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## Protecting Parent-Child Relationships: Determining Parental Rights of Same-Sex Parents Consistently Despite Varying Recognition of their Relationship

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# Protecting Parent-Child Relationships: Determining Parental Rights of Same-Sex Parents Consistently Despite Varying Recognition of their Relationship

LINDA S. ANDERSON\*

## I. INTRODUCTION

Imagine a child growing up with two committed, loving parents. The child knows that each parent has a unique role in the family relationship, and the interactions between the three are different, yet comfortable for all involved. The child understands that one parent stays at home to care for the child while the other parent spends time at work to provide for the family. Each parent finds a way to spend special time with the child, and they all work hard to spend special time together.

The child in this scenario understands that she can rely on either of her parents to protect her, to provide for her, to make important decisions for her, and to advocate for her. In line with this understanding, the child's parents each take on these responsibilities. This is, after all, what they expected when they decided to have children.

Now imagine the family relocating because of a change in employment circumstances. This relocation involves moving to a neighboring state. The family adjusts to the move easily, and the roles and expectations do not change. Yet, as a result of the move, the child no longer has two parents. She now has only one parent. Only one of the adults she has known as her parents is allowed to make decisions on her behalf. Only one of her parents is allowed to register her for school, access her immunization records, and provide health insurance for her. In addition, should one of her parents die, she will be the beneficiary of that parent's estate, but if the other dies she will get no benefits at all. And, should her parents ever decide to end their relationship, the state court will require one of her parents to continue supporting her but may not require this of the other and will not necessarily ensure that she be allowed to maintain a relationship with one of her parents.

This is the situation facing many children today. As children born of same-sex parents in states that recognize same-sex relationships and grant them the same rights and responsibilities as those in heterosexual mar-

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riages (regardless of what they name the relationship), these children can have their entire life turned upside down by simply crossing a state border. No court is involved, no action is initiated by either of the parents, and no state agency is involved. The only difference is which state law applies to the relationship between the parents, and consequently, the relationship between each parent and the child.

What causes this life-altering change? In the growing number of states that grant all the rights of marriage to those in same-sex relationships,<sup>1</sup> whether they call them marriages,<sup>2</sup> civil unions,<sup>3</sup> or domestic partnerships,<sup>4</sup> the presumption of parentage found in the respective parentage statutes or case law addressing children of same-sex couples can cause both partners to be recognized as parents of a child born to one of them during the marriage or civil union.<sup>5</sup> Yet, once the family moves to a state that does not recognize the same-sex relationship, the rights and obligations of parenthood may cease to exist for the non-biological parent because these rights and obligations are the result of a sister state's recognition of the same-sex relationship.<sup>6</sup>

For example, in the summer and fall of 2004, the reality of the consequences of a few states choosing to recognize same-sex relationships and other states refusing to do so became painfully apparent in a case involving

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1. Currently California, Connecticut, Vermont and Massachusetts grant rights equivalent to those of marriage to same-sex couples. CAL. FAM. CODE § 297.5 (West 2004) (granting domestic partners the same rights as spouses); CONN. GEN. STAT. ANN. § 46b-380o (West Supp. 2006) (granting rights of marriage to those who enter into civil unions in Connecticut); VT. STAT. ANN. tit. 15, § 1204 (2002) (granting all rights of marriage to members of civil unions); see *Goodridge v. Dep't of Pub. Health*, 798 N.E.2d 941 (Mass. 2003) (establishing right to same-sex marriage in Massachusetts).

2. In Massachusetts, same-sex couples may be married. See *Goodridge*, 798 N.E.2d at 969.

3. In Connecticut and Vermont, same-sex couples may enter civil unions. See CONN. GEN. STAT. ANN. § 46b-38bb; VT. STAT. ANN. tit. 15, § 1202.

4. California recognizes same-sex domestic partnerships. See CAL. FAM. CODE § 297.

5. Though not tested in each state that recognizes same-sex couples, those that have addressed this issue have found the children have two parents, both of the same sex. See *Elisa B. v. Superior Court*, 117 P.3d 660, 668 (Cal. 2005) (recognizing a woman's right to the presumption of parentage to a child born to her same-sex partner); *Miller-Jenkins v. Miller-Jenkins*, 2006 VT 78 ¶¶ 48, 56, 59 (2006) (recognizing both women in a civil union as parents of a child born to one of the women); see also VT. STAT. ANN. tit. 15, § 1204(f) (specifying that members of civil unions have the same rights regarding children born to one during the union as those of married couples). Case law or statutory provisions in other states are available for similar application. See MASS. GEN. LAWS ch. 209C, § 6 (1998) (granting presumption of paternity to man married to the mother); *Freda v. Freda*, 476 A.2d 153, 155 (Conn. Super. Ct. 1984) (acknowledging that children born during marriage are presumed to be legitimate).

6. The majority of states that do not allow legal recognition of same-sex relationships also legislate against recognition of rights based on other states' recognition of this relationship. E.g., OKLA. STAT. ANN. tit. 43, § 3.1 (West 2001) ("A marriage between persons of the same gender performed in another state shall not be recognized as valid and binding in this state as of the date of the marriage."). These provisions are often referred to as mini-DOMAs, because of their similarity to the federal Defense of Marriage Act, also known as DOMA.

Janet and Lisa Miller-Jenkins.<sup>7</sup> Partners in a civil union legalized in Vermont on December 19, 2000,<sup>8</sup> Janet and Lisa turned to two separate state courts to determine rights and custody of the child they had raised as part of their family. Once the relationship terminated, the courts attempted to determine custody and visitation.

The *Miller-Jenkins* case, as yet to be completely resolved,<sup>9</sup> provides a vivid picture of the challenges facing same-sex couples, but it does not yet address the underlying problems that will be faced by the growing numbers of families involving children born to members of a legally sanctioned same-sex relationship. *Miller-Jenkins* helps identify the potential issues, but differs from other situations that will ultimately arise, because the child born to this couple was conceived and born in Virginia, a state that specifically rejects same-sex marriage or civil unions. This case touches on several issues that could arise in same-sex relationships, but, because it is primarily a custody dispute, may not provide answers to questions that will ultimately arise with intact families.

The difficulty with this situation is the fact that each state has the right to determine whether to recognize same-sex relationships as the legal equivalent of marriage or whether to refuse to recognize these relationships. In fact, the Defense of Marriage Act<sup>10</sup> (DOMA) specifically allows states to not only prevent same-sex partners from obtaining legal recognition within the state, DOMA also allows states to refuse to acknowledge these relationships that have already been sanctioned through legal procedures in sister states.<sup>11</sup> As a result, children of these relationships are subject to fluctuating legal relationships based only on geographical location.

This need not be the case. There is a solution that would allow states to continue to legalize or prohibit same-sex marriages or civil unions, while maintaining consistency regarding parental rights and responsibili-

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7. This dispute is actually two separate legal actions. One seeking dissolution of a civil union and requesting custody and visitation orders, was filed in Vermont on November 24, 2003. *Miller-Jenkins v. Miller-Jenkins*, No. 454-11-03 (Vt. Fam. Ct. filed Nov. 24, 2003). After several issues related to parentage arose, the court, on November 17, 2004, said it would recognize the parental interest of both parties. This ruling was appealed to the Vermont Supreme Court which determined that both parties to the civil union were parents and affirmed the Family Court's rulings regarding parental rights and visitation. *Miller-Jenkins*, 2006 VT 78 ¶ 59. The second action, seeking a parentage determination, was filed in Virginia on July 1, 2004. It was appealed to the Virginia Court of Appeals and is awaiting a decision. *Miller-Jenkins v. Miller-Jenkins*, *appeal docketed*, 2654 04 4 (Va. Ct. App. Nov. 10, 2004).

8. Brief of Defendant-Appellee, *Miller-Jenkins v. Miller-Jenkins*, Nos. 2004-443 & 2005-030 (Vt. June 7, 2005), available at [http://www.glad.org/GLAD\\_Cases/Miller-JenkinsVTSupremeCtBrief.pdf](http://www.glad.org/GLAD_Cases/Miller-JenkinsVTSupremeCtBrief.pdf).

9. Though the Vermont Supreme Court has affirmed the decisions of the Vermont Family Court, it is unclear what this ruling will mean for the pending appeal in Virginia.

10. The federal Defense of Marriage Act (DOMA), 28 U.S.C. § 1738C (2006), grants each state the right to restrict the definition of marriage to members of opposite sexes and to refuse to recognize same-sex relationships from other states.

11. *Id.*

ties. Rather than focusing on the relationship of the parents, honing in on the relationship between the parent and the child, and allowing that relationship to continue despite the non-recognition of the same-sex relationship is a potential solution. This can be accomplished by making some small changes to the Uniform Parentage Act (UPA or Act) and the individual state statutes that are based on this Act.

