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# Differential power in intact same-sex families based on legal and cultural understandings of parentage

Deirdre M Bowen

## **Abstract**

### *Differential Power in Intact Same-Sex Families Based on Legal and Cultural Understandings of Parentage.*

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By Deirdre M. Bowen, J.D., Ph.D.

Do intact same-sex couples in which one member of the couple became pregnant with assisted reproduction or one member was the primary adopter, and the other member became a parent through second parent adoption understand the legal protections afforded them? In short the answer is no. An interesting family dynamic arises around who can claim the "true" status as parent based on their legal understandings of parenthood and their interactions with the dominant culture. While high profile custody cases on this issue have been decided in the United States with varying results, no research has examined the impact of uneven legal protections afforded to gay fathers and mothers on intact same-sex families.

Results indicated that second parent adopters had much less emotional power in the family, but often had more economic power. Even in long-term stable relationships, non-biological mothers and second parent adoptive fathers expressed significant worries about this emotional power differential. On the other hand, biologically connected mothers and some primary adopter fathers were concerned about whether their partners would continue to financially support their children should the couple's relationship dissolve. Both parents had misconceptions about what kind of legal protections or obligations the law afforded these second parent adopters should the couple end their relationship. Furthermore, the families' interactions with the larger culture served to further undermine the stability of the family, as they worried whether their family would be culturally and legally recognized if they traveled from one state to another. Ultimately, I conclude that second parent adopters become imprisoned parents within the family and across the larger culture because of current legal frameworks and policies.

After digesting and critiquing the current state of the law as it pertains to same-sex parentage and a thorough discussion of the results of this study, I offer a set of incremental reforms to create stable parentage at the outset of family formation rather than addressing parentage at the time of family breakdown. I argue that recognition of the marital presumption nationally, in spite of DOMA, whether through same-sex marriage, domestic partnerships, or civil unions, should be a long-term goal. Next, I suggest that we eliminate the need for second parent adoption by allowing for unmarried same sex couples to engage in joint adoption, even with international adoptions. In addition, this can be achieved in artificial reproduction cases by courts interpreting or states adopting a gender neutral version of the Uniform Parentage Act that currently creates parentage for an unmarried man if he consents to his partner's use of artificial reproductive technology, and a child is born to them. Finally, I ask whether the nature of the discourse used by family law attorneys to counsel biological mothers in their partner's second parent adoption should be revisited to consider how it might better serve the family relationship rather than undermine it. I believe these reforms will equalize the status of both parents and lead to family stability and cultural recognition.

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## THE IMPRISONED PARENT: DIFFERENTIAL POWER IN SAME-SEX FAMILIES BASED ON LEGAL AND CULTURAL UNDERSTANDINGS OF PARENTAGE

DEIRDRE BOWEN, J.D.,PH.D.

### I. INTRODUCTION

The decision to include children in same-sex families has been on the rise in the last twenty years with the increased availability of assisted reproductive technology.<sup>1</sup> In fact, the 2000 United States Census reports that same sex couples live in 96% of all counties in the country with approximately 30% of lesbian couples and 20% of gay couples raising children.<sup>2</sup> A significant number of law review articles have explored the treatment of these families within the law in regards to legal parentage<sup>3</sup> at the time the relationship ends, while relatively few articles have examined how same-sex couples navigate their families as they plan for, and have children in the face of constantly evolving social and legal realities.<sup>4</sup> Instead, much of the research on same-sex families has been on the effects to children of being raised in these households.<sup>5</sup>

This article explores the cultural and legal definitions gay and lesbian families give to parenthood, and what that means for them in the current socio-legal context. Specifically, I examine

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1. *The Cost of Marriage Inequality to Children and Their Same-Sex Parents*, A Human Rights Campaign Foundation Report 3 (April 13, 2004) available at <http://www.hrc.org>.

2. *Id.*

3. See, e.g., Oren Goldhaber, *I Want My Mommies: The Cry for Mini-Domas to Recognize the Best Interests of the Children of Same-Sex Couples*, 45 Fam. Ct. Rev. 287 (2007); John New, *Aren't You Lucky You Have Two Mamas?: Redefining Parenthood in Light of Evolving Reproductive Technologies and Social Change*, 81 Chi.-Kent. L. Rev. 773 (2006); Richard Storrow, *Rescuing Children from the Marriage Movement: The Case Against Marital Status Discrimination in Adoption and Assisted Reproduction*, 39 U.C. Davis L. Rev. 305 (2006); Lisa Chen, *Second-Parent Adoptions: Are They Entitled to Full Faith and Credit?*, 46 Santa Clara L. Rev. 171 (2005); Courtney Joslin, *The Legal Parentage of Children Born to Same-Sex Couples: Developments in the Law*, 39 Fam. L.Q. 683 (2005); Maggie Manternach, *Where is My Other Mommy?: Applying the Presumed Father Provision of the Uniform Parentage Act to Recognize the Rights of Lesbian Mothers and Their Children*, 9 J. Gender Race & Just. 385 (2005); Laura Williams, *The Unheard Victims of the Refusal to Legalize Same-Sex Marriage: The Reluctance to Recognize Same-Sex Partners as Parents Instead of Strangers*, 9 J. Gender Race & Just. 419 (2005); Margaret Osborne, *Legalizing Families: Solutions to Adjudicate Parentage for Lesbian Co-Parents*, 49 Vill. L. Rev. 363 (2004); Nancy 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 (1990).

4. See Kathryn Almack, *Seeking Sperm: Accounts of Lesbian Couples' Reproductive Decision-Making and Understandings of the Needs of the Child*, 20 Int'l J.L. Pol'y & Fam. 1 (2006); E. Haines & K. Weiner, *Everybody's Got a Dad: Issues for Lesbian Families in the Management of Donor Insemination*, 22 Soc. of Health & Illness 4, 477 (2000).

5. J.S. Gottman, *Children of gay and lesbian parents*, in *Homosexuality and family relations* 177-196 (F.W. Bozett & M.B. Sussman eds. 1990); Fiona Tasker & Susan Golombok *Young People's Attitudes Toward Living in a Lesbian Family: A Longitudinal Study of Children Raised by Post-Divorce Lesbian Mothers*, *Journal of Divorce & Remarriage*, New York: Dec 31, 1997, Vol. 28, Iss. 1/2, p. 183; Paul Cameron & Kirk Cameron, *Homosexual parents*, *Adolescence*, Roslyn Heights: Winter 1996, Vol. 31, Iss. 124, p. 757; Fiona Tasker & Susan Golombok, *Adults raised as children in lesbian families*, *American Journal of Orthopsychiatry*, Albany: Apr 1995, Vol. 65, Iss. 2; p. 203; Elizabeth D. Gibbs, *Psychosocial Development of Children Raised by Lesbian Mothers: A Review of Research*, *Women & Therapy*, New York: Dec 31, 1988, Vol. 8, Iss. 1/2; p. 65; *Talking About Family Abbie E Goldberg*, *Journal of Family Issues*, Beverly Hills: Jan 2007, Vol. 28, Iss. 1; p. 100; *Self-Defined Empowerment for Gay and Lesbian Parents: A Qualitative Examination* Pamela S Lassiter, Brian J Dew, Kathryn Newton, Danica G Hays, Billy Yarbrough, *Family Journal*, Alexandria: Jul 2006, Vol. 14, Iss. 3; p. 245; *The National Lesbian Family Study: 4. Interviews With the 10-Year-Old Children* Nanette Gartrell, Amalia Deck, Carla Rodas, Heide Peyser, Amy Banks, *American Journal of Orthopsychiatry*, Albany: Oct 2005, Vol. 75, Iss. 4; p. 518.

how they culturally do family<sup>6</sup>, how same-sex couples decide how to acquire children as they engage in family formation, what parent-child relationship legal protections they avail themselves of, and finally, what they understand those protections to afford them, and the social and emotional costs of achieving these perceived protections.

I argue that what emerges from this data is the idea of the imprisoned family on two levels. First, within the family, parents have different levels of status and power because of their differing relationships with their children due to the nature of law's willingness to recognize only certain types of parentage (biological versus non-biological parents), which can cause an emotional imprisonment for the parent whose relationship with the child may not be legally recognized (the non-biological parent). Second, again due to these differing levels of legal parental recognition that vary across state lines, same-sex families are vulnerable to having their families dissolved as they move from one state to the next. While there are severe costs to the parent child relationship at the time of a couple's dissolution of their relationship under the current legal climate<sup>7</sup>, I suggest that the same legal climate exacts costs on *intact* same-sex family relationships.

The significance of understanding the impact of the law's treatment of same-sex families from their own perspective is well articulated by Lin:

No matter how courts attempt to distinguish societal trends and views from their own determination of the legal status of lesbian and gay families, a strict separation is impossible. Every decision that courts make...whether it be to affirm same-sex family structures, or to disparage their worth, tells a story that influences other courts, potential lesbian and gay parents, and society.<sup>8</sup>

He goes on to argue that courts can be influenced by the narratives of the parties involved:

Lesbian and gay narratives have tremendous informational value. These stories can effectively convey the substantial costs of the exclusionary [or discriminatory] policy.<sup>9</sup>

While it is necessary and important to appreciate how the law responds to new and emerging family formations, it is equally important to reflect the mirror back on those families and examine how they, in turn, respond to the law. This article offers an empirical examination of same-sex families' understanding and response to the law through the use of qualitative data gathered from eight gay couples and ten lesbian couples in Washington state who planned and have at least one child together.

Part II of this article begins with an examination of how the law treats children born to same-sex couples, what options exist for same sex couples to establish parentage, what the costs are of this differential treatment from married couples, and what the outcomes of recent cases are as states grapple with the issues of couple recognition versus parent-child relationship recognition across state lines. Part III explores the impact of this varied legal climate on same-sex families, from their perspective, as they engage in family formation both legally and culturally. Part IV of this article makes recommendations for consideration by the judiciary, legislature, and others involved in the development of family public policy.

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6. The phrase "doing family" represents the notion that family is in a constant state of transition. Furthermore, it represents the view that an essentialist approach to the family, as a discrete, heteronormative institution, i.e. one mother and one father, is no longer an appropriate basis of analysis. See, e.g., J. Stacey, *Gay and Lesbian Families: Queer Like Us*, in *All Our Families New Policies for a New Century: A Report of the Berkley Family Forum*. (M. A. Mason, A. Sholnick & S. D. Sugarman eds.)

7. See Williams, *supra* note 3.

8. Timothy Lin, *Social Norms and Judicial Decisionmaking: Examining the Role of Narratives in Same-Sex Adoption Cases*, 99 Colum. L. Rev. 739, 767 (1999).

9. *Id.* at 790.

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## II. THE LEGAL FRAMEWORK SURROUNDING SAME-SEX FAMILY FORMATION<sup>10</sup>

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For the most part, same-sex couples have availed themselves of two approaches in engaging in family formation<sup>11</sup>, adoption and assisted reproductive technology, with varied legal outcomes.

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### A. Adoption

As adoption has a much longer history in the United States, and abroad, it is heavily regulated with varying outcomes within the United States as well as internationally, particularly for same-sex couples. For example, while adoption law does not require adoptive parents to be married, some states do not allow unmarried partners, and in turn, same-sex couples to jointly adopt an unrelated child.<sup>12</sup> Currently, sixteen states are contemplating initiatives for the November 2008 ballot to ban gays and lesbians from adopting children.<sup>13</sup> Similarly, in international adoptions, many countries do not allow for joint adoption by unmarried couples, or may specifically bar same-sex couples from adopting.<sup>14</sup> By disallowing joint adoption, same-sex couples cannot acquire legal parentage simultaneously, if at all. Specifically, only one member of the couple will be permitted to adopt the child. Furthermore, unless the couple resides in a state that permits second parent adoption, the second member will never be allowed to acquire the same parental rights. This legal vulnerability can sometimes lead to tragic results.<sup>15</sup>

Second-parent adoption allows the partner of a legally recognized parent to adopt the latter's child, with the parent's consent, without terminating the legally recognized parent's legal rights. It's a legal device that allows unmarried couples to both adopt a child in succession, if not simultaneously. Currently, second-parent adoptions are available in ten states and in some counties of fifteen states.<sup>16</sup> However, this leaves a large segment of gay and lesbian families without this op-

10. Virtually all of the cases discussed in this paper involve lesbian couples and their children, because that is where the litigation tends to be, but this article does discuss the issues faced by both gay and lesbian headed families.

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11. Other methods exist, including sexual intercourse with a donor who will waive parental rights, not be informed of the resulting pregnancy.

12. Massachusetts, Vermont, New Jersey, California and Washington, D.C. explicitly allow for joint adoption by same sex couples because of the legal rights afforded to these couples via marriage, civil unions and domestic partnerships respectively. Alternatively, Oklahoma, Colorado, Utah, and Mississippi make same-sex joint adoption virtually impossible because of their ban on adoption by unmarried couples. Florida bans all lesbian and gay individuals and couples from adoption. See MISS. CODE ANN. 93-17-3 (West 2005); UTAH CODE ANN. 78-30-1 (3)(b) (West 2005); FLA. STAT. ANN. 63.042 (West 2005).

