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## Two Mothers and Their Child: A Look at the Uncertain Status of Nonbiological Lesbian Mothers Under Contemporary Law

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# TWO MOTHERS AND THEIR CHILD: A LOOK AT THE UNCERTAIN STATUS OF NONBIOLOGICAL LESBIAN MOTHERS UNDER CONTEMPORARY LAW

## INTRODUCTION

Currently, state family law courts are embroiled in custodial matters arising in the context of nontraditional family units. Courts increasingly are being asked to address matters of custody, visitation, and child support for a separating couple and their child, when the child has a legally recognized biological connection to only one of the parents. One particularly difficult situation to reconcile is that of homosexual couples whose unions have resulted in children but which have subsequently dissolved. Because of the unique make-up of these families, the traditional legal model addressing custody rights fails to adequately fashion remedies for them.<sup>1</sup> Nevertheless, many states' courts rigidly adhere to the traditional model in order to dispose of these couples' cases in a cursory manner.<sup>2</sup> This state of the law results in vicious consequences: "Parents create a nontraditional family, [which] becomes the reality of the child's life. . . . The courts should protect children's interests within the context of nontraditional families, rather than attempt[ing] to eradicate such families by adhering to a fictitious, homogenous family model."<sup>3</sup> Other states, attempting to address the reality of these families, struggle to create new legal models for the situation.<sup>4</sup>

This note explores the current legal theories implemented in resolving questions of custodial rights and responsibilities in the context of same-sex parents. It demonstrates that the traditional model of resolving custody disputes insufficiently addresses the reality of contemporary family units in a fair manner. It argues instead that the newer models of functional parenthood more appropriately addresses the situation of couples like the one in the focus case explored herein.

Part I details the facts of the currently pending case involving Janet and Lisa Miller-Jenkins, now immersed in a custody dispute

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1. This idea is explored in this note through the consideration of a real nontraditional family.

2. See *infra* notes 78-96 and accompanying text.

3. Nancy D. Polikoff, *This Child Does Have Two Mothers: Redefining Parenthood to Meet the Needs of Children in Lesbian-Mother and Other Nontraditional Families*, 78 GEO. L.J. 459, 482 (1990).

4. See, e.g., *infra* notes 108, 120, 145, 158 and accompanying text.

over Lisa's biological daughter, Isabella.<sup>5</sup> This case implicates custodial rights and responsibilities for biological and nonbiological parents, and it illustrates how those rights play out under different states' laws dealing with the issue.<sup>6</sup> In this case, the specific differences between Vermont law and Virginia law on the subject are relevant. Thus, Part II discusses Vermont and Virginia law in this area and the differences between them. Vermont law provides a more promising remedy to the problem than current Virginia law; however, many states' laws are not on par with Vermont and have failed to incorporate alternatives to the traditional parental model.<sup>7</sup> Part III therefore examines the various models and legal theories that may be used to answer custody questions arising in cases involving nonbiological parties seeking parental rights and compares the traditional and nontraditional models. Parts II and III also apply these various laws and models to the focus case demonstrating how the various state laws and theories examined can lead to different results. Part IV concludes the note. Taking all of the factors of the focus case into account, this note argues that in cases similar to the focus case the fairest result is achieved by using a functional parent model rather than adhering to the traditional model that allocates custody rights and responsibilities primarily, if not solely, on the basis of the biological status of the party.

### I. CONFLICTING LAWS, COMPETING RIGHTS: THE MILLER-JENKINS CASE

In 2002, Isabella Miller-Jenkins was born in Virginia, as a result of artificial insemination, to Lisa and Janet Miller-Jenkins.<sup>8</sup> The women, initially a couple in Virginia, moved to Vermont to become a legally recognized couple under that state's civil union laws.<sup>9</sup> The couple then moved back to Virginia, where Isabella was born, before eventually settling in Vermont.<sup>10</sup> The Miller-Jenkinses lived as a legally recognized family unit under Vermont law, comprised of two parents and their child, until Lisa sought a

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5. Justin Bergman, *Custody Fight May Test Va. Law, Mother of Child Seeks Sole Custody After Civil Union to Woman Ends*, RICHMOND TIMES-DISPATCH, Aug. 13, 2004, at B2.

6. *Id.*

7. See *infra* notes 70, 76 and accompanying text.

8. Alan J. Keays, *Civil Union Custody Fight: Woman Found in Contempt: Judge Scolds Mom for Leaving for Another State*, RUTLAND HERALD, Sept. 8, 2004, <http://www.rutlandherald.com/apps/pbcs.dll/article?AID=/20040908/NEWS/409080397&S>.

9. *Id.*

10. *Id.*

dissolution of the civil union, again under Vermont law, in 2003.<sup>11</sup> The women agreed to adjudicate the custodial issues involving Isabella in the same proceeding, also before a Vermont judge.<sup>12</sup> Under that decision, Janet received visitation rights to Isabella.<sup>13</sup> The decision comported with the couple's belief that, pursuant to their civil union, Janet already had parental status with regard to the child and did not need to legally adopt Isabella.<sup>14</sup> After all, "Lisa Miller-Jenkins and Janet Miller-Jenkins might have expected that their lives as a couple joined in civil union would enjoy the same protections that married couples enjoy. That was the explicit purpose behind the creation of civil unions."<sup>15</sup>

When Lisa returned to Virginia after these proceedings, she took Isabella with her and sought full custody under Virginia law,<sup>16</sup> which prohibits gay marriage<sup>17</sup> and civil unions<sup>18</sup> and voids such marriages or unions from other states.<sup>19</sup> The Full Faith and Credit Clause of the United States Constitution, however, provides that each state give full recognition to the public acts and records of every other State.<sup>20</sup> The original purpose behind the Full Faith and Credit Clause was to "guard . . . against the disintegrating influence of provincialism."<sup>21</sup> Because the Miller-Jenkinses' civil union was a matter of public record, the Constitution seemingly would require Virginia to acknowledge the civil union and Janet's parental rights as established under Vermont Law. To the contrary, however, states are not required to honor out-of-state civil unions or marriages if doing so would conflict with state public policy.<sup>22</sup> The Supreme Court noted in 1998 that "[t]he Full Faith and Credit Clause does not compel 'a state to substitute the statutes of other states for its own statutes dealing

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11. Calvin R. Trice, *Judge Rules That Va. Law Voids Issue of Custody for Gays*, RICHMOND TIMES-DISPATCH, Aug. 25, 2004, at A1.

12. Keays, *supra* note 8.

13. Trice, *supra* note 11.

14. Bergman, *supra* note 5.

15. *A Question of Dignity*, RUTLAND HERALD, Aug. 26, 2004, <http://www.rutlandherald.com/apps/pbcs.dll/article?AID=/20040826/NEWS/408260321&S>.

16. Trice, *supra* note 11.

17. VA. CODE ANN. §§ 20-45.2 (2004).

18. *Id.* § 20-45.3.

19. *Id.* § 20-45.2-45.3.

20. U.S. CONST. art. IV, § 1.

21. Robert H. Jackson, *Full Faith and Credit: The Lawyer's Clause of the Constitution*, 45 COLUM. L. REV. 1, 17 (1945).

22. See *Baker v. Gen. Motors Corp.*, 522 U.S. 222, 233 (1998) (distinguishing *law* of another jurisdiction from *judgments* rendered in another jurisdiction and explaining that, in applying *law* from another jurisdiction, courts may invoke a "public policy" exception).

with a subject matter concerning which it is competent to legislate."<sup>23</sup> Thus began a bitter custody battle between the two women that has captured national attention.<sup>24</sup>

Virginia laws prohibit its state courts from hearing custody issues when proceedings concerning the case are already underway in another state.<sup>25</sup> Federal law presumably also would bar Virginia from participating in the Miller-Jenkins dispute because the Vermont court had already given Janet visitation rights.<sup>26</sup> Federal anti-kidnapping legislation guards against the very result seen in the Miller-Jenkins dispute.<sup>27</sup> The law seeks to prevent one parent taking a child from one state to another, when custody proceedings are already underway in one venue, in an attempt to garner more favorable legal outcomes in a custody dispute under another state's laws.<sup>28</sup> This seemingly applicable law, however, was not applied by the Virginia court in this instance.<sup>29</sup> Instead, Lisa argued that federal law does not prevent her suit from proceeding in Virginia, citing the 1996 Defense of Marriage Act,<sup>30</sup> because the Vermont custody case had been heard under Vermont's civil union laws, which are not recognized in Virginia.<sup>31</sup> She argued, therefore, that the Virginia law that prohibits recognizing civil unions likewise should create "an exception" to the law prohibiting simultaneous custody proceedings in both Virginia and another state.<sup>32</sup> On August 24,

23. *Id.* at 232 (citing *Pac. Employers Ins. Co. v. Indus. Accident Comm'n*, 306 U.S. 493, 501 (1939)).

