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ARTIFICIAL INSEMINATION AND THE PRESUMPTION OF PARENTHOOD: TRADITIONAL FOUNDATIONS AND MODERN APPLICATIONS FOR LESBIAN MOTHERS

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Charlie and Isabel are married. Two years into the marriage, they decide that they want to have children. But unlike many married couples, Charlie cannot get Isabel pregnant, so they decide to use artificial insemination. They find a reputable clinic and make an appointment for a consultation the next week. After the consultation, the donor selection, and several follow-up visits, the pregnancy test finally shows a pink plus sign. Following months of morning sickness, crib-shopping, Lamaze classes, Häagen-Dazs chocolate chip, and countless hours scanning over baby-name books, the day finally comes for Isabel to give birth. Joy and excitement fill the hospital room as a perfect little girl is born. However, another emotion makes its way into the delivery room that day too: confusion. The hospital will not name Charlie on the birth certificate as the legal parent. For some reason, the hospital is saying that it will only put the name of the biological father on the certificate, even though Charlie has been a vital part of the entire process and Charlie and Isabel have been married for three years now. A few thousand tears, hours, and dollars later, Charlie is able to secure a second parent adoption and finally becomes the little girl's legal parent. Now, most people would agree that such a year of uncertainty, anxiety, and heartache should have never occurred—but should it matter that Charlie is a woman?

INTRODUCTION

Unfortunately, many state legislatures and courts do think it matters that Charlie is a woman. Although she is married to the mother of the child and has actively participated in the decision to have a baby, she cannot be considered a legal parent without a second parent adoption. In April of 2009, the Iowa Supreme Court gave the Midwest its first taste of marriage equality by ruling in *Varnum v. Brien* that denying same-sex couples the

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right to marry violated the Iowa State Constitution.[1] But, just as many expected, this newly recognized right became the subject of both political and legal attack, with critics trying to chip away at the broad and inclusive rights that the *Varnum* decision granted to same-sex couples. Unfortunately, one particular attack on the right to marry came from the Iowa Attorney General, Tom Miller, who claimed that the *Varnum* decision did not afford the presumption of parenthood to legal same-sex spouses.[2] This presumption, which has long been described as being "one of the strongest known to law,"[3] automatically confers parental status upon the spouse of the child's natural mother if the mother is married to her spouse at the time the child is born.[4] While most of the presumption of parenthood statutes are written with opposite-sex married couples in mind, which is noted by the opposite-sex gender-specific language used in those statutes,[5] this fact may not necessarily limit their application to newly legalized same-sex married couples, especially when the underlying rationales for the presumption are applied to same-sex parents.[6] Since the state legislatures have not updated the presumption statutes to specifically include newly recognized same-sex married couples, the question of whether this presumption applies to same-sex couples is still a viable legal query.

Part I of this Note recounts the history of the presumption of parenthood, focusing on the traditional rationales of the presumption by going through the meandering path of court decisions and state statutes in order to uncover the reasons the common law created this legal fiction. Part II discusses the artificial insemination statutes that presume parentage to the non-biological spouse simply by nature of the couples' marital status. After showing that biological ties have little to do with the presumption, at least with respect to children conceived through artificial insemination, the anal-

1. Varnum v. Brien, 763 N.W.2d 862 (Iowa 2009).

2. *Don't Make Gay Spouses Adopt Their Own Children*, BLEEDING HEARTLAND (Jul. 5, 2009, 11:30:31 AM CDT), http://www.bleedingheartland.com/diary/2866/dont-make-gay-spouses-adopt-their-own-children/. This is not the original article. The original has been removed.

3. *E.g.*, R.N. v. J.M. 61 S.W.3d 149, 155 (Ark. 2001); N.A.H. v. S.L.S., 9 P.3d 354, 360 (Colo. 2000); *In re* Russell's Estate, 110 S.E. 791, 793 (S.C. 1922); *In re* Jones' Estate, 8 A.2d 631, 635 (Vt. 1939); Pierson v. Pierson, 214 P. 159, 159 (Wash. 1923).

4. *E.g.*, GA. CODE ANN. § 19-7-20 (2010); MO. REV. STAT. § 210.822 (LexisNexis 2009); *see also* Susan Frelich Appleton, *Presuming Women: Revisiting the Presumption of Legitimacy in the Same-Sex Couples Era*, 86 B.U. L. REV. 227, 233 (2006).

5. For example, the Illinois Parentage Act states that "A man is presumed to be the natural father of a child if (1) he and the child's natural mother are or have been married to each other, even though the marriage is or could be declared invalid, and the child is born or conceived during such marriage." 750 ILL. COMP. STAT. 45/5 (LexisNexis 2009).

6. *See* Elisa B. v. Super. Ct., 117 P.3d 660 (Cal. 2005) (applying the California presumption of parenthood statute, which was written in gender-specific terms, to make the biological mother's lesbian partner the child's presumed mother).

ysis will continue with an argument in support of preserving a lesbian spouse's right to be considered the presumed parent of her spouse's biological child. This will be done by examining the language and purposes of artificial insemination statutes and by showing that the best interest of the child is achieved by being born into a two-parent family, whatever the sex or sexual orientation of the parents may be. The research used to support the child welfare analysis is part of the same social science research used by the petitioners who won marriage equality in Iowa.[7]

I. TRACING THE (SOMETIMES COMPETING) HISTORIES OF THE PRESUMPTION OF PARENTHOOD: FROM BASTARD LAWS TO ARTIFICIAL INSEMINATION

There is no solitary historical rationale for the creation of the presumption of parenthood, which is presumably why "authorities disagree about the purpose of the presumption, with some emphasizing its role in promoting child welfare, others focusing on its protection of the public purse, and still others criticizing it as a means of imposing patriarchal and racist norms or protecting husbands' vanity."[8] This quagmire of historical reasoning might seem problematic for someone who is trying to uncover the *true* foundation of the presumption, but as Professor Susan Appleton suggests, even if someone could theoretically find the original reason for the presumption, such a finding would not necessarily change the discussion.[9] This Note is not attempting to find the one and only justification for the presumption of parenthood, if such a justification even exists, but it is rather searching for any *sound reasons* that might support the application of the presumption to same-sex married couples today.[10] The purpose of this preliminary historical journey is to put the presumption in context and therefore set the groundwork for illustrating how the traditional reasons for the creation and preservation of the presumption of parenthood should—and do—apply to women having children with women.

A. Child Welfare

The first, and most logical, rationale underlying the creation of the presumption of parenthood is child welfare. Before there were laws protect-

7. This social science research was generously made available by the Midwest Regional Office of Lambda Legal Defense and Education Fund.

8. Appleton, *supra* note 4, at 237.

9. *Id.* at 242.

10. *See id.*

ing children born out of wedlock, there were laws punishing the parents of the resulting "filius nillius" (child of no one)[11] for their immoral behavior.[12] In both English and American common law, a child whose parents were not married was considered illegitimate and was subject to severe repercussions for his parents' indiscretions.[13] The illegitimate, or "bastard," child had limited rights with respect to both parents and society in general; these were ultimately codified in "Bastardy Laws."[14] For example, in the early common law, the child born out of wedlock was not even given the right to demand support from his parents or the right to inherit from his deceased parents.[15] Some states eventually allowed the illegitimate child to inherit from his mother's side of the family.[16] Several scholars recognize that the reason for these harsh legal outcomes was to punish parents for acting immorally. Professor Laurence Nolan suggests that "the most significant policy reasons given for treating the illegitimate child so harshly were to promote morality and marriage, to discourage promiscuity, to protect the marital family unit, and to punish the immorality of the parents."[17] Based on English legal canon,

> [i]t was in the interest of morals that the children born of a valid marriage should have privileges denied children born of illicit unions. Parents were to be punished in their children's disabilities more effectively than in themselves.[18]

It was by stigmatizing these illicit children with the hardships of bastardy that the immoral acts of their parents were thought best punished because the law not only burdened the parent-child relationship with shame, but also tried to create an endless sense of regret for the sinful intercourse.

11. 1 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 447 (1765).

