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**MOMMY OR DADDY AND ME:
A CONTRACT SOLUTION TO A CHILD'S LOSS OF
THE LESBIAN OR TRANSGENDER
NONBIOLOGICAL PARENT**

INTRODUCTION

After five years in a committed lesbian relationship, Susan and Jane want to start a family. Unable to conceive a child together, they decide to use artificial insemination (AI). Prior to undergoing AI, Susan, Jane, and their doctor sign an agreement stating that both partners will be co-parents of the child. Susan is then inseminated with an anonymous donor's semen. Jane has no biological role in conception. A girl is born—Lesley—and Susan and Jane raise her together. Ten years later, Susan and Jane decide to split up. After they tell ten-year-old Lesley the news, Jane moves out of the family home and the child remains with Susan. As tensions escalate between the ex-partners, Susan eventually decides to end Lesley's relationship with Jane. Lesley, who has spent ten years with two mothers, is now denied the emotional, mental, and financial support of a woman she has always known as "Mom."

Jane hires an attorney to establish custody and visitation rights, but her attorney warns her that it is unlikely the courts will grant either. The attorney tells Jane that although the three of them have been living as a family for over a decade, the law in their state only explicitly provides protections for heterosexual nonbiological parents. The courts will not enforce Susan and Jane's legal parentage agreement because the state's Parentage Act only deems such agreements enforceable for heterosexual couples. Furthermore, while the state has recognized the applicability of certain common law parentage doctrines in nonbiological parents' parental rights cases, the state supreme court has refused to apply these doctrines to lesbian nonbiological parents who were never married to the biological parents. Although Susan and Jane had essentially functioned as a married couple for over a decade, they were never able to legally marry under state law.

When Jane commenced action to gain custody of Lesley, the court denied her custody and visitation, holding that she did not have legal standing as a lesbian, unmarried, and nonbiological parent. Therefore, after a lifetime with a two-parent family, her ten-year-old girl experienced the traumatic loss of her mother.

Unfortunately for children conceived through AI by lesbian or transgender¹ couples, Jane's experience is an increasingly common problem.² Lesbian and transgender nonbiological parents³ face unique barriers to establishing parentage of their children after the deterioration of their relationships with the biological parents.⁴ The determination of parentage is of "profound" significance in a custody or visitation proceeding.⁵ A nonbiological parent "must have standing . . . to seek custody or visitation before a court will address the merits of the petition."⁶ While legal parents both have standing to bring an action for custody or visitation rights after the termination of their

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1. Transgender is an umbrella term that refers to people who live differently than the gender presentation and roles expected of them by society. . . . Transsexual is a term for people who seek to live in a gender different from the one assigned at birth and who may seek or want medical intervention (through hormones and/or surgery) for them to live comfortably in that gender.

National Center for Transgender Equality, *Teaching Transgender* 15–16 (2009), available at http://transequality.org/Resources/NCTE_Teaching_Transgender.pdf.

2. See Bettina Boxall, *Laws Mean Lesbian Custody Battles Often Are One-Sided*, L.A. TIMES, Jan. 27, 1997, at A1 ("[A] [c]ouple break[s] up, share[s] the child's custody for a while. Then the biological mother, often after forming a new relationship, starts limiting her former partner's visits with the child, sometimes stopping them altogether. The woman discovers that however long the child may have called her 'mom,' she is a nobody to the law."); see also Jonathan Saltzman, *Partner Child Support at Issue*, BOSTON GLOBE, Mar. 1, 2004, at B1 (quoting Bennett H. Klein, a lawyer for Gay & Lesbian Advocates & Defenders: "One of the realities of the world today is that more and more children are being born through reproductive technologies where they have a biological connection to one parent and not to the other Part of the reason we're seeing this case is because the law has not fully caught up with that reality.").

3. While gay men may also have difficulty establishing parentage when using AI to conceive a child through a surrogate mother, this issue is beyond the scope of this Comment. For an explanation of legal barriers to gay men's parental rights under current AI and surrogacy law, see generally Catherine DeLair, *Ethical, Moral, Economic and Legal Barriers to Assisted Reproductive Technologies Employed by Gay Men and Lesbian Women*, 4 DEPAUL J. HEALTH CARE L. 147 (2000).