13. Alabama, Alaska, Arizona, Georgia, Indiana, Kansas, Kentucky, Michigan, Missouri, Ohio, Oregon, Pennsylvania, Tennessee, Utah, Vermont, and West Virginia are all considering such initiatives. Andrea Stone, *Gay Ban Adoption Heats Up*, USA Today Feb. 24<sup>th</sup>, 2006 available at [http://www.usatoday.com/news/nation/2006-02-20-gay-adoption\\_x.htm](http://www.usatoday.com/news/nation/2006-02-20-gay-adoption_x.htm) (last checked February 28, 2008.); States Weigh Ban on Gay Adoption available at <http://www.npr.org/templates/story/story.php?storyId=5241925>. The Tennessee legislature introduced such a bill on January 30<sup>th</sup>, 2008. David Shelton, *Anti-gay Bill Filed in Tennessee*, Clarksville Online Jan 31, 2008 available at <http://www.clarksvilleonline.com/2008/01/31/anti-gay-adoption-bill-filed-in-tennessee>.

14. Only Sweden, Netherlands, Andorra, Spain, England, Wales, Belgium, and Canada allow for same-sex joint adoption. On the other hand, countries like China and Guatemala, where many adoptions occur, will not knowingly allow a gay or lesbian individual to adopt a child. In these cases, not only is one member of the couple excluded from the adoption, the individual who is adopting must remain closeted throughout the adoption process.

15. See e.g., *In re Interest of Z.J.H.*, 471 N.W.2d 202 (WI 1991) (holding lesbian ex-partner of a child's adoptive mother had no right to custody or visitation as she stood as a third party); *B.F. v. T.D.*, 194 S.W. 3d 310 (KY 2006) (holding adoptive mother's partner lacked standing to assert custody or visitation rights either statutorily or equitably because no documents recognized her as a guardian and although she did provide financial support, she was not the primary caretaker of the child).

16. California, CAL. FAM. CODE § 9000(f) (West 2004); Colorado, Colo. Rev. Stat. §§ 19-5-208(5), 19-5-210(1.5), 19-5-211(1.5) (2007); Connecticut, CONN. GEN. STAT. § 45a-725(3) (2004) and Vermont, VT. STAT. ANN. tit. 15A § 1-102(b) (2004) allow for second-parent adoption by statute. In addition a California court ruled that the state's adoption law extends to same-sex couples not registered as domestic partners. (*Sharon S. v. Superior Court of San Diego County*, 73 P.3d 554 (Cal. 2003); The District of Columbia, Illinois, Indiana, Massachusetts, New York New Jersey, Pennsylvania all have court rulings that interpret their state

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tion. Specifically, 29% of same-sex families live in jurisdictions where the availability of second parent adoption is unclear or expressly prohibited. In fact, Miami-Dade County is ranked ninth in the United States of counties with the greatest number of same-sex couples with children,<sup>17</sup> yet second parent adoption for same-sex couples is banned in Florida.<sup>18</sup>

Aside from the jurisdictional bars discussed above, adoption as a way to establish parentage comes with other problems for same-sex couples. While states have traditionally recognized the final, valid adoption decrees of other states<sup>19</sup> in accordance with the Full Faith and Credit Clause of the United States Constitution,<sup>20</sup> even if that state does not allow second-parent adoption,<sup>21</sup> at least one state legislature attempted to decline to recognize second-parent adoptions involving same-sex couples performed in other states.<sup>22</sup>

In Finstuen v. Edmondson<sup>23</sup> three families challenged the validity of Oklahoma's statute stating that it violated the Full Faith and Credit Clause, the Equal Protection Clause, the Due Process Clause and the Right to Travel.<sup>24</sup> The case involved two lesbian families in which one partner in both families had used second-parent adoption to establish legal parentage for the non-biological mother. The third family involved a gay couple who, in an open adoption, agreed to take the child back to Oklahoma to visit her birth family. The adoption was finalized in Washington State but the couple sought a birth certificate from Oklahoma. Initially, the Department of Health issued a certificate with only one of the fathers' names on it.<sup>25</sup> The Oklahoma Attorney General issued an opinion stating that birth certificates must contain both fathers' names in accordance with the Full Faith and Credit Clause requiring states to recognize Washington's final

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adoption laws to allow for second-parent adoption. In re M.M.D. v. B.H.M., 662 A.2d 837 (D.C. 1995); In re Petition of K.M. & D.M., 653 N.E.2d 888 (Ill. App. Ct. 1995); In re Adoption of K.S.P., 804 N.E.2d 1253 (Ind. Ct.App. 2004); In re Adoption of M.M.G.C., 785 N.E.2d 267 (Ind. Ct. App. 2003); In re Adoption of Tammy, 619 N.E.2d 315 (Mass. 1993); In re Jacob, In re Dana, 660 N.E.2d 397 (N.Y. 1995); In re the Adoption of Two Children by H.N.R., 666 A.2d 535 (N.J. Super. 1995); In re Adoption of R.B.F. & R.C.F., 803 A.2d 1195 (Pa. 2002). Alabama, Alaska, Delaware, Hawaii, Iowa, Louisiana, Maryland, Michigan, Minnesota, Nevada, New Mexico, Oregon, Rhode Island, Texas and Washington all have certain counties where trial courts have granted second parent adoptions. The appellate courts in Nebraska, Ohio, and Wisconsin have ruled that second parent adoption is not possible under their state's adoption laws. In re Adoption of Luke, 640 N.W.2d 374 (Neb. 2002); In re Adoption of Doe, 719 N.E.2d 1071 (Ohio Ct. App. 1998); Interest of Angel Lace M., 516 N.W.2d 678 (Wis. 1994). It is unclear whether state adoption laws permit second-parent adoption in the remaining twenty-two states.

17. Gates, supra, note 1 at 5.

18. Lofton v. Secretary of Dept. of Children and Family Servs., 358 F. 3d 804 (11<sup>th</sup> Cir. 2004) *cert. denied* 543 U. S. 1081 (2005).

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19. Barbara Cox, Adoptions by Lesbian and Gay Parents Must Be Recognized by Sister States Under the Full Faith and Credit Clause Despite Anti-Marriage Statutes that Discriminate Against Same-Sex Couples, 31 Cap. U. L. Rev. 751 (2003) noted that in 2000, Mississippi enacted a ban on same-sex couples adopting in its state, but rejected a proposed clause that would have refused to recognize same-sex couple's adoptions issued in other states.

20. U.S. Const. art. IV, § 1 ("Full Faith and Credit shall be given in each State to the Public Acts, Records, and judicial Proceedings of every other State.")

21. Russell v. Bridgens, 647 N.W.2d 56 (Neb. 2002) (Nebraska must recognize second-parent adoption granted in Pennsylvania, even though Nebraska would not have permitted such an adoption); Starr v. Erez, No. COA99-1534 (N.C. Ct. App. Nov. 27, 2004) (North Carolina must honor second-parent adoption granted in Washington state).

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22. See OKLA. STAT. tit. 10, § 7502-1.4(A) (2006).

23. 497 F. Supp. 2d 1295 (W.D. Okla. 2006) *aff'd in part* Finstuen v. Crutcher 496 F. 3d 1139 (10<sup>th</sup> Cir. 2007).

24. Id. supra note 18.

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25. Id.

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adoption decree.<sup>26</sup> In response to this opinion, the legislature enacted the amendment to the Oklahoma adoption code at issue in the case.<sup>27</sup> The U.S. District Court for the Western District of Oklahoma struck down the amendment on all of the grounds alleged except the Right to Travel.<sup>28</sup> The court found that the third family, the two fathers who had adopted a child from Oklahoma, had not actually traveled to the state, and therefore, in dismissing their claim, concluded they did not have standing.<sup>29</sup> While the legislation is no longer in force, it suggests that cultural resistance to same-sex parentage is strong enough to be expressed in political action. Therefore, same-sex couples may face similar issues questioning or undermining the legitimacy of their parentage.

For those families who do live in jurisdictions that allow for second-parent adoption, it can be difficult finding access to lawyers who have an expertise in this area. Furthermore, the expense of completing a second-parent adoption, after expending considerable resources on an international<sup>30</sup> or domestic adoption<sup>31</sup> may be cost prohibitive for some couples.<sup>32</sup> In addition to the legal costs, the state requirements surrounding second parent adoption mean additional expenditures<sup>33</sup> for evaluations by a licensed psychologist and home study by a social worker to determine if the adoption is in the best interests of the child. These evaluations also mean having to divulge one's sexual orientation, creating a risk to the parent's privacy and exposure to bias, a concern that exists with joint adoption proceedings, too. And in some cases, couples are simply not aware that a second adoption is necessary, may not want to adopt or cannot adopt.<sup>34</sup>

One further issue with arises with second-parent adoption, waiting periods,<sup>35</sup> which are often not waived. During the waiting period, the petitioning parent does not have the legal status of parent, which means the child cannot enjoy the benefits and protections that partner could provide otherwise. This leaves the child in a vulnerable position if the legal parent were to die during this waiting period or be unavailable to sign medical consent forms should the child need emergency medical care. It also leaves the petitioning parent in a defenseless state should the relationship end prior to the completion of the adoption or should the legal parent change his or her mind in consenting to the adoption. This could leave the petitioning parent without any legal rights to the child. Similarly, should the petitioning parent change his or her mind about adopting the child

<sup>26</sup> *Id.*

<sup>27</sup> *Id.*

<sup>28</sup> *Id.*

<sup>29</sup> *Id.*

<sup>30</sup> International adoption can cost \$10,000-\$30,000. See <http://www.aboutadoption.com>.

<sup>31</sup> Domestic adoption can cost \$5,000-\$15,000. See *id.*

<sup>32</sup> A second parent adoption can cost \$2500-\$3000. See Manternach *supra*, note 3, at 411, citing Carol Ness, *Lesbian Moms Gain Rights*, S.F. Examiner, May 2, 1999, at A-1 discussion costs.

<sup>33</sup> The Department of Social Services (DSS) may charge an investigation fee of \$1250. See Emily Duskow, *The Second-Parent Trap: Parenting for Same-Sex Couples in a Brave New World*, 20 J. Juv. L. 1, 21 (1999).

<sup>34</sup> As Shapiro points out, a child adopted or born of a previous heterosexual relationship in which both biological or adoptive parents are still involved with the child, cannot be adopted by the parent's new partner (the same is true for heterosexual couples). In addition, prospective second parent adopters may find that criminal, drug or alcohol abuse histories will prevent them from adopting. Finally, lesbian and gay families that don't fit the heteronormative nuclear family model may also have their applications denied. Julie Shapiro, *A Lesbian Centered Critique of Second Parent Adoption*, 14 Berkley Women's L. J. 17 (1999).

<sup>35</sup> A typical second parent adoption can take six to eight months to complete. See *supra*, note 33.

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during this wait period, he or she has no legal obligations to the child he or she jointly intended to bring in to the family. Thus, putting the other parent in a vulnerable position too.

These outcomes are in stark contrast to the treatment of married couples. Not only does every state in the nation allow married couples to jointly adopt, all states recognize step-parent adoption, in which a parent's new spouse may adopt the parent's child, with consent, without terminating the other parent's legal rights. While second-parent adoptions require pre- and post-placement home studies, a waiting period, and a psychological evaluation, these requirements are frequently waived in step-parent adoptions in favor of streamlining the process.<sup>36</sup> Great weight is given to the parent's spouse's petition to adopt.<sup>37</sup> In most cases, unless a same-sex couple lives in Massachusetts where marriage is available to them<sup>38</sup>, or in states with civil unions, they are barred from taking advantage of the more efficient process of step-parent adoption.<sup>39</sup>

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### *B. Assisted Reproduction in Marriage, Civil Unions, and Domestic Partnerships*

The increased use of assisted reproduction<sup>40</sup> by both heterosexual and homosexual couples alike, married or not, has lead to a complex set of responses by courts as it seeks to catch up with these new approaches to family formation and the issues of parentage. Assisted reproduction comes in a variety of formats. Artificial insemination uses an anonymous or known sperm donor to impregnate a female member of a partnership. IVF, known as in vitro fertilization, uses a couple's own genetic material or a donated egg and/or sperm fertilized outside the uterus and then implants it in a female member of the partnership. More complex techniques include surrogacy in which a male member of a partnership's sperm is used to impregnate a surrogate and IVF from anonymous egg and sperm donations implanted in a surrogate mother for the benefit of a couple intending to be the child's parents. The treatment of parentage for the children born from these techniques has been largely determined by the nature of the relationship between the two people claiming to be the child's parents.<sup>41</sup> I begin with an exploration of how the law treats children born to married couples through assisted reproduction. Next, I examine how the law treats children born to unmarried different- or same-sex couples through the use of these same techniques.

Traditionally, the courts have looked to either a state's common law or statutory version of the Uniform Parentage Act (UPA) to determine parentage.<sup>42</sup> In general, the gestational mother<sup>43</sup> (unless a surrogate mother)<sup>44</sup> and her husband are both presumed to be the legal parents of the

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36. Sanford N. Katz, *Family Law in America* (2003).

