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Reproductive Technology and the New Family: Recognizing the Other Mother

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REPRODUCTIVE TECHNOLOGY AND THE NEW FAMILY: RECOGNIZING THE OTHER MOTHER

> Even if we can agree, therefore, that " family" and "parenthood" are part of the good life, it is absurd to assume that we can agree on the content of those terms and destructive to pretend that we do.[1]
>
> The old family is no more; the new family is not yet.[2]

Regardless of strong, negative feelings about lesbian couples raising children in the United States,[3] the number of lesbian couples raising children is steadily increasing.[4] These lesbian coparents often remain together in committed relationships with shared salaries, friends, and values.[5] However, while these women are assuming many, if not all, of the responsibilities of parenthood, the law affords them few coordinate

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1. Michael H. v. Gerald D., 491 U.S. 110, 141 (1989) (Brennan, J., dissenting).

2. Harry D. Krause, Family Law Reform v. "Family Values," Speech at the Brendan F. Brown Lecture Series, Catholic University of America, Columbus School of Law. (Oct. 15, 1992) *adapted in* Harry D. Krause, *Family Law and Family Values*, 9 J. CONTEMP. HEALTH L. & POL'Y 109 (1993).

3. James D. Wilson, *Gays Under Fire*, NEWSWEEK, Sept. 14, 1992, at 35. A survey revealed that 61% of Americans disapprove of adoption rights for gay spouses. *Id.* at 37. This Comment does not argue in favor of or against the right of homosexual parents to raise children. It merely proposes a solution to problems that often arise when a court must determine the custody rights of a child produced in a lesbian coparent relationship. This Comment focuses on female homosexual relationships rather than male homosexual relationships because the arguments developed are based on judicial recognition of the female's Constitutional right to procreate. *See infra*, notes 92-113 and accompanying text. Likewise, many male homosexual couples are raising children. *See generally* Anne Pressley & Nancy Andrews, *For Gay Couples, the Nursery Becomes the New Frontier*, WASH. POST, Dec. 20, 1992, at A1.

4. Gina Kolata, *Lesbian Partners Find The Means to be Partners*, N.Y. TIMES, Jan. 30, 1989, at A13. By some estimates, 10,000 children are being raised by lesbian mothers who conceived through artificial insemination. Alissa Friedman, *The Necessity for State Recognition of Same-Sex Marriage: Constitutional Requirements and Evolving Notions of Family*, 3 BERKELEY WOMEN'S L.J. 134, 159 n.168 (1988) (*citing* E. Donald Shapiro & Lisa Schultz, *Single-Sex Families: The Impact of Birth Innovations Upon Traditional Family Notions*, 24 J. FAM. L. 271, 278 (1985-86). Other estimates show that six to ten million children are being raised in households with a homosexual parent. *Id.* A director of a sperm bank in California stated that approximately 40% of the sperm bank's clients are lesbians couples who intend to raise their children in a lesbian coparent family. *Id.*

5. Friedman, *supra* note 4, at 159. "The fact that some people think that 'practicing homosexuality' is immoral does not lead lesbians and gay men to reject morality as a force

rights.[6]

These "families" are now a permanent fixture in society and "courts must inevitably deal with the offspring of [lesbian coparents] . . . and must determine rights for support, visitation, inheritance, and all the other traditional rights stemming from a heterosexual marriage."[7] To do otherwise will not serve the best interests of the children involved.

This Comment focuses on the problems faced by lesbian coparents, courts, and society as a whole in the event of the couple's separation,[8] or the death or incapacity of the biological mother. This Comment proposes an interim solution in contract, consistent with the best interests of the child, in the event of the dissolution of the lesbian coparent relationship, or the death or incapacity of the biological coparent. Part I of this Comment provides a brief history of child custody law and discusses the contemporary status of child custody law in the United States. Part II explores the current status of child custody law as it relates to lesbian parents. In part III, this Comment describes new reproductive technology and discusses the lesbian woman's constitutionally protected right to use this technology for procreation. Part IV sets forth a contractual solution to the problems created when a lesbian couple separates, or when the biological mother dies or becomes incapacitated. The Comment concludes that courts should enforce these contracts absent a showing that doing so would not be in the best interests of the child.

I. CURRENT STANDARDS IN CHILD CUSTODY DETERMINATIONS

Child custody law involves rights and duties associated with the parent-child relationship.[9] Parental rights operate against the state, third parties, and the child.[10] Parents have the right to custody of the child, to disci-

in their lives. Nor does it discourage them from trying to instill values and morals in their children." *Id.* at 159 n.168.

6. *Id.* at 136.

7. *Id.* at 160 (quoting E. Donald Shapiro & Lisa Schultz, *Single-Sex Families: The Impact of Birth Innovations Upon Traditional Family Notions*, 24 J. FAM. L. 271, 280 (1985-1986)).

8. *See generally* Curiale v. Reagan, 272 Cal. Rptr. 520 (Cal. Ct. App. 1990) (holding that the nonnatural lesbian coparent who jointly agreed to raise the child and support both the biological mother and child for three years has no standing to assert a custody claim after the couple's separation).

9. Mara Q. Berke, Note, *In re Marriage of Birnbaum: Modifying Child Custody Arrangements by Ignoring the Rules of the Game*, 24 LOY. L.A. L. REV. 467, 469 (1991).

10. Katharine T. Bartlett, *Rethinking Parenthood as an Exclusive Status: The Need for Legal Alternatives When the Premise of the Nuclear Family Has Failed*, 70 VA. L. REV. 879, 884 (1984).

pline the child, to make educational and medical decisions, to determine religious upbringing, to name the child, to decide where the child lives, to speak for the child by enforcing or waiving the child's rights, to determine who may visit the child, and to place the child in another's care.[11] These rights also confer upon the parent coordinate responsibilities, including the duty to care for the child, provide financial support, educate the child, provide medical care, and control the child.[12]

In a child custody dispute, the court decides with whom the child will reside, who will have primary responsibility for the child's welfare, and the permissible terms for visitation, if any.[13] Child custody law in the United States presently focuses on the "best interests of the child."[14] The current focus evolved from the ancient Roman and early European concept of *patria potestas,*[15] which vested in the father absolute authority over the child,[16] and the "tender years doctrine," which provided a maternal preference in child custody disputes.[17]

Courts make custody decisions based on the unique circumstances of each case.[18] While some states provide a statutory list of factors to aid the court in determining what is in the best interests of the child,[19] two

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11. *Id.* at 884-85.

12. *Id.* at 885.