4. See Melanie B. Jacobs, *Micah Has One Mommy and One Legal Stranger: Adjudicating Maternity for Nonbiological Lesbian Coparents*, 50 BUFF. L. REV. 341, 345 (2002); see also David Crary, *Lesbians Face Custody Battleground Law: When Female Partners Separate After Rearing Children, One May Find Herself Cut off and Without Recourse*, L.A. TIMES (Oct. 24, 1999), <http://articles.latimes.com/1999/oct/24/news/mn-25720> ("[W]renching cases are surfacing across the nation as more lesbian partners rear children born after artificial insemination. When such couples separate, dissolving a union that no state recognizes as marriage, the partner who is not the biological parent finds herself in legal limbo.").

5. 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).

6. Laurie A. Rompala, *Abandoned Equity and the Best Interests of the Child: Why Illinois Courts Must Recognize Same-Sex Parents Seeking Visitation*, 76 CHI.-KENT L. REV. 1933, 1934 (2001).

relationship,⁷ nonlegal parents are often denied standing to bring an action at all.⁸

In heterosexual relationships, both parents are often biological and legal parents to the children. If one or both parents in a heterosexual couple are not biological parents, presumptions of parentage in state law usually apply if the parties intended to raise the child together.⁹ However, courts often refuse to grant parentage to lesbian and transgender nonbiological parents in similar circumstances.¹⁰ These nonbiological parents are often denied standing to pursue custody or visitation.¹¹ In these cases, the child suffers the trauma of losing a fit¹² and caring parent.¹³

The relevant statutory law¹⁴ and common law parentage doctrines governing these issues vary widely across jurisdictions.¹⁵ Part II of this Comment reviews the current status of parentage statutes and common law doctrines that courts apply to cases in which nonbiological parents claim parentage.¹⁶ Different states have adopted the 1973 version of the Uniform Parentage Act, the 2000 version of the Uniform Parentage Act, or neither.¹⁷ Because the AI sections of state parentage statutes usually include gender-specific language, courts

7. See Polikoff, *supra* note 5, at 471 n.47 (citing MINN. STAT. § 518.17(3) (West Supp. 2005) (“In determining custody, the court shall consider the best interests of each child and shall not prefer one parent over the other solely on the basis of the sex of the parent.”) and WASH. REV. CODE § 26.09.002 (2005) (“In any proceeding between parents under this chapter, the best interests of the child shall be the standard by which the court determines and allocates the parties’ parental responsibilities.”)).

8. See Polikoff, *supra* note 5, at 472.

9. See Jacobs, *supra* note 4, at 371–72.

10. See *infra* notes 43–102 and accompanying text.

11. See Jacobs, *supra* note 4, at 345; see also Crary, *supra* note 4 (“Courts in many . . . states have sided categorically with the biological mother in such disputes, ruling that estranged lesbian partners have no more legal right to demand visitation than a long-term nanny or close family friend.”).

12. Non-heterosexual parents are not “unfit” by definition due to their sexual orientation. See, e.g., Lisa Belkin, *What’s Good for the Kids*, N.Y. TIMES, Nov. 8, 2009, at 9 (“In most ways, the accumulated research shows, children of same-sex parents are not markedly different from those of heterosexual parents. They show no increased incidence of psychiatric disorders, are just as popular at school and have just as many friends.”).

13. See, e.g., *In re Parentage of A.B.*, 818 N.E.2d 126, 131 (Ind. Ct. App. 2004) (stating that when lesbian nonbiological parents are considered “legal strangers,” children can be “denied the affection of a ‘parent’ who has been with them from birth”).

14. DeLair, *supra* note 3, at 162 n.135 (“Many states have not enacted any statutes dealing with assisted reproductive technologies.”). The following discussion on parentage statutes illustrates how state courts have interpreted identical statutes differently, especially in regards to lesbian and transgender nonbiological parents.

15. See Jacobs, *supra* note 4, at 348.

16. See *infra* notes 43–215 and accompanying text.

17. Kira Horstmeyer, Note, *Putting Your Eggs in Someone Else’s Basket: Inserting Uniformity into the Uniform Parentage Act’s Treatment of Assisted Reproduction*, 64 WASH. & LEE L. REV.

often hold that these statutes do not apply to lesbian or transgender couples.¹⁸ Without statutory recourse, lesbian or transgender nonbiological parents sometimes request that courts apply common law doctrines to their parentage claims.¹⁹ However, the common law doctrines often result in dramatically different results across jurisdictions. Some courts refuse to accept these doctrines in the context of lesbian or transgender nonbiological parentage claims at all.²⁰

