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# BEST INTERESTS AND PARENTAL PRESUMPTIONS: BRINGING SAME-SEX CUSTODY AGREEMENTS BEYOND PRECLUSION BY THE FEDERAL DEFENSE OF MARRIAGE ACT

Alison M. Schmieder\*

Whether we believe same-sex couples should be allowed to get married, enter into civil unions, or raise children, the reality is that they do so.<sup>1</sup>

## INTRODUCTION

According to United States Census data for the year 2000, the number of same-sex families is on a dramatic rise, with thirty-four percent of lesbian couples and twenty-two percent of gay male couples raising children under eighteen.<sup>2</sup> As the number of such non-traditional families increases, so does the need for adequate legal protection. What some classify as “anti-gay legislation” is eroding the ability of same-sex parents to safeguard their basic parental rights, specifically with regard to custody and visitation.<sup>3</sup> Upon the dissolution of a same-sex relationship or legally recognized union, one parent’s relationship to the child is usually shifted to the status of “legal stranger.”<sup>4</sup> Even if certain individual rights are granted, they often fail to amount to complete recognition as a “legal parent,”<sup>5</sup> short-changing homosexual parents and their children in ways traditional families need not even consider.

Courts routinely rely on biology to limit the people claiming to be parents, but “parental rights do not spring full-blown from the biological connection . . . [t]hey require relationships more enduring.”<sup>6</sup> But traditional families account for a mere one-

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\* J.D., William & Mary School of Law, 2009; B.S., University of Pittsburgh, 2006. Many thanks to my parents, friends, and family for their support.

<sup>1</sup> Linda S. Anderson, *Protecting Parent-Child Relationships: Determining Parental Rights of Same-Sex Parents Consistently Despite Varying Recognition of Their Relationship*, 5 PIERCE L. REV. 1, 29 (2006).

<sup>2</sup> T. Shawn Taylor, *Ties That Unwind; Legal Cases and Some State Laws Threaten to Undo Lesbian Couples’ Adoptions, Parental Arrangements*, CHI. TRIB., Nov. 17, 2004, at C1.

<sup>3</sup> Gretchen Lee, *Split Decisions: How the Big Lesbian Custody Battles Affect All of Us*, CURVE, May 1, 2006, at 48. (“[A] court in Indiana recently came to the astounding conclusion that families headed by lesbians and gay men don’t need legal protections at all . . . [b]y assert[ing] that we . . . tend to plan for our children much more than heterosexuals do.”).

<sup>4</sup> Anderson, *supra* note 1, at 11. A parent is a “legal stranger to the child” when all parental rights have been severed. *Shank v. Dep’t of Soc. Services*, 230 S.E.2d 454, 457 (Va. 1976).

<sup>5</sup> Anderson, *supra* note 1, at 11.

<sup>6</sup> Laurie A. Rompala, *Abandoned Equity and the Best Interests of the Child: Why Illinois*

quarter of the total number of households in the United States, and many of the remaining non-traditional families would be willing to provide stable and healthy homes for children if they were afforded adequate legal protection to ensure that stability.<sup>7</sup> If fundamental constitutional rights continue to be extended to traditional nuclear families, it is widely suggested that similar rights be afforded to other non-traditional parents as well.<sup>8</sup>

Beyond biology, the determination of a custody or visitation agreement is based on a "best interest of the child" standard.<sup>9</sup> Some argue, however, that a "habitual commitment and preference of different-sex couple parenting"<sup>10</sup> exists, which interferes with the application of the best interest standard to same-sex parents.<sup>11</sup> Even if same-sex parents are granted custody rights in an agreement, the difficulty in seeking legal protection for these parenting rights is further compounded if one partner moves to a different state after dissolution of the relationship. Ordinarily, the Full Faith and Credit Clause,<sup>12</sup> enhanced by the Parental Kidnapping Prevention Act (PKPA),<sup>13</sup> protects a parent when his or her ex-spouse changes domiciles.<sup>14</sup> But with the enactment of the Federal Defense of Marriage Act (DOMA)<sup>15</sup> and subsequent state statutes, same-sex parental rights are in a more tenuous position than ever.<sup>16</sup>

The enactment of the Federal DOMA, which allows states to decline effect to same-sex marriage related rights,<sup>17</sup> has left states to interpret whether the Act was intended to modify the PKPA's extension of full faith and credit to custody agreements granted to same-sex couples in other states.<sup>18</sup> The Virginia and Vermont courts recently addressed this issue as they were pitted against one another in the series of

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*Courts Must Recognize Same-Sex Parents Seeking Visitation*, 76 CHI.-KENT L. REV. 1933, 1960 (2001) (quoting *Caban v. Mohammed*, 441 U.S. 380, 397 (1979) (Stewart, J., dissenting)).

<sup>7</sup> Karla J. Starr, *Adoptions by Homosexuals: A Look at Differing State Court Opinions*, 40 ARIZ. L. REV. 1497, 1513 (1998).

<sup>8</sup> Rompala, *supra* note 6, at 1960.

<sup>9</sup> See *infra* notes 158–61 and accompanying text.

<sup>10</sup> Jeffrey A. Dodge, *Same-Sex Marriage and Divorce: A Proposal for Child Custody Mediation*, 44 FAM. CT. REV. 87, 88 (2006).

<sup>11</sup> Heather Fann Latham, *Desperately Clinging to the Cleavers: What Family Law Courts are Doing About Homosexual Parents, and What Some Are Refusing to See*, 29 LAW & PSYCHOL. REV. 223, 226 (2005) ("Whatever test is used, it seems that courts remain reluctant to assume, as they unblinkingly do with heterosexuality, that the sexual preference of a parent is irrelevant to parenting skills . . .").

<sup>12</sup> U.S. CONST. art. IV, § 1.

<sup>13</sup> 28 U.S.C. § 1738A (2007).

<sup>14</sup> See *infra* Part I.B.

<sup>15</sup> 28 U.S.C. § 1738C (2007).

<sup>16</sup> See *infra* Part I.C.

<sup>17</sup> ANDREW KOPPELMAN, *SAME SEX, DIFFERENT STATES: WHEN SAME-SEX MARRIAGES CROSS STATE LINES* 123 (2006).

<sup>18</sup> MARK STRASSER, *ON SAME-SEX MARRIAGE, CIVIL UNIONS, AND THE RULE OF LAW: CONSTITUTIONAL INTERPRETATION AT THE CROSSROADS* 51 (2002).

cases surrounding *Miller-Jenkins v. Miller-Jenkins*.<sup>19</sup> The Virginia Court of Appeals eventually held that the PKPA prevented Virginia's exercise of jurisdiction over a Vermont custody agreement between two same-sex partners after the dissolution of their Vermont civil union.<sup>20</sup>

The Virginia ruling was a powerful step towards protecting the children of separated same-sex couples because it provided full faith and credit to the previously-entered Vermont agreement.<sup>21</sup> However, the court made it clear that the ruling was a "narrow one of jurisdiction" only,<sup>22</sup> leaving the conflicts between full faith and credit, DOMA, and the PKPA open to further—potentially back-peddalling—interpretation. The United States Supreme Court denied a petition for writ of certiorari in January of 2008, leaving this issue open for further discussion on a national level.<sup>23</sup>

Though complicated, the enactment of the Federal DOMA and subsequent state "mini-DOMAs"<sup>24</sup> is not an insurmountable obstacle for same-sex couples seeking to protect their parental rights. Using current statutory construction, this Note will argue that despite DOMA and mini-DOMAs, the Full Faith and Credit Clause, as broadened by the PKPA, requires the extension of same-sex parentage rights to couples regardless of current state of domicile, and will contend, using state standards for custody determinations, that the mere existence of a previous custody agreement bestows a baseline presumption of parentage upon both same-sex parents, untouchable by DOMA. Particularly if the parentage rights arise from the relationship forged with the child, rather than from the same-sex marriage or union itself, DOMA should not preclude recognition of cross-state custody agreements.

Part I of this Note will present the statutory history of the Full Faith and Credit Clause, the Federal DOMA, and the PKPA. This Part will introduce the history of the "final judgment" and "public policy" exceptions to the Full Faith and Credit Clause and possible implications regarding custody agreements.<sup>25</sup> It will show how these implications gave rise to the PKPA, designed to prevent a parent from moving from state to state to obtain a favorable custody agreement, and discuss how the legislative intent surrounding this congressional policy against "child snatching" and "forum shopping" does not give rise to a presumption that the PKPA is meant solely for heterosexual parents.<sup>26</sup> Lastly, this Part will present the language of the Federal DOMA,

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<sup>19</sup> 637 S.E.2d 330 (Va. Ct. App. 2006), *cert. denied*, 128 S. Ct. 1127 (2008).

<sup>20</sup> *See id.* at 337.

<sup>21</sup> *Id.*

<sup>22</sup> *Id.* at 338.

<sup>23</sup> *Miller-Jenkins v. Miller-Jenkins*, 128 S. Ct. 1127 (2008).

<sup>24</sup> "Mini-DOMA" refers to a state-enacted version of the Federal DOMA. *See* STRASSER, *supra* note 18, at 41.

<sup>25</sup> *See infra* Part I.A.

