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THE PARENT TRAP: DIFFERENTIAL FAMILIAL POWER IN SAME-SEX FAMILIES

DEIRDRE M. BOWEN*

ABSTRACT

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

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

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of the marital context, and reframe how lawyers counsel same-sex couples as they engage in family formation.

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INTRODUCTION

The decision to include children in same-sex families has been on the rise in the last twenty years with the increased availability of assisted reproductive technology.¹ In fact, the 2000 United States Census reports that same-sex couples live in ninety-six percent of all counties in the country, with approximately thirty percent of lesbian couples and twenty percent of gay couples raising children.² A significant number of law review articles have explored the treatment of these families within the law in regard to legal parentage at the time the relationship ends,³ while relatively few articles have examined

1. See Courtney G. Joslin, *The Legal Parentage of Children Born to Same-Sex Couples: Developments in the Law*, 39 FAM. L.Q. 683, 683 (2005) (stating children are increasingly being born into planned same-sex families); Laura L. Williams, Note, *The Unheard Victims of the Refusal to Legalize Same-Sex Marriage: The Reluctance to Recognize Same-Sex Partners as Parents Instead of Strangers*, 9 J. GENDER RACE & JUST. 419, 419 (2005) (stating "many homosexual couples are having children through artificial means").

2. LISA BENNETT & GARY J. GATES, HUMAN RIGHTS CAMPAIGN FOUND., THE COST OF MARRIAGE INEQUALITY TO CHILDREN AND THEIR SAME-SEX PARENTS: A HUMAN RIGHTS CAMPAIGN FOUNDATION REPORT 3 (2004), available at <http://www.hrc.org/documents/costkids.pdf>.

3. See, e.g., Joslin, *supra* note 1, at 683; Nancy D. Polikoff, *This Child Does Have Two Mothers: Redefining Parenthood to Meet the Needs of Children in Lesbian-Mother*

how same-sex couples navigate their families as they plan for and have children in the face of constantly evolving social and legal realities.⁴ Instead, much of the research on same-sex families has concerned the effects of children raised in these households.⁵

This article explores the cultural and legal definitions gay and lesbian families give to parenthood and what that means for them in the current socio-legal context. Specifically, I examine how they culturally “do family,”⁶ how same-sex couples decide how to acquire children, what legal protections they avail themselves of, what they understand those protections to afford them, and finally what they understand as the social and emotional costs of achieving these perceived protections.

and Other Nontraditional Families, 78 GEO. L.J. 459, 461-62 (1990); Richard F. Storrow, *Rescuing Children from the Marriage Movement: The Case Against Marital Status Discrimination in Adoption and Assisted Reproduction*, 39 U.C. DAVIS L. REV. 305, 305-06 (2006); Lisa S. Chen, Comment, *Second-Parent Adoptions: Are They Entitled to Full Faith and Credit?*, 46 SANTA CLARA L. REV. 171, 171 (2005); Oren Goldhaber, Note, “I Want My Mommy’s”: *The Cry for Mini-DOMAs to Recognize the Best Interests of the Children of Same-Sex Couples*, 45 FAM. CT. REV. 287, 287 (2007); Maggie Manternach, Note, *Where is My Other Mommy?: Applying the Presumed Father Provision of the Uniform Parentage Act to Recognize the Rights of Lesbian Mothers and Their Children*, 9 J. GENDER RACE & JUST. 385, 385-86 (2005); John G. New, Note, “Aren’t You Lucky You Have Two Mamas?”: *Redefining Parenthood in Light of Evolving Reproductive Technologies and Social Change*, 81 CHI.-KENT. L. REV. 773, 773-74 (2006); Margaret S. Osborne, Note, *Legalizing Families: Solutions to Adjudicate Parentage for Lesbian Co-Parents*, 49 VILL. L. REV. 363, 363-66 (2004); Williams, *supra* note 1, at 419.

4. See Kathryn Almack, *Seeking Sperm: Accounts of Lesbian Couples’ Reproductive Decision-Making and Understandings of the Needs of the Child*, 20 INT’L J.L. POL’Y & FAM. 1, 1 (2006); Erica Haimes & Kate Weiner, *Everybody’s Got a Dad . . . : Issues for Lesbian Families in the Management of Donor Insemination*, 22 SOC. OF HEALTH & ILLNESS 477, 477 (2000).

5. See, e.g., Paul Cameron & Kirk Cameron, *Homosexual Parents*, 31 ADOLESCENCE, 757 (1996); Julie Schwartz Gottman, *Children of Gay and Lesbian Parents*, in HOMOSEXUALITY AND FAMILY RELATIONS 177-193 (Frederick W. Bozett & Marvin B. Sussman, eds., 1990); Nanette Gartrell et. al., *The National Lesbian Family Study: 4. Interviews with the 10-Year-Old Children*, 75 AMER. J. ORTHOPSYCHIATRY 518, 518-19 (2005); Elizabeth D. Gibbs, *Psychosocial Development of Children Raised by Lesbian Mothers: A Review of Research*, 8 WOMEN & THERAPY 65, 65-66 (1989); Abbie E. Goldberg, *Talking About Family: Disclosure Practices of Adults Raised by Lesbian, Gay, and Bisexual Parents*, 28 J. FAM. ISSUES 100, 101 (2007); Fiona Tasker & Susan Golombok, *Adults Raised as Children in Lesbian Families*, 65 AMER. J. ORTHOPSYCHIATRY 203, 203 (1995).

6. Amaryll Perlesz et. al., *Family in Transition: Parents, Children and Grandparents in Lesbian Families Give Meaning to ‘Doing Family’*, 28 J. OF FAM. THER. 175, 176 (2006). The phrase “doing family” represents the notion that family is in a constant state of transition. *Id.* Furthermore, it represents the view that an essentialist approach to the family as a discrete, heteronormative institution (i.e. one mother and one father) is no longer an appropriate basis of analysis. See, e.g., Melanie B. Jacobs, *Why Just Two? Disaggregating Traditional Parental Rights and Responsibilities to Recognize Multiple Parents*, 9 J.L. & FAM. STUD. 309, 309-12 (2007); Judith Stacey, *Gay and Lesbian Families: Queer Like Us*, in ALL OUR FAMILIES: NEW POLICIES FOR A NEW CENTURY: A REPORT OF THE BERKLEY FAMILY FORUM 144, 165 (Mary Ann Mason et. al., eds., 2nd ed. 2003).

I argue that what emerges from this data is the idea of the imprisoned family on two levels. First, within the family, parents have different levels of status and power because of their differing relationships with their children. This is due to the nature of law's willingness to recognize only certain types of parentage (biological versus non-biological parents),⁷ which can cause an emotional imprisonment for the parent whose relationship with the child may not be legally recognized (the non-biological parent). Second, due to these differing levels of legal parental recognition that vary across state lines, same-sex families are vulnerable to having their families dissolved as they move from one state to the next.⁸ While severe costs to the parent-child relationship exist at the time of a couple's dissolution of their relationship under the current legal climate,⁹ I suggest that the same legal climate exacts costs on *intact* same-sex family relationships.

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

No matter how courts attempt to distinguish societal trends and views from their own determination of the legal status of lesbian and gay families, a strict separation is impossible. Every decision that courts make . . . whether it be to affirm same-sex family structures, or to disparage their worth, tells a story that influences other courts, potential lesbian and gay parents, and society.¹⁰

He goes on to argue that courts can be influenced by the narratives of the parties involved since "lesbian and gay narratives have tremendous informational value. . . . These stories can effectively convey the 'substantial social costs of the exclusionary [or discriminatory] policy.'" ¹¹ While it is necessary and important to appreciate how the law responds to new and emerging family formations, it is equally important to reflect the mirror back on those families and examine how they, in turn, respond to the law. This article offers an empirical examination of same-sex families' understanding and response to the law through the use of qualitative data gathered from eight gay couples and ten lesbian couples in Washington State who planned and had at least one child together.

7. See Williams, *supra* note 1, at 420.

8. See Goldhaber, *supra* note 3, at 291, 293.

9. See Williams, *supra* note 1, at 420.

10. Timothy E. Lin, Note, *Social Norms and Judicial Decisionmaking: Examining the Role of Narratives in Same-Sex Adoption Cases*, 99 COLUM. L. REV. 739, 767 (1999).

11. *Id.* at 790 (citation omitted).

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

I. THE LEGAL FRAMEWORK SURROUNDING SAME-SEX FAMILY FORMATION¹²

For the most part, same-sex couples have availed themselves of two approaches in engaging in family formation: adoption and assisted reproductive technology,¹³ with varied legal outcomes.¹⁴ In this section, I explore how these two methods have worked for same-sex couples.

A. Adoption

As adoption has a much longer history in the United States and abroad, it is heavily regulated with varying results within the United States as well as internationally, particularly for same-sex couples. For example, while adoption law does not require adoptive parents to be married, some states do not allow unmarried partners, and in turn same-sex couples, to jointly adopt an unrelated child.¹⁵ Sixteen states

12. Virtually all of the cases discussed in this paper involve lesbian couples and their children because that is where the litigation tends to be, but this article discusses issues faced by all same-sex households.

13. Other methods exist, such as sexual intercourse with a donor who will waive parental rights. In some cases, the donor may have no contact with the resulting child or play a limited role with no recognized legal relationship to the child.

14. See, e.g., Osborne, *supra* note 3, at 356-66, n.19.

15. Massachusetts, Vermont, New Jersey, California and Washington, D.C. explicitly allow for joint adoption by same-sex couples because of the legal rights afforded to these couples via marriage, civil unions, and domestic partnerships respectively. See Cal. Fam. Code §§ 8601, 8603 (West 2008); D. C. CODE § 16-302 (2008); MASS. GEN. LAWS ANN. ch. 210, §1 (West 2008); N.J. STAT. ANN. § 9:3-43 (West 2008); VT. STAT. ANN. tit. 15A, § 1-101 (2008). Alternatively, Oklahoma, Colorado, and Mississippi make same-sex joint adoption virtually impossible because of bans on adoption by unmarried couples. See COLO. REV. STAT. ANN. § 19-5-202 (West 2008); MISS. CODE ANN. § 93-17-3(5) (West 2008); OKLA. STAT. ANN. tit. 10, § 7503-1.1 (West 2008). Florida and Utah ban all lesbian and gay individuals and couples from adoption. See FLA. STAT. ANN. § 63.042(3) (West 2008); UTAH CODE ANN. § 78B-6-115 (West 2008).

contemplated initiatives on the November 2008 ballot to ban gays and lesbians from adopting children.¹⁶ Similarly, in international adoptions many countries do not allow for joint adoption by unmarried couples, or may specifically bar same-sex couples from adopting.¹⁷ By disallowing joint adoption, same-sex couples cannot acquire legal parentage simultaneously, if at all, because only one member of the couple will be permitted to adopt the child.¹⁸ Furthermore, unless the couple resides in a state that permits second-parent adoption, the second member will never be allowed to acquire the same parental rights.¹⁹ This legal vulnerability can sometimes lead to tragic results.²⁰

16. Alabama, Alaska, Arizona, Georgia, Indiana, Kansas, Kentucky, Michigan, Missouri, Ohio, Oregon, Pennsylvania, Tennessee, Utah, Vermont, and West Virginia all considered such initiatives. Andrea Stone, *Drives to Ban Gay Ban Adoption Heat Up in 16 States*, USA TODAY, Feb. 20, 2006, available at http://www.usatoday.com/news/nation/2006-02-20-gay-adoption_x.htm; *States Weigh Ban on Gay Adoption by Gay Parents* (NPR radio broadcast Mar. 2, 2006), available at <http://www.npr.org/templates/story/story.php?storyId=5241925>. The Tennessee legislature introduced such a bill on January 30, 2008. David W. Shelton, Op-Ed., *Anti-Gay Adoption Bill Filed in Tennessee*, CLARKSVILLE ONLINE (Tennessee), Jan. 31, 2008, <http://www.clarksvilleonline.com/2008/01/31/anti-gay-adoption-bill-filed-in-tennessee>.

17. Only Sweden, the Netherlands, Andorra, Spain, the United Kingdom, Belgium, and Canada allow for same-sex joint adoption. See ILGA Europe, *Marriage and Partnership Rights for Same-Sex Partners: Country-by-Country*, http://www.ilga-europe.org/europe/issues/marriage_and_partnership/marriage_and_partnership_rights_for_same_sex_partners_country_by_country (last visited Nov. 3, 2008); Danny Sandor, Case Note, *Joint Adoption by Same Sex Spouses in Canada*, 43 FAM. MATTERS 27 (1996). On the other hand, countries like China and Guatemala, where many adoptions occur, will not knowingly allow a gay or lesbian individual to adopt a child. Scott D. Ryan et. al., *Coming Out of the Closet: Opening Agencies to Gay and Lesbian Adoptive Parents*, 49 SOC. WORK 85, 86 (2004). In these cases not only is one member of the couple excluded from the adoption, the individual who is adopting must remain closeted throughout the adoption process. However, it seems likely that under the rules of the Hague Convention on Protection of Children and Co-operation in Respect of Intercountry Adoption ("Hague Adoption Convention"), which took effect in the United States on April 1, 2008, home studies will be required of both prospective parents; thus same-sex couples will no longer have the option of remaining closeted. See World Organization for Cross-Border Co-operation in Civil and Commercial Matters, Hague Conference on Private International Law, Hague Convention on Protection of Children and Co-operation in Respect of Intercountry Adoption, art. 5, 15, 17, May 29, 1993, available at http://www.hcch.net/index_en.php?act=conventions.text&cid=69 (entered into force May 1, 1995); Derek Repp, *New Intercountry Adoption Standards Implemented in United States*, AMERICA.GOV, May 1, 2008, <http://www.america.gov/st/diversity-english/2008/May/20080430094700zjsredna0.1149866.html>.