12. Laurence C. Nolan, *"Unwed Children" and Their Parents Before the United States Supreme Court from* Levy *to* Michael H.*: Unlikely Participants in Constitutional Jurisprudence,* 28 CAP. U. L. REV. 1, 6–9 (1999); *see generally* Harry D. Krause, *Equal Protection for the Illegitimate,* 65 MICH. L. REV. 477 (1967); Harry D. Krause, *Bringing the Bastard into the Great Society—A Proposed Uniform Act on Legitimacy,* 44 TEX. L. REV. 829 (1966).

13. Nolan, *supra* note 12, at 6–9.

14. *See* Debi McRae, *Evaluating the Effectiveness of the Best Interests Marital Presumption of Paternity: It is Actually in the Best Interests of Children to Divorce the Current Application of the Best Interests Marital Presumption of Paternity,* 5 WHITTIER J. CHILD & FAM. ADVOC. 345, 360 (2006) ("bastardy laws denied illegitimate children the right to child support and the right to inherit property from their parents at common law").

15. Nolan, *supra* note 12, at 7–8. England changed this and gave the illegitimate child a right to support, as did most states in the United States.

16. *Id.*

17. *Id.* at 7.

18. Joseph C. Ayer, Jr., *Legitimacy and Marriage,* 16 HARV. L. REV. 22, 37 (1902).

Because of the harsh repercussions of being stigmatized a bastard, the common law developed the presumption of paternity, in part to protect the welfare of the child, when the mother of the questionable child was married.[19] The presumption assumed that a child born in wedlock was legitimate, which "elevated child welfare above adult interests" by making it almost impossible for a husband to refute his parental status.[20] Traditionally, the husband could only rebut the presumption by showing that he could not have possibly fathered the child because he was either incapable of procreation or did not have access to his wife during the "relevant period."[21] This highly improbable standard is also seen by the courts' early adherence to Lord Mansfield's rule, which barred the very spousal testimony that would have been crucial in proving another man's paternity.[22] As historian Michael Grossberg suggests, "[b]y continuing to deny married couples the most effective means of establishing the illegitimacy of a child, the courts placed child welfare above parental rights, thus ignoring the growing conviction of jurists that litigants had the right to present all evidence that supported their causes."[23] In contrast to the growing conviction of jurists, Professor Theresa Glennon seems to correctly understand that a traditional basis for the presumption was to indoctrinate the understanding that "parenthood within marriage best protects children," positioning child welfare at the forefront of the presumption's rationales.[24]

Even after the Supreme Court stripped away many of the vestiges of bastardy law,[25] making the distinction between illegitimate and legitimate children less legally important, the courts continued to apply the presumption to protect a child's best interest within the bonds of marriage.[26] The reasoning implicit in the Supreme Court's decision in *Michael H. v. Gerald D.* is that a child's best interest is served when that child is capable of sustaining a long-term relationship with both parents, cemented through the child's parents' marriage.[27] In this case, Gerald D. and Carole D. were

19. Appleton, *supra* note 4, at 243.

20. *Id.*

21. Michael H. v. Gerald D., 491 U.S. 110, 124–25 (1988) (citing H. NICHOLAS, ADULTURINE BASTARDY 1, 9–10 (1836)).

22. Appleton, *supra* note 4, at 243.

23. MICHAL GROSSBERG, GOVERNING THE HEARTH: LAW AND THE FAMILY IN NINETEENTH-CENTURY AMERICA 220 (1985).

24. *See* Theresa Glennon, *Somebody's Child: Evaluating the Erosion of the Marital Presumption of Paternity,* 102 W. VA. L. REV. 547, 590–91 (2000).

25. Levy v. Louisiana, 391 U.S. 68 (1968).

26. *Michael H.*, 491 U.S. at 110.

27. *See id.* at 124.

married for approximately two years when Carole D. became pregnant.[28] Carole D., however, suspected that the child's biological father was really her neighbor, Michael H.[29] After the child was born, the presumption of parenthood was applied, and Gerald D. was placed on the birth certificate as the child's father since he was married to the child's mother.[30] It was later shown through blood test results that Michael H. was indeed the biological father, and he subsequently attempted to establish his paternity in court.[31] The Supreme Court reaffirmed Gerald D.'s paternity, recognizing that a legal parent did not necessarily have to be a biological parent, and the presumption of parenthood could apply even to a non-biological father when that father was the husband of the child's mother and that father had a strong parental connection to the child.[32] Other courts agreed with the proposition that the best interest of the child is protected when that child has two parents,[33] and the presumption was used to ensure that the child had two parents.[34]

Although it is clear that a child's welfare was a traditional rationale underlying the presumption, how exactly is it that a child's welfare is served by having two *legally* recognized parents? One way is that when a child has two legal parents, that child has a greater likelihood of maintaining relationships with both parents if the parents ever divorce, thus continuing the nurturing and emotionally supportive benefits of having both parental figures.[35] Because both parents would have legal claims to visitation and/or custody, and "presum[ing] that parental visitation is in the best interest of the child, absent proof that such visitation would be harmful," the best interest of the child is served when both parents can claim the child as legally their own.[36] If, for example, the non-biological parent were not presumed the legal parent of the child created through artificial insemina-

28. *Id.* at 113.

29. *Id.* at 113–14.

30. *See id.* at 113.

31. *Id.* at 114.

32. *Id.* at 124–26.

33. *See, e.g.*, C. M. v. C. C., 377 A.2d 821, 825 (N.J. Juv. & Dom. Rel. Ct. 1977); *see also* Caban v. Mohammed, 441 U.S. 380, 391 (1979) ("We do not question that the best interests of [illegitimate] children often may require their adoption into new families who will give them the stability of a normal, two-parent home."); *In re* A.A., 144 Cal. App. 4th 771, 781 (2003) ("[t]he paternity presumptions are driven by state interest in preserving the integrity of the family and legitimate concern for the welfare of the child").

34. *See, e.g. In re* J.O., 178 Cal. App. 4th 139, 148–49 (2009) (the presumption will not be rebutted when the result will be to leave the child with fewer than two parents because the child should have the benefit of two parents whenever possible).

35. *See* In the Matter of Evan, 153 Misc. 2d 844, 846 (N.Y. Sur. Ct. 1992).

36. *Id.*

tion, and the non-biological parent could not afford to adopt the child at the time of birth, in most states, the non-biological parent would not have a right to see that child if the spouses ever divorced.[37] This could seriously affect the well-being of the child by removing a long-time parental relationship from its life, consequently removing a potent source of emotional support. Furthermore, scientific evidence suggests that "the presence of two parents, irrespective of their gender or sexual orientation, [is] associated with more positive outcomes for [a child's] psychological well-being."[38] Along the same vein, the presumption increases the well-being of children because children benefit from the simple fact of having a legally recognized relationship with both parents—not a relationship that is extra-legal and socially stigmatizing.[39]

In addition to the emotional and psychological aspects, a child with two legal parents benefits economically.[40] When a child has two parents, that child has two sources of inheritance, can be eligible through both parents for Social Security benefits in the event of disability or death,[41] and has access to medical benefits provided by either parent's employment and may be able to choose the more generous plan, depending on the policy's conditions.[42] The child also has rights concerning survivors' benefits and military benefits.[43] While not exhaustive, this list illustrates the financial advantages of having two legal parents and illustrates another manner in which the presumption is important with respect to a child's welfare.

B. Protecting the Public Purse

Another documented historical rationale for the presumption of parenthood is the benefit that it has on preserving limited governmental re-

37. *See id.* Under New York law, In the Matter of Alison D. v. Virginia M., 572 N.E.2d 27 (N.Y. 1991), and some other jurisdictions, *In re* the Interest of of Z.J.H., 471 N.W.2d 202 (Wis. 1991); Nancy S. v. Michele G., 228 Cal. App. 3d 831 (1991), the non-biological mother would have no right to visitation even if it were demonstrated that denying visitation would be harmful to the child. While these cases are discussing adoptions by same-sex couples, the underlying reasoning is substantially similar and relevant to a discussion concerning legal parentage and the presumption of parenthood.