13. Note, *Custody Denials to Parents in Same Sex Relationships: An Equal Protection Analysis*, 102 HARV. L. REV. 617, 618 (1989) [hereinafter *Equal Protection Analysis*].

14. Andrea Charlow, *Awarding Custody: The Best Interests of the Child and Other Fictions*, 5 YALE L. & POL'Y REV. 267, 268 n.3 (1987). This doctrine, however, is not universally hailed as the best solution for the child. *See generally Id.*

15. *Id.* at 267; *see also* Rebecca Korzec, *A Tale of Two Religions: A Contractual Approach to Religion as a Factor in Child Custody and Visitation Disputes*, 25 NEW ENG. L. REV. 1121, 1123 (1991).

16. Korzec, *supra* note 15, at 1123. Under the concept of *patria potestas*, the child was treated as chattel and the father had all rights in and to such "chattel." Charlow, *supra* note 14, at 267 n.1.

17. *See* Allan Roth, *The Tender Years Presumption in Child Custody Disputes*, 15 J. FAM. L. 423 (1976-77).

18. Charlow, *supra* note 14, at 268.

19. *See, e.g.*, KY. REV. STAT. ANN. § 403.270(1)(a)-(c) (Baldwin 1988); WIS. STAT. ANN. § 767.24(5)(a)-(k) (West 1993). The Uniform Marriage and Divorce Act lists the following relevant, but not exclusive, factors for custodial determinations:

> (1) the wishes of the child's parent or parents as to his custody;
> (2) the wishes of the child as to his custodian;
> (3) the interaction and interrelationship of the child with his parent or parents, his siblings, and any other person who may significantly affect the child's best interest;
> (4) the child's adjustment to his home, school, and community; and
> (5) the mental and physical health of all individuals involved.

UNIF. MARRIAGE AND DIVORCE ACT § 402, 9A U.L.A. 561 (1987).

other states leave this determination to the sole discretion of the court.[20] In either event, courts ultimately exercise discretion in determining the weight to be given each factor.[21] The net result in either approach is a judicial determination of "the best interests of the child."

There are three types of custody and visitation disputes, the classification of which depends upon the parties involved. The first involves custody disputes between a child's natural parents.[22] The second involves disputes between a legally recognized parent and a nonlegally recognized parent, or nonparent.[23] The third type of child custody dispute involves contests which terminate parental rights.[24]

When a custody dispute involves a contest between a legally recognized parent and nonparent, most courts follow the "parent's rights doctrine,"[25] which permits granting custody to the nonparent only if the court is convinced that the legal parent is unfit.[26] A few jurisdictions impose a somewhat weaker burden wherein the nonlegally recognized parent must show only that awarding custody to the natural parent would not be in the best interests of the child.[27] But regardless of which burden a given jurisdiction employs, the nonlegally recognized parent often will be denied standing to challenge parental custody.[28]

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20. *See, e.g.*, TENN. CODE ANN. § 36-6-101(a) (1991).

21. Charlow, *supra* note 14, at 268.

22. *See, e.g.*, Ashbee v. Cozart, No. 2910285, 1992 WL 336999, at *1 (Ala. Civ. App. Nov. 20, 1992) (discussing a post divorce child custody battle between the natural parents). In a child custody battle between the natural parents, the parents stand on equal footing and the court uses the best interests of the child standard to determine custody. Nancy D. Polikoff, *This Child Does Have Two Mothers: Redefining Parenthood to Meet the Needs of Children in Lesbian-Mother and Other Nontraditional Families*, 78 GEO. L.J. 459, 471 (1990).

23. *See, e.g.*, Nancy S. v. Michelle G., 279 Cal. Rptr. 212, 213-14 (Cal. Ct. App. 1991). In this case, the natural mother sought a declaration that her lesbian partner, with whom she had celebrated a "marriage" ceremony and agreed to raise a child, had no legal rights with respect to that child. *Id.* at 214. This Comment focuses on the contest between the legally recognized parent and the nonlegally recognized parent in the context of a lesbian coparent relationship.

24. *See, e.g.*, Roe v. Roe, 324 S.E.2d 691, 694 (Va. 1985) (holding that the father was an unfit custodian solely on the basis that his child was continuously exposed to his immoral and illicit same sex relationship).

25. Note, *Developments in the Law—Sexual Orientation and The Law*, 102 HARV. L. REV. 1508, 1634 (1989) [hereinafter *Sexual Orientation*].

26. *Id.*

27. *Id.*; *See also* Nancy S. v. Michele G., 279 Cal. Rptr. 212 (Cal. Ct. App. 1991).

28. Under the Uniform Marriage and Divorce Act, a nonbiological parent may institute a custody action only if the child is not in the physical custody of a biological parent. UNIF. MARRIAGE AND DIVORCE ACT §401(d)(2), 9A U.L.A. 550 (1987). This Comment does not argue that *any* third party should have standing to challenge a biological parent's

II. PRESENT LEGAL STATUS OF LESBIAN COPARENTS

When deciding which parent should be awarded custody of a child in a custody dispute between the child's natural parents, courts have taken one of three different approaches.[29] These variations shed light on judicial attitudes towards lesbian coparenting. In some jurisdictions, the fact that the biological or legal parent is involved in a relationship with someone of the same gender creates an irrebuttable presumption that granting custody to that parent is not in the best interests of the child.[30] In these jurisdictions, lesbian coparents are unable to raise children lawfully. Other jurisdictions have established a rebuttable presumption against awarding custody to parents involved in such relationships. In these jurisdictions the homosexual parent may overcome the presumption by showing that the same sex relationship poses no harm to the child.[31] In a third group of jurisdictions consisting of at least ten states, courts have rejected a presumption against awarding custody to parents solely on the basis of their involvement in a same sex relationship.[32]

A court must recognize standing in the party seeking custody or visita-

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custody rights. Rather, it argues that a party to a contract between lesbian coparents should have standing to enforce that contract when enforcement is in best interests of the child.

29. *See Equal Protection Analysis*, *supra* note 13, at 619.

30. *Id.* at 619 n.12 (citing G.A. v. D.A., 745 S.W.2d 726, 728 (Mo. Ct. App. 1987); N.K.M. v. L.E.M., 606 S.W.2d 179, 186 (Mo. Ct. App. 1980); Roe v. Roe, 324 S.E.2d 691, 691 (Va. 1985)). These cases demonstrate that a judicially created irrebuttable presumption against awarding custody to parents involved in same sex relationships exists in Missouri and Virginia.

31. *See Sexual Orientation*, *supra* note 25, at 1631.