18. See ILGA Europe, *supra* note 17. See Joslin, *supra* note 1, at 691.

19. See Joslin, *supra* note 1, at 691.

20. *Id.* at 689 (citing *Nancy S. v. Michelle G.*, 279 Cal. Rptr. 212, 217 (Cal. Ct. App. 1991)). See, e.g., *B.F. v. T.D.*, 194 S.W.3d 310, 310-12 (Ky. 2006) (holding adoptive mother's partner lacked standing to assert custody or visitation rights either statutorily or equitably because no documents recognized her as a guardian, and although she did provide financial support, she was not the primary caretaker of the child); *In re the Interest of Z.J.H.*, 471 N.W.2d 202, 205 (Wis. 1991) (holding lesbian ex-partner of a child's adoptive mother had no right to custody or visitation as she stood as a third party), *overruled by In re Custody of H.S.H.-K.*, 533 N.W.2d 419 (Wis. 1995).

Second-parent adoption allows the partner of a legally recognized parent to adopt the latter's child with the parent's consent, without terminating the legally recognized parent's legal rights.²¹ It is a legal device that allows unmarried couples to both adopt a child in succession, if not simultaneously.²² Currently, second-parent adoptions are available in ten states and in some counties of fifteen other states.²³ This, however, leaves a large segment of gay and lesbian families without the option of second-parent adoption.²⁴ Specifically, twenty-nine percent of same-sex families live in jurisdictions where the availability of second-parent adoption is unclear or is expressly prohibited.²⁵ In fact, Miami-Dade County is ranked ninth in the United States of counties with the greatest number of same-sex couples with children,²⁶ yet second-parent adoption for same-sex couples is illegal in Florida.²⁷

Aside from the jurisdictional bars discussed above, adoption as a way to establish parentage brings other problems for same-sex

21. See Joslin, *supra* note 1, at 691.

22. See *id.*; JOAN M. BURDA, GAY, LESBIAN, AND TRANSGENDER CLIENTS: A LAWYER'S GUIDE 90 (2008).

23. See Joslin, *supra* note 1, at 691. California, Colorado, Connecticut, and Vermont allow for second-parent adoption by statute. See CAL. FAM. CODE § 9000(b) (West 2008); COLO. REV. STAT. ANN. §§ 19-5-208(5), 19-5-210(1.5), 19-5-211(1.5) (West 2008); CONN. GEN. STAT. ANN. § 45a-724(3) (West 2008); VT. STAT. ANN. tit. 15A § 1-102(b) (2008). In addition, a California court ruled that the state's adoption law extends to same-sex couples not registered as domestic partners. See *Sharon S. v. Superior Court*, 73 P.3d 554, 554, 565-66, 571-72 (Cal. App. Dep't. Super. Ct. 2003). The District of Columbia, Illinois, Indiana, Massachusetts, New Jersey, New York, and Pennsylvania all have court rulings that interpret their state adoption laws to allow for second-parent adoption. *In re M.M.D. & B.H.M.*, 662 A.2d 837, 862 (D.C. 1995); *In re Petition of K.M. & D.M.*, 653 N.E.2d 888, 898-99 (Ill. App. Ct. 1995); *In re Adoption of K.S.P.*, 804 N.E.2d 1253, 1259-60 (Ind. Ct. App. 2004); *In re Adoption of M.M.G.C.*, 785 N.E.2d 267, 270-71 (Ind. Ct. App. 2003); *Adoption of Tammy*, 619 N.E.2d 315, 319-21 (Mass. 1993); *In re the Adoption of Two Children by H.N.R.*, 666 A.2d 535, 538 (N.J. Super. Ct. App. Div. 1995); *In re Jacob*, 660 N.E.2d 397, 397 (N.Y. 1995); *In re Adoption of R.B.F. & R.C.F.*, 803 A.2d 1195, 1200, 1202 (Pa. 2002). Alabama, Alaska, Delaware, Hawaii, Iowa, Louisiana, Maryland, Michigan, Minnesota, Nevada, New Mexico, Oregon, Rhode Island, Texas, and Washington all have certain counties where trial courts have granted second parent adoptions. Katharine Swan, *The Rainbow Babies, All About Second Parent Adoptions for Gay Families*, <http://www.therainbowbabies.com/SecondParentAdoption.html> (last visited Nov. 4, 2008). The appellate courts in Nebraska, Ohio, and Wisconsin have ruled that second parent adoption is not possible under their state's adoption laws. *In re Adoption of Luke*, 640 N.W.2d 374, 383 (Neb. 2002); *In re Adoption of Doe*, 719 N.E.2d 1071, 1072 (Ohio Ct. App. 1998); *In the Interest of Angel Lace M.*, 516 N.W.2d 678, 682-83, 686 (Wis. 1994). It is unclear whether state adoption laws permit second-parent adoption in the remaining twenty-two states. See Joslin, *supra* note 1, at 691.

24. See BENNETT & GATES, *supra* note 2, at 8 fig. 2.

25. See *id.*

26. *Id.* at 5.

27. *Gilmore v. Sec'y of the Dept. of Children and Fam. Servs.*, 358 F.3d 804, 806-07 (11th Cir. 2004), *cert. denied*, 543 U.S. 1081 (2005).

couples. Although states have traditionally recognized the final, valid adoption decrees of other states,²⁸ in accordance with the Full Faith and Credit Clause of the United States Constitution,²⁹ even if that state does not allow second-parent adoption,³⁰ at least one state legislature attempted to ban second-parent adoptions involving same-sex couples performed in other states.³¹

In *Finstuen v. Edmondson*,³² three families challenged the validity of Oklahoma's statute, stating that it violated the Full Faith and Credit Clause, the Equal Protection Clause, the Due Process Clause, and the Right to Travel.³³ The case involved two lesbian families in which one partner in both families had used second-parent adoption to establish legal parentage for the non-biological mother.³⁴ The third family involved a gay couple who, in an open adoption, agreed to take the child "back to Oklahoma to visit her birth family."³⁵ The adoption was finalized in Washington State, but the couple sought a birth certificate from Oklahoma.³⁶ Initially, the Department of Health issued a certificate with only one of the fathers' names on it.³⁷ The Oklahoma Attorney General issued an opinion stating that birth certificates must contain both fathers' names in accordance with the Full Faith and Credit Clause, requiring states to recognize Washington's final adoption decree.³⁸ In response to this opinion, the legislature enacted the amendment to the Oklahoma adoption code at issue in the case.³⁹

28. Barbara Cox noted that in 2000, Mississippi enacted a ban on same-sex couples adopting in its state, but rejected a proposed clause that would have refused to recognize same-sex couples' adoptions issued in other states. Barbara J. Cox, *Adoptions by Lesbian and Gay Parents Must Be Recognized by Sister States Under the Full Faith and Credit Clause Despite Anti-Marriage Statutes that Discriminate Against Same-Sex Couples*, 31 CAP. U. L. REV. 751, 781 (2003).

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

30. See, e.g., *Russell v. Bridgens*, 647 N.W.2d 56, 58-9 (Neb. 2002) (noting that Nebraska must recognize a second-parent adoption granted in Pennsylvania, even though Nebraska would not have permitted such an adoption); Gay & Lesbian Advocates & Defenders, *Bibliography of Adoption Cases* 8, <http://www.glad.org/uploads/docs/publications/adoption-bibliography.pdf> (last visited Nov. 3, 2008) (summarizing *Erez v. Starr*, 97 CVD 64 (Durham Gen. Ct. 1997), *appeal dismissed*, COA99-1534 (N.C. Ct. App. 2000) and stating that the judge in this case found North Carolina must honor second-parent adoption granted in Washington state) [hereinafter GLAD].

31. See OKLA. STAT. ANN. tit. 10, § 7502-1.4(A) (West 2008).

32. 497 F. Supp. 2d 1295, 1300 (W.D. Okla. 2006), *aff'd in part*, *Finstuen v. Crutcher*, 496 F.3d 1139 (10th Cir. 2007).

33. *Id.* at 1300.

34. *Id.* at 1301-02.

35. *Id.* at 1301.

36. *Id.*

37. *Id.*

38. *Id.*

39. *Id.*

The U.S. District Court for the Western District of Oklahoma struck down the amendment on all of the grounds alleged except the Right to Travel.⁴⁰ The court found that because the two fathers had adopted from Oklahoma but had not actually traveled to the state, they did not have standing and dismissed their claim.⁴¹ Although the legislation is no longer in force, it suggests cultural resistance to same-sex parentage is strong enough to be expressed in political action, and that the dominant culture has permission to question or undermine the legitimacy of same-sex parents.

For those families who do live in jurisdictions that allow for second-parent adoption, it can be difficult finding access to lawyers who have an expertise in this area.⁴² Furthermore, the expense of completing a second-parent adoption, after expending considerable resources on an international⁴³ or domestic adoption,⁴⁴ may be cost-prohibitive for some couples.⁴⁵ In addition to the legal costs, the state requirements surrounding second-parent adoption mean additional expenditures⁴⁶ for evaluations by a licensed psychologist, and a home study by a social worker to determine if the adoption is in the best interests of the child.⁴⁷ These evaluations also mean having to divulge one's sexual orientation, creating a risk to the parent's privacy and exposure to bias, a concern that also exists with joint adoption proceedings.⁴⁸ In some cases, couples are simply not aware that a second adoption is necessary, may not want to adopt, or cannot adopt.⁴⁹

40. *Id.* at 1315.

41. *Id.* at 1304, 1315.

42. See Joslin, *supra* note 1, at 692.

43. International adoption can cost \$7,000-\$30,000. See Adoption.com, *Adoption Costs*, <http://costs.adoption.com> (last visited Sep. 26, 2008).

44. Domestic adoption can cost \$5,000-\$40,000. *Id.*

45. A second-parent adoption can cost \$2,500-\$3,000. See Manternach, *supra* note 3, at 411 (citing Carol Ness, *Lesbian Moms Gain Rights*, S.F. EXAMINER, May 2, 1999, at A-1).

46. For example, the Department of Social Services (DSS) may charge an investigation fee of \$1,250. See Emily Duskow, *The Second Parent Trap: Parenting for Same-Sex Couples in a Brave New World*, 20 J. JUV. L. 1, 21 n.118 (1999).

47. See *id.* at 6-7 (discussing the California DSS process of home study); BURDA, *supra* note 22, at 85 (stating common statutory adoption requirements include a home study and determination of the child's best interests).

48. See Scott D. Ryan & Scottye Cash, *Adoptive Families Headed by Gay or Lesbian Parents: A Threat . . . or Hidden Resource?*, 15 U. FLA. J.L. & PUB. POL'Y 443, 460 table 2 (2004).

49. As Julie Shapiro points out, a child adopted or born of a previous heterosexual relationship in which both biological or adoptive parents are still involved with the child, cannot be adopted by the parent's new partner (the same is true for heterosexual couples). See Julie Shapiro, *A Lesbian-Centered Critique of Second-Parent Adoptions*, 14 BERKELEY WOMEN'S L.J. 17, 27 (1999). In addition, prospective second-parent adopters may find that criminal, drug, or alcohol abuse histories will prevent them from adopting. See *id.* at 31. Finally, lesbian and gay families that do not fit the heteronormative nuclear family model may also have their applications denied. See *id.* at 31-32.

One further issue in second-parent adoption is the waiting period, which courts do not often waive.⁵⁰ During the waiting period, the petitioning parent does not have the legal status of parent, which means the child cannot enjoy the benefits and protections that the partner could otherwise provide.⁵¹ This leaves the child in a vulnerable position if the legal parent were to die or be unavailable to sign medical consent forms.⁵² It also leaves the petitioning parent in a defenseless state should the relationship end prior to the completion of the adoption or should the legal parent change his or her mind in consenting to the adoption.⁵³ This situation could leave the petitioning parent without any legal rights to the child.⁵⁴ Similarly, should the petitioning parent change his or her mind about adopting the child during this waiting period, he or she has no legal obligations to the child he or she jointly intended to bring in to the family.⁵⁵ Thus, the "birth" parent may also be put in a vulnerable position.

These outcomes starkly contrast the treatment of married couples. Not only does every state in the nation allow married couples to jointly adopt, but all states also recognize step-parent adoption, in which a parent's new spouse may adopt the parent's child with consent and without terminating the other parent's legal rights.⁵⁶ While second-parent adoptions require pre- and post-placement home studies, a waiting period and a psychological evaluation, these requirements are frequently waived in step-parent adoptions in favor of streamlining the process.⁵⁷ Courts give great weight to the parent's spouse's petition to adopt.⁵⁸ In most cases, unless a same-sex couple lives in Massachusetts, California, or Connecticut, where marriage is available to them,⁵⁹ or in states with civil unions, they are barred

50. A typical second-parent adoption can take six to eight months to complete. Doskow, *supra* note 46, at 21.

51. See National Center for Lesbian Rights, *Adoption by Lesbian, Gay and Bisexual Parents: An Overview of Current Law*, 9 (2004), <http://www.nclrights.org/site/DocServer/adptn04.pdf?docID=1221>.

52. See *id.*

53. See Doskow, *supra* note 46, at 9-12.

54. See *id.* at 9.

55. See *id.*

56. Storrow, *supra* note 3, at 335-36.

57. *Id.* at 336-37. See SANFORD N. KATZ, *FAMILY LAW IN AMERICA* 174-75 (2003).