37. Storrow, *supra*, note 3 at 334.

38. *Goodridge v. Dep't of Pub. Health*, 802 N.E. 2d 565 (Mass. 2004).

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39. California allows for registered domestic partnership couples to use domestic partnership adoption that has the same streamlined process as step-parent adoption. See National Center for Lesbian Rights California Domestic Partnership (AB 205) Fact Sheet available at <http://nclrights.org/publications/ab205faq.htm>.

40. Ctrs. for Disease Control and Prevention, U.S. Dep't of Health & Human Servs., 2000 Assisted Reproductive Technology Success Rates (2000), available at <http://apps.nccd.cdc.gov/art00/nation00acc.asp>.

41. See, e.g. *In re Marriage of Buzzanca*, 72 Cal. Rptr. 2d 280 (Ct. App. 1998).

42. UNIF. PARENTAGE ACT art. 3 cmt., 9B U.L.A. 313 (2002). The UPA was amended in 2002, and only seven states have adopted this version, while 19 states have adopted the 1973 version of this Act. *Id.*

43. Gestational mother is the female who gives birth to the child.

44. A surrogate mother is a female who may or may not have a genetic link to the child, but does give birth to the child, and agrees to waive any presumed parental rights as part of a contract with the people who intended the child to be created.

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child born in their marriage.<sup>45</sup> This presumption exists even when artificial insemination is used, and the husband clearly has no biological link to the child.<sup>46</sup> In fact, even if the couple marries after the child is born, the presumption remains as long as the husband holds the child out as his own according to the statutory guidelines.<sup>47</sup> For those remaining states that have not enacted legislation dealing with parentage occurring from artificial insemination, courts have applied common law to create a parental relationship where none existed biologically.<sup>48</sup> While this presumption is not uniformly interpreted by the states, generally it takes one of four forms: 1. a significant but not totally insurmountable irrefutable presumption; 2. a rebuttable presumption, if to do so is in the child's best interests; 3. a rebuttable presumption that is triggered at the time of divorce regardless of the length of the parent-child relationship or whether it would be in the best interests of the child; and 4. a rebuttable presumption available to anyone who believes he is the parent to the child in question.<sup>49</sup>

What has emerged either by statute or common law is the creation of parenthood by focusing on intent over biology, for husbands<sup>50</sup> and sometimes for wives.<sup>51</sup> The legal parentage of married women who use assisted reproduction is a little more complex. Because the 1973 UPA did not contemplate situations that would involve IVF, egg donors, and surrogate mothers, and the 2002 UPA, which did address these issues, has only been adopted by seven states, some confusion around this statutory presumption has arisen.<sup>52</sup>

It seems the marital presumption to paternity is also carried over in same-sex relationships where a couple resides in a state that affords them the same rights and protections as married

45. See, e.g., *Cross v. Cross*, 3 Paige Ch. 147, 140-142 (N.Y. 1832) (holding that the fact that a husband had neither lived with nor seen his wife in the prior 18 months, the presumption of parentage could not be overcome); *Michael H. v. Gerald D.*, 491 U.S. 110, 124-25 (1989) (held that child born of adulterous affair was still the child of the husband despite wife's lover's claim to fatherhood because, among other things, a long history of biological presumption exists to preserve the family unit).

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Furthermore, this presumption finds itself codified in many state statutes.

See ALA. CODE § 26-17-5(a)(1) (LexisNexis 1992); ALASKA STAT. § 18.50.160(d) (LexisNexis 2002); ARIZ. REV. STAT. ANN. § 25-814 (2000); CAL. FAM. CODE § 7611 (West 1994); CONN. GEN. STAT. ANN. § 7611 (West 1994); DEL. COD. ANN. tit. 13 § 804(a)(1-3) (1999); HAW. REV. STAT. ANN. § 584-4(a)(1-3) (LexisNexis 1999); 750 ILL. COMP. STAT. ANN. 45/5 (a)(1) (LexisNexis 1999); IND. CODE ANN. § 31-14-7-1 (1)(A)(B)(2)(A)(B) (LexisNexis 1999); KY. REV. STAT. ANN. § 406.11 (LexisNexis 1999); MD. CODE ANN. FAM. LAW § 5-1027(c)(1) (LexisNexis 1999); MASS. GEN. LAWS ANN. ch. 209c § 6(a)(1)(2)(3) (West 1998); MINN. STAT. ANN. § 257.55 Subdiv. 1(a)(b)(c) (West 2003); MO. ANN. STAT. § 210.822.1(1-3) (West 1996); MONT. CODE ANN. § 40-6-105(1) (2003).

46. Specifically, Section 5 of the 1973 UPA states that if a wife is artificially inseminated under the supervision of a licensed physician, and with her husband's consent, with sperm from someone other than the husband, the husband is still legally recognized as the child's natural father. The 1973 UPA goes on to say that the sperm donor will not be recognized in law as the child's natural father.

47. See UPA, *supra* note 24, at §204(a)(4).

48. See, e.g., *Jackson v. Jackson*, 739 N.E.2d 1203 (Ohio App. Ct. 2000) (created a duty to support twins where husband had orally consented to wife's artificial insemination.); *K.S. v. G.S.*, 440 A.2d 64, 68 (N.J. Super. Ct. 1981) (husband found to be the father of child born via artificial insemination because the father had not established that he had withdrawn his consent.)

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49. Linda Anderson, *Protecting Parent-Child Relationships: Determining Parental Rights of Same-Sex Parents Consistently Despite Varying Recognition of Their Relationship*, 5 *Pierce L. Rev.* 1 (2006).

50. *Buzzanca*, *supra*, at 280 (Ct. App. 1998) (holding that husband was responsible for child support as intended for the child to be brought about).

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51. *Johnson v. Calvert*, 851 P.2d 776, 782 (Cal. 1993) (holding that when the genetic mother differs from the gestational mother, intentionality will determine who the natural mother is to be).

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52. *In re Baby M.*, 537 A.2d 1227 (N.J. 1988) (holding surrogate contract illegal, surrogate to be the natural mother, but husband of the other party to the surrogacy contract was the natural father, not the husband of the surrogate mother).

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couples, if not the right to marriage itself. However, in Massachusetts, the only state that permits couples of the same-sex to marry,<sup>53</sup> the couple must take advantage of those rights conferred by the state, i.e. marry, in order to protect this presumption.<sup>54</sup> According to the Massachusetts Supreme Judicial Court in an advisory opinion to the senate, the state could not create civil unions while barring same-sex marriage because it is unconstitutional, on due process and equal protection grounds, to deny same-sex couples the opportunity to marry, and thus treat them differently from married couples.<sup>55</sup> This suggests that a child created using artificial insemination born to a same-sex married couple has two legally recognized parents from the moment of conception, regardless of the other mother's biological or gestational connection to the child.<sup>56</sup>

Currently, only California<sup>57</sup> and Oregon<sup>58</sup> through registered domestic partnership and Connecticut,<sup>59</sup> Vermont,<sup>60</sup> New Jersey<sup>61</sup> and New Hampshire<sup>62</sup> through civil union confer virtually all the rights, protections and responsibilities of married couples,<sup>63</sup> while the District of Columbia, Maine, Washington, and Hawaii offer limited rights and recognition to same-sex families.<sup>64</sup> California's Domestic Partner Rights and Responsibilities Act specifically addresses the parent child relationship in domestic partnerships with the following language:

"The rights and obligations of registered domestic partners with respect to a child of either of them shall be the same as those of spouses. The rights and obligations of former or surviving registered domestic partners with respect to a child of either of them shall be the same as those of former or surviving spouses."<sup>65</sup>

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53. *Id.* note 22. See MASS. GEN. LAWS ANN. 46 § 4B (LexisNexis 2007).

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54. See *T.F. v. B.L.*, 813 N.E.2d 1244 (Mass. 2004) (holding parentage could not be established because the couple did not marry, though they could have; parenting agreement was unenforceable; and parentage options in equity not available to create new obligations only existing ones; See also, *Massachusetts Supreme Court Holds that a Former Domestic Partner Need Not Fulfill Promises to Support a Child Born After the Relationship Dissolves*, 118 Harv. L. Rev. 1039 (2005).

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55. *In re Opinions of the Justices to the Senate*, 802 N.E.2d 565 (Mass. 2004).

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56. Williams, *supra*, note 3 at 439 citing Mark Strasser, *When is a Parent Not a Parent? On Doma, Civil Unions, and Presumptions of Parenthood*, 23 Cardozo L. Rev. 299 (2001).

57. CAL. FAM. CODE § 297.5(d) (West 2004).

58. Oregon's domestic partnership statute, the Oregon Family Fairness Act, took effect on January 1<sup>st</sup>, 2008.

59. CONN. GEN. STAT. ANN. § 46b-38aa (West 2006). See also CONN. GEN. STAT. ANN. § 46b-38mm (West 2006) (recognizes same-sex civil unions from foreign countries where couples now reside in Connecticut).

60. VT. STAT. ANN. tit. 15, § 1202.

61. *Lewis v. Harris*, 908 A.2d 196, 231 (N.J. 2006).

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62. New Hampshire's statute, An Act Permitting Same Gender Couples to Enter Civil Unions and Have the Same Rights, Responsibilities, and Obligations as Married Couples, took effect on January 1<sup>st</sup>, 2008. HB 437-FN-LOCAL (2007).

63. This marital presumption has not been tested in Connecticut or California.

64. National Gay and Lesbian Taskforce Report on the Status of Same-Sex Relationship Protections State Map, February 22, 2008 available at <http://www.thetaskforce.org>.

65. CAL. FAM. CODE § 297.5 (West 2004). See also the National Center for Lesbian Rights AB 205 fact sheet available at <http://nclrights.org/publications/ab205faq.htm>, which states that the presumption of paternity for registered domestic partnership lesbian couples is available for children born via artificial insemination *before or after* the act took effect in January 2005, while registered gay couples who use a surrogate will still need a declaration of parentage to both be included on the birth certificate, similar to heterosexual couples. But see, *K.M. v. E.G.*, 117 P.3d 673 (Cal. 2005) (The court declined to rule on the parental presumption for

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When read together with California's fatherhood presumption statute<sup>66</sup> only children created by artificial insemination born to a married couple, children created in the same way born to a registered domestic partnership couple would have two legal parents under this presumption. This protection appears to be afforded to the couple without judicial intervention or a requirement that both parties have a biological/gestational connection to the child. A similar result seems likely to occur in civil union states.<sup>67</sup>

The Vermont legislature created analogous statutory language to California's act, but in the context of civil unions. The Vermont statute declares:

"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."<sup>68</sup>

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Likewise, when read in conjunction with Vermont's parentage statute<sup>69</sup> the non-biological parent in a civil union appears to have the same legal status as the biological parent of the child created with artificial insemination.

However in *Miller-Jenkins v. Miller-Jenkins*<sup>70</sup> the Vermont Supreme Court used common law, not the statutory parental presumption of § 308(4) because it found the statute irrelevant to the facts of the case.<sup>71</sup> The court found that the legislature enacted the statute to make bringing child support actions easier.<sup>72</sup> While the court found the statute inapposite to this case because there was nothing in the legislative history to suggest that it was intended to mediate the parentage rights of children born to same-sex couples or through reproductive technology, it did make clear that the statute could not be interpreted in the manner appellant argued, which is to say biology is the only determinant of parentage.<sup>73</sup> According to the court, such an interpretation would mean "the husband of a wife who bears an artificially inseminated child cannot be the father of that child, just like a civil union spouse cannot be a parent to the child."<sup>74</sup> The court went on to state the appellant's argument would mean that a civil union spouse of a biological parent to an artificially inseminated child would have no parentage rights unless he/she formally adopted the

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children born to a same sex couple who had registered as a domestic partnership because they found parentage for both mothers on other grounds).

66. Cal. Fam. Code § 7611(a).

67. See *Anderson, supra*, note 31 at 5, in which the premise of her article is that the parental presumption would exist in domestic partnership and civil union states under statute.

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68. VT. STAT. ANN. tit. 15 § 1204(f).

69. VT. STAT. ANN. tit. 15 § 308(4) (stating in part that a rebuttable presumption exists that a person is a natural parent to a child born to a couple who is legally married at the time of the birth).

70. 912 A.2d 951 (Vt. 2006).

71. *Id.* at 963.

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72. *Id.*

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73. Appellant's argument turned on the use of the words "presumed to be natural parent" in § 308(4) of the statute to suggest that natural exclusively meant biological.

74. *Id.* at 964.