32. *Id.* at 1631 n.15 (citing S.N.E. v. R.L.B., 699 P.2d 875, 879 (Alaska 1985); *In re* Marriage of Birdsall, 243 Cal. Rptr. 287, 289 (Cal. Ct. App. 1988); Nadler v. Superior Court, 63 Cal. Rptr. 352, 354 (Cal. Ct. App. 1967); D.H. v. J.H., 418 N.E.2d 286, 293 (Ind. Ct. App. 1981); Doe v. Doe, 452 N.E.2d 293, 296 (Mass. App. Ct. 1983); *In re* J.S. & C., 324 A.2d 90, 92-94 (N.J. Super. Ct. Ch. Div. 1974), *aff'd*, 362 A.2d 254 (N.J. Super. Ct. App. Div. 1976); Stroman v. Williams, 353 S.E.2d 704, 705-06 (S.C. Ct. App. 1987); Medeiros v. Medeiros, 8 Fam. L. Rep. (BNA) 2372 (Vt. Super. Ct. 1982); *In re* Marriage of Cabalquinto, 669 P.2d 886, 888 (Wash. 1983); Rowsey v. Rowsey, 329 S.E.2d 57, 60-61 (W. Va. 1985)). Courts rely on different theories to justify this more liberal treatment. The Massachusetts court justified the lack of a *per se* rule by analogizing the homosexual relationship of the mother to the illegal heterosexual relationship of the father which did not serve as a bar to awarding the father custody of his minor child. Doe v. Doe, 452 N.E.2d at 296. The New Jersey courts hold that a parent's right to custody of his or her child is protected by the First, Ninth, and Fourteenth Amendments and cannot be subordinated without a showing that the parent's activity impaired the health of the child. *See, e.g., In re* J.S. & C., 324 A.2d at 92-94. Thus, in New Jersey, a parent's homosexuality does not, *per se*, provide a sufficient basis for disallowing custody. *Id.* at 94. The Washington courts hold that a parent's homosexuality alone does not bar visitation rights because all the facts in the case

tion. Nonbiological coparent status affords no greater standing than that of any other third party seeking custody of a child in a contest with the biological parent. The nonbiological coparent must offer prima facie evidence for each of the statutory visitation factors that third parties must present to obtain an evidentiary hearing,[33] even though she may have assisted in the insemination process, paid for the expenses associated with the pregnancy, and supported both the biological mother and the child since the birth.[34] The practical result of the high burden imposed by the parental preference doctrine is that the nonbiological coparent may be cut off from the child at the whim of the biological coparent.[35]

Nonbiological coparents have sought custody rights by borrowing from existing legal theories that have proven successful for heterosexual couples.[36] These theories include adoption, *in loco parentis*,[37] *de facto* parenthood,[38] and equitable parenthood.[39] Although these legal doctrines provide some relief to the nonbiological coparent, they currently do not adequately serve the best interests of the child or the nonbiological mother.[40]

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must be weighed to determine the best interests of the child. *See, e.g., In re* Marriage of Cabalquinto, 669 P.2d at 888.

33. *See, e.g.,* Kulla v. McNulty, 472 N.W.2d 175, 180-81 (Minn. Ct. App. 1991). The Minnesota statute is illustrative:

> A court shall grant the [visitation] petition if it finds that:
> (1)visitation rights would be in the best interests of the child;
> (2)the petitioner and child had established emotional ties creating a parent child relationship; and
> (3)visitation would not interfere with the relationship between the custodial parent and the child.

MINN. STAT. § 257.022(2)(b) (1992).

34. Ann Hagerdorn & Amy D. Marcus, *Case in California Could Expand Legal Definition of Parenthood*, WALL ST. J., Sept. 8, 1989, at B10. Terri Sabol alleged these facts in her custody suit against her former lover for custody of their child. *Id.*

35. *See supra* notes 25-28 and accompanying text.

36. *See* Polikoff, *supra* note 22, at 491.

37. "*[In] [l]oco parentis* exists when [a] person undertakes care and control of another in absence of such supervision by latter's natural parents and in absence of formal legal approval, and is temporary in character and is not to be likened to an adoption which is permanent." BLACK'S LAW DICTIONARY 787 (6th ed. 1990).

38. *De Facto* adoption is defined as, "[a]n agreement to adopt according to statutory procedures in a given state which will ripen into *de jure* adoption when the petition is properly presented." *Id.* at 416.

39. Equitable adoption "[r]efers to [the] situation involving oral contract to adopt child, fully performed except that there was no statutory adoption, and in which rule is applied for benefit of child in determination of heirship upon death of person contracting to adopt." *Id.* at 538.

40. *See* Polikoff, *supra* note 22, at 500-02, 506-08.

A. Same-Sex Adoption

Adoption is the "[l]egal process pursuant to state statute in which a child's legal rights and duties toward his natural parents are terminated and similar rights and duties toward his adoptive parents are substituted."[41] Adoption terminates the rights and coordinate responsibilities of the natural parents and vests them in the adoptive parents.[42] Adoption is subject to judicial intervention and will only be permitted when it is deemed to be in the best interests of the child.[43] Because adoption is a legislative creation, nonexistent at common law, courts must look to adoption statutes to determine the propriety of an adoption petition.[44]

The language in most adoption statutes compels a majority of courts to deny adoption petitions filed by same sex couples because the adoption statute would divest the natural mother of her parental rights should the court confer these rights on her lesbian partner.[45] Adoption statutes, drafted specifically for the nuclear family, permit only heterosexual couples to obtain the rights and responsibilities of adopted parenthood. The statutes only allow for one parent of each sex to be a legally recognized parent, and thus do not permit two partners of the same sex to share parental rights and responsibilities. While the statutes of only two states explicitly forbid homosexual adoption,[46] many courts deny adoption by same sex couples on the basis that adoption by the nonbiological coparent would terminate the biological coparent's rights and responsibilities.[47] Recently, however, the Surrogate's Court in New York County broke from precedent and allowed a biological mother's lesbian partner to adopt her six year old son.[48] The court recognized and embraced the

41. BLACK'S LAW DICTIONARY 49 (6th ed. 1990).

42. *See Sexual Orientation*, *supra* note 25, at 1642-43.

43. *Id.*

44. Emily C. Patt, *Second Parent Adoption: When Crossing the Marital Barrier is in a Child's Best Interests*, 3 BERKELEY WOMEN'S L.J. 96, 112-13 (1988).

45. *See* Polikoff, *supra* note 22, at 522.

