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I. Introduction

The United States is engaged in a national debate over same-sex marriage. While there are undeniably numerous privileges and benefits that marriage bestows—a central argument in the fight for marriage equality—there are certain protections for families that rest outside of legal marriage. Same-sex couples that choose not to marry should be entitled to the same protections for their families as the families of heterosexual couples who choose not to marry. As LGBT activists often clarify, the fight for marriage equality is the fight to secure the same state sanctioned opportunities as heterosexual couples—the right to *choose* whether to marry or not. Those same-sex couples that choose not to marry should be treated the same as heterosexual couples who choose not to marry.

In *Levy v. Louisiana*,[1] a principal example of family protections unrelated to marriage can be seen in the legal treatment of children born to non-married couples.[2] It has long been established that children should not be treated differently based on the legal status of their parents' relationship.[3] However, there are substantial differences between same-sex families[4] and heterosexual families that make it a very real possibility that courts will read more into the decision of same-sex couples not to marry

1. *See* Levy v. Louisiana, 391 U.S. 68, 72 (1968) (finding that denying dependent, illegitimate children their benefits following the wrongful death of their mother constitutes discrimination against them). In *Levy*, the Court considered whether Louisiana could statutorily preclude illegitimate children from recovering under its wrongful death statute. *Id*. at 69–70. Applying the rational basis test, the Court held that the Louisiana court's construction of the wrongful death statute as denying recovery to illegitimate children invidiously discriminated against these children for no rational reason. *Id*. at 72; *see also The Supreme Court, 1975 Term—Discrimination Against Illegitimate Children*, 90 HARV. L. REV. 123 (1976) [hereinafter "The 1975 Term"] (discussing, in general terms, the *Levy* case and others in this line of jurisprudence).

2. *See Levy*, 391 U.S. at 72.

3. *See* The 1975 Term*, supra* note 1 (discussing the outcome of the *Levy* case).

4. For the purposes of this article I will use the phrase "same-sex families" to refer to families headed by same-sex couples.

than they would for heterosexual couples making the same decision. The potential differential treatment between children of an unmarried same-sex couple and children of an unmarried heterosexual couple is most evident in establishing legal parentage. For heterosexual couples, the parent-child relationship can be easily assessed at any time by a simple DNA test, while for obvious reasons the same is not true for same-sex couples. In the same-sex family context, the parent-child relationship for at least one of the partners will never be automatic or easily and objectively ascertainable. Thus, there is a strong desire for courts to find an easily determinable, bright line proxy for biology. Enter same-sex marriage and presuming (or more importantly *not* presuming) legal parenthood for children in same-sex families based on marital status. In what can only be explained as unfortunate irony, the fight to increase the legal shield for same-sex families by securing the rights and benefits of legal marriage may instead sharpen the legal sword against these families if they choose not to marry.

New York, the most recent state to legalize same-sex marriage, provides the perfect case study.[5] The current jurisprudence of assessing legal parentage for same-sex families in New York is quite complex. Therefore, it is easy to appreciate the attractiveness of a clear standard such as deriving legal parent-child status directly from the same-sex couple's marital status. While only time will tell if New York courts give into this imprudent temptation, there is a suggestion from recent cases that they will. I argue against this impulse and provide a discussion of preferable, alternative proxies for biology that focus not on marital status, but rather on the more appropriate best interests of the child.

This article focuses principally on the current status of New York law regarding parentage determination for the purposes of child custody/visitation as well as child support in the context of a lesbian relationship. Part I of this paper provides a very brief general discussion of legal parentage in the context of same-sex families and then focuses on child support assessment for a non-biological, non-adoptive parent. Part II outlines the role marriage rights play in determining parentage for the purposes of securing child support. Part III discusses the intersection of child custody/visitation jurisprudence and child support jurisprudence in New York, and utilizes a critique of New York Court of Appeals "companion"[6] cases, *Debra H. v. Janice R.*[7] and *H.M. v. E.T.*,[8] to highlight

5. H.R. A08354, 2011 Gen. Assemb., Reg. Sess. (N.Y. 2011).

6. The word companion is placed in quotes to signal that even though the New York Court of Appeals handed down the cases together, the legal theories underlying them are quite different. This is further developed in Part III.

the importance of relying on the *same* parentage standard *both* in adjudication of parental rights (child custody/visitation) and parental obligations (child support). Part IV proposes and evaluates possible parentage standards that could be applied in both child custody/visitation adjudication as well as child support adjudication that do not focus on marital status. Finally, Part V briefly concludes.

II. Determining Legal Parentage for Non-Biological Lesbian Mothers For Child Custody/Visitation and Child Support

The 2000 Census reported that 34.3% of lesbian couples were raising children.[9] New technologies have gradually increased the opportunity for

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7. *See* Debra H. v. Janice R., 930 N.E.2d 184, 194 (N.Y. 2010) (ruling that the decision of whether to expand the category of persons who have standing to seek child custody is a subject to be decided by the legislature). In *Debra H.*, the court considered whether to expand the category of persons who have standing to seek both child custody and visitation beyond those persons presently permitted by the Domestic Relations Law. *Id*. at 596. The former same-sex domestic partner of child's biological mother brought the claim before the court seeking legal and physical custody of a child. *Id*. at 586. The child was born during the parties' valid Vermont civil union but conceived through artificial insemination prior to the parties' union. *Id*. The court let the legislature decide how to expand the category of persons who have standing to seek child custody. *Id*. at 597.

8. *See* H.M. v. E.T., 930 N.E.2d 206, 210 (N.Y. 2010) (determining that family court does have subject matter jurisdiction to adjudicate a biological mother's petition for child support). In *H.M.*, the court considered a birth mother's petition to have her former same-sex partner adjudicated as a parent of a child conceived by artificial insemination, in an attempt to seek retroactive child support. *Id*. at 207. The court began by determining that the Family Court unquestionably has the subject matter jurisdiction to ascertain the support obligations of a female parent. *Id*. at 288. From this determination the court found that the Family Court has the inherent authority to ascertain, in certain cases, whether the female respondent is a child's parent. *Id*. This finding allowed the court to rule that the Family Court had subject matter jurisdiction to adjudicate biological mother's petition for child support. *Id*. at 209.

9. *See* Jason N.W. Plowman, *When Second-Parent Adoption is the Second-Best Option: The Case for Legislative Reform as the Next Best Option for Same-Sex Couples in the Face of Continued Marriage Inequality*, 11 SCHOLAR 57, 58 (2008) (arguing that the best way to secure protection for same-sex parenting situations is to take legislative action because such legislation results in a more predictable and enduring framework for providing children the legal protection of both parents); *see also* Ellen C. Perrin, *Technical Report: Co-parent or Second Parent Adoption by Same-Sex Parents*, 109 AM. ACAD. PEDIATRICS 341, 341 (Feb. 2002), *available at* http://aappolicy.aappublications.org/cgi/reprint /pediatrics;109/2/341.pdf (last visited April 08, 2012) (arguing that no data suggests any risk associated with growing up in a same-sex family and that parent's sexual orientation does not factor into the parent's ability to provide a supportive home environment) (on file with the Washington and Lee Journal of Civil Rights and Social Justice).

lesbian couples to raise biologically related children in addition to adoption. Among lesbian couples, a majority utilizes some method of artificial insemination,[10] one of the oldest and most common forms of assisted-reproduction technology.[11] In terms of determining parentage in these family compositions, as a consequence of artificial insemination, the biological mother automatically gains parental status, while the non-biological parent must seek out legal parentage.[12] Some states have artificial insemination statutes that bestow automatic parentage on the spouse who consented to the artificial insemination, but these hetero-normative statutes are limited to a husband who consents to his wife's in-vitro fertilization and do not provide automatic parentage for lesbian parents in the identical position.[13] Only the District of Columbia and New Mexico have explicitly extended these laws to lesbian couples.[14] The only other way to receive automatic parentage rights is by way of the marriage presumption—the presumption that both individuals in a married relationship are legal parents of any children born during the marriage. This is, however, limited to couples living in states that recognize same-sex marriage, or provide a marriage-like status.[15]

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10. *See* Emily Doskow, *The Second Parent Trap: Parenting for Same-Sex Couples in a Brave New World*, 20 J. JUV. L. 1, 2 (1999) (discussing the current parenting issues facing the many same-sex couples, focusing on the status of the same-sex partners of biological or legal parents).

11. *See* ROBERT BLANK & JANNA C. MERRICK, HUMAN REPRODUCTION, EMERGING TECHNOLOGIES, AND CONFLICTING RIGHTS 84–108 (1995) (examining the controversial and complex policy issues surrounding current reproductive technology and how medical advances are challenging traditional ideas of reproductive rights); *see also* Karin Mika & Bonnie Hurst, *One Way to Be Born? Legislative Inaction and the Posthumous Child*, 79 MARQ. L. REV. 993, 994 (1996) (arguing that the rights and responsibilities related to posthumous children are related to procreation and that legislation must resolve the issues related to posthumous children); *see generally* Charles P. Kindregan, Jr., *Thinking About the Law of Assisted Reproductive Technology*, 27 WIS. J. FAM. L. 123, 123–29 (2007) *available at* http://www.wisbar.org/AM/TemplateRedirect.cfm?template=/CM/ContentDisplay.cfm &Section=family_law_section&ContentID=75102 (discussing the new uses of assisted reproductive technology and the lack of legislature's actions in resolving disputes involving these relatively-new technologies).

12. *See* Doskow, *supra* note 10, at 2 (arguing that the birth of a child only creates a legal relation to the biological mother, while the same-sex partner of the mother can become a legal parent through either second-parent adoption or a Uniform Parentage Act petition).

13. *See* sources and discussion *infra* Part IV.A.

14. *See* sources and discussion *infra* notes 122–23.

15. *See* sources and discussion *infra* Part III.

Adoption is another common method used by lesbians.[16] It is important to differentiate between joint adoption, in which both individuals establish legal adoptive parenthood over a child, and second-parent adoption, in which one parent is already the legal, biological parent—either through surrogacy, artificial insemination, or from a previous relationship—and the biological parent's partner must actively seek to establish a legal relationship with the child.[17] Although there is a way for non-biological same-sex parents to clearly establish legal parenthood (through adoption, or through same-sex marriage if the state allows), there are many lesbian non-biological parents who, for a variety of reasons, do not legally establish adoptive parenthood and are not in a state that recognizes same-sex marriage. Thus, there are many possible scenarios in which at the dissolution of a lesbian relationship one partner can find herself without any legal tie to the child they called their own. This complicates both the rights of this partner to custody/visitation as well as this partner's obligations to provide child support.

As a quick aside, it is important to quickly acknowledge how ensuring financial support of children is a high priority in our country's social policy.[18] Insufficient child support is a leading cause of child poverty.[19] Furthermore, children who receive child support perform better academically, and are more likely to finish school and attend college.[20] Although child support laws are left to the states, the federal government has stepped in and required states to implement stronger child support enforcement measures.[21] In 1996, Congress mandated that states enact the

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16. *See* Doskow, *supra* note 10, at 3–4 (discussing how the same-sex partner of a biological parent can become a legal parent of the child through an independent adoption process).