24. Reports of the case have been made across both Virginia, e.g., Christina Nuckols, *Two Women, Two States, One Child*, VIRGINIAN-PILOT & LEDGER STAR, Dec. 13, 2004, at A1, and Vermont, e.g., *Vt. Union Cited in Custody Battle*, BURLINGTON FREE PRESS, Aug. 13, 2004, at 2. Reports also appeared in Washington, D.C., e.g., S. Mitra Kalita, *Vt. Same-Sex Unions Null in Va., Judge Rules, Case Seen as Test of Parental Rights*, WASH. POST, Aug. 25, 2004, at B1; Chicago, e.g., *Judge to Rule on Custody of Gay Couple's Daughter*, CHI. TRIB., Aug. 25, 2004, at 9; Portland, e.g., Bill Graves, *Election 2004 Gay Marriage Questions of Rights, Social Status Stir Debate on Same-Sex Marriage*, OREGONIAN, Oct. 8, 2004, at A1; Orlando, e.g., *In Virginia, Lesbian Fights Ruling Denying Her Custody*, ORLANDO SENTINEL, Dec. 9, 2004, at A15; Kansas City, e.g., *Child Custody Case Puts States at Odds*, KAN. CITY STAR, Dec. 9, 2004, at 9; Cincinnati, e.g., Justin Bergman, *Custody Battle Could Test Law*, CINCINNATI POST, Aug. 13, 2004, at A4; Boston, e.g., *Civil Union Custody Case Dispute Continues*, BOSTON GLOBE, Sept. 9, 2004, at B2; and Memphis, Tennessee, e.g., Henry Bailey, *Briefly*, COM. APPEAL, Sept. 29, 2004, at A4.

25. Calvin R. Trice, *It's Virginia vs. Vermont in Custody Case; Laws on Same-Sex Unions Conflict in Former Lovers' Dispute*, RICHMOND TIMES-DISPATCH, Aug. 14, 2004, at B2.

26. See Christina Nuckols, *supra* note 24. Nuckols references the Parental Kidnapping Prevention Act of 1980, 28 U.S.C. § 1738A (2005). *Id.*

27. See *id.*

28. See *id.*

29. *Id.*

30. 1 U.S.C. § 7 (2005).

31. Nuckols, *supra* note 24.

32. Trice, *supra* note 25.

2004, a Virginia judge agreed with Lisa's argument and held that Lisa was entitled to full custody under Virginia law, which, according to the judge, voids any claims of parental rights by Janet.<sup>33</sup> The Vermont judge handling the same case disagreed and has "ruled that Virginia 'improperly exercised jurisdiction' in the case because the matter was already pending in Vermont before a filing was made in that state."<sup>34</sup>

These conflicting rulings marked only the beginning of the dispute over which states' laws should govern the parties involved in the Miller-Jenkins case. In early September, a Vermont judge found Lisa in contempt for attempting to circumvent the Vermont decision and jurisdiction over the case.<sup>35</sup> The judge reprimanded Lisa for her behavior, noting that:

[She] chose to bring her action initially in Vermont because of the rights and benefits Vermont's law provide her. . . . But when she realized that there were obligations and burdens to go along with those rights and benefits, and decided that under the specific order issued by the Vermont court the benefits were outweighed by the burdens, she changed her mind and decided to go elsewhere.<sup>36</sup>

Although this confusion and double-dealing would seem to be the precise reason that the federal and state custody dispute laws exist, Virginia's staunch refusal to assist in furthering rights for same-sex families in any manner will lead to continued legal proceedings in both states. This circumstance inevitably results in the crisis that is currently unfolding for the Miller-Jenkins in the dispute over Janet's parental rights. Both Vermont and Virginia have handed down conflicting orders, and both parties have filed appeals to the adverse decisions.<sup>37</sup> No one seems to agree which laws rightfully apply to the Miller-Jenkins case.

The case drags on in these conditions with no end in sight.<sup>38</sup> Meanwhile, Isabella is caught in the middle of a charged and tangled

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33. Trice, *supra* note 11.

34. *Lesbian Custody Dispute May Reach Vt. High Court*, RICHMOND TIMES-DISPATCH, Jan. 13, 2005, at B4.

35. Keays, *supra* note 8.

36. *Id.* (quoting Judge William Cohen's decision to grant Janet Miller-Jenkins's motion).

37. Alan J. Keays, *Civil Union Case Goes to Vt. Supreme Court*, RUTLAND HERALD, Jan. 29, 2005, available at <http://www.rutlandherald.com/apps/pbcs.dll/article?AID=/20050129/NEWS/501290336&S> (reporting that Lisa Miller-Jenkins is appealing the Vermont decision to the Vermont Supreme Court while Janet Miller-Jenkins simultaneously appeals the Virginia decision to the Virginia Court of Appeals).

38. *Id.*

custody battle that challenges traditional legal theory governing parental rights, which arises because traditional theory does not transfer well from the traditional view of parents as one mother and one father to the increasingly complex reality of today's family structures. This reality is apparent when a person can be simultaneously adjudicated to be a parent and a nonparent in different jurisdictions. The circumstances of the Miller-Jenkins case exposes some of the flaws in the present system.

Currently, growing numbers of gay and lesbian couples are choosing to start families of their own.<sup>39</sup> The growing number of such nontraditional families will exacerbate the problem exposed by the Miller-Jenkins case. The law and the current reality must align themselves in order for those in Janet, Lisa, and Isabella Miller-Jenkins's places to be treated fairly and consistently within the legal system.

## II. VERMONT LAW VERSUS VIRGINIA LAW

### A. Vermont Law

Vermont has long been a pioneer of equal rights for homosexual couples in the family law arena.<sup>40</sup> Through both adoption and civil union laws, the state has recognized the reality that not all children are born or reared in a female-mother and male-father traditional family unit.<sup>41</sup> With this in mind, Vermont has set up legal avenues that protect both biological and nonbiological parents.<sup>42</sup> This approach arguably offers better protection from the child's perspective as well, since it ensures that the "law [is] available to help preserve a child's important primary relationships, even if the child's parents were not genetic parents and their marriage was not a formal one."<sup>43</sup> As family units become more varied and complex, such laws become increasingly necessary to safeguard all parties' rights and responsibilities in

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39. See EVAN WOLFSON, WHY MARRIAGE MATTERS 87 (2004) (noting that in the 2000 national census, an estimated 180,000 of 600,000 American gay couples were raising children). See also Dan Gilgoff, *The Rise of the Gay Family*, U.S. NEWS & WORLD REP., May 24, 2004 (noting that the 2000 census shows a substantial increase of gay and lesbian couples raising children since the previous 1990 census).

40. Patricia Wen, *A Civil Tradition: Data Show Same-Sex Unions in VT Draw a Privileged Group*, BOSTON GLOBE, June 29, 2003, at B1.