38. Ellen C. Perrin et al., *Gay and Lesbian Issues in Pediatric Health Care*, 34 CURRENT PROBS. IN PEDIATRIC & ADOLESCENT HEALTH CARE 355, 378–79 (2004).

39. *See Evan*, 153 Misc. 2d at 847 ("As he matures, his connection with two involved, loving parents will not be a relationship seen as outside the law, but one sustained by the ongoing, legal recognition of a court-ordered adoption."). Although this is adoption-related, the basic premise remains: a child who has two legal parents is benefitted because he or she is not stigmatized by having a non-legal parent.

40. *See id.* at 846.

41. 42 U.S.C. § 402(d) (2006).

42. *See Evan*, 153 Misc. 2d at 846.

43. *In re* J.O., 178 Cal. App. 4th 139, 148–49 (2009).

sources and taxpayer dollars.[44] In sixteenth-century England, in order to remove the financial burden of illegitimate children, the government mandated that children born out of wedlock be cared for by the parish.[45] Of course, the parish did not want to foot the bill for these illicit children, so when the mother of the bastard child was not married, and no presumption of paternity was enforceable, Parliament nonetheless attempted to shift the financial burden of caring for illegitimate children from the parish to the *actual* parents by enacting the 1576 Poor Laws in England.[46] These laws granted authority to justices of the peace to collect money or other goods from the actual parents for the upkeep of the illegitimate child.[47] In the early 1600s, the same notions behind the British Poor Laws made their way to the colonies. Virginia, for example, recognized that the church was the legal guardian of the bastard child, but that the church could recoup its funds by fining the parents for their illicit acts.[48] The illegitimate children of these immoral unions were also forced to compensate the church by working in flax houses or by being "bound to some manual trade."[49] This system of after-the-fact compensation when a child was born out of wedlock was obviously cumbersome and difficult to enforce.[50] So when the mother was married at the time of the child's birth, the presumption of paternity served to save the state and the church the financial burden of caring for the child first, and seeking compensation from the parents later; when a child was born to a married couple, the church could wash its hands of both the costs of childcare and child-support collection. In essence, "[b]efore the scientific developments that now permit accurate paternity testing, the presumption definitely identified a legal father responsible for child support and this man's legal heirs."[51] This financially liberated the state from being forced to support the fatherless child through welfare programs,[52] and courts have taken this "public funds" rationale into considera-

44. *See* Appleton, *supra* note 4, at 246.

45. Dominik Lasok, *Virginia Bastardy Laws: A Burdensome Heritage*, 9 WM. & MARY L. REV., 402, 407 (1967). Unlike the United States, England does not have such a definite separation between church and state. In the 1500s, for example, bishops served in the House of Lords in Parliament. HOUSE OF LORDS, THE HISTORY OF THE HOUSE OF LORDS (2008), *available at* http://www.parliament.uk/documents/lords-information-office/hoflbphistory.pdf

46. Lasok, *supra* note 45, at 407.

47. *Id.*

48. *Id.* at 412. Later legislation also provided that if the mother was an unmarried servant, she would have to pay 2000 pounds of tobacco to her master in addition to being whipped. *Id.* at 416.

49. *Id.* at 412.

50. *See id.* at 416 ("[I]t was not always possible to exact payment from the putative father especially if he was a servant.").

51. Appleton, *supra* note 4, at 247.

52. *Id.*

tion when deciding paternity.[53] Essentially, this rationale for the presumption recognizes that the two people who participate in the decision to create a child, and not the state, should be financially responsible for that child.[54]

C. Biological Concerns

Along with child welfare and state fiscal concerns, scholars recognize the promotion of biological connections between parent and child as another traditional, albeit disputed, justification for the presumption of parenthood.[55] Since its early formation in England, the presumption of parenthood could be rebutted by evidence showing that the presumed father was not actually the natural father of the child. The "conclusive presumption did not apply unless the husband and wife were cohabiting."[56] The presumption also did not apply if the husband was sterile or "beyond the four seas" (away from England) for more than nine months,[57] or if the child's race did not match that of the husband.[58] All of these exceptions to the presumption demonstrate that even before DNA testing, the father's biological connection to the child related to the traditional common law presumption of paternity, allowing the father to escape the clutches of the presumption if he could prove he did not father the child. In fact, some scholars suggest that the presumption was simply a rudimentary way of determining genetic relationships in the absence of paternity tests.[59] If a husband was incapable of passing his genetic material to his wife, either by not being in contact with her for nine months or by nature of his impotence, the common law carved out a biology-based exception that allowed the husband to rebut the presumption.[60] Even today, this biological concern is

53. *See* Elisa B. v. Super. Ct., 37 Cal. 4th 108, 123 (2005) ("By recognizing the value of determining paternity, the Legislature implicitly recognized the value of having two parents, rather than one, as a source of both emotional and financial support, especially when the obligation to support the child would otherwise fall to the public.").

54. *See In re* Marriage of Buzzanca, 61 Cal. App. 4th at 1410, 1424 (1998) ("Very plainly, the Legislature has declared its preference for assigning *individual* responsibility for the care and maintenance of children; not leaving the task to the taxpayers.") (emphasis in original).

55. *See* Appleton, *supra* note 4, at 251.

56. *Id.* at 251; *see also* Michael H. v. Gerald D., 491 U.S. 110, 129 (1989).

57. Appleton, *supra* note 4, at 251.

58. *Id.; see also* Jeffries v. Moore, 559 S.E.2d 217, 221 (N.C. Ct. App. 2002).

59. Marjorie Maguire Shultz, *Reproductive Technology and Intent-Based Parenthood: An Opportunity for Gender Neutrality,* 1990 WIS. L. REV. 297, 317.

60. Appleton, *supra* note 4, at 251–52. *But see In re* Findlay, 170 N.E. 471, 473 (N.Y. 1930) ("If husband and wife are living together in the conjugal relation, legitimacy will be presumed, though the wife has harbored an adulterer.").

alive and well.[61] Some state courts have even held that a father who raises the child as his own, but is later proven to not be the biological father, can rebut the presumption and release himself from any legal connection to that child.[62] This shows that in addition to protecting the state's budget and providing for the child's well-being, at least some states acknowledge that a crucial underlying reason of the presumption is to recognize and maintain biological relationships.[63]

Some scholars, however, suggest that the biological rationale underlying the presumption might not be exclusively based on the father's legitimate genetic connection to his offspring, but rather on the *appearance* of biological ties between parent and child.[64] Professor Appleton proposes that "[i]f a child could 'pass' as the husband's own, then the law made the husband the father . . . [but] if one could see through the charade, then the presumption would not apply."[65] Professor Appleton recognizes that while the historical exceptions to the presumption might have implicated genetic relationships, the real motivation underlying the doctrine was the appearance of a facially cohesive family unit. This conclusion is supported by the fact that the husband could not introduce rebuttal evidence to discount his paternity "even if he *knew* that his wife had strayed" or was aware of his sterility.[66] If the presumption was necessarily focused on biological ties, why would the rule allow such near-impossible hurdles to the discovery of the biological truth? It seems then that these "nuances in the rule signal an emphasis on the perceptions of others, not biology."[67]

Furthermore, as the Supreme Court indicated in *Michael H.*, biological ties often take a backseat when the other traditional rationales—namely child welfare—are implicated, showing that genetic relationships might not

61. *See e.g., Jeffries*, 559 S.E.2d at 221. But see Love v. Love, 959 P.2d 523, 527 & n.2 (Nev. 1998), where even though the mother lied to her husband about him being the biological father, he was still liable for child support because the traditional rationales of child welfare and preserving public funds outweighed the concern of genetic ties: the "legislature's primary interest [in creating the presumption of parenthood] was in ensuring that children are supported by their parents, and not by welfare."

62. *See* NPA v. WBA, 380 S.E.2d 178, 180 (Va. Ct. App. 1989) (although the husband had assumed the role of father for the child's entire life, he did not knowingly misrepresent to the child that he was his natural father). *But see* M.H.B. v. H.T.B., 498 A.2d 775, 779 (N.J. 1985).