Vermont was the first state to grant same-sex couples legal recognition and legal rights and responsibilities.<sup>12</sup> Connecticut has followed suit, granting same-sex partners legal recognition identical to married partners,<sup>13</sup> and California has enacted legislation creating domestic partnerships.<sup>14</sup> Under the Civil Unions legislation and the Domestic Partnership legislation, same-sex partners in Vermont, Connecticut, and California are entitled to all the rights and responsibilities granted to heterosexual couples who marry.<sup>15</sup> Statutes that refer to spouses or husband and wife are interpreted to include same-sex spouses. Consequently, under the Vermont version of the Uniform Parentage Act, a child born to a same-sex couple could be presumed to be the child of the union, and both parties could be presumed to be parents.<sup>16</sup> Likewise, California and Connecticut authorities could provide the identical result.<sup>17</sup> To date, courts in Vermont and California have determined parental rights of same-sex partners only in conjunction with custody disputes.<sup>18</sup> Vermont chose not to use the presumption, but instead looked at the parent-child relationship.<sup>19</sup> California applied the parentage presumption.<sup>20</sup> Unlike the separate status granted by Vermont, Connecticut, and California, the Commonwealth of Massachusetts went one step further than civil unions, granting same-sex partners the right to marry.<sup>21</sup> Though as yet untested, in Massachusetts, married couples who have a child would both be presumed to be the parents of that child unless there is a legal action brought to challenge that presumption.<sup>22</sup>

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

13. CONN. GEN. STAT. ANN. §§ 46b-38aa to -38pp (West Supp. 2006).

14. CAL. FAM. CODE § 297.5 (West 2004).

15. *Id.*; CONN. GEN. STAT. ANN. §§ 46b-38aa to -38pp; VT. STAT. ANN. tit. 15, § 1204.

16. VT. STAT. ANN. tit 15, § 308(4) (2002). Though the Vermont Supreme Court acknowledged that the civil union legislation made this provision applicable to same-sex parents in civil unions, it declined to base its decision regarding parentage of a child of a civil union on this provision. See *Miller-Jenkins*, 2006 VT 78 ¶ 44.

17. CAL. FAM. CODE § 7540 (establishing presumption of paternity for husband of child's mother); *Schaffer v. Schaffer*, 445 A.2d 589, 590 (Conn. 1982) (stating unequivocally that there is a presumption that a man is a child's father if he is married to the mother at the time of the child's birth).

18. *Elisa B. v. Superior Court*, 117 P.3d 660, 662 (Cal. 2005); *Miller-Jenkins v. Miller-Jenkins*, 2006 VT 78 ¶ 4 (2006).

19. *Miller-Jenkins*, 2006 VT 78 ¶ 44.

20. *Elisa B.*, 117 P.3d at 668.

21. *Goodridge v. Dep't of Pub. Health*, 798 N.E.2d 941, 969 (Mass. 2003).

22. MASS. GEN. LAWS ch. 209C, § 6 (1998).

By recognizing same-sex relationships as legally equivalent to marriages, these states have also created safeguards for those who choose to have their relationship recognized. Once created, a civil union, domestic partnership, or same-sex marriage cannot be dissolved without the oversight of a court.<sup>23</sup> This is an important safeguard for the children who are part of these families, as it ensures that there will be some consideration of the need to maintain both parents' support and relationship with the child. However, unless and until the partners choose to dissolve their union, in the eyes of the state, the family is treated identically to that resulting from a heterosexual marriage. Herein lies the potential problem.

Going one step beyond the *Miller-Jenkins* situation, where parties are determining the status of a child born in a state that did not grant the same-sex partner any rights similar to those of marriage, this article will consider the issues raised by the fact that under Massachusetts, Vermont, Connecticut, and California state law, same-sex partners who enter civil unions, domestic partnerships, or marriages are granted all of the rights and obligations of heterosexual married couples.<sup>24</sup> Consequently, under state law in each of these jurisdictions, a child born to a member of the relationship, after the legal recognition of the relationship through a civil union ceremony, registration of a domestic partnership, or marriage ceremony, is a child of both the birth mother and her spouse. By granting all the rights of marriage to same-sex couples, and treating a same-sex partner as a spouse in any legislation related to the rights and obligations of marriage, Vermont, Massachusetts, California, and Connecticut create two legally recognized parents of the child of same-sex partners simply by the birth of that child. Like the creation of heterosexual parents, no court action is necessary.

To illustrate, consider a married heterosexual couple. When the woman in this relationship has a child, her husband is presumed to be the other parent. Only when there is a dispute about the parentage of the child will the court become involved, and then, only under certain conditions. Similarly, in a same-sex relationship recognized by state law, when one member of the relationship gives birth, the spouse should be presumed to be the other parent, under the same provision or court decision that allows

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23. *E.g.*, VT. STAT. ANN. tit. 15, § 1206 (2002) (requiring parties to dissolve union through family court).

24. CAL. FAM. CODE § 297.5 (West 2004) (granting domestic partners the same rights as spouses); CONN. GEN. STAT. ANN. § 46b-380o (West Supp. 2006) (granting rights of marriage to those who enter into civil union in Connecticut); VT. STAT. ANN. tit. 15, § 1204 (granting all rights of marriage to members of civil unions); *see Goodridge*, 798 N.E.2d at 941 (establishing right to same-sex marriage in Massachusetts).

the husband to be the presumed parent of the heterosexual union.<sup>25</sup> The court will only become involved to determine the members of the same-sex couple's rights and responsibilities when there is a dispute about parentage.

This arrangement makes sense, as long as the couples remain in the states that recognize their relationship. In addition to granting same-sex couples rights equivalent to marriage, or marriage rights themselves, these states have also adjusted their systems to address the termination of these relationships, through divorce proceedings or the equivalent, including having provisions for establishing parental custody and support for children of the relationship.<sup>26</sup>

The family and parental relationship appears secure as long as the members of the family stay within the borders of the states that recognize their relationship. What happens, though, when the family ventures beyond the borders of Vermont, Massachusetts, California, and Connecticut, has yet to be determined. Legislation in almost every other state has addressed whether each state will recognize the couples' relationship,<sup>27</sup> but no state has determined how it will treat the legal relationship between the children of these couples and their parents.<sup>28</sup> This article will focus on the fragile legal relationship between same-sex parents and their children and will suggest legislative adjustments that can address this relationship without forcing states to recognize the underlying relationship with the parents.

Part II will explain the most common methods of addressing parentage issues in traditional family relationships. Part III will review the various methods courts have used to address parentage determinations in same-sex relationships in states where same-sex relationships are not sanctioned. Part IV will explain how courts have addressed parentage determinations

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25. CAL. FAM. CODE § 7540 (establishing presumption of paternity for husband of child's mother); MASS. GEN. LAWS ch. 209C, § 6; *Schaffer v. Schaffer*, 445 A.2d 589, 590 (Conn. 1982) (stating unequivocally that there is a presumption that a man is a child's father if he is married to the mother at the time of the child's birth); *Miller-Jenkins*, 2006 VT 78 ¶¶ 48, 56, 59.

26. Some states rely on language in the legislation creating civil unions of domestic partnerships to force the alteration of other related statutes. For instance, California includes a provision in the domestic partnership legislation that states: "(1) Where necessary to implement the rights of registered domestic partners under this act, gender-specific terms referring to spouses shall be construed to include domestic partners." CAL. FAM. CODE § 297.5. Other states, like Vermont, have identified exactly how dissolutions are to be handled: "The family court shall have jurisdiction over all proceedings relating to the dissolution of civil unions. The dissolution of civil unions shall follow the same procedures and be subject to the same substantive rights and obligations that are involved in the dissolution of marriage in accordance with chapter 11 of this title, including any residency requirements." VT. STAT. ANN. tit 15, § 1206 (2002).

27. Forty-three states have some form of legislation banning recognition of same-sex relationships. Lambda Legal Def. & Educ. Fund, *States With Laws Banning Marriage Between Same-Sex Couples*, <http://www.lambdalegal.org/cgi-bin/iowa/news/fact.html?record=1427> (last visited Oct. 31, 2006).

28. Oklahoma attempted to legislate the ability to ignore out-of-state adoptions by same-sex couples, but the legislation was recently found unconstitutional. *Finstuen v. Edmondson*, No. CIV-04-1152-C, 2006 WL 1445354 (W.D. Okla. May 19, 2006).

in the states that recognize some form of same-sex relationship. Part V will identify potential and actual issues that arise when same-sex couples travel from states that recognize their relationship to those that do not. Finally, Part VI will suggest legislative action that can eliminate the need for varying tests and standards depending on the sexes of the parents.

