

2011

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Recommended Citation

Saladino, Julia (2011) "Is a Second Mommy a Good Enough Second Parent?: Why Voluntary Acknowledgments of Paternity Should be Available to Lesbian Co-Parents," *The Modern American*: Vol. 7: Iss. 1, Article 3.
Available at: <http://digitalcommons.wcl.american.edu/tma/vol7/iss1/3>

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Is a Second Mommy a Good Enough Second Parent?: Why Voluntary Acknowledgments of Paternity Should be Available to Lesbian Co-Parents

IS A SECOND MOMMY A GOOD ENOUGH SECOND PARENT?: WHY VOLUNTARY ACKNOWLEDGMENTS OF PATERNITY SHOULD BE AVAILABLE TO LESBIAN CO-PARENTS

By Julia Saladino¹

I. Introduction

Janet Jenkins simply wants to see her daughter. Jenkins and her former partner, Lisa Miller, jointly agreed to parent a child together after obtaining a civil union in Vermont.² Miller completed artificial insemination with the consent and support of Jenkins. After Miller gave birth in Virginia to the couple's daughter, Isabella, the two women cohabitated and co-parented in Virginia before separating.³ Because Miller is the biological mother of Isabella, she fervently tried to deny parental rights to Jenkins after their separation. The case gained considerable attention, and Miller filed custody disputes in both Virginia and Vermont. Ultimately, Virginia's Supreme Court held that the Vermont courts have jurisdiction, and Vermont's Supreme Court determined that Jenkins did in fact have parental rights.⁴ Virginia, therefore, could not modify the custody order. Even today, Miller continues to appeal the case and objects to sharing physical custody with Jenkins.⁵ Jenkins' case is not particularly unique. Same-sex parents all over the country face custody disputes after separating.⁶ Often the biological parent claims full parental authority, and if the parents live in a state where same-sex marriages or civil unions are not recognized, the non-biological parent may be left with limited resources.⁷

These custody cases raise the family law issue of what constitutes a parent. If both parties agree to co-parent, what makes one parent more entitled to parenting rights than the other? Does biology dictate parenting rights when the couple has a pre-established agreement to co-parent? In states where second parent adoption is incredibly difficult or not available, non-biological parents have limited options to gain legal parentage over their children.⁸ This

paper argues that alternative avenues for parental rights, specifically Voluntary Acknowledgements of Paternity (VAP) which allow the parties to establish parentage by signing an affidavit shortly after the child's birth, should be available to lesbian co-parents. I further argue that VAPs are appropriate devices to establish consensual parentage rights at a child's birth and that making these forms available to lesbian co-parents satisfies the equal protection clause of the Constitution and meets Congress' original policy considerations in developing the federal VAP statute.

II. Background

The VAP process is a simplified administrative procedure that allows the government to easily identify parents in the absence of a marital presumption of parentage.⁹ One of Congress' original policy concerns for adopting VAP statutes in the 1990s was to facilitate the collection of child support funds.¹⁰ In order to put a simplified procedure in place, Congress created a federal child support enforcement statute, Title IV-D.¹¹ To receive federal funding, Congress requires each state to establish informal procedures for establishing paternity.¹² Consequently, each state has a VAP statute in place to easily facilitate this process without requiring the involvement of the judicial system every time an unwed mother gives birth.¹³

An additional Congressional consideration when promoting the VAP process is to encourage the establishment of legal parentage as early in a child's life as possible. Because our legal system recognizes two parents for children, the VAP process is attractive and allows this determination to be made with judicial ease.¹⁴ The legal determination of parentage additionally follows the child and her

parents throughout the country. Because a VAP is treated as a court order, states view a VAP granted in another state with full faith and credit, eliminating the need to litigate parentage when a parent moves across state lines.¹⁵ Not all findings of parentage are afforded full faith and credit however.¹⁶ States are allowed to refuse to grant full faith and credit to other state's statutes, so accordingly, a finding of parentage based on a statute will not clearly always be afforded full faith and credit outside that state.¹⁷

Court orders, unlike findings of parentage based on a statute, have portability and are generally granted full faith and credit.¹⁸ Since VAPs are treated as judicial determinations, states should grant these parentage determinations full faith and credit. This full faith and credit aspect of the VAP process affords greater administrative ease to the judicial system and protects individual parental rights.¹⁹ Because lesbian co-parents who cannot access second parent adoptions need some form of legal protection that transfers across state lines, access to the VAP process could have significant and critical implications for lesbian co-parents' parental rights.