63. *But see* Godin v. Godin, 725 A.2d 904, 910 (Vt. 1998) ("Thus, the State retains a strong and direct interest in ensuring that children born of a marriage do not suffer financially or psychologically merely because of a parent's belated and self-serving concern over a child's biological origins.").

64. *See* Appleton. *supra* note 4, at 253.

65. *Id.* Professor Appleton suggests that "the obligation to support a child whom others might know that the husband had not fathered perhaps would add too much insult to injury." *Id.*

66. *Id.* (emphasis in original).

67. *Id.* at 254.

be genuinely fundamental to the presumption.[68] In that case, the Supreme Court reaffirmed the paternity of a non-biological father who was presumed the parent of his child because he was married to her mother at the time of birth, consequently denying the biological father's claim for paternity. Although blood test results proved that the presumed father was not the biological father, the court decided that the child's interest in maintaining a two-parent family outweighed concerns about biological ties—seemingly devaluing the importance of genetics as a fundamental justification for the presumption.[69] Even if biology played a role in the formation of the traditional presumption of parenthood, it seems that the other considerations have taken on more weight in determining parentage—at least to the Supreme Court. In the end, whether supportive of true genetic bonds or superficially cohesive families, the biological rationale does not factor into the discussion below concerning lesbian couples and children born through artificial insemination—limiting the applicability of the biological basis in this analysis.

II. ARTIFICIAL INSEMINATION AND THE PRESUMPTION OF PARENTHOOD

Although the traditional rationales of the presumption of parenthood apply to fathers of children begotten by sexual intercourse who are married to the biological mother, these same rationales can be used to make sense of the presumption as it applies to children conceived through artificial insemination. In a study conducted by the Congressional Office of Technology and Assessment (OTA) (the most comprehensive survey to date), the researchers concluded that between 1986 and 1987, 172,000 women underwent artificial insemination by anonymous donor ("AID").[70] Another study conducted a few years later estimated that approximately 80,000 women each year undergo AID.[71] While no national survey determining the percentage of lesbian women undergoing AID could be found, one micro-survey of a California-based artificial insemination clinic showed that 62% of the surveyed women who utilized AID were lesbian.[72] The

68. *See* Michael H. v. Gerald D., 491 U.S. 110, 124–27 (1989).

69. *See id.*

70. U.S. CONGRESS OFFICE OF TECHNOLOGY ASSESSMENT, ARTIFICIAL INSEMINATION: PRACTICE IN THE UNITED STATES: SUMMARY OF A 1987 SURVEY 3(1988); *see also* Holly J. Harlow, *Paternalism Without Paternity: Discrimination Against Single Women Seeking Artificial Insemination by Donor* 6 S. CAL. REV. L. & WOMEN'S STUD. 173, 177–78 (1996).

71. Judith Gaines, *A Scandal of Artificial Insemination,* N.Y. TIMES, Oct. 7, 1990, *available at* http://www.nytimes.com/1990/10/07/magazine/a-scandal-of-artificial-insemination.html?pagewanted=1/.

72. Raymond W. Chan, Barbara Raboy & Charlotte J. Patterson, *Psychosocial Adjustment Among Children Conceived via Donor Insemination by Lesbian and Heterosexual Mothers,* 69 CHILD DEV.,

evident and growing importance of AID in the creation of lesbian families requires that the old doctrines regarding legal parentage be reinterpreted to take into account this modern family, not only for the preservation of the family unit, but also for the benefit of the children involved. Specifically, the presumption of parenthood that is automatically given to the non-biological father of an AID-conceived child should also be afforded to the non-biological lesbian mother of an AID-conceived child (both non-biological parents being married to the artificially inseminated wife). Looking at the history of AID, the statutory incorporation of the procedure, and the application of the presumption's traditional rationales discussed above, it is evident that the female spouse of the biological mother should have the right to legal parenthood from birth.

A. The History of Artificial Insemination

While most people think that artificial insemination is a relatively new procedure, the process of artificial insemination[73] can actually be traced back to 220 A.D.,[74] with the first reported human case occurring in England in 1770.[75] In the United States, the first reported artificial insemination procedure occurred in 1866, but it was met with public outrage, and the procedure was effectively discontinued for some time.[76] The first known case of AID in the United States was performed in 1884.[77] Today, artificial insemination is a popular and publicly accepted manner of producing children when a woman's partner cannot provide viable sperm, or when the mother decides to have her child without a partner.[78]

443, 445 (1998) (in a pool of 195 families, thirty-four of the families were headed by lesbian couples, and seventy were headed by a single lesbian parent); *see also* Carol A. Donovan, *The Uniform Parentage Act and Nonmarital Motherhood-By-Choice*, 11 N.Y.U. REV. L. & SOC. CHANGE 193, 195 (1983).

73. Some commentators prefer the term "alternative insemination" instead of "artificial insemination." *See* Vickie L. Henry, *A Tale of Three Women: A Survey of the Rights and Responsibilities of Unmarried Women Who Conceive by Alternative Insemination and a Model for Legislative Reform*, 19 AM. J.L. & MED. 285 (1993). Other commentators prefer the use of the phrase "donor insemination." *See* Ethics Commission of the American Fertility Society, *Ethical Considerations of Assisted Reproductive Technologies*, 62 FERTILITY & STERILITY 1S, 43S (Supp. Nov. 1994).

74. Harlow, *supra* note 70, at 176.

75. E. Donald Shapiro & Benedene Sonnenblick, *The Widow and the Sperm: The Law of Post-Mortem Insemination*, 1 J.L. & HEALTH 229, 234 (1987) (first case performed by surgeon John Hunter). There is, however, some controversy because some researchers say that the first artificial insemination was actually performed by a French doctor, not a British doctor, in the 1700s. *See* WILFRED J. FINEGOLD, ARTIFICIAL INSEMINATION 6 (2d ed. 1976).

76. Shapiro & Sonnenblick, *supra* note 75, at 234. Before this, animals were artificially inseminated. *Id.*

77. Denise S. Kaiser, Note, *Artificial Insemination: Donor Rights in Situations Involving Unmarried Recipients*, 26 J. FAM. L. 793, 794 (1988).

78. Shapiro & Sonnenblick, *supra* note 75, at 234.

Even though some courts in the first three quarters of the twentieth century considered AID tantamount to a wife's adultery, the most modernly acceptable and "logical evaluation of the legal significance of AID was made by the Supreme Court of California in 1968."[79] In *People v. Sorensen,* the California Court found that a husband who consented to his wife's impregnation by artificial insemination was that child's legal father, and therefore had to pay child support.[80] The court recognized that without the husband's "participation and consent," his wife would not have undergone the procedure.[81] The court realized that in ascertaining legitimacy, "the determinative factor is whether the legal relationship of father and child exists," not whether there was any biological connection to an anonymous donor.[82] Since "the anonymous donor of the sperm cannot be considered the 'natural father,' as he is no more responsible for the use made of his sperm than is the donor of blood or a kidney," it would make little sense to "illegitimate" the child by removing the possibility for the child to have a legal father through the presumption of parenthood.[83] Stated another way, because the child has no legally recognizable natural father, it would serve no purpose to bastardize the child by not recognizing the mother's husband as the legal parent, especially when that husband has consented to, and readily participated in, the entire procedure.[84] Courts ultimately recognized that "[p]arental status could be created without genetic tie, merely by intending to become a parent."[85]

B. Statutory Incorporation of the Artificial Insemination Presumption: Marriage as a Marker for Parentage

Taking their cue from the common law, most states have enacted statutory guidelines for artificial insemination. These statutes normally provide that a man is the legal father of a child conceived through AID if (1) he and the mother of the child are married; (2) the husband consents to the procedure; and (3) there has been a substantial effort to disconnect any legal ties that the sperm donor has to the potential child.[86] Inherent in the

79. *Id.* at 238.

80. People v. Sorensen, 437 P.2d 495, 499 (Cal. 1968).

81. *Id.*

82. *Id.* at 498.

83. *Id.*

84. *See generally id.* at 498–501.