17. *See id*. (distinguishing between domestic agency adoption (i.e. joint adoption) and second-parent adoption).

18. *See* Drew A. Swank, *The National Child Non-Support Epidemic*, 2003 MICH. ST. DCL L. REV. 357, 363–65 (2003) (discussing a brief history of child support enforcement).

19. *See id.* at 361 ("The possibility of a child escaping poverty often depends on whether or not the owed child support is being paid.").

20. *See* Michael L. Hopkins, *"What is Sauce for the Gander is Sauce for the Goose:" Enforcing Child Support on Former Same-Sex Partners Who Create a Child Through Artificial Insemination*, 25 ST. LOUIS U. PUB. L. REV. 219, 222 (2006) (discussing how non-payment of child support is the nation's greatest source of financial insecurity because children who do not receive child support are less likely to finish high school or attend college).

21. *See* Swank, *supra* note 19, at 365 (explaining how the Personal Responsibility and Work Opportunity Reconciliation Act of 1996 dramatically changed the nation's child support system by requiring employers to report new hires in an effort to track delinquent

Uniform Interstate Family Support Act in order to receive federal funds in an attempt to make child support awards more uniform and to increase levels and efficiency in proceedings.[22]

Child support can be sought either in an action by the partner with custody of the child following the partnership's dissolution, or in an action by a governmental body attempting to recoup prior or prevent future child support payments, where the child or the custodial parent is receiving public support.[23] Courts are charged with the responsibility of interpreting and applying state family law statutes, and because most are drafted as general guidelines, the role of the court is substantial in determining parentage and the rights and obligations attendant to that status.[24]

III. Impact of Legal Recognition of Same-Sex Relationships

As briefly discussed in the preceding section, the legal nature of the lesbian partnership directly impacts parental determination, which in turn impacts child custody/visitation and support. In addition, the nature of state recognition is far more complex, however, than states recognizing same-sex marriage versus states that do not. Therefore, the possible scenarios for non-biological parents seeking legal parentage are numerous and complex. For clarity and ease of argument I divide this section into the following categories: Looking first at the legal recognition of the relationship factor, I separate my discussion into (a) same-sex marriage states; (b) civil unions/domestic partnerships states; and (c) no recognized legal status states. Second, looking at methods used to formally create legal parentage, I separate my discussion into (a) establishing parentage through second-parent adoption; and (b) establishing parentage through adoption. Finally, I discuss the scenario of no legal relationship between the couple and no legal adoptive relationship between the non-biological partner and child.

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parents).

22. *See* Uniform Interstate Family Support Act, 42 U.S.C. § 666(f) (2011) (requiring certain statutorily prescribed procedures to improve effectiveness in child support enforcement).

23. *See* Hopkins, *supra* note 20, at 222–23 (explaining traditional child support obligations and laws).

24. *See id.* (explaining the broad discretion granted to state court judges to resolve child support cases, which allows the judge to provide for a child of same-sex partners because the child's situation is not covered by state statute).

A. Marriage [25]

Marriage-like recognition of same-sex relationships theoretically provides automatic legal parentage by way of the legal connection between the parents. For example, a legally married lesbian couple:

> [One] engaging in reproduction through artificial insemination would not need to take any steps at all to protect the rights of the partner who did not carry the child, as the latter would be considered to be in the same position as the husband of a heterosexual woman who is inseminated with the semen of another man [whereby the law] . . . deems the husband the legal parent of [the] child born as a result of the insemination, despite the absence of genetic connection.[26]

Thus, extending this marital presumption to lesbian couples, a partner in a legal same-sex marriage is presumed to be the parent and would have standing to contest custody/visitation as well as be potentially liable for child support.

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25. *See* HUMAN RIGHTS CAMPAIGN, MARRIAGE EQUALITY & OTHER RELATIONSHIP RECOGNITION LAWS, http://www.hrc.org/files/assets/resources/Relationship_Recognition_Laws_Map(1).pdf (last visited April 8, 2012) [hereinafter MARRIAGE EQUALITY] (showing that same-sex couples can marry in Connecticut, Iowa, Massachusetts, New Hampshire, New York, Vermont, and the District of Columbia, while Maryland recognizes marriages between same-sex couples entered into in other jurisdictions) (on file with the Washington and Lee University Journal of Civil Rights and Social Justice); *see also* CAL. FAM. CODE § 308(b) (West 2011) (revealing that California recognized marriages between same-sex couples entered into prior to November 5, 2008, but same-sex marriages after that date are not accorded the designation of marriage, but are instead granted the state-conferred rights and responsibilities of marriage); *see also* Strauss v. Horton, 207 P.3d 48, 64 (Cal. 2009) (holding that marriages between same-sex couples entered into in California prior to November 5, 2008 are valid for all purposes); *see also* NAT'L CTR. FOR LESBIAN RIGHTS, SB 54, AND SAME-SEX COUPLES WHO MARRY OUTSIDE OF CALIFORNIA, www.nclrights.org/SB54FAQ (last visited April 8, 2012) (clarifying the rights of same-sex couples that marry outside the state of California) (on file with the Washington and Lee Journal of Civil Rights and Social Justice).

26. Doskow, *supra* note 10, at 4–5.

B. Civil Unions/Domestic Partnerships[27]

In most states that provide civil unions or domestic partnerships, the rights and responsibilities bestowed by that status are very similar to those of marriage, particularly with respect to parentage determination for children born during the relationship.[28] Thus, similar to same-sex marriage states, in most of these civil union/domestic partnership states, the non-biological partner is presumed to be a legal parent. For example, in *Baker v. State*, the Supreme Court of Vermont held that "the State is constitutionally required to extend to same-sex couples the common benefits and protections that flow from marriage under Vermont law."[29] Soon after, the Vermont legislature formally defined these protections by enacting the Civil Union Act, affording same-sex couples all the legal benefits of marriage without the specific status declaration.[30] One provision of the Civil Union Act specifically relates to parentage:

> 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.[31]

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27. *See* MARRIAGE EQUALITY, *supra* note 25 (comparing states that permit same-sex couples to receive all the benefits of marriage by entering into civil unions, such as California, Delaware, Hawaii, Illinois, Nevada, New Jersey, Rhode Island, Oregon, and Washington to states that only grant part of the same rights to same-sex couples, such as Colorado, Maine, and Wisconsin); *see, e.g.* CAL. FAM. CODE § 297.5(d) (West 2011) ("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."); *see, e.g.*, N.J. STAT. ANN. § 37:1-31(e) (West 2011) (discussing the rights and responsibilities of civil union couples). The statute states:

> The rights of civil union couples with respect to a child of whom either becomes the 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 or partner in a civil union couple becomes the parent during the marriage.
>
> *Id.*

28. *See* MARRIAGE EQUALITY, *supra* note 25 (explaining the similarities between rights bestowed at marriage and rights conferred upon those in a civil union or domestic partnership).

29. Baker v. State, 744 A.2d 864, 868 (Vt. 1999) (ruling that excluding same-sex couples from benefits commonly obtained through marriage violated the common benefit clause of the state constitution).

30. *See* VT. STAT. ANN. tit. 15, §§ 1201–07 (2002) (showing how the Vermont legislature's enactment of the Civil Union Act afforded same-sex couples the same benefits as those held by married couples).

31. *Id.* § 1204(f).

Therefore, a Vermont civil union provides a rebuttable marriage-like presumption that the non-biological, non-adoptive parent is a legal parent.[32]

C. No Legal Recognition of Same-Sex Relationships

Finally, the following thirty-two states provide no legal recognition for same-sex couples: Alaska, Alabama, Arizona, Arkansas, Florida, Georgia, Idaho, Indiana, Kansas, Kentucky, Louisiana, Michigan, Minnesota, Mississippi, Missouri, Montana, Nebraska, New Mexico, North Carolina, North Dakota, Oklahoma, Pennsylvania, South Carolina, South Dakota, Tennessee, Texas, Utah, Virginia, West Virginia, and Wyoming.[33] It is important to note that a separate issue apart from a state's own laws regarding same-sex marriage concerns recognition of other states' same-sex marriage laws. Currently, only Maryland fully acknowledges out-of-state same-sex marriages.[34]

In the absence of a legal parent-child relationship automatically formed via the legal relationship between the same-sex partnership, legal parental status can be sought through adoption. It is important to distinguish between joint and second-parent adoption. The term joint adoption generally refers to a couple together adopting a child who is not the biological or pre-existing adoptive child of either of them.

i. Joint Adoption

Formal adoption provides standing to contest child custody/visitation as well as provides a prima facie case of liability against a former same-sex partner to pay child support. However, not all states allow homosexuals to adopt. Until very recently Florida law expressly prohibited "homosexual" individuals from adopting.[35] Similarly, as of 2000, Mississippi law expressly prohibits "adoption by couples of the same gender."[36] Utah prohibits adoption "by a person who is cohabiting in a relationship that is

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32. *Id*.

33. *See* MARRIAGE EQUALITY, *supra* note 25 (providing a list of states that do not legally recognize same-sex couples at all).

34. *Id.*

35. *See* FLA. STAT. ANN. § 63.042(3) (West 2002) ("No person eligible to adopt under this statute may adopt if that person is a homosexual.").

36. MISS. CODE ANN. § 93-17-3(5) (West 2011) ("Adoption by couples of the same gender is prohibited.").

not a legally valid and binding marriage."[37] Utah defines cohabitation as "residing with another person and being involved in a sexual relationship with that person."[38] Even when available, joint-adoption is not ideal in the majority of lesbian families where one of the partners is already the biological parent because it requires severing the pre-existing relationship between the biological parent and child in order to allow both individuals to jointly adopt the child.[39]

ii. Second Parent Adoption

Some states explicitly permit legal adoption by a second parent in a same-sex relationship without terminating the legal status of the biological parent.[40] In these states, "the adoptive parent stands in parity with the

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37. UTAH CODE ANN. § 78B-6-117(3) (West 2011).

38. UTAH CODE ANN. § 78B-6-103(10) (West 2011).

39. *See In re* Estates of Donnelly, 502 P.2d 1163, 1166–67 (Wash. 1973) (stating that the purpose of these types of severing provisions is to give "the adopted child a 'fresh start' by treating him as the natural child of the adoptive parent, and severing all ties with the past"); *see also* NAT'L CONFERENCE OF COMM'RS ON UNI. STATE LAWS, UNIF. ADOPTION ACT (1994), http://www.law.upenn.edu/bll/archives/ulc/fnact99/1990s/uaa94.pdf (last visited April 8, 2012) (noting that the cut-off provision which terminates the biological parent's right can be avoided if the biological parent terminates his or her right to become a joint adoptive parent with the partner) (on file with the Washington and Lee Journal of Civil Rights and Social Justice); *see also* Jason C. Beekman, *Same-Sex Second-Parent Adoption and Intestacy Law: Applying the Sharon S. Model of "Simultaneous" Adoption to Parent-Child Provisions of the Uniform Probate Code*, 96 CORNELL L. REV. 139, 148–49 (2010) (discussing the complexity of severing ties with the biological parent to allow adoption from the same-sex partner).