58. See Storrow, *supra* note 3, at 334-35.

59. *In re Marriage Cases*, 183 P.3d 384, 433-34 (Cal. 2008) (holding a statute limiting marriage to opposite sex couples violated the constitution) (note, however, that as this article went to press, California voters passed Proposition 8, which reverses this decision and amends the California constitution to ban gay marriage. See *Los Angeles: No More Licenses for Same-Sex Marriages*, CNN, Nov. 6, 2008); *Opinions of the Justices to the Senate*, 802 N.E.2d 565, 567-68 (Mass. 2004) (discussing *Goodridge v. Dep't. of Pub. Health*, 440 Mass. 309 (2003), where state law allowing same-sex marriage was upheld);

from taking advantage of the more efficient process of step-parent adoption.⁶⁰

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

The increased use of assisted reproduction⁶¹ by both heterosexual and homosexual couples, married or not, has led to a complex set of responses by courts, as the law seeks to catch up with these new approaches to family formation and the issues of parentage.⁶² Assisted reproduction comes in a variety of formats.⁶³ Artificial insemination uses an anonymous or known sperm donor to impregnate a female member of a partnership.⁶⁴ In vitro fertilization, also known as IVF, uses a couple's own genetic material or a donated egg and/or sperm, which is then fertilized outside the uterus and implanted in a female member of the partnership.⁶⁵ More complex techniques include surrogacy, in which a male member of a partnership's sperm or donor sperm is used to impregnate a surrogate, and gestational surrogacy, in which IVF using an anonymous egg and sperm donation/sperm from a male member of the partnership is fertilized and later implanted in a surrogate mother who will carry the child to term for the benefit of a couple intending to be the child's parents.⁶⁶ The treatment of parentage for the children born from these techniques has been largely determined by the nature of the relationship between the two people claiming to be the child's parents.⁶⁷ I begin with an exploration

Kerrigan v. Commissioner of Public Health, 289 Conn. 135, 2008 WL 4530885 at *1, *4, *46-47 (Conn. 2008) (holding a statute restricting marriage to heterosexual couples violated same-sex couples equal protection rights and was unconstitutional in Connecticut).

60. Vermont allows a partner of a biological parent to engage in step-parent adoption if the partner is in a civil union with that biological parent. See VT. STAT. ANN. tit. 15A, § 4-101(b) (2008); Vermont Judiciary, Vermont Probate Court: Stepparent/Partner Adoptions, <http://www.vermontjudiciary.org/courts/probate/probateinfo/adoptsteppar.aspx> (last visited Aug. 29, 2008) (stating that "partner" is not defined in the legislation, but it is usually interpreted as a person who has been part of a civil union).

61. CTRS. FOR DISEASE CONTROL AND PREVENTION ET. AL., U.S. DEPT OF HEALTH & HUMAN SERVS., 2000 ASSISTED REPRODUCTIVE TECHNOLOGY SUCCESS RATES: NATIONAL SUMMARY AND FERTILITY CLINIC REPORTS 57 (2002), available at <http://www.cdc.gov/ART/ArchivedARTPDFs/ART2000.pdf> [hereinafter CDC].

62. See Jacobs, *supra* note 6, at 318; Recent Cases — *Family Law* — *Unmarried Couples* — *Massachusetts Supreme Judicial Court Holds that a Former Domestic Partner Need Not Fulfill Promises to Support a Child Born After the Relationship Has Dissolved* T.F. v. B.L., 813 N.E.2d 1244, 118 HARV. L. REV. 1039, 1039 (2005) [hereinafter Recent Cases].

63. See CDC, *supra* note 61, at 3.

64. See 1 THE NEW ENCYCLOPEDIA BRITANNICA 605 (15th ed., 2007).

65. See CDC, *supra* note 61, at 3.

66. See 11 THE NEW ENCYCLOPEDIA BRITANNICA 413 (15th ed., 2007).

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

of how the law treats children born to married couples through assisted reproduction. Next, I examine how the law treats children born to unmarried different- or same-sex couples through the use of these same techniques.

Traditionally, the courts have looked to either a state's common law or statutory version of the Uniform Parentage Act ("UPA") to determine parentage.⁶⁸ In general, the gestational mother⁶⁹ (unless a surrogate mother is used)⁷⁰ and her husband, are both presumed to be the legal parents of the child born in their marriage.⁷¹ This presumption exists even when the parents use artificial insemination, and the husband clearly has no biological link to the child.⁷² In fact, even if the couple marries after the birth of the child, the presumption remains as long as the husband holds the child out as his own according the statutory guidelines.⁷³ For those remaining states that have not enacted legislation dealing with parentage occurring from artificial insemination, courts have applied common law to create a

68. See UNIF. PARENTAGE ACT 9B U.L.A. 4 (Supp. 2002); Jacobs, *supra* note 6, at 318. The UPA was amended in 2002 but only seven states have adopted this version. *Id.* Fourteen states have adopted the 1973 version of this Act. UNIF. PARENTAGE ACT 9B U.L.A. 67 (Supp. 2008).

69. The gestational mother is the female who carries and gives birth to the child. See 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, 7 n.32 (2006); New, *supra* note 3, at 803-04.

70. A surrogate mother is a female who may or may not have a genetic link to the child, but does give birth to the child, and agrees to waive any presumed parental rights as part of a contract with the people who intended the child to be created. See THE NEW ENCYCLOPEDIA BRITANNICA, *supra* note 66 at 413; New, *supra* note 3, at 803-04.

71. See, e.g., Michael H. v. Gerald D., 491 U.S. 110, 124-30 (1989) (holding that a child born of an adulterous affair was still the child of the husband, despite the wife's lover's claim to fatherhood because, among other things, a long history of biological presumption exists to preserve the family unit); Cross v. Cross, 3 Paige Ch. 139, 140-41 (N.Y. Ch. 1832) (discussing the "ancient" and "modern" presumptions of parentage between married couples and rebutting those presumptions).

Furthermore, this presumption finds itself codified in many state statutes. See ALA. CODE § 26-17-5(a)(1) (2008); ALASKA STAT. § 18.50.160(d) (2008); ARIZ. REV. STAT. ANN. § 25-814(A)(1) (2008); CAL. FAM. CODE § 7611(a) (Deering 2008); HAW. REV. STAT. ANN. § 584-4(a)(1-3) (LexisNexis 2008); 750 ILL. COMP. STAT. ANN. 45/5-5(a)(1) (LexisNexis 1999); IND. CODE ANN. §§ 31-14-7-1(1), (2) (LexisNexis 2008); KY. REV. STAT. ANN. § 406.011 (West 2008); MD. CODE ANN., FAM. LAW § 5-1027(c)(1) (LexisNexis 2008); MASS. GEN. LAWS ANN. ch. 209C, § 6(a)(1)-(3) (West 2008); MINN. STAT. ANN. § 257.55 (1)(a)-(c) (West 2008); MO. ANN. STAT. § 210.822(1-3) (West 2008); MONT. CODE ANN. § 40-6-105(1) (2008).

72. Specifically, section 5 of the 1973 UPA states that if a wife is artificially inseminated "under the supervision of a licensed physician," with her husband's consent, and with sperm from someone other than the husband, the husband is still legally recognized at the child's natural father. UNIF. PARENTAGE ACT § 5(a), 9B U.L.A. 407 (1973). The 1973 UPA goes on to say that the sperm donor will not be recognized in law as the child's natural father. *Id.* at § 5(b).

73. See UNIF. PARENTAGE ACT § 204(4)(a)(A)-(C), 9B U.L.A. 17 (Supp. 2008).

parental relationship where none existed biologically.⁷⁴ Although this presumption is not uniformly interpreted by the states, generally it takes one of four forms: (1) a significant but not totally insurmountable irrefutable presumption; (2) a rebuttable presumption, if to do so is in the child's best interests; (3) a rebuttable presumption that is triggered at the time of divorce regardless of the length of the parent-child relationship, or whether it would be in the best interests of the child; and (4) a rebuttable presumption available to anyone who believes he is the parent to the child in question.⁷⁵

What has emerged either by statute or common law is the creation of parenthood by focusing on intent over biology for husbands,⁷⁶ and sometimes for wives.⁷⁷ The legal parentage of married women who use assisted reproduction is a little more complex. Because the 1973 UPA did not contemplate situations that would involve IVF, egg donors, and surrogate mothers, and because the 2002 UPA, which did address these issues, has only been adopted by seven states, some confusion around this statutory presumption has arisen.⁷⁸

It seems the marital presumption to paternity is also carried over in same-sex relationships in which a couple resides in a state that affords them the same rights and protections as married couples, if not the right to marriage itself.⁷⁹ In Massachusetts, one of only three⁸⁰ states that permit couples of the same sex to marry,⁸¹ the couple

74. See, e.g., *K.S. v. G.S.*, 440 A.2d 64, 68-69 (N.J. Super. Ct. Ch. Div. 1981) (finding husband the father of child born via artificial insemination because he had not established that he had withdrawn his consent); *Jackson v. Jackson*, 739 N.E.2d 1203, 1205-06, 1209 (Ohio Ct. App. 2000) (creating a duty to support twins where husband had orally consented to wife's artificial insemination).

75. Anderson, *supra* note 69, at 8.

76. See *In re Marriage of Buzzanca*, 72 Cal. Rptr. 2d 280, 291-93 (Cal. Ct. App. 1998) (holding that husband was responsible for child support as he intended for the child to be brought about).

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

78. See *In re Baby M.*, 537 A.2d 1227, 1235-36, 1250, 1253, 1256 (N.J. 1988) (holding surrogate contract illegal and the surrogate to be the natural mother, but finding the husband of the other party to the surrogacy contract was the natural father, not the husband of the surrogate mother).

79. See, e.g., *Miller-Jenkins v. Miller-Jenkins*, 912 A.2d 951, 967-69 (Vt. 2006).

80. Again, as this issue went to press, the passage of Proposition 8 in California has called into question the ability of same-sex couples to marry in this state.

81. Christine Vestal, *Ruling Could Ripple Across Country: States at Odds Over California's Recognition of Same-Sex Marriages*, ABERDEEN AM. NEWS (California), June 17, 2008, at Front Page, available at 2008 WLNR 11460097. But see *Los Angeles: No More Licenses for Same-Sex Marriages*, *supra* note 59. See also Robert D. McFadden, *Gay Marriage Is Ruled Legal in Connecticut*, N.Y. TIMES, Oct. 11, 2008, at A1, available at <http://www.nytimes.com/2008/10/11/nyregion/11marriage.html?pagewanted=1> (announcing the decision of the Connecticut Supreme Court striking down the state civil union law and ruling same-sex couples can marry).

must marry in order to protect this presumption.⁸² According to the Massachusetts Supreme Judicial Court in an advisory opinion to the Senate, the State could not create civil unions while barring same-sex marriage because it is unconstitutional, on due process and equal protection grounds, to deny same-sex couples the opportunity to marry, and thus treat them differently from married couples.⁸³ This suggests that a child created using artificial insemination born to a same-sex married couple has two legally recognized parents from the moment of conception, regardless of biological or gestational connection to the child.⁸⁴

Currently, only Oregon,⁸⁵ through registered domestic partnership, Rhode Island and New York,⁸⁶ through out-of-state recognition, and Vermont,⁸⁷ New Jersey,⁸⁸ and New Hampshire,⁸⁹ through civil unions, confer virtually all the rights, protections, and responsibilities of married couples to same-sex couples.⁹⁰ Maine, Maryland, Hawaii, Washington, and the District of Columbia also offer limited rights and recognition to same-sex families.⁹¹ California's Domestic

82. See *T.F. v. B.L.*, 813 N.E.2d 1244, 1246, 1252-54 (Mass. 2004) (holding parenting agreement was unenforceable and that parentage options in equity were not available to create new obligations, only existing ones); see also Recent Cases, *supra* note 62, at 1039 (discussing impact of Massachusetts court decision recognizing only family relationships that are expressly set out in a statute).

83. *In re Opinions of the Justices to the Senate*, 802 N.E.2d 565, 572 (Mass. 2004). It is highly likely that the same rule applies in California, where same-sex marriage took effect on June 17, 2008. The California Supreme Court's opinion dealt with a comparable issue on marriage as the Massachusetts opinion cited here. See *In re Marriage Cases*, 183 P.3d 384, 398 n.3 (Cal. 2008); Vestal, *supra* note 81. But see *Los Angeles: No More Licenses for Same-Sex Marriages*, *supra* note 59.

84. See Williams, *supra* note 1, at 439 (citing Mark Strasser, *When is a Parent Not a Parent? On Doma, Civil Unions, and Presumptions of Parenthood*, 23 CARDOZO L. REV. 299, 299 (2001)).

85. Oregon's domestic partnership statute, the Oregon Family Fairness Act, took effect on January 1, 2008. Oregon Family Fairness Act, ch. 99, §§ 1-9, OR. REV. STAT. ANN., §§ 107.615, 192.842, 205.320, 409.300, 432.005, 432.235, 432.405, 432.408, (2007).

86. New York's Governor Patterson ordered that all state agencies recognize same-sex marriages performed out of state (or nation) in a memorandum publicized on May 29, 2008. Memorandum from David Nocenti, State of New York, Executive Chamber, to All Agency Counsel (May 14, 2008). In addition, a county court ordered the recognition of a same-sex marriage performed in Canada in *Martinez v. Co. of Monroe*, 850 N.Y.S.2d 740, 744 (N.Y. App. Div. 2008), *appeal denied* 10 N.Y.3d 856 (2008).

87. VT. STAT. ANN. tit. 15, § 1202 (2008).

88. *Lewis v. Harris*, 908 A.2d 196, 196 (N.J. 2006) (holding that the New Jersey legislature would be required to amend or create laws in order to provide civil unions for same-sex couples to enjoy the same rights and benefits of married couples).

89. New Hampshire's House Bill 437, An Act Permitting Same Gender Couples to Enter Civil Unions and Have the Same Rights, Responsibilities, and Obligations as Married Couples, took effect on January 1, 2008. N.H. REV. STAT. ANN. §§ 457-A:1 to 457-A:8 (2008).