85. Deborah L. Forman, *Interstate Recognition of Same-Sex Parents in the Wake of Gay Marriage, Civil Unions, and Domestic Partnerships*, 46 B.C. L. REV 1, 37–38 (2004).

86. *See e.g.*, IDAHO CODE ANN. § 39-5405 (2009); 750 ILL. COMP. STAT. ANN. 40/3 (LexisNexis 2009); MINN. STAT. § 257.56 (2010).

common law and statutory articulation of artificial insemination is that, while the other traditional reasons for a presumption of parenthood still hold true (i.e., child welfare and protecting the state purse), the biological rationale necessarily falls away because there is no genetic connection between child and legal father.[87] In most of the artificial insemination laws, the state actually prevents the donor from exerting any parental right to a child that may be produced from his donated sperm. In fact, many sperm donation facilities require that the donor sign a release form, removing any legal claims to the potential child.[88] Therefore, the law and practice of AID necessarily subtract any biological foundations that the presumption may have had from the equation; the state governments are essentially recognizing that a biological connection is not a vital factor to the determination of parental status since the state statutes effectively *prevent* biology from playing a role in the determination of legal parenthood.[89] The courts have also recognized that biology is not determinative of parental status when children are created by artificial insemination.[90] Since biology cannot play a role in determining parentage by artificial insemination, the traditional "biological connection" rationale has no weight in this analysis, and only the public purse and child welfare rationales apply.

Furthermore, even if we accept Professor Appleton's suggestion that the biological concern was more about the child looking like the parent rather than the child and parent actually being genetically connected, that analysis is only applicable to the presumption in traditional childbirth, not the artificial insemination context. The biological rationale (and the "passing" rationale, for that matter) exists exclusively through the *exceptions* to the presumption, which attempt to disprove paternity by showing that the presumed father could not have biologically contributed to the creation of the child.[91] Genetics are relevant only when the biological mother's hus-

87. Appleton, *supra* note 4, at 252.

88. For example, all donors at the California Cryobank must sign the following waiver: "I have no intention or desire to be deemed a legal parent of any resulting child(ren) and, to the fullest extent possible, waive any and all claims that I may have to parenthood or any child(ren) that may result from my donation(s). I intend for this waiver to apply regardless of whether my semen specimens are used by a married or unmarried woman and regardless of the state in which my semen specimens are used." *Rights of the Sperm Donor and Clients Purchasing and Using Sperm*, CAL. CYROBANK, http://www.spermbank.com/newdonors/index.cfm?ID=5 (last visited Nov. 4, 2010).

89. *See e.g.*, IDAHO CODE ANN. § 39-5405 (2009) (donor shall have no right, obligation, or interest with respect to a child born as a result of artificial insemination); MINN. STAT. § 257.56 (2010) (same).

90. *See, e.g.*, Miller-Jenkins v. Miller-Jenkins, 912 A.2d 951, 968 (Vt. 2006) (finding it illogical to base artificial insemination paternity solely on biology because that would force the non-biological parent to adopt the child).

91. For example, historically, the husband could show that he was not the father by proving that he was not in contact with his wife for the relevant period. *See* Appleton, *supra* note 4, at 251.

band's status as the child's father is being rebutted because even if the presumed father is not the biological father, without a challenge to that presumption, biology plays no role in the legal status of that father-child relationship.[92] While couples who use artificial insemination can try and match the appearance of the anonymous donor with that of the legal father, in the event that the child does not look like the mother's husband, the husband cannot "rebut" the presumption of parenthood by showing that he is not the biological father because that is a given with AID. Even though the original presumption may have been rooted in the appearance of a genetically related family by nature of the father's ability to renounce paternity if his child did not look like him (and was subsequently found to not be his offspring), this justification is not relevant to the artificial insemination presumption because the AID-created child is by definition not the father's offspring, and therefore, appearances have no consequence. Essentially, the "risk" of having a non-passing child is shifted to the father, and he cannot renounce paternity after he has consented to the AID procedure. As stated above, the father has, by statute, given away his ability to rebut the presumption when he agrees to his wife's impregnation through AID, which necessarily excludes his ability to rebut his paternity in the event that his child does not look like his own.

What is therefore apparent about the presumption of parenthood with respect to artificial insemination is that it arises purely out of the marriage (and consent) of two people—not any biological relationships to the child.[93] When a husband consents to his wife's use of artificial insemination as a means to create a child, the law does not require anything of the husband besides proof of his marriage to his wife and, sometimes, that his consent be in writing.[94] Since artificial insemination laws require that the parties be married before the non-biological parent is legally presumed,[95] but do not (and by definition cannot) require any biological ties to the child, it follows that marriage is essentially the only prerequisite to obtain-

92. Without a paternity challenge, the legal relationship between father and child remains intact even though the biological relationship between them might not exist.

93. *See e.g.*, ALASKA STAT. § 25.20.045 (2009) ("A child, born to a *married* woman by means of artificial insemination performed by a licensed physician and consented to in writing by both *spouses*, is considered for all purposes the natural and legitimate child of both *spouses*.") (emphasis added); ARK. CODE. ANN. § 9-10-201 (2010) ("Any child born to a *married* woman by means of artificial insemination shall be deemed the legitimate natural child of the woman and the woman's husband if the husband consents in writing to the artificial insemination.") (emphasis added); CAL. FAM, CODE § 7613 (Deering 2009) ("If . . . with the consent of her *husband,* a *wife* is inseminated artificially . . . , the *husband* is treated in law as if he were the natural father of a child thereby conceived.") (emphasis added).

94. *See* statutes cited *supra* note 86.

95. For example, for the non-biological parent to be placed on the birth certificate at the time of birth.

ing the presumption in artificial insemination situations. This is important to the topic of artificial insemination in lesbian relationships because it is only when two women are married[96] that the artificial insemination presumption can apply.[97] Furthermore, even though the artificial insemination statutes are normally opposite-sex specific,[98] some courts read the statutes to include same-sex couples.[99] Also, since the statutes themselves require no other relationship besides marriage of the parties involved, lesbian married couples should be covered by the same statutory presumption by nature of their marital status.[100]

C. *Applying the Artificial Insemination Presumption to a Non-Biological Mother: The Traditional Rationales Revisited*[101]

A married lesbian couple should, solely by nature of their marriage, be able to invoke the artificial insemination presumption of parenthood as it is written in several state laws. Yet, since most of the statutes regarding AID parentage are specific to heterosexual couples, some extra motivation will undoubtedly be required in order to persuade a court to expand the literal meaning of the text to include lesbian married couples. This motivation could arise from the application of the traditional purposes of the presumption of parenthood discussed in Part I. Again, the traditional rationales justifying the creation of the presumption were for the welfare of the child, the protection of public funds, and, to some degree, the preservation of biological ties to both parents. With artificial insemination by an anonymous donor, however, the biological rationale disappears because from the get-go, there is no biological connection between the child and the parent seeking the benefit of the presumption of parenthood. Therefore, to bolster the

96. *But see* Elisa B. v. Super. Ct., 37 Cal. 4th 108 (2005) (finding that the women's civil union was essentially the same thing as marriage for purposes of the artificial insemination presumption).

97. *See* statutes cited *supra* note 86. In most artificial insemination statutes, the marriage of the two parents is the underlying requirement to obtaining legal parenthood for the non-biological parent.

98. *See* supra note 5 and accompanying text.

99. *See, e.g., Elisa B.*, 37 Cal. 4th 108. *But see In re* Marriage of Simmons, 825 N.E.2d 303, 311–12 (Ill. App. Ct. 2005) (reading artificial insemination presumption of parenthood narrowly to apply only to married men and women).

100. This is merely a bare-bones statutory reading, and the argument to allow lesbian married couples to utilize the presumption of parenthood needs to be supplemented by the presumption's traditional justifications. Since the statutes are opposite-gender specific, it seems that many courts will not expand them to include same-sex couples unless the public policy espoused by the presumption statutes also supports affording the presumption to lesbian married couples. This is the rationale underlying the application of the traditional justifications to lesbian artificial insemination in the remainder of this Note.