40. *See* FAMILY EQUALITY COUNCIL, STATE-BY-STATE: SECOND PARENT ADOPTION LAWS (2012), http://www.familyequality.org/get_informed/equality_maps/second-parent_adoption_laws/ (last visited April 8, 2012) (stating that second-parent adoption is available by statute in California, Colorado, Connecticut, Delaware, District of Columbia, Hawaii, Illinois, Indiana, Iowa, Maine, Maryland, Massachusetts, Nevada, New Jersey, New York, Oregon, Pennsylvania, Rhode Island, Vermont, and Washington) (on file with the Washington and Lee Journal of Civil Rights and Social Justice); *see also* CAL. FAM. CODE § 9000(b) (West 2011) (allowing only registered domestic partners to adopt without terminating the legal status of the biological parent); *see also* CONN. GEN. STAT. § 45a-724(a)(3) (West 2011) (stating that a joint adoption is allowable without requiring a severance of the existing legal relationship); *see also* VT. STAT. ANN. tit. 15A, § 1-102(b) (2002) (allowing joint adoption without severing any existing legal relationships); *see also* Sharon S. v. Super. Ct., 73 P.3d 554, 562–63 (Cal. 2003) (ruling that adoption does not always require termination of the birth parent's rights and that the independent adoption laws make second-parent adoptions valid); *see also In re* M.M.D., 662 A.2d 837, 862 (D.C. 1995) (holding that a member of a same-sex couple is allowed to adopt his or her partner's child without termination of parental rights); *see also In re* K.M., 653 N.E.2d 888, 898 (Ill.

biological parent and has all the rights and responsibilities that flow from legal parenthood."[41] Second-parent adoption is modeled on stepparent adoption, a statutory scheme that allows a biological (or adoptive) parent's spouse to adopt a child without terminating the biological parent's legal rights.[42] Although most states are not explicit in terms of whether second-parent adoption is available for same-sex families, some states do explicitly provide for same-sex second-parent adoption by statute, while others provide for same-sex second-parent adoption through appellate court decisions.[43] Vermont is a unique example because it provides protection for same-sex families through a family law code that is gender neutral rather than specifically applying only to homosexual couples.[44] The law states that "[i]f a family unit consists of a parent and the parent's partner, and adoption is in the best interest of the child, the partner of a parent may adopt a child of the parent. Termination of the parent's parental rights is unnecessary in an adoption under this subsection."[45]

App. Ct. 1995) (summarizing a Vermont law that allows unmarried persons to adopt if the adoption is in the best of the interest of the child because the adoption had not been prohibited); *see also In re* Infant K.S.P., 804 N.E.2d 1253, 1260 (Ind. Ct. App. 2004) (finding that public policy can be violated when the denying legal protections to a relationship with a child is inconsistent with the child's best interest); *see also In re* M.M.G.C., 785 N.E.2d 267, 270–71 (Ind. Ct. App. 2003) (holding that Indiana law does not require that a petitioning adoptive parent be a legal relative of the adoptive parent of the child); *see also In re* Tammy, 619 N.E.2d 315, 319 (Mass. 1993) (stating that Massachusetts law does not preclude same-sex couples from jointly adopting child); *see also In re* H.N.R., 666 A.2d 535, 540–41 (N.J. Super. Ct. App. Div. 1995) (ruling that children can be adopted by a mother's same-sex partner without terminating the mother's paternal rights); *see also In re* Jacob, 660 N.E.2d 397, 405–06 (N.Y. 1995) (stating that same-sex couples have standing to become adoptive parents without terminating the biological mother's parental rights); *see also In re* R.B.F., 803 A.2d 1195, 1202 (Pa. 2002) (determining that same-sex partners were entitled an opportunity to demonstrate cause as to whether the purpose of relinquishment of the parental rights requirement would be otherwise fulfilled or was unnecessary); *see also In re* B.L.V.B., 628 A.2d 1271, 1275 (Vt. 1993) (stating that denying same-sex partners, as a class, the security of a legally recognized relationship with their second parent serves no legitimate state interest).

41. Margaret S. Osborne, *Legalizing Families: Solutions to Adjudicate Parentage for Lesbian Co-Parents*, 49 VILL. L. REV. 363, 369 (2004).

42. *See* Nancy D. Polikoff, *A Mother Should Not Have to Adopt Her Own Child: Parentage Laws for Children of Lesbian Couples in the Twenty-First Century,* 5 STAN. J. C.R. & C.L. 201, 205 (2009) [hereinafter *Parentage Laws*] (arguing that existing adoption statutes should be interpreted to permit adoption by a mother's same-sex partner).

43. *See* sources cited *supra* note 43 (listing cases that held adoption was possible without severing pre-existing legal relationships).

44. VT. STAT. ANN. tit. 15A, § 1-102(b) (2011).

45. *Id.*

In a family structure in which only one parent is the biological parent, second-parent adoption is often thought of as the best solution to legalize the relationship between the non-biological parent and the child.[46] However, second-parent adoptions are far from a panacea; second-parent adoptions are far more burdensome than courts and commentators acknowledge.[47] Part IV below further discusses some of the problems in placing too much of an emphasis on second-parent adoption as the New York Court of Appeals did in *Debra H.*

IV. The Wrong Parental Standard: Requiring Second-Parent Adoption or Marriage to Gain Legal Parentage

The New York Court of Appeals handed down *Debra H.* and *H.M.* the same day—May 4, 2010. Both involved lesbian families.[48] Both were child-related cases; *Debra H.* addressed a petitioner seeking visitation, and *H.M.* addressed a petitioner seeking child support.[49] Both were to be treated under a similar "best interest of the child" standard.[50] Yet, these

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46. *See* Osborne, *supra* note 41, at 367–68 (describing other non-litigious options for co-parents, including co-parenting agreements, pre-birth decrees, and visitation agreements subsequent to the dissolution of the relationship). In her article, Osborne discusses cases in which courts found co-parenting agreements to be simple, contract-like legal documents outlining the particular rights and responsibilities of each parent. *Id.* at 370–71. Yet, courts often refuse to enforce co-parenting agreements on the grounds that biological parents cannot contract away any portion of their constitutional right to guide the upbringing of their children. *Id.* Pre-birth decrees attempt to adjudicate parenthood from conception (be it by in vitro sperm donation, surrogacy, or other method). *Id.* at 371–72. This option is only available to those parents seeking to legally solidify their relationship with an as yet unborn child. *Id.* Visitation agreements, even if prepared preemptively before the dissolution of a relationship, are often unenforceable because courts are reluctant to allow parties to independently contract for child custody without a court applying a best interest of the child standard. *Id.* at 372–74. Despite these other attempts to avoid a post-dissolution adversarial court determination of parental rights, second-parent adoption is the most robust non-litigious option to formally establish a legal parent–child relationship. *Id.* at 367–68.

47. *See* sources and discussion *infra* notes 80–84 (discussing second-parent adoptions).

48. *See* Debra H. v. Janice R., 930 N.E.2d 184, 186 (2010) (stating that the biological mother, Janice R., entered into a civil union with Debra H.); *see also* H.M. v. E.T., 930 N.E.2d 206, 207 (2010) (stating that the case involved "a biological parent seeking child support from her former same-sex partner").

49. *See Debra H.*, 930 N.E.2d at 186 ("She sought joint legal and physical custody of M.R., restoration of access and decision making authority with respect to his upbringing, and appointment of an attorney for the child."); *see also H.M.*, 930 N.E.2d at 207 (stating that the petitioner sought child support).

50. *See Debra H.*, 930 N.E.2d at 194 (citing N.Y. DOM. REL. LAW § 70(a) (MCKINNEY

cases are anything but "companion" cases. Taken together, these cases establish a legal regime for lesbian partners where, for the purposes of contesting child custody, the court takes a narrow view of legal parenthood and requires that the non-biological partner formally adopt the child through second-parent adoption. Nevertheless, for securing child support against a non-biological parent, the court takes a much more expansive view of legal parenthood.

Debra H. held that absent a second-parent adoption, or valid same-sex marriage, a non-biological parent does not have standing to seek custody or visitation with the child she helped raise.[51] The compelling facts of *Debra H.* are common to these types of cases. Respondent Janice R. conceived through artificial insemination and gave birth to M.R. after Janice R. and Debra H. entered into a civil union in the state of Vermont.[52] While Debra H. did not take the step of formally adopting M.R. as a second parent, for much of his life, Janice R. held Debra H. out—both to the world and to M.R.—as M.R.'s mother, and the two women raised M.R. together until they separated in 2006.[53] Indeed, even after they separated, Debra H. continued to act as M.R.'s parent.[54] It was not until May 2008, when M.R. was almost five years old, that Janice R. abruptly and unilaterally sought to sever all forms of contact between Debra H. and M.R.[55]

The New York Court of Appeals was quite divided in its analysis in *Debra H.*, evidenced by four separate opinions. However, the majority clearly expressed the court's reaffirmation of the court's precedent established in *Alison D. v. Virginia M.*[56] nearly twenty-years prior. In *Alison D.*, the Court of Appeals of New York addressed whether a non-biological, non-adoptive "stranger" had standing to seek visitation under applicable New York domestic relations law.[57] The facts of *Alison D.*,

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2012)); H.M. v. E.T., 906 N.Y.S.2d 85, 87 (N.Y. App. Div. 2010) (evaluating the best interest of the child).

51. *See Debra H.*, 930 N.E.2d at 196–97 (upholding the parental rights of the non-biological mother based on the fact that the couple entered into a Vermont civil union, and comity principles required that the court follow Vermont law). Therefore, based on marital status, the New York Court of Appeals ultimately held that Debra H. was the legal parent of M.R. and thus entitled to seek custody and visitation with her son. *Id.*

52. *Id.* at 186.

53. *Id.*

54. *Id.*

55. *Id*.

56. *See* Alison D. v. Virginia M., 572 N.E.2d 27, 29–30 (N.Y. 1991) (holding that a woman who had a live-in relationship with the child's mother was not a legal "parent").

57. *Id*. at 28.

similar to the facts of *Debra H.*, are quite compelling. Together Alison D. and respondent Virginia M. planned for the conception and birth of the child and agreed to share jointly in all the privileges and obligations of parenthood.[58] The child was given Alison's last name as his middle name and Alison shared in both pre-birth and post-birth expenses.[59] In fact, until the child was two years and four months old, both individuals jointly cared for and made decisions regarding the child.[60] Yet, the court followed a bright–line rule, holding that without a formal second-parent adoption, "although [Alison] apparently nurtured a close and loving relationship with the child, she is not a parent."[61]

Lower New York courts have long criticized *Alison D.*[62] In 2008, a New York trial court stated: "In the seventeen years since *Alison D.*, under constraint of that decision, courts have continued to deny the proactive efforts of a non-biological, non-adoptive domestic partner or spouse to obtain custodial rights, notwithstanding the ties that may have developed between that person and the child."[63] The court argued, "[I]f the concern of both the legislature and the Court of Appeals is what is in the child's best interest, a formulaic approach to finding that a 'parent' can only mean a biologic or adoptive parent may not always be appropriate."[64]

Despite *Debra H.* presenting the perfect opportunity for the Court of Appeals to revise its ruling in *Alison D.*, the court instead authoritatively rejected arguments that *Alison D.* should be overruled because it is outmoded, unworkable, and does not take into account the best interests of the child.[65] The court remained stubbornly steadfast, holding that "*Alison D.*, in conjunction with second-parent adoption, creates a bright line rule that promotes certainty in the wake of domestic breakups."[66] Preferring an arguably naive sense of certainty and predictability over the child's best interest in maintaining a meaningful relationship, the court refused to utilize

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58. *Id*.