46. *See* FLA. STAT. ANN. § 63.042(3) (West 1985); N.H. REV. STAT. ANN. § 170-B:4 (1990). In an advisory opinion the New Hampshire Supreme Court held that § 170-B:4 of the New Hampshire statute does not violate the Equal Protection clause or the Due Process clause of either the New Hampshire or the United States Constitutions, and does not infringe upon the right of freedom of association under either constitution. Opinion of the Justices, 530 A.2d 21, 23-29 (N.H. 1987). The justices noted that the legislative purpose of the statute was to protect children rather than to punish homosexual conduct, and that homosexual conduct is not illegal in New Hampshire. *Id.* at 28.

47. *See* Patt, *supra* note 44, at 113.

48. *In re* Adoption of a Child Whose First Name is Evan, 583 N.Y.S.2d 997 (1992). The court concluded that adoption was in the best interests of the child, noting that the adoption would increase the boy's economic security, would not bring change or trauma to

societal reality lesbian couples actually do raise children.[49] This decision, however, is inconsistent with precedent in a vast majority of states where legislative amendments would likely be necessary to permit same sex adoption.[50] Because adoption is largely unavailable to lesbian coparent families, a contractual approach would bridge this legal gap until lawmakers give their legislative blessings to same sex adoption.

B. In Loco Parentis

A person standing *in loco parentis* has assumed the position of a parent by taking on the duties of a parent without a legal adoption.[51] California courts recognize this doctrine in the context of a stepparent-stepchild relationship when the stepparent seeks custody of a nonadopted stepchild upon dissolution of the marriage.[52] The intent of the party standing *in loco parentis* largely determines the applicability of the doctrine: the party has no legal obligation to seek custody of a nonadopted stepchild, but is permitted to.[53]

Courts are reluctant to extend the doctrine to the nonbiological lesbian coparent seeking custody after separation from her partner.[54] Courts generally limit the use of the *in loco parentis* doctrine in two ways. First, some courts deny the nonbiogical coparent standing in custody proceedings.[55] While a stepparent may have standing by virtue of the underlying marital dissolution proceeding, the nonbiological coparent has no such proceeding to exploit.[56] Secondly, if the nonbiological coparent is able to obtain standing, some courts have limited the effectiveness of the doc-

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his life, and would enable him to participate in the nonbiological mother's employer provided health care plan. *Id.* at 998-99.

49. *Id.* at 1002.

50. *See, e.g., In re* Adoption of Charles B., 1988 WL 119937 (Ohio App.). *But see In re* Adoption Petition of Nancy M., No. 89-5-0067-7 (Cal. Super. Ct. San Francisco County Nov. 16, 1989) (permitting adoption by the nonbiological coparent without terminating the parental rights of the biological parent); Adoptions of B.L.V.D. and E.L.V.D, 628 A.2d 1271 (Vt. 1993).

51. Elizabeth Delaney, Note, *Statutory Protection of the Other Mother: Legally Recognizing the Relationship Between the Nonbiological Lesbian Parent and Her Child*, 43 HASTINGS L.J. 177, 194 (1991).

52. *Id.*

53. *See* Polikoff, *supra* note 22, at 507.

54. *See, e.g.*, Nancy S. v. Michelle G., 279 Cal. Rptr. 212 (Cal. Ct. App. 1991).

55. *See, e.g.*, Alison D. v. Virginia M., 572 N.E.2d 27, 29 (N.Y. 1991) (*de facto* parental status does not afford the nonbiological coparent standing to seek custody of the child she raised with the biological coparent).

56. *See* Delaney, *supra* note 51, at 195.

trine for fear that it will undermine parental autonomy.[57] Courts accomplish this by limiting the rights of a party standing *in loco parentis* to the right to intervene on behalf of the child rather than the right to sue for sole or joint custody.[58] Furthermore, the party standing *in loco parentis* will have to meet the higher "detriment" standard that all third parties must meet in order to obtain custody over the biological coparent's objections.[59] For all of these reasons, the doctrine of *in loco parentis* does not adequately serve the best interests of the children raised in lesbian coparent families.

C. *De Facto Parenthood*

A *de facto* parent is "[a] person who, on a day-to-day basis, assumes the role of parent, seeking to fulfill both the child's physical needs and his psychological need for affection and care."[60] *De facto* parenthood encompasses a child-parent relationship that is defective in form, but accepted for all practical purposes;[61] it exists in fact, but not at law.[62] Parties who do not fit the legal definition of parent, but who nonetheless consider themselves parents, often allege *de facto* parenthood in child custody disputes.[63]

De facto parenthood suffers from the same inadequacies that plague the doctrine of *in loco parentis*. Without an underlying controversy, the *de facto* parent often does not have standing to sue,[64] and even if the standing is granted, the most she can expect is limited visitation rights because *de facto* parenthood does not afford joint custody.[65] *De facto* parenthood does not change the legal status of the party seeking custody:

57. *See Nancy S.*, 279 Cal. Rptr. at 217.

58. *E.g.*, OR. REV. STAT. § 109.119(1) (1989) (allowing any person "who has established emotional ties creating a child-parent relationship with a child" to petition or intervene on behalf of the child). The legislative intent is not to confer any parental rights upon the *de facto* parent, but rather to "allow the courts to incorporate all relevant information about the existence of such a relationship into the decision making process, thereby most effectively serving the child's best interests." Delaney, *supra* note 51, at 200.

59. *See* P.L.H. v. E.C. & R.T., 601 So. 2d 1018 (Ala. Civ. App. 1992) (stating that a nonparent who wishes custody must "present clear and convincing evidence that the [legal] parent is unfit or unsuited for custody, and that the best interests of the child will be served by granting custody to the nonparent, rather than the [legal] parent"). *See also* Delaney, *supra* note 51, at 201.

60. Patt, *supra* note 44, at 107 (citing *In re B.G.*, 523 P.2d 244, 253 n.18 (Cal. 1974)).

61. *See* Delaney, *supra* note 51, at 188.

62. *Id.*

63. *Id.*

64. *Id.* at 190.

65. *Id.* at 193.

the petitioning party still faces the parental preference doctrine and must satisfy the "detriment" standard applied to a third party seeking custody of a child against the wishes of the legally recognized parent.[66]

D. Equitable Parenthood

The doctrine of equitable parenthood recognizes a husband who is not the biological father of a child born to his wife during their marriage as the natural father if: (1) the husband and child mutually acknowledge such a relationship or if the mother has cooperated in the development of a parent-child relationship between her child and husband, and (2) the husband desires to have the rights of parenthood and accepts its coordinate responsibilities.[67] The doctrine of equitable parenthood evolved from the doctrine of equitable adoption, which allowed a child to inherit, under the laws of intestate succession, from a man who was not his legal father but who had recognized the child as his son.[68] Courts extended this doctrine to allow the "father" to sue for custody under the rationale that if the "father" can be recognized as such after death there is no justification for not recognizing him as such while alive.[69] Under this doctrine, heterosexual couples have been able to extend the scope of parenthood.