101. This Note will not address the situation where one mother donates her egg and the other mother carries that egg and subsequent child. For that analysis, see Ryiah Lilith, *The G.I.F.T. of Two Biological and Legal Mothers*, 9 AM. U. J. GENDER SOC. POL'Y & L. 207 (2001).

claim that the lesbian spouse of the artificially inseminated biological mother should be afforded the presumption of parenthood, an application of the child welfare and state financial justifications should be applied to the current realities of artificial insemination in lesbian marriages.

1. A child's welfare is served by legally recognizing lesbian parents.

As noted above, one of the traditional rationales for the presumption was to promote the well-being of the child by automatically giving that child two parents who have a legally recognized level of commitment to each other within the bonds of marriage. The benefits afforded a child born with two legal parents range from financial support to emotional support, and securing this welfare for children from the moment they are born is an essential element in sustaining the best interests of children. Without a gender-blind (or sexual-orientation-blind) presumption, the lesbian spouse who becomes pregnant by an anonymous donor is the only legal parent to that child, depriving the child of having two legal parents, even though the non-biological spouse is ready, willing, and able to care for and support that child. From a child welfare point of view, the only reason to deny the presumption to same-sex lesbian couples would be because of some deleterious effect on the child's well-being by having two mothers instead of a mother and father. Credible social science research demonstrates that there is no difference between same-sex and different-sex parents in terms of the welfare of the child being raised. Therefore, with respect to the traditional rationale of child welfare, there is no reason not to afford the presumption to a lesbian non-biological mother.

Lesbians can and do form the same type of committed relationships as heterosexual couples. Therefore, any stereotypical arguments that same-sex married couples should not be granted the presumption by nature of some substantial difference stemming from the same-sex relationships themselves are absurd. Although research on the relationship qualities of married same-sex couples is still developing by nature of its "newness," it is still possible to get a feel for the equality between same-sex and different-sex relationships by examining research discussing same-sex relationships in general. In her expert affidavit for the plaintiffs in *Varnum v. Brien*, Dr. Pepper Schwartz emphasized that "lesbians form stable, committed relationships that are equivalent to heterosexual relationships."[102] She also noted that homosexual couples are no more vulnerable to relationship prob-

102. Affidavit of Pepper Schwartz at 3, Varnum v. Brien, 763 N.W.2d 862 (Iowa 2009) (No. CV5965).

lems than are heterosexual couples.[103] The American Psychological Association urges that, after extensive research regarding same-sex and different-sex couples, the psychological data "provides no evidence to justify discrimination against same-sex couples."[104] All of this research leads to one conclusion: that there is no functional or fundamental difference beyond gender composition, psychological or otherwise, that generally differentiates same-sex from different-sex relationships. Because empirical research shows that lesbians do form the same sort of relationships as do heterosexual couples, one cannot justify the exclusion of non-biological lesbian mothers from the benefits of the presumption by nature of stereotypical arguments that homosexual relationships are somehow "inferior" to, or "substantially different" from, heterosexual relationships.

Similar research shows that same-sex couples make just as good parents as their opposite-sex counterparts, and researchers have concluded that heterosexual and lesbian parents do not differ in their parenting ability.[105] In fact, Dr. Michael Lamb concludes that children raised by gay and lesbian couples are as likely to be well-adjusted as those children raised by heterosexual couples, and it is actually the emotional relationship to the parent, as well as economic resources, that are the most contributory factors to a well-adjusted parent-child relationship.[106] Dr. Lamb notes that "children's adjustment is not affected by the gender or sexual orientation of the parent(s)," and "[t]he children of same-sex parents are as emotionally healthy and as educationally and socially successful as children raised by heterosexual parents."[107] Dr. Lamb also finds that "[t]here is no empirical support in the social science literature for the claim that there is an optimal gender mix of parents or that children with two female . . . parents suffer any developmental disadvantages relative to children with two different-sex parents."[108] Moreover, the American Psychological Association recognizes that "[r]esearch has shown that adjustment, development, and psychological well-being of children is unrelated to parental sexual orientation and

103. *Id.* at 3; *see also* Lawrence A. Kurdek, *Are Gay and Lesbian Cohabiting Couples* Really *Different from Heterosexual Married Couples?*, 66 J. MARRIAGE & FAM. 880 (2004) (finding no differences between gay and lesbian couples and heterosexual couples without children on individual personality differences, views on relationships, conflict resolution, and satisfaction).

104. AM. PSYCHOL. ASS'N, RESOLUTION ON SEXUAL ORIENTATION, AND MARRIAGE (2004), *available at* http://www.apa.org/about/governance /council/policy/gay-marriage.pdf.

105. Affidavit of Michael E. Lamb at 3, Varnum v. Brien, 763 N.W.2d 862 (Iowa 2009) (No. CV5965); *see also* Susan Golombok et al., *Children with Lesbian Parents: A Community Study*, 39 DEVELOPMENTAL PSYCHOL. 20, 29 (2003); Cheryl A. Parks, *Lesbian Parenthood: A Review of the Literature*, 68 AM. J. ORTHOPSYCHIATRY 376, 381–84 (1998).

106. Affidavit of Michael E. Lamb, *supra* note 105, at 4.

107. *Id.* at 7.

108. *Id.*

that the children of lesbian and gay parents are as likely as those of heterosexual parents to flourish."[109]

Children with lesbian mothers may actually *benefit* from their nontraditional families. Some studies of children with gay or lesbian parents have reported that "like the children in other types of nontraditional families, these children have less sex-stereotyped beliefs, and are more open-minded."[110] This sometimes stems from the less gendered division of labor in same-sex households, giving children of same-sex couples a more egalitarian model of work and family life.[111] This line of research shows that children of lesbian mothers are actually *benefited* by having a nontraditional family because they are more open to new careers than those stereotypically restricted to certain gender-roles.[112] Furthermore, some studies show that in contrast with children of heterosexual parents, "children with lesbian parents are more likely to feel loveable and to be protective with younger children, and less likely to be bossy and domineering."[113]

Some authority, however, points the other way—attempting to show that same-sex parents are not as adequate as opposite-sex parents. For example, the President of the National Association for Research & Therapy of Homosexuality,[114] Dr. A. Dean Byrd, suggests that children need a mother and a father because children need to witness dual-gendered interactions at home in order to be emotionally stable in the future.[115] Dr. Byrd cites several studies from the eighties and early nineties, which suggest that children need the "warm and sympathetic" parenting style of a mother, as well as the "consistent and predictable" style of a father, in order to flourish.[116] Furthermore, Dr. Bryd recognizes the "complementary" nature of a

109. AM. PSYCHOL. ASS'N, *supra* note 104; *see also* Charlotte J. Patterson, *Children of Lesbian and Gay Parents,* 63 CHILD DEV., 1025, 1036 (1992) ("There is no evidence to suggest that psychosocial development among children of gay men or lesbians is compromised in any respect relative to that among offspring of heterosexual parents.").

110. Affidavit of Michael E. Lamb, *supra* note 105, at 8.

111. ABBIE E. GOLDBERG, LESBIAN AND GAY PARENTS AND THEIR CHILDREN: RESEARCH ON THE FAMILY LIFE CYCLE 99-100 (2010).

112. Judith Stacey & Timothy J. Biblarz, *(How) Does the Sexual Orientation of Parents Matter?*, 66 AM. SOC. REV. 159, 168 (2001). For example, a daughter of a lesbian couple is more likely to think that being an astronaut or being a doctor are appropriate aspirations for girls as well as boys than are girls raised by heterosexual mothers. *Id.* Likewise, the children of lesbian mothers may tend to think of nursing as a possible occupation for both boys and girls.

113. Charlotte J. Patterson, *Adoption of Minor Children by Lesbian and Gay Adults: A Social Science Perspective*, 2 DUKE J. GENDER L. & POL'Y 191, 202 (1995).

114. This organization believes that homosexuality can be "cured" through psychology and religion.

115. *Dr. Byrd Provides Testimony in English Court Case Regarding Same-Sex Adoption*, NAT'L ASS'N FOR RESEARCH & THERAPY OF HOMOSEXUALITY (Feb. 1, 2007), http://www.narth.com/docs/byrdtestimony.pdf.