<sup>26</sup> *See infra* Part I.B.

and discuss what rights this allows states, via state court judgments or mini-DOMAs, to deny same-sex couples.<sup>27</sup>

Part II of this Note will analyze the potential effect DOMA and mini-DOMAs will have on the application of the PKPA and the Full Faith and Credit Clause to custody agreements, given the conflicts arising from overlapping policy arguments behind the inception of each.<sup>28</sup> Using a recent Virginia same-sex custody dispute, *Miller-Jenkins v. Miller-Jenkins*,<sup>29</sup> as a starting point, this Part will argue for favorable parentage rights to the members of same-sex relationships, both despite—and beyond—the reach of DOMA.<sup>30</sup> The common public policy to pursue the “best interest of the child” will be used to overcome the exclusion of same-sex custody agreements by the public policy exception of the Full Faith and Credit Clause.<sup>31</sup> Using the legal reasoning behind imputation of presumptive parentage to non-biological parents, this Part will also argue that the parentage rights provided for in custody agreements do not spring automatically from marriage, but rather from the relationship with the child, and therefore do not fall within the scope of rights DOMA has authorized states to deny to the members of a same-sex relationship.<sup>32</sup>

Part III will look ahead to the paradox that arises if DOMA were to overcome the PKPA: two conflicting agreements will exist from the lack of operation of the PKPA, so must the first state then recognize the agreement ordered by the second state?<sup>33</sup> The second state could claim DOMA protects its actions, but the first could then claim the new anti same-sex parent agreement violates its own public policy of equality and best interest of the child.<sup>34</sup> This Part will examine the status the first agreement might have, and what rights may spring forth due to its existence. Using another recent Virginia case, *Denise v. Tencer*,<sup>35</sup> it will argue that, at a minimum, same-sex parents can use a custody agreement entered previously in another state as the means to prove contractual rights exist between the parties, vesting both with a basic parental presumption and accompanying rights.<sup>36</sup> It will show that stringent mini-DOMAs with bans on contractual rights are limited to those rights granted solely on the grounds of marriage, and thus are insufficient to usurp contractually based parentage rights.<sup>37</sup>

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<sup>27</sup> See *infra* Part I.C.

<sup>28</sup> See *infra* Part II.A.

<sup>29</sup> 637 S.E.2d 330 (Va. Ct. App. 2006), *cert. denied*, 128 S. Ct. 1127 (2008).

<sup>30</sup> See *infra* Part II.

<sup>31</sup> See *infra* Part II.B.1.

<sup>32</sup> See *infra* Part II.B.2.

<sup>33</sup> See *infra* Part III.A.

<sup>34</sup> See *id.*

<sup>35</sup> 617 S.E.2d 413 (Va. Ct. App. 2006).

<sup>36</sup> See *infra* Part III.B.

<sup>37</sup> See *infra* Part III.B.

## I. STATUTORY HISTORY AND THE EVOLUTION OF DOMA AND THE PKPA

When the parents of a child separate, custody and visitation are granted through a court-issued custody or visitation order, after one or both parents petition for such.<sup>38</sup> Visitation is simply the legal right to continue a pre-existing relationship with a child, while legal custody affords a parent more control over the actual upbringing of a child.<sup>39</sup> There should be a strong system of safeguards to protect either right, with special considerations for custody.<sup>40</sup> But historically, this system of petitions and orders tended to fail whenever one of the parents changed domiciles and sought a new order.<sup>41</sup> With clarification of the Full Faith and Credit Clause and the enactment of the PKPA, heterosexual couples regained protection of their parental rights.<sup>42</sup> But with the creation of the Federal DOMA and other pro-marriage legislation, same-sex parents may be barred from protecting the very same rights.<sup>43</sup> To disentangle the statutory complications now facing same-sex parents, it is important to examine the evolution of the statutes involved.

### A. Full Faith and Credit Clause

The Framers of the United States Constitution designed the Full Faith and Credit Clause as one of many clauses intended to transform a collection of independent and sovereign states into one nation, each respecting the “federal system.”<sup>44</sup> The Clause provides that “Full Faith and Credit shall be given in each State to the public Acts, Records and judicial Proceedings of every other State.”<sup>45</sup> Full faith and credit prevents states from freely ignoring the obligations formed by judicial proceedings or laws of other states, rendering each state an integral part of a single functioning nation.<sup>46</sup> Despite the power of this clause, its application to custody agreements—between traditional and same-sex couples alike—is far from seamless. Issues regarding the modifiability of custody judgments arose, and prior to the enactment of the PKPA,

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<sup>38</sup> See *Rompala*, *supra* note 6, at 1950.

<sup>39</sup> *Id.* Note that there is also a difference between legal custody and physical custody. A legal custody determination “requires findings regarding who has actual possession of the child, how that custody was obtained, how long that individual has had the child, and the nature of the custodial relationship between the individual and the child.” *Id.* at 1951.

<sup>40</sup> *Id.* at 1950.

<sup>41</sup> See *infra* note 85 and accompanying text.

<sup>42</sup> See *infra* notes 78–81 and accompanying text.

<sup>43</sup> See *infra* note 123 and accompanying text.

<sup>44</sup> *Finstuen v. Crutcher*, 496 F.3d 1139, 1152 (10th Cir. 2007) (“If in its application local policy must at times be required to give way, such is part of the price of our federal system.” (quoting *Sherrer v. Sherrer*, 334 U.S. 343, 355 (1948))).

<sup>45</sup> U.S. CONST. art. IV, § 1.

<sup>46</sup> *Finstuen*, 496 F.3d at 1152 (quoting *Milwaukee County v. M. E. White Co.*, 296 U.S. 268, 276–77 (1935)).

generally prevented its use in dual-state cases.<sup>47</sup> Further public policy concerns complicate its use, specifically by same-sex couples as well.<sup>48</sup>

### 1. Extension of Full Faith and Credit to Modifiable Agreements

Though the Supreme Court only weakly applies full faith and credit to state laws,<sup>49</sup> it strictly enforces the clause with respect to judgments.<sup>50</sup> Centuries-old doctrine holds,

[T]he judgment of a state court should have the same credit, validity, and effect in every other court in the United States, which it had in the State where it was pronounced, and that whatever pleas would be good to a suit thereon in such State, and none others, could be pleaded in any other court of the United States.<sup>51</sup>

So the full faith and credit obligation for “credit, validity, and effect”<sup>52</sup> is exacting for judgments.<sup>53</sup> Under more recent precedent, a suit need not even be justiciable in a particular forum for that forum to grant credit to the judgment entered in another state.<sup>54</sup> Simply, it is well settled that a state may not refuse to enforce a final judgment granted by another state court.<sup>55</sup>

As applied to custody determinations, the “final judgment” facet of full faith and credit was a point of some contention.<sup>56</sup> Procedurally, the use of the word “decree” or “order” does not impede the conclusion that these court decisions are “judgments”<sup>57</sup> subject to the exacting standard of the Full Faith and Credit Clause.<sup>58</sup> However, by its nature, a custody agreement is subject to somewhat substantial modification.<sup>59</sup>

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<sup>47</sup> See *infra* Part I.A.1.

<sup>48</sup> See *infra* Part I.A.2.

<sup>49</sup> *Baker v. Gen. Motors Corp.*, 522 U.S. 222, 232 (1998) (“Our precedent differentiates the credit owed to laws (legislative measures and common law) and to judgments.”).

<sup>50</sup> *Id.* at 233–34 (citing *Fauntleroy v. Lum*, 210 U.S. 230, 237 (1908)).

<sup>51</sup> *Fauntleroy*, 210 U.S. at 236 (citing *Hampton v. M’Connel*, 16 U.S. (3 Wheat.) 234 (1818)).

<sup>52</sup> *Id.*

<sup>53</sup> *Baker*, 522 U.S. at 233.

<sup>54</sup> *Id.* at 232 (citing *Milwaukee County v. M. E. White Co.*, 296 U.S. 268, 277 (1935)).

<sup>55</sup> KOPPELMAN, *supra* note 17, at 123.

<sup>56</sup> See *infra* note 60 and accompanying text.

<sup>57</sup> *Finstuen v. Crutcher*, 496 F.3d 1139, 1152 n.12 (10th Cir. 2007) (stating that the term “judgment” refers to a “court’s final determination of the rights and obligations of the parties in a case . . . [including] an equitable decree and any order from which an appeal lies” (quoting BLACK’S LAW DICTIONARY (8th ed. 2004) (citing FED. R. CIV. P. 54))).

<sup>58</sup> See *supra* note 49 and accompanying text.

<sup>59</sup> *Denise v. Tencer*, 617 S.E.2d 413, 425 (Va. Ct. App. 2005) (“A party must obey an existing custody order until a modification order supersedes it.” (quoting *Johnson v. Johnson*, 493 S.E.2d 668, 673 (1997))).

Prior to the PKPA, some states used the fact that an issuing state could modify a custody order as a specific ground for refusing to grant full faith and credit to that order.<sup>60</sup> But the PKPA was added as an addendum to the Full Faith and Credit Clause to extend coverage to custody agreements, so now, at least in regard to finality of the initial judgment, custody orders must be granted credit regardless of modifiability.<sup>61</sup>

## 2. Same-Sex Parents Versus the Public Policy Exception

Though the PKPA resolved problems with the application of full faith and credit to custody agreements in general,<sup>62</sup> new arguments arose over the Clause's extension to those agreements formed by same-sex couples. Some argue that the Full Faith and Credit Clause requires each state to acknowledge and recognize same-sex marriages entered into in another state, but this is a common misinterpretation.<sup>63</sup> In fact, the Supreme Court consistently affirms that the Full Faith and Credit Clause does not broadly "oblig[ate] a state to set aside its own laws in favor of those of other states."<sup>64</sup> Rather, as long as a final judgment is not involved, a court is permitted to choose on a case-by-case basis between competing public policies.<sup>65</sup> This construction does not result in required blanket recognition of same-sex marriage.