The VAP procedure consists of a hospital-based program where an unmarried couple has the option of signing an affidavit voluntarily acknowledging paternity immediately before or after the child's birth. Some state VAP forms require that the affidavits state that the parents have some reason to believe that the male is the biological father.²⁰ Additionally, VAPs serve as a judicial determination of parentage and are very difficult to challenge later in the child's life. Typically, once both parents sign a VAP, a court will overturn the determination of parentage only if the male parent signed due to a mother's representation that amounts to fraud.²¹

In *Andrew R. v. Arizona Dept. of Economic Security*, Andrew and Mother signed a VAP after the birth of Isabella.²² Another man claiming paternity over Isabella challenged the voluntary acknowledgement of paternity. The court determined that because Andrew R. and Isabella's mother signed the VAP, a judicial determination of parentage stands despite evidence that another man is Isabella's actual biological father, and Andrew was financially responsible for Isabella. The court noted that after properly executed, a VAP in Arizona stands unless challenged within 60 days on the basis of fraud or duress. This case demonstrates the relative

difficulty of dismissing a validly executed VAP after a reasonable time period.

Although the state is often eager to find a second parent to support a child to avoid financial burden on the government, *Andrew R.* articulates the burden an individual faces when challenging an acknowledgement of paternity.²³ Often, unless the challenging party can prove fraud, duress, or material mistake of fact, the finding of parentage established through a VAP stands.²⁴ Additionally, in cases where the child's education and or custody is at issue, rather than challenging child support orders, courts will honor VAPs, even in the absence of a father's biological tie to the child.²⁵ These cases demonstrate that VAPs are difficult to overturn, and that a party challenging parentage based on a VAP faces a high burden.²⁶ Cases where judges have overturned parentage determinations often contain some finding of duress or fraud.²⁷

Historically, the VAP process has been closed off to lesbian co-parents. In states that model their VAP statute on the Uniform Parentage Act (UPA) and require the non-biological parent to attest to a belief of biological parenthood, lesbian co-parents are unable to meet this requirement.²⁸ The UPA is not a desirable model for state VAP statutes because its gender specific language forecloses the VAP procedure for lesbian couples.²⁹ Federal legislation does not have this requirement, and the male parent signing the VAP is not compelled to attest to being the biological father.³⁰ If a state limits access to VAPs to situations where both parents have a reason to believe the father signing the affidavit is the biological father, they are not made available to a lesbian partner. Lesbian partners cannot claim biological parentage when her partner is the biological parent.³¹ However, case law demonstrates that even when parents sign a VAP with knowledge that the listed father is not the child's biological father, the VAP will be still be honored.³² The father's false affidavit typically does not constitute fraud or coercion because even though the man knows he is not the biological father, he still signs the VAP to demonstrate his agreement to co-parent.³³

Accordingly, state legislatures should not follow the UPA model and should instead allow two adults to consent to parentage immediately before or after the child's birth, regardless of biological parenthood. Additionally, I argue that when two

lesbians make the decision to co-parent, the non-biological parent should have the same ability to establish parentage as a similarly situated male so as not to violate equal protection. Finally, access to VAPs for both heterosexual and lesbian parents furthers Congress' policy considerations of establishing parentage early in a child's life and ensuring that children have two parents responsible for their needs, and therefore lesbian co-parents should have an option to sign a VAP.³⁴

III. Analysis

A. Voluntary Acknowledgements of Paternity are appropriate for use within lesbian parenting units because courts do not always rely on biology to determine parentage.

VAPs are an appropriate method of establishing parentage of a lesbian partner because courts uphold VAPs even in instances where the father signs the affidavit with knowledge that he is not the biological father.³⁵ Under the federal statute governing VAPs, a man may voluntarily acknowledge his paternity as long as the mother consents.³⁶ Federal law does not require genetic testing before a man has access to the VAP process, indicating that the "acknowledged father" may not always be the biological father.³⁷ Similarly, if a non-biological lesbian partner wishes to acknowledge parentage and the biological mother consents, federal and state statutes should allow the couple to utilize the VAP procedure to legally establish parentage. In some states, under the current VAP process, a man acknowledging paternity must attest that he believes himself to be the biological father.³⁸ However, in practice, a man can use the system to establish parentage even with the knowledge that he is not the biological father.³⁹ Because VAPs are extremely difficult to overturn, a heterosexual couple can essentially consent to parentage and bypass the judicial process, while lesbian couples are not allowed the same convenience.

One argument against allowing homosexual couples access to the VAP process is that these couples may circumvent adoption by doing so. A lesbian co-parent that signs a VAP, however, is not circumventing second-parent adoption any more so than a heterosexual male co-parent accessing the VAP process. Both the female and the male co-parent are

establishing parentage without first proving a genetic tie to the child or completing the adoption procedure. Adoptions are intended to terminate one party's legal parental rights and grant those rights to another party or in the case of second-parent adoption, establish a second parent's parental rights.⁴⁰ In an Ohio case, the court determined that a gestational surrogacy agreement rebutted a presumption of parentage when the birth mother did not want to abide by the surrogacy contract.⁴¹ This situation is a more accurate example of circumventing adoption.