59. *Id*.

60. *Id*.

61. *Id.*

62. *See, e.g.*, Beth R. v. Donna M., 853 N.Y.S.2d 501, 507 (N.Y. Sup. Ct. 2008) (citing several cases which criticized *Alison D.* as well as several cases that followed a theory of equitable estoppel to avoid the harsh results of *Alison D.*'s bright-line rule).

63. *Id*.

64. *Id.* at 508.

65. *See* Debra H. v. Janice R., 930 N.E.2d 184, 201 (N.Y. 2010) (Ciparick, J., concurring) (noting that *Alison D.* should be "overruled as outmoded and unworkable").

66. *Id.* at 191.

its common law and equitable powers to expand its definition of a parent to include "de facto" parentage or parenthood "by estoppel."[67] Granted, an equitable or functional analysis is more subjective than biology; however, as Judge Smith, concurring in *Debra H* and *H.M.*, correctly understands, "[I]t is not possible for both members of a same-sex couple to become biological parents of the same child . . . . These differences seem . . . to warrant different treatment."[68] Different treatment does not mean worse treatment; requiring a lesbian couple to seek a formal second-parent adoption is much more of a burden than the burden on heterosexual couples to take a DNA test. Requiring marriage would likewise be problematic. Despite what the New York Court of Appeals believes, a bright-line rule finding legal parentage only by a second-parent adoption or legal marriage is inappropriate, unfair, and overly burdensome. There are better proxies for biology that the court failed to consider, which I fully address and evaluate in Part IV.

In the end, however, the court found Debra H. had standing to seek custody, recognizing her parenthood by way of the Vermont civil union she entered into with Janice R.[69] Based on the end result, it might appear as if this opinion expands the rights of gay parents. In reality, however, the case limited the rights of gay parents by finding that a child has no legal relationship with the non-biological parent unless the parents married each other (or entered into a civil union, domestic partnership, or other state recognized "marriage-like" status) or finalized a second-parent adoption. Relying on the status of the parents' relationship, the court found the civil union "as determinable as whether there had been a second-parent adoption," because "both civil union and adoption require the biological or adoptive parent's legal consent, as opposed to the indeterminate implied consent featured in the various [equitable] tests proposed to establish de facto or functional parentage."[70] However, does Janice R. holding Debra H.

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67. *Id.* at 192–93.

68. *Id*. at 205 (Smith, J., concurring).

69. *See id.* at 196–97 (deciding narrowly that the court would recognize a civil union for this specific purpose and not the issue of comity for Vermont law).

70. *Id.* Judge Graffeo made a similar argument in his concurrence. *See id*. at 197 (Graffeo, J., concurring). Graffeo noted:

> Rather than employing an 'equitable estoppel' or 'in loco parentis' basis for establishing parental status, Alison D. created a bright-line rule that made it possible for biological and adoptive parents to clearly understand in what circumstances a third party could obtain status as a parent and have standing to seek visitation or custody with a child.

Id.

out to the world as M.R.'s mother, and the two women together raising M.R. for over two years, not convey a determinable level of consent?[71] And, is the court so blinded by the desire to have a "bright line" rule that it completely ignores how far they stray from the "best interests of the child," the cornerstone standard of family law? In Part IV below, I further combat the court's assertion that it was forced to maintain the *Alison D*. parental requirements of biology or adoption for the proffered reasons of certainty and predictability.

While the court finds fault in other potential theories of parenthood, it does not adequately acknowledge the faults in requiring a second-parent adoption. Instead, the court merely pointed to its thought process behind opening the door for same-sex second-parent adoption in *In re Jacob*.[72] The court "stressed that permitting such second-parent adoptions 'allows . . . children to achieve a measure of permanency with both parent figures and avoids the sort of disruptive visitation battle [the court] faced in [*Alison D.*].'"[73] However, there is a difference between allowing second-parent adoption and *requiring* it. Heterosexual parents simply need to take a DNA test to be considered a parent with standing to contest custody/visitation. Yet, the court is comfortable requiring homosexual parents to go through a second-parent adoption, a process that is time-consuming, expensive, and intrusive.[74] The couple must hire a lawyer and participate in what will likely be a long, drawn-out process. Many families remain unfamiliar with these procedures, or even if familiar with them, are unable to amass the resources necessary to fully pursue them. It can also be emotionally taxing; until a judge signs the adoption decree, the non-biological mother and her child are legal strangers.[75]

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71. *See id*. at 186–88 (examining the answer to this question).

72. *Id.* at 190 ("In *Matter of Jacob* . . . we construed . . . New York's adoption statute, to permit 'the unmarried partner of a child's biological mother, *whether heterosexual or homosexual*, who is raising the child together with the biological parent [to] become the child's second parent by means of adoption.'") (citing *In re* Jacob*,* 660 N.E.2d 397 (N.Y. 1995)).

73. *Id.* at 190.

74. *See Parentage Laws*, *supra* note 42, at 267 ("Even where available, however, recognition of a child's family should not depend upon the family's access to court proceedings that require a lawyer and take two precious and limited commodities–time and money."); *see also In re* Kimberly Robinson, 890 A.2d 1036, 1038 n.3 (N.J. Super. Ct. Ch. Div. 2005) (noting that the couple decided not to seek a second-parent adoption because they did not want the child in legal limbo for the two years it would take to finalize the adoption).

75. *See Parentage Laws*, *supra* note 43, at 207.

Same-sex couples likely do not even consciously consider the importance of a second-parent adoption. Similar to many newlyweds who find it unnecessary to sign pre-nuptial agreements because they could never see the relationship dissolving, same-sex couples might not subject themselves to the expensive, drawn out process of second-parent adoption because they similarly are too blinded by love to ever consider the legal ramifications should the couple break up.[76] Thus, requiring a second-parent adoption closes the door to maintaining relationships with both parents in households headed by a same–sex couple for whom adoption may not be a practical option for any number of reasons. Looking toward marital status is no better a solution. While the court in *Debra H.* relied on an out-of-state same-sex marriage, now with the passage of same-sex marriage legislation in New York, it is clear that there is potential for New York courts to focus erroneously on marital status as the sought after "bright line" rule for ascertaining parentage for lesbian non-biological parents. While arguably less burdensome than requiring a second-parent adoption, neither rule is ideal.

Judge Kaye, dissenting in *Alison D.*, warned that the best interest of the child is ignored by requiring second-parent adoption because it "limit[s] [the child's] opportunity to maintain bonds that may be crucial to their development."[77] Thus, Judge Kaye would have remanded *Alison D.* for the lower court to assess Alison's parenthood based on a theory of *in loco parentis* to see if it was in the best interest of the child to allow visitation.[78] This is similar to what the Court of Appeals should have done in *Debra H.*; and, in fact, it is what the trial court did by applying principles of equity to find Debra H. a *de facto* parent.[79]

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76. *See* A.H. v. M.P., 857 N.E.2d 1061, 1066 n.6 (Mass. 2006) ("The plaintiff stated that she had no sense of urgency to formalize the relationship to the child because she never imagined a possible threat to her parental status . . . she viewed the adoption as a formality necessary only in the unlikely event of a 'worst case scenario.'").

77. Alison D. v. Virginia M., 77 N.Y.2d 651, 658 (N.Y. 1991) (Kaye, J., dissenting).

78. *Id*. at 654 (stating that gay couples are the "functional equivalent of biological parents").

79. *See* Debra H. v. Janice R., No. 106569/08, 2008 WL 7675822 (N.Y. Sup. Ct. Oct. 2, 2008) (holding that the equitable estoppel doctrine could be invoked to bar a child's biological mother from denying the partner's parental relationship). The court noted:

> The facts as alleged by petitioner, if found to be true, establish a prima facie basis for invoking the doctrine of equitable estoppel . . . . Of particular significance are her allegations that the parties moved in together and consulted an adoption attorney prior to M.R's birth, sent out birth announcements together, were both listed as M.R.'s parents on the child-naming certificate and on some of M.R.'s school and camp documents, and

Such an equity-based approach to parentage would parallel the Court of Appeals' approach to parentage determination in *H.M.*,[80] thereby properly placing parentage standards for child custody/visitation standing in parity with parentage for adjudicating child support.

The divergence between New York's parentage determination in lesbian family child custody/visitation and child support cases grew in *H.M.* where the court applied a similar equitable parentage determination as in *Shondel J.*[81] In *Shondel J.*,[82] the New York Court of Appeals held that despite a lack of genetic connection, the doctrine of equitable estoppel prohibited a man who had held himself out to be the father of a child from denying paternity for purposes of paying child support.[83] In *H.M.*, H.M. and her partner E.T. "planned to conceive and raise a child together, discussing, among other things, available methods of conception, child-rearing practices, and whether the child would be raised as a sibling of E.T.'s children from a prior relationship."[84] After several failed attempts, H.M. finally became pregnant by artificial insemination through a procedure E.T. performed and helped finance.[85] E.T. was present in the delivery room at birth, and participated in the child's care until the couple ended their relationship four months later.[86]

Following more of an *Alison D.*-type parentage determination, the New York Appellate Division denied jurisdiction to entertain H.M.'s petition for child support, highlighting the fact that "H.M. [was] never married to or in a civil union with E.T., [and yet] seeks to have E.T., a

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> that petitioner was present in the delivery room at M.R.'s birth and cut his umbilical cord, and that M.R. was given petitioner's last name as a middle name on his original birth certificate.

Id.

80. H.M. v. E.T., 930 N.E.2d 206, 208–09 (N.Y. 2010) (holding that Family Court had subject-matter jurisdiction to adjudicate biological mother's petition for child support).

81. *See id.* at 213 ("*Shondel J.* makes clear that the doctrine of equitable estoppel is applicable, in the child support context, only to preclude a party's reliance on genetic marker and DNA testing to prove or disprove *paternity* when such an approach is warranted to prevent disruption of an ongoing parent/child relationship").

82. Shondel J. v. Mark D., 853 N.E.2d 610, 611 (N.Y. 2006) (holding that equitable estoppel prohibited a man from denying paternity, even when DNA results indicated that he was not the child's biological father).

83. *See id*. ("[A] man who has mistakenly represented himself as a child's father may be estopped from denying paternity, and made to pay child support, when the child justifiably relied on the man's representation of paternity, to the child's detriment.").

84. *H.M.*, 930 N.E.2d at 207.