However, judgment or no judgment, there is an "unwritten, but known" public policy exception to full faith and credit application that precludes recognition of the acts of a state if the public policy of the reviewing state is strongly contra to the public policy of the original actor state.<sup>66</sup> The Supreme Court touched upon this idea, holding that it is often recognized that limitations exist "upon the extent to which a state may be required by the Full Faith and Credit Clause to enforce even the judgment of

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<sup>60</sup> *Thompson v. Thompson*, 484 U.S. 174, 180 (1988). Prior to enactment of the PKPA, "custody orders held a peculiar status under the full faith and credit doctrine . . . [C]ustody orders characteristically are subject to modification as required by the best interests of the child. As a consequence, some courts doubted whether custody orders were sufficiently 'final' to trigger full faith and credit requirements . . . ." *Id.* (citations omitted).

<sup>61</sup> *Id.* at 183 ("Congress'[sic] chief aim in enacting the PKPA was to extend the requirements of the Full Faith and Credit Clause to custody determinations [regardless of finality] . . . . The language and placement of the statute reinforce this conclusion.").

<sup>62</sup> See *infra* Part I.B.1.

<sup>63</sup> See KOPPELMAN, *supra* note 17, at 117. This assumption would be the functional equivalent of assuming that full faith and credit would allow the holder of a state-issued concealed handgun permit to carry a concealed handgun in any state in the United States—a false conclusion. *Id.* at 117–18.

<sup>64</sup> David M. Wagner, *A Vermont Civil Union and a Child in Virginia: Full Faith and Credit?*, 3 AVE MARIA L. REV. 657, 663 (2005).

<sup>65</sup> See *Hughes v. Fetter*, 341 U.S. 609, 611 (1951).

<sup>66</sup> Oren Goldhaber, "*I Want My Mommies*": *The Cry for Mini-DOMAs to Recognize the Best Interests of the Children of Same-Sex Couples*, 45 FAM. CT. REV. 287, 294 (2007) (citing *Nevada v. Hall*, 440 U.S. 410, 410 (1979)).



another state in contravention of its own statutes or policy.”<sup>67</sup> This is not to say that public policy would be violated every time state law simply differs from that of a sister state.<sup>68</sup> Instead, the exception applies when there is violation of “some prevalent conception of good morals, some deep-rooted tradition of the common weal.”<sup>69</sup>

In some states, same-sex relations are just that—violations of the “prevalent conception of good morals.”<sup>70</sup> But thankfully for those same-sex couples with custody agreements, the denial of full faith and credit based on contravening state policy towards a judgment is rarely upheld.<sup>71</sup> The Clause is needed precisely when the policies of two states clash.<sup>72</sup> A court may use the forum state’s public policy as a guide to determine what law is applicable, but there is “no roving ‘public policy exception’ to the full faith and credit due [to] judgments.”<sup>73</sup> To allow such a roving exception would tamper with the “practical operation of the federal system.”<sup>74</sup> The very purpose of the Clause was to unify the states and protect the rights of citizens via recognition of out-of-state judgments.<sup>75</sup> To allow a state to disregard the judgment of another state anytime there are non-identical state policies at play would undermine the purpose of the Clause.<sup>76</sup> To avoid undermining this purpose, same-sex custody agreements should not be disregarded simply because they do not fall in line with the public policy of a “pro-marriage” state. This is exactly the kind of protection same-sex couples need for their parental rights.

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<sup>67</sup> *Pac. Employers Ins. Co. v. Indus. Accident Comm’n*, 306 U.S. 493, 502 (1939).

<sup>68</sup> Larry Kramer, *Same-Sex Marriage, Conflict of Laws, and the Unconstitutional Public Policy Exception*, 106 YALE L.J. 1965, 1970 (1997).

<sup>69</sup> *Id.* (quoting *Loucks v. Standard Oil Co.*, 120 N.E. 198, 202 (N.Y. 1918)).

<sup>70</sup> *Id.*

<sup>71</sup> *Estin v. Estin*, 334 U.S. 541, 545–46 (1948) (“The Full Faith and Credit Clause is not to be applied accordion-like, to accommodate our personal predilections.”). *But cf.* *Thompson v. Thompson*, 484 U.S. 174, 180 (1988). “Because courts entering custody orders . . . retain[ed] the power to modify them,” other states would change the order according to their own views of the best interest of the child. *Id.* (citing *New York ex rel. Halvey v. Halvey*, 330 U.S. 610, 614–15 (1947)). So an argument can still be made that since custody judgments are not technically “final,” a strong contravening public policy may overcome this tendency towards credit to judgments.

<sup>72</sup> *Union Nat’l Bank v. Lamb*, 337 U.S. 38, 42 (1949) (“There is no room for an exception . . . where the clash of policies relates to revived judgments rather than to the nature of the underlying claim as in *Fauntleroy v. Lum* . . . . It is the judgment that must be given full faith and credit.”).

<sup>73</sup> *Baker v. Gen. Motors Corp.*, 522 U.S. 222, 233 (1998).

<sup>74</sup> *Id.* (“Full Faith and Credit Clause ‘ordered submission . . . even to hostile policies reflected in the judgment of another State, because the practical operation of the federal system, which the Constitution designed, demanded it.’” (quoting *Fauntleroy v. Lum*, 210 U.S. 230, 237 (1908))).

<sup>75</sup> See *supra* notes 44–46 and accompanying text.

<sup>76</sup> *Baker*, 522 U.S. at 234.

## *B. Creation of the Parental Kidnapping Prevention Act*

Due to the above concerns arising over the application of the Full Faith and Credit Clause to custody agreements,<sup>77</sup> Congress enacted the Parental Kidnapping Prevention Act (PKPA) in 1980.<sup>78</sup> An addendum to the Clause,<sup>79</sup> the main objective of the Act was to ensure that full faith and credit would extend to basic custody determinations, alleviating state versus state disputes over jurisdiction.<sup>80</sup> The PKPA declares, “[t]he appropriate authorities of every State shall enforce according to its terms, and shall not modify except as provided in . . . this section, any custody determination or visitation determination made consistently with the provisions of this section by a court of another State.”<sup>81</sup> Remedying “what was widely considered to be the inapplicability of . . . full faith and credit . . . to child custody orders,”<sup>82</sup> the PKPA gives effect to a custody determination from one state in the court of another state.

### 1. Objective: Preventing “Child Snatching”

To accomplish this remedy, a primary focus of the PKPA was to prevent a parent who was unable to obtain custody in the legal forum of one state from kidnapping a child in order to enter another forum.<sup>83</sup> Act supporters estimated this type of parental behavior affected between 25,000 and 100,000 children at the time of the Act’s inception.<sup>84</sup> Prior to the PKPA, any time a spouse moved between states, even without questionable motives, he or she could seek a new custody order in their new state of residence, effectively trumping the original order.<sup>85</sup> This would result, “with depressing frequency,” in a set of conflicting custody orders from two different states, where “neither [state was] willing to concede the exclusive custody jurisdiction of the other.”<sup>86</sup>

Procedurally, the Act provides for federal declaratory and injunctive relief for jurisdictional issues without ruling on the actual merits of each state’s custody order.<sup>87</sup> By primarily assessing jurisdiction,<sup>88</sup> the PKPA supports the strong congressional

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<sup>77</sup> See *supra* Part I.A.

<sup>78</sup> 28 U.S.C. § 1738A (2007).

<sup>79</sup> See *supra* note 61 and accompanying text.

<sup>80</sup> *Miller-Jenkins v. Miller-Jenkins*, 637 S.E.2d 330, 334 (Va. Ct. App. 2006) (quoting *Scott v. Rutherford*, 516 S.E.2d 225, 231 (Va. Ct. App. 1999)), *cert. denied*, 128 S. Ct. 1127 (2008).

<sup>81</sup> 28 U.S.C. § 1738A(a) (2007).

<sup>82</sup> *Wilson v. Gouse*, 441 S.E.2d 57, 60 (Ga. 1994) (citing *Thompson v. Thompson*, 484 U.S. 174, 181 (1988)).

<sup>83</sup> *Thompson*, 484 U.S. at 181.

<sup>84</sup> *Id.*

<sup>85</sup> *Meade v. Meade*, 812 F.2d 1473, 1475 (4th Cir. 1987).

<sup>86</sup> *Id.*

<sup>87</sup> *Id.* at 1476 (citing *Hickey v. Baxter*, 800 F.2d 430, 431 (4th Cir. 1986)).

<sup>88</sup> *Id.*

policy against “child snatching and forum shopping” that led to its creation,<sup>89</sup> affording general protection for parental rights in custody agreements. With such a child-focused objective, nothing indicates that the PKPA was meant, or should be construed, to leave out the children of same-sex couples.

## 2. Procedural Application

To achieve this general protection, the PKPA preempts state family law when there is a conflict between various state court methods for determining custody jurisdiction.<sup>90</sup> The PKPA outlines two distinct requirements that the original jurisdiction must meet in order for full faith and credit to apply to the first custody order.<sup>91</sup> First, the court originally ruling on custody must have subject matter jurisdiction and personal jurisdiction over the parties at the time.<sup>92</sup> Second, one of five conditions must be met<sup>93</sup> as laid out in the Uniform Child Custody Jurisdiction Act (UCCJA).<sup>94</sup> These simple criteria can be applied by state courts to determine the correct state of jurisdiction when a conflict occurs without the federal courts having to step in.<sup>95</sup> By slightly preempting state law, the PKPA diminishes conflicts over dueling jurisdictions with minimal federal interference.

The jurisdictional determination of the PKPA turns primarily on what state is considered the child’s “home state.”<sup>96</sup> This determination prevents a parent from simply crossing state lines and filing for a new order the next day, claiming residency. The “home state” requirement has been interpreted to apply primarily to the child’s current or most recent domicile.<sup>97</sup> When a child is newly relocated to a state, having no “home state,” mere presence is generally enough only in instances where the child is abandoned or abused.<sup>98</sup> So for the average case, turning on the home state of the

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<sup>89</sup> *Salisbury v. Salisbury*, 657 S.W.2d 761, 766 (Tenn. Ct. App. 1983).