41. Andrew Fegelman, *State Court Says Gays Have Right to Adopt*, CHI. TRIB., July 19, 1995, at N1.

42. See VT. STAT. ANN. tit. 15A, § 1-102(a) (2002).

43. Barbara Bennett Woodhouse, *Hatching the Egg: A Child-Centered Perspective on Parents' Rights*, 14 CARDOZO L. REV. 1747, 1858 (1993).

child custody and visitation disputes. Vermont has responded to this reality.<sup>44</sup>

Prior to the State's civil union laws, Vermont provided an avenue for nonbiological parents to attain legal parenthood through adoption.<sup>45</sup> Statutory authorization allows for "any person"<sup>46</sup> to adopt a child to create a legal parent-child relationship between the two.<sup>47</sup> Specifically speaking to the situation confronting gay and lesbian couples planning to start a family, the Vermont law states: "If a family unit consists of a parent and the parent's partner, and adoption is in the best interest of the child, the partner of a parent may adopt a child of the parent. Termination of the parent's parental rights is unnecessary in an adoption under this subsection."<sup>48</sup> This legal recourse directly applies to a biological parent's lesbian or gay partner regarding children brought into the couple's life, and it would allow such partners to establish equal parental rights to the child.<sup>49</sup>

A Vermont court drew this precise conclusion in *Tichenal v. Dexter*.<sup>50</sup> A woman involved in a long-term lesbian relationship adopted a daughter who was raised as the mutual daughter of both women.<sup>51</sup> The other woman did not adopt the child and, when the relationship dissolved, she petitioned the court for visitation rights pursuant to her status as the child's second mother.<sup>52</sup> Granting the adoptive mother's motion to dismiss, the court firmly stated that the non-adoptive woman's opportunity to establish parental rights existed under Vermont law through adoption, rather than through equitable petition after the dissolution of the relationship.<sup>53</sup> Speaking clearly to those who may find themselves in the non-adoptive woman's position in the future, the judge stated:

Persons affected by this decision can protect their interests. Through marriage or adoption, heterosexual couples may assure that nonbiological partners will be able to petition the court regarding parental rights and responsibilities or parent-child contact in the event a relationship ends. Nonbiological partners

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44. See VT. STAT. ANN. tit. 15A, § 1-102(a) (2002).

45. *Id.*

46. *Id.*

47. *Id.*

48. *Id.* § 1-102(b).

49. *Id.*

50. *Tichenal v. Dexter*, 693 A.2d 682 (Vt. 1997).

51. *Id.* at 683.

52. *Id.*

53. *Id.* at 686-87.



in same-sex relationships can gain similar assurances through adoption.<sup>54</sup>

As stated, Vermont adoption laws protect the rights of lesbians who wish to establish their parental rights despite their nonbiological parent status, and Vermont courts have spoken on the issue, affirming that the law intends this protection.<sup>55</sup> Even before the 1995 codification of parental rights attainable through adoption for same-sex nonbiological parents, Vermont courts construed earlier, more restrictive code language as granting parental status through adoption to the lesbian partner of the biological parent.<sup>56</sup>

Vermont blazed a further path for homosexuals in the area of parental rights with its passage of civil union laws in 1999.<sup>57</sup> Under Vermont law, a civil union is created when "two eligible persons have established a relationship pursuant to this chapter, and may receive the benefits and protections and be subject to the responsibilities of spouses."<sup>58</sup> This definition suggests that the legislature intended to create a marriage alternative for same-sex couples through which they can receive legal status and rights equal to those obtained by traditional male-female marriages. Various criteria must be met for a couple's civil union certificate application to be approved: the parties must be of the same sex,<sup>59</sup> they must not be party to another civil union or marriage,<sup>60</sup> and they must comply with specific procedural rules pertaining to the application for a civil union license.<sup>61</sup> The civil union statutes also address the particular benefits, rights, and obligations conferred on parties joined by a civil union.<sup>62</sup> The statute declares that:

(a) Parties to a civil union shall have all the same benefits, protections and responsibilities under law, whether they derive from statute, administrative or court rule, policy, common law or any other source of civil law, as are granted to spouses in a marriage.

(b) A party to a civil union shall be included in any definition or use of the terms "spouse," "family," "immediate family," "dependent," "next of kin," and other terms that denote the

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54. *Id.* at 686.

55. *Id.*

56. *See, e.g., In re B.L.V.B.*, 628 A.2d 1271 (Vt. 1993).

57. VT. STAT. ANN. tit. 15, § 1201 (2002).

58. *Id.*

59. *Id.* § 1202.

60. *Id.*

61. VT. STAT. ANN. tit. 18, § 5160 (2000).

62. VT. STAT. ANN. tit. 15, § 1204 (2002).

spousal relationship, as those terms are used throughout the law.

(c) Parties to a civil union shall be responsible for the support of one another to the same degree and in the same manner as prescribed under law for married persons.

(d) The law of domestic relations, including annulment, separation and divorce, child custody and support, and property division and maintenance shall apply to parties to a civil union.

....  
(f) *The rights of parties to a civil union, with respect to a child of whom either becomes the natural parent during the term of the civil union, shall be the same as those of a married couple, with respect to a child of whom either spouse becomes the natural parent during the marriage.*<sup>63</sup>

Upon dissolution, civil unions are again subjected to the same rules governing dissolution as marriages under Vermont law.<sup>64</sup> This analysis demonstrates that the civil union laws fundamentally create a situation analogous to marital status for same-sex couples, including specifically analogous rules pertaining to children brought into the civil union.

The foregoing laws provide an inclusive framework for resolution of the Miller-Jenkins dispute.<sup>65</sup> The couple specifically sought out Vermont law to solidify and govern their relationship.<sup>66</sup> Janet and Lisa consciously decided to move to Vermont to apply for a civil union certificate, which they received,<sup>67</sup> thereby binding themselves legally to one another and incurring the rights and responsibilities that accompany this new legal status.<sup>68</sup> After becoming a legally recognized couple, they consciously decided to start a family and settle in Vermont in order to take advantage of the treatment and protection Vermont law would afford them.<sup>69</sup> Isabella was brought into their family with the understanding that she was to be the legal daughter

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63. *Id.* (emphasis added). Under Vermont law, the statute is interpreted to mean that both the custodial and non-custodial parents enjoy certain rights, as well as incur certain responsibilities, both pertaining to the child and to the other parent. *Id.* §§ 653-669.

64. *Id.* § 1206 (2002).

65. See *supra* notes 44-48.

66. Bergman, *supra* note 5.

67. *Id.*

68. Jonathan Finer, *Court Says Both in Gay Union Are Parents*, WASH. POST, Nov. 22, 2004, at A3 (quoting Rutland, Va., Family Court Judge William D. Cohen writing "[P]arties to a civil union who use artificial insemination to conceive a child can be treated no differently than a husband and wife who . . . choose to conceive . . . with the sperm of an anonymous donor").

69. Keays, *supra* note 8.

of both mothers, as stipulated by the Vermont legislature.<sup>70</sup> The visitation decision rendered by the family court of Vermont upon the Miller-Jenkinses' dissolution of their civil union clearly shows that the intended effect of the women's union, equal parental rights, had been achieved.<sup>71</sup> These women sought out the protection Vermont afforded same-sex couples wishing to legalize their unions, and that protection was granted. Presumably because of the status of Vermont's laws, Janet did not pursue the alternative method of ensuring her legal rights regarding Isabella through adoption.<sup>72</sup> She should not be punished for failing to do so because her rights were equally guaranteed under the state's civil union laws. Furthermore, Lisa should not be given the opportunity to unilaterally default on the agreement she made regarding her legal partnership with Janet and the daughter they mutually agreed to have. The Vermont judge involved in the Miller-Jenkins case realized these policy concerns when he "ruled for the first time that both members of a same sex civil union are the legal parents of a child born to one of them."<sup>73</sup> The court's ruling embodied the natural, logical, and required result under Vermont law.<sup>74</sup>

Janet and Lisa made decisions together regarding their status as a family. Their decisions gained the sanctity of legally enforceable rights and obligations when they applied for and received a certificate of civil union in Vermont.<sup>75</sup> They expected Vermont law to govern their relationship with each other and their relationships to Isabella. Allowing one partner in these circumstances to shirk responsibilities by moving to a new state and beginning legal proceedings to which she knows she is not legally entitled is unjust. It would be equally as unjust for a nonbiological mother in Janet's position to demand release from the legal obligations she has assumed as Isabella's mother, as it would be to allow a mother in Lisa's position to demand and receive, under a different state's laws than those rightfully governing her relationship, sole parental rights regarding Isabella pursuant to her status as a biological parent.

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70. Bergman, *supra* note 5.

71. Keays, *supra* note 8.

72. Bergman, *supra* note 5.

73. Alan J. Keays, *Landmark Ruling Made in Civil Union Custody Battle*, RUTLAND HERALD, Nov. 21, 2004, available at <http://www.rutlandherald.com/apps/pbcs.dll/article?AID=/20041121/NEWS/411210342&S>.

74. *Id.*

75. Legally enforceable rights and obligations are conferred pursuant to title 15, sections 1201-1207, of the Vermont Code.