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

91. National Gay and Lesbian Taskforce, Relationship Recognition for Same-Sex Couples in the U.S. (Oct. 15, 2008), <http://www.thetaskforce.org/downloads/reports/issue>

Partner Rights and Responsibilities Act specifically addresses the parent-child relationship in domestic partnerships with the following language:

The rights and obligations of registered domestic partners with respect to a child of either of them shall be the same as those of spouses. The rights and obligations of former or surviving registered domestic partners with respect to a child of either of them shall be the same as those of former or surviving spouses.⁹²

When read together with California's fatherhood presumption statute on children created by artificial insemination born to a married couple,⁹³ children created in the same way and born to a registered domestic partnership couple would have two legal parents under this presumption. This protection appears to be afforded to the couple without judicial intervention or a requirement that both parties have a biological/gestational connection to the child.⁹⁴ A similar result seems likely to occur in civil union states.⁹⁵

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

The rights of parties to a civil union, with respect to a child of whom either becomes the natural parent during the term of the civil union, shall be the same as those of a married couple, with respect to a child of whom either spouse becomes the natural parent during the marriage.⁹⁶

_maps/relationship_recognition_10_08.pdf; National Conference of State Legislatures, *Same Sex Marriage, Civil Unions and Domestic Partnerships* (Oct. 2008), <http://www.ncsl.org/programs/cyf/samesex.htm>.

92. CAL. FAM. CODE § 297.5(d) (Deering 2008). See also NATIONAL CENTER FOR LESBIAN RIGHTS & EQUALITY CALIFORNIA, *THE CALIFORNIA DOMESTIC PARTNERSHIP LAW: WHAT IT MEANS FOR YOU AND YOUR FAMILY* 15 (2007), <http://www.nclrights.org/site/DocServer/AB205.04.2007.pdf?docID=1264> [hereinafter NCLR & EQUALITY CA] (stating that the presumption of parentage for children born of a registered domestic partnership will apply before or after the act took effect January 2005. Under the Act, lesbian couples conceiving via artificial insemination can have both their names included on the birth certificate at birth, while gay couples in a registered domestic partnership using a surrogate will still need a declaration of parentage by a court before partners can both be included on the birth certificate, similar to heterosexual couples.). But see *K.M. v. E.G.*, 117 P.3d 673 (Cal. 2005) (declining to rule on the parental presumption for children born to a same-sex couple who had registered as a domestic partnership because they found parentage for both mothers on other grounds). The status of parentage in domestic partnerships remains important in California because same-sex couples will not necessarily choose to marry as they engage in family formation.

93. CAL. FAM. CODE § 7613(a) (Deering 2008).

94. See *id.*

95. See Anderson, *supra* note 69, at 5 (arguing the parental presumption would exist in domestic partnership and civil union states under statute).

96. VT. STAT. ANN. tit. 15, § 1204(f) (2008).

Likewise, when read in conjunction with Vermont's parentage statute, the non-biological parent in a civil union appears to have the same legal status as the biological parent of the child created with artificial insemination.⁹⁷

However, in *Miller-Jenkins v. Miller-Jenkins*,⁹⁸ the Vermont Supreme Court used common law, not the statutory parental presumption of § 308(4), because it found the statute irrelevant to the facts of the case.⁹⁹ The court found that the legislature enacted the statute to make bringing child support actions easier.¹⁰⁰ Although the court found the statute inapposite to this case because there was nothing in the legislative history to suggest that it was intended to mediate the parentage rights of children born to same-sex couples or through reproductive technology,¹⁰¹ it did make clear that the statute could not be interpreted to mean biology is the only determinant of parentage as the appellant argued.¹⁰²

According to the court, such an interpretation would mean "the husband of a wife who bears an artificially inseminated child cannot be the father of that child, just like a civil union spouse cannot be a parent to the child."¹⁰³ The court went on to state that the appellant's argument would mean that a civil union partner of a biological parent to an artificially inseminated child would have no parentage rights unless she/he formally adopted the child.¹⁰⁴ Such an outcome would undermine the intent of the legislature in creating legal equality between civil unions and marriages.¹⁰⁵

Noting the legislature's silence on the issue of parentage for families who have used assisted reproductive technology, the court stressed its preference for legislative guidance, but in its absence, turned to common law to establish the presumption of parentage for the non-biological parent in this case.¹⁰⁶ In concluding that the non-biological mother was a parent to the child at issue in this case, the court declared, "in accordance with the common law, the couple's legal

97. VT. STAT. ANN. tit. 15, § 308(4) (2008) (stating in part that a rebuttable presumption exists that a person is a natural parent to a child born to a couple who is legally married at the time of the birth).

98. 912 A.2d 951 (Vt. 2006), *cert. denied*, 127 S. Ct. 2130 (2007).

99. *Id.* at 969.

100. *Id.* at 966.

101. *Id.*

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

103. *Id.* at 967.

104. *Id.* at 968.

105. *Id.*

106. *Id.* at 968-69.

union at the time of the child's birth is extremely persuasive evidence of joint parentage."¹⁰⁷ Thus, while Vermont's statutory language was not controlling, the court still found the same presumption of parenthood that exists for married couples was available to civil union couples under the common law.¹⁰⁸ Whether this holds true in the remaining states with civil unions depends on the common law of those states, the legislative intent of the statute creating a presumption, and whether the legislature has spoken on the issue of parentage through the use of assisted reproductive technology.¹⁰⁹

Meanwhile, a New Jersey Superior Court determined that a child conceived through artificial insemination and born to a same-sex couple that had married in Canada and now resided in New Jersey had the presumption of parentage under New Jersey's artificial insemination statute.¹¹⁰ In this case, *In re Child of K.R.*,¹¹¹ a couple sought to establish legal parentage for the non-gestational mother prior to the child's birth.¹¹² In ruling that the state's artificial insemination statute should apply to children born to a same-sex married couple, the New Jersey court asserted that it was the intent of such statutes to identify and provide the certainty of parentage for the benefit of the child.¹¹³

Although such a presumption does appear to exist for parents in a domestic partnership, civil union, or marriage, this parentage presumption does not necessarily exist beyond the lines of the state that created it.¹¹⁴ Under the Defense of Marriage Act (DOMA), however, each state is free to determine whether it will recognize same-sex

107. *Id.* at 971.

108. It should be noted that this litigation was extremely complex because of a competing case in Virginia. *Miller-Jenkins v. Miller-Jenkins*, 637 S.E.2d 330 (Va. Ct. App. 2006), *subsequent appeal*, 2007 Va. App. LEXIS 158, (Va. Ct. App. April 17, 2007), *aff'd*, 661 S.E.2d 822 (Va. 2008). Despite Vermont's ruling that the non-biological mother should have visitation with her daughter, I.M.J., it has taken over three years for her to get regular visitation. See *Miller-Jenkins v. Miller-Jenkins*, No. 454-11-03Rddm, slip op. at 6, 8 (Rutland Fam. Ct. June 15, 2007). While the biological mother appealed to the U.S. Supreme Court, *Miller-Jenkins v. Miller-Jenkins*, 127 S. Ct. 2130 (2007), *cert. denied*, 2008 WL 3538468 (Oct 06, 2008), the Rutland Family Court ordered "parenting time" to begin June 30, 2007 with the non-biological mother. *Miller-Jenkins*, No. 454-11-03Rddm, slip op. at 14.

109. Alabama, Delaware, North Dakota, Oklahoma, Texas, Utah, Washington, and Wyoming have adopted the 2002 version of the UPA. Uniform Law Commissioners, *A Few Facts About the Uniform Parentage Act (Last Amended or Revised in 2002)*, http://www.nccusl.org/Update/uniformact_factsheets/uniformacts-fs-upa.asp. New Mexico has recently considered adopting the 2002 version. *Id.*

110. N.J. STAT. ANN. § 9:17-44(a) (West 2008); Joslin, *supra* note 1, at 702-03.

111. See Joslin, *supra* note 1, at 702 n.92 (stating case is on file with the author).

112. *Id.* at 703.

113. *Id.*

114. See 28 U.S.C. § 173C (2008).

relationships in its own state or those legally created in other states, where these relationships are treated like marriage.¹¹⁵ Over forty states have amended their state constitutions or enacted statutes that incorporate the language and intentions of DOMA, with most states taking action in the 2004 and 2006 elections.¹¹⁶ In fact, DOMA goes even further and declares that no state is required to give effect to the rights or claims arising from such relationships.

This suggests that under DOMA, states do not have to acknowledge gay and lesbian fathers and mothers whose parentage arises from a parental presumption of a legally recognized same-sex relationship. The result is that as same-sex families move from non-DOMA to DOMA states their family structure is altered and the non-birth parent's parental status dissolves into that of a legal stranger.¹¹⁷ Currently, it is unclear how these "mini-DOMA"¹¹⁸ states will deal with the legal parent-child relationships in these same-sex families.¹¹⁹ As no legislation currently exists to guide them, the courts must handle the issue.

For example, let us return to *Miller-Jenkins v. Miller-Jenkins*.¹²⁰ The plaintiff, the biological mother, brought suit in Vermont in November 2003 to dissolve a civil union with her partner and establish custody for their child, born of that union, using artificial insemination.¹²¹ The lower court ruled that she would get sole custody, but the other mother was entitled to liberal visitation.¹²² Almost immediately, the plaintiff denied her former partner access to their child.¹²³ Eight months later, the plaintiff took their daughter and filed suit in her new state of residency, Virginia, a mini-DOMA state.¹²⁴ In filing a Petition to Establish Parentage and for declaratory relief, the biological mother's goal was to eliminate the parental rights of the non-birth mother, and to have herself deemed the only legal parent.¹²⁵ Filing the custody case in two jurisdictions with differing views about the legitimacy of same-sex unions pitted DOMA against the Parental

115. 1 U.S.C.A. § 7 and § 173C constitute the Defense Against Marriage Act.

116. See 1 U.S.C. § 7; HUMAN RIGHTS CAMPAIGN, STATEWIDE MARRIAGE PROHIBITIONS (Oct. 15, 2008), http://www.hrc.org/documents/marriage_prohibitions.pdf.

117. Goldhaber, *supra* note 3, at 291.

118. See Strasser, *supra* note 84, at 305.

119. See *id.* at 305-06. Consequently, same-sex non-birth parents in states like Massachusetts continue to adopt their children, despite the marital parentage presumption, in order to protect their legal status as parents as they across state lines.

120. 912 A.2d 951 (Vt. 2006).

121. *Id.* at 956.

122. *Id.*

123. *Id.*

124. *Id.* See also National Gay and Lesbian Taskforce, *supra* note 91.

125. *Miller-Jenkins*, 912 A.2d at 956-57.

Kidnapping Prevention Act (PKPA)¹²⁶ and the Uniform Child Custody Jurisdiction and Enforcement Act (UCCJEA).¹²⁷ Virginia could have determined that it had proper jurisdiction to adjudicate this custody claim and could have refused to recognize the non-birth mother as a legal parent, granting sole parentage to the plaintiff denying the defendant any access to the child.¹²⁸ In fact, the Virginia trial court did just that.¹²⁹

On appeal, however, a three-judge panel reversed the lower court's ruling, stating that the case raised the narrow issue of jurisdiction.¹³⁰ Under the PKPA the plaintiff had initially filed in Vermont and, therefore, availed herself of that state's jurisdiction.¹³¹ Virginia ruled that Vermont's decision must be followed.¹³² The Virginia Court of Appeals declined to determine the "constitutionality" or "viability" of its state DOMA statute, called the Marriage Affirmation Act,¹³³ as it did not apply in this case, and if it did, the PKPA trumped it.¹³⁴ In other words, the court did not wish to rule on the issue of whether, under Virginia's DOMA statute, it was required to recognize the parental presumption created from a civil union. While *Miller-Jenkins* may provide some guidance in competing custody actions, it offers little insight on how to interpret the effect of mini-DOMA legislation on the parental-child relationship formed through parental presumptions of legally recognized same-sex unions.

1. Assisted Reproduction for Unmarried or Unrecognized Couples

For same-sex couples who live in states that do not allow them to marry or do not recognize their union, or for couples who simply choose not to marry, the parent-child relationship is completely vulnerable to the decisions of the biological parent and the state in

126. *Id.* at 957. The PKPA is federal legislation requiring that each state give full faith and credit to the custody decision of another state that has proper jurisdiction. 28 U.S.C. § 1738A (1982). It was created to discourage parents from taking their children to other states to engage in forum shopping in the hopes of achieving a custody ruling in their favor. *Miller-Jenkins*, 912 A.2d at 957-58.

127. *Miller-Jenkins*, 912 A.2d at 957-58. The National Conference of Commissioners on Uniform State Laws enacted this act and it has been adopted by all states. UNIF. CHILD CUSTODY JURISDICTION AND ENFORCEMENT ACT, prefatory note (1997). The act determines which state has proper jurisdiction to adjudicate a custody claim. *Id.*

128. *Miller-Jenkins*, 912 A.2d at 957.

129. *Id.*

130. *Miller-Jenkins v. Miller-Jenkins*, 637 S.E.2d 330, 337-38 (Va. Ct. App. 2006).

131. *Id.* at 338.

132. *Id.* at 337-38.

133. *Id.*; VA. CODE ANN. § 20-45.3 (2008).