In this case, the appellee, an unmarried woman, contacted an Ohio clinic to find anonymous sperm and egg donors and a surrogate in order to fulfill a gestational surrogate pregnancy. The clinic located the appellant surrogate and the two women along with the appellee's fiancé entered into a surrogacy agreement naming the appellee as the intended mother and the appellant as the surrogate. According to the contract all parental rights and responsibilities belonged to the appellee, and the appellant agreed to relinquish all rights. When the appellant challenged the surrogacy agreement and tried to establish herself as the child's legal mother, the appellate court determined that the surrogacy agreement trumped the birth mother's rights.⁴² The judge relied on Ohio's Parentage Act and reasoned that "appellee's voluntary acknowledgment of maternity is sufficient to rebut the presumption that appellant is the child's natural mother by reason of her having given birth to the child."⁴³ This Ohio case, however, is not representative of how the VAP process should operate for lesbian couples, where in most cases the lesbian co-parent would be establishing parentage of her partner's biological or birth child. Additionally, because many states do not grant second parent adoptions for same-sex co-parents, lesbian couples may be in even more dire need for the VAP process than heterosexual couples.⁴⁴

In Chicago, Illinois a judge upheld a VAP despite contradictory biological evidence. A heterosexual couple that had dated in the past but never married agreed to sign a VAP when Torres gave birth in 2001.⁴⁵ Torres tried to extinguish Huddleston's paternity despite the fact that Huddleston had acted as a parent for two years, playing with the child, changing diapers, and contributing to the child's financial needs. The Domestic Relations Judge determined that the parties exhibited a clear and

unambiguous intent to name Huddleston as father of the child. Because both parties contributed to the misrepresentation, the fact that the affidavit was improperly signed was immaterial to the case. Huddleston, though not the biological father, was determined to have legal rights to the child.⁴⁶ The judge strongly considered Huddleston's active role in the child's life for the preceding two years. The judge reasoned that "both parties are participants in what the court views as their clear, unambiguous intent to denominate Mr. Huddleston as the parent of this child," and therefore the VAP must remain valid.⁴⁷

A lesbian non-biological parent who intends to act as a child's parent should have the option of legally establishing paternity through the use of a VAP. If biology is not the determinative factor for heterosexual couples that utilize the VAP process, then biology alone should not bar a same-sex, non-biological parent from accessing the VAP procedure.⁴⁸ Even though the VAP system in some states is premised on biological considerations, in practice, a finding contrary to an attestation of biological parenthood often does not void a VAP. As a result, lesbian non-biological parents should have the same access as heterosexual male parents.

The Supreme Court has also suggested that biology is not the determinative factor in establishing parentage. The Court held that the law does not recognize the rights of biological parents claiming a relationship to a child when a marital parental unit exists. In *Michael H. v. Gerald D.*, Michael sought recognition as a dual father for a child born to a woman with whom he was previously engaged in an affair.⁴⁹ Because the mother was married to Gerald at the time of the child's birth, Gerald had parental rights because of California's marital presumption.⁵⁰ Even though Michael maintained a parental relationship with the child, Justice Scalia held that Michael's relationship with his daughter is not "an interest traditionally protected by our society."⁵¹ Michael, therefore, was legally barred from being the child's father. While this case stands for the proposition of privileging parental rights in marital relationships, *Michael H.* also demonstrates that biology alone is not the determinative factor granting custody. The holding in *Michael H.* opposes a functional parenting framework but still supports the proposition that biology is not the ultimate threshold for parental rights.⁵² Accordingly, the law should allow lesbian,

non-biological parents parental rights even despite the absence of a biological connection to the child.

Because biology is not determinative of the validity of a VAP, states should eliminate the affidavit of "believed biology" in their VAP statutes and forms and instead adopt an affidavit that establishes the signing parent expects and consents to act as a parent to the child assuming all the rights and responsibilities that accompany parentage. Parentage should reflect a functional parenting framework rather than a biological parenthood requirement. Functional parenthood applies when a person acts as a parent without being a child's biological parent. A person who has a relationship with the child, cares for the child, and supports the child while not having a biological relationship to the child is an example of a functional parent.⁵³

As familial make-ups in society continue to change and expand, legislatures and judges are more willing to define, create, and interpret family law in ways that do not only consider biology.⁵⁴ Courts that are willing to liberally interpret the definition of parenthood and family have increasingly looked to what is in the child's best interests when paternity is challenged.⁵⁵ For example, a father who has acted as a child's parent and then finds genetic proof that he is not the father may still have parental responsibilities to that child.⁵⁶ If a court finds that the father has sufficiently acted as a parent and established a continued relationship with the child, then the court may determine that maintaining that parent-child relationship is in the best interests of the child. Instead of relying primarily on biology, judges should be more willing to consider the functional parenting of the parent and make a determination that prefers relationships to genetics.

B. Denying Voluntary Acknowledgements of Paternity to a non-biological parent in a lesbian couple unconstitutionally discriminates on the basis of gender and therefore violates the Equal Protection Clause of the Fourteenth Amendment.