<sup>90</sup> *See Meade*, 812 F.2d at 1476.

<sup>91</sup> *Forsakringskassan Int’l Div. v. Zacek*, No. 0813-06-4, 2007 Va. App. LEXIS 15, at \*6 (Jan. 16, 2007).

<sup>92</sup> *Id.*

<sup>93</sup> *Id.*

<sup>94</sup> See 28 U.S.C. § 1738A(c)(2) for a full list of the conditions that must be met.

<sup>95</sup> *See Meade*, 812 F.2d at 1476.

<sup>96</sup> 28 U.S.C. § 1738A(b)(4).

“[H]ome State” means the State in which, immediately preceding the time involved, the child lived with his parents, a parent, or a person acting as parent, for at least six consecutive months, and in the case of a child less than six months old, the State in which the child lived from birth with any of such persons. Periods of temporary absence of any of such persons are counted as part of the six-month or other period.

*Id.*

<sup>97</sup> *See Forsakringskassan*, 2007 Va. App. LEXIS 15, at \*7.

<sup>98</sup> *Id.*

child, this determination clearly protects heterosexual couples. It should also prevent a same-sex parent from claiming a new domicile and using that state's laws to cut off the parental rights of the other parent.<sup>99</sup> Yet with the enactment of the Federal DOMA, that is precisely the result suggested.

### C. Defense of Marriage Act and Mini-DOMAs

The Federal Defense of Marriage Act (DOMA)<sup>100</sup> was enacted in 1996, with the intent to protect the "institution of traditional heterosexual marriage" by permitting states to deny recognition and credit to same-sex marriages.<sup>101</sup> The Act sets forth:

No State, territory, or possession of the United States, or Indian tribe, shall be required to give effect to any public act, record, or judicial proceeding of any other State, territory, possession, or tribe respecting a relationship between persons of the same sex that is treated as a marriage under the laws of such other State, territory, possession, or tribe, or a right or claim arising from such relationship.<sup>102</sup>

Though a narrow reading suggests that only a couple's current domicile at the time of marriage can refuse to recognize a union entered into elsewhere, a broad, literal reading allows a state to refuse recognition of the union regardless of the date and state in which it was entered.<sup>103</sup> This broader reading is where problems arise for same-sex parents seeking custody rights, as some states embracing DOMA could potentially refuse to "give effect to any . . . judicial proceeding . . . respecting a relationship between persons of the same sex," including custody agreements.<sup>104</sup> Federal law is rarely enacted to broadly regulate family law, so the correct reading and exact constitutional reach of DOMA is still unclear.<sup>105</sup>

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<sup>99</sup> Carmel Sileo, *Virginia Courts Balance Competing Laws on Civil Unions in Custody Fight*, TRIAL, June 2007, at 73, 74 (2007) ("The decisions are simply jurisdictional, and they emphasize that this is a basic principle that applies as much to same-sex couples as it does to any other married couple." (quoting Rebecca Glenberg, Co-Counsel and Legal Director of the American Civil Liberties Union of Virginia)).

<sup>100</sup> 28 U.S.C. § 1738C (2007).

<sup>101</sup> *Miller-Jenkins v. Miller-Jenkins*, 637 S.E.2d 330, 337 (Va. Ct. App. 2006) (citing H.R. REP. NO. 104-664, at 2 (1996), reprinted in 1996 U.S.C.C.A.N. 2905, 2906), cert. denied, 128 S. Ct. 1127 (2008).

<sup>102</sup> 28 U.S.C. § 1738C.

<sup>103</sup> STRASSER, *supra* note 18, at 25.

<sup>104</sup> 28 U.S.C. § 1738C.

<sup>105</sup> For an explanation of the constitutional arguments posed against the validity of DOMA, see *Eighth Annual Review of Gender and Sexuality Law: Family Law Chapter: Recognition of Same-Sex Marriage*, 8 GEO. J. GENDER & L. 683, 733-37 (Matthew T. Cook & Jason E. Shelly eds., 2007).

## 1. Federal Deference to State Family Law: Where DOMA Oversteps

Generally, marriage, divorce, and related matters fall exclusively within the domain of state action.<sup>106</sup> A “state is ‘directly interested in determining the status of its own citizens, and to this end can and does establish and enforce its own policy in relation to marriage and divorce.’”<sup>107</sup> Congress and federal judicial precedent tend to defer to each individual state’s definition of marriage because family law is traditionally a “peculiarly state province.”<sup>108</sup> Though Congress is not explicitly barred from regulating family law, “[b]efore a state law governing domestic relations will be overridden, it must do major damage to clear and substantial federal interests.”<sup>109</sup> The Federal DOMA treads this line of state deference carefully, coming just short of an outright federal ban on same-sex marriage while setting up an effective roadblock to widespread acceptance of same-sex rights at the state level.<sup>110</sup>

For both the PKPA and DOMA, the arguably legitimate concerns over variations in state law act as a means for federal law to step in as a referee, at least when conflicts arise.<sup>111</sup> DOMA, in particular, defends the traditional heterosexual marriage by protecting the right of states to legislate in regard to “legal recognition of same-sex unions, free from any federal constitutional implications that might attend the recognition by one State of the right for homosexual couples to acquire marriage licenses.”<sup>112</sup> The language of the Federal DOMA is fairly permissive, allowing—but not requiring—states to recognize same-sex unions from other states if desired.<sup>113</sup> As a result, to date, at least forty states have amended their constitutions to bar recognition of same-sex unions<sup>114</sup> or enacted separate mini-DOMAs.<sup>115</sup> This result comes close to requiring

<sup>106</sup> *Shoup v. Shoup*, 556 S.E.2d 783, 787 (Va. Ct. App. 2001) (quoting *Heflinger v. Heflinger*, 118 S.E. 316, 322 (1923)). “Indeed, the parties’ well-established and broad right to reach legally binding and enforceable agreements concerning the support of their children is firmly rooted in Virginia law.” *Id.* at 788.

<sup>107</sup> *Id.* at 787.

<sup>108</sup> STRASSER, *supra* note 18, at 31 (quoting *United States v. Yeazell*, 382 U.S. 341, 353 (1966)).

<sup>109</sup> *Id.* (quoting *Rose v. Rose*, 481 U.S. 619, 625 (1987)).

<sup>110</sup> See *infra* Part II.B.1.

<sup>111</sup> See Leah C. Battaglioli, *Modified Best Interest Standard: How States Against Same-Sex Unions Should Adjudicate Child Custody and Visitation Disputes Between Same-Sex Couples*, 54 CATH. U. L. REV. 1235, 1260–61 (2005).

<sup>112</sup> *Miller-Jenkins v. Miller-Jenkins*, 637 S.E.2d 330, 337 (Va. Ct. App. 2006) (citing H.R. REP. NO. 104-664, at 2 (1996), reprinted in 1996 U.S.C.C.A.N. 2905, 2906), *cert. denied*, 128 S. Ct. 1127 (2008).

<sup>113</sup> STRASSER, *supra* note 18, at 41.

<sup>114</sup> Goldhaber, *supra* note 66, at 287.

<sup>115</sup> See, e.g., VA. CODE ANN. § 20-45.3 (2004).

A civil union, partnership contract or other arrangement between persons of the same sex purporting to bestow the privileges or obligations of marriage is prohibited. Any such civil union, partnership contract or other arrangement entered into by persons of the same sex in another state or

DOMA to be self-regulating, as its very offspring result in the conflicting state family laws it must referee.

## 2. Implications of DOMA and Mini-DOMAs on Marriage-Related Rights

On its face, DOMA appears to have a somewhat radical effect, allowing states to decline effect even to non-marriage-related judicial proceedings respecting same-sex couples' rights.<sup>116</sup> But it remains unclear whether the intent of DOMA was to modify the constitutional guarantee of full faith and credit to final judgments and, if so, whether Congress has the power to make such a modification in the first place.<sup>117</sup> Even assuming that intent, it is clear that DOMA fails to usurp *all* rights of same-sex couples.<sup>118</sup> The language "does not say *any* rights afforded to same-sex couples need not be recognized."<sup>119</sup> Rather, only those "rights afforded to same-sex couples by virtue of their having contracted a same-sex marriage . . . need not be enforced,"<sup>120</sup> which has important implications regarding parentage rights that are independent from marriage rights.<sup>121</sup>

Constitutionality and breadth of reading aside, the enactment of DOMA effectively set up a "powerful potential conflict: DOMA allows a state to reject a civil union formed in another state, while the PKPA requires a state court to refuse to grant a new custody order when one has already been issued by another state."<sup>122</sup> Though the legislators behind the PKPA sought to ensure extension of full faith and credit to child custody determinations,<sup>123</sup> it is possible that certain applications of DOMA may withdraw this guarantee.<sup>124</sup> Until the Supreme Court examines this conflict, state courts are left to grapple with the implications of these statutes, and "[t]here will undoubtedly be cases in the future that touch on these precise themes."<sup>125</sup>

## II. CURRENT STATUTORY APPLICATION TO SAME-SEX CUSTODY DETERMINATIONS

To date, though successful applications of the PKPA abound for heterosexual parents, there is limited case law interpreting the conflicts arising from application

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jurisdiction shall be void in all respects in Virginia and any contractual rights created thereby shall be void and unenforceable.

*Id.* It is important to note that, subject to future review, these state laws may not be authorized by the language of DOMA, depending on whether the federal statute is construed in a narrow or broad manner, and whether DOMA itself is constitutional. STRASSER, *supra* note 18, at 42.

<sup>116</sup> See KOPPELMAN, *supra* note 17, at 123.

<sup>117</sup> See STRASSER, *supra* note 18, at 51.

<sup>118</sup> *Id.* at 50.