85. *Id*.

86. *Id*.

woman having no biological or legal connection to the subject child, adjudicated a parent of that child and required to pay child support."[87] The New York Court of Appeals reversed, holding that the lower family court could hear a claim from H.M. that E.T., the non-biological and non-adoptive partner, is liable for child support.[88] Far from the court's analysis in *Debra H.*, the Court of Appeals in *H.M.* focused heavily on equitable considerations.[89] The court did not even acknowledge that the defendant was not a "legal" parent under *Alison D*.[90] Although the court recognized it was not ruling on whether or not the non-biological parent was a "legal parent" and instead ruling on jurisdictional grounds that the Family Court should consider the matter, the court had a clear and easy opportunity to reinforce *Alison D.* as it did in *Debra H.*, yet in the child support context it failed to do so.

Judge Smith, concurring in both *Debra H.* and *H.M.*, acknowledged that "[both cases] present (though neither majority decision ultimately turns on) the question of whether a person other than a biological or adoptive mother or father may be a 'parent' under New York law."[91] Although agreeing with the ultimate outcome in both—recognizing Debra H.'s parental status under the law of Vermont and providing jurisdiction in family court to adjudicate child support—Judge Smith was rightfully concerned about the divergent nature of the underlying basis for adjudicating parentage in each. For that reason, Judge Smith advocated departing from *Alison D.*, *both* for visitation and child support.[92] Although acknowledging the need for predictability and certainty in cases of parental rights and obligations, Judge Smith felt that this should not overshadow the desire to act in the best interest of the child to maintain important child-parent relationships.[93] Judge Ciparick also expressed concern that "the

87. *See* H.M. v. E.T., 881 N.Y.S.2d 113, 116 (N.Y. App. Div. 2009).

88. *See* H.M. v. E.T., 930 N.E.2d 206, 209 (N.Y. 2010) ("In short, because H.M. asserts that E.T. is the child's parent, and is therefore chargeable with the child's support, this case is within the Family Court's article 4 jurisdiction.").

89. *Id*. at 209.

90. *Id*. (ruling majority that the New York Family Court does have jurisdiction to hear a child support action, even though the statutes refer to "parents" and under the precedent of *Alison D.* there was no parental relationship present).

91. Debra H. v. Janice R., 930 N.E.2d 184, 203 (N.Y. 2010) (Smith, J., concurring).

92. *See id*. at 204 ("I grant that there is much to be said for reaffirming *Alison D.*, but I conclude that there is even more to be said against it.").

93. *See id.* ("I have said that the interest in certainty is extremely strong in this area; but society's interest in assuring, to the extent possible, that each child begins life with two parents is not less so.").

[*Debra H.*] majority sees no 'inconsistency in applying equitable estoppel . . . for purposes of support, but not to create standing when visitation and child custody are sought . . . .'"[94] Judge Ciparick eloquently described how "the duty to support and the rights of parentage go hand in hand and it is nonsensical to treat the two things as severable."[95] Finally, Judge Jones, dissenting in *H.M.*, stated most authoritatively that "the position taken by the majority [in *H.M.*] is inconsistent with [the] Court's holding today in *Debra H.*"[96]

In their concurrences, Judge Smith and Judge Ciparick both propose alternative parentage standards, based more on the court's common law and equitable powers, to replace *Alison D.*, Both of these are further discussed in the possible solutions discussion of Part VI. Judge Smith proposed a version of a solution discussed in Part VI.A.i.: "where a child is conceived through [artificial insemination] by one member of a same-sex couple living together, with the knowledge and consent of the other, the child is as a matter of law—at least in the absence of extraordinary circumstances—the child of both."[97] Judge Ciparick proposed a version of a solution I discuss in Part VI.A.ii. In addition to biological and adopting parents, Judge Ciparick would also bestow parentage on an individual who can show that: (1) the biological or adoptive parent consented to and encouraged the formation of a parental relationship; and, (2) the petitioner intended to and actually did assume the typical obligations and roles associated with parenting the child.[98] Both of these, Judge Smith focusing more on consent to insemination, and Judge Ciparick focusing more on intent and *de facto*/functional parenthood, are viable options and preferable to *Alison D.* and to the potential desire, seen in *Debra H.*, to rely on marital status.

V. Discussion and Evaluation of Preferable Parentage Theories to Apply in Both Contexts

Below I briefly describe possible parentage theories that should be applied in the context of lesbian families to determine parentage *both* in

94. *Id.* at 201–02 (Ciparick, J., concurring).

95. *Id.* at 202.

96. H.M. v. E.T., 930 N.E.2d 206, 214 (N.Y. 2010) (Jones, J., dissenting).

97. *Id.* at 211.

98. Debra H. v. Janice R., 930 N.E.2d 184, 202–03 (N.Y. 2010) (Ciparick, J., concurring) (listing ways one could demonstrate parentage).

actions for child custody/visitation as well as actions for child-support. It is important to have one standard for both so as to ensure that there is not one definition of legal parenthood for the purposes of adjudicating child custody/visitation, and then a completely different standard when deciding child support. After a brief description, I evaluate each theory and stress the importance of focusing on the relationship between child and partner and less on the relationship between the partners.

A. Read Applicable Parentage Statutes in a Gender-Neutral Way

i. Assisted Reproduction Statutes

Many states have enacted laws, or developed doctrines through the court's common law and equitable powers, to grant automatic legal parentage to a woman's husband who consents to her artificial insemination.[99] Read in a gender-neutral way, these should apply to same-sex couples if they are in a legally recognized same-sex marriage or marriage-like arrangement.[100] Several state courts have gone a step further and formally and explicitly extended these statutes and doctrines to lesbian couples.[101] For example, the Vermont Supreme Court addressed the legal parentage of a child born through assisted reproduction to a same-sex couple in a civil union and held that both spouses were the legal parents of the resulting child.[102] The court stated that "[i]f Janet had been Lisa's husband, these factors would make Janet the parent of the child born from the artificial insemination" and because Vermont law requires "the equality

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99. *See* Hopkins, *supra* note 20, at 221–22 (discussing different state laws that automatically grant legal parentage to husbands who consent to artificial insemination).

100. *See* sources and discussion *supra* Part II.

101. *See, e.g.*, CAL. FAM. CODE § 297.5(d) (West 2011) ("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."); *see also* Elisa B. v. Superior Court, 117 P.3d 660, 666 (Cal. 2005) (noting in dicta that children born to registered domestic partners are considered the legal children of both partners); *see also* Shineovich v. Kemp, 214 P.3d 29, 40 (Or. Ct. App. 2009) (noting that "[t]here appears to be no reason for permitting heterosexual couples to bypass adoption proceedings by conceiving a child through mutually consensual artificial insemination, but not permitting same-sex couples to do the same").

102. *See* Miller-Jenkins v. Miller-Jenkins, 912 A.2d 951, 970 (Vt. 2006), *cert. denied*, 550 U.S. 918 (2007) (holding, in part, that a couple in a same-sex union were both parents because the child had been artificially inseminated within the biological mother with the expectation that both partners would parent the child, and both partners acted as parents to the child).

of treatment of partners in civil unions," the same result must be true as to a same-sex civil union spouse.[103]

However, there are still a majority of states that do not legally recognize same-sex relationships. Thus, the focus on the legal status of the same-sex couple makes the widespread implementation of this solution problematic. The reliance on marital status in this solution also makes it no better than that employed by the New York Court of Appeals. Courts should be looking more at the relationship between the child and purported parent and less at the relationship between the same-sex couple.[104] Marriage should never play an important role; courts certainly do not hesitate to enforce child support obligations on biological, but unwed parents of children "who are conceived by accident."[105] Thus, including marital status in a parentage doctrine or statute is arguably unconstitutional since it discriminates against children of non-married couples. Such discrimination against "illegitimate" children of non-married couples—the status of most children in same-sex families since the majority of states do not recognize same-sex relationships[106]—has long been ruled unconstitutional. A series of U.S. Supreme Court decisions between 1968 and 1983 and the enactment of the Uniform Parentage Act (UPA) eliminated legal discrimination based on the "legitimacy" of a child.[107] The

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103. *Id.* at 970.

104. *See, e.g.*, *In re* Robinson, 890 A.2d 1036 1041–42 (N.J. Super. Ct. Ch. Div. 2005) (noting the state's artificial insemination statute required marriage, and thus only extended the statute to the lesbian couple at hand because the child was born in the context of a same-sex Canadian marriage).

105. Hopkins, *supra* note 20, at 240.

106. *See* sources cited *supra* Part II (discussing instances in which courts have found such discrimination to be unconstitutional).

107. *See* Clark v. Jeter, 486 U.S. 456, 465 (1988) (striking down a six-year old Pennsylvania statute limiting the time to bring a support action for non-marital children, because the statute did not withstand the heightened scrutiny test under the Equal Protection Clause when compared to support rights of marital children); Gomez v. Perez, 409 U.S. 535, 539 (1973) (holding that there was a constitutional duty of both parents to support a non-marital child, once paternity had been proved); Weber v. Aetna Cas. & Sur. Co., 406 U.S. 164, 165 (1972) (holding that a non-marital child could also recover under state worker's compensation laws); Levy v. Louisiana 391 U.S. 68, 70–72 (1968) (holding that non-marital children were clearly persons within the meaning of the Equal Protection Clause of the United States Constitution, and it would be "invidious to discriminate against them"); *see also* UNIF. PARENTAGE ACT, § 202 (2002), 9B U.L.A. 309 (Supp. 2010) ("A child born to parents who are not married to each other has the same rights under the law as a child born to parents who are married to each other."); Annette Ruth Appell, *Uneasy Tensions Between Children's Rights and Civil Rights*, 5 NEV. L. J. 141, 154 (2004) (discussing the recent decision of the Supreme Court to recognize children as "persons").

UPA includes Section 202, which states that a child born to parents who are not married to each other has the same rights under the law as a child born to parents who are married to each other.[108] More specifically, with regard to child support, the Equal Protection Clause of the Constitution requires states to enforce child support regardless of whether the parents of the child were ever married.[109]

Rather than focus on the same-sex couple's legal status, parentage statutes and court-applied doctrines should focus more on parental behavior and the connection between the purported parent and child. Judge Smith recognized this in his proposed solution in *Debra H.*, focusing on consent to insemination and intent to parent rather than focusing on the legal status of the parents' relationship.[110] When a child is conceived through the process of artificial insemination into a union of two women, "the decision to create the child is even more conscious and deliberate than the decision that is made by some couples who are both biological parents and conceive a child by direct sexual intercourse."[111] It demonstrates a well-thought-out decision and steadfast commitment to care for and support the child. Thus, under an ideal artificial insemination statute, the consenting non-biological parent with intent to parent the child would be presumed to be a legal mother of the child, irrespective of the legal status of the couple's relationship, which could only be rebutted by clear and convincing evidence.[112] In the absence of any such evidence, the partner would be legally defined as a parent, and from that legal status, derive both the right to seek custody/visitation as well as the obligation to provide child support.