Strict categorizations of parent and nonparent relying on biological affiliation to the child as the threshold and dispositive inquiry do not address all family structures in today's diverse society.<sup>76</sup> A family law system that refuses to recognize a couple's binding, contractual relationship spelling out mutual, equal rights and obligations owed to their children, and instead strictly adheres to a biological/nonbiological distinction is manifestly unjust. Allowing Lisa's action to effectuate a refusal to acknowledge and grant Janet's deserved parental status, virtually guarantees "exactly this scenario — parents fleeing with children from one jurisdiction to another, because they don't like the custody rulings of a state."<sup>77</sup>

### *B. Virginia Law*

The Virginia legislature and courts, in contrast to Vermont's, have chosen to abide by traditional legal theory in handling many domestic issues.<sup>78</sup> The state's preference for traditional law in this area is especially evidenced by their treatment of marriage and parental rights. Both issues show Virginia's adherence to a conventional societal framework wherein families consist of a married man and woman and their mutually, biologically conceived offspring.<sup>79</sup> Statutes and court decisions implicating these matters demonstrate that biology is indeed often the initial and sole question for disposition of such issues.<sup>80</sup> Males may marry females, and children have two parents, one male and one female.<sup>81</sup>

Although this construction certainly allows for efficient resolution of marital and parental status questions, it does not provide equal access to legal benefits or equal access to enforcement of legal obligations in the context of family units that do not mirror such a conventional makeup. Although traditional theories may make sense for many traditional families, they simply do not translate

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76. For evidence that family structures are changing, see *supra* note 39 and accompanying text.

77. Alan J. Keays, *Vt., Va. at Odds Over Child Custody Civil Union Law at Issue in Case About Visitation*, RUTLAND HERALD, Aug. 25, 2004 (quoting Rebecca Glenberg, an ACLU attorney), available at <http://www.rutlandherald.com/apps/pbcs.dll/article?AID=/20040825/NEWS/408250374/1024/NEWS04>.

78. T. Shawn Taylor, *Ties that Unwind: Legal Cases and Some State Laws Threaten to Undo Lesbian Couples' Adoptions, Parental Agreements*, CHI. TRIB., Nov. 17, 2004, at C1.

79. Peter Whorisky, *A New Years Baby with an Additional Difference: Two Moms*, WASH. POST, Jan. 2, 2003, at A1.

80. *Id.*

81. VA. CODE ANN. § 20-45.2 (2004).

effectively to nontraditional families.<sup>82</sup> Virginia law can cleave to these traditional laws, but today's world shows that it will not follow suit by constraining itself to such narrow boxes.

Under Virginia law, marriage between persons of the same sex is prohibited.<sup>83</sup> Virginia also does not recognize any same-sex marriage that takes place in another jurisdiction.<sup>84</sup> Recently, the state expanded its prohibition on legalized same-sex partnerships by passing the "Affirmation of Marriage Act."<sup>85</sup> This act proclaims that Virginia additionally will neither allow within its jurisdiction a civil union between two men or two women nor recognize such a union that has taken place under another state's laws.<sup>86</sup> Virginia parental status laws follow the traditional legal model whereby biological parents are the only legal parents, unless adoption procedures have been followed and parental status has been legally determined.<sup>87</sup>

Under Virginia law, the Miller-Jenkins case was efficiently resolved under the Affirmation of Marriage Act; Virginia simply declared Lisa the only mother that Isabella has and the only woman who has a legal claim to parental rights to the girl based on her biological connection to Isabella.<sup>88</sup> Virginia's law sends the message that Lisa's suit for sole custodial rights is appropriate, despite the contrary rulings in Vermont under the laws applicable there to the couple.<sup>89</sup> Because Lisa, the biological mother, seeks legal assurance that she is the parent entitled to Isabella, and the adverse party here is, from Virginia's viewpoint, a third-party nonbiological outsider, Janet has no claim to the girl whatsoever and, therefore, rightfully is excluded from the proceedings.<sup>90</sup>

Federal and state laws prohibiting Virginia's courts from entertaining simultaneous custody petitions that are already undertaken in another state<sup>91</sup> pose something of a problem, but the

82. Whorisky, *supra* note 79.

83. VA. CODE ANN. § 20-45.2 (2004).

84. *Id.*

85. *Id.* § 20-45.3.

86. *Id.*

87. *Id.* § 20-49.1.

88. Trice, *supra* note 11. See also Calvin R. Trice, *Va. Woman Gets Sole Custody; Ex-Lesbian Partner Wants Visitation Rights Under Vermont Law*, RICHMOND TIMES-DISPATCH, Sept. 29, 2004, at B4 (reporting that the Virginia judge "ruled . . . that Virginia's new Affirmation of Marriage Act prohibits state courts from recognizing civil unions and deemed Lisa Miller-Jenkins the child's only parent").

89. Trice, *supra* note 11.

90. *Id.* (stating that the Virginia judge "deemed [Janet] no more than a friend").

91. See *Upholding the Law*, RUTLAND HERALD, Sept. 9, 2004, available at <http://www.rutlandherald.com/apps/pbcs.dll/article?AID=/20040909/NEWS/409090339&S> (noting

courts, in response, have relied again on the Affirmation of Marriage Act.<sup>92</sup> Because Virginia does not recognize civil union laws of other states, it is not precluded from deciding Lisa's petition because it bears no obligation to consider proceedings taking place in Vermont that are based on that state's civil union laws.<sup>93</sup> Virginia's treatment of this case is in line with other Virginia cases that evidence gay stereotyping, a problem that arises in many states' laws and court decisions.<sup>94</sup>

Virginia's treatment of the Miller-Jenkins case and others shows that its concern is centered on ensuring biological parents' rights, unless that biological parent places her child in a nontraditional, homosexual family unit. This insistence on biological rights is little more than a mechanism for discouraging a lifestyle that the State's official laws do not condone. The focus on biology alone hardly suffices to dictate family affairs that have already been determined in the appropriate sphere — the family itself, formed according to the parties' own autonomous decisions.<sup>95</sup>

Virginia's concern for biological parents' rights would not be eroded by a departure from its traditional legal framework. Here, for example, Isabella's biological mother is well-protected under Vermont's progressive law; Lisa was granted custody of her child and, if she were to request it, is entitled to financial support from Isabella's other parent, Janet.<sup>96</sup> Vermont law only restricts Lisa by holding her to the legal obligations she also incurred by consciously deciding to form her family, thereby giving her the freedom to make autonomous family choices with the assurance that they will be respected by the law. By ignoring the Vermont proceeding, Virginia law protects Lisa from her own choices, allowing her to circumvent her decisions and permitting her to take advantage of narrow,

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specifically that although Virginia's law refusing to recognize civil unions from other states may be a legitimate exercise of that state's legislature, that law "does not outweigh the law that requires states to recognize the jurisdiction of other states in parental disputes").

92. *ACLU Files Appeal in Gay Custody Battle*, RUTLAND HERALD, Dec. 9, 2004, <http://www.rutlandherald.com/apps/pbcs.dll/article?AID=/20041209/NEWS/412090419&S>.

93. Trice, *supra* note 11.

94. See *Bottoms v. Bottoms*, 457 S.E.2d 102 (Va. 1995) (awarding a grandmother custody of a child instead of the child's mother). The court based its opinion in part on its finding that the mother's homosexuality was "illegal" and "immoral," which it found to contribute to the mother's "unfitness" and thus to validate a disregard for the court's usual deference to biological parents' rights. *Id.* at 107. See generally Amy D. Ronner, *Bottoms v. Bottoms: The Lesbian Mother and the Judicial Perpetuation of Damaging Stereotypes*, 7 YALE J.L. & FEMINISM 341 (1995).

95. Richard F. Storrow, *Parenthood by Pure Intention: Assisted Reproduction and the Functional Approach to Parenthood*, 53 HASTINGS L.J. 597, 639-40 (2002).

96. The responsibility to pay child support arises under title 15, section 1204(d) of the Vermont Code. VT. STAT. ANN. tit. 15, § 1204(d) (2002).

arbitrary laws she initially rejected when they did not support her desires at that time.

### III. LEGAL MODELS FOR CUSTODIAL RIGHTS

This section describes current legal models that are used by courts hearing child custody and related matters. Some of these models reflect the legal avenues taken by the states discussed in the previous section as seen in their statutory and case law, while others offer other visions of how legal parental issues might be decided. The traditional, parent/nonparent model is analyzed, followed by various other 'functional parent' models used by some courts to deal with the complexities of nontraditional families. Among 'functional parent' models are equitable parenthood, de facto parenthood, in loco parentis, and equitable estoppel. Although no separate category exists for a 'best interests of the child' test to determine parental rights issues, the child's interest is always a factor in parental establishment proceedings, as can be seen in the following discussion.