Part III of this Comment demonstrates that the inconsistent statutes, doctrines, and applications of law in this area lead to inconsistent and inequitable results for lesbian and transgender parents, disregarding both the autonomy of the parties and the best interests of the children.²¹ This Part proposes the use of contract law in all AI parentage determinations.²² Biological and nonbiological parents often sign pre-insemination AI agreements, illustrating their intent to co-parent the resulting children. If courts recognize the children of these parties as the intended third-party beneficiaries of pre-insemination AI agreements, the children should be entitled to specific performance of these agreements.²³ The specific performance under such agreements is the nonbiological parent's promise to be a legal parent and to provide physical, mental, emotional, and financial support for the child.²⁴

Part IV of this Comment illustrates that despite judicial resistance to applying contract law in a family law context, a contractual approach is appropriate in determining parentage of children conceived through AI.²⁵ The contract framework ensures uniform and equitable results, as it will not distinguish between heterosexual, homosexual, or transgender parents.²⁶ It also respects the best interest of the children and the parents' autonomous decisions to create families.²⁷ For these reasons, courts should use a child-focused contract approach for custody disputes between biological and nonbiological parents.

671, 700 (2007) (“[C]onsistency across the country in this area of family law is a desirable objective.”).

18. *Id.* at 675.

19. See John E. Durkin, Comment, *Reproductive Technology and the New Family: Recognizing the Other Mother*, 10 J. CONTEMP. HEALTH L. & POL’Y 327, 332 (1994).

20. Lindsay J. Rohlf, Note, *The Psychological-Parent and De Facto-Parent Doctrines: How Should the Uniform Parentage Act Define “Parent”?*, 94 IOWA L. REV. 691, 700 (2009).

21. See *infra* notes 216–65 and accompanying text.

22. See *infra* notes 266–313 and accompanying text.

23. See *infra* notes 291–313 and accompanying text.

24. See *infra* notes 301–13 and accompanying text.

25. See *infra* notes 350–85 and accompanying text.

26. *Id.*

27. *Id.*

II. BACKGROUND

Couples who wish to start a family often turn to assisted reproductive technologies when they cannot or will not conceive through sexual intercourse.²⁸ Assisted reproductive technologies include “(a) [i]ntrauterine insemination; (b) [d]onation of eggs; (c) [d]onation of embryos; (d) [i]n-vitro fertilization and transfer of embryos; and (e) [i]ntracytoplasmic sperm injection.”²⁹ AI is “the ‘introduction of semen into a woman’s vagina or uterus, other than by sexual intercourse.’”³⁰ While the first human AI procedure was performed in the United States in 1866,³¹ women out of heterosexual wedlock have only begun to use AI over the last several decades.³² Because lesbian and transgender couples cannot conceive children through sexual intercourse, many now use assisted reproductive technologies, such as AI, to conceive children.³³ According to a recent estimate by the American Bar Association, approximately ten million children are being raised by gay, lesbian, or bisexual parents³⁴ in the United States.³⁵

While some state legislatures have enacted statutes designed to establish the parentage of nonbiological parents of children conceived

28. See Janet L. Dolgin, *An Emerging Consensus: Reproductive Technology and the Law*, 23 VT. L. REV. 225, 225 (1998).

29. ABA MODEL ACT GOVERNING ASSISTED REPRODUCTIVE TECHNOLOGY § 102(1) (2008).

30. See DeLair, *supra* note 3, at 149 (quoting U.S. CONGRESS, OFFICE OF TECHNOLOGY ASSESSMENT, ARTIFICIAL INSEMINATION: PRACTICE IN THE UNITED STATES: SUMMARY OF A 1987 SURVEY—BACKGROUND PAPER 7 (1988)).

31. Barbara Kritchevsky, *The Unmarried Woman’s Right to Artificial Insemination: A Call for an Expanded Definition of Family*, 4 HARV. WOMEN’S L.J. 1, 1 n.3 (1981).

32. Carmel B. Sella, *When a Mother Is a Legal Stranger to Her Child: The Law’s Challenge to the Lesbian Nonbiological Mother*, 1 UCLA WOMEN’S L.J. 135, 151 n.77 (1991) (citing Kritchevsky, *supra* note 31, at 1).