The potential strength of equitable parenthood is that it does not foreclose the possibility of legally recognizing two parents of the same sex,[70] and implies that parenthood can exist without a biological tie.[71] While this doctrine has yielded success for some married couples, nonbiological lesbian coparents who have attempted to use equitable parenthood to gain custody of the issue of their lesbian relationships have experienced little success[72] due to the legal preference for biological parents in cus-

66. *See supra* notes 25-28 and accompanying text.

67. Atkinson v. Atkinson, 408 N.W.2d 516, 519 (Mich. 1987). *But see In re* Marriage of O'Brien, 772 P.2d 278, 283-84 (Kan. Ct. App. 1989) (denying custody because the Kansas Supreme Court held that the state does not recognize the doctrine of equitable adoption). *See also* Allan Stephens, Annotation, *Parental Rights of Man who is Not Biological or Adoptive Father of Child But was Husband or Cohabitant of Mother When Child Was Conceived or Born*, 84 A.L.R.4th 666 (1991).

68. *See* Stephens, *supra* note 67.

69. *Id.*

70. *See* Polikoff, *supra* note 22, at 500.

71. *Id.* at 501.

72. *See* Delaney, *supra* note 51, at 206. In California, which has adopted the Uniform Parentage Act along with at least 26 other states, courts have held that the "equitable parent," the *de facto* parent, and the parent standing *in loco parentis* do not have standing

tody disputes.[73]

Thus, although the above theories serve the needs of the heterosexual community, they currently do not yield satisfactory results for lesbian coparents. The restrictive language of adoption statutes drafted for the traditional nuclear family prohibit adoption by a nonbiological coparent. Both *de facto* parenthood and *in loco parentis* fall short of meeting the best interests of the child raised in a lesbian coparented family because courts often deny standing to the nonbiological coparent, or limit the nonbiological coparent's recovery to visitation rights if standing is granted. Furthermore, courts have restricted equitable parenthood to heterosexual couples. Judicial enforcement of contracts negotiated by lesbian coparents, consistent with the best interests of the child, can fill the void left by these traditional theories.

III. REPRODUCTIVE TECHNOLOGY

Advances in reproductive technology offer women feasible alternatives to procreation within a heterosexual marriage.[74] These advances, such as artificial insemination,[75] *in vitro* fertilization,[76] and surrogate mothering,[77] offer expanded opportunities for women who, by choice, want to have children outside the traditional rubric of the nuclear family.[78]

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on the ground that they do not meet the definition of parent under the Uniform Parentage Act. *Id. See, e.g.*, Nancy S. v. Michele G., 279 Cal. Rptr. 212, 216-18 (Cal. Ct. App. 1991).

73. Polikoff, *supra* note 22, at 501-02.

74. Note, *Reproductive Technology and the Procreative Rights of the Unmarried*, 98 HARV. L. REV. 669, 669 (1985) [hereinafter *Reproductive Technology*].

75. Artificial insemination involves the introduction of semen into the woman's uterus or vagina by means other than coitus. *See Sexual Orientation*, *supra* note 25, at 1649 n.143. This Comment discusses artificial insemination rather than other advances in reproductive technology because artificial insemination supplies the missing element for pregnancy, while *in vitro* fertilization and surrogate motherhood are methods to circumvent female infertility.

76. *In vitro* fertilization, which is used by women who are unable to conceive because of a fallopian dysfunction, involves implanting into the women's uterus an egg which has been fertilized outside the women's body. *Reproductive Technology*, *supra* note 74, at 669 n.2.

77. Surrogacy involves the artificial insemination of a woman who contractually agrees to relinquish her parental rights in that child to the father or the father and his wife. *Id.* at 669 n.4. This Comment does not discuss surrogacy in light of its tenuous status after *Matter of Baby M*, 537 A.2d 1227 (N.J. 1988) (holding that surrogacy contracts are unenforceable as against public policy).

78. *Reproductive Technology*, *supra* note 74, at 669; Sheila M. O'Rourke, *Family Law in a Brave New World: Private Ordering of Parental Rights and Responsibilities for Donor Insemination*, 1 BERKELEY WOMEN'S L.J. 140, 141 (1985). Single women do not represent the only segment of society taking advantage of reproductive technology. In 1987, the

Lesbian couples who wish to raise a child together most often do so by artificially inseminating one of the partners. The woman may obtain sperm from a physician, a sperm bank or a private donor.[79] The method chosen is significant because it largely determines the legal rights and obligations of the parties involved with respect to the resulting child.[80]

The advantage of obtaining sperm either from a sperm bank or under the supervision of a physician is that the donor's identity is not disclosed to recipients, and the recipient's identity is not disclosed to the donor.[81] The preservation of anonymity drastically reduces the possibility of a paternity suit.[82] In fact, at least seven states provide that a donor's rights and responsibilities are severed when the procedure is done under a doctor's supervision or through a sperm bank.[83] Two of these states terminate the donor's paternity rights and obligations unless the parties agree otherwise.[84] This presumption applies both when a licensed physician supervises the process, as well as when the parties employ a private donor.[85] In states with statutes that allow the donor and recipient to contract out the donor's parental rights, an unmarried, artificially inseminated mother has the choice to raise the child on her own, in conjunction with the donor (if he consents), or with a partner other than the donor.[86] However, in jurisdictions that have adopted the Uniform Parentage Act, the do-

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Washington Post reported that an unmarried priest utilized the procedure to conceive a child. Marjorie Hyer, *A Need Examined, a Prayer Fulfilled: Unmarried Priest Bears Child by Artificial Insemination*, WASH. POST, Dec. 7, 1987, at A1.

79. O'Rourke, *supra* note 78, at 143.

80. *Id.*

81. *Id.*

82. *Id.* However, not all authorities agree that anonymity protects the best interests of the child. Ann T. Lamport, Note, *The Genetics of Secrecy in Adoption, Artificial Insemination, and In Vitro Fertilization*, 14 AM. J.L. & MED. 109, 116-17 (1988) (arguing that anonymity can lead to half-sibling matings and other genetic difficulties). The problem of genetic screening is beyond the scope of this Comment.