<sup>119</sup> *Id.*

<sup>120</sup> *Id.*

<sup>121</sup> See *infra* Part III.B.

<sup>122</sup> See Sileo, *supra* note 99, at 73.

<sup>123</sup> See *supra* note 80 and accompanying text.

<sup>124</sup> See *supra* note 122 and accompanying text.

<sup>125</sup> Sileo, *supra* note 99, at 74 (quoting Joseph Price, Lead Counsel for Janet Miller-Jenkins).

of the above statutes to same-sex parents. But as the number of same-sex-headed households rises,<sup>126</sup> it is inevitable that the reaches of DOMA will be fiercely litigated as same-sex parents seek to enforce their parental rights in mini-DOMA states. The Virginia case, *Miller-Jenkins v. Miller-Jenkins*, was one of the first to touch upon this growing concern among same-sex families.<sup>127</sup>

#### A. Case Study: Janet Miller-Jenkins v. Lisa Miller-Jenkins

Over the last five years, the courts of Virginia and Vermont were forced to consider the conflicts that arise when one state adjudicating a PKPA claim has a mini-DOMA and the other recognizes same-sex unions.<sup>128</sup> Ultimately deferring to the original judgment of Vermont, Virginia's handling of a secondary custody claim between Lisa and Janet Miller-Jenkins was commendable, giving hope to same-sex couples across the nation.

The relationship between Lisa, Janet, and their daughter was laden with legal issues from the start.<sup>129</sup> Though residents of Virginia, Lisa and Janet traveled to Vermont and entered into a civil union pursuant to Vermont state law.<sup>130</sup> Two years later, Lisa gave birth to Isabella<sup>131</sup> via artificial insemination from an anonymous donor, at which point the new family moved to Vermont.<sup>132</sup> In 2003, the couple ended their relationship, and Lisa and Isabella returned to Virginia.<sup>133</sup> Before leaving, Lisa filed a petition to dissolve the union in Vermont, designating Isabella as a "child of the union."<sup>134</sup> She sought legal and physical custody, requesting supervised contact for Janet, as well as child support.<sup>135</sup> Vermont granted the petition, ordering temporary physical custody to Lisa and temporary parent-child visitation for Janet.<sup>136</sup>

<sup>126</sup> See *supra* note 2 and accompanying text.

<sup>127</sup> 637 S.E.2d 330, 332 (Va. Ct. App. 2006), *cert. denied*, 128 S. Ct. 1127 (2008).

<sup>128</sup> See Sileo, *supra* note 99, at 73 ("If one state recognizes civil unions and another doesn't, whose laws win in a custody battle?").

<sup>129</sup> A series of legal proceedings spanned five years, beginning with Lisa's initial petition for marriage dissolution, and ending in denial of certiorari. See *Miller-Jenkins v. Miller-Jenkins*, 128 S. Ct. 1127 (2008).

<sup>130</sup> *Miller-Jenkins*, 637 S.E.2d at 332.

<sup>131</sup> Sileo, *supra* note 99, at 73.

<sup>132</sup> *Miller-Jenkins*, 637 S.E.2d at 332.

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

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

<sup>135</sup> *Id.* But cf. Adam Liptak, *Custody After Civil Union Pits States and Judges*, N.Y. TIMES, Sept. 8, 2005, at A18, available at [http://www.nytimes.com/2005/09/08/national/08custody.html?\\_r=1&oref=slogin](http://www.nytimes.com/2005/09/08/national/08custody.html?_r=1&oref=slogin) (explaining how Lisa would later claim that though she filed the legal petitions, she never actually intended to bestow any claim to Isabella upon Janet—"Ms. Miller now says she was confused and did not mean to acknowledge any parental relationship between her former partner and Isabella").

<sup>136</sup> *Miller-Jenkins*, 637 S.E.2d at 332.

The conflict between Virginia and Vermont arose when Lisa filed a petition asserting sole custody and rights over Isabella in Virginia court, on the day the Virginia Marriage Affirmation Act came to fruition.<sup>137</sup> The Virginia Circuit Court awarded temporary sole custody to Lisa and granted an order that Isabella not be removed from the state of Virginia, in direct conflict with the Vermont custody order.<sup>138</sup> Vermont responded to the Virginia petition by entering an order claiming jurisdiction and demanding that the temporary order for parent-child contact be followed, or a hearing would be held to change the current custody order.<sup>139</sup> A legal battle ensued, pitting the Virginia and Vermont courts against each other, eventually resulting in one of the most important rulings affecting the parenting rights of same-sex couples to date.<sup>140</sup>

After a series of orders, the Virginia Court of Appeals entered a ruling that the Virginia trial court erred “in failing to recognize that the PKPA prevented its exercise of jurisdiction and required it to give full faith and credit to the custody and visitation orders of the Vermont court.”<sup>141</sup> The court rejected Lisa’s contention that the Virginia parentage order, seeking “sole parental rights” and avoidance of Janet’s “claim to ‘parental rights,’” did not fall within the meaning of the PKPA’s custody or visitation determination.<sup>142</sup> Despite “semantical machinations,” the right to custody<sup>143</sup> and visitation<sup>144</sup> falls within the common understanding of “parental rights.” The court went on to list the “parental rights” guaranteed by the Constitution to varying degrees, which would bring a related order under the PKPA.<sup>145</sup> Determining that a “parentage action” is covered by the PKPA<sup>146</sup> appears a victory for the power of the PKPA and its extension to same-sex couples, but the jurisdictional issue remained.<sup>147</sup>

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

<sup>138</sup> *Miller-Jenkins v. Miller-Jenkins*, 661 S.E.2d 8, 22 (Va. 2008).

<sup>139</sup> *Miller-Jenkins*, 637 S.E.2d at 333.

<sup>140</sup> Sileo, *supra* note 99, at 73.

<sup>141</sup> *Miller-Jenkins*, 637 S.E.2d at 337.

<sup>142</sup> *Id.* at 335–36.

<sup>143</sup> *Id.* at 336 (citing *Szemler v. Clements*, 202 S.E.2d 880, 884 (1974)) (“The right of a non-custodial parent to the company and society of his or her child is well established. Barring gross unfitness which jeopardizes the well being of the child, visitation is a presumed entitlement.”).

<sup>144</sup> *Id.* at 336 (citing PETER N. SWISHER, LAWRENCE D. DIEHL & JAMES R. COTTRELL, *VIRGINIA PRACTICE SERIES: FAMILY LAW: THEORY, PRACTICE, AND FORMS* § 15.8 (2004 ed.)).

<sup>145</sup> These rights include: physical possession (or visitation for a non-custodial parent), right to discipline, right to control and manage a minor’s earnings and property, and the right to prevent a child’s adoption without parental consent. *Id.* at 336 n.4 (citing *L.A.M. v. State*, 547 P.2d 827, 832 n.13 (Alaska 1976)).

<sup>146</sup> *Id.* at 336.

<sup>147</sup> See Sileo, *supra* note 99, at 73.

[I]t became more of a jurisdictional question: Can a parent undo a custody ruling from a state that recognizes civil unions and nonbiological



Most importantly, on the jurisdictional aspect of the case, the court rejected Lisa's contention that DOMA "effectively trumps the PKPA."<sup>148</sup> However, the court also made it clear that, as a PKPA-based decision, it was ruling *only* on the jurisdictional issue, leaving open the merits of the custody order and subsequent constitutional issues.<sup>149</sup> This case turned on the fact that the initial order was entered in Vermont, as Lisa invoked Vermont jurisdiction, subjecting herself and Isabella to its laws.<sup>150</sup>

A further appeal to the Vermont Supreme Court was denied certiorari.<sup>151</sup> More recently, the United States Supreme Court declined to lend clarity as well, denying certiorari in 2008.<sup>152</sup> Though this allows this powerful ruling to stand, it is simply not enough. In failing to move beyond jurisdiction and resolve the conflicts between the PKPA, DOMA, and Full Faith and Credit doctrine, the rulings of the Virginia and United States courts made it inevitable that future cases on similar issues will arise.<sup>153</sup> Future cases may be resolved much differently, which is a daunting prospect for same-sex couples seeking parental rights.<sup>154</sup>

## *B. Unanswered Conflicts Between the PKPA, DOMA, and Full Faith and Credit*

### 1. Public Policy and the Best Interest of the Child Standard

Untouched by the *Miller-Jenkins* court, there is contention over whether the public policy exception of the Full Faith and Credit Clause should apply to same-sex couples seeking rights in mini-DOMA states.<sup>155</sup> In reality, anti same-sex marriage legislation is a relatively new conception<sup>156</sup> that may not meet the "deep-rooted tradition" stan-

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parents by going to a state that does not? And do laws that protect stability in children's lives equally protect the stability of children of same-sex couples?

*Id.* (quoting Rebecca Glenberg, Co-counsel and Legal Director of the American Civil Liberties Union of Virginia).

<sup>148</sup> *Miller-Jenkins*, 637 S.E.2d at 336.

<sup>149</sup> *Id.* at 337.

<sup>150</sup> *Id.* at 338.

<sup>151</sup> *Miller-Jenkins v. Miller-Jenkins*, 127 S. Ct. 2130 (2007). Additionally, the Virginia Court of Appeals overturned a circuit court judgment reversing the juvenile and domestic relations court's judgment granting registration of the Vermont custody order. *Miller-Jenkins v. Miller-Jenkins*, 276 Va. 19, 22 (2008), *aff'g* *Miller-Jenkins v. Miller-Jenkins*, No. 0688-06-4, 2007 WL 1119817 (Va. Ct. App. Apr. 17, 2007), *petition for cert. filed*, 77 U.S.L.W. 3122 (2008).

<sup>152</sup> *Miller-Jenkins v. Miller-Jenkins*, 128 S. Ct. 1127 (2008).