134. *Miller-Jenkins*, 637 S.E.2d at 337-38.

which they reside. If the couple ends their relationship, the biological parent may choose to sever all ties between the non-biological parent and the child.¹³⁵ Often, the child has known this parent since birth.¹³⁶ If the biological parent does attempt to dissolve the relationship between the child and parent, the non-birth parent must rely on court intervention to protect their parent-child relationship.¹³⁷ Until recently, many courts chose to recognize only the biological parent as the legal parent, treating the other as a legal stranger.¹³⁸

For example, in *Kazmierczak v. Query*,¹³⁹ the court held that the former partner of a child's natural mother had no claim to custody of the child she co-parented.¹⁴⁰ As a third party, she could not interfere with the biological parent's fundamental right of privacy absent a finding of significant harm to the child.¹⁴¹ On this basis, the non-biological mother could neither seek judicial relief on statutory nor equitable grounds for custody or visitation.¹⁴² Similar results have occurred in other jurisdictions.¹⁴³

The results can be even more tragic for children who lose one parent to death and then the other parent when courts deny custody to the non-biological parent.¹⁴⁴ In *McGuffin v. Overton*, two children were born to an unmarried biological mother, Leigh McGuffin.¹⁴⁵ She filed a paternity action against the father, Russell Overton, and he stipulated that he was the biological father.¹⁴⁶ Moreover, Leigh began raising the children together with her lesbian partner, Carol Porter, when the children were five and three years of age, and continued to do so until the time of McGuffin's death seven years later.¹⁴⁷ Just prior to her death, McGuffin executed a power of attorney delegating all her parental powers to Porter.¹⁴⁸ She also executed a will assigning

135. See, e.g., *Joslin*, *supra* note 1, at 689 (discussing *Nancy S. v. Michelle G.*, 279 Cal. Rptr. 212 (Cal. Ct. App. 1991), where this occurred). This is also true for unmarried heterosexual couples.

136. See, e.g., *id.* at 688-89.

137. See *id.*

138. See *id.*

139. 736 So. 2d 106 (Fla. Dist. Ct. App. 1999), *review denied*, 760 So. 2d 947 (Fla. 2000).

140. *Id.* at 106, 110.

141. *Id.* at 109.

142. See *id.* at 110.

143. See, e.g., *In re Visitation with C.B.L.*, 723 N.E.2d 316, 316-17 (Ill. App. Ct. 1999); *In re Alison D. v. Virginia M.*, 572 N.E.2d 27, 27 (N.Y. 1991); *Liston v. Pyles*, No. 97APF01-137 1997 WL 467327 at *1 (Ohio Ct. App. 1997); *In re Thompson v. Thompson*, 11 S.W.3d 913, 913-14 (Tenn. Ct. App. 1999); *Titchenal v. Dexter*, 693 A.2d 682, 682 (Vt. 1997). *But see infra* note 160 for court decisions finding otherwise.

144. See *McGuffin v. Overton*, 542 N.W.2d 288, 289, 291-92 (Mich. Ct. App. 1995).

145. *Id.*

146. *Id.*

147. *Id.*

148. *Id.*

guardianship of the children to Porter, instead of the children's father, Overton, because he had not established a relationship with his sons, nor paid \$20,000 in child support.¹⁴⁹ The court found, however, that Porter had not been legally established as a guardian.¹⁵⁰ Therefore, she had to be treated as a mere third party, despite raising the children for the last seven years.¹⁵¹ In fact, the court found that under Michigan's custody statute, Porter did not have standing to bring a custody claim.¹⁵² The children then received a second trauma of losing their other mother, Porter, when the court granted their biological father custody.¹⁵³

The biological mother can also be vulnerable in these relationships. A non-biological parent can walk away from a relationship refusing to pay child support for a child that both partners planned to raise together.¹⁵⁴ *State ex rel. D.R.M. v. Wood* illustrates this situation.¹⁵⁵ In this case a lesbian couple ended a four-and-a-half year relationship before learning that one of the partners, Kelly, was pregnant.¹⁵⁶ Tracey, her partner, had actively researched reproductive options and participated in the artificial insemination process to get Kelly pregnant.¹⁵⁷ Once the child was born, however, the parties could not establish an agreeable support and visitation plan for Tracey, and she stopped paying support.¹⁵⁸ When Kelly applied for public assistance, the state attempted to enforce a child support obligation on Tracey, but the court ruled that Tracey was not a mother under the state's Uniform Parentage Act and therefore could not order her to pay support.¹⁵⁹

While the litigation discussed thus far explores the nature of the parent-child relationship for non-biological parents at the time the couple's relationship terminated, courts have also been disinclined to recognize co-parenting agreements created at the time the couple decides to engage in family formation.¹⁶⁰ A lesbian couple in *In re*

149. *Id.*

150. *Id.* at 291-92.

151. *Id.* at 289.

152. *Id.* at 291.

153. *Id.*

154. See *State ex rel. D.R.M. v. Wood*, 34 P.3d 887, 887 (Wash. Ct. App. 2001).

155. *Id.*

156. *Id.* at 890.

157. *Id.*

158. See *id.*

159. *Id.* at 890-91.

160. *T.F. v. B.L.*, 813 N.E.2d 1244, 1244 (Mass. 2004). See *A.C. v. C.B.*, 829 P.2d 660, 663-64 (N.M. Ct. App. 1992) (allowing parent to enter into a custody agreement with a third party subject to modification under a best interests standard); *Rubano v. DiCenzo*, 759 A.2d 959, 959 (R.I. 2000) (stating former partner's written agreement with the non-biological mother allowing visitation rights with their child is enforceable). But see *In re*

Bonfield had a committed fifteen-year relationship in which they sought to have children via artificial insemination.¹⁶¹ Because second-parent adoption was not available in Ohio, the couple petitioned the court to enter into a co-parenting agreement to protect the parental rights of the non-biological mother.¹⁶² The agreement's purpose was "to 'confirm their commitment that they [both mothers] will . . . continue to raise the children regardless of what happens to their relationship.'"¹⁶³ The court found that the non-biological mother did not fit the legal definition of either adoptive or natural mother, and consequently, as a third party, she could not enter into a shared parenting agreement with the children's biological mother.¹⁶⁴

More recently, however, courts have looked to common law or equity to protect the parent-child relationship for children born by assisted reproduction, using doctrines such as *in loco parentis*, *de facto*, or psychological parent.¹⁶⁵ Under these doctrines, the non-biological parent is viewed as a legal stranger who has functioned as the child's parent affording him or her some sort of rights in relation to the child even after the parent's relationship has terminated.¹⁶⁶ Unfortunately, the interpretation of what rights are to be afforded non-biological same-sex parents under these equitable doctrines is far from consistent among the states.¹⁶⁷

States which have utilized these equitable doctrines place the *de facto* parent into one of two categories. Courts in some states recognize *de facto* parents as a special class of third party individuals seeking access to a child, who thus have standing to petition for visitation

Custody of H.S.H.-K. v. Knott, 533 N.W.2d 419, 419, 437 (Wis. 1995) (holding the court was not barred from using equitable powers to determine visitation for former same-sex partner with parent-like relationship to the child).

161. See *In re Bonfield*, 780 N.E.2d 241 (Ohio 2002).

162. *Id.* at 243-44.

163. *Id.* at 244.

164. *Id.* at 246-47.

165. Colorado, Maryland, Massachusetts, New Jersey, New Mexico, Pennsylvania, Rhode Island, Washington, and Wisconsin have all used these doctrines. National Center for Lesbian Rights, *Legal Recognition of LGBT Families*, sec. IV. (2008), available at http://www.nclrights.org/site/DocServer/Legal_Recognition_of_LGBT_Families?docID=2861.pdf. But see *Janice M. v. Margaret K.*, 948 A.2d 73, 87 (Md. 2008) (stating Maryland will not recognize *de facto* parentage).

166. In order to establish *de facto* parenthood, the non-biological/non-legal parent has to demonstrate that he or she has lived in the same household as the child long enough to establish a relationship, helped raise the child, held himself/herself out as a parent, and completed all this with the biological parent's consent. *In re E.L.M.C.*, 100 P.3d 546, 560-61 (Colo. Ct. App. 2004) (describing this four-part test as well as the types of legally-created parents in equity); *In re the Custody of H.S.H.-K. v. Knott*, 533 N.W.2d 419, 435-36 (Wis. 1995).

167. Donald K. Sherman, *Child Custody and Visitation*, 6 GEO. J. GENDER & L. 691, 713-15 (2005).

only.¹⁶⁸ Courts in other states find that the *de facto* parent is entitled to be viewed on par with non-custodial biological or adoptive parents in seeking custody and visitation.¹⁶⁹ A Washington State case appears to go further and creates a third category of shared parentage for *de facto* parents.¹⁷⁰ In *In re Parentage of L.B.*,¹⁷¹ the court found that a non-biological mother was a *de facto* parent, as she had co-raised the child for six years, was referred to as “mama” by the child, and publicly held herself out as the child’s mother.¹⁷² In ruling that a *de facto* parent has standing to petition the court, the court stated that *de facto* parents stand “in legal parity with an otherwise legal parent, whether biological, adoptive, or otherwise.”¹⁷³

Courts have also been willing to apply the doctrine of estoppel to prevent non-biological parents who are psychological parents from withholding financial support for the children they helped bring into the world with their former partner.¹⁷⁴ Courts in some states have also found that their statutory language permits psychological parents to possess some of the same rights and obligations as biological parents.¹⁷⁵ The California Supreme Court has used its state’s statutory language to determine parentage of non-biological parents. In *Elisa B. v. Superior Court*,¹⁷⁶ the California Supreme Court found that a lesbian partner who refused to pay child support for children she planned for, held out as her own, lived with in the same household, and agreed to co-raise with her former partner, was also the mother under the state’s Uniform Parentage Act.¹⁷⁷ In so holding,

168. See, e.g., *S.F. v. M.D.*, 751 A.2d 9, 15-17 (Md. Ct. Spec. App. 2000), *overruled by* *Janice M. v. Margaret K.*, 948 A.2d 73 (Md. 2008).

169. E.g., *E.N.O. v. L.M.M.*, 711 N.E.2d 886, 891-92 (Mass. 1999) The trial court held that “children born to parents who are not married to each other are to be treated in the same manner as all other children.” *Id.* at 889. The appellate court held that “[t]he child ‘is entitled to be protected from the trauma caused by the disruption’ of his relationship with [his non-biological mother.]” *Id.* at 894. See also *King v. S.B.*, 837 N.E.2d 965, 966-67 (Ind. 2005) (vacating the court of appeals ruling that a non-biological mother who planned for and raised a child with her former partner was a legal parent, but transferring the case back to the trial level to determine the custody of the child using a best interests test because courts have authority to place a child with someone other than his/her natural parent).

170. Williams, *supra* note 1, at 434-35.

171. 122 P.3d 161 (Wash. 2005).

172. *Id.* at 164, 178.

173. *Id.* at 177.

174. *L.S.K. v. H.A.N.*, 813 A.2d 872, 877-78 (Pa. Super. Ct. 2002) (holding that the former lesbian partner, who was not the biological mother, was obligated to pay child support under equitable doctrine).

175. See, e.g., *Rubano v. DiCenzo*, 759 A.2d 959, 975-76 (R.I. 2000).

176. 117 P.3d 660, 666-70 (Cal. 2005).

177. *Id.* at 666-70. In this case, after the non-biological mother refused to pay child support, the biological mother had to seek financial assistance from the county. *Id.* at 662-63.

the court determined that California's UPA should be read in a gender-neutral fashion.¹⁷⁸ Using an intentionality test that courts had applied to unmarried fathers in artificial insemination cases, the court stated that the non-biological parent was also a mother and therefore was obligated to financially support children that she helped create.¹⁷⁹

In a companion case to *Elisa B.*, the California Supreme Court ruled under the UPA that a child could have two parents of the same sex with separate claims to motherhood in *K.M. v. E.G.*¹⁸⁰ E.G. gave birth to twins using in vitro fertilization with eggs donated by her partner, K.M., and an anonymous sperm donor.¹⁸¹ K.M. signed a parental claims waiver at the clinic where she donated her eggs.¹⁸² In addition, the couple decided to keep secret K.M.'s genetic connection to the children.¹⁸³ Both mothers raised the children for the first five years of their life, but after their relationship ended, E.G. sought to sever the relationship between K.M. and the children.¹⁸⁴ The court held that E.G. was the legal mother under the UPA by virtue of giving birth, but K.M. had a biological connection to the children and therefore was also their legal mother under the UPA.¹⁸⁵

Finally, California offers some hope to same-sex couples who seek parentage determinations before their child is born. In a third companion case, *Kristine H. v. Lisa R.*,¹⁸⁶ Kristine became pregnant through a known sperm donor.¹⁸⁷ At the time of her pregnancy, the couple sought and got a judgment declaring Kristine as the biological mother and Lisa as the child's other legal parent.¹⁸⁸ When their relationship ended two years after the birth of the child, Kristine filed a motion to "set aside the stipulated judgment."¹⁸⁹ The California Supreme Court held that the biological mother was estopped from challenging the order because she had stipulated to the judgment and enjoyed the benefits of it during the child's first two years of life, but did not rule on the validity of the judgment.¹⁹⁰ The court also noted

178. *See id.* at 666-67.

179. *Id.* at 665-70.

180. 117 P.3d 673, 681-82 (Cal. 2005).

181. *Id.* at 676, 683.

182. *Id.* at 676.

183. *See id.* at 676-77.

184. *Id.* at 676-77.

185. *Id.* at 680-82.

186. 117 P.3d 690 (Cal. 2005).

187. *Id.* at 692.