Legislation in the District of Columbia and New Mexico—the former in a jurisdiction that legally recognized same-sex marriage, the latter in a jurisdiction that does not—provide good models for an ideal assisted-reproduction statute of the sort I propose. The D.C. legislation reads: "A person who consents to the artificial insemination . . . with the intent to be

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108. UNIF. PARENTAGE ACT, § 202.

109. *See Gomez*, 409 U.S. at 538 (holding that once a state posits a judicially enforceable right on behalf of children to needed support from their natural fathers, denying such an essential right to a child simply because her natural father has not married her mother violates the Equal Protection Clause).

110. Debra H. v. Janice R., 930 N.E.2d 184, 204 (N.Y. 2010) (Smith, J., concurring).

111. T.F. v. B.L., 813 N.E.2d 1244, 1254 (Mass. 2004) (Greaney, J., dissenting) (quoting a lower court's decision).

112. *See, e.g.*, Elisa B. v. Super. Ct., 117 P.3d 660, 667 (Cal. 2005) (discussing how the court in *Nicholas H.* concluded that the fact that the presumed father may not be the biological father *may* be, rather than *is,* rebutted in an appropriate action by clear and convincing evidence).

the parent of her child, is conclusively established as a parent of the resulting child."[113] Similarly, the New Mexico statute reads: "A person who . . . consents to assisted reproduction . . . with the intent to be the parent of a child is a parent of the resulting child."[114] Both correctly focus on the deliberate and intentional participation in the decision to bring a child into the world rather than on the legal status of the same-sex couple. Both are also gender-neutral and therefore apply equally to same-sex couples. In 2008, The American Bar Association lent its approval to this type of statutory language by approving a Model Act Governing Assisted Reproductive Technology: "An individual who . . . consents to assisted reproduction by a woman . . . with the intent to be a parent of her child is a parent of the resulting child."[115] This would be the most ideal solution; it is clear, easily applicable, and more of a "bright line" rule than other solutions I discuss below. However, despite its virtues, this solution requires legislative action, and in a climate in which most states still do not recognize same-sex marriage, passing such a wide-reaching, gender-neutral statute is not a political reality.

ii. Holding Out Provisions in State Family Law Statutes

Most state parentage laws are based on the Uniform Parentage Act ("UPA").[116] The UPA includes a "holding out" presumption, which many

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113. D.C. CODE § 16-909(e)(1) (2001); *see also* D.C. CODE § 16-909(e)(1)(A), (B) (2001) (describing when the parent-child relationship is conclusively established). The code states:

> (A) Consent by a woman, and a person who intends to be a parent of a child born to the woman by artificial insemination, shall be in writing signed by the woman and the intended parent. (B) Failure of a person to sign a consent required by subparagraph (A) of this paragraph, before or after the birth of the child, shall not preclude a finding of intent to be a parent of the child if the woman and the person resided together in the same household with the child and openly held the child out as their own.

Id.

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

115. AM. BAR ASS'N, AMERICAN BAR ASSOCIATION MODEL ACT GOVERNING ASSISTED REPRODUCTIVE TECHNOLOGY § 603 (Proposed Official Draft 2008), http://apps.americanbar.org/family/committees/artmodelact.pdf (last visited April 8, 2012) (on file with the Washington and Lee Journal of Civil Rights and Social Justice).

116. Unif. Law Comm'n, *Parentage Act Summary,* http://uniformlaws.org/Act Summary.aspx?title=Parentage%20Act (last visited April 8, 2012) (summarizing the Act and the history of the Act) (on file with Washington and Lee Journal of Civil Rights and Social Justice). The Uniform Law Commission (ULC), previously known as the National

states have incorporated into their own parentage laws.[117] The "holding out" presumption is a provision that establishes a presumption of parentage for a man if, "while the child is under the age of majority, he receives the child into his home and openly holds out the child as his natural child."[118] Thus far, California is the only state that has addressed whether such a holding out can be read in a gender neutral way and applied to a woman in a same-sex relationship.[119] In *Elisa B. v. Superior Court*, the California Supreme Court determined that the non-biological parent, Elisa, was a legal parent under California's holding out presumption because she received the children into her home and openly held them out as her natural children.[120] The court concluded that the parentage presumption was not rebutted simply by the fact that she was not the biological parent.[121] In so acting, the judges focused on the best interest of the child in establishing a child-parent relationship, regardless of the marital status of the parents.[122] Specifically, the court spoke of the fact that Elisa "actively participated in causing the children to be conceived with the understanding that she would raise the children as her own together with the birth mother" and also that after birth, she "voluntarily accepted the rights and obligations of parenthood."[123] Both

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Conference of Commissioners on Uniform State Laws (NCCUSL), promulgated a version of the UPA in 1973. *Id.* The Act reflects both federal requirements and state best practices in the paternity area. *Id.* Fourteen states have adopted a version of the 1973 UPA: Alabama, California, Colorado, Hawaii, Illinois, Kansas, Minnesota, Montana, New Jersey, North Dakota, Ohio, Rhode Island, Texas, and Washington. *Id.* The NCCUSL approved a new version of the UPA in 2002. *Id.* Only nine states have formally enacted a version of the most recent UPA: Alabama, Delaware, New Mexico, North Dakota, Oklahoma, Texas, Utah, Washington, and Wyoming. *Id.* Although other states have not formally adopted the UPA, it still influences the creation of state parentage laws. *Id.*; *see also* Unif. Law Comm'n, *Legislative Fact Sheet – Parentage Act*, http://uniformlaws.org/LegislativeFactSheet

.aspx?title=Parentage%20Act (last visited April 8, 2012) (listing states that have adopted the Act) (on file with Washington and Lee Journal of Civil Rights and Social Justice).

117. UNIF. PARENTAGE ACT, § 4(a)(4) (1973).

118. *Id.*

119. *See* CAL. FAM. CODE §7611(d) (West 2004) (stating that a man is presumed to be a parent of a child if "he receives the child into his home and openly holds out the child as his natural child, and noting that California's "holding out" provision is based on Section 4 of the 1973 UPA).

120. *See* Elisa B. v. Super. Court, 117 P.3d 660, 669–73 (Cal. 2005) (stating that Elisa consented to co-parent the children with her partner as her natural children).

121. *See id*.

122. *See id.* at 669 (noting that the legislature has "implicitly recognized the value of having two parents, rather than one, as a source of both emotional and financial support, especially when the obligation to support the child would otherwise fall to the public").

123. *Id.* at 670.

parties breast-fed the children, chose the children's names—giving them all hyphenated combination of their surnames— and co-parented the children until they were approximately two years old.[124] Justice Kennard, in his concurring opinion, put it well: "Had a man who, like Elisa, lacked any biological connection to the twins received them into his home and held them out as his natural children, this case would . . . undoubtedly have resulted in determination that he met the statutory criteria for being the presumed father of the twins."[125]

In terms of the sufficient amount of time a parent must "hold out" a child as her own before considered a "legal parent" under the "holding out" presumption, in *Charisma R. v. Kristina S.*, the California Court of Appeal held that Charisma was entitled to a presumption of parentage even though she co-parented the child for only thirteen weeks.[126] With regard to the short duration, the court emphasized that "[o]n its face, the [California] statute contains no durational requirement; it does not, for example, state that the child must be received or held out 'for a significant period of time.'"[127]

This is a solution with much potential, especially since the presence of the 1973 UPA "holding out" presumption, or something similar, is quite widespread across the 50 states.[128] In addition, nine states have adopted the 2002 version of the UPA which also includes a holding out provision; however, unlike the open-ended 1973 version, the 2002 version has a specific durational requirement, providing that the person must have lived with and held the child out as her own for the first two years of the child's life.[129]

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124. *Id.* at 663.

125. *Id*. at 673 (Kennard, J., concurring).

126. Charisma R. v. Kristina S., 96 Cal. Rptr. 3d 26, 39 (Cal. Ct. App. 2009) (concluding that the presumption of parentage is not limited by duration).

127. *Id*.

128. *See, e.g.*, COLO. REV. STAT. ANN. § 19-4-105(1)(d) (West 2010) (stating that a man, who holds a child under the age of majority out to be his, is presumed to be the natural father); HAW. REV. STAT. § 584-4(a)(4) (West 2010) (same); IND. CODE ANN. 31-14-7-2(a) (West 2010) (same); MINN. STAT. ANN. § 257.55(1)(d) (West 2010) (same); N.H. REV. STAT. ANN. § 168-B:3(I)(d) (West 2010) (same); NEV. REV. STAT. ANN. 126.051(1)(d) (West 2010) (same); N.J. STAT. ANN. §§ 9:17-43(a)(4)–(5) (West 2010) (same); 20 PA. CONS. STAT. ANN. § 2107(c)(2) (West 2010) (same); TENN. CODE ANN. § 36-2-304(4) (West 2010) (same).

129. *See* UNIF. PARENTAGE ACT, § 204(a)(5) (2002) ("[A] man is presumed to be the father of a child if . . . for the first two years of the child's life, he resided in the same household with the child and openly held out the child as his own."); *see also* sources cited *supra* note 129 (noting the coinciding state statutes).

There are, however, several issues with this solution. First, it requires courts to read the state's holding out provision in a gender-neutral way. Additionally, while the "holding out" presumption appropriately looks at the relationship between the child and parent rather than between the parents, it focuses too much on post-birth behavior. This is a concern shared by many of the equity-based solutions. Under these parental theories, it may be difficult for the non-birth parent to seek custody/visitation, and likewise for the biological parent to seek support, if the couple ended their relationship prior to the birth of the child. For example, in two cases in which the lesbian couple terminated their relationship prior to the birth of children conceived through alternative insemination, appellate courts in both Massachusetts and Washington concluded that the non-birth partner was not a legal parent and did not have any legal obligation to support the resulting child.[130] This solution would, perhaps, be stronger if more weight were placed on the intent to have a child in the first place, by, for example, looking at consent to the partner's artificial insemination, attendance at birthing classes, and other pre-birth behavior. Thus, holding out statutes, as a solution, could be strengthened by focusing on more than just post-birth behavior.

B. Utilize Common Law Equitable Doctrines

In the absence of the possible statutory-based solutions discussed above, common law equitable considerations should be applied to determine parentage for both child custody/visitation and child support for a parent with no biological, adoptive, or other legal connection to the child. Courts have long recognized their authority "in the absence of legislative mandates . . . [to] construct a fair, workable and responsible basis for protection of children, aside from whatever rights the adults may have vis a vis each other."[131] Therefore, courts in a growing number of states have applied long standing common law or equitable doctrines, including *in loco parentis*, *de facto* parenthood, psychological parent, or parenthood by

130. *See* T.F. v. B.L., 813 N.E.2d 1244, 1253 (Mass. 2004) (determining that the cohabitant is not considered a legal parent and therefore is not financially obligated to the child); *see also* State *ex rel.* D.R.M., 34 P.3d 887, 890–92 (Wash. Ct. App. 2001) (declaring that the cohabitant neither legally adopted the child nor engaged in a commitment ceremony with the biological mother, and is therefore neither a legal parent nor financially responsible for the child).