Denying a non-biological lesbian partner the option of signing a VAP violates equal protection because similarly situated male, heterosexual parents are allowed to sign a VAP and the discrimination is not substantially related to the important government interest. The Fourteenth Amendment to the United

States Constitution provides that “no state shall... deny to any person within its jurisdiction the equal protection of the laws.”⁵⁷ Because a male that is not a child’s biological father is able to sign a VAP without first genetically establishing paternity, a similarly situated female must have the same opportunity. Therefore, a non-biological lesbian parent who wants to establish paternity through a VAP must be afforded that option in order for a state’s VAP statute to satisfy equal protection.

Laws that differentiate based on the parent’s gender will not survive equal protection challenges unless the laws satisfy intermediate scrutiny.⁵⁸ To stand, the law must serve an important government interest and the law must be substantially related to that interest.⁵⁹ In cases where states create parenting statutes that differentiate based on gender, the Supreme Court may invalidate those statutes if they do not satisfy intermediate scrutiny. In *Caban v. Mohammed*, a New York law gave mothers the absolute right to consent to adoption.⁶⁰ Caban, the father, and Mohammed, the mother, had two children together but never married. After the couple separated, Caban petitioned for adoption of the children, and Mohammed cross-petitioned. The court granted Mohammed custody based on the New York Domestic Relations statute that allows an unwed mother, but not an unwed father, to block their child’s adoption by withholding her consent. The Supreme Court held that the sex-based distinction between unwed mothers and unwed fathers in the New York statute violated the equal protection clause of the Fourteenth Amendment because it bore no substantial relation to any important state interest.⁶¹

Similarly, in *Stanley v. Illinois*, the Supreme Court struck down an Illinois statute that made children of unwed parents wards of the State upon their mothers’ death.⁶² Stanley, a biological and functional parent for his four children, challenged the law when the state placed his children in the care of court appointed guardians after their mother died. Stanley’s parental rights were effectively terminated, despite other statutory provisions that required a showing of unfitness to terminate parental rights.⁶³ Because the court never proved that Stanley was an unfit parent, rather, it discriminated against him on the basis of his status as an unwed-father, Stanley argued that the state statute violated the equal protection clause. The Court held that the Illinois

law violated equal protection because removing a child from an unwed father after the mother’s death, when the father had an existing relationship with the children, did not further the state’s interest of having children cared for by fit parents.⁶⁴

Based on the holdings in *Caban* and *Stanley*, state legislatures should create VAP statutes that refuse to differentiate on the basis of gender. VAP statutes that preference male parents over female parents violate equal protection if they do not meet intermediate scrutiny because the gender distinction is not substantially related to an important government interest. If the government’s interest is administrative ease and establishing parentage early in a child’s life when an unwed mother gives birth, a VAP statute that only allows male parents to establish parentage is not substantially related to that interest. Such a statute would likely meet rational basis review but is under-inclusive and fails to satisfy the higher level of scrutiny required when analyzing laws that discriminate on the basis of gender. However, when a lesbian mother is impregnated and gives birth by means of artificial insemination, there is likely no male that will claim parentage at the child’s birth. There could, however, be a female co-parent who wants to establish parentage. As both a legal and policy matter, VAP statutes should not deny access to female co-parents.

In *Nguyen v. INS*, however, Nguyen challenged the constitutionality of 8 U.S.C. § 1409(a).⁶⁵ This section of the U.S. Code governs the acquisition of U.S. citizenship of a child born to unmarried parents when only one parent is a U.S. citizen. The statute has different requirements for granting a child citizenship depending on whether the citizen parent is the mother or the father; the law makes it much more difficult for a citizen father to confer his U.S. citizenship to his child. The Supreme Court held that the statute survived intermediate scrutiny because although it involved classifications based on gender – raising the burden of the father above the burden of the mother – the law also achieved important government objectives of ensuring that the father is biologically related to the child and that the child and parent have everyday ties.⁶⁶ There is no need for the statute to impose these additional requirements on the mother because she necessarily will be with the child at birth and is guaranteed an opportunity to establish a relationship with the child. *Nguyen*,

therefore, provides an example of where the Court held that a gender-based parentage classification did not violate the equal protection clause of the Constitution and that a priority for biological ties is an important state interest.⁶⁷

Still, *Nguyen* does not unequivocally support gender-based classifications based on biology. In the VAP situation, both a father and a lesbian co-parent both have the potential to lack biological ties to the child. Signing a VAP affirms that the co-parent agrees to accept parental rights and responsibilities associated with the child, regardless of biology. The need to establish and promote biological ties is not furthered by excluding a co-parent when a biological mother is unmarried and consents to sharing parental rights with another parent.