116. *Id.* ¶ 6.

mother's and a father's roles in childrearing, whereby the mother's touch is used to "calm" and "soothe," whereas the father is "less involved in caretaking" and more involved in "rough and tumble play."[117] These differences, along with the fact that fathers are "firm" when it comes to discipline and mothers tend to "negotiate" with children, make up a substantial basis for why Dr. Byrd believes that same-sex parents are incapable of maintaining an optimal rearing environment. If it is not obvious already, these arguments are not only outdated, but also seem to be based on the very gender stereotypes about men and women that our society no longer supports.[118] In fact, while it may go without saying that being "firm" or being "calm" are not sex-specific characteristics, Dr. Byrd's analysis does not ever conclude that a same-sex couple cannot embody these "complementary" parenting styles. The only "negative" he posits about same-sex couples rearing children is that these children are less constrained by gender norms.[119] He claims that boys raised by lesbians are "less traditionally masculine" and girls raised by lesbians are "more sexually adventurous and less chaste."[120] Without an explanation of what being "less traditionally masculine" means, or why that is a negative, it seems difficult to conclude that same-sex parents are deficient because of this claimed effect on young boys. Furthermore, concluding that daughters of lesbian parents are "less chaste" seems too explicitly sexist to even warrant rebuttal, especially when there was no mention of how a boy's sexuality was affected by having lesbian mothers. Overall, the majority of research attempting to suggest that same-sex parents are incapable of properly rearing children is fundamentally based on aged stereotypes about men, women, and marriage. These studies are not only decades old, but are also incompatible with the modern breakdown of rigid and sexist gender norms.

Courts have also attempted to rebut the modern science in favor of same-sex families. In *Hernandez v. Robles,* for example, the court sheepishly recognized that while social science might tend to negate differentiations between same-sex and opposite-sex couples, a "[l]egislature could rationally think otherwise."[121] In *Varnum,* the court also recognized that it

117. *Id.*

118. *See* Price Waterhouse v. Hopkins, 490 U.S. 228, 251 (1989).

119. *See Dr. Byrd Provides Testimony in English Court Case Regarding Same-Sex Adoption, supra* note 115, at ¶ 27.

120. *Id.*

121. *See* Hernandez v. Robles, 855 N.E.2d 1, 7 (N.Y. 2006). The court seemed to recognize that the differentiation between opposite-sex and same-sex couples regarding parenting ability was not grounded in science, but chose to give no teeth to rational basis review—using it more like an idiocy test rather than a barrier to discrimination.

could be *rational* to think that opposite-sex couples raised children better, but the court ultimately determined that "[t]hese opinions, while thoughtful and sincere, were largely unsupported by reliable scientific studies."[122] The *Varnum* court asserted that science, not stereotypes, should prevail—recognizing that while some social science and opinion may say the opposite, the majority of credible science does not support the differentiation between same-sex and opposite-sex parents.

Again, the majority of scientific evidence on the issue concludes that a child's well-being is not in any way negatively affected by that child having two mothers. Children born to lesbian parents can still obtain the emotional and financial benefits of having two parents, such as inheritance rights and visitation rights in the event of divorce, which are essential to the well-being rationale of the traditional presumption. If the traditional rationale of child welfare is used to support the granting of the presumption of parenthood, the social science research illustrates that that purpose is still served by lesbian parents.

In fact, if the presumption were not afforded lesbian parents, there is evidence that a child's well-being would be harmed. Research suggests that growing up in a single-parent household can actually harm a child's well-being, and while granting the non-biological mother legal parental status from birth does not ensure that she will remain married to the biological mother and therefore remain living with the child, legal parentage presumes that the non-biological mother will at least have the right to a level of custody, visitation, and responsibility to support the child. This research extrapolates the benefits of having two married parents and implicitly explains how denying a child two legal parents from birth can actually diminish a child's welfare. Some research suggests that children of single mothers (not necessarily lesbian) do worse in school and have a lower chance of attending college than children with two married parents.[123] This same research suggests that children raised in single-parent families are more likely to engage in criminal and delinquent behavior, and even have more health problems later in life.[124] While these conclusions are not universally ac-

122. Varnum v. Brien, 763 N.W.2d 862, 899 (Iowa 2009).

123. STEVEN L. NOCK & CHRISTOPHER J. EINOLF, THE ONE HUNDRED BILLION DOLLAR MAN: THE ANNUAL PUBLIC COSTS OF FATHER ABSENCE 7 (2008).

124. *Id.*; *see also* Barbara Dafoe Whitehead, *Single-Parent Families Are Harmful*, *in* SINGLE-PARENT FAMILIES 11 (Bruno Leone et al. eds., 1997) (children raised by single parents are two to three times more likely to have emotional and behavioral problems than children raised in two-parent families, and are more likely to abuse drugs, get into trouble with the law, drop out of high school, and get pregnant as teenagers).

cepted,[125] the fact that *some* research suggests a corollary between single-parentage and diminished child well-being reinforces the need to afford the presumption to lesbian married couples and allow their children the advantage of being born with two parents. The mere *chance* that not having two parents can negatively affect a child should weigh in favor of presuming a lesbian non-biological mother. Why allow the *possibility* of reducing a child's well-being by removing a parent when that parent is willing and able to assume the parental role?

Since research shows that same-sex couples have the same capacity to raise a child and promote that child's welfare as do heterosexual married couples, it follows that the same child-welfare rationale motivating the presumption of parenthood in heterosexual artificially inseminated couples should apply to homosexual artificially inseminated couples. The social science negates any reason for a differing application of the presumption, especially when the best interest of the child is considered a principal justification of the presumption. If the welfare of the child is served equally by two lesbian parents as it is with two heterosexual parents, and a child's welfare is a dominant purpose in applying the presumption in the first place, it is wrong to deny a child the right to have two parents by not allowing his or her other mother to be presumed a parent.[126] Regardless of the parents' gender and sexual orientation, a child's welfare is benefited monetarily, psychologically, physically, and emotionally by having two parents. Accordingly, the presumption that automatically creates two parents should also apply to same-sex married couples in order to benefit the children born into those unions.

2. The Economic Benefit to the State of Applying the Presumption to Lesbian Married Couples

Apart from the child's well-being, the other applicable traditional rationale underlying the presumption of parenthood is the economic benefit to the state achieved when a second parent is automatically recognized through the presumption. Since most states do not grant the non-biological mother legal ties to the child absent a second-parent adoption, she can theoretically leave her children if she divorces her wife and have no duty to pay

125. Affidavit of Michael E. Lamb, *supra* note 105, at 6 (about 70% of children who grow up in single-parent families are not maladjusted).

126. Some critics argue that these non-biological mothers can adopt these children and become their parents that way. Yet, adoption is expensive and intrusive, and many parents cannot afford to spend several thousand dollars to go through the process. Furthermore, a non-biological father of an AID-created child is not required to adopt his child, so why should a non-biological mother be required to do so?

child support or help the biological mother in any way.[127] Because the non-biological mother has no legal obligation to care for the children, the biological mother is now left alone to support the family, and often, this financial burden ultimately rests on the government. First, there are direct costs to the state and federal governments resulting from single-mother households. In 1986, for example, "[r]oughly one of two single mothers [lived] below the poverty line, as compared with one in ten married couples with children."[128] A more recent study conducted in 2003 concluded that "39.3 percent of single-mother families [not necessarily lesbian] lived in poverty."[129] Since these single-mother households are making less money than married households, they are paying less taxes, and the state is therefore losing out on income.[130] Not only is the state receiving less money from single mothers on average, but these poverty-stricken single-parent households actually cost the federal government an astounding $99.8 billion in direct costs—stemming from their dependence on federal welfare programs.[131] In the study, the researchers analyzed fourteen federal programs and isolated the monetary allocations and program-usage statistics accounting for single-mother households.[132] For example, single-mother households accounted for one quarter of the total food stamp budget, or $9.3 billion, and 37% of the households using public housing and Section 8 rental assistance were single-mother households.[133] Of course, creating a legal bond between the non-biological mother and child would not completely remove the costs of single-motherhood from the government, but requiring the non-biological mother to pay some sort of child support in the event of separation would guarantee that there is less of a burden on the state—keeping in line with the protection of the public purse rationale.