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child.<sup>75</sup> Such an outcome would undermine the intent of the legislature in creating legal equality between civil unions and marriages.<sup>76</sup>

Noting that the legislature is silent on the issue of parentage for families who have used assisted reproductive technology, the court stressed its preference for legislative guidance, but in its absence, turned to common law to establish the presumption of parentage for the non-biological parent in this case. In concluding that the non-biological mother was a parent to the child at issue in this case, the court declared, “in accordance with common law, the couple’s legal union at the time of the child’s birth is extremely persuasive evidence of joint parentage.”<sup>77</sup> Thus, while Vermont’s statutory language was not controlling, the court still found the same presumption to parenthood that exists for married couples was available to civil union couples, too, in common law.<sup>78</sup> Whether this holds true in the remaining states with civil unions seems dependent on the common law of those states, or the legislative intent of the statute creating a presumption, and whether the legislature has spoken on the issue of parentage through the use of assisted reproductive technology.<sup>79</sup>

Meanwhile, a New Jersey Superior Court determined that a child conceived through artificial insemination and born to a same-sex couple that had married in Canada and now resided in New Jersey both had the presumption of parentage under New Jersey’s artificial insemination statute.<sup>80</sup> In this case, *In re Child of K.R.*<sup>81</sup> a couple sought to establish legal parentage for the non-gestational mother prior to the child’s birth. In ruling that the state’s artificial insemination statute should apply to children born to a same-sex married couple, the New Jersey court asserted that it was the intent of such statutes to identify and provide the certainty of parentage for the benefit of the child.<sup>82</sup>

While such a presumption does appear to exist for parents in a domestic partnership, civil union, or marriage, this parentage presumption does not necessarily exist beyond the state lines that created it. The parentage presumption is created out of the nature of the legally recognized relationship between the parents in the state in which they reside. However, under the Defense of Marriage Act,<sup>83</sup> each state is free to determine whether it will recognize same-sex relationships in its own state or those legally created in other states, where these relationships are treated like marriage. Over forty states have amended their state constitutions or enacted statutes that incorpo-

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75. *Id.* at 965.

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76. *Id.* at 964.

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77. *Id.* at 966.

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78. It should be noted that this litigation was extremely complex because of a competing case in Virginia. *Miller-Jenkins v. Miller-Jenkins*, 637 S.E.2d 330 (Va. Ct. App. 2006); *subsequent appeal* 2007 Va. App. LEXIS 158, (April 17, 2007). Despite Vermont’s ruling that the non-biological mother should have visitation with her daughter, IMJ, it has taken over three years for her to get regular visitation. While the biological mother appealed to the U.S. Supreme Court, *Miller-Jenkins v. Miller-Jenkins*, 127 S. Ct. 2130 (2007) (*cert. denied*) the Rutland Family Court ordered “parenting time” to begin June 30, 2007 with the non-biological mother. *Miller-Jenkins v. Miller-Jenkins*, No. 454-11-03, slip op. at 14 (Fam. Ct. Vt. 2007).

79. Delaware, North Dakota, Oklahoma, Texas, Utah, Washington and Wyoming have adopted the 2002 version of the UPA. Alabama and New Mexico are currently considering it. See [http://www.nccusl.org/update/uniformact\\_factsheets/uniformacts-fs-upa-asp](http://www.nccusl.org/update/uniformact_factsheets/uniformacts-fs-upa-asp) (last visited March 3, 2008).

80. N.J. STAT. ANN. 9:17-44(a)(West 1992).

81. See Joslin, *supra*, note 3 at 702, footnote 92 where author states she has case on file.

82. *Id.*

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83. 28 U.S.C. § 173C (2006).

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rate the language and intentions of DOMA, with most states taking action in the 2004 and 2006 elections.<sup>84</sup> In fact, DOMA goes even further and declares that no state is required to give effect to the rights or claims arising from such relationship.<sup>85</sup> This suggests that under DOMA, states do not have to acknowledge gay and lesbian fathers and mothers whose parentage arises from a parental presumption for non-birth parents that emerged from a legally recognized same-sex relationship. The result is that as same-sex families move from non-DOMA to DOMA states their family structure is altered such that the non-birth parent's parental status dissolves into that of a legal stranger. Currently, it is unclear how these mini-DOMA states<sup>86</sup> will deal with the legal parent-child relationships in these same-sex families.<sup>87</sup> As no legislation currently exists to guide them, it is up to the courts to handle the issue.

For example, let us return to *Miller-Jenkins v. Miller-Jenkins*. The plaintiff, the biological mother, initially brought suit to dissolve a civil union with her spouse, and establish custody for their child, born of that union, using artificial insemination in Vermont in November 2003.<sup>88</sup> The lower court ruled that the plaintiff would get custody, but the other mother was entitled to liberal visitation. Almost immediately, the plaintiff denied her former partner access to their child. Eight months later the plaintiff took their daughter, and filed suit in her new state of residency, Virginia, a mini-DOMA state.<sup>89</sup> In filing a Petition to Establish Parentage and for declaratory relief, the biological mother's goal was to eliminate the parental rights of the defendant, the non-birth mother, and have the plaintiff ruled as the only legal parent of the child.<sup>90</sup> Filing the custody case in two jurisdictions with differing views about the legitimacy of same-sex unions pitted DOMA against the Parental Kidnapping Prevention Act (PKPA)<sup>91</sup> and the Uniform Child Custody Jurisdiction and Enforcement Act (UCCJEA).<sup>92</sup> Essentially, Virginia could have determined that it had proper jurisdiction to adjudicate this custody claim, refused to recognize the non-birth mother as a legal parent that arose out of their civil union and award full custody to the plaintiff, and deny the defendant any access to the child, as she is legally nothing more than a third party. In fact, the Virginia trial court did just that.<sup>93</sup> On appeal, however, a three judge panel reversed the lower court's ruling stating that the case raised the narrow issue of jurisdiction. Under the PKPA, the plaintiff had initially filed in Vermont and had, therefore, availed herself of that state's jurisdiction.<sup>94</sup> Virginia ruled that Vermont's decision must be followed.<sup>95</sup> The Virginia Court of Appeals

84. See Human Rights Campaign, *Statewide Marriage Law* at <http://www.hrc.org> (last visited March 6<sup>th</sup>, 2008.)

85. *Id.* *Supra*, note 62.

86. See Strasser, *supra*, note 39 clarifying that states that have adopted DOMA are referred to as mini-DOMA states.

87. Consequently, same-sex non-birth parents in states like Massachusetts continue to adopt their children, despite the marital parentage presumption, in order to protect their legal status as parents as they move across state lines.

88. See *Miller-Jenkins v. Miller-Jenkins*, *supra*, at note 74.

89. *Id.*

90. *Id.*

91. 28 U.S.C § 1738A (1982). The PKPA is federal legislation requiring the each state give full faith and credit to the custody decision of another state that has proper jurisdiction. It was created to discourage parents from taking their children to other states to engage in forum shopping in the hopes of achieving a custody ruling in their favor.

92. The National Conference of Commissioners on Uniform State Laws enacted this act and it has been adopted by all states, it determines which state has proper jurisdiction to adjudicate a custody claim.

93. *Id.*, *supra*, note 66.

94. *Id.*

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declined to determine the “constitutionality or viability” of its state DOMA statute, the Marriage Affirmation Act,<sup>96</sup> as it did not apply in this case, and if it did, it was trumped by the PKPA.<sup>97</sup> In other words, the court did not wish to rule on the issue of whether under Virginia’s DOMA statute, it was required to recognize the parental presumption created from a civil union.

While *Miller-Jenkins* may provide some guidance in competing custody actions, it offers little insight on how to interpret the effect of mini-DOMA legislation on the parental-child relationship formed through the parental presumptions that emerge from legally recognized same-sex unions.

#### *Assisted Reproduction for Unmarried or Unrecognized Couples*

For couples who live in states that don’t allow them to marry, or don’t recognize their union, or simply choose not to marry the non-biological parent, the parent-child relationship seems completely vulnerable to the decisions of the biological parent and the state in which they reside. If the couple ends their relationship, the biological parent may choose to sever all ties between the non-birth parent and the child.<sup>98</sup> Often, a parent the child has known since birth. If that occurs, the non-birth parent must rely on court intervention to protect their parent-child relationship. Until recently, many courts chose to recognize only the biological parent as the legal mother, treating the other parent as a legal stranger.<sup>99</sup>

For example in *Kazmierazak v. Query*,<sup>100</sup> the court held that the former partner of a child’s natural mother had no claim to custody of the child she helped raise. As a third party, she could not interfere with the biological parent’s fundamental right or privacy rights absent a finding of significant harm to the child.<sup>101</sup> On this basis, the non-biological mother could not seek judicial relief on statutory nor equitable grounds for custody or visitation.<sup>102</sup> Similar results have occurred in other jurisdictions.<sup>103</sup>

The results can be even more tragic for a child who loses one parent to death and then the other parent through judicial action when the court denies custody to the non-biological parent. In *McGuffin v. Overton*,<sup>104</sup> two children were born to an unmarried biological mother, Leigh McGuffin. She filed a paternity action against the father, Russell Overton, and he stipulated that

<sup>95</sup> *Id.*

<sup>96</sup> VA. CODE ANN. § 20-45.3 (2005).

<sup>97</sup> *Id.* *supra*, note 66.

<sup>98</sup> This is also true for unmarried heterosexual couples.

<sup>99</sup> See *Joslin*, *supra*, note 3, at 687.

<sup>100</sup> 736 So. 2d 106 (Fla. Dist. Ct. App. 4<sup>th</sup> Dist. 1999), *review denied* (Fla. 2000). *In re Pearlman*, 15 Fam. L. Rep. (BNA), 1355 (Fla. Cir. Ct. May 30, 1989) (lesbian non-biological mother had to petition to invalidate deceased partner’s (biological mother) parent’s adoption of their child, who had also denied non-biological mother visitation and then adopted her child without consent).

<sup>101</sup> *Id.*

<sup>102</sup> *Id.*

<sup>103</sup> See, e.g., *Curiale v. Reagan*, 272 Cal. Rptr. 520 (Ct. App. 1990); *Nancy S. v. Michele G.* 279 Cal. Rptr. 212 (Ct. App. 1991); *Alison D. v. Virginia M.*, 572 N.E.2d 27 (N.Y. 1991); *In re C.B.L.*, 723 N.E. 2d 316 (Ill. App. Ct. 1999); *Titchenal v. Dexter*, 693 A.2d 682 (Vt. 1997); *In re Thompson*, 11 S.W.3d 913 (Tenn. Ct. App. 1999); *Liston v. Pyles*, 1997 WL 467327 (Ohio Ct. App. Aug. 12, 1997). But see note 120 *infra* for court decisions finding otherwise.

<sup>104</sup> 542 N.W. 2d 288 (Mich. Ct. App. 1995). See also, *In re Hatzopoulos*, No. D-54498 (Denver Juv. Ct. July 8, 1977; *In re Pearlman*, No. 87-24,926 DA (Fl.Cir. Ct., Broward City, Mar. 31, 1989.)

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he was the biological father. However, Leigh began raising the children together with her lesbian partner, Carol Porter, when the children were five and three years of age, until the time of the McGuffin's death, seven years later in 1995.<sup>105</sup> Just prior to her death, McGuffin executed a power of attorney delegating all her parental powers to Porter. She also executed a will assigning guardianship of the children to Porter, instead of the children's father, Overton, because he had not established a relationship with his sons, nor paid \$20,000 in child support.<sup>106</sup> The court found that Porter had not been legally established as a guardian. Therefore, she had to be treated as a mere third party, despite raising the children for the last seven years.<sup>107</sup> In fact, the court found under Michigan's custody statute, Porter did not have standing to bring a custody claim.<sup>108</sup> The children then received a second trauma of losing their other mother, Porter, when their biological father was given custody.<sup>109</sup>

The biological mother can also be vulnerable in these relationships. A non-biological parent can walk away from a relationship refusing to pay child support for a child that both partners planned to raise together. This situation is illustrated in *State ex. Rel. D.R.M. v. Wood*,<sup>110</sup> in which a lesbian couple ended a four and a half year relationship before learning that one of the partners, Kelly, was pregnant.<sup>111</sup> Tracey, her partner, had actively researched reproductive options and participated in the artificial insemination process to get Kelly pregnant.<sup>112</sup> However, once the child was born, the parties could not establish an agreeable support and visitation plan for Tracey, and she stopped paying support.<sup>113</sup> When Kelly applied for public assistance, the state attempted to enforce a child support obligation on Tracey, but the court ruled that Tracey was not a mother under the state's Uniform Parentage Act, and therefore couldn't be ordered to pay support.<sup>114</sup>

While the litigation discussed thus far explores the nature of the parent-child relationship for non-biological parents at the time the couple's relationship has terminated, courts have also been disinclined to recognize co-parenting agreements created at the time the couple decides to engage in family formation.<sup>115</sup> A lesbian couple in *In re Bonfield*<sup>116</sup> had a committed 15 year relationship in which they sought to have children via artificial insemination. Because second parent adoption was not available in Ohio, the couple petitioned the court to enter into a co-parenting agreement to protect the parental rights of the non-biological mother.<sup>117</sup> The agreement's purpose was to

<sup>105</sup> *Id.*

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<sup>106</sup> *Id.*

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<sup>107</sup> *Id.* at 103.

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<sup>108</sup> *Id.* at 105.

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<sup>110</sup> 34 P.3d 887 (Wash. Ct. App. 2001); *T.F. v.B.L.*, 813 N.E.2d 1244 (Mass. 2004).

<sup>111</sup> *Id.* at 890.

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<sup>112</sup> *Id.*

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<sup>113</sup> *Id.*

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<sup>114</sup> *Id.* at 892-93.

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<sup>115</sup> *T.F. v.B.L.*, 813 N.E.2d 1244 (Mass. 2004).