33. Valerie Kellogg, *How the Children of the Gay Baby Boom Are Faring*, NEWSDAY, July 10, 2001, at B10 (“Many of those families have evolved out of divorce, but gays and lesbians, alone or with a partner, are also turning to adoption, artificial insemination, foster care and surrogacy to start the families they may have always wanted but didn’t expect they could have.”); see also Jane E. Brody, *Gay Families Flourish as Acceptance Grows*, N.Y. TIMES, July 1, 2003, at F7 (“[M]ore and more gay couples are acquiring their own [children], through artificial insemination, adoption and, for some gay men, through a surrogate mother inseminated with their sperm.”); Gina Kolata, *Lesbian Partners Find the Means to Be Parents*, N.Y. TIMES, Jan. 30, 1989, at A13 (“[T]housands of lesbians around the country are having children. . . . [M]ore and more of these women are choosing to have their own babies, most often by artificial insemination.”).

34. There are no statistics available on the number of children being raised by transgender parents at this time. According to the National Center for Transgender Equality, there are somewhere between one million and three million transgender people living in America. See Russell Goldman, *‘My Mommy Is a Boy,’ ABC News* (Mar. 28, 2008), <http://abcnews.go.com/Health/story?id=4536604&page=1>. How many of them are parents, however, is unknown. *Id.*

35. See Kellogg, *supra* note 33, at B10 (“As many as 10 million children are living with gay, lesbian or bisexual parents in the United States, according to estimates by the American Bar Association.”).

through AI, the vast majority of these statutes do not explicitly include lesbian or transgender couples within their scope.³⁶ Therefore, although some courts adopt a gender-neutral interpretation of parentage statutes to grant parental status to lesbian or transgender nonbiological parents, others consider the nonbiological lesbian or transgender parents to be legal strangers to the children and “decline to expand the current laws to recognize the nonbiological partner’s parental rights.”³⁷ Furthermore, while some courts have used various common law doctrines of functional parenthood to grant nonbiological parents their parental status, others may grant partial parental rights or refuse to grant parentage at all under these doctrines.³⁸

Section A of this Part examines the different parentage statutes adopted by the states and the various interpretations of those statutes by different state courts.³⁹ It also discusses a potential trend among a few states of adopting gender-neutral language and interpretation.⁴⁰ Section B of this Part reviews the current status of several common law doctrines that courts sometimes apply in cases where nonbiological parents claim parentage of children conceived through AI.⁴¹ Finally, Section C notes that some lesbian or transgender nonbiological parents may attempt to sidestep the issues associated with statutory or common law remedies through second-parent adoption.⁴²

A. Parentage Statutes

When determining parentage, “[c]ourts have traditionally applied statutory law.”⁴³ Historically, however, states did not have statutes regulating the parental rights and obligations of nonbiological parents to children conceived through AI.⁴⁴ Without a legal standard, chil-

36. Many state parentage statutes are modeled after the AI sections of the UPA (1973) or the UPA (2000). Both of these AI sections include gender-specific language, which, if interpreted strictly, would exclude lesbian and transgender couples. See UNIF. PARENTAGE ACT § 703 (2000) (revised 2002); UNIF. PARENTAGE ACT § 5(a) (1973).

37. Betsy J. Walter, Note, *Lesbian Mediation: Resolving Custody and Visitation Disputes When Couples End Their Relationships*, 41 FAM. CT. REV. 104, 106 (2003).

38. See *infra* notes 138–206 and accompanying text.

39. See *infra* notes 43–102 and accompanying text.

40. See *infra* notes 103–37 and accompanying text.

41. See *infra* notes 138–206 and accompanying text.

42. See *infra* notes 207–15 and accompanying text.

43. Micah Nilsson, *You Can’t Force Her to Be a Second Mom: K.M. v. E.G.*, 10 U.C. DAVIS J. JUV. L. & POL’Y 479, 484 (2006).

44. Walter Wadlington, *Artificial Insemination: The Dangers of a Poorly Kept Secret*, 64 NW. U. L. REV. 777, 785 (1970) (“Most of the legal profession today is either in ignorance or in hiding concerning artificial insemination. Until recently a handful of British Commonwealth decisions and a few trial court cases, not always officially reported, were the only sources available upon which to construct a legal framework for the process.”).

dren born to married or unmarried couples through AI were found “illegitimate.”⁴⁵ In 1973, the National Conference of Commissioners on Uniform State Laws (the Conference) proposed a comprehensive set of model laws regarding parentage rights, including a section on the parentage of children conceived through AI.⁴⁶ The Conference aimed to create a uniform application of parentage law across jurisdictions.⁴⁷ However, many states have adopted variations of the model laws or no statutes at all, and state courts have interpreted identical statutes differently.⁴⁸ Therefore, conflicts still arise when courts attempt to determine the parental status of lesbian or transgender nonbiological parents.⁴⁹