## II. PARENTAGE DETERMINATIONS IN HETEROSEXUAL RELATIONSHIPS

When a heterosexual couple divorces, all states have provisions for determining custody of children.<sup>29</sup> Usually, parentage, meaning who is considered a legal parent of the child, is not an issue. In these cases, the court, in conjunction with granting the couple's divorce, determines the parental rights and obligations of each member of the couple. Questions about whether one party is actually a parent are resolved under provisions of state statutes that are often loosely based on the UPA.<sup>30</sup>

In addition to determining parentage of heterosexual married couples, the UPA and similar legislation in most states also addresses situations where parents are unmarried, or where the parents of the child are not married to each other but the mother is married to someone else.<sup>31</sup>

### A. Parentage Determinations Under the UPA

Under the provisions of the UPA, the gestational mother<sup>32</sup> is considered the child's parent unless a surrogacy agreement is involved.<sup>33</sup> If she is married at the time, the gestational mother's husband, regardless of whether there is a biological relationship to the child, is presumed to be the

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29. As of 1981, all fifty states had enacted the Uniform Child Custody Jurisdiction and Enforcement Act. Uniform Law Commissioners, *Summary: Uniform Child Custody Jurisdiction and Enforcement Act*, [http://www.nccusl.org/Update/uniformact\\_summaries/uniformacts-s-uccjaea.asp](http://www.nccusl.org/Update/uniformact_summaries/uniformacts-s-uccjaea.asp) (last visited Oct. 31, 2006).

30. UNIF. PARENTAGE ACT, 9B U.L.A. 295 (2002). Though only seven states have adopted this act, nineteen states have adopted the predecessor to this act, the 1973 version of the UPA, and many others adopted portions of the 1973 version. *Id.* at 296 (prefatory comments to the uniform act). This article will consider the provisions of the 2002 uniform act rather than evaluating individual state's enactments.

31. As stated in the UPA:

Sections 302-305 clarify that, if a child has a presumed father, that man must file a denial of paternity in conjunction with another man's acknowledgment of paternity in order for the acknowledgement to be valid. If the presumed father is unwilling to cooperate, or his whereabouts are unknown, a court proceeding is necessary to resolve the issue of parentage.

UNIF. PARENTAGE ACT art. 3 cmt., 9B U.L.A. 313.

32. Throughout this article mother will be modified by several different terms. At times, each of these will refer to the same person; at other times they may not. Gestational mother refers to the woman who carries a child and gives birth to the child.

33. UNIF. PARENTAGE ACT § 201(a), 9B U.L.A. 309.

father.<sup>34</sup> This presumption exists as long as the couple was married at the time of the birth.<sup>35</sup> In addition, the husband is presumed to be the father even if the couple marries after the child's birth, as long as the husband acknowledges the child in compliance with the statute.<sup>36</sup> The result of this presumption can mean the biological or genetic relationship between an individual and the child is afforded less importance than the legal relationship which results from the couple's marriage.<sup>37</sup>

The presumption of parentage is applied differently in each state. The way the presumption works can be divided into roughly four categories. Some states create a strong, but not completely irrefutable presumption. Others allow the presumption to be rebutted if doing so is in the child's best interests. Still others allow parentage to be rebutted at the time of a divorce, regardless of whether this is in the child's best interest and without evaluating the length or quality of the parent-child relationship. Finally, a few states allow the presumption to be challenged by anyone who believes he is a parent, allowing genetic relationships to control the legal determinations.<sup>38</sup>

Though now codified in most states, the presumption of legitimacy has a long history in common law.<sup>39</sup> Originating in the common law of England to prevent children from losing their inheritance and succession rights, the presumption was also meant to protect the integrity of families, regardless of the biological connections.<sup>40</sup> Addressing parenthood and legitimacy, the United States Supreme Court recently acknowledged that there can be a difference between biological fatherhood and the determination that one is a parent.<sup>41</sup> Addressing the strong presumption of parentage included in California's statutory scheme<sup>42</sup> the Court acknowledged the

34. *Id.* § 204(a), 9B U.L.A. at 311.

35. *Id.* § 204(a)(1), (3), 9B U.L.A. at 311.

36. *Id.* § 204(a)(4). This section sets out specific requirements regarding acknowledgement.

37. An un rebutted presumption of paternity arising under section 204 results in the establishment of a parent-child relationship. Since this presumption arises simply by the birth of a child while the couple is married, whether the father is the genetic father or not may never be an issue.

38. Susan Frelich Appleton, *Presuming Women: Revisiting the Presumption of Legitimacy in the Same-Sex Couples Era*, 86 B.U. L. REV. 227, 236 (2006).

39. See *Michael H. v. Gerald D.*, 491 U.S. 110, 124-25 (1989) (plurality opinion) (exploring the roots of the presumption to determine whether the relationship between a child and the biological parent is a protected family unit).

40. *Id.* at 125.

41. *Id.* at 126-27.

42. CAL. EVID. CODE § 621 (repealed Jan. 1, 1994) (current version at CAL. FAM. CODE § 297.5) addressed in *Michael H.* read:

Child of the marriage; notice of motion for blood tests

(a) Except as provided in subdivision (b), the issue of a wife cohabiting with her husband, who is not impotent or sterile, is conclusively presumed to be a child of the marriage.

(b) Notwithstanding the provisions of subdivision (a), if the court finds that the conclusions of all the experts, as disclosed by the evidence based upon blood tests performed pursuant to

difference between being a biological father and being a parent, stressing that parenthood brings “parental prerogatives” with the determination.<sup>43</sup> Recognizing that protecting children’s rights and the integrity of families remained the purpose of the presumption of parentage, the Court asserted that no state currently awards “substantive parental rights to the natural father of a child conceived within, and born into, an extant marital union that wishes to embrace the child.”<sup>44</sup> Hence, the intent of a gestational mother’s husband to be the child’s father outweighs the biological relationship over the man who genetically fathers the child.

The priority of the familial unit and the intent of the couple to create a parent-child relationship over the biological connection are also evident in the provisions of the UPA addressing children born through assisted reproductive technologies. Under UPA Articles 7 and 8, like the presumption that arises upon the birth of a child to a married couple, when couples use artificial insemination, in-vitro fertilization, gamete donors,<sup>45</sup> and gestational surrogates,<sup>46</sup> the parent-child relationship is created with no judicial intervention.

For instance, a couple who have a child, genetically related to both members of the couple, yet conceived through artificial reproductive technology, are still considered parents. A man, whose wife gives birth to a child conceived through the fertilization of her ova by an anonymous sperm donor, is still considered the father, despite the lack of genetic or biological relationship. The opposite is also true: a child conceived through donated egg cells, fertilized by the husband’s sperm, and carried by the wife is a child of both members of the couple. Finally, a child genetically related to both, or genetically related to only one, or genetically related to neither yet carried by a gestational surrogate, is still the child of

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Chapter 2 (commencing with Section 890) of Division 7 are that the husband is not the father of the child, the question of paternity of the husband shall be resolved accordingly.

(c) The notice of motion for blood tests under subdivision (b) may be raised by the husband not later than two years from the child's date of birth.

(d) The notice of motion for blood tests under subdivision (b) may be raised by the mother of the child not later than two years from the child's date of birth if the child's biological father has filed an affidavit with the court acknowledging paternity of the child.

(e) The provisions of subdivision (b) shall not apply to any case coming within the provisions of Section 7005 of the Civil Code [dealing with artificial insemination] or to any case in which the wife, with the consent of the husband, conceived by means of a surgical procedure.

491 U.S. at 117-18. The current version of this statute has been renumbered, but the content remains the same.

43. *Michael H.*, 491 U.S. at 124.

44. *Id.* at 127.

45. UNIF. PARENTAGE ACT art. 7, 9B U.L.A. 354 (2002).

46. *Id.* art. 8, 9B U.L.A. at 360.

both the husband and wife.<sup>47</sup> In each of these situations, the legal parents are identified at the time of the child's birth.

### B. *Intent Overrides Biology*

In all of the instances described above, the couple's intent overrides the genetic or biological relationship.<sup>48</sup> Generally, the law presumes an intact family, even if genetics would contradict this result; the details of conception are irrelevant.<sup>49</sup> With the exception of arrangements involving gestational surrogates, the UPA attempts to ensure that a child has two parents, in the same household whenever possible, to provide the most secure financial and emotional situation possible. Even in situations involving gestational surrogates where the surrogacy agreement is not valid, two parents are clearly identified. The gestational mother is the parent and her husband, if she is married, is considered the father.<sup>50</sup> If she is not married, the sperm donor (if known) or the intended father is considered the child's father.<sup>51</sup>

## III. PARENTAGE DETERMINATIONS IN SAME-SEX RELATIONSHIPS WHERE RELATIONSHIP IS NOT LEGALLY SANCTIONED

As the situation involving Lisa and Janet Miller-Jenkins illustrates, same-sex couples have children as well. Though the options necessary to have children who are genetically related to both members of the couple are not yet available, same-sex couples use assisted reproductive techniques of several varieties to bring children into their relationship. However, legally, for female couples in states that do not grant same-sex couples rights equivalent to marriage, only one of the members of the couple, the birth mother, has been considered the parent at the time of the child's birth. While some couples utilize adoption to complete the parent-child relationship for the additional parent, this is not always a viable option.

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47. *Id.* §§ 807-809, 9B U.L.A. at 368-69. Note that not all states that embrace the UPA include provisions related to surrogacy.