188. *Id.*

189. *Id.*

190. *Id.* at 696.

that it would be against public policy to not recognize both parent-child relationships.¹⁹¹ In addition, the court observed that Lisa might be able to use the parental presumption under a gender-neutral reading of the Family Code to establish parentage, using the intentionality test.¹⁹²

Although these statutory interpretations and equitable doctrines provide some relief for same-sex families residing in the minority of states that allow for them, a number of questions surrounding the non-biological parent's status to the child are still left unanswered. For example, the non-biological parent is still cast into the role of a legal stranger, as he or she petitions the court for *de facto* parental recognition.¹⁹³ After overcoming the hurdle of meeting the legal requirements of psychological parent,¹⁹⁴ these second parents, even then, do not obtain the rights of legal parenthood.¹⁹⁵ They may receive custody or visitation and child support obligations, depending on the category that the state places the non-biological parent in (equal footing versus special class of third parties), but in this quasi-parent role the parent-child relationship is by no means secure.¹⁹⁶

In this inferior position, it is unclear whether the child can receive health insurance or survivor benefits from the psychological parent.¹⁹⁷ It is also uncertain whether the non-legal parent can make medical or educational decisions for the child.¹⁹⁸ Finally, if the legal parent were to become incapacitated or die, would the non-biological parent compete with other third parties for custody of the child?¹⁹⁹ If the child were to become seriously ill, could the non-legal parent take time off from work to care for the child and be protected by the state or federal Family Medical Leave Act?²⁰⁰

In the majority of states, where these equitable options are not available, the second parent has no opportunity to maintain a relationship with the child he or she has been parenting if the biological

191. *Id.*

192. *Id.* at 693.

193. See Joslin, *supra* note 1, at 685.

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

195. See Goldhaber, *supra* note 3, at 292.

196. *Id.* See Joslin, *supra* note 1, at 696.

197. See Joslin, *supra* note 1, at 690.

198. *Id.*

199. *Id.*

200. *Id.* The Family Medical Leave Act, 29 U.S.C. § 2612 (1994), remains a source of confusion for a lot of same-sex families. For example, the federal government offers a progressive policy where any individual who is an economic dependent of an employee qualifies for purposes of taking leave to care for that individual.

parent chooses to sever their tie.²⁰¹ Not having a legally recognized parent-child relationship can lead to outcomes significantly detrimental to both the child and parent.²⁰² From a financial point of view the child may not receive any support, may not have inheritance rights, may not receive state or federal survivor benefits like Social Security, retirement, or worker's compensation, and may not receive insurance or tax benefits.²⁰³ Furthermore, the child is left in a vulnerable position if the biological parent dies or becomes disabled.²⁰⁴ The safety net that a second parent can provide is not present. From an emotional point of view, both parent and child will have the same grieving process as losing a family member to death. With no way to maintain a relationship with each other, each must act as if the parent or child they have known since birth is dead.

With this level of ambiguity surrounding non-biological parent-child relationships, second-parent adoption is recommended regardless of whether presumptions, equitable, or statutory relief exists.²⁰⁵ As stated previously, second-parent adoption is fraught with its own issues. It requires court intervention and is available only in certain states or counties. In addition to those issues discussed earlier, the following cases illustrate further challenges that arise in using second-parent adoption in assisted reproduction cases.

In *In re Adoption of A. W.*,²⁰⁶ three children were born to a same-sex couple using artificial insemination.²⁰⁷ The biological mother withdrew her consent to allow her partner to adopt the children, and the court dismissed the petition.²⁰⁸ The non-biological mother lost all contact with the children because the court ruled, under governing statutes, that she had no standing to request visitation.²⁰⁹ Although a couple may plan together to bring a child into the world and negotiate who will be the biological mother or father with the understanding that adoption will make the second parent a legal mother or father, the non-biological parent finds him or herself at the mercy of the biological parent if the relationship starts to disintegrate.

Sometimes, the non-biological mother's expression of a desire to adopt the biological mother's children that the couple planned together to create can actually destabilize a couple's relationship. For example,

201. Joslin, *supra* note 1, at 690.

202. *See id.* at 689-90.

203. *Id.*

204. *See id.*

205. *See* NCLR & EQUALITY CA, *supra* note 92, at 7.

206. 796 N.E.2d 729, 730 (Ill. App. Ct. 2003).

207. *Id.* at 730.

208. *Id.* at 731.

209. *See id.* at 735-36.

in *E.N.O. v. L.M.M.*²¹⁰ a lesbian couple had been in a thirteen-year relationship before deciding to have a child using artificial insemination.²¹¹ The couple executed a co-parent agreement establishing themselves as parents regardless of what happened to their relationship.²¹² The couple then discussed second-parent adoption, and shortly afterwards, the relationship ended.²¹³ After years of litigation, the non-biological mother established herself as a *de facto* parent, and received visitation, but she did not have legal parentage over the child.²¹⁴

Finally, in a third case, a biological mother attempted to undo the second-parent adoption of her child by her former partner.²¹⁵ In *Erez v. Starr*, a biological mother gave birth to a child using artificial insemination.²¹⁶ While the mother and her partner were residing in Washington State, the non-biological mother used second-parent adoption to become a legal parent of their daughter.²¹⁷ “Three years later, the family moved to North Carolina where [the adoptive mother] became the primary caretaker,” and after the relationship ended, the biological mother moved to Georgia, leaving the children in the care of the adoptive mother.²¹⁸ During the custody dispute filed in North Carolina, the biological mother argued that the Washington State second-parent adoption decree could not be recognized in North Carolina under its anti-marriage statute.²¹⁹ The court held that the Washington State adoption decree had to be recognized in North Carolina.²²⁰ Although the outcome of this case was favorable for the adoptive mother, it nonetheless took significant amounts of time and money litigating at the expense of the parent-child relationship. In

210. 711 N.E.2d 886, 889 (Mass. 1999).

211. *Id.* at 888.

212. *Id.* at 889.

213. *Id.*

214. *Id.* at 892-93. *See also In re Elisa B.*, 117 P.3d 660, 662-63 (Cal. 2005) (discussing how the non-biological mother, who also had a biological child through artificial insemination with her former partner Elisa B., had discussed with her former partner the possibility of adopting each other’s children, but that Elisa B. changed her mind because she “had misgivings” about her former partner adopting the daughter she gave birth to); *V.C. v. M.J.B.*, 748 A.2d 539, 544 (N.J. 2000) (stating that two months after discussing the non-biological parent adopting the couple’s child, the biological mother terminated the relationship).

215. *See GLAD, supra* note 30, at 8 (summarizing holding in *Erez v. Starr*, 97 CVD 64 (Durham Gen. Ct. 1997), *appeal dismissed*, COA99-1534 (N.C. Ct. App. 2000)); Press Release, National Center for Lesbian Rights, Lesbian Attempts to Use Anti-Gay Law to Invalidate Second-Parent Adoption (Apr. 24, 2000), *available at* http://web.archive.org/web/20010222004604/www.nclrights.org/releases/pr_nocar.htm.

216. *See* Press Release, *supra* note 215.

217. *See id.*

218. *Id.*

219. *Id.*

220. *See GLAD, supra* note 30, at 8.

some cases, the length of time taken to resolve the case may be longer than the time the parent and child spent living together as a family.²²¹

Despite the significant concerns surrounding second-parent adoption, it currently offers the best hope for securing the parental rights of the non-biological parent or the non-primary adoptive parent in countries or states that do not allow joint adoption by unmarried or same-sex couples.²²² However, for those couples living where second-parent adoption is unavailable, unaffordable, unattainable due to lack of knowledgeable counsel, undesirable (either because the couple simply does not wish to use it or because the biological parent will not consent) or for those who are unaware of the option, or who are afraid to petition to the court for fear of a homophobic response, the non-legal parent-child relationship is tenuous even for intact relationships.²²³ Against this cultural and legal backdrop, the legally fragile parent-child relationship may exact significant costs on same-sex families, including destabilizing it. In the next section, using empirical work, I explore the impact of this socio-legal climate on same-sex couples' decisions to engage in family formation and partake in the very institutions that may act to undermine their family structure.

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

The qualitative data used in this exploratory study came from eighteen same-sex couples, comprised of eight gay couples and ten lesbian couples located in the greater metropolitan Seattle area, who had their first children together using assisted reproductive technology or adoption.²²⁴ As the goal of the study was to examine how same-sex couples navigate family formation in the current socio-legal climate, other types of family forms, such as blended families with children from previous hetero- or homosexual relationships, were excluded from the sample.

221. See, e.g., *Miller-Jenkins v. Miller-Jenkins*, 912 A.2d 951, 956 (Vt. 2006), *appeal after remand and decision*, 949 A.2d 1082 (Vt. 2008).

222. Some jurisdictions will also allow declaratory judgments for parentage prior to the birth of the child, thus allowing parental rights to be established without going through a second-parent adoption process. See Casey Martin, Comment, *Equal Opportunity Adoption & Declaratory Judgments: Acting in a Child's Best Interest*, 43 SANTA CLARA L. REV. 569, 583-4 (2003) (discussing California case law).

223. See Joslin, *supra* note 1, at 696.

224. As a part of the study participants were guaranteed confidentiality. As such, all original source material related to the study remains on file with the author and throughout this section names have been changed to protect confidentiality.

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

Subjects were recruited using snowball sampling, using four sources of contact to begin. The ethnographic work for the study was carried out between January and June 2007, by conducting ninety-minute interviews with one or both members of the couple.²²⁵ Specifically, all eight interviews with the gay couples were conducted with the primary caretaker, who was either a stay-at-home dad or worked part-time outside the home. For five of the ten lesbian couples, the interviews included both partners, and the remaining five were carried out with the biological mother, who in all cases but one tended either to be stay-at-home mothers or to work part-time outside the home. All of the couples were raised in different-sex families. All but two of the interviewees had been raised in other states and had moved to Washington in adulthood.

The interviews used a narrative format in which I explored respondents' perspectives on a number of issues, such as the decision to create families, reproductive decision-making, engaging as families with normative social networks and institutions, strategies to legally and culturally preserve the families, and family dynamics in light of these strategies. In all cases, the interviews were taped and immediately transcribed.²²⁶ Subjects were contacted for clarification on certain responses. As the children of the couples in this study were all quite young, the accounts the couples provided give a contemporary perspective of same-sex families managing to "do family" in this constantly evolving socio-legal atmosphere.²²⁷

A. Expectations for Having Children

The lesbian couples in this study all stated that the idea of having children was an expectation that grew out of their family of origin.²²⁸ As girls, they had been socialized to believe that part of

225. On file with author.

226. On file with author.

227. See sources *supra* note 6.

228. Family of origin refers to the family into which they were born into or adopted into and raised. See FAMILY THERAPY: MAJOR CONTRIBUTIONS 3 (Robert Jay Green &

being a woman meant also being a mother. At some point in adulthood, they grappled with the intersecting ideas of motherhood and their sexual orientation. For some, the two ideas could not co-exist. But for others, as they developed social networks, it seemed possible to be both a lesbian and a mother.

Every lesbian respondent discussed the decision to bring children into their relationship as a process of negotiation. In about half of the couples, one partner did not want to have children because of concerns about how the child would be treated by society at large. Others articulated a lack of desire to have children because of a long-held belief that gay and lesbian individuals could not have children in our contemporary society. In other words, not having children was simply one of many costs of possessing their particular sexual orientation. Diane²²⁹ put it this way, with her partner nodding her head vigorously in agreement:

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

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

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

James L. Framo, eds., 4th prtg. 1986) (defining "family of origin" as the "nuclear family in which the adult individual was raised").

229. Again, all subjects' names have been changed to maintain confidentiality.

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

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

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

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

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

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

The different factors the subjects prioritized in their responses reflect the larger cultural and social influences experienced during their coming of age. Most of these respondents came of age during the 1980's, when the AIDS epidemic led to increased homophobic responses by the world at large.²³⁰ As they moved into their reproductive years, the first wave of gay and lesbian family formation had been well established.²³¹ Gay fathers and lesbian mothers were winning custody of their children from previous marriages and living with their same-sex partners.²³² In addition, the second wave, known as the "gayby" boom,²³³ was underway by the mid 1990's, offering a

230. See Erik F. Strommen, *Hidden Branches and Growing Pains: Homosexuality and the Family Tree*, in *HOMOSEXUALITY AND FAMILY RELATIONS*, *supra* note 5, at 11.

231. See Stacey, *supra* note 6, at 146-49.

232. See *id.*; Polikoff, *supra* note 3, at 461-65, 533-42.

233. Suzanne Kemmer, Rice University, The Rice University Neologisms Database, http://neologisms.rice.edu/index.php?a=srch&d=I&id_srch=599ale8df51a3b9f78cb676

model to follow. It seems that the initial factors weighed in deciding to have children were significantly more informed by culture than the law.

1. What Path the Stork Will Take

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

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

We both had really good benefits at work, but Kate was in residency at the time we wanted to get pregnant. There was no way for her to stay on track with being a doctor, if she was pregnant during a residency or when she was just starting out, so we thought she should go second. On the other hand, I worked in an office with tons of moms. There was just way more flexibility for me.

8cl86df708&il-en&p=1 (last visited Nov. 4, 2008). This term was first used in CURVE magazine on August 1, 1997, to observe the demographic trend of gay and lesbian couples having babies. Katie Sanborn, *Baby Boom or Bust*, CURVE, August 1997, at 24.

And then when we decided we wanted another one, Kate's career was really taking off and it just didn't make sense to interrupt that, when it had worked so well for me the first time.

The reasoning articulated above represents the paradox in which lesbian couples must organize their reproductive lives. On the one hand, the decision of when to become pregnant, and the potential sacrifices to a career that it may cause, is shared by all women, but for the women in this study, there is an additional factor in the calculus. In Washington State, the other mother is not legally recognized as a mother without judicial intervention, using second-parent adoption,²³⁴ which cannot occur until some time after the birth of the child. Therefore, unlike heterosexual couples who can rely on both partners to assess their access to health insurance and the protections of the state and federal Family Medical Leave Act, lesbian couples must appraise their career situations individually to determine whether having a child makes sense.²³⁵

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

We had heard stories about couples who had used friend's sperm, and he had promised not to want to establish a relationship with the child. But then, after the baby arrived, he wanted to be part of her life. He insisted and even went to court. It was a nightmare. We wanted no part of that. Our eldest daughter knows how babies are made and she asks where her dad is. We make it very clear: we went to a sperm shop and bought it. We tell her some people have a mommy and a daddy, but you don't. You are very lucky because you have two mommies.

