274. *Id.*

275. The ACLU LGBT Project was involved in the litigation. See ACLU Urges Social Security Administration to Grant Survivor Benefits to Son of Lesbian (Oct. 15, 2003), <http://www.aclu.org/lgbt/relationships/12362prs20031015.html>. Nic would have prevailed if New Jersey law considered him able to inherit as a child from Camille if she died without a will. The ACLU was unsuccessful in arguing that New Jersey would recognize Camille's "equitable adoption" of Nic. Professor Courtney Joslin discusses the decision of the administrative law judge in the case in Joslin, *Assisted Reproductive Technology*, *supra* note 132, at 50-51.

In public discussion about this case, the ACLU LGBT Project attributed Nic's exclusion from benefits to the inability of Eva and Camille to marry or otherwise obtain formal relationship recognition.²⁷⁶ Elsewhere I have criticized marriage equality advocates who argue that same-sex couples must be allowed to marry for the sake of their children.²⁷⁷ Since the family law revolution that began in the late 1960s, children are not supposed to suffer because their parents have not married, and that principle must extend to the children of lesbian couples. A gender-neutral and marital-status neutral statute, conferring parentage on a person who consents to a woman's insemination with the intent to jointly parent, achieves this result.

Indeed, lesbian couples and their children are better protected by such a statute than they are by a presumption deriving from the couple's marriage or civil union/domestic partnership. The latter can be rebutted; the former cannot. Nic was the son of both Eva and Camille regardless of whether the couple would have married or entered a civil union had those options been available. That is what the law must recognize.

Since the first generation of lesbian mother family law issues more than thirty years ago, advocates have been fighting to keep the focus on the children. Courts and legislatures that have approved second-parent adoptions have done just that. Even where available, however, recognition of a child's family should not depend upon the family's access to court proceedings that require a lawyer and take two precious and limited commodities—time and money. The nonbiological mother and her child also should not be legal strangers during the inevitable period of time it takes to obtain an adoption decree. I look forward to the day when a mother asks me why she has to adopt her own child, and I can tell her that she doesn't. That day has come—albeit with a caveat²⁷⁸—in the District of Columbia.

276. ACLU, *supra* note 275 ("If the couple had been allowed to marry, Nicolaj would be entitled to Camille's benefit. . . . This case illustrates just one of the many ways in which same-sex couples are hurt by our government's refusal to respect their relationships."). ACLU attorney Ken Choe stated that "If lesbian and gay couples were allowed to marry, all of these hoops and obscure legal arguments would be unnecessary." Price, *supra* note 273. Columnist Deb Price concludes that, "Ultimately, the only fair way to nurture gay couples and their children is to open up civil marriage." *Id.* ACLU attorney Ken Choe further connected the issue in this case to marriage by commenting that "At times of need, like death, that's where marriage acts as a safety net for families." Newman, *supra* note 271.

277. See Nancy D. Polikoff, *For the Sake of All Children: Opponents and Supporters of Same-Sex Marriage Both Miss the Mark*, 8 N.Y. CITY L. REV. 573 (2005). See also POLIKOFF, *BEYOND MARRIAGE*, *supra* note 103, at 100-03.

278. Given the uncertainty surrounding interstate recognition of parentage in the absence of a court order, I still advise that mother to consult a lawyer and obtain such a court order, either of parentage or adoption. See *supra* Part V.