In addition to the direct and measurable financial costs associated with impoverished single-mother households, there are indirect costs that are also statistically attributable to single-mother homes. Unfortunately, the harsh reality is that children born without two active parents are more like-

127. *See, e.g.*, Smith v. Gordon, 968 A.2d 1 (Del. 2009) (former lesbian partner was not considered a legal parent); Janice M. v. Margaret K., 948 A.2d 73 (Md. 2008) (same).

128. Sara McLanahan & Karen Booth, *Mother-Only Families: Problems, Prospects, and Politics*, 51 J. MARRIAGE & FAM. 557, 558 (1989). This study analyzes all single-mother families, without differentiating between lesbian and heterosexual single-mothers.

129. Nock & Einolf, *supra* note 123, at 6.

130. *Id.* at 8.

131. *See id.* at 11.

132. *Id.* at 14–16.

133. *Id.* at 15–16; *see also* Daniel P. Mueller & Philip W. Cooper, *Children of Single Parent Families: How They Fare As Young Adults*, 35 FAM. RELATIONS 169, 173 (1986) (single-parent families were more likely to have received welfare assistance than two-parent families).

ly to be placed in jail, depend on the state for economic support, and have a more difficult time being productive citizens.[134] Children raised by single mothers also use mental health services at a higher rate than children from two-parent families, have more behavioral problems at school, and are more likely to enter the juvenile system.[135] These children are also statistically more likely to have less education and lower wages than children from two-parent families, which results in lower tax revenues for the government.[136] While these indirect costs to the government are difficult to tabulate, some studies indicate how great the cost may in fact be. For example, as noted above, children of single-mother households are more likely than children of two-parent homes to go to juvenile detention programs.[137] In New York, the cost of maintaining one juvenile in the detention center for one year in 2009 was $226,320.[138] To put that into perspective, the state spends only $15,371 to send a child to a New York City public high school.[139] This enormous cost shows how financially burdensome children raised by single mothers can potentially be to the state.[140]

All of the statistical analysis relating the associated costs of single-mother households demonstrates that there is a real risk of unnecessarily wasting government funds when the presumption of parenthood is not given to lesbian mothers.[141] The risk derives from the fact that the non-biological mother can theoretically divorce the biological mother and not have any fiscal obligations to the children due to the nonexistent legal relationship between her and the children.[142] These children are consequently being raised by a single mother, and the statistics above illustrate the detrimental effects on government budgets that such a situation can impose.

134. *See* Nock & Einolf, *supra* note 123, at 8, 15–16.

135. *Id.* at 8.

136. *Id.*

137. *Id.*

138. CORRECTIONAL ASS'N OF N.Y., JUVENILE DETENTION IN NEW YORK CITY 1 (2010), *available at* http://www.correctionalassociation.org/publications/download/jjp/factsheets/detention_fact_sheet_2010.pdf.

139. *Id.*

140. I personally do not endorse this point of view, but am only relating the research to support the overall analysis.

141. It seems logical, from a fiscal standpoint, to create a legal relationship between the non-biological mother and the child when that mother actually *wants* to be legally responsible, and not attempting to extract financial support from her after a divorce, for example, when she is no longer willing to foot the bill and the state must go through the expensive court system.

142. *See* cases cited *supra* note 127. In those states that do not recognize *de facto* parenthood, it is very difficult for the non-biological mother to be considered a legal parent.

If the presumption of parenthood were to apply to the non-biological mother by nature of her marriage to the children's biological mother and her consent to AID, she would automatically have a legal relationship with her kids and could not simply walk away and leave the state to carry her burden. The legal parental relationship would create some type of financial duty to support the children, allowing the state to minimize its costs—at the very least in terms of the direct costs associated with single mothers.[143] As a presumed parent from birth, the non-biological mother is financially responsible for her child until it becomes an adult, and that saves the state money—which is always a persuasive argument. While this rationale might not be the most altruistic, protecting the public purse was a rationale associated with the original presumption of parenthood, and such a rationale undoubtedly holds true with respect to artificial insemination and lesbian mothers.

CONCLUSION

The presumption of parenthood is a legal tool, which, at its core, is used to solidify two legal parents from the moment a child is born. This doctrine has inevitably been applied in new ways throughout the centuries, but some of the underlying rationales for the creation and preservation of the presumption do not seem to have changed—at least in principle. Scholars predominantly identify three motivations when tracing the justifications for both the old and the new applications of the presumption of parenparentage: (1) promotion of child welfare; (2) preservation of public funds; and to some extent, (3) protection of biological connections. While these rationales stem from the traditional presumption of parenthood, which of course emerges from the practice of having children through sexual intercourse, the advent of artificial insemination by anonymous donor has redefined the presumption and forced it to be applied in new ways. Specifically, when a lesbian married couple decides to start a family with the help of AID, the presumption of parenthood should apply to automatically make the non-biological mother a legal parent by nature of her marriage to the biological mother and her consent to the child's creation—as it does for heterosexual couples in the same situation. However, many states have now

143. In Illinois, for example, if the non-biological mother had a legal relationship with the children by nature of the presumption of parenthood, the non-biological mother will have to pay child support even if she is not the custodial parent. In the event she does not pay, the state can garnish her wages or even seize her bank accounts, among other things, in order to protect the state from footing the bill. *See* ILLINOIS CHILD SUPPORT SERVICES, www.childsupportillinois.com/customers/faq.html (last visited Nov. 4, 2010).

codified the presumption of parenthood with regard to artificial insemination for opposite-sex couples, which actually poses problems for same-sex married couples who opt for AID and have both of their names on the birth certificate. This is because the artificial insemination statutes are written in heterosexual-specific language (before same-sex marriage was legal in any state), and many courts will not expand the use of the statute beyond the literal gendered terms. In order to persuade courts to expand the artificial insemination presumption of parenthood, or at least add to the argument, it is necessary to recognize how the traditional rationales underlying the historical presumption actually apply in the modern usage of the doctrine.

First, it is necessary to dispel the biology rationale from the beginning because, by definition, the biological mother's spouse will not be genetically related to a child born by AID—and that is true for both same-sex and opposite-sex spouses. It would therefore make little sense to promote genetic ties to children when such ties are impossible to obtain. That leaves the child welfare and the public purse justifications, which both lean in favor of affording same-sex married couples the protections and benefits of the presumption of parenthood. In terms of child welfare, a child is benefitted in several ways by having two parents, and affording the presumption to lesbian couples would, at the very least, give an added assurance of a two-parent household from the outset of the child's life. Furthermore, research shows that same-sex parents are just as capable at raising children as opposite-sex couples, and those children are just as likely to "flourish" as are children raised by heterosexual couples—which means that the benefit of having two parents is served by both same-sex and opposite-sex couples alike. With respect to public funds, by not granting the presumption to lesbian married couples, the state may suffer. This is because the non-biological mother has no legal connection to her children, and in the event of divorce, she can discard any financial obligation without legal ramification—leaving it to the state to support the single mother if necessary. Since single mothers have a higher than average rate of needing governmental support, by not making the non-biological mother a legal parent from the outset, the government (i.e., taxpayer) pays.

The traditional rationales underlying the presumption of parenthood favor granting the presumption to families headed by lesbian married couples, and there is no legitimate reason for denying this privilege to them. While the statutes that codify the artificial insemination presumption are written with "traditional" marital norms in mind, these norms are outdated with regard to modern marriage law in states that support same-sex marriage. At the end of the day, children are generally better off when they

have two parents—and that is true regardless of the parents' sex or sexual orientation. So ultimately, do we really want to force good parents, who love and care for their children, to unnecessarily battle with the uncertainties, costs, and pressures of adoption, just to have a legal relationship with the children with whom they already have a parental relationship? This Note has answered that in the negative.