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<sup>116</sup> 780 N.E.2d 241 (Ohio 2002). But see, *In re Custody of H.S.H.-K.*, 533 N.W.2d 419 (Wisc. 1995); *A.C. v. C.B.*, 829 P.2d 660 (N.M. Ct. App. 1992) (allows parent to enter into a custody agreement with a third party subject to modification under a best interests standard); *Rubano v. DiCenzo*, 759 A.2d 959 (R.I. 2000) (former partner's written agreement with non-biological mother allowing visitation rights with their child is enforceable).

<sup>117</sup> *Id.* at 243.

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“confirm...that they [both mothers] will continue to raise the children regardless of what happens to their relationship.”<sup>118</sup> The court found that the non-biological mother didn’t fit the legal definition of mother as either adoptive or natural, and consequently, as a third party, she could not enter into a shared parenting agreement with the children’s biological mother.<sup>119</sup>

More recently, however, courts have looked to common law or equity to protect the parent-child relationship for children born by means of assisted reproduction using doctrines such as *in loco parentis*, *de facto* or *psychological parent*.<sup>120</sup> Under these doctrines, the non-biological parent is viewed as a legal stranger who has functioned as the child’s parents affording them some sort of rights in relation to the child, even after the parent’s relationship has terminated.<sup>121</sup> Unfortunately, the interpretation of what rights are to be afforded non-biological same-sex parents under these equitable doctrines is far from consistent among the states.<sup>122</sup>

States that have utilized these equitable doctrines, place the *de facto* parent into one of two categories. Some states recognize *de facto* parents as a special class of third party individuals seeking access to a child, and thus have standing to petition for visitation only.<sup>123</sup> Other states find that the *de facto* parent is entitled to be viewed on par with non-custodial biological or adoptive parents in seeking custody and visitation.<sup>124</sup> A Washington State case appears to go further and creates a third category of shared parentage for *de facto* parents.<sup>125</sup> In *In re Parentage of L.B.*,<sup>126</sup> the court found that a non-biological mother was a *de facto* parent, as she had co-raised the child for six years, was referred to as Mama by the child, and publicly held herself out as the child’s mother.<sup>127</sup> In ruling that a *de facto* parent has standing to petition the court, the court stated *de facto* parents “stand in parity with biological and adoptive parents in our state.”<sup>128</sup> The

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118. *Id.* at 244.

119. *Id.* at 247.

120. Colorado, Maryland, Massachusetts, New Jersey, New Mexico, Pennsylvania, Rhode Island, Washington, and Wisconsin have all used these doctrines.

121. In order to establish *de facto* parenthood, the non-biological/no-legal parent has to demonstrate that he/she has lived in the same household as the child long enough to establish a relationship, helped raise the child, held themselves out as a parent, and done all this with the biological parent’s consent. See e.g., *In re Custody of H.S.H.-K v. Elsbeth Knott*, 533 N.W.2d 419 (Wis. 1995); *In re E.L.M.C.*, 100 P.3d 546, 560-62 (Colo. Ct. App 2004)(opinion provides a thorough description of the types of legally created parents in equity).

122. Donald Sherman, *Sixth Annual Review of Gender and Sexuality Law: V. Family Law Chapter: Child Custody and Visitation*, 6 Geo. J. Gender & L. 691 (2005).

123. See e.g., *S.F. v. M.D.*, 751 A.2d 9, 15 (Md. Ct. Spec. App. 2000);

124. *E.N.O. v. L.M.M.*, 711 N.E. 2d 886, 894 (Mass. 1999) in which the court held that “children born to parents who are not married to each other are to be treated in the same manner as all other children....The child is entitled to be protected from the trauma caused by the disruption of his relationship [with his non-biological mother.]” See also, *In re Parentage of A.B.*, 835 N.E. 2d 965 (Ind. 2005) (Indiana Supreme Court vacated court of appeals ruling that a non-biological mother who planned for and raised a child with her former partner is a legal parent, but transferred the case back to the trial level to determine the custody of the child using a best interests test, because courts have authority to place a child with someone other than its natural parent.)

125. Williams, *supra*, note 3 at 434.

126. 122 P.3d 161 (Wash. 2005).

127. *Id.*

128. *Id.*

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court went on to note that a child has a constitutionally protected right to maintain relationships with both legal and *de facto* parents.<sup>129</sup>

Courts have also been willing to apply the doctrine of estoppel to prevent non-biological parents who are psychological parents from withholding financial support for the children they helped bring into the world with their former partner.<sup>130</sup>

States have also found that their statutory language permits psychological parents to possess some of the same rights and obligations as biological parents.<sup>131</sup> The California Supreme Court has used its state's statutory language to determine parentage of non-biological parents. In *Elisa B. v. Superior Court*<sup>132</sup> the California Supreme Court found that a lesbian partner who refused to pay child support for children she planned for, held out as her own, lived with in the same household, and agreed to co-raise with her former partner, is also the children's mother under the state's Uniform Parentage Act.<sup>133</sup> In so holding, the court determined that California's UPA should be read in a gender-neutral fashion.<sup>134</sup> Using an intentionality test that had been applied to unmarried fathers in artificial insemination cases, the court stated that the non-biological parent was also a mother, and therefore, was obligated to financially support children that she helped create.<sup>135</sup>

In a companion case to *Elisa B.*, the California Supreme Court ruled under the UPA that a child could have two parents of the same sex with separate claims to motherhood in *K.M. v. E.G.*<sup>136</sup> K.M. gave birth to twins using in vitro fertilization with eggs donated by her partner, E.G. and an anonymous sperm donor. However, E.G. signed a parental claims waiver at the clinic where she donated her eggs. In addition, the couple decided to keep secret E.G.'s genetic connection to the children.<sup>137</sup> Both mothers raised the children for the first five years of their life, but after their relationship ended, K.M. sought to sever the relationship between E.G. and the children.<sup>138</sup> The court held that K.M. was the legal mother under the UPA by virtue of giving birth, but E.G. also had a biological connection to the children and therefore, was their legal mother too under the UPA.<sup>139</sup>

Finally, California offers some hope to same-sex couples who seek parentage determinations before their child is born. In a third companion case, *Kristine H. v. Lisa R.*<sup>140</sup> Kristine be-

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<sup>129</sup> *Id.*

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<sup>130</sup> *L.S.K. v. H.A.N.*, 813 A.2d 872 (holding former lesbian partner, who was not the biological mother, was obligated to pay child support under equitable doctrine).

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<sup>131</sup> *Rubano v. DiCenzo*, 759 A.2d 959 (R.I. 2000).

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<sup>132</sup> 117 P.3d 660 (Cal. 2005) (In this case, upon refusal of the non-biological mother to pay child support, the biological mother had to seek financial assistance from the county).

<sup>133</sup> *Id.* at 665.

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<sup>134</sup> *Id.*

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<sup>135</sup> *Id.*

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<sup>136</sup> 117 P.3d 673 (Cal. 2005).

<sup>137</sup> *Id.* at 677.

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<sup>138</sup> *Id.* at 678.

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<sup>139</sup> *Id.* at 683.

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<sup>140</sup> 117 P.3d. 690 (Cal. 2005).

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came pregnant through a known sperm donor. At the time of her pregnancy, the couple sought and got a judgment declaring Kristine as the biological mother and Lisa as the child's other legal parent.<sup>141</sup> When their relationship ended two years after the birth of the child, Kristine filed a motion to set aside the stipulated judgment.<sup>142</sup> The California Supreme Court held that the biological mother was estopped from challenging the order because she had stipulated to the judgment and enjoyed the benefits of it during the child's first two years of life, but it did not rule on the validity of the judgment.<sup>143</sup> The court also noted that it would be against public policy to not recognize both parent-child relationships.<sup>144</sup> In addition, the court observed that Lisa might be able to use the parental presumption under a gender neutral reading of the Family Code to establish parentage, using the intentionality test.<sup>145</sup>

While these statutory interpretations and equitable doctrines provide some relief for same-sex families residing in the minority of states that allow for them, a number of questions surrounding the non-biological parent's status to the child are still left unanswered. For example, the non-biological parent is still cast into the role as legal stranger, as he or she petitions the court for *de facto* parental recognition. After overcoming the hurdle of meeting the legal requirements of psychological parent,<sup>146</sup> these second parents, even then, do not obtain the rights of legal parenthood. They may receive custody or visitation and child support obligations, depending on the category that the state places the non-biological parent in—equal footing versus special class of third parties, but in this quasi-parent role, the parent child relationship is by no means secure. In this inferior position, it is unclear whether the child can receive health insurance or survivor benefits from the psychological parent.<sup>147</sup> It is also uncertain whether the non-legal parent can make medical or educational decisions for the child. Finally, if the legal parent were to become incapacitated or die, would the non-biological parent compete with other third parties for custody to the child? If the child were to become seriously ill could the non-legal parent take time off from work to care for the child and be protected by the state or federal Family Medical Leave Act?

In the majority of states, where these equitable options are not available, the second parent has no opportunity to maintain a relationship with the child he/she has been parenting if the biological parent chooses to sever their tie. Not having a legally recognized parent-child relationship can lead to outcomes significantly detrimental to both the child and parent. From a financial point of view, the child may not receive any support; may not have inheritance rights; may not receive state or federal survivor benefits like Social Security, retirement, or worker's compensation; may not receive insurance benefits or tax benefits.<sup>148</sup> From an emotional point of view, both parent and child will have the same grieving process as if losing a family member to death. With no way to maintain a relationship with each other, each must act as if the parent or child they've known

141. *Id.* at 692.

142. *Id.*

143. *Id.* at 696.

144. *Id.* at 695.

145. *Id.* at 693.

146. It is not clear how these equitable doctrines would apply if the couple ends the relationship just prior to or just after the child is born, where enough time has not elapsed to establish the parent child bond between the non-biological partner and baby. Would the non-legal parent who helped plan for the child have access to the child?

147. Joslin, *supra*, note 3 at 696.

148. *Id.* at 689-90.

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since birth is dead. Furthermore, the child is left in a vulnerable position, should the biological parent die or become disabled. The safety net that a second parent can provide is not present.

With this level of ambiguity surrounding non-biological parent-child relationships, second-parent adoption is recommended regardless of whether presumptions, equitable or statutory relief exists.<sup>149</sup> As stated previously, second-parent adoption is fraught with its own issues. It requires court intervention and is available only in certain states or counties. In addition to those issues discussed earlier, the following cases illustrate further challenges that arise in using second parent adoption in assisted reproduction cases.

In *In re Adoption of A.W.*,<sup>150</sup> three children were born to a same-sex couple using artificial insemination. The biological mother withdrew her consent to allow her partner to adopt the children, so the court dismissed the petition. The non-biological mother lost all contact with the children because the court ruled, under governing statutes, that she had no standing to request visitation.<sup>151</sup> While a couple may plan together to bring a child into the world and negotiate who will be the biological mother or father with the understanding that adoption will make the second parent a legal mother or father, the non-biological parent finds him or herself at the mercy of the biological parent if the relationship starts to disintegrate.

Sometimes, the non-biological mother expressing the desire to adopt the biological mother's children that the couple planned together to create, can actually destabilize a couple's relationship. For example in *E.N.O. v. L.M.M.*<sup>152</sup> a lesbian couple had been in a thirteen-year relationship before deciding to have a child using artificial insemination.<sup>153</sup> The couple executed a co-parent agreement establishing themselves as parents regardless of what happened to their relationship.<sup>154</sup> The couple then discussed second-parent adoption, and shortly afterwards, the relationship ended.<sup>155</sup> After years of litigation, the non-biological mother did establish herself as a *de facto* parent, and received visitation, but she does not have legal parentage over this child.<sup>156</sup>

Finally, in a third case, a biological mother attempted to undue the second parent adoption of her child by her former partner. In *Starr v. Erez*<sup>157</sup> a biological mother gave birth to a child using artificial insemination. While the mother and her partner were residing in Washington State, the non-biological mother used second-parent adoption to become a legal parent of their daughter. After the relationship ended, the biological mother moved to Georgia and then North Carolina, at which time, the adoptive mother became the child's primary caretaker. During the custody dis-

<sup>149</sup> See, e.g., National Center for Lesbian Rights California Domestic Partnership (AB 205) Fact Sheet available at <http://nclrights.org/publications/ab205faq.htm>.

<sup>150</sup> 796 N.E.2d 729,730 (Ill. App. Ct. 2003).

<sup>151</sup> *Id.*

<sup>152</sup> 711 N.E.2d 886 (Mass. 1999).

<sup>153</sup> *Id.* at 888.

<sup>154</sup> *Id.*

<sup>155</sup> *Id.* at 889.

<sup>156</sup> *Id.* at 892-93; see also, *V.C. v. M.J.B.*, 748 A.2d 539 (N.J. 2000) (two months after discussing the non-biological parent adopting the couple's child, the biological mother terminated the relationship); *In re Elisa B.*, 117 P.3d 660 (Cal. 2005) (non-biological mother in this case, also had a biological child through artificial insemination, and while the couple discussed adopting each other's children, Elisa B. changed her mind because she "had misgivings" about her former partner adopting the daughter she gave birth to).