83. CAL. CIV. CODE § 7005(b) (West 1983); COLO. REV. STAT. § 19-4-106(2) (Supp. 1992); N.J. REV. STAT. § 9:17-44 (Supp. 1988); WASH. REV. CODE § 26.26.050(2) (1985); WYO. STAT. § 14-2-103(b) (1986). "[P]hysicians have guarded the public's purse, its common morality, and its social structure by acting as gatekeepers, refusing to inseminate candidates whom they have felt unfit to the task." Daniel Wikler & Norma J. Wikler, *Turkey-baster Babies: The Demedicalization of Artificial Insemination*, 69 MILBANK Q. 5, 13 (1991). Predicating the legal status of the donor on the presence of a physician gives the medical profession unjustifiable control over who may be immunized from paternity claims in the use of reproductive technology. *See Sexual Orientation*, *supra* note 25, at 1653 n.167. "Medical gatekeeping" has caused many women to rely on self-insemination rather than physician assisted insemination. Wikler & Wikler *supra* at 6.

84. OR. REV. STAT. § 109.239 (1987); TEX. FAM. CODE ANN. § 12.03(b) (West 1986).

85. *See* O'Rourke, *supra* note 78, at 147.

86. *Id.*

nor's paternity rights and obligations are severed *only* when the woman is *married* and is inseminated under the supervision of a physician.[87] Restricting the right to sever the donor's rights and responsibilities to married couples may unconstitutionally hinder a single woman's right to procreate.[88]

Physician supervision, however, is not necessary for successful artificial insemination. Some women obtain donor semen from a private source, either directly or through a third party.[89] While this approach allows the woman the greatest degree of control, it also allows, both as a practical and a legal matter, both the donor and biological mother to assert rights and enforce responsibilities which could lead to custody disputes between the parties.[90] In at least two states, however, parties involved in artificial insemination may contract out of parental rights and obligations regardless of whether the sperm is obtained from a direct private source, a sperm bank, or under the supervision of a physician.[91] Allowing the parties to contract out the donor's paternity rights provides the basis for the contractual solution proposed in this Comment.

IV. Constitutional Right to Procreate With The Aid of Reproductive Technology

The theory that the Constitution of the United States protects a woman's procreative rights, including the right to procreate with the aid of reproductive technology has been proposed in a *Harvard Law Review* Note.[92] The Note finds support for this theory in the United States

87. Unif. Parentage Act § 5, 9B U.L.A. 301-02 (1989). Section five of the Act provides:

> (a)If, under the supervision of a licensed physician and with the consent of her husband, a wife is inseminated artificially with semen donated by a man not her husband, the husband is treated in law as if he were the natural father of a child thereby conceived . . .
>
> (b)The donor of semen provided to a licensed physician for use in artificial insemination of a married woman other than the donor's wife is treated in law as if he were not the natural father of a child thereby conceived.

Id.

88. *See infra* notes 107-11 and accompanying text.

89. It is not unusual for a lesbian couple to obtain sperm from a relative of the noninseminated partner in order to pass on the family genes of both partners. Annette Baran & Rueben Pannor, Lethal Secrets, the Shocking Consequences and Unsolved Problems of Artificial Insemination; Parents, Children, Donors, and Experts Speak Out 132 (1990).

90. *See* O'Rourke, *supra* note 78, at 143.

91. *See supra* note 84 and accompanying text.

92. *See Reproductive Technology*, *supra* note 74, at 674-75.

Supreme Court's holdings in three areas related to procreation: sterilization, contraception, and abortion.[93]

The United States Supreme Court addressed the question of state-mandated sterilization in two cases. Writing for the Court in 1927, Justice Holmes concluded in *Buck v. Bell*[94] that the sterilization of an imbecile without consent was neither violative of due process or equal protection.[95] While never expressly overruled, *Buck* "is now widely regarded as an aberration, largely the product of a misguided, pseudoscientific eugenics fad."[96] The second case, *Skinner v. Oklahoma*[97] "commands greater respect."[98] In *Skinner,* the Court applied strict scrutiny to an equal protection challenge seeking to invalidate a criminal statute that ordered sterilization as punishment for repeated felony convictions, but that exempted certain white collar crimes such as embezzlement.[99] *Skinner* supports the individual's right to procreate outside of marriage by emphasizing the importance of procreation to the individual and society:[100] "[the right to have offspring is] a sensitive and important area of human rights . . . a right which is basic to the perpetuation of a race."[101] The Note argues that the "basic liberty" at stake in *Skinner* is tied to procreation itself, to the ability to bear children, and therefore is not dependent upon the individual's marital status.[102]

The Note also finds support for a single woman's right to procreate in cases involving contraception. Despite the Supreme Court's initial holding in *Griswold v. Connecticut*[103] that a state's ban on contraception violates the right of *marital* privacy,[104] the Court later extended the right to avoid pregnancy by the use of contraceptives beyond the marital context

93. *Id.* at 675. "Although the cases address specific aspects of the procreation process, they can best be explained as stages in the elaboration of a more general right that guarantees the individual a substantial measure of control over all aspects of procreation." *Id.*

94. Buck v. Bell, 274 U.S. 200 (1927).

95. *Id.* at 207.

96. *Reproductive Technology, supra* note 74, at 675 (citing Cynkar, *Buck v. Bell: "Felt Necessities" v. Fundamental Values?*, 81 COLUM. L. REV. 1418 (1981)). "Most scholars agree that the case [Buck v. Bell] would be overturned if presented to the Supreme Court today." *Id.* at 675 n.37 (citations omitted).

97. Skinner v. Oklahoma, 316 U.S. 535 (1942).

98. *Reproductive Technology, supra* note 74, at 675.

99. *Skinner*, 316 U.S. at 541.

100. *See Reproductive Technology, supra* note 74, at 675.

101. *Id.* at 676 (quoting Skinner v. Oklahoma, 316 U.S. 535, 536 (1942)).

102. *Id.*

103. Griswold v. Connecticut, 381 U.S. 479 (1965).

104. *Id.* at 485-86.

in *Eisenstadt v. Baird*.[105] *Eisenstadt* supports the proposition that an individual's right to control decisions about procreation flows from the individual's interest in autonomy, regardless of the individual's marital status.[106] The premise that a single woman has a fundamental right to control her procreative system to prevent pregnancy supports the conclusion that a single woman has a fundamental right to control her reproductive system to conceive with the aid of reproductive technology.