1. *The 1973 Uniform Parentage Act*

The stated purpose of the original Uniform Parentage Act (UPA (1973)) is to uniformly provide “substantive legal equality of children regardless of the marital status of their parents.”⁵⁰ The Conference noted that a series of Supreme Court decisions had mandated equal legal treatment of children born in and out of wedlock under the Equal Protection Clause of the Fourteenth Amendment, specifically as it relates to intestate succession.⁵¹ However, much of the law across jurisdictions was, at the time, “either unconstitutional or subject to grave constitutional doubt.”⁵² Concerned with every child’s ability to assert her equal legal rights, the Conference established a network of presumptions and rules to identify the child’s legal parents.⁵³

However, while other sections of the UPA (1973) ensure equal treatment for children born in and out of wedlock, § 5 of the UPA (1973), which specifically addresses the parentage issues involving children conceived through AI, states that if “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.”⁵⁴ Despite the Conference’s stated goal of equal-

45. *Id.* at 785–86.

46. UNIF. PARENTAGE ACT prefatory note (1973).

47. *Id.*

48. See DeLair, *supra* note 3, at 162 n.135 (“Many states have not enacted any statu[t]es dealing with assisted reproductive technologies.”).

49. See Nilsson, *supra* note 43, at 484.

50. UPA (1973) prefatory note.

51. *Id.*

52. *Id.*

53. *Id.*

54. UPA (1973) § 5(a) (emphasis added).

izing the treatment of children born in and out of wedlock, the use of the terms “husband” and “wife” excludes unmarried couples and their children conceived through AI from the parentage protections of the UPA.⁵⁵

Eight states adopted § 5 of the UPA (1973).⁵⁶ Other UPA (1973) states did not adopt § 5, but two of these states enacted similar AI sections.⁵⁷ In states that follow the UPA (1973), courts often refuse to apply the AI section protections to lesbian and transgender nonbiological parents. For example, Missouri adopted the UPA (1973) in 1987,⁵⁸ and in 2009, a Missouri appellate court refused to apply the AI section of the parentage statute to a dispute between former lesbian partners.⁵⁹ In *White v. White*, Michelle and Leslea each conceived one child through AI, in 2001 and 2004 respectively, and raised the two children together as a family.⁶⁰ Each partner was the biological parent to one child and the nonbiological parent to the other child.⁶¹ After the relationship ended in 2005, Leslea sought joint parental rights to both children.⁶² Michelle, however, sought to deny Leslea any parental rights to Michelle’s biological child.⁶³ Leslea attempted to establish parentage of her nonbiological child through the Missouri parentage statute.⁶⁴ The court held that the Missouri statute only al-

55. *Id.*

56. See CAL. FAM. CODE § 7613 (West 2004 & Supp. 2011); COLO. REV. STAT. ANN. § 19-4-106(1)–(2) (West 2005); 750 ILL. COMP. STAT. 40/3 (2008); MINN. STAT. ANN. § 257.56 (West 2007); MO. ANN. STAT. § 210.824 (West 2010); MONT. CODE ANN. § 40-6-106 (2009); NEV. REV. STAT. ANN. § 126.061 (West 2008); N.J. STAT. ANN. § 9:17-44 (West 2002); see also John J. Sampson, *Uniform Family Laws and Models Acts*, 42 FAM. L.Q. 673, 681 (2008) (noting that California, Colorado, Hawaii, Illinois, Kansas, Minnesota, Missouri, Montana, Nevada, New Jersey, New Mexico, Ohio, and Rhode Island have all adopted the UPA (1973)).

Hawaii and Rhode Island did not adopt the AI sections of the UPA (1973). See HAW. REV. STAT. § 584-1–584-26 (2010); R.I. GEN. LAWS § 15-8-1–15-8-28 (2010). New Mexico’s law is similar to the UPA (2000) but is gender neutral. The New Mexico statute states, “A person who provides eggs, sperm or embryos for or consents to assisted reproduction as provided in Section 7-704 of the New Mexico Uniform Parentage Act with the intent to be the parent of a child is a parent of the resulting child.” N.M. STAT. ANN. § 40-11A-703 (West 2003 & Supp. 2010).

57. See KAN. STAT. ANN. § 23-129 (2007); OHIO REV. CODE ANN. § 3111.95 (LexisNexis 2008).

58. “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.” MO. ANN. STAT. § 210.824 (West 2010).