131. L.S.K. v. H.A.N., 813 A.2d 872, 878 (Pa. Super. Ct. 2002) (relying on equitable considerations to bestow parental responsibility).

estoppel to conclude that a person who is not in a biological or adoptive relationship with a child, but who has functioned as a parent, is entitled to some rights and responsibilities with respect to the child.[132] While preferable to the extremely narrow marriage or second-parent adoption parentage standard set in *Debra H.*, it is important to note that adjudicating parenthood under statutory "holding out" provisions in the state's family law or under a gender-neutral reading of an artificial insemination statute is preferable to the application of common law and equitable doctrines because persons found to be protected under equitable and common law doctrines might not be granted *full* legal parental status.

i. Psychological Parent

The Colorado Court of Appeals held that a "psychological parent" is a person with whom the child has "deep emotional bonds such that the child recognizes the person, independent of the legal form of the relationship, as a parent from whom they receive daily guidance and nurturance."[133] Alaska, New Jersey, New Mexico, and West Virginia, among others, also

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132. *See, e.g.*, Mason v. Dwinnell, 660 S.E.2d 58, 71 (N.C. Ct. App. 2008) (holding that a lesbian co-parent had standing to seek custody where the parties had jointly planned for the birth of the child and had jointly parented the child after the child's birth); *In re* L.B., 122 P.3d 161, 178 (Wash. 2005) (holding that a woman who had co-parented a child with her same-sex partner was a *de facto* parent and, therefore, stood "in parity with biological and adoptive parents in [Washington State]"); *In re* Clifford K., 619 S.E.2d 138, 157 (W. Va. 2005) (holding that, in exceptional circumstances, a "psychological parent" may intervene in a custody proceeding); *In re* E.L.M.C., 100 P.3d 546, 562 (Colo. App. 2004) (holding that a lesbian co-parent had standing to seek custody where the legal parent consented to, and fostered, the formation of a bonded parent-child relationship between the child and the parent's former partner); T.B. v. L.R.M., 786 A.2d 913, 917 (Pa. 2001) (holding that a lesbian co-parent had standing to seek custody under the *in loco parentis* doctrine, because, with the consent of the child's legal parent, she had assumed the obligations incident to the parental relationship); V.C. v. M.J.B., 748 A.2d 539, 550 (N.J. 2000) (holding that a former same-sex partner had standing to seek custody or visitation as a "psychological parent" because, with the consent of the legal parent, she had formed a parent-child bond and had taken on the responsibilities of parenthood); Laspina-Williams v. Laspina-Williams, 742 A.2d 840, 844 (Conn. Super. Ct. 1999) (holding that a non-biological lesbian co-parent had standing to seek visitation with the child, after demonstrating she assumed a significant role in the child's life); E.N.O. v. L.M.M., 711 N.E.2d 886, 891 (Mass. 1999) (holding that a former same-sex partner was a *de facto* parent entitled to seek visitation and that a *de facto* parent is a person who, despite a lack of biological connection to a child, lived with the child and, with the consent of the legal parent, functioned as a parent to the child).

133. *In re E.L.M.C.*, 100 P.3d at 559.

have utilized a "psychological parent" standard when adjudicating parentage.[134]

ii. In Loco Parentis

While utilizing a different term, *in loco parentis*, states including Arkansas, Indiana, Mississippi, Nebraska, and Pennsylvania follow a standard similar to "psychological parenthood" by looking at the relationship between a child and a person who has acted as a parent but who has no biological, adoptive, or other legal tie.[135] The Pennsylvania Supreme Court first established the doctrine of *in loco parentis*, recognizing parenthood for an individual who acts like a parent and voluntarily takes on parental obligations as if she were a natural parent.[136] *Spells v. Spells* first formulated the *in loco parentis* doctrine:

> [A] person may "put himself in the situation of a lawful parent by assuming the obligations incident to the parental relationship without going through the formality of a legal adoption. [The status of in loco

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134. *See* Kinnard v. Kinnard, 43 P.3d 150, 154 (Alaska 2002) (finding that a stepmother was the child's psychological parent for purposes of determining custody of the child as between the stepmother and her husband, who was child's biological father); *V.C.*, 748 A.2d at 550 (finding that a biological mother's same-sex former domestic partner had standing to seek joint legal custody of, and visitation with, mother's biological children, as her former partner's allegation that she was children's psychological parent was sufficient to invoke "exceptional circumstances" doctrine); *In re Clifford K.*, 619 S.E.2d at 152 ("[A] person may, subject to the exercise of the court's discretion, intervene in a proceeding adjudicating custody if the facts of the particular case warrant such intervention and if the intervention is likely to promote the best interests of the child[ren]."); *In re* Adoption of Francisco A., 866 P.2d 1175, 1182 (N.M. Ct. App. 1993) (evidence, including children's wishes, was insufficient to support award of visitation to former foster parent as a part of adoption decree).

135. *See, e.g.*, Robinson v. Ford-Robinson, 196 S.W.3d 503, 508 (Ark. Ct. App. 2004), *aff'd*, 208 S.W.3d 140, 144 (Ark. 2005) (granting a step-mother visitation rights under the *in loco parentis* doctrine); King v. S.B., 837 N.E.2d 965, 966–67 (Ind. 2005) (determining that King acted *in loco parentis* and is financially obligated to the child); Logan v. Logan, 730 So. 2d 1124,1126 (Miss. 1998) (determining that a parent who treats child as his own is considered to be acting *in loco parentis*); Russell v. Bridgens, 647 N.W.2d 56, 61 (Neb. 2002) (finding that the lower court erred for not considering appellant's *in loco parentis* status); *T.B.*, 786 A.2d at 914 (applying the *in loco parentis* doctrine to construct parental status).

136. *See* Nancy D. Polikoff, *This Child Does Have Two Mothers: Redefining Parenthood to Meet the Needs of Children in Lesbian-Mother and Other Nontraditional Families*, 78 GEO. L.J. 459, 502 (1990) (stating that the doctrine creates rights in one who voluntarily provides support) [hereinafter *Redefining Parenthood*].

> parentis] embodies two ideas first, the assumption of a parental status, and second, the discharge of parental duties."[137]

iii. De Facto Parenthood

Maine, Massachusetts, Minnesota, North Carolina, Washington, and Wisconsin, among others, use the term *de facto* parent or custodian, to describe a person who has functioned as a child's parent and established a parent-child bond.[138] In a decision often cited by other courts, the Wisconsin Supreme Court in *In re Custody of H.S.H-K.* established a four-part test for demonstrating a *de facto* parent relationship: (1) whether the legal parent consented to or fostered the relationship between the *de facto* parent and the child; (2) whether the *de facto* parent lived with the child; (3) whether the *de facto* parent assumed the obligations of parenthood by taking significant responsibility for the child's care, education, and development, including contributing towards the child's support, without expectation of financial compensation; and, (4) whether a parent-child bond was formed.[139] Courts in New Jersey, Massachusetts, South Carolina, and Washington, among others, have directly adopted this test.[140] Courts in other states have adopted similar versions of this test.[141] However, like the

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137. Spells v. Spells, 378 A.2d 879, 881–82 (Pa. Super. Ct. 1977).

138. *See, e.g.*, C.E.W. v. D.E.W., 845 A.2d 1146, 1147 (Me. 2004) (stating that the person who parented the child equal to that of the biological parent, is a *de facto* parent); E.N.O. v. L.M.M., 711 N.E.2d 886, 899 (Mass. 1999) (deeming a lesbian partner a *de facto* parent based upon her behavior toward biological and child); Soohoo v. Johnson, 731 N.W.2d 815, 822–24 (Minn. 2007); Mason v. Dwinnell, 660 S.E.2d 58, 61 (N.C. Ct. App. 2008) (determining that declaring someone a *de facto* parent can be in the child's best interest); *In re L.B.*, 122 P.3d 161, 175–76 (Wash. 2005) (stating that the scope of the statute is not limited by gender and extends to *de facto* parents); Holtzman v. Knott, 533 N.W.2d 419, 420 (Wisc. 1995) (remanding the case to the lower court for not consider *de facto* factors).

139. *Holtzman*, 533 N.W.2d at 435–36 (providing a four-step test that demonstrates the existence of a parent-like relationship with a child).

140. *See* V.C. v. M.J.B., 748 A.2d 539, 550 (N.J. 2000) (adopting the best interest test for determining *de facto* parents); Marquez v. Caudill, 656 S.E.2d 737, 743–44 (S.C. 2008) (applying the four-prong best interest test for determining *de facto* parents); Carvin v. Britain, 122 P.3d 161, 176 (Wash. 2005) (adopting the best interest test for determining *de facto* parents).

141. *See, e.g.*, *In re* E.L.M.C., 100 P.3d 546, 552 (Colo. App. 2004) (applying a strict scrutiny test for statutes that possibly infringe on parental rights); *E.N.O.*, 711 N.E.2d at 890 (determining that the best interest test controls); J.A.L. v. E.P.H., 682 A.2d 1314, 1318 (Pa. 1996) (applying a substantial and immediate test to determine de facto parenthood); *In re* Jonathan G., 482 S.E.2d 893, 912–13 (W. Va. 1996) (determining that a child may have a continuing relationship with a non-biological parent if it is considered in his best interest).

problems with the "holding out" solution, this theory of parentage focuses heavily on post-birth behavior and might prove problematic if the relationship dissolved before the child's birth.

iv. Equitable Estoppel

Courts have also followed principles of equitable estoppel in determining parentage by looking at pre-conception and post-birth behavior to determine whether a reasonable expectation was formed that the non-biological, non-adoptive parent would support the child.[142] Even though courts have so far used this theory to enforce child support based on a theory of reliance, there is no reason this should not also be used as a parentage standard in child custody/visitation cases.[143] In the first appellate court decision in the nation to apply the estoppel doctrine in the child support context, *L.S.K. v. H.A.N.*,[144] the Pennsylvania Superior Court found sufficient facts to infer that the partner's actions—both pre-conception and post birth—financially and emotionally caused the mother to form a reasonable expectation that the partner would support the child.[145] The court explained that equitable estoppel is a doctrine of fundamental fairness designed to preclude a party from depriving another of a reasonable expectation when the party inducing the expectation knew or should have known that the other party would rely upon that conduct to his or her detriment.[146] Thus, the court used the estoppel doctrine to preclude a former domestic partner from defending against paying child support by arguing that a lack of biological connection prevented a child support obligation.[147] The Superior Court focused on how H.A.N. "acted as a 'co-parent' . . . in

142. Courts have determined that equitable estoppel can support child support enforcement without a biological relation and it should generally be extended to parentage determination. *See, e.g.*, Shondel J. v. Mark D., 853 N.E.2d 610, 615 (N.Y. 2006); S.K. v. H.A.N., 813 A.2d 872 (2002); Rubano v. Dicenzo, 759 A.2d 959, 976 (R.I. 2000); J.C. v. C.T., 184 Misc. 2d 935, 711 N.Y.S.2d 295 (Fam. Ct. 2000).

143. *See* Hopkins, *supra* note 20, at 234 (stating that estoppel that is used to obligate a non-biological parent to pay child support should also be used to create a parentage standard).