48. *Johnson v. Calvert*, 851 P.2d 776, 782 (Cal. 1993) (holding that when genetic consanguinity and gestation involve two different women, the intent to be a parent determines the natural mother); see *Michael H.*, 491 U.S. at 127 (noting that the Court is unaware of any state that awards substantive parental rights to the natural father of a child born into an existing marriage).

49. The UPA presumptions of parentage allow one to become a parent in many situations where a biological relationship is missing. For instance, a husband who marries a woman knowing that she is already pregnant by another man is presumed to be the child's parent unless this relationship is challenged. See UNIF. PARENTAGE ACT § 204(a)(3), 9B U.L.A. at 311.

50. *Id.* §§ 201(a)-(b), 807(b), 9B U.L.A. at 309, 368.

51. *Id.*

Some states prohibit adoption unless the birth mother relinquishes her parental rights; something that many mothers who want to maintain their relationships to their children are loathe to do. Male same-sex couples face even more hurdles, as they must always use a gestational surrogate to give birth, even if one of the members of the same-sex relationship is genetically related to the child. Additionally, some states do not allow same-sex couples to adopt, regardless of whose genetic material is involved.

With the exception of second-parent adoptions, which may not be available in many states, parentage determinations for same-sex parents usually arise in the course of dissolution of the relationship. In this process, same-sex partners may attempt to convince the court that both partners have acted as parents. This usually results in the application of equitable doctrines and a determination that the partner without the legal relationship to the child is a *de facto* parent, a psychological parent, or a parent by estoppel.<sup>52</sup> Each of these situations places the parent attempting to establish a legal relationship in the position of a “legal stranger.”<sup>53</sup> In the position of a legal stranger, the second parent is unlikely to obtain all the rights of parenthood. Usually, if rights are granted, these include custody, visitation, and support, but not the recognition as the legal parent.<sup>54</sup> In addition, these court-determined methods, including step-parent adoption, require the passage of time and the interference of others to make the determination.<sup>55</sup> Finally, some states are beginning to allow declaratory judgments establishing partners as parents before the child’s birth,<sup>56</sup> but like the post-birth options, this step requires the interference of the court to determine parentage.

#### IV. PARENTAGE DETERMINATIONS IN SAME-SEX RELATIONSHIPS IN STATES THAT GRANT RIGHTS OF MARRIAGE TO SAME-SEX COUPLES

Though *Goodridge* established the right to marry in Massachusetts, and legislation created civil unions in Vermont and Connecticut and domestic partnerships in California, whether the provisions of the parentage statutes in each of these states are part of the rights and responsibilities of

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52. See *In re E.L.M.C.*, 100 P.3d 546, 560-62 (Colo. Ct. App. 2004) (granting joint parental rights to a “psychological parent”). This case provides a complete and thorough explanation of the different types of “parents,” all of which have the same characteristics but with different names.

53. Melanie B. Jacobs, *Micah Has One Mommy and One Legal Stranger: Adjudicating Maternity for Nonbiological Lesbian Coparents*, 50 BUFF. L. REV. 341, 351 (2002).

54. Appleton, *supra* note 38, at 233-34.

55. *Id.*

56. Steven J. Hyland, *The Changing and Uncertain Status of Same-Sex Families*, 236 N.J. LAW. 16, 20 (2005).

marriage that now apply to same-sex couples, or whether these statutes remain restricted to heterosexual relationships because of the heterosexual requirement of procreation, has been addressed only in California and Vermont. Vermont and California come to different conclusions about whether the parentage statutes apply to determine that same-sex partners are both parents, but this is at least partly the result of differing statutory schemes.<sup>57</sup> Regardless, each of these states has found a way to reach the same result: same-sex partners are both parents of children born during the relationship.<sup>58</sup>

Even as Massachusetts was grappling with the implications of *Goodridge*, the court recognized that issues regarding parentage would arise. One step in the process that resulted in same-sex marriages becoming available in Massachusetts was an attempt by the legislature to create civil unions, providing all of the benefits and privileges of marriage without being called marriage.<sup>59</sup> During this attempt to create civil unions, the legislature requested an advisory opinion from the Supreme Judicial Court of Massachusetts regarding whether civil unions rather than marriage would meet the equal protection and due process requirements of the Massachusetts Constitution.<sup>60</sup> While the majority of the court determined civil unions would not be constitutional,<sup>61</sup> Justice Martha B. Sosman dissented, identifying potential differences regardless of what the relationship was called.<sup>62</sup> While explaining these differences, Justice Sosman also noted that certain statutes would need to be overhauled to address same-sex marriages or civil unions. She provided an example that reaffirms the strength of the presumption of paternity over the biological relationship. Noting that the presumption is gender-based, Justice Sosman wrote:

[I]f a married man impregnates a woman who is not his wife, the law contains no presumption that overrides the biological mother's status and presumes the child to be that of the biological father's wife. By comparison, if a married woman becomes impregnated by a man who is not her husband, the presumption makes her husband the

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57. California's parentage statutes are based on the UPA, while Vermont's parentage statutes include only limited provisions of the UPA and include other sections that are not based on the UPA.

58. *Elisa B. v. Superior Court*, 117 P.3d 660, 668 (Cal. 2005); *Miller-Jenkins v. Miller-Jenkins*, 2006 VT 78 ¶¶ 48, 56, 59 (2006).

59. *See In re Opinions of the Justices to the Senate*, 802 N.E.2d 565, 566 (Mass. 2004).

60. *Id.* at 566.

61. *Id.* at 572.

62. *Id.* at 574 (Sosman, J., dissenting).

legal father of the child, depriving the biological father of what would otherwise be his parental rights.<sup>63</sup>

As Justice Sosman points out, applying this interpretation of the availability or lack of availability of the presumption literally results in different outcomes for male same-sex couples than for female same-sex couples.<sup>64</sup> Since male same-sex couples must use a surrogate to bear a child, they face the challenge of overcoming the presumption that their child's gestational surrogate mother will be a parent, and her husband, if any, will be the father.

In addition, even as Massachusetts was moving forward with same-sex marriage, the fact that the legal relationships created by marriage would disappear as same-sex couples crossed state borders did not go unnoticed.<sup>65</sup> In light of this, Justice Sosman suggested that a modification of the presumption of paternity was necessary to address this new situation.<sup>66</sup>

#### A. *California Applies Provisions of the UPA*

In the aftermath of the recognition of domestic partnerships, California applied the provisions of its parentage legislation<sup>67</sup> to female same-sex couples, but has not yet addressed same-sex couples involving men. In three opinions issued on the same day, the California Supreme Court considered the parental rights and obligations of a woman to the child of her lesbian partner when the child was born during the relationship. Each of the three cases addressed slightly different situations, all involving parental rights of women whose lesbian partners gave birth during their relationship.

*Elisa B. v. Superior Court*, the first case decided by the California Supreme Court, addressed a child-support case involving two women who both gave birth during the course of their relationship.<sup>68</sup> Though both women had raised all three children as their natural children, after the couple separated, Elisa, the mother who had been providing support for the family, denied being the parent of the twins who had been born to her former partner.<sup>69</sup> Though the trial court found that Elisa was a parent to all three children, the Court of Appeals held that Elisa was not a parent under

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63. *Id.* at 577 n.3 (Sosman, J., dissenting).

64. *Id.*

65. *Id.* at 575 (Sosman, J., dissenting).

66. *Id.*

67. The California parentage statute, CAL. FAM. CODE §§ 7600-7605 (West 2004), is based on the UPA.

68. *Elisa B. v. Superior Court*, 117 P.3d 660, 660 (Cal. 2005).

69. *Id.* at 662-63.

the terms of the California UPA.<sup>70</sup> In reaching this decision, the Court of Appeals relied on *Johnson v. Calvert*, a prior decision of the California Supreme Court that stated a child can only have one natural mother.<sup>71</sup> Upon reaching its decision in *Elisa B.*, the California Supreme Court clarified its holding in *Johnson*, stating that the rule that a child can have only one natural mother was limited to the situation present in *Johnson* where there were two potential mothers and a father, creating three potential parents.<sup>72</sup> The *Elisa B.* court moved on to evaluate the situation of two potential mothers with no others claiming parentage using the section of the California UPA addressing presumptions of parentage.<sup>73</sup> Noting that the California UPA allows the application of sections of the statute relating to fatherhood to be used to determine motherhood as well,<sup>74</sup> the court concluded that Elisa had received the children into her home and held them out as her own; had actively participated in causing the children to be conceived with the understanding that she would raise them together with her partner who had given birth; that she had, in fact, accepted the rights and obligations of parenthood until the relationship ended; and that there were no competing claims to her being a second parent.<sup>75</sup> Consequently, under section 7611(d) of the California UPA, Elisa was declared the twins' mother regardless of the fact that that her partner was also their mother.<sup>76</sup>

Once the possibility of deciding that a child could have two mothers was available, the California Supreme Court moved on, in *K.M. v. E.G.*,<sup>77</sup> to address a situation where one partner in a same-sex relationship, K.M., donated her egg to the other partner, E.G., for in vitro fertilization.<sup>78</sup> At the time of the donation the parties agreed that K.M., the donor partner, would not reveal her genetic relationship to the child or others.<sup>79</sup> As part of the egg donation process K.M. also signed a standard agreement acknowledg-

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70. *Id.* at 664. The Uniform Parentage Act is codified in California as CAL. FAM. CODE §§ 7600-7605.