59. See *White v. White*, 293 S.W.3d 1, 9 (Mo. Ct. App. 2009).

60. *Id.* at 6.

61. *Id.*

62. *Id.*

63. *Id.*

64. *Id.* at 9. Leslea also stated claims for relief on the basis of her being the de facto parent of, or one standing in *loco parentis* to, Michelle’s biological child. *Id.* at 11. Leslea also claimed that

lowed claims for parentage rights based on a biological tie or a presumption of parentage due to marriage or attempted marriage.⁶⁵ As a former partner in a non-marital relationship with no biological ties to Michelle's biological child, Leslea could not assert parental rights to the child under the Missouri statute.⁶⁶

Transgender nonbiological parents face unique issues in parentage claims under statutes that include the terms "husband" and "wife." In some states, a marriage involving a transsexual partner may be declared an invalid same-sex marriage if that partner has not completed the sex reassignment process.⁶⁷ In *In re Marriage of Simmons*, an Illinois appellate court refused to apply the Illinois Parentage Act⁶⁸ to a custody dispute between a female-to-male transsexual nonbiological parent and a female biological parent, despite the fact that they were married.⁶⁹ During their marriage, the female partner was inseminated with donor sperm.⁷⁰ Prior to insemination, both the female partner and the transsexual male partner signed a parentage agreement,⁷¹ as

Michelle was equitably estopped from refuting the parent-child relationship between Leslea and Michelle's biological child. *Id.* These issues are discussed later in this Comment.

65. *Id.*

66. *Id.*

67. Among the states, "there is not uniformity in whether, and how, a birth certificate can be modified for surgically treated transsexuals." See Richard Green, *Transsexual Legal Rights in the United States and United Kingdom: Employment, Medical Treatment, and Civil Status*, 39 ARCHIVES OF SEXUAL BEHAVIOR 153, 156 (2010). Some states will only recognize a marriage with a transsexual partner if he has completed sexual reassignment surgery and is legally the opposite sex of his partner. See, e.g., *In re Marriage of Simmons*, 825 N.E.2d 303, 309 (Ill. App. Ct. 2005). Other states do not recognize a postoperative transsexual's marriage within the reassigned sex. See, e.g., *Kantaros v. Kantaras*, 884 So. 2d 155, 161 (Fla. Dist. Ct. App. 2004) ("[T]he Florida statutes governing marriage [do not] authorize a postoperative transsexual to marry in the reassigned sex.").

68. 750 ILL. COMP. STAT. 40/3(a) (2008). The AI section of the statute, adopted from the UPA (1973), states,

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 shall be treated in law as if he were the natural father of a child thereby conceived. The husband's consent must be in writing executed and acknowledged by both the husband and wife. The physician who is to perform the technique shall certify their signatures and the date of the insemination, and file the husband's consent in the medical record where it shall be kept confidential and held by the patient's physician. However, the physician's failure to do so shall not affect the legal relationship between father and child.

Id.

69. *Simmons*, 825 N.E.2d at 311.

70. *Id.*

71. The agreement stated,

It is further agreed that [at] the moment of conception the husband hereby accepts the act as his own, and agrees:

1. That such child or children so produced are his own legitimate child or children and are heirs of his body; and

required by the AI section of the Illinois Parentage Act.⁷² When their relationship deteriorated, the nonbiological parent filed a petition for the dissolution of marriage and sought custody of the child.⁷³

The biological parent alleged that the nonbiological parent lacked standing because the same-sex marriage was invalid under Illinois law, and he was neither the biological nor adoptive parent.⁷⁴ The nonbiological parent argued that he was a parent under the Illinois Parentage Act.⁷⁵ The court interpreted the Illinois Parentage Act, which uses the terms “husband” and “wife” in the AI section, to include only legally married couples in its scope.⁷⁶ While the transsexual nonbiological parent underwent several surgeries in the sex reassignment process during the marriage, he still had external female genitalia at the time of the dispute.⁷⁷ Therefore, the court held that the nonbiological parent was not legally male, and the couple’s marriage was an invalid same-sex marriage.⁷⁸ The nonbiological parent did not have standing to seek custody of the child under the Illinois Parentage Act.⁷⁹

2. *The 2000 Uniform Parentage Act*

In 2000, the Conference promulgated a new Uniform Parentage Act to replace the UPA (1973) as the official recommendation of the Conference on the subject of parentage.⁸⁰ The Conference explained that the new laws were necessary because “[c]ase law has not always reached consistent results in construing UPA (1973). Moreover,

2. That he hereby completely waives forever any right which he might have to disclaim such child or children as his own; and

3. That such child or children so procedure [sic] are, and shall be considered to be, in all respects including descent of property, child or children of his own body.