#### *A. Traditional Model: Parent Versus Nonparent*

Legally, upon the birth of a child, the law demands a determination of the identity of the child's parents, within the underlying framework that each child has exactly one mother and one father.<sup>97</sup> A determination of legal parentage is also a determination of the rights and responsibilities of parenting the child to the exclusion of all others.<sup>98</sup> This embodiment of the parent versus nonparent ideology can be explained as follows: "legal parenthood is an all-or-nothing status. A parent has all of the obligations of parenthood and all of the rights; a nonparent has none of the obligations and none of the rights."<sup>99</sup> A designated parent can expect to prevail in a contest with a nonparent involving the child, short of the parent's gross inadequacy of caretaking.<sup>100</sup> A person may be deemed a legal parent only

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97. See, e.g., VA. CODE ANN. § 20-49.1 (2004) (stating that the act of giving birth is prima facie proof of parent status as well as describing other ways to establish parentage).

98. Polikoff, *supra* note 3, at 468.

99. *Id.* at 471.

100. See, e.g., Mark Strasser, *Fit to Be Tied: On Custody, Discretion, and Sexual Orientation*, 46 AM. U. L. REV. 841, 846-47 (1997). This article states:

It is extremely difficult for a nonparent to wrest custody away from a parent. Because the nonparent "bears a heavy burden of persuasion," it may not even suffice to establish that the parent intentionally abused or neglected the child. . . . [T]hird parties must prove parental unfitness or other very unusual conditions to wrest custody away from the parents. . . . The New York Court of Appeals spelled out what some of those unusual conditions might be, explaining

if he or she is biologically related to the child,<sup>101</sup> married to a woman giving birth to a child,<sup>102</sup> or legally adopts the child according to the relevant state law.<sup>103</sup>

In a court proceeding to determine a child's future arrangements when a couple separates:

The significance of parental status . . . is profound. In a custody dispute, parents stand on equal footing with respect to one another, and the court determines custody under a best interests of the child standard. When the dispute is between a parent and a nonparent, not only is the parent usually considered the preferred custodian, but the nonparent may even be found without standing to challenge parental custody.<sup>104</sup>

This biology-centered, nonparent-exclusion model has obvious implications for the growing number of family units that share the characteristics of the Miller-Jenkins family. Because Lisa is the female parent of Isabella, the court can dispose of the custody proceeding with little fanfare. Under the traditional legal model, Lisa has all the rights and responsibilities of Isabella's upbringing, while Janet, a nonparent, has no legal recourse for the visitation rights she seeks. Logically, under this model, Janet, who was involved in Isabella's life from the very plan of her conception, has

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that a state may terminate parental rights "if there is first a judicial finding of surrender, abandonment, unfitness, persistent neglect, unfortunate or involuntary extended disruption of custody, or other equivalent but rare extraordinary circumstance which would drastically affect the welfare of the child."

*Id.* (footnotes omitted). In one case, termination of parental rights was deemed appropriate because neglect would be ongoing for a long or indefinite period. *In re J.J.B.*, 390 N.W.2d 274, 278 (Minn. 1986).

101. Polikoff, *supra* note 3, at 468-69 (noting that a single, biological mother's desire to be deemed a child's only parent is of "no legal consequence" because she is required to submit the biological father's name and remains "vulnerable to a paternity claim even if the child was born as a result of alternative insemination").

102. *Id.* at 469-70 (discussing the already apparent difficulties with the biological parenthood model, arising from the legal presumption that the mother's husband is the child's father, which hinder a biological father in gaining parental rights when the mother is already married to another man).

103. *Id.* at 483. Even adoption is riddled with the legal model that limits a child's parents to two, and only one of each sex. For example:

[A] stepparent cannot adopt a child if the child has a living parent of the same sex as the stepparent and that parent does not consent to termination of his or her parental status. This concept interferes with the ability of a child in a lesbian-mother family to acquire two legally recognized mothers through adoption by the second mother.

*Id.* at 470 (citations omitted).

104. *Id.* at 471-72.



no standing to bring even a visitation claim in court, while a sperm donor could bring such a claim and probably be granted rights and responsibilities equal to Lisa's pursuant to his status as the father.<sup>105</sup> This unfair result, from the point of view of Isabella's functional family, is the logical conclusion of an out-dated model, which clings to the idea that a child has exactly two parents and exactly one of each sex.

## *B. Functional Parenthood Models*

### *1. Equitable Parenthood*

A legal model based on three factors has developed that allows a legal nonparent to gain parental rights and responsibilities.<sup>106</sup> The factors of equitable parenthood are: (1) mutual acknowledgment of a parent-child relationship between the child and the nonparent, or cooperation by the parent in such relationship's development over a period of time prior to separation; (2) the nonparent's desire for parental rights regarding the child; and (3) the nonparent's willingness to pay child support.<sup>107</sup> It is helpful to see how this theory plays out in practice by examining some cases invoking the doctrine.

In the case creating the equitable parenthood concept, a divorced father sought parental rights to a child who was found not to be his biological son but who had been born during his marriage to the child's mother.<sup>108</sup> The Michigan Court of Appeals reversed a lower court decision awarding sole custodial rights and responsibilities to the mother. The lower court found that the divorced husband was not the father and, therefore, had no claim to the child.<sup>109</sup> The appellate court stated that the ex-husband was entitled to consideration as the child's parent based on the factors outlined above.<sup>110</sup> Interestingly, the court did not rely on the presumption that is often used in these cases, which allows a man in this situation to be given parental status pursuant to his marriage to the mother when the child was born.<sup>111</sup> Instead, the court deemed the ex-husband an

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105. In fact, some case law does support this logical conclusion. See, e.g., *C.M. v. C.C.*, 377 A.2d 821 (N.J. Super. Juv. & Dom. Rel. Ct. 1977).

106. Polikoff, *supra* note 3, at 484-85.

107. *Id.* (citing *Atkinson v. Atkinson*, 408 N.W.2d 516, 519 (Mich. Ct. App. 1987), in which the doctrine arose).

108. *Atkinson v. Atkinson*, 408 N.W.2d 516, 517 (Mich. Ct. App. 1987).

109. *Id.*

110. *Id.* at 519-20.

111. *Id.* at 517-19.

equitable parent because of the functional parent-child relationship in existence as demonstrated by application of the equitable factors.<sup>112</sup> The court noted that the ex-husband had assumed the status of father upon the child's birth and had established a strong parental relationship with the child over the next ten years, satisfying factor one, the mutual acknowledgment factor.<sup>113</sup> This factor would also be met because the mother had allowed such a perceived parent-child relationship to develop.<sup>114</sup> In fact, the court noted, the mother raised the issue of the husband's non-paternity status only during the divorce proceeding, surprising both the husband and the child.<sup>115</sup> Factor two, the desire for rights factor, was met by the fact that the husband was proceeding with the action to obtain legal right to the child and by his wish to pursue the parental relationship.<sup>116</sup> To satisfy factor three, although not specifically mentioned, the ex-husband presumably was willing to assume the financial obligations of paternity or had already entered into a child support agreement.<sup>117</sup> One scholar notes that this holding easily could be limited to marital situations, excluding its application to a separating homosexual couple's custody dispute.<sup>118</sup> The author notes, however, that this result would be illogical:

[T]he underlying rationale for the equitable parenthood doctrine does not depend upon the parties' marriage. Two of the three prongs of the test enunciated in *Atkinson* would presumably apply in a lesbian-mother family: the nonbiological mother's desire for the rights of parenthood and her willingness to pay child support. The first prong of the test, which requires either the mutual acknowledgment of a parent-child relationship or the biological parent's cooperation in the development of such a relationship, can be easily adapted from a marital situation to a nonmarital one. If the nonbiological mother in a lesbian-mother family satisfies the relationship prong of the *Atkinson* test, she is no less a parent than was the husband in *Atkinson*.<sup>119</sup>

In fact, one Florida case supports this very result in the lesbian nonbiological parent context.<sup>120</sup> Kristen Pearlman was born to Joan

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112. *Id.* at 519-20.

113. *Id.*

114. *Id.*

115. *Id.*

116. *Id.*

117. *Id.* at 519.

118. Polikoff, *supra* note 3, at 485.

119. *Id.* (citations omitted).