71. *Elisa B.*, 117 P.3d. at 665; see *Johnson v. Calvert*, 851 P.2d 776, 776 (Cal. 1993) (addressing a dispute between a husband and wife and the surrogate who bore their child, where the genetic mother and the surrogate mother both claimed to be the child's mother). The *Johnson* court recognized that each mother demonstrated equally compelling evidence supporting maternity; one based on genetics, the other on gestation. Consequently, the court turned to evidence of the couple's intent to procreate to determine that the genetic mother who had provided the ovum with the intent to bring a child into the world and to raise that child as her own was the natural mother. *Johnson*, 851 P.2d at 782.

72. *Elisa B.*, 117 P.3d at 666.

73. *Id.* at 667.

74. *Id.*

75. *Id.* at 670.

76. *Id.*

77. 117 P.3d 673 (Cal. 2005).

78. *Id.* at 675.

79. *Id.* at 676.

ing that she was relinquishing any claim to the resulting child.<sup>80</sup> Upon the birth of the child, both partners welcomed the child into their joint home, and, though they kept the genetic relationship hidden, both partners were identified as the child's mother to family, schools, and others with whom they interacted.<sup>81</sup>

Although the court could have applied a provision of the California UPA providing that a sperm donor is not a father if he provides semen to someone other than his wife,<sup>82</sup> the court chose not to apply this section to the egg donation from K.M. to E.G., despite the fact that K.M. had donated her eggs to someone who was not her spouse.<sup>83</sup> Instead, recognizing that it had just determined in *Elisa B.* that the provisions of the UPA that apply to fathers can also be applied to mothers, the court stressed that this language included the limitation of "where practicable," and chose to apply the provision of the UPA that allows genetic consanguinity to determine paternity to this situation, though in this case using genetic consanguinity to determine maternity.<sup>84</sup> In so doing, the *K.M.* court found the fact that K.M. and E.G. intended to raise the child in their joint home analogous to the situation in *Johnson v. Calvert*,<sup>85</sup> where the married couple had not intended to donate their gametes to the surrogate who carried the child they intended to raise as their own, eliminating any claim by the surrogate to parenthood based on giving birth.<sup>86</sup> As a result, the court carved out an exception for lesbian mothers, holding that the "exception to the usual rules governing parentage that appl[y] when a man donates semen to inseminate a woman not his wife, [do] not apply" when a woman provides ova to her lesbian partner "in order to produce children who would be raised in their joint home."<sup>87</sup> Since the donor exception was not applicable, the "usual provisions of the UPA" were used to determine parentage and K.M. was declared a parent based on genetic consanguinity.<sup>88</sup>

Unlike the unanimous decisions entered in the two companion cases, two dissenting opinions pointed out concerns in *K.M. v. E.G.*. Both dissents disagreed with the majority's choice to avoid treating the egg donor the same way a sperm donor would be treated.<sup>89</sup> This tension demonstrates

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80. *Id.*

81. *Id.* at 677.

82. CAL. FAM. CODE § 7613(b) (West 2004).

83. *K.M.*, 117 P.3d at 678.

84. *Id.* at 678.

85. 851 P.2d 776 (Cal. 1993).

86. *K.M.*, 117 P.3d at 679.

87. *Id.* at 681.

88. *Id.*

89. *Id.* at 683-84 (Kennard, J., dissenting); *id.* at 688 (Werdegar, J., dissenting). Justice Werdegar's dissent also points out concerns about the majority's refusal to apply the intent test articulated in *John-*

that the application of the UPA in its current form may lead to conflicting decisions despite similar factual situations, reinforcing the concern raised in Massachusetts that adjustments are necessary to address same-sex couples of either gender.

Finally, in *Kristine H. v. Lisa R.*,<sup>90</sup> the parties, a committed same-sex couple, obtained a court order prior to the baby's birth, identifying one partner as the biological parent and the other as the "second mother/parent," to allow both women to be identified as parents on the child's birth certificate.<sup>91</sup> The order was granted under the provisions of the UPA.<sup>92</sup> When determining whether the birth-mother could challenge the validity of the court's judgment after the couple separated, the Supreme Court of California did not address whether the judgment was appropriate under the UPA, but held that the birth mother was estopped from challenging the judgment because she had "stipulated to the issuance of a judgment, and enjoyed the benefits of that judgment for nearly two years."<sup>93</sup>

These three cases demonstrate the willingness and ability of a court to use provisions of the UPA to determine parental rights and obligations of same-sex partners without explicitly recognizing the validity of their relationship. Rather than looking for ways to create a relationship that confers some of the rights and responsibilities of parenthood upon the "legal stranger" of a child, applying the provisions of the UPA to establish parenthood regardless of marital status will allow states to identify two parents for each child whether they are being raised by a single parent, a heterosexual couple, or a same-sex couple. However, there are still difficulties arising from the application of the UPA to male relationships, especially because some states do not include provisions relating to assisted reproductive techniques within the parentage legislative schemes.

#### B. *Vermont Declines to Apply Parentage Statute*

The lack of uniformity in statutes related to parentage determinations is evident in the alternative reasoning the Vermont Supreme Court used to determine that partners in a same-sex civil union were both parents of a child born during that civil union.<sup>94</sup> In *Miller-Jenkins v. Miller-Jenkins*,

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*son*, which would allow it to evaluate preconception intent of the parties as well as concerns that the majority opinion provides rights and responsibilities based on sexual orientation. *See id.* at 687-88.

90. 117 P.3d 690 (Cal. 2005).

91. *Id.* at 692.

92. *Id.* at 695-96.

93. *Id.* at 696.

94. *Miller-Jenkins*, 2006 VT 78 ¶¶ 55-56.

the Vermont Supreme Court declined to use the presumption of parenthood<sup>95</sup> under its statutory scheme related to parentage to declare that both women were entitled to parental status, reasoning that the presumption of parentage was enacted to address child support issues rather than to determine legal parentage.<sup>96</sup> Instead, the court found Janet had status as a parent because she and Lisa were in a valid civil union at the time the child was born; the couple intended that they would both be parents; Janet was involved in the decision and procedures involving the conception and birth; while living as a couple they had treated Janet as a parent and identified her as such; and no one else claimed status as a parent.<sup>97</sup> This reasoning mirrors that used by California to determine that the California UPA controlled the determination of parentage.

It is important to note that all of the cases that have addressed whether the parental presumption applies to children of same-sex partners involved relationships that had ended or were in the process of ending.<sup>98</sup> Consequently, in reaching its decision, the court has the ability to use hindsight and to evaluate whether the party requesting parental rights has engaged in appropriate behaviors to be considered a parent. This hindsight is not available to the courts when the same-sex couple is still together and is trying to assert joint parenting rights in the face of challenges from others rather than from each other. This is likely to arise more frequently as couples in valid civil unions or same-sex marriages move to other locations.

#### V. ISSUES THAT ARISE WHEN SAME-SEX FAMILIES CROSS STATE BORDERS

As long as same-sex couples remain in the states where their relationship is acknowledged, their rights and responsibilities to their children re-

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95. Vermont's presumption of parentage is codified at VT. STAT. ANN. tit. 15, § 308(4) (2002) and states:

A person alleged to be a parent shall be rebuttably presumed to be the natural parent of a child if: (1) the alleged parent fails to submit without good cause to genetic testing as ordered; or (2) the alleged parents have voluntarily acknowledged parentage under the laws of this state or any other state, by filling out and signing a Voluntary Acknowledgement of Parentage form and filing the completed and witnessed form with the department of health; or (3) the probability that the alleged parent is the biological parent exceeds 98 percent as established by a scientifically reliable genetic test; or (4) the child is born while the husband and wife are legally married to each other.

96. *Miller-Jenkins v. Miller-Jenkins*, 2006 VT 78 ¶ 44 (2006).

97. *Id.* ¶ 56.

98. See *Elisa B. v. Superior Court*, 117 P.3d 660, 662 (Cal. 2005) (child support dispute); *K.M.*, 117 P.3d at 675 (custody and visitation dispute); *Kristine H.*, 117 P.3d at 692 (motion to set aside stipulated agreement regarding parental rights after parties separated); *Miller-Jenkins*, 2006 VT 78 ¶ 1 (appeal of custody and visitation orders).

main generally intact. However, as the *Miller-Jenkins* cases have demonstrated, when a same-sex couple and their family relocate, or when part of the family relocates, their entire legal relationship is put in jeopardy by simply crossing state borders.

In almost all states that have banned same-sex marriage, or restricted marriage to one man and one woman, the legislation doing so also specifically prohibits the recognition of such relationships that were created and legalized in states where they are legal.