Although *Nguyen* does establish that a gender-based classification in parentage determinations is acceptable to uphold certain governmental interests, the VAP process does not reflect one of those instances where a distinction is justified. In support of the gender-based distinction in the VAP process, the government might claim that it has an interest in providing a child with a *father* rather than simply a second parent.⁶⁸ Government and society's preference for a two parent, opposite gender household is often premised on the notion that this is a healthier, more stable environment where children will grow up to understand and conform to their established gender roles.⁶⁹ Such a justification, however, is not a valid reason to place an unconstitutional gender-based distinction on parentage determinations.⁷⁰ Most distinctions between a father and a second parent would be based on stereotypes and are, therefore, not legitimate government interests that will satisfy equal protection.⁷¹

In the context of the VAP process, if a non-biological male can consent to parentage through the VAP process, then in order to satisfy equal protection, a non-biological female should have the same access to the VAP procedure. While Congress and state legislatures may have intended states only to use VAPs in cases where an unwed mother can identify a potential biological father, in reality the statutes are often not used in that way and the finding of parentage is still upheld. In *In the Matter of J.B. and J.G.*, J.B. was listed on the child's birth certificate and signed an affidavit of paternity.⁷² After a disagreement regarding the child's schooling, J.B. filed

in family court to establish his parental rights, and J.G. responded by alleging that J.B. was not the biological father and therefore did not have any parental rights.⁷³ The court determined that despite genetic testing that confirmed that J.B. was not biologically related to the child, overturning a previously established determination of parentage would be inconsistent with the legislature's intent.⁷⁴ The court reasoned that because biology is not the sole avenue to establish parentage, the legislature intended for an expansive definition of parent.⁷⁵ Because J.B. correctly followed procedure to establish himself as a parent under the law, his lack of a biological relationship to the child did not bar him from enjoying the same parental rights to care and make decisions for the child as the mother.⁷⁶ Accordingly, state VAP statutes should not differentiate based on the co-parent's gender and lack of biological ties to the child and should allow lesbian parents to access the VAP process.

C. Use of Voluntary Acknowledgements of Paternity within lesbian parenting couples furthers Congress' original policy considerations in enacting the federal VAP statute.

Allowing same-sex couples access to VAPs furthers Congress' original policy considerations to create judicial and administrative ease in determining a child's parentage and allow for efficient collection of child support funds.⁷⁷ In a child support system based on legal paternity rather than biology, allowing a co-parent to establish parentage early in the child's life identifies another adult who is responsible for financially supporting the child. To further this goal, federal law states that after the 60-day rescission period, the parties may only challenge a VAP on the basis of fraud, duress, or material mistake.⁷⁸ Once the parties have identified a second legal, financially responsible parent, Congress does not allow the parties to rescind the finding arbitrarily. By making the process of invalidating a VAP more difficult, the government can collect child support more efficiently because the parties have already consented to being financial responsible for the child. If the couple separates before the child reaches the age of majority, or the couple chooses to never maintain a relationship, the parties will have already established paternity through the VAP process, and a judicial hearing to determine paternity will not be necessary

for the government to determine which individuals are responsible for paying child support.

In some jurisdictions, if a custodial parent requires government assistance, the government will reimburse itself by enforcing a child support order against the other biological parent (District of Columbia operates this way). First, however, the government must find this individual, and spends public resources doing so. If a second parent can establish paternity through the VAP process, the co-parent responsible for financially supporting the child has already been identified, and the government will not have to expend resources ascertaining the second responsible parent.⁷⁹ Allowing all couples, regardless of sexual orientation, to access the VAP process would relieve the government of the burden of soliciting personal information on a child's other parent from a birth mother on public assistance.

Additionally, the court system would also be freed from the burden of judicially establishing the paternity of the other responsible parent. The VAP process, as it was intended, already allows heterosexual parents to consent to a judicial finding of paternity. Allowing both heterosexual and lesbian couples access to this system permits the government to identify a co-parent in an additional situation where the parents are willing to consent to a judicial finding of paternity, thereby furthering Congress' goal of creating administrative ease and efficient collection of child support.⁸⁰ Parents and children would be best served and legally protected, and the government's objectives of administrative efficiency would be met, if state legislatures allow same-sex parents to consent to parentage through a VAP just as heterosexual, unmarried parents are allowed.

IV. Conclusion

Congress created the VAP system to allow unwed mothers the opportunity to establish the paternity of a father at the child's birth with relative simplicity. Such a system relieves both the judicial and administrative agencies of the burden of determining who are – or should be – a child's parents. Although no states currently allow same-sex couples access to the VAP process, legislatures should open the VAP system to same-sex couples. In practice, biology is not the controlling factor for upholding paternity, and

therefore, biology should not be the determinative criteria for allowing access to the VAP process. Additionally, allowing a similarly situated man access to the system but denying that same access to a woman violates equal protection; the government interests Congress identified are not substantially related to the gender discrimination in the VAP system. Finally, to satisfy Congress' goals of establishing parentage and allowing for ease in collecting child support, lesbian couples should have access to a system that easily creates a judicial determination of parentage. If two adults agree to co-parent and the mother is willing to consent to parentage, access to the VAP system creates ease for the government, the parents, and the child, and as a matter of public policy, the system should be accessible to both heterosexual and lesbian couples.