The Supreme Court's decisions concerning abortion further support a single woman's right to procreate with the aid of reproductive technology.[107] For example, in *Roe v. Wade*[108] the Court emphasizes the relationship between procreation and the right of privacy.[109] When examined together, these cases support the proposition that an individual's decisions concerning procreation are protected by a Constitutional right to privacy.[110] If this proposition is accepted by the Court, the state will be required to present a compelling interest to justify restricting a single woman's access to new reproductive technology.[111]

Once the single woman's constitutional right to procreate with the aid of reproductive technology is established, donors and donees must be allowed to contract out of parental rights and responsibilities. If states do not permit the donors to "opt out" of their parental rights and responsibilities, the states are effectively limiting the number of potential donors by exposing them to liability for support.[112] Thus, the inability of donors to "opt out" could deny the single woman her constitutionally protected

105. Eisenstadt v. Baird, 405 U.S. 438, 453 (1972) (plurality opinion). The *Eisenstadt* court stated:

> It is true that in *Griswold* the right of privacy . . . inhered in the marital relationship. Yet the marital couple is not an independent entity with a mind and heart of its own, but an association of two individuals each with a separate intellectual and emotional makeup. If the right of privacy means anything, it is the right of the *individual*, married or single, to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child.

Id.

106. *Id.*; *see also Reproductive Technology*, *supra* note 74, at 676-77.

107. *See Reproductive Technology*, *supra* note 74, at 677.

108. Roe v. Wade, 410 U.S. 113 (1973).

109. *Id.* at 152-54. While the validity of *Roe* is uncertain in light of *Planned Parenthood v. Casey*, 112 S. Ct. 2791 (1992), the Supreme Court continues to recognize an individual's right to procreate. The right to procreate does not rest on the constitutionality of *Roe* because this right does not threaten the separate interest in the preservation of life. *Reproductive Technology*, *supra* note 74, at 677 n.50.

110. *See Reproductive Technology*, *supra* note 74, at 677.

111. *Id.*

112. *See* O'Rourke, *supra* note 78, at 151.

right to procreate with the aid of artificial insemination.[113] Furthermore, the ability to "opt out" allows the biological coparent to retain all the parental rights and responsibilities in herself which would facilitate transferring some of those rights and responsibilities to the nonbiological coparent through the contract proposed in this Comment.

V. Solution in Contract

Because the doctrines of *de facto* parenthood,[114] *in loco parentis*,[115] and equitable parenthood[116] do not adequately meet the needs of lesbian coparents, and because same sex adoption[117] has not yet been widely accepted, an interim solution is needed to protect the best interests of the children raised by lesbian coparents. "[U]nlike married partners whose obligations are specified by law, unmarried partners must create and delineate their mutual obligations in accordance with the needs of their relationship."[118]

The law of contracts offers a solution for children raised in lesbian coparent relationships that is consistent with the best interests of those children. The courts could enforce contracts wherein the parties set forth their parental rights and obligations. This solution requires two contractual steps to further the best interests of the child being raised by lesbian coparents. The first step severs the rights and responsibilities of the biological father; the second provides the nonbiological coparent with parental rights in the event of separation of the couple, or the death or incapacity of the biological coparent.

Recent trends in family law indicate increasing legal acceptance of such contractual provisions.[119] The rise of "no fault" divorce indicates that states have relinquished some control over the marriage contract.[120] Prenuptial and postnuptial agreements also offer married partners greater autonomy at the expense of state control by allowing them to downgrade the marital contract to which the state is a party.[121] By allowing marital partners greater autonomy in structure and control of their marriage, the state has allowed for greater legal acceptance of non-

113. *Id.*
114. *See supra* notes 60-66 and accompanying text.
115. *See supra* notes 51-59 and accompanying text.
116. *See supra* notes 67-73 and accompanying text.
117. *See supra* notes 41-50 and accompanying text.
118. *See Sexual Orientation*, *supra* note 25, at 1625.
119. *Id.* at 1624-25.
120. *See* O'Rourke, *supra* note 78, at 162.
121. *See* Krause, *supra* note 2.

traditional families.[122]

Courts have also begun to give increased weight in custody and divorce proceedings to agreements resulting from negotiations between the natural parents.[123] Some courts have held that a custody agreement between the parents is a significant factor in child custody determinations.[124] Other courts have held that custody agreements between husband and wife will be upheld as long as they are in the best interests of the child.[125] Most noteworthy is a New Mexico Court of Appeals decision that custody agreements between a lesbian parent and her partner were not *per se* unenforceable.[126] Such increasing judicial tolerance for personal autonomy in child custody agreements provides fertile ground for a solution in contract.

A. Severing the Paternal Rights and Responsibilities

The first step in this contractual solution requires divesting the natural father of his rights and obligations toward the child. This step makes the biological mother the only legal parent, because when one parent ceases to be a parent for any reason, the other parent *ipso facto* assumes all parental rights and responsibilities.[127] There are several methods of terminating a natural father's parental rights and responsibilities. Most obviously, the death of the natural father terminates his parental rights. Neglect or dependency proceedings may result in a permanent termination of parental rights.[128] Adoption also terminates the rights of natural

122. *Id.*

123. *See infra* notes 127-29 and accompanying text. *But see In re* Marriage of Mager, 785 P.2d 198, 200 (Mont. 1990) (holding that parties may not make binding contracts regarding support, custody, or visitation, and the trial court must determine the best interests of the child using the factors prescribed by statute).

124. *See, e.g.,* Ruffin v. Ruffin, 560 N.Y.S.2d 885, 886 (N.Y. App. Div. 1990).

125. *See, e.g.,* Crocker v. Crocker, 195 F.2d 236, 237 (10th Cir. 1952). *But see* Ford v. Ford, 371 U.S. 187, 193 (1962) (holding that under Virginia law, parents cannot make an agreement that will bind a court to decide a custody case in a predetermined manner); *In re* Marriage of Mager, 785 P.2d 198, 200 (Mont. 1990) (holding that parties may not make a binding agreement as to custody or visitation because such agreements would not necessarily be in the best interests of the child); Hill v. Moorman, 525 So. 2d 681, 681 (La. Ct. App. 1988) (holding that a contract between natural parents and adoptive parents that permits the natural parent to visit the adopted child is unenforceable as against public policy).

126. A.C. v. C.B., 829 P.2d 660, 661-64 (N.M. Ct. App. 1992) (holding that a child custody agreement between the nonbiological lesbian coparent and the biological lesbian coparent is not unenforceable *per se,* and that the petitioner's sexual orientation alone is not a permissible basis for denying custody or visitation).