Heterosexual couples and their families do not face this challenge. When a heterosexual couple relocates from Vermont, Massachusetts, or Connecticut, to Florida, Utah, or any other state that bans same-sex marriage, nothing about their legal relationship changes. Yet, when a same-sex couple and their children cross state borders, not only are they no longer a legally recognized couple, but the parent-child relationship for at least one of the parents may have effectively been terminated, with no court action, no complaint, and no opportunity for the parent to object to the termination. In addition, there is no documentation of this legal “undoing” of the legal relationship. The parental rights and responsibilities simply do not transcend the state borders. This change in the legal status of one of the parents may prevent that parent from accessing school records, making medical decisions, and allowing children to inherit from the parent. In some states, unlike the children of heterosexual parents, the children of same-sex parents may no longer be eligible for health insurance coverage under the “other” parent’s health insurance, and may not be the default beneficiaries of life insurance policies for that parent.

Depending on the original circumstances involved at the time of the creation of the family, the intent of the couple when doing so may be completely thwarted. In all instances, the gestational mother will be a parent. Many times this will be part of the couple’s intention, at least when the same-sex couple is female. Applying the UPA, without modification, the other partner will have no presumptive parenthood, so the child will either have only one parent, because of an anonymous sperm donor, or an identified sperm donor who may never have intended to take a parental role, will be the legal parent. In some states that do not allow gestational surrogacy, if the child were the product of donated gametes carried by a surrogate, the gestational mother may even be identified as the parent even if she has never seen the child since its birth.

The potential for issues such as this to arise as couples cross borders is demonstrated in *Finstuen v. Edmondson*,<sup>99</sup> which addressed an Oklahoma statute that specifically prohibited the recognition of adoptions from other

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99. No. CIV-04-1152-C, 2006 WL 1445354 (W.D. Okla. May 19, 2006).

states if those adoptions involved more than one member of the same sex.<sup>100</sup> The court was reviewing a motion for summary judgment alleging that the statute violated the Full Faith and Credit Clause, the Equal Protection Clause, the Due Process Clause, and the Right to Travel.<sup>101</sup> Plaintiffs were composed of three families. One family had moved to Oklahoma after both members of the same-sex couple had adopted their child in California.<sup>102</sup> Though California had included both women as adoptive parents, Oklahoma refused to issue a birth certificate with both partners named as parents.<sup>103</sup> This couple had experienced difficulty in Oklahoma when they were both attempting to be involved with their child's medical care.<sup>104</sup> A second family was two women, one of whom had given birth and the other of whom had adopted the child, while the birth mother's parental rights were preserved.<sup>105</sup> Though the adoption occurred in New Jersey, the family relocated to Oklahoma.<sup>106</sup> The couple alleged, and the court agreed, that the legislation prohibiting Oklahoma from recognizing the out-of-state same-sex parent adoption interfered with the adoptive parent's ability to sign school documents or medical documents on behalf of her child.<sup>107</sup> Finally, a third family consisted of a couple who had adopted, in Washington, a child from Oklahoma prior to the addition of the restrictive language.<sup>108</sup> After much legal wrangling, Oklahoma had issued a birth certificate with both men's names as parents, but the couple was afraid to return to Oklahoma because they were concerned that their rights would not be recognized in light of the amended legislation, which had been changed to prohibit Oklahoma from recognizing an out-of-state adoption by a member of a same-sex couple.<sup>109</sup> The court found the first two couples had standing to challenge the statute because they could demonstrate injury, but the couple who were already both recognized as parents on an Oklahoma birth certificate did not have standing to challenge the legislation.<sup>110</sup>

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100. See OKLA. STAT. tit. 10, § 7502-1.4(A) (West Supp. 2006). The statute requires recognition of adoptions from other states as if Oklahoma had granted the adoption, "[e]xcept that, this state, any of its agencies, or any court of this state shall not recognize an adoption by more than one individual of the same-sex from any other state or foreign jurisdiction."

101. *Finstuen*, 2006 WL 1445354, at \*1.

102. *Id.* at \*2.

103. *Id.*

104. *Id.*

105. *Id.*

106. *Id.*

107. *Id.*

108. *Id.* at \*1.

109. *Id.*

110. *Id.* at \*5.

Though the court struck down the statute as violating of the Full Faith and Credit Clause,<sup>111</sup> the Equal Protection Clause,<sup>112</sup> and the Due Process Clause,<sup>113</sup> it found that the Plaintiffs failed to demonstrate that their right to travel was infringed upon in any way because the only parties who were restricted from traveling as a result of the potential enforcement of the statute were those living outside the state, but they had already been dismissed for lack of standing.<sup>114</sup>

Though the Oklahoma statute is no longer in force, the fact that the Oklahoma legislature felt compelled to enact such a statute demonstrates that this issue may continue to arise. DOMA gives states the right to limit recognition of these otherwise-valid relationships, but it does not allow states to alter parent-child relationships. Consequently, states may feel their ability to refuse recognition to same-sex couples is eroded if they must grant them parental rights based on another state's recognition of the relationship.

This tension can be resolved by focusing on the parent-child relationship rather than the couple's relationship—but doing so means we will need to strive for better consistency in statutes which determine parentage. This consistency already exists in related areas, such as the Uniform Child Custody Jurisdiction and Enforcement Act<sup>115</sup> and the Parental Kidnapping Prevention Act.<sup>116</sup> Consistency is important when children are involved as they innocently suffer the consequences of adults' differences of opinion.

## VI. POTENTIAL CHANGES TO THE UNIFORM PARENTAGE ACT

With many states enacting legislation prohibiting recognition of same-sex relationships, and other states allowing the recognition of these relationships, it is clear that the legal status of those involved in these relationships must be addressed. States are making their wishes regarding the couples well known, but these couples, recognized or not, often have legal relationships with others—their children—based on the recognition or non-

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111. *Id.* at \*7.

112. *Id.* at \*8.

113. *Id.* at \*14.

114. *Id.* at \*15.

115. UNIF. CHILD CUSTODY JURISDICTION ENFORCEMENT ACT, 9 U.L.A. 649 (1997 & Supp. 2006). The precursor to this act, the Uniform Child Custody Jurisdiction Act, 9 U.L.A. 261 (1968), was adopted by all fifty states. The revisions included in the Uniform Child Custody Jurisdiction Enforcement Act have been adopted in forty-four states, the District of Columbia, and the U.S. Virgin Islands. Legislation is pending in four additional states. National Conference of Commissioners on Uniform State Laws, [http://www.nccusl.org/nccusl/uniformact\\_factsheets/uniformacts-fs-uccjea.asp](http://www.nccusl.org/nccusl/uniformact_factsheets/uniformacts-fs-uccjea.asp) (last visited Nov. 1, 2006).

116. 28 U.S.C. § 1738A (2000).

recognition of their relationships. These children may suffer from the potentially disastrous consequences of the decisions of state governments about the status of their parents.

One way to minimize the potential harm to children of same-sex couples who relocate to states that do not recognize the couples' relationship is to focus on and protect the legal relationship between the parents and the child, without requiring consideration of the same-sex relationship. This can be accomplished through the UPA, as shown by California. However, states that refuse to recognize the relationship of the parents are unlikely to interpret the UPA to provide parental rights and responsibilities. Nevertheless, a few adjustments to the UPA may make its application more palatable.

Currently, if a state were to enact the UPA as written, in its entirety, the only way to determine that a same-sex couple was composed of two parents of a child would be to follow the lead of California in *Elisa B.* and *K.M.* and decide that the presumption of paternity can be used to determine maternity as well and to ignore the use of husband and wife, treating both categories as partners or spouses. In addition, a court would have to choose to avoid the application of the sperm donor language to an egg donor, or to a sperm donor of a male same-sex couple who used a gestational surrogate. The likelihood of consistent results across different states would be slim. Instead, adjusting the UPA to address these situations would allow states to adopt a common language, with common meaning, leading to a much higher probability of consistent decisions. In addition, determining parentage through legislation would eliminate the need for parentage determinations to wait for a conflict that would allow the court to articulate the rule.

The Uniform Parentage Act has had several different versions. The 1973 UPA was adopted by nineteen states in its entirety, with several other states choosing to enact portions.<sup>117</sup> The 1973 version declared "all children should be treated equally without regard to the marital status of parents."<sup>118</sup> This goal is still relevant today.

The National Conference of Commissioners on Uniform Laws recognized that courts did not always construe the 1973 version consistently, and that there were several other uniform acts that addressed related areas such as custody and surrogacy.<sup>119</sup> The UPA was revised in 2000 and amended in 2002, to become what is now the official recommendation of the Na-

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117. UNIF. PARENTAGE ACT, Prefatory Note, 9B U.L.A. 296 (2002).