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

On the other hand, one couple did try using a known sperm donor. They wanted the child to have a "father-like" figure in his or her life, but they also wanted to make it clear that they would be the parents. The donor would have occasional and flexible visitation. Ultimately, when the couple brought the legal documents to the donor

234. In Washington, second-parent adoption appears to be available only in certain counties and with particular judges based on the conducted interviews.

235. See Joslin, *supra* note 1, at 690.

to sign, he decided against participating because he felt that he would want to be a parent to the child. Diane explains why they then chose to use an anonymous donor:

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

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

All of the gay couples in the study, with the exception of one, chose to use international adoption combined with a domestic second-parent adoption.²³⁶ Their reason for using adoption, as opposed to a surrogate mother, mirrored the same concerns as the lesbian couples in using an anonymous sperm donor. First, the couples thought that international adoption would have a level of finality with the geographic distance that they were not sure would be possible with domestic adoptions. Jay expressed his trepidation this way:

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

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

For the one couple who chose to use a surrogate mother, they felt the same desire as the lesbian families — to have some genetic connection to their child. In this case, they both contributed sperm to be used for in vitro fertilization so that each of them would be genetically connected to one of the twins born to them. They had less fear than the other couples in using a surrogate after carefully researching

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

and locating a state with geographical distance from their own that would allow for joint adoption by a gay couple and would enforce surrogacy contracts. Furthermore, they used an egg donor, so that the gestational mother would have no biological connection to their children. From their point of view, they had eliminated the role of mother as being a clearly defined person and cemented their role as the only parents to the children by using this type of reproductive technology.

With both the lesbian and gay couples, considerable research went into establishing the best strategy to create a family. The priority for all couples was to ensure the legal integrity of their family unit. Cultural influences played less of a role at this stage, although it was important not to have an identifiable mother donor or father donor who others could point to as being the "true" parent to the child. More so, the couples were concerned over legal challenges that could disrupt their family relationship. Biological connections clearly take a backseat to the social relationships developed and carried out by the couple 'doing family.' The desire to draw firm boundaries around their family units may have been influenced by the increasing number of states that enacted legislation or amendments banning gay marriage in the elections of 2004 and 2006.²³⁷ In the face of mounting hostility towards legal recognition of their partnership, the couples felt an urgent desire to protect their parent-child relationships. It is interesting to note that despite the cultural opposition to same-sex relationships, these couples were not dissuaded from growing their families.

B. Strategies to Legally Preserve the Family and Couples' Understanding of What They Have Achieved

All of the couples engaged the services of legal counsel to assist them in maximizing both party's legal standing as parent. Every attorney advised them to use second-parent adoption.²³⁸ The couples described the process as nerve-racking and, in some cases, fear inducing. Both the gay and lesbian couples expressed two key themes regarding the process. It became obvious to everyone as they began to investigate the process of second-parent adoption, first by talking with friends who had navigated the procedure already, and then in discussing it with an attorney, that a back door network had to be employed. Jake explains:

237. See HUMAN RIGHTS CAMPAIGN, *supra* note 116. See also *Gilmore v. Sec'y of the Dept. of Children and Family Servs.*, 358 F.3d 804, 811-15 (11th Cir. 2004) (reiterating in 2004 that there is no fundamental right to adopt children).

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

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

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

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

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

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

Jo explained that because she and her partner feared that her parents would try to seek custody of their child if anything were to happen to Jo, the biological mother, she made it clear in her will that her partner would be the legal guardian, in addition to also getting a

second-parent adoption. In contemplating what would happen if their relationship ended, however, Jo tells her partner, "if we separated, I'd just take that part [the desire to have her partner be guardian to their child] out of the will." After hesitating, some awkward silence, and a look of confusion on her partner's face, she continues: "Oh wait. Even if I did that, you're still the parent."

Such observations reflect the confusion of most of the parents in the study. First, second-parent adoptions may not have the legal finality of other adoptions, and second, a second parent who adopts holds an inferior position to that of the first adoptive parent or biological parent.²³⁹

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

The lack of confidence around the second-parent adoption tool was also expressed in the family's fear of moving, traveling to other states, or in some cases, within states. Couples felt real restrictions about where they could live and work, or even feel confident traveling, because the law around second-parent adoption appeared to them to vary so much. A recurrent question or observation in almost all of the interviews was: If we ever moved, would our legal status as parents be recognized? Andy remarked, "I mean who wants to go to Idaho? But I do worry that all the legal protections we went through are meaningless in other states." Peter noted that "[m]y parents live in Florida. We could never move to be closer to them. We would not be recognized as a family legally." Emma echoed a similar sentiment upon learning that her friend's second-parent adoption was denied:

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

Due to their perceptions that the law is not uniformly in agreement about second-parent adoption, the respondents felt that this

239. Tiffany L. Palmer, *Family Matters: Establishing Legal Parental Rights for Same-Sex Parents and Their Children*, 30 HUM. RTS. 9, 10 (2003).

unevenness, reflected in the larger culture, seeped into their family dynamics. For example, the parents noted that the children in their families had picked up on the issues of parental legitimacy. One biological mom said that she and her partner had to work very hard to establish the relationship between their seven-year-old daughter and the non-biological mother. She acknowledged: "[Our daughter] doesn't listen to [the non-biological] mother, and will say, 'I don't have to do what you tell me. You're not my real Mommy. You just adopted me.'"

C. The Impact of Power Differences

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

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

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

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

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

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

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

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

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

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

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

Respondent: I hope this thing holds up.

Interviewer: What? The adoption or your relationship?

Respondent: Both.

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

Psychologically, the parent who second-parent adopts does not hold the same power in the family because family members perceive their status to be inferior both culturally and legally to that of the biological or first adoptive parent.²⁴⁰ This inequality can permeate not only the interactions within the family, but can also be reinforced by interactions in other social institutions. The result can be destabilizing if the parent feels like his or her parental legitimacy is being questioned, or more crucially, could be questioned if the relationship ended. This gives incredible power to one parent. While it may never be overtly used, it could have a corrosive effect on an intact family relationship in subtle ways. Emotionally, the parent with the perceived inferior position may not assert himself or herself either with the child or their partner in regard to their children for fear of how it will be received. In essence, the other family members could hold them emotionally hostage.

Geographically, the entire family is held captive when the parents are not confident they will be treated as a legitimate family regardless of where they live or travel.²⁴¹ When families are literally undone by simply entering a state's border, it is difficult to imagine a more effective way of undermining this type of family formation. As noted above, these real and perceived barriers exact a toll on the family's ability to exist to the fullest extent. Whereas different-sex

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

241. See Goldhaber, *supra* note 3, at 291-93.

families take the right to travel for granted, same-sex families must weigh the risks against the benefits.²⁴² These families are bound to the states that are willing to acknowledge them.²⁴³

III. RECOMMENDATIONS

The results of this study reflect the state of ambiguity that exists culturally and legally in same-sex families. The families in this study demonstrate that they must still negotiate both cultural resistance and legal inconsistencies as they engage in family formation. Perhaps most troubling, however, is the power differential that emerges from the uncertainty of the law. At once, the law that has been a shield of protection can be wielded as a weapon of destruction. First-adopter and biological parents find themselves in a powerful position to dismantle parent-child relationships.²⁴⁴

Although the courts and legislatures have made some gains in preserving the parent-child relationship after a same-sex couple relationship dissolves, the state has an interest in preserving all family units.²⁴⁵ The law must do more to support intact family units so a child can enjoy the benefits of both parents uniformly. Here are some of my recommendations.

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

As this research demonstrates, when highly educated and well-resourced same-sex families are still unclear about the status of their parenthood even after engaging the legal system, lawyers are doing a disservice to their clients.²⁴⁶ Family law attorneys should be

242. See Chen, *supra* note 3, at 195.

243. See *id.*

244. One of the subjects of this study, who happened to be a biological mother, reflected uncomfortably, on her fantasy of attempting to undo the parent-child relationship between her partner and their children. Despite watching the pain of a friend who was a second-parent adoptive mother having to fight to get shared custody of her children, she still felt the urge to think along those lines when she had strong discord with her partner.

245. See Goldhaber, *supra* note 3, at 291-93.

246. These results are somewhat consistent with a national poll conducted by Hunter College at The City University of New York. In this poll, only 38% of respondents could

working to ensure that both parents feel confident about their relationship with their children. Instead, the nature of the legal rhetoric used in second-parent adoptions, the clearest way in which both partners can establish parental rights, serves only to undermine the equality of each parent in his or her relationship to the child. By framing second-parent adoptions as a giving-up of rights by the biological parent, instead of a gaining of rights by the non-biological or non-first adopter in international adoptions, attorneys only reinforce the idea one parent is legally and socially lesser than the other.²⁴⁷ When few lawyers understand the nature of the practice and have to strategize about which judges or courts in which to file these petitions, same-sex families receive the message that their family is legally and culturally deviant.

The clearest way to solve the problem is eliminate the need for second-parent adoption.²⁴⁸ The use of second-parent adoption emerged

answer correctly all four questions about same sex marriage at the state and federal level, LGB military service, and LGB employment bias. PATRICK J. EGAN ET. AL., FINDINGS FROM THE HUNTER COLLEGE POLL OF LESBIAN, GAYS AND BISEXUALS: NEW DISCOVERIES ABOUT IDENTITY, POLITICAL ATTITUDES, AND CIVIC ENGAGEMENT 23-24 (2008), *available at* http://www.hrc.org/documents/Hunter_College_Report.pdf. Interestingly, respondents considered highly informed ranked parental rights and familial federal benefits as the two most important policy issues, compared to those considered less informed who ranked these issues third and fourth. *Id.* at 24, 25 fig.7. Similarly, younger members of the poll prioritized parental and adoption rights and marriage rights over other policy issues. *Id.* at 25, 26 fig.8.

247. At the time a couple engages the medical or legal system to begin family planning, either through artificial reproduction or adoption, it is incumbent upon these professionals to provide effective counseling that makes clear to both prospective parents that they will *both* be considered parents by the child they choose to bring into their family. In that regard, the law should be used to support the family relationship. Furthermore, lawyers should counsel first adopters and/or biological parents that the law should not be used to attempt to terminate the parental relationship between the second parent and child just because the former parent no longer wishes to be in a relationship with the latter parent. As long as attorneys are willing to take on high profile cases that challenge the parental status of a person who in every sense has acted as the parent to his or her child, the law is held out as a weapon that undermines the very relationships that, as a matter of policy, it should be preserving. For every step forward, culturally and legally, made with cases like *Miller-Jenkins*, we move a step backward with cases like *Janice M v. Margaret K.* These are both cases litigated this year.

248. In eliminating the need for second-parent adoption and instead creating narrowly rebuttable presumptions at the time the child is acquired by either the first adopter or through birth, the three main points of litigation would largely disappear: (1) parents would no longer challenge the legitimacy of their partner's parental status; (2) non-biological or non-adopter second parents could not walk away from the parental responsibility they took on at the time they agreed to bring a child into the family; and (3) sperm donors could neither claim parenthood nor be used to undermine the parental status of the biological parent's partner. Perhaps most importantly, these presumptions would exist outside of marriage, so same-sex couples would not have to rely on this institution as the only possible way of getting their family legally and culturally recognized.

from the creative use of step-parent adoption.²⁴⁹ However, the use of second-parent adoption has created an unwanted legacy of unequal parenting within some same-sex families. States developed step-parent adoption to support the positive policy goal of providing children with two parents.²⁵⁰ While second-parent adoption does the same for adoption and artificial insemination cases, the analogy ends there.²⁵¹ Step-parent adoption is based on the theory that another person lays greater claim to the child than the step-parent. Through consent or waiver and the desire of the step-parent's partner, a step-parent may legally replace another parent who consents to terminate his or her parental rights, or has waived them, or had them terminated through judicial action while the step-parent's partner maintains his or her parental rights.²⁵² On the other hand, same-sex couples start on equal footing as they plan to bring children into their family. The non-biological parent or the parent who does not adopt is not replacing another parent who had greater legal claim. One's biological or first adopter status should not serve as a legal basis on which to give one partner greater protections or power than the other, even temporarily.

Legislatures should allow couples who have planned together for a child, worked together to bring a child into the world, and intend to parent the child together to apply for a parentage declaration.²⁵³ This declaration would require no judicial intervention, but rather the application would be completed by both parents, thereby establishing their intentions to parent the child prior to the birth of the child. In assisted reproduction cases, the application could occur at the time the couple selects a donor and just prior to the medically procedural attempts at conception.²⁵⁴ Most importantly, no adoption would be

249. Martin, *supra* note 222, at 572. See Shapiro, *supra* note 49, at 27-8.

250. See Palmer, *supra* note 239, at 10.

251. See Shapiro, *supra* note 49, at 27.

252. *Id.*

253. Under the 2002 version of the Uniform Parentage Act, a father-child relationship is established when a man has consented to the use of assisted reproduction and a child is born, regardless of the marital status of the parents. UNIF. PARENTAGE ACT §§ 201(b)(5), 202, 9B U.L.A. 309-10 (2001) (amended 2002).