<sup>157</sup> *Starr v. Erez*, COA99-1534 (N.C. Ct. App. Nov. 27, 2000); see *Lesbian Attempts to Use Anti-Gay Law to Invalidate Second-Parent Adoption*, Apr. 24, 2000, available at <http://www.nclrights.org/releases/nocar.htm>.

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pute filed in North Carolina, the biological mother argued that the Washington state second-parent adoption decree could not be recognized in North Carolina under its anti-marriage statute.<sup>158</sup> The court held that the Washington state adoption decree had to be recognized in North Carolina.<sup>159</sup> While the outcome of this case was favorable for the adoptive mother, it nonetheless, took significant amounts of time and money litigating at the expense of the parent-child relationship. In some cases, the length of time taken to resolve the case may be longer than the time that the parent and child spent living together as a family.<sup>160</sup>

Despite the significant concerns surrounding second-parent adoption, it currently offers the best hope for securing the parental rights of the non-biological parent or the non-primary adoptive parent in countries or states that don't allow joint adoption by unmarried or same-sex couples.<sup>161</sup> However, for those couples where second-parent adoption is not available, or unaffordable, or unattainable because of lack of knowledgeable counsel, or for those couples who simply don't wish to use it (perhaps because the biological parent won't consent) or are unaware of it, or are afraid to petition to the court for fear of a homophobic response, the non-legal parent-child relationship is tenuous even in intact relationships. Against this cultural and legal backdrop, this legally fragile parent-child relationship may exact significant costs on same-sex families, including destabilizing it. In the next section, using empirical work, I explore the impact of this socio-legal climate on same-sex couples' decisions to engage in family formation and partake in the very institutions that may act to undermine their family structure.

### III. THE STUDY: HOW SAME-SEX COUPLES RESPOND TO THE LEGAL FRAMEWORK AS THEY ENGAGE IN FAMILY FORMATION

The qualitative data used in this exploratory study came from eighteen same-sex couples, eight gay couples and ten lesbian couples, located in the greater metropolitan Seattle area, who had their first children together using assisted reproductive technology or adoption. As the goal of the study was examine how same-sex couples navigate family formation in the current socio-legal climate, other types of family forms, such as blended families with children from previous heterosexual or homosexual relationships, were excluded from the sample.

All the respondents had at least a college degree, with half of the respondents also possessing a graduate degree. The families clearly fell into the upper middle class. Each couple had a household income that was over \$100,000. The age range for the respondents was between 35 and 45, and the mean age of acquiring their first child was 37.5. Most couples had been in their current relationship for ten years. All the respondents were White. The children ranged in age from seven years old to four months old, with a mean age of three years.

Subjects were recruited using snowball sampling, using four sources of contact to begin. The ethnographic work for the study was carried out between January and June of 2007, conducting ninety-minute interviews with one or both members of the couple. Specifically, all eight interviews with the gay couples were conducted with the primary caretaker, who was either a stay-at-home dad or worked part-time outside the home. Five of the ten lesbian couples included both partners, the remaining five were carried out with the biological mother, who in all cases but one, tended to be either a stay-at-home mother or worked part-time outside the home. All of the cou-

<sup>158</sup> *Id.*

<sup>159</sup> *Id.*

<sup>160</sup> See Miller-Jenkins, *supra*, note 74.

<sup>161</sup> Some jurisdictions will also allow declaratory judgments for parentage prior to the birth of the child, thus allowing parental rights to be established without going through a second parent adoption process. See Melanie B. Jacobs, *Applying Intent-Based Parentage Principles to Nonlegal Lesbian Coparents*, 25 N. Ill. U. L. Rev. 433-48, (2005).

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ples were raised in different-sex families. All but two of the interviewees had been raised in other states and had moved to Washington in adulthood.

The interviews used a narrative format in which I explored respondents' perspectives on a number of issues, such as the decision to create family, reproductive decision-making, engaging as a family with normative social networks and institutions, strategies to legally and culturally preserve the family, and family dynamics in light of these strategies. In all cases, the interviews were taped and immediately transcribed. Subjects were contacted for clarification on certain responses. As the children of the couples in this study were all quite young, the accounts the couples provided give a contemporary perspective of same-sex families managing to "do family" in this constantly evolving socio-legal atmosphere.

#### *A. Expectations for Having Children*

The lesbian couples in this study all stated that the idea of having children was an expectation that grew out of their family of origin.<sup>162</sup> As girls, they had been socialized to believe that part of being a woman meant also being a mother. At some point in adulthood, they grappled with the intersecting ideas of motherhood and their sexual orientation. For some, the two ideas could not co-exist, but for others, as they developed social networks, it seemed possible to be both a lesbian and a mother.

Every lesbian respondent discussed the decision to bring children into their relationship as a process of negotiation. In about half of the couples, one partner did not want to have children because of concerns about how the child would be treated by society at large. Others articulated a lack of desire to have children because of a long held belief that gay and lesbian individuals couldn't have children in our contemporary society. In other words, not having children was simply one of many costs of possessing their particular sexual orientation. Diane<sup>163</sup> put it this way, with her partner nodding her head vigorously in agreement:

There are just so many brick walls that feel about ten inches thick. First you have to get your parents on board with the concept. They might have accepted your sexual identity, but having kids was another matter. Then, you have to think about cost. These things don't occur by accident. You have to talk to doctors and lawyers, judges. And then there's your partner. Because you don't have marriage, you don't have that glue. So, when you bring the child into the relationship, with so much against you, how are you going to do this together? Are you both always going to be there? Financially and emotionally?

For couples where one partner was disinclined to have children because of a concern that any potential children would encounter a homophobic world, the key factor that caused them to change their mind was age. As Amy states:

I grew older and two things happened. All of a sudden I became more hopeful that it was possible to live in a world in which lesbians could have children and they'd be treated okay. I started seeing our [lesbian] friends having kids and that it was going really well for them [in Seattle]. The other thing was my age. My biological clock was ticking, and I realized that the decision to not have kids would soon be final. I mean I couldn't change my mind at a certain point.

Most of the women in this study had been raised in areas where they observed both overt and covert hostility towards homosexuals. After living in the Seattle area for some time, they felt that this was an area more tolerant, and in some cases, embracing of same-sex families. For the

162. Family of origin refers to the family to which they were born into or adopted into and raised.

163. All the subjects' identities have been changed to maintain confidentiality.

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other couples in which a partner didn't feel an urge to have children, the turn around in their position came when a partner threatened to end the relationship. Kara stated:

My partner really wanted to have children and I knew that, but I wasn't sure how long our relationship was going to last in the beginning. Then, as we started talking commitment ceremonies, she said she didn't think she could stay in the relationship if we didn't have children. Of course, the irony in all this is that I am the one who gave birth! Naturally, I've completely changed my mind about having kids.

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In these cases, the decision to have children was part of the process of deciding to commit to each other as a family unit.

All of the men in the study stated that as they approached adulthood they had no expectation of having a long-term partner, much less children. Peter sums up the respondents well when he says:

Once I came out to my family, there was no talk of me having kids one day. It was all about what a great uncle I would be. And I am. I'm the favorite uncle. But then there was also the issue of AIDs. Back then, men were dying of AIDs. The question was would we even be alive? It wasn't until I actually saw gay families did I think it was possible for me.

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The different factors prioritized in the subjects' responses reflects the larger cultural and social influences experienced during their coming of age. Most of these respondents came of age during the 1980s when the AIDs epidemic led to increased homophobic responses by the world at large. As they moved into reproductive years, the first wave of gay and lesbian family formation had been well established. Gay fathers and lesbian mothers were winning custody of their children from previous marriages, and now living with their same-sex partners. In addition, the second wave, known as the "gayby" boom,<sup>164</sup> was underway by the mid 1990s offering a model in which to follow. It seems that the initial factors weighed in deciding to have children were significantly more informed by culture than the law.

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#### *What Path the Stork Will Take*

All of the lesbian couples in the study chose to use artificial insemination from an anonymous sperm donor to conceive a child. The couples chose this method over adoption because they wanted to have some genetic history to share with their offspring. All but two of the couples planned to alternate childbearing so that each mother could have a genetic connection with their children, but in all cases, the biological mother of the first child became the biological mother to all the children in the family. This occurred because the non-biological mother became the primary breadwinner after the first child was born, and her career was on a stronger trajectory than the biological mother's career. The couple felt it was better not to disrupt the non-biological mother's career path.

The decision as to who would conceive a child came down to three factors: age, genetics and career. In the cases of the couples who never intended to alternate childbearing, the couples decided that given the age difference between them, it was best to have the younger women conceive the children. The second factor, genes, led to an assessment of family history, which influenced who would be genetically connected to the child. Those women who came from families with physical or mental health risks deferred to their partners who had healthier family backgrounds. Finally, the nature of employment dictated who was in a better position to give birth to a child and take family leave. There were clear distinctions in terms of cultural tolerance for pregnant women, as well as lesbian pregnant women, and mothers at the workplace. Furthermore, the

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164. The term was first used in Curve magazine on August 1<sup>st</sup>, 1997 to observe the demographic trend of gay and lesbian couples having babies. See <http://esa4.rice.edu/~ling215/browse.php?l=g>.

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realistic possibility of maintaining a particular career after the birth of the child determined who was better placed to become pregnant. Lynn observed:

We both had really good benefits at work, but Kate was in residency at the time we wanted to get pregnant. There was no way for her to stay on track with being a doctor, if she was pregnant during a residency or when she was just starting out, so we thought she should go second. On the other hand, I worked in an office with tons of moms. There was just way more flexibility for me. And then when we decided we wanted another one, Kate's career was really taking off and it just didn't make sense to interrupt that, when it had worked so well for me the first time.

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The reasoning articulated above represents the paradox in which lesbian couples must organize their reproductive lives. On the one hand, the decision of when to become pregnant, and the potential sacrifices to career it may cause, is shared by all women, but for the women in this study, there is an additional factor in the calculus. In Washington State, the other mother is not legally recognized as a mother without judicial intervention, using second-parent adoption,<sup>165</sup> which cannot occur until some time after the birth of the child. Therefore, unlike heterosexual couples who can rely on both partners to assess their access to health insurance and the protections of the state and federal Family Medical Leave Act, lesbian couples must appraise their career situations individually to determine whether having a child makes sense.

Finally, the decision to use an anonymous sperm donor, as opposed to someone the couple knew, was to have clearly defined boundaries about who the family was and could ever be. Jenna noted:

We had heard stories about couples who had used friend's sperm, and he had promised not to want to establish a relationship with the child. But then, after the baby arrived, he wanted to be part of her life. He insisted and even went to court. It was a nightmare. We wanted no part of that.

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Our eldest daughter knows how babies are made and she asks where her dad is. We make it very clear: we went to a sperm shop and bought it. We tell her some people have a mommy and a daddy, but you don't. You are very lucky because you have two mommies.

This statement reflects a consistent theme expressed by all the women in the study. They wanted a cohesive family unit that could not be challenged culturally or legally. By acknowledging the sperm donor, others might claim their daughter really did have a dad; in addition, the sperm donor might claim parental rights in court.

On the other hand, one couple did try using a known sperm donor. They wanted the child to have a "father-like" figure in his/her life, but wanted to make it clear that they would be the parents. The donor would have occasional and flexible visitation. Ultimately, when the couple brought the legal documents to the donor to sign, he decided against participating because he felt that he would want to be a parent to the child. Diane explains why they then chose to use an anonymous donor:

When he backed out at the eleventh and a half-hour, it was devastating. It was like having a miscarriage. We just couldn't believe it, and we couldn't talk about having a child for a whole year. During that year, we had time to think, and realized it would just never work having a known sperm donor understand that they could be the uncle or friend, but not the dad.

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By using a fertility clinic, they had legally and culturally eliminated the role of "father" in their family, and protected their particular family structure from intrusion.

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165. In Washington, second-parent adoption appears to be available only in certain counties with particular judges.

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All of the gay couples in the study, with the exception of one, chose to use international adoption<sup>166</sup> combined with a domestic second-parent adoption. Their reason for using adoption, as opposed to a surrogate mother, mirrored the same concerns as the lesbian couples in using an anonymous sperm donor. First, the couples thought that international adoption would have a level of finality with the geographic distance that they were not sure would be possible with domestic adoptions. Jay expressed his trepidation this way:

We wanted to make sure that there would be no question that we were the parents. So we ruled out surrogacy right away. First, we weren't even sure it was legal in this state. And even if we went to another state, what if she changed her mind? We thought there's no way we'd win. Then, when we thought domestic adoption, we were worried about the same thing. What if the mom found out we were gay. Could she change her mind and take the child back? Would the state undo our adoption?

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It was important to the couples to clearly establish that they were parents. Perhaps most importantly, the couples wanted to ensure that no one could step in and reverse the family arrangement they had created.

For the one couple that chose to use a surrogate mother, they felt the same desire as the lesbian families, to have some genetic connection to their child. In this case, they both contributed sperm to be used in in vitro fertilization so that each of them would be genetically connected to one of the twins born to them. They had less fear than the other couples in using a surrogate after carefully researching and locating a state, with geographical distance from their own, that would allow for joint adoption by a gay couple and would enforce surrogacy contracts. Furthermore, they used an egg donor, so that the gestational mother would have no biological connection to their children. From their point of view, they had eliminated the role of mother as being a clearly defined person and cemented their role as the only parents to the children by using this type of reproductive technology.