144. L.S.K. v. H.A.N., 813 A.2d 872, 879 (Pa. Super. Ct. 2002) (applying the doctrine of estoppel to bind the domestic partner to pay child support).

145. *See id*. at 877–79 (describing the factors that led the biological parent to reasonably believe that her partner would continue to support the child).

146. *See id*. at 877 (describing equitable estoppel).

147. *See* Hopkins, *supra* note 20, at 235 (referencing *L.S.K. v. H.A.N.*'s application of the estoppel doctrine).

all areas concerning the children's conception, care and support."[148] Besides agreeing to have children through artificial insemination, H.A.N. was an active participant in childbirth classes and in the delivery room itself, as well as assisted in selecting the names of the children.[149] After birth she stayed home with the children while L.S.K. continued her career; therefore, H.A.N. was intimately involved in the children's day-to-day care and schooling as well as health needs for over eight years.[150]

v. American Law Institute (ALI) Principles of the Law of Family Dissolution

Despite differences in terminology, the equitable doctrines discussed above in sections I through IV generally have similar focuses and describe a person who does not have a biological, adoptive, or other legally recognized relationship with the child, but who should be entitled to seek parental rights and protections by virtue of having established an actual parent-child relationship.[151] While state courts generally use the terms "psychological parent," *in loco parentis*, *de facto* parent, and "parent by estoppel" interchangeably, the drafters of the ALI Principles of Family Dissolution (ALI Principles)[152] distinguished these terms from one another. The ALI Principles narrow the definition of *de facto* parent and gives the terms "parent by estoppel" and "*de facto*" parent significantly different meanings.[153] The ALI Principles also explicitly give *de facto* parentage a lesser status than parentage by estoppel.[154]

The ALI Principles might prove confusing since they adopt the same terms utilized by state courts, but with different meanings. Most courts that use the term "*de facto* parent" give it a broader meaning, similar to what the ALI Principles refer to as a "parent by estoppel." For illustration,

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148. *L.S.K.*, 813 A.2d at 878.

149. *See id.* at 878 (describing H.A.N.'s parental-like efforts).

150. *Id*.

151. *See* Carvin v. Britain, 122 P.3d 161, 168 n.7 (Wash. 2005) ("Our cases, and cases from other jurisdictions, interchangeably and inconsistently apply the related yet distinct terms of *in loco parentis*, psychological parent, and *de facto* parent."); V.C. v. M.J.B., 748 A.2d 539, 546 n. 3 (N.J. 2000) (observing that "the terms psychological parent, *de facto* parent, and functional parent are used interchangeably").

152. AM. LAW INST., PRINCIPLES OF THE LAW OF FAMILY DISSOLUTION: ANALYSIS AND RECOMMENDATIONS § 2.03(1) (2002) [hereinafter ALI Principles].

153. See *id.* (defining a parent by estoppel and a *de facto* parent).

154. *Id*.

the Washington Supreme Court's four-factor test to establish *de facto* parenthood is nearly identical to the criteria for parentage by estoppel under the ALI Principles.[155] The ALI Principles define a parent by estoppel, in relevant part, as:

> An individual who, though not a legal parent, . . . lived with the child since the child's birth, holding out and accepting full and permanent responsibilities as a parent, as part of a prior co-parenting agreement with the child's legal parent (or, if there are two legal parents, both parents) to raise a child together each with full parental rights and responsibilities, when the court finds that recognition of the individual as a parent is in the child's best interests; or . . . lived with the child for at least two years, holding out and accepting full and permanent responsibilities as a parent, pursuant to an agreement with the child's parent (or, if there are two legal parents, both parents), when the court finds that recognition of the individual as a parent is in the child's best interests.[156]

Thus, under the ALI Principles, a person can become a parent by estoppel only where the child's legal parent has agreed to share full parental rights and responsibilities, and only when the court finds that recognition as a parent is in the child's best interests. Similar to *de facto* parenthood as it is understood by most states, a parent by estoppel under the ALI Principles stands in legal parity with a legal parent, whether biological, adoptive, or otherwise.[157]

In contrast, the ALI Principles define *de facto* parent, in relevant part, as someone, *other* than a legal parent or a parent by estoppel, who has lived with the child for at least two years and:

> for reasons primarily other than financial compensation, and with the agreement of the legal parent to form a parent-child relationship, or as a result of a complete failure or inability of any legal parent to perform caretaking functions, (A) regularly performed a majority of the caretaking functions for the child, or (B) regularly performed a share of the caretaking functions at least as great as that of the parent with whom the child primarily lived.[158]

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155. *See In re L.B.*, 122 P.3d 161, at 176–77 (Wash. 2005) (citing the four-part test first articulated in *In re H.S.H.-K.*; *see also* Holtzman v. Knott, 533 N.W.2d 419 (Wisc. 1995)).

156. ALI Principles, § 2.03(1).

157. *See id.* (listing factors that determine a legal parent under estoppel).

158. *Id.* at § 2.03(1)(c).

Under the ALI Principles definition, a *de facto* parent may not be awarded a majority of custodial responsibility for the child if a legal parent or parent by estoppel is fit and willing to care for the child.[159]

Despite confusing differences in the definitions of these doctrines, the main components of all these equitable theories are the same under the ALI Principles as under the common state court definitions discussed above. There are, however, differences in terms of the legal consequences attached to the theory by which an individual is determined to be a parent. In sum, under the ALI Principles, a parent by estoppel is someone who has entered into an agreement with the legal parent to assume full, permanent, and co-equal parental responsibility for a child and who has the same rights and responsibilities as a legal parent. A *de facto* parent is someone who develops a parent-like relationship with a child as a result of stepping in to perform caretaking functions; therefore, *de facto* parentage is a lesser status and provides fewer rights than legal parentage or parentage by estoppel.[160]

Unlike *Debra H.*'s reliance on *Alison D.*, which requires same-sex couples in New York to have a formalized second-parent adoption, or the worrisome fact that the court in *Debra H.* ultimately found legal parenthood based on the same-sex couple's out-of-state civil union, the alternative solutions discussed in this section are preferable in that they protect children's important relationships with parents who are not in a legal same-sex relationship that bestows automatic parental rights and obligations and either cannot or do not take steps to formalize their parent-child bonds through adoption. These solutions all focus more on the relationship between the child and putative parent.

New York, in fact, is out of step with most state courts, which reject an *Alison D.*-type parentage standard, holding instead that a person's inability or failure to adopt is not a bar to establishing parentage, and likewise reject a *Debra H.*-type parentage standard that finds legal parentage by way of the same-sex couple's marital status.[161] For example, the Pennsylvania

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159. *See id.* at § 2.18(1)(a) (stating that the court should not give *de facto* parents the majority of custodial rights if the biological parent objects).

160. *See* Sarah H. Ramsey, *Constructing Parenthood for Stepparents: Parents by Estoppel and De Facto Parents Under the American Law Institute's Principles of the Law of Family Dissolution*, 8 DUKE J. GENDER L. & POL'Y 285, 291–93 (2001) (explaining the rights accorded to parents by estoppels and *de facto* parents, respectively).

161. *See generally* Debra L. Forman, *Same-Sex Partners: Strangers, Third Parties, or Parents? The Changing Legal Landscape and the Struggle for Parental Equality*, 40 FAM. L.Q. 23, 46 (2006) ("If we look at these cases from the children's perspective, it becomes clearer that whether the partner adopted or not, the completion of a formal adoption seems beside the point, especially if she functioned as a parent and developed the resulting

Supreme Court has held that: "[t]he ability to marry the biological parent and the ability to adopt the subject child have never been and are not now factors in determining whether the third party assumed a parental status and discharged parental duties."[162] Similarly, the Vermont Supreme Court has rejected the view that couples who use assisted reproduction should be required to adopt in order to gain parental status, recognizing "[t]he disruption that would be caused by requiring adoption of all children conceived by artificial insemination."[163] The ALI Principles also expressly state that "[n]either the unavailability of adoption nor the failure to adopt when adoption would have been available forecloses parent-by-estoppel status."[164]

VI. Conclusion

Looking at *Debra H.* and *H.M.* together, one can clearly see an alarming development: eliminating the applicability of equitable principles to provide legal parental status for a non-biological, non-adoptive parent to contest custody/visitation, while at the same time relying on such principles to force child support payments on the same individuals. Not only are there significant deficiencies in the court's parentage standards, but also, it is problematic to apply different parentage standards depending on the particular child-related legal context. Child visitation jurisprudence and child support jurisprudence should stand in parity, making it so an individual would simply be adjudicated a parent, not a parent solely for contesting child custody/visitation or a parent solely for child support. Otherwise, not only is the best interest of the child lost, but so, too, is the principle of fundamental fairness on the part of the defendant partner.

Now, establishing that the standard should be the same, the question then becomes what is the most appropriate standard? It is easy to see the court's valuing judicial efficiency and "bright line" rule objectivity and clarity over ensuring the best interest of the child, although such valuation defies the very foundations of family law. The desire to solve this complicated jurisprudential mess by relying on a simple standard—legal marriage or legal adoption—to ascertain both child custody/visitation and

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psychological attachment with the child.").

162. T.B. v. L.R.M., 786 A.2d 913, 918–20 (Pa. 2001).

163. Miller-Jenkins v. Miller-Jenkins, 912 A.2d 951, 968 (Vt. 2006), *cert. denied*, 550 U.S. 918 (2007).

164. ALI Principles, *supra* note 152, at Comment b (iii).

child support is clearly a strong one. However, it must be resisted; relying on any of the solutions articulated for both custody/visitation and support is not only preferable on the grounds that these solutions properly place more emphasis on the best interests of the child, but also on the grounds that these statutory-based and equity-based solutions provide a more reasonable and fair proxy for biology in parental determinations that does not discriminate against same-sex families by placing an emphasis on marital status that the Supreme Court has long held unconstitutional in the heterosexual family context. Ascertaining legal parentage for a same-sex family is fundamentally different than that for a heterosexual family—a DNA test will provide no assistance to the non-biological parent. However, requiring marriage or a second-parent adoption is an improper, disproportionately more burdensome, and discriminatory proxy for biology.

Marriage activists speak of the vulnerability of same-sex families and the importance of legalizing same-sex marriage to protect them. What is often lost in the public debate is that the struggle for marriage equality is a fight for equal *access* to the institution of marriage. Thus, activists need to stress that the goal is for a same-sex couple to have the same rights to *decide* whether to marry or not. Failing to emphasize this, and instead naively believing same-sex marriage brings only legal benefits and protections for LGBT families, has grave potential for same-sex marriage to be far from the legal panacea same-sex families across the country believe it to be. Hopefully, this article is a warning sign, that through inappropriate and misapplied family law doctrines, same-sex marriage could in a perverse way turn back the family law clock to a point where children suffer for the decision of their parents not to marry, at least for same-sex couples. Without acknowledging this potential, discouraging it, and advocating for alternatives, fighting so arduously for same-sex marriage to protect same-sex family relationships, may instead, work to undermine them.