<sup>153</sup> See Sileo, *supra* note 99, at 74.

<sup>154</sup> See *infra* note 192.

<sup>155</sup> See *infra* note 156 and accompanying text.

<sup>156</sup> *Loucks v. Standard Oil Co.*, 120 N.E. 198, 202 (N.Y. 1918); MICHAEL J. ROSENFELD, *THE AGE OF INDEPENDENCE: INTERRACIAL UNIONS, SAME-SEX UNIONS, AND THE CHANGING AMERICAN FAMILY* 170 (2007).

dard required for application of the exception.<sup>157</sup> But an argument is made that by adopting a mini-DOMA or similar statute, a state reinforces its public policy against same-sex marriage and rights.<sup>158</sup> This contention is a tenuous policy argument in a time where the number of Americans who believe that homosexual conduct is always morally wrong is considerably exceeded by those who simply oppose same-sex marriage.<sup>159</sup> Just because there is a general opposition<sup>160</sup> to bestowing the specific title of "marriage" upon a same-sex couple does not equate to a blanket social policy against any same-sex rights that should be used to usurp the rights of children born to same-sex parents.<sup>161</sup>

Further, all states hold a public policy enforcing the best interests of a child, running contra to policies against same-sex rights.<sup>162</sup> This important best interest standard should be strong enough to equal or outweigh a public policy against same-sex marriage,<sup>163</sup> particularly regarding the stringent public policy exception of full faith and credit.<sup>164</sup> The best interest standard is amorphous, often considering biological and psychological relationship between parent and child, moral fitness of the parent, parenting ability, and the wishes and welfare of the child.<sup>165</sup> Unfortunately, same-sex couples face some obstacles with these considerations, as courts have historically been "reluctant to assume, as they unblinkingly do with heterosexuality, that the sexual preference of a parent is irrelevant to parenting skills."<sup>166</sup> However, the best interest

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<sup>157</sup> See *supra* note 69 and accompanying text.

<sup>158</sup> See Goldhaber, *supra* note 66, at 294.

<sup>159</sup> See KOPPELMAN, *supra* note 17, at 54. In a poll in February 2004, "62 percent of poll respondents opposed same-sex marriage, with 30 percent in favor . . . [O]nly 51 percent of respondents thought that a homosexual relationship between consenting adults is morally wrong; 45 percent thought that it was not a moral issue." *Id.* at 171 n.8 (citing John Cloud, *The Battle over Gay Marriage*, TIME, Feb. 16, 2004, at 57).

<sup>160</sup> Additionally, the moral argument against same-sex marriage is weakening. "Opponents of gay marriage had promised that gay marriage would have disastrous and immediate consequences for the social fabric of Massachusetts, but after sixteen months and 6,600 gay marriages, no such harmful effects were detected." ROSENFELD, *supra* note 156, at 180.

<sup>161</sup> Instead, courts "should recognize the reality of children's lives, however unusual or complex . . . . By failing to do so, they perpetuate the fiction of family homogeneity at the expense of children whose reality does not fit this form." Latham, *supra* note 11, at 240 (quoting *Blew v. Verta*, 617 A.2d 31, 36 (1992) (citation omitted)).

<sup>162</sup> Battaglioli, *supra* note 111, at 1251-52.

<sup>163</sup> Goldhaber, *supra* note 66, at 294.

<sup>164</sup> See *supra* note 69 and accompanying text.

<sup>165</sup> See Battaglioli, *supra* note 111, at 1252; see also Latham, *supra* note 11 (explaining that determining a child's best interest should focus on relations other than genetic connection, and disturbing the continuity of such parental relations is harmful). Rather, bonding and attachment involves "'the intense, person-specific nature of the interpersonal bonds that . . . make[] parental responsibility largely nontransferable.'" *Id.* at 238 (quoting Ilana Hurwitz, *Collaborative Reproduction: Finding the Child in the Maze of Legal Motherhood*, 33 CONN. L. REV. 127, 154 (2000)).

<sup>166</sup> Latham, *supra* note 11, at 226.

standard is supported by other sexuality-blind policies, ideally resulting in the best interests of the child prevailing even under pressure from a state policy against same-sex marriage and subsequent rights.

The first supportive public policy is a presumption that the interests of the child are best served by placing the child with its “natural” parents.<sup>167</sup> This initially tends to favor the biological parent of a same-sex couple.<sup>168</sup> But applying a presumption of parentage, as recognized in some jurisdictions,<sup>169</sup> this becomes biology and sexuality-neutral.<sup>170</sup> A person, biologically related or not, who actively participated in the creation of the child, and later took the child “into her home and held [her] out as her own,” is a parent in some states.<sup>171</sup> And a relationship with such a parent figure is in the best interest of the child, barring harmful circumstances, regardless of any anti same-sex marriage policies that may be present in the state.

More generally, the best interest standard is supported by a “public policy favoring that a child has two parents rather than one.”<sup>172</sup> The debate over “what relationships to value or even to sanctify”<sup>173</sup> between adults has no place alongside a policy for supporting the best relationships for a child.<sup>174</sup> To refuse to consider a same-sex parent, or any other non-biological or adoptive parent, as part of the best interests of a child would be contra to state child support requirements as well.<sup>175</sup> Turning away a parent, biological or not, who is seeking contact with—and offering

<sup>167</sup> *Szelmer v. Clemens*, 202 S.E.2d 880, 884 (Va. 1974).

<sup>168</sup> See *Rompala*, *supra* note 6, at 1949 (explaining that “biological parents’ rights are preferred,” but they are “not absolute” and may be overcome if their parental claims “do not serve the best interests of the child[]”).

<sup>169</sup> See *infra* note 187 and accompanying text.

<sup>170</sup> *Rompala*, *supra* note 6, at 1934 (“Both statutes and common law tradition recognize a biological parent’s legal rights to his or her child. However, nonbiological co-parents are not considered in the traditional rules, and often have no legal relationship to the child.”). This would include not only same-sex non-biological parents, but also heterosexual parent figures with no biological relationship to the child. *Id.*

<sup>171</sup> *Elisa B. v. Superior Court*, 117 P.3d 660, 662 (Cal. 2005).

<sup>172</sup> *Kristine H. v. Lisa R.*, 117 P.3d 690, 696 (Cal. 2005).

<sup>173</sup> *KOPPELMAN*, *supra* note 17, at 53.

<sup>174</sup> *Anderson*, *supra* note 1, at 4 (“Rather than focusing on the relationship of the parents, honing in on the relationship between the parent and the child, and allowing that relationship to continue despite the non-recognition of the same-sex relationship is a potential solution.”). *But cf.* Lynn D. Wardle, *A Critical Analysis of Interstate Recognition of Lesbian and Gay Adoptions*, 3 AVE MARIA L. REV. 561, 616 (2005) (“Respect for adult sexual preferences does not require that children be offered less than they need for their best childhood development opportunity, which includes a mother and a father . . .”).

<sup>175</sup> See *KOPPELMAN*, *supra* note 17, at 73. Discussing the consequences of denying same-sex parentage rights, Koppelman noted, “[a] blanket nonrecognition rule would also be convenient for nonbiological parents who want to be free from child support obligations if the couple separates.” *Id.*

support for— a child hardly seems to support a policy of “best interests.”<sup>176</sup> These presumptions, together, should support the best interest standard sufficiently to override any state policy against same-sex marriage and bestow adequate protective rights to same-sex parents and their children.<sup>177</sup>

## 2. Presumptive Parenthood Beyond the Grasp of DOMA

Even if the relationship is in the best interest of the child, one of the most difficult aspects of DOMA that same-sex couples must contend with to achieve maximum legal protection is the limitation on rights arising by virtue of the same-sex relationship.<sup>178</sup> Though it has been suggested that a presumption of parentage should be extended for any child born or adopted into a same-sex partnership,<sup>179</sup> under current DOMA readings, the right would need to spring not from the same-sex relationship, but from the actual relationship the parent has forged with the child.

Historically, parentage was determined only maternally, based solely on who birthed a child.<sup>180</sup> Later, statutes and common law adapted to the understanding of modern science, resulting in presumption of parentage given only to those who could prove a biological relationship to the child.<sup>181</sup> Today, biology matters less, and courts have gone so far as to ignore positive DNA tests in favor of protecting an existing family unit,<sup>182</sup> which is promising for same-sex parents. Though the presumption of parentage is rebuttable, it is one of the “strongest and most persuasive” in the law, and is therefore not easily overcome by those who are unable to achieve its status.<sup>183</sup>

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<sup>176</sup> Additionally, “[i]t is undoubtedly in the best interests of children to provide them with loving homes where that is possible, and to assist in maintaining and protecting their relationships with the people they recognize as parents.” Latham, *supra* note 11, at 241.

<sup>177</sup> See Goldhaber, *supra* note 66, at 289 (commenting that this does not infringe on a state’s right to enact a mini-DOMA and choose whether same-sex couples will be recognized). It simply “ensures that mini-DOMAs will not defeat their own public policy that custody decisions should be made in the best interests of the child.” *Id.*

<sup>178</sup> See *supra* notes 117–20 and accompanying text.

<sup>179</sup> See Jennifer L. Rosato, *Children of Same-Sex Parents Deserve the Security Blanket of the Parentage Presumption*, 44 FAM. CT. REV. 74 (2006). Further, the parentage presumption “should be one of the essential rights in the bundle awarded to couples who make these commitments.” *Id.* at 80. *But see supra* notes 117–20 and accompanying text (commenting on the limitations of rights contracted directly via marriage or similar unions).

<sup>180</sup> David Friedman, *Does Technology Require New Law?*, 25 HARV. J.L. & PUB. POL’Y 71, 75 (2001) (“Throughout almost all of human history, the fact that a child was born from the body of a particular woman was conclusive proof that she was the child’s mother. Paternity, on the other hand, was in most cases impossible to establish; it was a wise child that knew his father.” (citation omitted)).