120. *Id.* at 486 (citing *In re Pearlman*, No. 87-24,926 DA, slip op. at 3 (Fla. Cir. Ct. Mar. 31, 1989)).

and Janine Pearlman, though she was only the biological daughter of Joan.<sup>121</sup> When Joan died, Kristen was approximately six years old, and Janine began winding her way through the legal system to gain custody of her daughter.<sup>122</sup> Joan's parents had previously authorized Janine to care for Kristen, but to Janine's surprise they also attempted to gain custody of the girl, which they were eventually awarded.<sup>123</sup> Janine was granted visitation rights, but they were subsequently terminated when the grandparents legally adopted Kristen.<sup>124</sup> Janine found herself back in court fighting the decision, and this time the reality of the situation prevailed, as the court recognized that Janine and Joan had created a family unit with Kristen as their mutual daughter.<sup>125</sup> The court recognized Janine as the equitable parent of Kristen and awarded her physical and legal custody, noting:

Based upon the length and nature of the child's relationship with [Janine] and [Janine's] with her, including [Janine's] de facto parent status during the first seven years of the child's life, the powers afforded [Janine] with regard to Kristen under the power of attorney initially given by the Pearlmans, [Janine's] awarded visitation rights with the child and . . . the fact that [she] was and remains Kristen's primary psychological and equitable parent, the Court finds that [their] relationship was in all material respects a family relationship and in fact, if not in law, the equivalent of a parent-child relationship.<sup>126</sup>

The court further noted that Janine's constitutional rights had been violated by the Pearlmans' legal actions, due to her equitable parenthood status arising from the relationship between them.<sup>127</sup> The court elaborated:

[T]he relationship had begun with the consent of Kristen's natural mother and continued, at least temporarily after the natural mother's death . . . [Janine] had a fundamental liberty interest in preserving her family relationship with the [sic] Kristen . . . Likewise, Kristen had a constitutionally protected interest in preserving her family relationship with [Janine] . . . It is not the exact 'type' of relationship but rather the 'nature' of

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121. Polikoff, *supra* note 3, at 529.

122. *Id.*

123. *Id.*

124. *Id.*

125. *Id.*

126. *Id.* (quoting *Pearlman*, slip op. at 3-4).

127. *Id.* at 530 (quoting *Pearlman*, slip op. at 8).

the relationship that determines whether one's interests are sufficient.<sup>128</sup>

The court placed emphasis on the detriment to Kristen were she to remain with the Pearlmans rather than Janine, discussing Kristen's continued identification of Janine as her "primary parent figure[,] her strong preference for living with [Janine,] and her dislike of living with the Pearlmans."<sup>129</sup> Although the court in this case identified Janine by several functional parenthood status titles, including de facto parent and equitable parent,<sup>130</sup> the court apparently acknowledged the reality of the relationship between Janine and Kristen in terms of the equitable parenthood factors outlined in *Atkinson*.<sup>131</sup> The court repeatedly based its decision on the parent-child relationship existing between the parties and recognized by them, and to which the child's biological mother had consented, satisfying the first prong of the *Atkinson* test.<sup>132</sup> The court authorized the equitable relationship to continue existing as it had before, with Janine maintaining both the rights and responsibilities of legal parenthood as she desired, in satisfaction of prongs two and three.<sup>133</sup>

As seen in the *Pearlman* case, equitable parenthood allows the reality of a child's family unit to determine whether or not a person should be given status equivalent to a 'true' parent.<sup>134</sup> The *Pearlman* model logically can be applied to both heterosexual and homosexual couples who do not fit the 'traditional' nuclear family unit. Although the equitable parenthood model does not confer the formal label of 'parent' that is conferred on the biological parent, it does afford the equitable parent the same legal consideration as the traditional parent.<sup>135</sup> The doctrine goes a long way toward better serving the interests of the child and the functional parent because it focuses in particular on the emotional and psychological connection between them.<sup>136</sup> The equitable parenthood model looks at whether the child and equitable parent developed a psychological relationship equivalent to that of a child and traditional parent, whether they have acted and treated one another as such, and whether the equitable parent shows willingness to assume the obligations as well as the benefits

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128. *Id.* (citations omitted).

129. *Id.* at 530.

130. *Id.* at 531.

131. *Id.* at 529-31.

132. *Id.*

133. *Id.*

134. *See id.* at 529-30.

135. *See id.*

136. *See, e.g., id.*

afforded those with parental status.<sup>137</sup> All of these factors determine whether a child-parent relationship exists in fact, despite the legal system's failure to recognize it. In the Miller-Jenkins case, the equitable parenthood factors would result in Janet's equitable parent status since all three factors are met.

## 2. *In Loco Parentis*

This functional parenthood theory, like that of equitable estoppel,<sup>138</sup> arose primarily to impose financial responsibility on legal nonparents but has been extended to allow a parent-child relationship to continue despite the nonparent's lack of legal right to claim the child.<sup>139</sup> Unlike the focus in the equitable parenthood doctrine, which is the psychological and emotional bond between the nonparent and the child, the in loco parentis doctrine focuses on the intent of the nonparent only.<sup>140</sup> The doctrine "creates parental rights and responsibilities in one who *voluntarily* provides support or takes over custodial duties,"<sup>141</sup> requiring a court to determine the functional parent's mindset regarding the child as evidenced by concrete support, such as monetary assistance.<sup>142</sup> Legal proceedings involving this doctrine must answer the question of whether or not the nonparent meant to step into the role of parent, which justifies finding in loco parentis status and imposing or granting parental responsibilities or rights.<sup>143</sup>

When extending the in loco parentis doctrine to maintain relationships between functional parents and their children, courts have most often granted functional parents visitation rights.<sup>144</sup> Parental rights have mostly been granted in the context of a stepparent as the functional parent,<sup>145</sup> and courts may be unwilling to apply it in the context of a homosexual functional parent. An extension to that situation would depend on how narrowly courts choose to construe

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137. Elizabeth A. Delaney, *Statutory Protection of the Other Mother: Legally Recognizing the Relationship Between the Non-Biological Lesbian Parent and Her Child*, 43 HASTINGS L.J. 177, 202 (1991).

138. See *supra* notes 106-37.

139. Polikoff, *supra* note 3, at 502.

140. *Id.*

141. *Id.* (emphasis added).

142. See *State ex rel. Williams v. Juvenile Court*, 204 N.W. 21, 25 (Minn. 1924) (explaining use of objective evidence to determine third party's intention to parent), cited in Strasser, *supra* note 100, at 846 n.34.

143. *Id.*

144. Polikoff, *supra* note 3, at 502-04.

145. *Id.*

the case law, and it would be easy for a court to deny its applicability to a gay couple's situation by distinguishing it on grounds that stepparents gained rights in part due to their marital status to the child's legal parent. One court's rationale for granting visitation rights to a stepparent, however, supports a broader definition of awarding rights based on this theory:

[W]e do not intend to open the door to a myriad of unrelated third persons who happen to feel affection for a child. Nor do we intend to diminish the rights of the natural parent concerning his or her minor children. Our decision is explicitly limited to the factual situation before us, where the party seeking visitation is claiming he has acted in a parental capacity. The factual dispute as to the question of the intent of a person to assume the status of a parent is only preliminary; the determinative question remains as to what is in the best interests of the child.<sup>146</sup>

This language certainly can be used to argue in favor of granting rights to a functional parent like Janet Miller-Jenkins. She is certainly more than an "unrelated third person[] who happen[s] to feel affection for"<sup>147</sup> Isabella. Rather, she proceeds on her claim by the strength of the fact that she entered Isabella's life at its very beginning and has "acted in a parental capacity."<sup>148</sup> Her intent to do so is apparent and was apparent from the beginning. Furthermore, it can be argued that Janet is not seeking to "diminish the rights of the natural parent,"<sup>149</sup> but is instead seeking to gain visitation rights to maintain a relationship with Isabella, a relationship that both relevant parties intentionally began and acted on, including the natural parent in this case. Therefore, this doctrine could feasibly support a finding of Janet's parental status.

Some strengths of the *in loco parentis* doctrine support such a finding. These include the characteristics that:

[T]he legally recognized parent does not have the power to terminate the relationship[,] . . . [and] that *in loco parentis* is a non-exclusive status. There is no arbitrary limit on the gender or number of people who may stand *in loco parentis* for a child. The rights and responsibilities of parenthood under this doctrine

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146. *Carter v. Broderick*, 644 P.2d 850, 855 n.5 (Alaska 1982).