With both the lesbian and gay couples, considerable research went into establishing the best strategy to create a family. The priority for all couples was to ensure the legal integrity of their family unit. Cultural influences played less of a role at this stage, although it was important not to have an identifiable mother donor or father donor that others could point to as being the "true" parent to the child. More so, the couples were concerned over legal challenges that could disrupt their family relationship. Biological connections clearly take a backseat to the social relationships developed and carried out by the couple 'doing family'. The desire to draw firm boundaries around their family units may have been influenced by the increasing number of states that enacted legislation or amendments banning gay marriage in the elections of 2004 and 2006.<sup>167</sup> In the face of mounting hostility towards legal recognition of their partnership, the couples felt an urgent desire to protect their parent-child relationships. It's interesting to note, that despite the cultural opposition to same-sex relationships, these couples were not dissuaded from growing their families.

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### *Strategies to Legally Preserve the Family and Couples' Understanding of What They've Achieved*

All of the couples engaged the services of legal counsel to assist them in maximizing both party's legal standing as parent. Every attorney advised them to use second-parent adoption.<sup>168</sup> The couples described the process as nerve-racking and in some cases fear inducing. Both the gay and lesbian couples expressed two key themes regarding the process. It became obvious to every-

166. The respondents also mentioned that they preferred an international adoption because they thought it would be faster than a domestic adoption.

167. In addition, *Lofton v. Dept. of Children and Family Servs.* 358 F.3d 804 (11<sup>th</sup> Cir. 2004) ruled that there was not a fundamental right to adopt children.

168. Almost all of the couples had also created wills, established power of attorney, and chosen guardians for their children.

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one as they began to investigate the process of second-parent adoption, first by talking with friends who had navigated the procedure already, and then in discussing it with an attorney, that a back door network had to be employed. Jake explains:

Our friends told us about the particular attorney who was gay friendly and knew how to do these adoptions and knew the judges to go to who would approve our adoption. Then when we talked to the attorney, we learned that we would have to have evaluations and home studies. Oh my god, we thought, how would we get through this! But of course, there are the special social workers who know how to write reports without mentioning the words 'gay couple'. Everything seemed to be in code.

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The couples also felt that what they were engaging in was clearly not a mainstream legal procedure. The couples observed that a new category of adoption needed to be created for them and that only particular judges would allow their petition. In some cases, the attorneys had to confirm that the judge would allow the petition before bringing it to that court. Finally, only certain lawyers knew how to do the petitions. Even the way the attorneys counseled them made them question the legitimacy of what they were trying to do. Jo put it this way:

We've been together for ten years. We felt it was important for our relationship to bring a child into it. I give birth to our daughter, and now our family is complete and then the attorney kept saying to me, 'Do you understand what you are giving up. You are giving up half your parental rights forever.' And I kept saying, 'I am not losing anything. Our daughter is gaining another parent!'

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The experience left the couples questioning what they had actually achieved by engaging in the second-parent adoption process. Many of the couples, and in particular, the second-parent adoptive parents expressed the feeling that they held secondary cultural and legal status. A frequent refrain was if anything were to happen, would the courts *really* recognize me as a parent? In this quote Jay expresses his concern were he and his partner to end their relationship:

Well, God forbid we have a custody battle. [Robert] went to Guatemala. His name is listed as the parent. The kids have his last name. I've been taking care of them for the last six years, but I wouldn't get custody. I only did the second-parent adoption in the U.S.

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Jo explains that because she and her partner feared that her parents would try to seek custody of their child if anything were to happen to Jo (the biological mother) she made it clear in her will that her partner would be the legal guardian, in addition to also getting a second-parent adoption. But in contemplating what would happen if their relationship ended Jo tells her partner:

If we separated, I'd just take that part [the desire to have her partner be guardian to their child] out of the will.

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After hesitating, in which there is some awkward silence and a look of confusion on her partner's face she continues:

Oh wait. Even if I did that, you're still the parent.

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Such observations reflect the confusion of most of the parents in the study. First, second-parent adoptions may not have the legal finality of other adoptions; and second, a second-parent who adopts holds an inferior position to that of the first adoptive parent or biological parent.

Thus, although the couples had approached their reproductive decisions in such a way to maximize the stability of their family and protect it from outside legal and cultural challenges, not all partners were sure they had maximized stability from within, even after engaging the legal system. In other words, they feared their partner could lay greater claim to the child were their relationship to end, relying on the same laws used to create their parental status in the first place.

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The lack of confidence around the second-parent adoption tool was also expressed in the family's fear of moving or even traveling to other states or within states, in some cases. Because the law around second-parent adoption appeared to them to vary so much, couples felt real restrictions about where they could live and work, or even feel confident traveling. A recurrent question or observation in almost all of the interviews was if we ever moved would our legal status as parents be recognized? Andy remarked:

I mean who wants to go to Idaho? But I do worry that all the legal protections we went through are meaningless in other states.

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And Peter noted:

My parents live in Florida. We could never move to be closer to them. We would not be recognized as a family legally.

Emma echoed a similar sentiment upon learning that her friend's second-parent adoption was denied:

My first thought was we're naïve. It never occurred to us that we couldn't go somewhere else and be fine. Then I thought, oh well, I guess we're no longer going to Idaho. But then it hit me, every time we travel or think about jobs, we have to wonder what will that state do with our family status? If we need to go to a hospital, will we both get to see the baby? Both make the medical decisions? We live in a bubble, here in Seattle.

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Because of their perceptions that the law is not uniformly in agreement around second-parent adoption, the respondents felt that this unevenness, reflected in the larger culture, seeped into their family dynamics. For example, the parents noted that the children in their families had picked up on the issues of parental legitimacy. One biological mom said that they had to work very hard to establish the relationship between their seven year old daughter and the non-biological mother. She acknowledged:

[Our daughter] doesn't listen to [the non-biological] mother, and will say, "I don't have to do what you tell me. You're not my real Mommy. You just adopted me."

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In the families in this study, two kinds of power dynamics seem to emerge, the economic and the biological. The non-biological mother in the couples tended to be the primary breadwinner, and therefore, held more economic power in the relationship. On the other hand, the biological mother held a greater parental legitimacy claim due to her biological connection to the children, *and* because she tended to be fulfilling gendered normative expectations by also being the primary caretaker. As Kate, a non-biological mother ruefully observed:

I feel like I am always defending my position. Whether it's with the kids, other families, teachers at school or the doctor's office, I am not with them as much, so these people [teachers, other parents, doctors] already know [their daughter] has a Mom. The question is who am I? The other day we were flying, and I thought, I better bring the adoption decree just in case.

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This type of power dynamic was not as clearly articulated amongst the children of gay couples, perhaps because both parents have adopted the children. However, those dads who were parents by virtue of second-parent adoption did state they were glad to be in the primary caretaker role where more people knew them as the dad compared with the primary breadwinner dad. On the other hand, these dads expressed more vulnerability in the parent-child relationship if the relationship with their partner terminated. Not only were they economically exposed, because they were the stay-at-home dads, but they felt they had less legitimacy in the eyes of the law because they were not the first parent to adopt. Dan wryly put it this way:

The name says it all. *Second*. Parent. Adoption.

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The results of these quotes are troubling because they indicate that even though these couples have spent thousands of dollars to engage the legal system, and in particular to seek the advice of counsel, they are left with a feeling of uncertainty around the parental status of both adult family members.

The law's lack of uniformity in recognizing same-sex families is both a reflection of some states' unwillingness to do so, but also acts as a reinforcement of those states' cultural attitudes around this type of family formation. In so doing, social structures, like the legal system actually continue to undermine same-sex families. Several of the couples expressed frustration at school and medical forms that do not reflect their family structure, others lamented that lack of access to various employment and governmental benefits, but they were also concerned by the day to day interactions with others. Amy commented on how her family lives on a street filled with kids, and everyone is very friendly, but the other families seem to be *friends*:

If we're out playing, everyone will come and play. Our kids don't get excluded. But we don't get invited to other people's houses in the neighborhood. Oh sure, the parents say hi, but then they walk across our lawn to the other neighbors and hang out and have coffee. I can't help wondering, is it that they don't like us, or they don't like our type of family. I mean it's not the end of the world; we have a really large network of gay families we hang with. But still...

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Jenna's concern was more intense. Soon after giving birth to her daughter, she and her partner moved to another state. After living in their new neighborhood a few months, some people tried to break into their house at night. Jenna described her feelings about the incident:

For the first time ever, I thought did someone do this randomly, or did they do it to hurt our family because they don't agree with our lifestyle. I would have never had those thoughts in Seattle. Now we're moving again and I worry in this new state, I wonder will people like us? Then I tell myself what's not to like about us?

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Others expressed concern of the impact of their family structure on their extended family. A lot of the respondents in the study had moved from other locations that were more hostile to gay and lesbian families, and they still have relatives in these locations. Some couples said their parents could only talk to a few close friends about their sons' or daughters' family structures. Amy noted most tragically:

If we (she and her partner) were to die, our kids would go to my brother and sister-in-law in North Carolina. My biggest fear is that my partner [the non-biological mother] would not be remembered. Not because of my brother, but because of the community. They just couldn't talk about having two mommies.

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This legal insecurity permeates many of their institutional and relational interactions. It takes a toll on their family structure, as seen here:

Respondent: I hope this thing holds up.

Interviewer: What? The adoption or your relationship?

Respondent: Both.

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In the end, these families' interactions with and perceptions of the law seem to create an imprisoned family. Despite the extremely high level of education of the sample, the availability of resources to hire appropriate counsel, the engagement of the legal system to create whatever legal protections they could to solidify their family unit, a sense of diffidence surrounded what exactly they had achieved. The effect appears to create a captive family on two levels.

Psychologically, the parent who second-parent adopts does not hold the same power in the family because their status is perceived to be inferior both culturally and legally to that of the bio-

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logical or first adoptive parent.<sup>169</sup> This inequality can permeate not only the interactions within the family, but can also be reinforced by interactions in other social institutions. The result can be destabilizing if the parent feels like his or her parental legitimacy is being questioned, or more crucially could be questioned if the relationship ended. This gives incredible power to one parent. While it may never be overtly used, in subtle ways it could have a corrosive effect on an intact family relationship. Emotionally, the parent with the perceived inferior position may not assert himself or herself either with the child or their partner in regards to their children for fear of how it will be received. In essence, the other family members could hold them emotionally hostage.

Geographically, the entire family is held captive when the family unit is not confident that they will be treated as a legitimate family regardless of where they live or travel. When families are literally undone by simply entering a state's border, it is difficult to imagine a more effective way of undermining this type of family formation. As noted above, these real and perceived barriers exact a toll on the family's ability to exist to the fullest extent. While different-sex families take the right to travel for granted, same-sex families must weigh the risks against the benefits. These families are bound to the states that are willing to acknowledge them.

#### IV. RECOMMENDATIONS

While the courts and legislatures have made some gains in preserving the parent-child relationship after a same-sex couple dissolves its relationship, the state has an interest in preserving all family units. Much more has to be done to support intact family units, so that a child can enjoy the benefits of both parents uniformly. Here are some of my recommendations.

First, for those couples wishing to adopt a heteronormative model of family, same-sex marriage needs to be recognized on a nationwide basis. Obviously, this is a long term goal, with DOMA creating a considerable hurdle. However, Meezan and Rauch make a strong argument when they say:

Same-sex marriage might benefit children with the durability and stability of the parental relationship. In the heterosexual world, a substantial body of research shows that other things held equal, marriages are more durable and stable than cohabitation. To what extent this would be true of same-sex couples is not as yet known in any rigorous way, but anecdotal evidence suggests that a similar dynamic may apply. Gay couples who have formally married have attested that the act of marriage has deepened their relationship often to no one's surprise more than their own.<sup>170</sup>

None of the couples in the study suggested that they wanted gay marriage to be legalized. However, that was because they didn't see it as a family preserving tool in its current status. They felt that it wouldn't mean anything beyond the state in which they resided and wouldn't afford them any protections in regards to their children. None of the couples expressed any understanding of the marital presumption and what it offers married couples who acquire children through reproductive technology. However, allowing same-sex couples to marry provides a social legitimacy to the whole family unit. Under the parental presumption, the non-biological parent would not have to adopt a child born to the marriage, and a same-sex couple could jointly adopt a child.

169. It should be noted that gay fathers who were the second parent adopters garnered more parental legitimacy by choosing to be the primary caretaker. As they were more present in the social institutions where parent and child interact, their role as father was taken for granted. However, by stepping out of the job market, they traded economic power for increased cultural parental power. This did not necessarily allay their fears regarding legal parental power.