<sup>181</sup> See *supra* note 170 and accompanying text.

<sup>182</sup> Rosato, *supra* note 179, at 75, 83 n.16 (“[L]egislature’s primary interest [in creating the paternity presumption] was in ensuring that children are supported by their parents, and not by welfare.” (quoting *Love v. Love*, 959 P.2d 523, 527 (Nev. 1998))).

<sup>183</sup> STRASSER, *supra* note 18, at 44 (quoting *Godin v. Godin*, 723 A.2d 904, 909 (Vt. 1998)).

But if a presumption of parentage is extended to a same-sex parent of a child, it would be beyond DOMA's grasp of barring recognition of "a right or claim arising from such relationship,"<sup>184</sup> if the presumption is based on the parent's intended relationship with the child rather than the relationship of the same-sex couple.

To achieve this presumptive result is not insurmountable for same-sex parents. In the world of modern reproductive technology, there has been a trend towards assigning parentage based on a couple's intent, rather than biological or genetic relationships.<sup>185</sup> The Uniform Parentage Act,<sup>186</sup> for example, "attempts to ensure that a child has two parents, in the same household whenever possible, to provide the most secure financial and emotional situation possible."<sup>187</sup> In 2005, the California Supreme Court applied a presumption of parentage to a lesbian parent who was failing to meet agreed upon financial duties to children she shared with her ex-girlfriend.<sup>188</sup> The court quoted the lower court, which found that the pair "intended to create a child and 'acted in all respects as a family,' adding 'that . . . Legal parentage is not determined exclusively by biology.'"<sup>189</sup> By "actively participat[ing] in causing the children to be conceived with understanding she would raise the children as her own," Elisa accepted the obligations and rights of parenthood voluntarily, and was therefore given a presumption of parentage.<sup>190</sup>

Though the parents in *Elisa B. v. Superior Court* never executed a formal written custody agreement about the children,<sup>191</sup> the parentage principles should apply nonetheless to other same-sex couples. If a woman can be presumed a parent *without* an agreement, the existence of an agreement should be further protection for the rights of both parents.<sup>192</sup> These rights are arising from a parent's intent to have a relationship with the child, and should be considered separately from any legal relationship with the other same-sex parent.<sup>193</sup> Same-sex custody orders should be acceptable

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*But see* *Troxel v. Granville*, 530 U.S. 57, 90 (2000) (Kennedy, J., dissenting) ("presumptions notwithstanding . . . The almost infinite variety of family relationships that pervade our ever-changing society strongly counsel against the creation . . . of a constitutional rule that treats a biological parent's liberty interest in the care and supervision of her child as an isolated right that may be exercised arbitrarily.").

<sup>184</sup> 28 U.S.C. § 1738C.

<sup>185</sup> Anderson, *supra* note 1, at 10.

<sup>186</sup> UNIF. PARENTAGE ACT, 9B U.L.A. 295 (2002).

<sup>187</sup> *Id.*

<sup>188</sup> *Elisa B. v. Superior Court*, 117 P.3d 660, 664 (Cal. 2005).

<sup>189</sup> *Id.*

<sup>190</sup> *Id.* at 670. The court also noted that "there are no competing claims to her being the children's second parent." *Id.*

<sup>191</sup> *Id.* at 663.

<sup>192</sup> See *infra* Part III.B.

<sup>193</sup> See Rosato, *supra* note 179 ("[T]he California Supreme Court determined that the policies of stability and fair treatment of children are paramount, regardless of whether the child is born to a married couple, or unmarried persons—gay, lesbian, or straight."). The court

state-to-state, beyond the reach of DOMA, just as step-, adoptive, and other such non-traditional parents are afforded custody and visitation orders based on similar parentage presumptions.

### III. LOOKING FORWARD: OVERCOMING RESTRICTIVE INTERPRETATIONS OF DOMA VIA CONTRACTUAL RIGHTS

#### A. Potential Re-Emergence of Conflicting Custody Agreements

Despite the above presumptions and intentions of best interest, the “steady stream of new anti-gay legislation,”<sup>194</sup> makes determining the status of parentage increasingly complex.<sup>195</sup> The Federal DOMA, if interpreted broadly enough, could potentially interfere with all of these considerations. The PKPA, as another federally enacted statute, is the strongest protector against this outcome. Given that the main congressional policy behind the creation of this Act was to protect children by extending full faith and credit to modifiable custody agreements,<sup>196</sup> it seems highly unlikely that Congress intended it to apply only to custody orders granted to heterosexual couples.<sup>197</sup> But if the PKPA fails, and one state declines full faith and credit to another state’s previously entered custody order, a difficult paradox arises. Must the first state then strike its own order and accept the second?<sup>198</sup>

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specifically held, “Respondent chose to step in those shoes and assume the role and responsibility of the ‘other’ parent. This should be her responsibility . . . .” *Elisa B.*, 117 P.3d at 664.

<sup>194</sup> *Lee, supra* note 3, at 48.

<sup>195</sup> *See, e.g., Deborah Elkins, Virginia Court Gives Full Faith and Credit to Prior Vermont Court Ruling on Lesbian Couple’s Divorce*, VA. LAW. WKLY., Dec. 4, 2006.

The Virginia appellate decision said that if the Marriage Affirmation Act applies, it is preempted by the PKPA. But the federal DOMA says that the PKPA cannot preempt the state law, and with the additional passage Nov. 7 of Virginia’s constitutional amendment outlawing gay marriage, “We’re back to the whole issue about the interaction between DOMA and the PKPA . . . .”

*Id.* (quoting Mathew D. Staver, Counsel for Lisa Miller-Jenkins).

<sup>196</sup> *See supra* note 82 and accompanying text.

<sup>197</sup> Sileo, *supra* note 99, at 73 (“Can you imagine? You’d have gay couples running around kidnapping their kids and moving from state to state. I don’t think even conservatives would want that to happen.”) (quoting Joseph Price, Lead Counsel for Janet Miller-Jenkins)).

<sup>198</sup> On Lisa’s contention that if the PKPA does not apply, Vermont must give full faith and credit to the Virginia order, the Vermont court stated:

[w]hether Virginia must enforce the Vermont visitation order is not directly involved in this appeal, but that is an entirely different question from whether full faith and credit requires the Vermont court to strike its own visitation order because the Virginia court refuses to recognize its validity based entirely on Virginia law.

*Miller-Jenkins v. Miller-Jenkins*, 912 A.2d 951, 959 (Vt. 2006).

Vermont refused this line of reasoning, stating it would not give full faith and credit to another state's custody order if that state refused full faith and credit to an earlier Vermont order.<sup>199</sup> This result returns parents and children back to the starting point before the enactment of the PKPA, where two conflicting orders exist and neither state is willing to concede exclusive jurisdiction over the case.<sup>200</sup> The second state could ignore the first agreement and claim protection by DOMA or its mini-DOMA, and the first state can turn to the public policy exception—now supported, rather than overcome by—the best interests of the child, to refuse full faith and credit to the second agreement. This result is simply not fiscally, judicially, or socially responsible.

Promising, however, is the result of the *Miller-Jenkins* case, a particularly striking victory for advocates of same-sex parentage rights, given the state of Virginia has one of the toughest and most limiting mini-DOMA laws in the United States.<sup>201</sup> Despite the power of the ruling, the future of similar cases is still unclear, since this ruling is merely persuasive in other jurisdictions.<sup>202</sup> Therefore, same-sex couples should take advantage of a weakness in the construction of DOMA to ensure that their rights are protected even under the broadest of readings. Because DOMA does not authorize states to ignore all rights of same-sex couples, these families can protect themselves by establishing parental rights in ways that “do[] not require the existence of a marriage-like relationship.”<sup>203</sup> Even if two conflicting agreements exist, the use of third party and contractual rights may bridge any remaining uncertainties about the impact of DOMA and mini-DOMAs on the PKPA and the Full Faith and Credit Clause, and provide adequate protection to these same-sex parents and their children.<sup>204</sup>

### *B. The Status of Custody and Visitation Agreements: Third-Party Contracted Parental Rights*

As a final safety net for these same-sex parents and children, the rights created by third-party visitation and similar agreements are another potential avenue to secure court-ordered rights for same-sex parents who have been unable to obtain a presump-

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<sup>199</sup> *Id.* “We will not give ‘greater faith and credit to the judgments of the courts of other states’ than we give to our own courts’ judgments.” *Id.* at 959–60 (quoting *Medveskas v. Karparis*, 640 A.2d 543, 546 (Vt. 1994)).

<sup>200</sup> See *supra* note 86 and accompanying text.

<sup>201</sup> See KOPPELMAN, *supra* note 17, at 138–45 (2006) (comparing various mini-DOMA statutes, focusing on Virginia and other states with similarly stringent standards).

<sup>202</sup> See *supra* notes 150–52 and accompanying text.

<sup>203</sup> STRASSER, *supra* note 18, at 51.

<sup>204</sup> A major concern of mini-DOMA states is that providing a non-biological parent (same-sex or not) with visitation or custody rights will encourage other third parties to do so, leading to a drastic increase in litigation over third-party custody rights. See Goldhaber, *supra* note 66, at 295 (“Third parties could claim that they are the parent of a child and seek recognition as a parent, even though they are not the biological parent.”).

tion of parentage or other direct parental rights. Often granted to grandparents, third-party visitation often requires a showing that the party's absence from the child's life would be harmful in some way.<sup>205</sup> The loss of a parent may be one of the most difficult experiences for a child, so a showing of harm from absence should ideally not be difficult for a person who has acted as a parent to this point, same-sex or otherwise. Once granted, the existence of this right embodied in an agreement from another state may create a contractual right beyond DOMA's preclusion.