147. *Id.*

148. *Carter*, 644 P.2d at 855 n.5.

149. *Id.*

are based on the reality of who intentionally fulfills the parenting function, not on the one-mother/one-father model.<sup>150</sup>

As the intent of the legal parent is ignored under this model, courts may be unwilling to apply it due to the emphasis so often placed on protecting the biological or legal parent's rights.<sup>151</sup>

### 3. *De Facto Parenthood*

The doctrine of de facto parenthood "focuses solely on the psychological bond between the [functional parent] and the child"<sup>152</sup> and is largely analogous to the doctrine of equitable parenthood.<sup>153</sup> One author characterizes the distinction as one of usefulness: while equitable parenthood grants parental rights to functional parents, de facto parenthood allows a functional parent to have standing to make a claim,<sup>154</sup> but refuses to acknowledge the functional parent as a 'parent', and does not award custody or other rights "unless an award to a [legal] parent would be detrimental to the child."<sup>155</sup> Thus, the de facto parent has access to the courts but may face insurmountable difficulty in attaining any actual parental rights. The distinction maintained between the traditional parent and a functional parent refuses to allow a functional parent equal status. This model is particularly harmful and illogical when the reality of the situation does not warrant the outdated division, as in situations like that of the Miller-Jenkinses. Obviously, this aspect of the de facto parenthood model poses serious limitations for its use in the homosexual family context. A nonparent will only win a case for parental recognition in the limited circumstances where the child's legally recognized parent is so unfit as to be "detrimental to the child."<sup>156</sup> Because circumstances must be extreme before the de facto parenthood model operates to recognize a nonparent, it seems to be of little substantial use for preserving the rights of the nonbiological parent in a separating gay couple's custodial dispute.

The de facto parenthood model has also been interpreted, however, to allow more substantial remedies to flow from a finding of de facto parenthood.<sup>157</sup> The Maine Supreme Court addressed this

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150. Polikoff, *supra* note 3, at 507.

151. *Id.*

152. *Id.* at 510.

153. See *supra* note 107 and accompanying text.

154. Polikoff, *supra* note 3, at 510.

155. *Id.*

156. *Id.*

157. See, e.g., *C.E.W. v. D.E.W.*, 845 A.2d 1146 (Me. 2004).

issue in *C.E.W. v. D.E.W.*<sup>158</sup> In that case, a lesbian couple conceived a child through artificial insemination.<sup>159</sup> D.E.W., the biological mother, and C.E.W., the functional mother, made certain legal decisions to cement their status as a legal family unit with equal rights regarding the child.<sup>160</sup> They changed their last names to ensure all three would have the same name and signed two parenting agreements, which detailed that both parents would share rights and responsibilities regarding the child.<sup>161</sup> One agreement was signed just after the child's birth, and the other was signed after the couple separated.<sup>162</sup> The two women did in fact share the decision-making and contact with the child as "expected of loving and involved parents."<sup>163</sup> At the time of suit, the child was nine years old and "ha[d] bonded with C.E.W. as his parent. . . . [T]he child [was] both happy and healthy."<sup>164</sup> When C.E.W. brought suit seeking a declaratory judgment that she was entitled to parental rights and responsibilities, D.E.W. did not contest C.E.W.'s status as a de facto parent but, instead, wished to limit the remedy granted to C.E.W. on account of that status.<sup>165</sup> First, she claimed that de facto parenthood does not entitle a nonbiological parent to parental rights unless a legal parent relinquishes her own rights or there is a claim that the legal parent places the child in jeopardy.<sup>166</sup> Second, she claimed that even if these rights might be awarded by a court, the most a de facto parent is entitled to are rights of contact, or visitation rights.<sup>167</sup>

The Maine Supreme Court affirmed the lower court's ruling in favor of C.E.W., declaring that, under prior state case law interpreting statutory provisions speaking to a court's power to award such remedies, "as a corollary of a court's equitable jurisdiction to determine a child's best interest and award parental rights and responsibilities, it may, in limited circumstances, entertain an award of parental rights and responsibilities to a de facto parent."<sup>168</sup> Here, "D.E.W. concedes that C.E.W. is the child's de facto parent,

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158. *Id.*

159. *Id.* at 1147.

160. *Id.*

161. *Id.*

162. *Id.*

163. *Id.*

164. *Id.*

165. *Id.* at 1147-48.

166. *Id.* at 1148-49. The court noted that the issue of jeopardy to the child had been addressed by the lower court, whose decision included finding that the child's exclusion from C.E.W.'s life would itself constitute jeopardy. *Id.* at 1149 n.6.

167. *Id.*

168. *Id.* at 1150-51.



has accepted C.E.W.'s parental role in two written agreements, and has not challenged . . . the court's conclusion that C.E.W. is the child's de facto parent."<sup>169</sup> The remedy granted by the lower court was upheld, and C.E.W. was awarded a declaration of actual, equal parental rights and responsibilities, rather than visitation rights only, on the basis of her de facto parenthood status.<sup>170</sup> This case is of limited value in answering the threshold question of what precisely the standard is for a determination of de facto parenthood. The court specifically declined to define the term,<sup>171</sup> noting only that "[h]owever this term is defined as it is fleshed out by the Legislature or courts in the future, it must surely be limited to those adults who have fully and completely undertaken a permanent, unequivocal, committed, and responsible parental role in the child's life."<sup>172</sup>

Currently, the definition of the doctrine remains broad and, in many cases, of very limited remedial potential. For example, Janet Miller-Jenkins would probably be able to establish that she has formed a psychological bond with Isabella during the child's formative years, allowing Janet to bring her claim before the court. Depending on the strictness with which the court applied the doctrine, her success thereafter is highly questionable. Because no allegation has been made that Lisa is an unfit parent who will be detrimental to Isabella, de facto parenthood would not operate to grant parenthood to Janet. If, however, the court were to give more emphasis to the clear legal undertaking of equal parental status by both women through their use of Vermont law, Janet might prevail in a manner similar to C.E.W.

### *C. Equitable Estoppel Applied to Parental Rights Context*

Courts have occasionally borrowed from the contract doctrine of equitable estoppel either to compel a nonbiological, unrecognized parent to support a child financially<sup>173</sup> or to allow such a parent the right to continue the already established parent-child relationship.<sup>174</sup> Use of this doctrine in the context of a parental rights dispute depends on the traditional requirements of the doctrine being met; there must be "(1) action or non-action which induces (2) reliance by another (3) to his detriment."<sup>175</sup> Reliance depends upon what the

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169. *Id.* at 1151.

170. *Id.* at 1152.

171. *Id.* at 1151-52.

172. *Id.* at 1152.

173. Polikoff, *supra* note 3, at 491.

174. *Id.*

175. *Id.* (quoting *In re Paternity of D.L.H.*, 419 N.W.2d 283, 287 (Wis. 1987)).

actions of the legal parent might lead the nonparent to reasonably believe, and the detriment incurred may be either financial or emotional.<sup>176</sup>

Because this application focuses on what the suing party might reasonably have believed based on the nature of the couple's relationship with each other and with the child, it lends itself to the situation of separating lesbian partners with children. The doctrine is especially applicable when the nonbiological parent "believe[s] she is a] legal parent[] or because [the partners] have a co-parenting agreement."<sup>177</sup> Since "[t]he claim is based in part on the conduct or assurances of the child's [biological] parent, who has encouraged the [nonbiological parent] to assume the parental role[, a] prime example is the partner of a gay parent, who together with that parent decided to establish a family."<sup>178</sup> Estoppel often arises in these types of relationships because, as in the case of the Miller-Jenkins, the lesbian or gay couple consciously chooses to bring a child into the relationship to be raised together by the partners as mutual parents, giving rise to a reasonable belief of parental rights and responsibilities for both partners.<sup>179</sup> Factors commonly evident in these homosexual family units often invite reliance: actions leading to reliance on a belief of parental status; an explicit written agreement between the two mothers or two fathers stating that such parental status is mutual; an explicit oral agreement to the same effect; or similar implicit agreements between the two parents.<sup>180</sup> "Functional parents [who evidence these factors] . . . should be permitted to assert that by creating the parent-child relationship and representing that child rearing was a joint endeavor, the legally recognized [parent] has been estopped from denying the functional parent the status of legal parent."<sup>181</sup>

In addition to the legal parent's actions inducing reliance on the part of the legally unrecognized parent, reliance may also be evident from the child's perspective.<sup>182</sup> "In the case of either childbearing or adoption, the child relies upon the legally recognized mother's actions in developing a parent-child relationship with the legally unrecognized mother. Estoppel is therefore appropriate to preserve

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176. See generally, *id.* at 492-500.