Endnotes

¹ Julia Saladino is a third year student at American University Washington College of Law and former Senior Staff Editor of *The Modern American*.

² See *Miller-Jenkins v. Miller-Jenkins*, 912 A.2d 951, 951 (Vt. 2006) (rejecting Miller's argument that the Vermont family court lacked the jurisdiction to enter a custody order); see also Yusef Najafi, *Tale of Two Mommies*, METROWEEKLY (May 10, 2007), www.metroweekly.com/news/?ak=2692 (noting that the custody battle for Isabella has lasted over three years).

³ See Najafi, *supra* note 1 (explaining that Miller filed the custody case in both Isabella's place of birth and where the couple received their civil union to try to benefit from the more favorable venue).

⁴ *Id.*

⁵ See Emily Friedman & Susan Donaldson James, *Mom and Daughter Go AWOL in Lesbian Custody Case*, ABC NEWS (Jan. 1, 2009), <http://abcnews.go.com/US/lisa-miller-fails-hand-daughter-isabella-lesbian-partner/story?id=9462217> (describing Miller's reaction to sharing custody with her former partner and noting that Miller refused to bring Isabella to Jenkins because her daughter would undergo trauma as a result).

⁶ See WILLIAM N. ESKRIDGE, JR. & NAN D. HUNTER, *SEXUALITY, GENDER, AND THE LAW* 50 (2d ed. 2006) (noting that in states with no second

parent adoption partners of gay and lesbian parents have limited legal protection).

⁷ *Id.*

⁸ See Courtney Joslin, *Travel Insurance: Protecting Lesbian and Gay Parent Families Across State Lines*, 4 HARV. L. & POL'Y REV. 31, 35-36 (2010) (noting that second-parent adoptions give a co-parent legal parental rights without terminating the existing legal parent's rights).

⁹ See *id.* at 44 (explaining the hospital based VAP program available to unwed mothers who wanted to establish parentage immediately before or after their child's birth).

¹⁰ See *id.* (noting that states must afford full faith and credit to a VAP signed in another state).

¹¹ 42 U.S.C. § 654 (2009).

¹² Joslin, *supra* note 7, at 44.

¹³ See *id.* (explaining that Congress requires states to adopt the hospital-based program for unwed mothers to establish paternity).

¹⁴ See Bernardo Cuadra, *Family Law—Maternal and Joint Custody Presumptions for Unmarried Parents: Constitutional and Policy Considerations in Massachusetts*, 32 W. NEW ENG. L. REV. 599, 599 (2010) (asserting that the Supreme Court has determined that children born out of wedlock are afforded the same constitutional protections as children born to married parents).

¹⁵ See UNIFORM PARENTAGE ACT OF 2002 § 311 (2001) (affording full faith and credit to VAPs granted across state lines); see also Joslin, *supra* note 7, at 39 (arguing that all judicial determinations of parentage should be granted full faith and credit).

¹⁶ See Joslin, *supra* note 7, at 44 (explaining that a VAP is treated as a judicial determination of parentage and is afforded full faith and credit by states).

¹⁷ Jason Manning, *The Battle Over Same-Sex Marriage*, ONLINE NEWSHOUR (Apr. 30, 2004), http://www.pbs.org/newshour/bb/law/gay_marriage/act.html (explaining the public policy exception to full faith and credit in cases of same sex marriage even in the absence of the Defense of Marriage Act).

¹⁸ See Joslin, *supra* note 7, at 44.

¹⁹ *Id.* (noting that parental rights travel across state lines).

²⁰ See *In re Kevin Gendron*, 950 A.2d 151, 152 (N.H. 2008) (noting that when the couple signed the VAP in the hospital they attested that they both

were child's biological parent); see also DHS OR. DEPT OF HUMAN SERV., CTR. FOR HEALTH STATISTICS, VOLUNTARY ACKNOWLEDGEMENT OF PATERNITY AFFIDAVIT (FORM #45-21) 2 (2008), <http://public.health.oregon.gov/BirthDeathCertificates/ChangeVitalRecords/Documents/Paternity%20Docs/45-21instr.pdf> (specifying that the signing parties have a reason to believe the male parent is the child's biological father); see also Melanie Jacobs, *When Daddy Doesn't Want to be Daddy Anymore: An Argument Against Paternity Fraud Claims*, 16 YALE J.L. & FEMINISM 193, 229 (2004) (describing Georgia's paternity set-aside statute that does not allow a male parent to challenge a VAP that he signed while knowing that he was not the biological father).

²¹ See PAULA ROBERTS, CTR. FOR LAW AND SOC. POLICY, VOLUNTARY PATERNITY ACKNOWLEDGEMENT: AN UPDATE OF STATE LAW, 12-18 (2006), <http://www.clasp.org/admin/site/publications/files/0333.pdf> (outlining the state VAP statutes that use a fraud, duress, or material mistake of fact standard for parentage challenges).