170. William Meezan & Jonathan Rauch, *Gay Marriage, Same-Sex Parenting, and America's Children*, 15 FUTURE OF CHILDREN, Fall 2005, available at [http://www.futureofchildren.org/usr\\_doc/06\\_FOC\\_15-2\\_fall05\\_Meezan-Rauch.pdf](http://www.futureofchildren.org/usr_doc/06_FOC_15-2_fall05_Meezan-Rauch.pdf)

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There would be no “second” parent. It seems that in order to support the status of both parents in the family, legally and culturally, the idea of “second” parent should be dismantled.<sup>171</sup>

The status of marriage also creates a certain level of prestige and clear assumptions around parental structures. Marriage, after all is a social investment in the family. As Perlesz et al. remark in their study of children and grandparents in lesbian families:

The lack of institutional recognition of ‘the lesbian parented family’ by public figures, such as health and welfare workers, educators, legal bureaucrats and so on, has meant that the lesbian parented family is forever needing to redefine itself in its interactions with the public domain.<sup>172</sup>

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For those gay and lesbian couples wishing to partake of marriage, a socially familiar vocabulary exists in which to define their roles, statuses, and relationships as they interact with other institutions, and relate to society at large. The terms civil unions and domestic partnerships do not culturally connote the same level of status as marriage. One still needs to explain the family relationship. Marriage comes with a culturally recognized order to familial relationships.

While same-sex marriage is a long way from being recognized nationally, a first step in making marriage a meaningful tool to preserve parent child relationships would be to limit the power of DOMA. Courts can play a role in moving legislatures and society to recognize the importance of all family structures by giving narrow interpretation to statutes that impede this process. For example, despite Virginia’s extreme stance against same-sex unions, the Virginia Supreme Court in *Miller-Jenkins* found that the PKPA trumped the state’s DOMA statute, and thus preserved a parent-child relationship.

In recognizing the power of the law to engage in social engineering, the court could have ruled that while DOMA may permit states not to recognize same-sex relationships, DOMA cannot be interpreted to deny the parent-child relationship that emerges from the presumption of a same-sex couple’s civil union, registered domestic partnership or marital relationship. Such a ruling would be consistent with the Tenth Circuit’s ruling that states may not create legislation refusing to recognize second-parent adoptions by gay and lesbian parents that were finalized in other states.<sup>173</sup> While the legal basis of the decision rested on the full faith and credit clause, the impact of the decision promoted the policy of preserving parent-child relationships. If courts ruled that parental presumptions must be recognized everywhere, such action would make clear the importance of a policy that supports all family relationships.

In addition, Massachusetts recently held that residents of states that don’t ban same-sex marriage may marry in Massachusetts, which currently includes Rhode Island and New Mexico.<sup>174</sup> This has led the attorney general of Rhode Island to recommend that the state recognize same-sex marriages performed in Massachusetts.<sup>175</sup> These actions set the tone of what is possible. Simi-

171. While others correctly argue that parental rights and responsibilities should be disaggregated to allow for other family models, the couples in this study have chosen a model in which both parents want the same parental rights and responsibilities. See Melanie Jacobs, *Why Just Two: Disaggregating Parental Rights & Responsibilities to Recognize Multiple Parents* \_\_ J. L. & Fam. Stud. \_\_ (2007); Laura Kessler, *Community Parenting*, 24 Wash. U. J. L. & Pol. 47 (2007).

172. Perlesz et al., *Family in Transition: Parents, children and grandparents in lesbian families give meaning to doing family*, 28 J. of Fam. Ther. 175, 177 (2006).

173. *Finstuen*, *supra*.

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174. *Cote-Whitacre v. Dept. of Public Health*, 844 N.E.2d 623 (Mass. 2006).

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175. <http://www.nytimes.com/2007/02/22/us/22rhode.html>.

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larly, Vermont has decided to study whether civil unions in Vermont should be changed to marriages, thus eliminating a separate legal category for same-sex families.<sup>176</sup>

Second, in the interim, the need for second-parent adoption should be eliminated. The use of second-parent adoption emerged from the creative use of step-parent adoption. However, the use of second-parent adoption has created an unwanted legacy of unequal parenting within some same-sex families. States developed step-parent adoption to support the positive policy goal of providing children with two parents. While second-parent adoption does the same, in adoption and artificial insemination cases, however, the analogy ends there. Step-parent adoption is based on the theory that another person lays greater claim to the child than the step-parent. Through consent or waiver and the desire of the step-parent's partner, a step-parent may legally 'replace' another parent who consents to terminate his or her parental rights or has waived them or had them terminated through judicial action while the step-parent's partner maintains his or her parental rights. On the other hand, same-sex couples start on equal footing as they plan to bring children into their family. The non-biological parent or the parent who does not adopt is not replacing another parent who had greater legal claim. One's biological or first adopter status should not serve as a legal basis in which to give one partner greater protections or power than the other, even temporarily.

Legislatures should allow for couples who have planned a child together, worked together to bring a child into the world, and intend to parent the child together to apply for a parentage declaration.<sup>177</sup> This would require no judicial intervention, but rather the application would be completed by both parents establishing their intentions to parent the child prior to the birth of the child. In assisted reproduction cases, the application could occur at the time the couple selects a donor and just prior to the medically procedural attempts at conception. Most importantly, no adoption would be required; once parental responsibility is established, upon the birth of the child, the non-biological parent's status is presumed.<sup>178</sup>

Such an option should be available to same-sex couples who currently cannot or simply do not wish to have state recognition of their relationship,<sup>179</sup> but do wish to protect the parent-child relationships that they are creating using assisted reproduction. A procedure in which both parents-to-be are legally recognized prior to the birth of the child protects the state, the child and the parents. As noted from the cases discussed earlier, future parents can find themselves vulnerable in two ways as they wait for the impending birth of their child without the legal status of parenthood. First, the biologically connected parent may end the relationship prior to the birth and exclude the other parent from having a relationship with the child.<sup>180</sup> Second, the non-biologically

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176. John Curran, *Vermont Calmly Puts Marriage on the Table*, San Francisco Chronicle, Jan. 14, 2008, available at <http://www.sfgate.com/cgi-bin/article.cgi?f=/c/a/2008/01/14/MN40UENJO.DTL&feed=rss.gay>.

177. Under the 2002 version of the Uniform Parentage Act §201(b)(6) a father-child relationship is presumed when a man has consented to the use of assisted reproduction and a child is born, regardless of the marital status of the parents under § 202.

178. This goal could also be achieved by having legislatures adopt a gender neutral version of § 201(b)(6) of the Uniform Parentage Acts or have courts interpret it in a gender neutral fashion regardless of marital status. As previously noted, this was done in custody cases in California and New Jersey to ensure that a child has two parents, but not necessarily one mother and one father.

179. It is important to recognize that the use of marriage is largely an institution utilized by those in the upper class. Therefore, state recognized relationships creating parental rights can serve as only one among many options for creating parental rights at the time of family formation. Blaine Harden, *Numbers Drop for the Married with Children; Choice of Educated, Affluent A 3*, Mar 4, 2007 available at <http://pqasb.pqarchiver.com/washingtonpost/access/>.

180. As discussed earlier, virtually no equitable remedies would be available to the same-sex partner of a biologically connected parent who has planned for, participated in, and intended to parent a child yet to be born if the latter decides to end the relationship and bar his or her partner from establishing a relationship with the child. The key equitable remedy has been that of a psychological parent, which in part, requires that the non-biological parent has established a parent-like relationship with the child. On the other hand, if a heterosexual unmarried mother decides to end her relationship with her partner, even if the child was created through arti-

connected parent may end the relationship prior to the birth of the child and refuse to support such child, leaving the biological parent in a financially vulnerable state. In some cases, the now single mother has had to rely on state support. The state has a long-standing interest, both financially and socially, in having each child raised and supported by the two people who caused that child to be created. By allowing for a simple application at the planning stage, couples can be counseled so that both parties clearly understand the lifetime obligations they are about to undertake regardless of whether their relationship endures.<sup>181</sup>

Second-parent adoption can be eliminated in adoption cases by permitting same-sex couples to jointly adopt. If a state wishes to bar unmarried couples from adopting children, then it must allow same-sex couples to marry. While a state may be able to rationally articulate, with the support of scientific research, that a child may fair better if it is born into a married household, it cannot rationally articulate why same-sex couples who are bringing children into their family should not marry, particularly with the support of scientific research. Furthermore, creating a policy that prevents unmarried couples from adopting severely limits a state's policy on having children adopted. Married couples with children represented only 21.6% of the population in 2006, representing a continuing decline in the last three decades.<sup>182</sup>

In the case of international adoptions where other countries continue to bar same-sex couples from jointly adopting, each state could use an adoption presumption. As the state engages in its pre-adoption procedures for the one parent, it should allow for those same procedures to apply to the other parent. Once a state has acknowledged that one of the partners is fit to adopt, the other parent should likewise be acknowledged. Furthermore, an order should be created that states that at the time an international adoption has been formalized abroad, a presumption exists that the adoption is simultaneously valid for the partner who remained stateside.

Third, legislatures and courts should expand existing frameworks of parenthood as well as create new ones. Current models rely on the notion of biological connection or adoption, marital presumption, and most recently, equitable notions of intentionality and de facto or psychological parenthood. Yet, these concepts don't protect both parents equally from the time the child is born. Moreover, these approaches are not consistently available or are completely unavailable to same-sex families. By using the recommendations discussed above, the states can work to construct a new model of parentage that does not require judicial intervention.

Finally, attorneys currently assisting same-sex couples in family formation as they navigate the legal and social maze of establishing parenthood can take immediate action by considering the nature of how they currently counsel their clients. First, more family law attorneys should educate themselves about the current state of the law not only within the state they practice, but all states. This would serve two purposes: more attorneys would be available to assist these families, and more attorneys would provide better advice to these families.

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cial insemination, and the partner did not contribute genetic material, the partner would still be entitled to parental rights to the child. By not recognizing similarly situated homosexual partners, the law serves to undermine a family structure before it has even come to fruition.

181. The more difficult process is managing parenthood for families who choose conception outside of the traditional medical institutions that provide ART. In those cases, a judicial declaration may be needed. See *Jacob v. Shultz-Jacob*, 923 A.2d 473 (Pa. Super. Ct. 2007) (ruling that third party semen donor and lesbian non-biological mother could both have custodial and support obligations along with the lesbian partner biological mother); *A.A. v. B.B.*, 83 O.R. (3d) 561 (2007) (an Ontario, Canada court held that in a declaration of maternity for a lesbian couple's ongoing relationship, biological mother as well as her partner could be ruled as parents, as could the sperm donor who was actively involved in the child's life.)

182. [http://www.census.gov/Press-Release/www/releases/archives/american\\_community\\_survey\\_acs/010601.html](http://www.census.gov/Press-Release/www/releases/archives/american_community_survey_acs/010601.html).

As this research demonstrates, when highly educated and well-resourced same-sex families still are unclear about the status of their parenthood even after engaging the legal system, lawyers are doing a disservice to their clients. Family law attorneys should be working to ensure that both parents feel confident about their relationship with their children. Instead, the nature of the legal rhetoric used in second-parent adoptions (the clearest way in which both partners can establish parental rights) only serves to undermine the equality of each parent in his or her relationship to the child. By framing second-parent adoptions as a 'giving-up' of rights by the biological parent instead of a gaining of rights by the non-biological or non-first adopter in international adoptions, attorneys only reinforce the idea that one parent is legally and socially lesser than the other. When few lawyers understand the nature of the practice and have to strategize about which judges or courts in which to file these petitions, same-sex families receive the message that their family is legally and culturally deviant.

In the article, I have explored the current state of parentage options for same-sex couples, both legislatively and judicially, as well as how same-sex couples respond to or understand these options as they engage in family formation. The results of the research suggest that couples are not clear in their understanding of the rights they have established and this lack of confidence in these legal protections serves to undermine these families on both a macro and micro level.<sup>183</sup> Legislatures and courts have made significant strides in protecting the parent-child relationship in same-sex families after the parents have dissolved their relationship, but this comes at a colossal cost, both financially and emotionally to the unprotected parent and the child. States should work to create a solid foundation for same-sex families as they enter parenthood whereby both partners can feel confident in their legal and social status as mothers or fathers. It is good policy to protect the parent-child relationship in newly emerging families as well as in those that are no longer whole. In fact, a policy that recognizes and supports both parents in same-sex families may serve to reduce the number of children being raised in two single parent households, and thereby, eliminate the need for judicially created parental rights at the time the partner exists coupled. Our current mix of laws has created the imprisoned family, and in the process, has economically, socially, and emotionally undermined them. Using existing models as well as some of the recommendations discussed above, both the courts and the legislature can set these families free.

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183. It is important to note several limitations to this study. First, the sample comes from a singular geographical location that is not representative of most states, and in fact, not representative of this state. Therefore, other families may experience more severe stress as they engage in family formation in communities that are more hostile to same-sex couples. Second, the sample is quite small, and therefore not generalizable. Third, the sample includes only highly educated and highly privileged families who have the social capital to engage the legal system in a way that most other same-sex families do not. Again, this may mean that other same-sex families experience the effects of their legal ambiguity as parents more acutely than the families in this study. Further research should focus on families residing in areas that are more hostile to same-sex couples as well as focusing on same-sex couples who lack the resources to engage the legal system to create parental rights where they don't ordinarily exist. Regardless, this study offers a crucial look at how the current state of the law impacts intact couples as they engage in family formation.