177. Elizabeth S. Scott, *Parental Autonomy and Children's Welfare*, 11 WM. & MARY BILL RTS. J. 1071, 1096 (2003).

178. *Id.*

179. See Polikoff, *supra* note 3, at 499 (stating that equitable estoppel may be used where "child rearing was a joint endeavor").

180. *Id.*

181. *Id.*

182. *Id.*

the child's identity as the daughter of both her parents."<sup>183</sup> One author, examining cases that have found child support owed by a technical nonparent under the equitable estoppel doctrine,<sup>184</sup> notes that the common factor is that "these cases support the proposition that courts will enforce the parental obligation of support if the child would not have entered the family but for the actions of the 'non-parent.'"<sup>185</sup> A notable strength of this estoppel doctrine is that its focus on the intent of the legal parent, as seen through her actions, allows her parental autonomy to remain intact.<sup>186</sup> "A person cannot inadvertently achieve parental rights under equitable estoppel[, r]ather, a legally recognized parent must create the factual circumstances in which the additional parent-child relationship develops."<sup>187</sup> Thus, the estoppel doctrine simply works to respect the outcome of the decisions made by the legal parent when forming her family with her partner in the first place.<sup>188</sup> A significant weakness, however, is that the doctrine applies only to relief sought in specific petitions, rather than establishing a solid, overarching legal parenthood for the nonbiological individual.<sup>189</sup>

Taking the requirements of the estoppel doctrine into consideration, the Miller-Jenkins case would come out in favor of Janet, the nonbiological mother. Lisa and Janet entered into a civil union<sup>190</sup> whereby both parents were afforded equal parenting rights regardless of their biological relationship to a child brought into the family.<sup>191</sup> Isabella subsequently became their mutual daughter.<sup>192</sup> In addition to the contractual nature of the union, which itself is evidence of action inducing a reasonable belief by Janet that she would be entitled to parental status regarding Isabella, the couple endeavored to ensure that the child would look like both mothers by selecting characteristics of the sperm donor resembling Janet, to make up for her lack of biological participation in the child's conception.<sup>193</sup> The women were equally involved with the parenting until the union dissolved.<sup>194</sup>

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183. *Id.* at 500.

184. *Id.* at 492-94.

185. *Id.* at 493.

186. *Id.* at 501-02.

187. *Id.* at 502.

188. *Id.*

189. *Id.* at 501.

190. Bergman, *supra* note 5.

191. See VT. STAT. ANN. tit. 15 § 1204 (2002).

192. Bergman, *supra* note 5.

193. *Id.*

194. *Id.*

After the relationship's dissolution, Lisa's behavior further reinforced Janet's reliance on her own parental status. The couple sought adjudication of their custody and visitation claims in the Vermont family court.<sup>195</sup> Because Vermont law recognizes the rights due to Janet,<sup>196</sup> presumably, Lisa could invoke Vermont law to recognize the responsibilities owed by Janet, if Lisa needed help enforcing them. That Lisa's actions induced Janet's reliance satisfies the reliance element. The element of detriment is also satisfied, since severing the relationship between Janet and Isabella would result in emotional detriment to both of them.<sup>197</sup> An equitable estoppel theory, therefore, would result in a finding for Janet in this case. As noted above, because this doctrine offers relief only in specific types of litigation, Janet's rights and Isabella's welfare would not be adequately protected for the future.

### CONCLUSION

The United States Supreme Court has firmly held that, in family life, individuals should be allowed to direct their families' own destinies and that prejudice is not a valid reason for disallowing that autonomy.<sup>198</sup> In the case of lesbian parents such as Janet and Lisa Miller-Jenkins, the lingering and powerful prejudice against gay parents has enabled Lisa to sidestep the legal relationship she undertook with Janet regarding Isabella, which allowed them to do precisely what they wanted when their relationship was intact: direct their family's destiny, enabling each woman to obtain and maintain equal parental status regarding the daughter they consciously decided to bring into the world. This prejudice does not adequately justify a system that denies nonbiological parents' rights in situations of functional parenthood. The real findings available on the psychological adjustment of children raised by lesbian mothers demonstrate that the worries proclaimed by anti-gay activists regarding maladjustment by these children is misplaced.<sup>199</sup>

When two competent individuals enter into a decision to start a family and go through the legal processes to ensure that both of them will be considered equal parents to a child under the law, that decision should be binding. Both parents would be protected regarding their own rights to the child and each other's responsibilities owed

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195. *Id.*

196. See VT. STAT. ANN. tit. 15, §1204 (2002).

197. Polikoff, *supra* note 3, at 492-500.

198. See generally, *Palmore v. Sidoti*, 466 U.S. 429 (1984); *Loving v. Virginia*, 388 U.S. 1 (1967).

199. Polikoff, *supra* note 3, at 561-67. See also WOLFSON, *supra* note 39, 88-95.

to the child, in the event that the relationship dissolves. This ideal also best protects the child's own relationships with both of her functional parents. Lisa and Janet went through these processes and bound themselves through an agreement that defined their relationship with Isabella even after they formally dissolved their civil union. Only when Lisa decided that she desired to breach her agreements with Isabella's other mother did she decide to avail herself of another state's discriminatory laws to achieve her goal. Virginia's laws quickly and easily provided her with what she wanted, sole custody of Isabella.<sup>200</sup> This scenario raises an important legal issue as to what happens when legal proceedings concerning a single child take place in multiple states whose courts apply diametrically different laws and reach opposing outcomes. This issue is likely to come up again and again in the future, until such discrimination against gay parents is rooted out. As the Miller-Jenkins case shows, what happens is a tragedy for the legal, though nonbiological, parent and the child. Even if this case is eventually resolved as it should be, ensuring visitation and other parental rights to Janet as she requests, the time spent in these proceedings will have already produced a great deal of financial loss for Janet and emotional turmoil for both Janet and Isabella.

As this note has explored, the law in the United States leaves much room for improvement in recognizing functional families. While Virginia strictly adheres to a 'traditional' one mother and one father model, based on a biological link, other states recognize the potential for functional parenthood to better serve the needs of the parties seeking recognition of a parent-child relationship. While these models, too, embody shortcomings in granting parental status to nonbiological parents in homosexual relationships, they at the very least represent progress.

The Miller-Jenkins case makes the shortcomings of the traditional model acutely obvious. Their case clearly represents one where their daughter Isabella would not have been brought into existence but for the understanding, agreement, and mutual desires of Lisa *and* Janet. Virginia's refusal to recognize Janet as a parent is manifestly unjust and allows a person in Lisa's position to abuse the legal system. Family structures vary so greatly from the traditional model that Virginia's staunch refusal to acknowledge these structures rises to a level of reprehensibility.

Vermont is an excellent example that change, even if slow and steady, is good. The results of this change in family recognition, despite meeting opposition, are satisfying:

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200. Keays, *supra* note 8.

Increasingly in recent years, lawmakers have recognized the claims of non-parents to custody or visitation over the objections of parents. To some extent this trend simply expresses increased dissatisfaction with the traditional idea that parental rights exist on the basis of biology alone; it recognizes that functional parents may deserve parental status and authority. . . . These reforms recognize that, because of the complexity of modern family structure, children form true parent-child bonds with care-taking adults other than their biological parents.<sup>201</sup>

Still, the process is far from complete. The Miller-Jenkins case vividly illustrates the difficulties that are created by conflicting state laws.<sup>202</sup> Until all states recognize that nonbiological homosexual parents are entitled to the same rights as their biological counterparts, the status of these parents will remain tragically uncertain as they work their way through an equally uncertain judicial system.

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201. Scott, *supra* note 177, at 1094-95.

202. *A Question of Dignity*, *supra* note 15. The article notes that:

It is impossible to say how the varying state-by-state conflicts will be resolved in courts around the country, but it is clear the states that refuse to recognize the rights of gay and lesbian couples are seeking to perpetuate an era when the legal system that was supposed to be serving us all instead subjected gays and lesbians to the indignities of second-class citizenship.

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