118. *Id.*

119. *Id.*

tional Conference of Commissioners on Uniform Laws.<sup>120</sup> The goal of the 2000 UPA and the 2002 amendments was to treat children of unmarried parents equally with children of married parents and to adapt to advances in reproductive technologies.<sup>121</sup> In addition, the new UPA added a Voluntary Acknowledgement of Paternity provision to comply with the federal mandate that requires a simple non-judicial way to establish paternity for newborns and young children.<sup>122</sup>

Justice Sosman of Massachusetts has suggested adjusting the parentage legislation of Massachusetts.<sup>123</sup> Other scholars have suggested that the UPA already provides remedies for determining custody for same-sex parents through the provisions in sections 106 and 201 allowing for a declaration of maternity.<sup>124</sup> However, while this may provide alternatives for female same-sex couples, these provisions provide no relief for male same-sex couples. By looking at the current remedies available, and making some small changes, we can firmly establish a child's parentage at the time of the child's birth, regardless of the situation of the child's parents.

To adjust the UPA, the first step would be to replace "husband" and "wife" with "parenting partner" or another gender-neutral term. "Spouse" would be effective for states that consider same-sex couples to be spouses, but the majority of states do not do so. Then, rather than focusing on "paternity," the language of the statute would need to shift to focusing on the more gender-neutral term of "parentage." The following sections will suggest specific changes to each Article of the UPA.

#### A. Article 1: General Provisions

Article 1 contains information identifying the title,<sup>125</sup> defining terms,<sup>126</sup> determining the scope and identifying the choice of law,<sup>127</sup> naming the

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120. *Id.*

121. *Id.*

122. *Id.* 42 U.S.C. § 666(a)(5)(C) requires a state to develop "(i) . . . [p]rocedures for a simple civil process for voluntarily acknowledging paternity . . . (ii) . . . includ[ing] a hospital-based program for the voluntary acknowledgement of paternity focusing on the period immediately before or after the birth of a child." 42 U.S.C. § 666(a)(5)(C) (2006). Paragraph (a)(5)(D)(ii) of this section requires that the voluntary acknowledgement of paternity must be considered a "legal finding of paternity," subject to certain rights of rescission. *Id.* § 666(a)(5)(D)(ii).

123. While recognizing the disparate results of the application of Massachusetts' presumption of paternity legislation to male same-sex couples and female same-sex couples, Justice Sosman suggests that it might "make sense to rethink precisely how this biologically impossible presumption of paternity ought to apply to same-sex couples, and perhaps make some modification that would clarify its operation in this novel context," though no suggestions for modification are provided. *In re Opinions of the Justices to the Senate*, 802 N.E.2d at 577 n.3 (Mass. 2004).

124. *E.g.*, Jacobs, *supra* note 53, at 351.

125. UNIF. PARENTAGE ACT § 101, 9B U.L.A. 303 (2002).

126. *Id.* § 102, 9B U.L.A. at 303-05.

state with jurisdiction over proceedings involving the legislation,<sup>128</sup> clarifying that provisions of other legislation related to privacy, medical records, and other related protections are still applicable,<sup>129</sup> and explaining that the current language related to paternity can also be used to determine maternity.<sup>130</sup>

The title of the UPA appropriately focuses on parentage, rather than limiting itself to paternity. The Supreme Court has noted that there is a difference between a declaration of fatherhood and a declaration of parentage, which brings with it “parental prerogatives.”<sup>131</sup> These parental prerogatives include those rights associated with raising a child,

including the child’s care; the right to the child’s services and earnings; the right to make decisions regarding the control, education, and health of the child; and the right, as well as the duty, to prepare the child for additional obligations, which includes the teaching of moral standards, religious beliefs, and the elements of good citizenship.<sup>132</sup>

By focusing on parentage rather than paternity, the UPA should address the determination of who is entitled to the parental prerogatives described by the Court, regardless of whether they are male or female.

Section 102, which contains definitions, would require some small adjustments. Section 102(1) defines “acknowledged father” as a “man who has established a father-child relationship under [Article] 3.”<sup>133</sup> This language could be expanded to include parents of either sex by substituting “parent” for “father” and “person” for “man,” resulting in a definition of an acknowledged parent as one who establishes a parent-child relationship by voluntary acknowledgement.

“Presumed father” is defined in section 102(16). This definition refers to a man who is recognized as a father under the provisions related to the presumption of parentage in section 204. To allow the presumption of parentage to apply equally to male parents and female parents, a situation that currently exists through the application of section 106, the term to be defined should be changed to “presumed parent” and “father” changed to “parent.”

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127. *Id.* § 103, 9B U.L.A. at 306-07.

128. *Id.* § 104, 9B U.L.A. at 307.

129. *Id.* § 105, 9B U.L.A. at 308.

130. *Id.* § 106, 9B U.L.A. at 308.

131. *Michael H. v. Gerald D.*, 491 U.S. 110, 126 (1989) (plurality opinion).

132. *Id.* at 118-19.

133. The UPA includes brackets in several areas to indicate to prospective adopters language that can be modified to fit the individual state’s statutory scheme. Article 3 refers to the section that allows parentage to be established by voluntary acknowledgement.

Though adjusting the definitions to address parentage rather than paternity might eliminate the need for section 106, keeping this provision, which allows the UPA to be applied to determine maternity in the same manner in which paternity is determined, serves two purposes. First, it expresses the clear intent to allow the UPA to determine parentage of mothers and fathers, and it allows the genetic testing provisions, which will generally not be adjusted to accomplish the goal attempted here, to apply to genetic mothers as well as fathers.

#### B. *Article 2: Parent-Child Relationship*

Article 2 is the heart of the UPA, as it defines how the parent-child relationship is established. In its current form, the UPA identifies four ways a mother-child relationship is established and six ways a father-child relationship is established.<sup>134</sup> Though it is available through the application of section 106, allowing maternity to be established in the same manner as paternity, this provision does not specify that a mother-child relationship can be established through the presumption found in section 204, although this option is identified as a method of establishing paternity. In addition, paternity can be established through an acknowledgement of paternity,<sup>135</sup> or consent to assisted reproduction under Article 7,<sup>136</sup> though these options are not identified as alternatives to establish maternity.

To allow parentage determinations to be applied to same-sex parents the provisions available to men—the presumption of parentage, voluntary acknowledgement, and consenting to the assisted reproduction of a woman under Article 7, must also be available to women. In addition, altering the references to paternity to reflect parentage is necessary to focus on identifying the legal parent, not just the legal father.

Section 203 seems to be a straightforward, innocuous provision. It states that “a parent-child relationship established under this [Act] applies for all purposes, except as otherwise specifically provided by other law of the State.” The importance of this provision is evident by looking at the Vermont Supreme Court’s analysis in *Miller-Jenkins*. Since Vermont has not adopted most of the UPA, this provision was not available to the court and it chose to limit the application of the presumption of parentage to cases involving the collection of child support, rather than using it to determine that Janet was a parent of Lisa’s child.<sup>137</sup> When adopting any revisions of the UPA, states should include this provision to make it clear that

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134. UNIF. PARENTAGE ACT § 201(a), (b), 9B U.L.A. 309 (2002).

135. *Id.* § 201(b)(2).

136. *Id.* § 201(b)(5).

137. *Miller-Jenkins v. Miller-Jenkins*, 2006 VT 78 ¶ 44 (2006).

the purpose of the UPA is determining parentage in all situations, rather than only support or custody determinations.

The presumption of paternity is found in section 204. The title of this section should be adjusted to “Presumption of Parentage,” since that change is already implied by section 106, and at least one state, California, has interpreted this provision to apply to decisions about a woman’s parentage of another woman’s child.<sup>138</sup> To reflect this change, as well as the fact that a married couple in Massachusetts may be of the same-sex, the term “man” would need to be changed to “person,” making it gender-neutral; “father” would change to “parent”; and “paternity” would change to “parentage.” The result: a person is presumed to be a parent if married to the mother, in all of the current variations, or for the first two years the person held the child out as the person’s own while living in the same household as the birth mother. Though this does not yet provide for male same-sex partners because of their unique need to use a gestational surrogate, it does allow both parents in the household to be female.

### *C. Article 3: Voluntary Acknowledgement of Paternity*

Article 3 of the UPA provides for the voluntary acknowledgment of paternity through a civil process at the time of the child’s birth or shortly thereafter.<sup>139</sup> Included to address requirements of federal law,<sup>140</sup> this section requires genetic consanguinity in order to protect against parties avoiding adoption regulations.<sup>141</sup> As a result it cannot be used by male same-sex couples. However, by changing section 302 from referencing “paternity” and “fathers” to addressing “parentage” and “person,” a woman who donates her egg to a female partner would be able to acknowledge her genetic parentage under this section. Since the woman giving birth could claim parentage under the presumption in section 201, both parents could be determined at the time of the child’s birth. This would be reinforced by section 311, which requires a state that adopts this provision to give full faith and credit to voluntary acknowledgements from other states, since, under section 305, a valid acknowledgment is equivalent to a legal adjudication of parentage. The remaining provisions would require small editorial changes to reflect this substantive change, but would otherwise remain intact.

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138. See *Elisa B. v. Superior Court*, 117 P.3d 660, 662 (Cal. 2005).

139. UNIF. PARENTAGE ACT § 304, 9B U.L.A. 315 (2002).

140. *Id.* § 304 cmt.; see 42 U.S.C. § 666(a)(5)(C).