Id. at 310 (alteration in original) (emphasis omitted).

72. *See supra* note 68.

73. *Simmons*, 825 N.E.2d at 307.

74. *Id.*

75. *Id.* at 308. The nonbiological parent also alleged that his marriage was valid because he was legally male, or alternatively that he was a parent under common law doctrine. *Id.* at 308, 312.

76. *Id.* at 311.

77. *Id.* at 309.

78. *Id.*

79. *Id.* at 313. The court also ruled that he did not have standing under common law doctrines because standing must be found solely under Illinois statutes. *Id.* See also *Kantaras v. Kantaras*, 884 So. 2d 155, 161 (Fla. Dist. Ct. App. 2004), which reversed a trial court decision that a female-born transsexual nonbiological parent was legally male and invalidated his marriage. The appellate court held that Florida statutes governing marriage do not authorize a postoperative transsexual to marry in the reassigned sex. *Id.* The court held that the terms “male” and “female” refer to “immutable traits determined at birth.” *Id.*

80. UNIF. PARENTAGE ACT prefatory note (2000) (revised 2002).

widely differing treatment on subjects not dealt with by the Act has been common.”⁸¹ The Conference also noted that the law needed to keep up with new technologies and resulting legal issues, such as the increased use of assisted conception.⁸² While the 2000 version of the UPA (UPA (2000)) originally used the terms “husband” and “wife” in its AI section, the 2002 amendments replaced those terms with “man” and “woman.”⁸³

The revised UPA (2000) aimed to modernize the model parentage laws by applying the assisted reproduction provisions to children born in and out of wedlock.⁸⁴ Section 703 of the revised UPA (2000) states that “[a] *man* who provides sperm for, or consents to, assisted reproduction by a *woman* as provided in [§] 704 with the *intent* to be the parent of her child, is a parent of the resulting child.”⁸⁵ The AI section of the revised UPA (2000) made two major changes from the UPA (1973): the revised UPA (2000) lists the parents as “man” and “woman” instead of “husband” and “wife,” ending the exclusion of unmarried couples, and bases parentage on the intent of the nonbiological parents to raise the children conceived through AI.⁸⁶ Nine states have adopted the original or revised UPA (2000).⁸⁷ Eight of those states currently use the AI section of the original or revised UPA (2000).⁸⁸

Regardless of the new focus on the nonbiological parent’s intent to parent the child,⁸⁹ at least one state has still refused to apply its parentage statute to lesbian nonbiological parents who expressed an in-

81. *Id.*

82. UPA (2000) § 702 cmt.

83. UPA (2000) §§ 702 cmt., 703.

84. *Id.*

85. UPA (2000) § 703 (emphasis added).

86. *Id.*

87. ALA. CODE § 26-17-703 (LexisNexis 2009); DEL. CODE ANN. tit. 13, § 8-703 (2009); N.M. STAT. § 40-11A-703 (West 2003); N.D. CENT. CODE § 14-20-61 (2009); OKLA. STAT. ANN. tit. 10, § 552 (West 2009); TEX. FAM. CODE ANN. § 160.703 (Vernon 2008); UTAH CODE ANN. § 78B-15-703 (2008); WASH. REV. CODE ANN. § 26.26.710 (West 2005); WYO. STAT. ANN. § 14-2-903 (2009).

88. ALA. CODE § 26-17-703; DEL. CODE ANN. tit. 13, § 703; N.D. CENT. CODE § 14-20-61; OKLA. STAT. ANN. tit. 10, § 552; TEX. FAM. CODE ANN. § 160.703; UTAH CODE ANN. § 78B-15-703; WASH. REV. CODE ANN. § 26.26.710; WYO. STAT. ANN. § 14-2-903.

Four of these states adopted the pre-amendment version of the UPA (2000), which still uses the terms “husband” and “wife” instead of “man” and “woman.” See ALA. CODE § 26-17-703; OKLA. STAT. ANN. tit. 10, § 552; UTAH CODE ANN. § 78B-15-703; WASH. REV. CODE ANN. § 26.26.710.