²² See *Andrew R. v. Ariz. Dept. of Econ. Sec.*, 224 P.3d 950, 951 (Ariz. Ct. App. 2010) (demonstrating the difficulty parents face in overturning a validly executed VAP).

²³ See *id.* at 954 (noting that the Arizona statute governing VAPs clearly states that a finding of parentage will stand unless the challenger can meet the burden of proving fraud, duress, or material mistake of fact).

²⁴ *Id.*

²⁵ See *In re J.B.*, 953 A.2d 1186, 1187 (N.H. 2008) (upholding a non-biological father's VAP after a dispute about the child's education with the mother).

²⁶ *Andrew R.*, 224 P.3d at 954.

²⁷ Compare *In re Kevin Gendron*, 950 A.2d 151, 155 (N.H. 2008) (determining that lack of biological ties did not invalidate a VAP despite the mother's insistence that the named father should not enjoy parental rights), with *Glover v. Severino*, 946 A.2d 710, 714-15 (Pa. 2008) (finding that the mother's failure to disclose that another man could be the child's biological father constituted fraud and provided a reasonable basis to overturn the VAP).

²⁸ UNIFORM PARENTAGE ACT OF 2002 § 301 (2001) (suggesting that only the mother of a child and a man claiming to be the genetic father may sign a VAP).

²⁹ See *id.* (using language identifying mother and father, rather than a gender neutral term such as parent).

³⁰ Leslie Joan Harris, *A New Paternity for the Twenty-First Century: Of Biology, Social Function, Children's Interests, and Betrayal*, 44 WILLAMETTE L. REV. 297, 328 (2007).

³¹ DHS OR. DEP'T OF HUMAN SERV., *supra* note 19 (providing an example of a state VAP that requires the signing party to attest to biological parentage).

³² See *In re Paternity of Cheryl*, 746 N.E.2d 488, 495 (Mass. 2001) (finding that the child's best interests were served by maintaining the finding of paternity despite the father's discovery that he was not the child's biological father).

³³ *Id.*

³⁴ *But see* Drake Bennett, *Johnny Has Two Mommies—and Four Dads*, BOSTON GLOBE (Oct. 24, 2010), http://www.boston.com/bostonglobe/ideas/articles/2010/10/24/johnny_has_two_mommies_and_four_dads/?page=2 (commenting on the potential complications of adding additional legal parents in a system that only recognizes two legal parents noting the increased chances for disagreement).

³⁵ See *In re J.B.*, 953 A.2d 1186, 1187 (N.H. 2008) (upholding a non-biological father's paternity after it had been established through a VAP).

³⁶ UNIFORM PARENTAGE ACT OF 2002 § 304 (2001).

³⁷ Jayna Morse Cacioppo, *Voluntary Acknowledgement of Paternity: Should Biology Play a Role in Determining Who Can be a Legal Father?*, 38 IND. L. REV. 479, 489 (2005).

³⁸ DHS OR. DEP'T OF HUMAN SERV., *supra* note 19.

³⁹ See Michael Higgins, *Meaning of 'Dad' Widened by Judge*, CHICAGO TRIBUNE (Sept. 17, 2004), http://articles.chicagotribune.com/2004-09-17/news/0409170300_1_biological-father-paternity-legal (representing an example of a situation where a non-biological father is awarded parental rights).

⁴⁰ See Suzanne B. Goldberg, *Family Law Cases as Law Reform Litigation: Unrecognized Parents and the Story of Alison D. v. Virginia M.*, 17 COLUM. J. GENDER & L. 307, 312 (2008) (explaining second parent adoption as a newly afforded right to lesbian couples that is not available in every state).

⁴¹ Gestational Surrogacy Contract Rebutts Presumption of Maternity, 36 FAM. L. REP. 1363 (2010).

⁴² *Id.*

⁴³ *Id.*

⁴⁴ See Joslin, *supra* note 7, at 35-36 (noting that second-parent adoptions are not available to many families).

⁴⁵ See Higgins, *supra* note 38 (noting that the parties did not have a romantic relationship since Torres' pregnancy and the parties were not planning to marry).

⁴⁶ *Id.*

⁴⁷ *Id.*

⁴⁸ See, e.g., Jacobs, *supra* note 19, at 201 (noting that some states have allowed lesbian co-parents to continue visitation or file for custody because of their intent and history of parenting).

⁴⁹ See *Michael H. v. Gerald D.*, 491 U.S. 110, 123 (1989) (finding that historic traditions have not recognized the parental relationship between a father and his illegitimate child).

⁵⁰ See *id.* at 124 (finding that the presumption of legitimacy is a fundamental principle).

⁵¹ See *id.* at 122 (noting that Due Process only protects rights deeply rooted in the traditions of society so as to be considered fundamental).

⁵² See *id.* at 126 (determining that a non-biological parent has parental rights over the biological father because of California's marital presumption).