254. Currently, the District of Columbia allows for the status of *de facto* parent for the partner of the person who has adopted a child. Safe and Stable Homes for Children and Youth Amendment Act of 2007, D.C. CODE §§ 16-801 to -813 (2008) (amending D.C. CODE tits. 16, 21 (1981)), available at <http://www.dccouncil.washington.dc.us/images/00001/20070629100846.pdf>. The same should hold true for artificial insemination cases; the District of Columbia currently has draft legislation to this effect. Domestic Partnership Judicial Determination of Parentage Act of 2008, D.C. COUNCIL B17-0328, (amending D.C. CODE § 16-909(e), (f)), available at <http://www.dccouncil.washington.dc.us/images/00001/20080417171813.pdf>.

required; once parental responsibility is established, upon the birth of the child, the non-biological parent's status should be presumed and rebuttable under very limited circumstances.²⁵⁵

Such an option should be available to same-sex couples who currently cannot or simply do not wish to have state recognition of their relationship,²⁵⁶ but do wish to protect the parent-child relationships that they are creating using assisted reproduction. A procedure in which both parents-to-be are legally recognized prior to the birth of the child protects the state, the child and the parents. As noted from the cases discussed earlier, future parents can find themselves vulnerable in two ways as they wait for the impending birth of their child without the legal status of parenthood. First, the biologically-connected parent may end the relationship prior to the birth and exclude the other parent from having a relationship with the child.²⁵⁷ Second, the non-biologically connected parent may end the relationship prior to the birth of the child and refuse to support such child, leaving the biological parent in a financially vulnerable state.²⁵⁸ In some cases, the now single mother has to rely on state support.²⁵⁹ The state has a long-standing interest, both financially and socially, in having each child raised and supported by the two people who caused

255. This goal could also be achieved by having legislatures adopt a gender-neutral version of § 201(b)(5) of the Uniform Parentage Act or by having courts interpret it in a gender-neutral fashion regardless of marital status. As previously noted, this was done in custody cases in California and New Jersey to ensure that a child has two parents, but not necessarily one mother and one father.

256. It is important to recognize that marriage is largely an institution utilized by those in the upper class. Blaine Harden, *Numbers Drop for the Married with Children: Institution Becoming the Choice of the Educated, Affluent*, WASH. POST, Mar. 4, 2007, at A-03, available at <http://www.washingtonpost.com/wp-dyn/content/article/2007/03/03/AR2007030300841.html>. Therefore, state-recognized relationships creating parental rights can serve as only one among many options for creating parental rights at the time of family formation.

257. As discussed earlier, virtually no equitable remedies would be available to the same-sex partner of a biologically-connected parent who has planned for, participated in, and intended to parent a child yet to be born if the latter decides to end the relationship and bar his or her partner from establishing a relationship with the child. See Joslin, *supra* note 1, at 688-89. The key equitable remedy has been that of a psychological parent, which, in part, requires that the non-biological parent has established a parent-like relationship with the child. On the other hand, if a heterosexual unmarried mother decides to end her relationship with her partner, even if the child was created through artificial insemination, and the partner did not contribute genetic material, the partner would still be entitled to parental rights to the child. By not recognizing similarly situated homosexual partners, the law serves to undermine a family structure before it has even come to fruition.

258. See, e.g., *State ex rel. D.R.M. v. Wood*, 34 P.3d 887, 887 (Was. Ct. App. 2001) (discussing non-biological former partner who ended relationship before discovering partner was pregnant; when she discontinued support the biological former partner applied for state assistance, but a court ruled the non-biological former partner was under no duty to pay child support).

259. *Id.* at 890-91.

that child to be created.²⁶⁰ By allowing for a simple application at the planning stage, couples can be counseled so that both parties clearly understand the lifetime obligations they are about to undertake, regardless of whether their relationship endures.²⁶¹

Second-parent adoption can be eliminated in adoption cases by permitting same-sex couples to jointly adopt. If a state wishes to bar unmarried couples from adopting children, then it must allow same-sex couples to marry. Although a state may be able to rationally articulate, with the support of scientific research, that a child may fare better if it is born into a married household,²⁶² it cannot rationally articulate why same-sex couples who are bringing children into their family should not marry, particularly with the support of this same scientific research. Furthermore, creating a policy that prevents unmarried couples from adopting severely limits a state's policy on having children adopted. Married couples with children represented only 21.6% of the population in 2006, indicating a continuing decline in the last three decades.²⁶³ The key factor that states must consider is that relying on the institution of marriage as the gatekeeper of adoption unnecessarily privileges a decreasing portion of the population.

In the case of international adoptions, where other countries continue to bar same-sex couples from jointly adopting, each state could use an adoption presumption similar to the District of Columbia.²⁶⁴ As the state engages in its pre-adoption procedures for one parent, it should allow for those same procedures to apply to the other parent. Once a state has acknowledged that one of the partners is fit to adopt, the other parent should likewise be acknowledged. Furthermore, an order should be created that declares at the time an international adoption has been formalized abroad, a presumption exists that the adoption is simultaneously valid for the partner who remained stateside.²⁶⁵

260. See Goldhaber, *supra* note 3, at 291.

261. The more difficult process is managing parenthood for families who choose conception outside of the traditional medical institutions that provide ART. In those cases, a judicial declaration may be needed. See, e.g., *Jacob v. Shultz-Jacob*, 923 A.2d 473, 473, 476, 482 (Pa. Super. Ct. 2007) (ruling that third-party semen donor and lesbian non-biological mother could both have custodial and support obligations along with the lesbian partner biological mother); *A.(A.) v. B.(B.)*, [2007] 83 O.R.3d 561 (Can.) (declaring maternity of lesbian non-biological mother to a child with a legally recognized biological mother and actively involved sperm donor father).

262. See Storrow, *supra* note 3, at 308-09, n.9.

263. Press Release, United States Census Bureau, New Census Bureau Data Reveal More Older Workers, Homeowners, Non-English Speakers (Sept. 12, 2007), http://www.census.gov/Press-Release/www/releases/archives/american_community_survey_acs/010601.html.

264. See *supra* note 254 and accompanying text.

265. However, this proposition seems unlikely under the recently ratified Hague Convention rules on adoption and home studies. Same-sex couples will find it extremely

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

The . . . area where same-sex marriage might benefit children is in the durability and stability of the parental relationship. In the heterosexual world, a substantial body of research shows that other things held equal, marriages are more durable and stable than cohabitation. . . . To what extent this would be true of same-sex couples is not as yet known in any rigorous way, but anecdotal evidence suggests that a similar dynamic may apply. Gay couples who have formally married . . . have attested that the act of marriage has deepened their relationship — often to no one's surprise more than their own.²⁶⁶

It is important to note that none of the couples in the study suggested that they wanted gay marriage to be legalized. However, that was because they did not see it as a family preservation tool in its current status. They felt that it would not mean anything beyond the state in which they resided and would not afford them any protections in regard to their children. None of the couples expressed any understanding of the marital presumption and what it offers married couples who acquire children through reproductive technology. Allowing same-sex couples the option to marry, however, provides a social legitimacy to the whole family unit. Under the parental presumption, the non-biological parent would not have to adopt a child born to the marriage, and a same-sex couple could jointly adopt a child. There would be no "second" parent. It seems that in order to support the status of both parents in the family, legally and culturally, the idea of "second" parent should be dismantled.²⁶⁷

difficult to hide their sexual orientation and therefore, will likely find it more difficult to adopt internationally. See World Organization for Cross-Border Co-operation in Civil and Commercial Matters, *supra* note 17, at art. 5, 15, 17.

266. William Meezan & Jonathan Rauch, *Gay Marriage, Same-Sex Parenting, and America's Children*, 15 FUTURE OF CHILDREN 97, 108-09 (2005), available at http://www.futureofchildren.org/usr_doc/06_FOC_15-2_fall05_Meezan-Rauch.pdf (emphasis omitted).

267. While others correctly argue that parental rights and responsibilities should be disaggregated to allow for other family models, the couples in this study have chosen a model in which both parents want the same parental rights and responsibilities. See Jacobs, *supra* note 6, at 312, 313, 332, 338 (stressing the importance of the disaggregation of parental rights to more accurately reflect the reality of many families to allow children the full benefit of all relevant parental figures, and to grant parental rights as individually appropriate and not necessarily equally); Laura T. Kessler, *Community Parenting*, 24 WASH. U. J.L. & POL'Y. 47, 49, 72, 74 (2007) (discussing the prevalence of

The status of marriage also creates a certain level of prestige and clear assumptions around parental structures. Marriage, after all, is a social investment in the family. As Perlesz et al. remark in their study of parents, children and grandparents in lesbian families, "[t]he lack of institutional recognition of 'the lesbian-parented family' by public figures, such as health and welfare workers, educators, legal bureaucrats and so on, has meant that the lesbian-parented family is forever needing to redefine itself in its interactions with the public domain."²⁶⁸ For those gay and lesbian couples wishing to partake in marriage, a socially familiar vocabulary exists in which to define their roles, statuses, and relationships as they interact with other institutions and relate to society at large. The terms "civil unions" and "domestic partnerships" do not culturally connote the same level of status as marriage. One still needs to explain the family relationship. Marriage comes with a culturally recognized order to familial relationships.

Although same-sex marriage is a long way from being recognized nationally, a first step in making marriage a meaningful tool to preserve parent-child relationships would be to limit the power of DOMA. Courts can play a role in moving legislatures and society to recognize the importance of all family structures by giving narrow interpretation to statutes that impede this process. For example, despite Virginia's extreme stance against same-sex unions, the Virginia Supreme Court in *Miller-Jenkins* found that the PKPA trumped the state's DOMA statute, and thus preserved a parent-child relationship.²⁶⁹

In recognizing the power of the law to engage in social engineering, the court could have ruled that while DOMA may permit states not to recognize same-sex relationships, DOMA cannot be interpreted to deny the parent-child relationship that emerges from the presumption of a same-sex couple's civil union, registered domestic partnership, or marital relationship. Such a ruling would be consistent with the Tenth Circuit's holding that states may not create legislation refusing to recognize second-parent adoptions by gay and lesbian parents that were finalized in other states.²⁷⁰ Although the legal basis of the decision rested on the Full Faith and Credit Clause, the impact of the decision promoted the policy of preserving parent-child relationships. If courts ruled parental presumptions must be recognized

"more-than-two' parent" families and the social, political and legal responses and implications).

268. Perlesz et. al., *supra* note 6, at 177.

269. *Miller-Jenkins v. Miller-Jenkins*, 637 S.E.2d 330, 337-38 (Va. Ct. App. 2006).

270. *Finstuen v. Edmondson*, 497 F. Supp. 2d 1295, 1300 (W.D. Okla. 2006), *aff'd in part*, *Finstuen v. Crutcher*, 496 F.3d 1139 (10th Cir. 2007).

everywhere, such action would make clear the importance of a policy that supports all family relationships.

In addition, Massachusetts recently held that residents of states which do not allow same-sex marriage may marry in Massachusetts.²⁷¹ This has led the Attorney General of Rhode Island to recommend that the state recognize same-sex marriages performed in Massachusetts.²⁷² Likewise, New York's Governor Paterson has ordered all state agencies to recognize out-of-state same-sex marriages.²⁷³ Similarly, Vermont has decided to study whether civil unions in Vermont should be changed to marriages, thus eliminating a separate legal category for same-sex families.²⁷⁴ These actions set the tone of what is possible.

CONCLUSION

In this article, I have explored the current state of parentage options for same-sex couples, both legislatively and judicially, as well as how same-sex couples respond to or understand these options as they engage in family formation. The results of the research suggest couples are not clear in their understanding of the rights they have established and this lack of confidence in these legal protections serves to undermine these families on both a macro and micro level.²⁷⁵

271. *Cote-Whitacre v. Dep't. of Pub. Health*, 844 N.E.2d 623, 623 (Mass. 2006). Furthermore, on July 15, 2008 the Massachusetts Senate voted to repeal a 1913 law that has prevented out-of-state same-sex couples from marrying in Massachusetts. The state House of Representatives is expected to follow suit and Governor Deval Patrick plans to sign the repeal. Stephen Braun, *The Nation: Another Win for Gay Marriage*, L.A. TIMES, July 16, 2008, at A-12. Such action reflects the "norming" of gay marriage as its prevalence has increased since its legalization in the state in 2004.

272. Katie Zezima, *Rhode Island Steps Towards Recognizing Same-Sex Marriage*, N.Y. TIMES, Feb. 22, 2007, at A19, available at <http://www.nytimes.com/2007/02/22/us/22rhode.html>.

273. See Memorandum from David Nocenti, *supra* note 86.

274. John Curran, *Vermont Calmly Puts Marriage on the Table*, S. F. CHRON. (San Francisco), Jan. 14, 2008, at A-4, available at <http://www.sfgate.com/cgi-bin/article.cgi?f=/c/a/2008/01/14/MN4OUEJJO.DTL&feed=rss.gay>.

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

Legislatures and courts have made significant strides in protecting the parent-child relationship in same-sex families after the parents have dissolved their relationship, but this comes at a colossal cost, both financially and emotionally to the unprotected parent and the child.²⁷⁶ States should work to create a solid foundation for same-sex families as they enter parenthood whereby both partners can feel confident in their legal and social status as mothers or fathers. It is good policy to protect the parent-child relationship in newly emerging families as well as in those that are no longer whole. In fact, a policy that recognizes and supports both parents in same-sex families may serve to reduce the number of children being raised in single parent households, and thereby eliminate the need for judicially-created parental rights at the time the partner exits coupledness. Our current mix of laws has created the imprisoned family and in the process has economically, socially, and emotionally undermined them. Using existing models as well as some of the recommendations discussed above, lawyers, courts, and legislatures can set these families free.

study offers a crucial look at how the current state of the law impacts intact couples as they engage in family formation.

276. Goldhaber, *supra* note 3, at 291-93.