127. *See* Bartlett, *supra* note 10, at 883.

128. *See Sexual Orientation, supra* note 25, at 1635.

parents.[129]

Although these methods will sever the rights and obligations of the father, conception through artificial insemination may provide the best method for lesbian coparents. In fact, several state statutes terminate the donor's rights and obligations to the child conceived therefrom when the parties use a sperm bank or operate under the supervision of a physician.[130] Furthermore, at least two states presume that the donor is not the legal father unless the parties contract otherwise, regardless of whether the parties employ a sperm bank or proceed under the supervision of a physician.[131] Through the use of artificial insemination a single woman can give birth to a child for whom she is the only legal parent. Thus, denying a single woman the ability to sever the rights and obligations of the donor may violate her constitutional right to procreate.[132]

One author has suggested that arrangements where women and donors contract out the donor's parental rights and obligations, may violate anti-baby selling statutes.[133] While this argument may have some validity in the context of adoption and surrogacy, the same cannot be said for artificial insemination, because the "commodity" is semen rather than live babies.[134] Semen is not a constitutionally protected entity, whereas a fetus and the mother's relationship with that fetus during gestation are constitutionally protected.[135] "The level of legal and public policy concerns over the exchange of semen do not reach the same heights as the concern over the welfare of live babies."[136] Thus, the law should not hinder prospective lesbian coparents from severing the parental rights and responsibilities of the donor when doing so would be in the best interests of the child.

B. The Contract Between the Coparents

Once the father's rights and obligations are extinguished, the parental rights would vest solely in the biological mother.[137] When the lesbian partners determine that they want to raise a child together they must de-

129. *See supra* note 42 and accompanying text.
130. *See supra* note 83 and accompanying text.
131. OR. REV. STAT. § 109.239 (1987); TEX. FAM. CODE ANN. § 12.03(b) (West 1986).
132. *See supra* notes 92-113 and accompanying text (arguing a single woman has a constitutional right to use reproductive technology).
133. *See* O'Rourke, *supra* note 78, at 159.
134. *Id.*
135. *Id.* (citing Roe v. Wade, 410 U.S. 113 (1973)).
136. *Id.* at 159.
137. *See supra* note 127 and accompanying text.

termine the rights and obligations of each coparent and put this into a written contract so that courts will enforce it if the couple separates, or if the biological coparent dies or is incapacitated.

In the contract, the parties may wish to establish financial obligations to require the nonbiological mother to partially or fully support the child. The parties could agree upon custody and visitation rights should the couple separate in the future. The contract could include numerous other provisions, such as a stipulation of the child's surname, the faith under which the child would be raised, or any other parental right or duty that the parties wish to stipulate.[138]

Courts could enforce such a pre-separation, pre-death contract in a post hoc situation. Judicial inquiry would focus on whether the coparents had entered into an express contract regarding the rights and responsibilities of the nonbiological coparent. If such an agreement exists, the court would enforce the contract absent a clear showing that enforcement would not be in the best interests of the child.

Because the nonbiological mother would assume the duties of parenthood in exchange for the coordinate rights, there would be no lack of consideration to void the contract. Although courts may be disinclined to enforce these contracts on the grounds that they would not serve the best interests of the child, enforcement would be appropriate absent an affirmative showing that the contract is not in the best interest of the child.

It is important to note that a biological link is not necessary for an individual to be a good parent; the biological parent, an adoptive parent, or any other caring adult can properly fulfill the role of parent.[139] In the context of a lesbian coparent relationship, the nonbiological coparent in fact becomes a psychological parent upon whom the children depend for love and support.[140] As the law now stands, in the family unit where the child is being raised by a legal parent and a nonlegally recognized parent there is no legal protection of the nonlegally recognized coparent.[141] Continuity and consistency are fundamental requirements for a child's

138. *See supra* notes 10-12 and accompanying text (discussing the parental rights and responsibilities to which the parties may stipulate).

139. *See* Patt, *supra* note 44, at 103 (quoting JOSEPH GOLDSTEIN ET. AL., BEYOND THE BEST INTERESTS OF THE CHILD 19 (2d ed. 1979)).

140. Elizabeth Zuckerman, *Second Parent Adoption for Lesbian-Parented Families: Legal Recognition of the Other Mother*, 19 U. C. DAVIS L. REV. 729, 741 (1986).

141. *See* Patt, *supra* note 44, at 105.

healthy development.[142] An enforceable contract would be in the best interests of the child because by creating legal recognition of the nonbiological coparent, the contract would increase the likelihood of continuity in the relationship between the child and nonbiological parent should the couple separate. The increased stability and certainty of an enforceable contract would benefit both the children and the parents.

The same need for continuity exists when the biological mother dies: "maintenance of a continuous relationship between a child and a stable, familiar, adult figure is crucial in the event of the death or incapacity of a child's legal parent."[143] Judicial enforcement of a contract could facilitate adoption of the child by the nonbiological coparent in the event of death or permanent incapacity of the biological coparent because the nonbiological coparent would be legally recognized.[144] Once again the contract would serve the best interests of the child by providing stability and consistency in the child's life.

Finally, the legally enforceable contract would permit two willing parents to assume the responsibilities of parenthood. In addition to love and affection and other intangible benefits which parents confer on their children, these two parents would be able to provide future financial support and inheritance. Both the child and the state would be able to enforce the contractual duty to provide financial support in the same manner that a child or mother could in the case of a deadbeat father. Unarguably, this would be in the best interests of the child.

V. Conclusion

Lesbian women are coming together as families and raising children with two mothers. The United States Constitution guarantees these women the right to procreate and raise a family outside the bounds of marriage. Because present law is not equipped to handle these post nuclear families, an interim solution is needed. Enforcement of contracts between lesbian coparents, consistent with the best interests of the child, would provide such an interim solution. Enforceable contracts would provide economic and emotional stability in the life of the child of the lesbian

142. *Id.* at 102.

143. *Id.* at 106. Patt argues in favor of same sex adoption, a step that courts and legislatures largely have been unwilling to accept. The solution in contract offers many of the benefits of adoption including financial and emotional stability.

144. In the event of the death of the biological mother, adoption would be possible because the statutory provisions which sever the rights of the natural parents no longer would be of concern. *See supra* notes 41-50 and accompanying text.

coparent relationship. This stability would serve the best interests of the child in the event of the couple's separation, or the death or incapacity of the biological mother. When a person is willing to provide love, attention, and financial support to a child who is the product of her relationship, there is no reason why the law should stand in her way.

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