⁵³ See *Lehr v. Robertson*, 463 U.S. 248, 257-58 (1983) (noting the importance of familial relationships and intimacy and nurturing between parents and children).

⁵⁴ See Jacobs, *supra* note 19, at 201 (noting that scientific and social advances cause legislatures and judiciaries to question what makes a parent).

⁵⁵ *Id.*

⁵⁶ See *In re Paternity of Cheryl*, 746 N.E.2d 488, 495 (Mass. 2001) (finding that although the father discovered he was not the biological father of Cheryl, his ongoing parental relationship made termination of parental rights against the best interests of the child).

⁵⁷ U.S. CONST. amend. XIV, § 1.

⁵⁸ See generally *Craig v. Boren*, 429 U.S. 190 (1976) (establishing that statutory or administrative gender-based classifications must be subjected to an intermediate scrutiny standard of review in response to a statute that legislated a different legal drinking age for men and women).

⁵⁹ *Id.* at 197.

⁶⁰ See *Caban v. Mohammed*, 441 U.S. 380, 387-88 (1979) (finding a sex-based distinction in a New York statute governing adoption).

⁶¹ See *id.* at 393 (rejecting the government's argument that the sex-based distinction was necessary because of the inherent difference between maternal and paternal roles).

⁶² *Stanley v. Illinois*, 405 U.S. 645, 658 (1972).

⁶³ *Id.* at 650.

⁶⁴ See *id.* (failing to find a substantial relationship between the statute and the state's interest).

⁶⁵ See *Nguyen v. Immigration and Naturalization Serv.*, 533 U.S. 53, 62-65 (2001) (allowing a sex-based distinction for parentage determinations based on the government's interests in assuring that a biological relationship exists, as well as facilitating a relationship between the parent and child).

⁶⁶ See *id.* at 63 (finding that a preference for biological ties is an important government interest).

⁶⁷ The constitutionality of this standard is currently being reviewed by the Supreme Court. See generally *United States v. Flores-Villar*, 536 F.3d 990 (9th Cir. 2008), *cert. granted*, 130 S.Ct. 1878 (2010) (oral argument Nov.10, 2010) (pending case that challenges immigration law that treats U.S. citizen parents wanting to confer citizenship upon their child differently based on gender).

⁶⁸ See Carlos Ball, *Lesbian and Gay Families: Gender Nonconformity and the Implications of Difference*, 31 CAP. U. L. REV. 691, 697 (2003) (commenting on the Stacey and Biblarz essay noting that children of same-sex parents display positive differences in terms of gender fluidity in comparison to children raised by heterosexual parents).

⁶⁹ See *id.* at 726 (rejecting the argument that a heterosexual household is more stable than a homosexual household because of the lack of empirical evidence).

⁷⁰ See, e.g., *id.* at 726-30 (arguing that adoption bans for homosexual parents with the justification that the children of homosexual parents will not conform with their socially constructed gender roles is an unconstitutional violation of Equal Protection and even fails under rational basis review).

⁷¹ See *Palmore v. Sidoti*, 466 U.S. 429, 433 (1984) (holding that stereotypes and private biases are not permissible considerations for removing a child from the custody of her white mother when she remarried a black man); see also Ball, *supra* note 67,

at 696 (noting that an additional justification for distinctions between heterosexual and homosexual parents in the law is that children of homosexual parents will experience stigmatization and behavioral and emotional problems, but finding that this literature is based on myth and stereotype).

⁷² *In re J.B.*, 953 A.2d 1186, 1187 (N.H. 2008) (noting that the named father took all steps to care and contribute to the upbringing of the child).

⁷³ See *id.* (explaining the mother's desire to invalidate the father's parentage because of his lack of biological ties to the child).

⁷⁴ *Id.* at 1189.

⁷⁵ See *id.* (using adoption and other parentage statutes to reason that the legislature would not have intended J.B.'s lack of a biological tie to the child to be fatal to his request to parental rights).

⁷⁶ *Id.*

⁷⁷ See Joslin, *supra* note 7, at 44 (noting that Congress developed the hospital-based VAP process to establish two parents for a child as early as possible in the child's life and to identify two adults financially responsible for the child).

⁷⁸ See 42 U.S.C. § 666 (2007) (prohibiting challenges to paternity after 60 days for reasons unrelated to fraud or duress, therefore making VAP agreements extremely difficult to circumvent without good cause); see also Harris, *supra* note 29, at 328 (identifying an alternative option for challenging VAPs in the version of the law enacted before 2007, that is if blood tests were not performed before the administrative order is entered, the party could challenge paternity for up to a year).

⁷⁹ D.C. CODE § 16-916 (2001).

⁸⁰ See *Genetic Mother Adopts Child Gestated by Her Same-Sex Spouse*, 35 FAM. L. REP. 1291 (2009) (noting that a child's best interests are served when that child is provided with two responsible parents and paternity proceedings should be available to lesbian co-parents).