### 1. Distinguishing Contracted Third-Party Rights From *Troxel v. Granville*

After the 2000 Supreme Court ruling in *Troxel v. Granville*, it appeared that this visitation option was possibly in limbo for grandparents and homosexuals alike.<sup>206</sup> *Troxel* struck down a Washington state statute that permitted any person to petition for the right to visit a child at any time, provided the visitation was found to be in the best interest of the child.<sup>207</sup> The Court held that as applied to Granville, the mother, the statute's allowance of visitation rights to the Troxels, the child's grandparents, violated the "fundamental right of parents to make decisions concerning the care, custody, and control of their children."<sup>208</sup> This turned heavily on the fact that no one alleged, and no court found, that Granville was an unfit parent, given that there is a "presumption that fit parents act in the best interests of their children."<sup>209</sup>

But *Troxel* is a surmountable obstacle.<sup>210</sup> First, "[f]amilies deliberately created by same-sex couples are identifiable and distinct from [mere] third parties."<sup>211</sup> Further, in cases where a previous custody or visitation agreement exists from another state, the mere existence of the agreement creates a shifting of parental rights. This opens a potential new avenue applicable to same-sex couples who entered support, visitation, or custody agreements in supportive states before the parentage disputes arose. In *Denise v. Tencer*, the Virginia Court of Appeals distinguished, from *Troxel*, an instance where a grandfather was granted custody in another state.<sup>212</sup> The court held that the biological father's consent, via the original court order granting custody, vested in the grandfather "precisely the same child-rearing autonomy as that enjoyed by a parent."<sup>213</sup> Should DOMA or a state's mini-DOMA preclude the registering of a sister state's custody agreement, there is the possibility that the very existence of the

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<sup>205</sup> Latham, *supra* note 11, at 234.

<sup>206</sup> *Id.*

<sup>207</sup> *Troxel v. Granville*, 530 U.S. 57, 67 (2000).

<sup>208</sup> *Id.* at 66.

<sup>209</sup> *Id.* at 68.

<sup>210</sup> "To say that third parties have had no historical right to petition for visitation does not necessarily imply . . . that a parent has a constitutional right to prevent visitation in all cases not involving harm." *Id.* at 97 (Kennedy, J., dissenting).

<sup>211</sup> Rompala, *supra* note 6, at 1960.

<sup>212</sup> *Denise v. Tencer*, 617 S.E.2d 413, 419–21 (Va. Ct. App. 2005).

<sup>213</sup> *Id.* at 424.



original document can act as evidence of the biological parent's acquiescence to a contractual agreement granting parent-like rights to the non-biological partner.

This type of contract or custody agreement results in a situation where the biological parent "is no longer 'clothed with the parental presumption generally accorded natural parents in a dispute with non-parents.'"<sup>214</sup> Rather, it becomes more akin to a dispute between two parents, each holding a specific set of rights. In *Denise*, the third-party grandfather received parental rights similar to those normally reserved for presumptive parents.<sup>215</sup> The court went on to say,

whether we denominate father's agreement, as embodied in the court orders, to be a relinquishment of at least some of the constitutional rights enunciated by *Troxel* . . . or whether we simply find that his agreement, as incorporated into two court orders, factually and, as a matter of law, established an equality of interests and rights as between father and grandfather, [it is] analogous to the equality posited when two fit parents . . . dispute custody.<sup>216</sup>

Application to same-sex couples who have custody or visitation agreements in sister states would essentially vest in the non-biological parent the same parental presumptions and rights afforded to the biological parent. Ideally, this would result in a mutually beneficial custody and visitation agreement, as both are then presumed to be acting in the best interest of the child.

## 2. Applying Contracted Third-Party Rights to Same-Sex Parents

Additionally, the rights granted contractually through a pre-existing third-party visitation or custody agreement, similar to the grandfather's agreement in *Denise*, may be beyond the reach of DOMA for same-sex parents. Though a biological parent can argue that she never had the intent to contract away any of her parental rights or to create equal parental presumptions in both former partners,<sup>217</sup> this is not a strongly upheld position. Such an argument was unsuccessfully attempted by Lisa Miller-Jenkins.<sup>218</sup> Lisa claimed that at the time she originally filed court documents, "she was confused and did not mean to acknowledge any parental relationship between her

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<sup>214</sup> *Id.* (quoting *McEntire v. Redfearn*, 227 S.E.2d 741, 743 (Va. Ct. App. 1976)) (noting that although *McEntire* was decided pre-*Troxel*, the "facts and circumstances" of the two cases are distinguishable, and thus the principles outlined by the *McEntire* court are still validly applicable here).

<sup>215</sup> *Id.*

<sup>216</sup> *Id.*

<sup>217</sup> See Liptak, *supra* note 135, at A18.

<sup>218</sup> *Id.*

former partner and Isabella.”<sup>219</sup> This failed as a legal argument in the Virginia court, who ruled that in placing the issues of “legal and physical ‘rights and responsibilities’” before the Vermont court, she invoked a valid ruling.<sup>220</sup> The court held that “‘parental rights and responsibilities’” means “‘rights and responsibilities related to a child’s physical living arrangements, parent child contact, . . . and any other matter involving a child’s welfare and upbringing.’”<sup>221</sup> So by filing the dissolution documents with the Vermont court, Lisa acknowledged Janet as a parent, potentially vesting in her certain parental rights and responsibilities, regardless of her actual intent at the time.

Though Virginia and several other mini-DOMA states have barred the effectiveness of contractual rights created by legal documents between same-sex partners, this is generally not extended to rights that do not arise specifically out of marriage.<sup>222</sup> Virginia has not only barred same-sex marriage and any purported contractual rights thereby created,<sup>223</sup> but also went one step further to block any “partnership contract or other arrangement . . . purporting to bestow the privileges or obligations of marriage.”<sup>224</sup> This essentially bars the effectiveness of any legal document seeking to give a same-sex couple any rights that the law would ordinarily give to a married couple.<sup>225</sup> However, the state attorney general declared that this was not intended to prohibit rights and privileges that are not exclusive to marriage.<sup>226</sup> Parental rights are certainly not rights that arise exclusively because of the title “marriage.” They can arise from biology, relationship to the child, adoption, presumptive parenthood, and the like,<sup>227</sup> so the rights should not be cut off by provisions like that in Virginia.

Furthermore, if the principle of *Denise* is construed as the relinquishment and passing on of parental rights to a third party via the *act* of agreeing,<sup>228</sup> rather than the rights bestowed upon the physical *agreement*, even Virginia’s mini-DOMA should not preclude the application of third-party parental rights upon the non-biological parent.<sup>229</sup> The parental rights would have to spring directly from the couple’s marriage or union to be cut off by DOMA or a mini-DOMA. But where the parental rights provided for in a custody agreement arise from third-party visitation rights,

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<sup>219</sup> *Id.*

<sup>220</sup> *Miller-Jenkins v. Miller-Jenkins*, 637 S.E.2d 330, 334 (Va. Ct. App. 2006), *cert. denied*, 128 S. Ct. 1127 (2008).

<sup>221</sup> *Id.* (quoting VT. STAT. ANN. tit. 15, § 644(1) (2006)).

<sup>222</sup> See *supra* note 110 and accompanying text.

<sup>223</sup> VA. CODE ANN. § 20-45.2 (2007) (“Any marriage entered into by persons of the same sex in another state or jurisdiction shall be void in all respects in Virginia and any contractual rights created by such marriage shall be void and unenforceable.”).

<sup>224</sup> VA. CODE ANN. § 20-45.3 (2004).

<sup>225</sup> See KOPPELMAN, *supra* note 17, at 142.

<sup>226</sup> *Id.* at 144 (citing Laura Hutchinson, *Couple Feels Forced to Leave*, FREDERICKSBURG FREE LANCE-STAR, Jan. 9, 2005).

<sup>227</sup> See *supra* notes 181–93 and accompanying text.

<sup>228</sup> See *supra* notes 216–17 and accompanying text.

<sup>229</sup> See *supra* note 110 and accompanying text.

the relationship of the child, or any other non-marriage related right, DOMA is no match for the PKPA, and full faith and credit should be provided, protecting both children and same-sex parents.

### CONCLUSION

Though the enactment of the federal DOMA and state mini-DOMAs complicates the status of same-sex parents, it is not insurmountable. Regardless of the individual parents' current state of domicile, the PKPA, as an expansive addendum to the Full Faith and Credit Clause, requires the recognition of cross-state custody agreements, regardless of the type of family involved—gay, lesbian, straight or any other familial construction. To claim conflicting policy issues or specific DOMA provisions in order to deny full faith and credit leaves both states at odds, each ordering a conflicting custody remedy, and each refusing to heed the jurisdiction of the other. This was the very situation the PKPA was designed to prevent, and no state public policy against same-sex marriage should override this important legal doctrine.

Even if an argument can be made that DOMA was intended to preempt. The PKPA's extension to same-sex custody agreements, if the parental rights protected in the agreement do not arise out of the marriage or same-sex union, they are beyond the reach of DOMA. A parental relationship does not arise merely from biology, and as more states begin to bestow a presumption of parentage to non-biological parents based on their intent to form a family and "raise the children as [his or] her own,"<sup>230</sup> same-sex parents will gain greater standing. The mere existence of a custody agreement might bestow a presumption of contracted parental rights as well, weakening DOMA's grasp on custody agreements even further. It is in the best interest of children to have two parents, particularly when both are interested in a continued loving and supportive relationship, and it is this public policy that should override all other considerations and allow full faith and credit to be granted to all custody agreements, regardless of what type of parents created them and where they were formed.

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<sup>230</sup> See *supra* note 190 and accompanying text.