141. UNIF. PARENTAGE ACT § 301 cmt., 9B U.L.A. 313 (2002).

#### D. *Article 4: Registry of Paternity*

Article 4 establishes a registry of paternity, to protect fathers' rights in cases of potential adoption. This registry allows fathers to be notified if a child that might be theirs is to be adopted. Since there may be situations where a same-sex parent would have a genetic relationship to a child who might be put up for adoption, allowing this to be a "parentage registry" rather than a "paternity registry" would cover the situation of a woman who has a genetic relationship to a child that is carried by her partner or former partner.

#### E. *Article 5: Genetic Testing*

The provision of the UPA that addresses genetic testing, including when such testing can be ordered, how it must be completed, and who will bear the costs, need not be changed. In order to require a party to submit to genetic testing, the court must find that there is a reasonable probability of sexual contact that would lead to conception. Since this will never be the case with same-sex partners, who will always need to use some form of assisted reproduction, this provision will continue to apply to heterosexual parents only.

#### F. *Article 6: Proceeding to Adjudicate Parentage*

Article 6 addresses the details and requirements of proceedings to adjudicate parentage. The requirements use terminology that results from previous sections, such as "acknowledged father" and "presumed father." Without changing any of the details of the underlying proceedings, this article can be edited to reflect the gender-neutral changes of the prior sections. For instance, rather than granting standing to the child, mother, and "man whose paternity is to be adjudicated,"<sup>142</sup> standing could be granted to the child, mother, and "person whose parentage is to be adjudicated." Additional references to father and paternity could be changed to parent, or if necessary to distinguish from the mother, second parent, and parentage.

Section 631 initially appears to present a stumbling block to the application of this article to same-sex parents because it appears to require genetic testing.<sup>143</sup> However, should the court find that genetic testing does not identify the father (or as suggested, parent), the court can then move on

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142. *Id.* § 602, 9B U.L.A. at 338-39.

143. *Id.* § 631(1), 9B U.L.A. at 348.

to adjudicate parentage using other evidence.<sup>144</sup> Therefore, the provision would allow proceedings to continue with same-sex parents with no genetic relationship to the child.

G. *Article 7: Child of Assisted Reproduction*

According to the latest statistical information from the Centers for Disease Control and Prevention, in 2003, 35,785 births (delivery of one or more infants) were the result of assisted reproductive techniques, resulting in 48,756 children.<sup>145</sup> Because of the variety of possible parentage determinations that could arise when assisted reproductive techniques are used, the UPA attempted to clarify the parentage of a child born as a result of assisted reproduction.<sup>146</sup> Since assisted reproduction is the only option available to same-sex parents, this portion of the UPA must be considered carefully.

Section 701 limits the application of Article 7 to situations that do not involve sexual intercourse or gestational surrogacy. Consequently, Article 7 will not apply to male same-sex couples, but will apply to females, since one member of the female same-sex couple is likely to avail herself of assisted reproductive techniques.

Sections 703 and 704 must be read in conjunction with each other, and each needs adjusting to encompass children of same-sex couples. Section 703 currently provides: “A man who provides sperm for, or consents to, assisted reproduction by a woman as provided in section 704 with the intent to be the parent of her child, is a parent of the resulting child.” The comment following this section points to the increase in the use of assisted reproductive techniques as a compelling reason to clarify the parentage of children born in this manner.<sup>147</sup> Section 704(a) requires: “Consent by a woman, and a man who intends to be a parent of a child born to the woman by assisted reproduction must be in a record signed by the woman and the man. This requirement does not apply to a donor.” As a result of the application of these two sections to a female same-sex couple, a woman who provides her own egg to her partner for use in an assisted reproductive technique is not considered a parent. Throughout the UPA, a donor is a person who provides an egg or sperm for use in assisted reproduction, but a donor does not include a husband or wife who provides genetic materials

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144. *Id.* § 631(3), 9B U.L.A. at 349.

145. CTRS. FOR DISEASE CONTROL AND PREVENTION, 2003 ASSISTED REPRODUCTIVE TECHNOLOGY SUCCESS RATES: NATIONAL SUMMARY AND FERTILITY CLINIC REPORTS 13 (2005), available at <http://www.cdc.gov/art/art2003/PDF/ART03part1.pdf>.

146. UNIF. PARENTAGE ACT art. 7 cmt., 9B U.L.A. 354 (2002).

147. *Id.* § 703 cmt., 9B U.L.A. at 356.

for the wife to use or the woman who gives birth to a child through assisted reproduction unless doing so under a gestational surrogacy agreement.<sup>148</sup> So, the woman providing her egg to her female partner is a donor, and therefore is not a parent under section 703. To remedy this situation, section 703 should be amended to state: “A person who provides genetic material for, or consents to, assisted reproduction by a woman as provided in section 704 with the intent to be the parent of her child, is a parent of the resulting child.” To maintain this change through section 704, sub-section (a) should be changed to require consent by the woman and “the person” intending to be the parent. To further clarify the distinction between a donor who has no parentage rights, and a woman who donates to her female partner, revising the reference to donors in this section to read: “This does not apply to a donor unless the donor intends to raise the child in the couple’s joint home,” will allow a woman to donate her egg to another woman who is not her same-sex partner in the traditional egg donation situation. Further editorial changes to the provisions of Article 8 would be necessary to provide gender-neutral terms such as “partner,” “cohabiting partner,” and “couple,” rather than “wife” or “husband.”

#### H. *Article 8: Gestational Agreement*

Article 8, covering gestational agreements, is an optional section of the UPA. Drafted in response to the fact that, despite widely varying state laws about the legality of these agreements, thousands of children are born through the use of gestational surrogates,<sup>149</sup> the section attempts to determine the parentage of these children. Whether legally approved or not, gestational arrangements are currently the only option for male same-sex couples to have a child genetically related to one of them. Hence, states would be well-advised to include this provision to address the results of the reality of today’s reproductive world. As noted in the comments associated with Article 8, courts have realized that they will be forced to address these issues regardless of whether the procedures are banned or criminalized, and the children born as a result cannot be ignored.<sup>150</sup>

To expand the coverage of Article 8 to address parentage decisions involving same-sex couples, only one section needs to be changed, and, though powerful, the changes are slight. Section 801 authorizes the use of gestational agreements provided certain conditions are met. Section 801(a)(2) requires “the prospective gestational mother, her husband if she

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148. *Id.* § 102(8), 9B U.L.A. at 304.

149. *Id.* art. 8 cmt., 9B U.L.A. at 360-62.

150. *Id.* (citing *In re Marriage of Buzzanca*, 72 Cal. Rptr. 2d 280 (Cal. Ct. App. 1998)).

is married, and the donors relinquish all rights and duties as the parents of a child conceived through assisted reproduction”; thereby eliminating any possibility that the sperm donor<sup>151</sup> is a parent of the resulting child. Though the application of the revised definition of “donor” would likely allow a member of a male same-sex couple to be an intended parent, the fact that this provision is the only one that allows members of a male couple to become parents warrants reinforcing that possibility here. Hence, adding a limitation to donors to specifically except those who are the intended parent would clarify the potential application of the section to intended fathers who donate sperm to a gestational mother. Finally, in section 801(b), substituting “individuals” for “man and woman” allows the provision to be gender-neutral.

The remaining provisions of this section are drafted in gender-neutral terms and, though they require the interference of a court to judicially approve the agreement, would allow a male same-sex couple to be legally recognized as the parents of a child, regardless of the genetic relationship or lack thereof.

#### *I. Article 9: Miscellaneous Provisions*

The final section of the UPA provides typical legislative details regarding severability,<sup>152</sup> effective date,<sup>153</sup> repeal of prior conflicting legislation,<sup>154</sup> and transition issues.<sup>155</sup> Most importantly, it also provides a section requiring states to interpret the provisions of the UPA in ways that maintain consistency between the various states that enact it.<sup>156</sup> In order to provide stability for children who become the innocent victims of disagreements between states regarding the status of their parents, this section is essential.

## VII. CONCLUSION

Whether we believe same-sex couples should be allowed to get married, enter into civil unions, or raise children, the reality is that they do so. Over time, whether or how we recognize the relationship between the adults will become clear. In the meantime, the legal relationship between

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151. “Donor” is defined in section 102(8) and specifically excludes an intended parent under a gestational agreement.

152. UNIF. PARENTAGE ACT § 902, 9B U.L.A. 371.

153. *Id.* § 903, 9B U.L.A. at 371.

154. *Id.* § 904, 9B U.L.A. at 371-72.

155. *Id.* § 905, 9B U.L.A. at 372.

156. *Id.* § 901, 9B U.L.A. at 371.

members of a same-sex couple and their children must be clarified to avoid treating children differently based on their parents' marital status. Being proactive about the status of these parent-child relationships will allow for greater consistency among states and will avoid the long, drawn out legal battles that harm the parent-child relationship and create potential conflicts between states that are epitomized in the *Miller-Jenkins* case that, after three years, still has not been completely resolved.