89. *In re* Parentage of L.B., 122 P.3d 161, 170 (Wash. 2005) (“[T]he UPA establishes that at least in the case of artificial insemination, the intent of the parties is the principal inquiry in determining legal parentage.”).

tent to parent the children.⁹⁰ In *In re Parentage of L.B.*,⁹¹ the Supreme Court of Washington stated that a lesbian nonbiological parent did not have a statutory remedy in the Washington parentage statute.⁹² The court held that the AI section of the statute, which included the terms “husband” and “wife,”⁹³ did not apply to same-sex couples.⁹⁴ The court stated that the “legislature has been conspicuously silent when it comes to the rights of children like L.B., who are born into nontraditional families, including any interests they may have in maintaining their relationships with the members of the family unit in which they are raised.”⁹⁵ However, the court recognized the status of de facto parent⁹⁶ as a means of determining parentage *in addition to* the UPA (2000).⁹⁷ The court remanded the case for a determination of whether the nonbiological parent was a de facto parent.⁹⁸

Although the Conference noted that there was a need for a new model parentage law due to inconsistent interpretations of the UPA (1973) and the increasing prevalence of assisted reproduction in marital and nonmarital families,⁹⁹ only nine states adopted either the original or the revised UPA (2000).¹⁰⁰ Similar to the UPA (1973), the revised UPA (2000) excluded same-sex couples from its AI parentage protections by specifying that the section is only applicable to a couple that includes a “man” and “woman.”¹⁰¹ While the revised UPA (2000) states differ on how they enforce and interpret the AI section of their statutes, at least one state has refused to apply the UPA (2000) to a lesbian nonbiological parent.¹⁰²

90. *Id.* at 163.

91. The nonbiological parent in this case did not actually claim that she was a parent under the AI section of the Washington UPA, but the court still made a point to say that the entire UPA did not apply in this case. *See id.* at 166 n.5.

92. *Id.* at 166. The nonbiological parent also stated claims for relief on the basis of her being the de facto parent of the child. This issue will be discussed later in this Comment.

93. “If a husband provides sperm for, or consents to, assisted reproduction by his wife . . . he is the father of a resulting child born to his wife.” WASH. REV. CODE ANN. § 26.26.710.

94. *L.B.*, 122 P.3d at 169.

95. *Id.*

96. De facto parentage is a common law doctrine discussed below. *See infra* notes 142–74 and accompanying text.

97. *See L.B.*, 122 P.3d at 166–77.

98. *Id.* at 180.

99. UNIF. PARENTAGE ACT prefatory note (2000) (revised 2002).

100. *See sources cited supra* note 87.

101. *See* UPA (2000) § 703.

102. *L.B.*, 122 P.3d at 166 n.5.

3. Gender-Neutral Trends

As discussed above, state parentage statutes often do not directly address the parentage of lesbian or transgender nonbiological parents whose partners conceive children through AI. Recently, however, some courts have applied a gender-neutral interpretation of parentage statutes to oblige a same-sex partner to pay child support, and even to recognize the legal parenthood of same-sex partners.¹⁰³ For example, the New Jersey Parentage Act specifically refers to “husbands” and “wives,” seemingly excluding lesbian and transgender nonbiological parents from its scope.¹⁰⁴ Yet in *In re Parentage of Robinson*, the New Jersey state trial court granted a lesbian nonbiological parent legal parent status despite the statutory exclusion of same-sex couples.¹⁰⁵ The couple established domestic partnership under New York law in 2003 and was married in Canada in 2004.¹⁰⁶ Shortly thereafter, they moved to New Jersey to be closer to family and friends once they started a family.¹⁰⁷

When one of the partners was artificially inseminated, the couple sought a pre-birth order establishing that the nonbiological parent was the second legal parent to the child.¹⁰⁸ Although the New Jersey Parentage Act specifically referred to “husbands” and “wives,”¹⁰⁹ the couple argued that “[t]o deny the children of same-sex partners the security of a legally recognized relationship with their second parent serves no legitimate state interest,” and that construing the AI statute to include same-sex couples would serve the best interest of the child.¹¹⁰ The court noted that the couple had “availed themselves of every legal opportunity open to them to declare they [were] committed domestic partners, a married couple and a dedicated family.”¹¹¹ Taking into account the strong public policy that the state must focus on the best interests of the children, the court held that the child was

103. See, e.g., *Elisa B. v. Superior Court of El Dorado Cnty.*, 117 P.3d 660, 670 (Cal. 2005); *In re Parentage of Robinson*, 890 A.2d 1036, 1042 (N.J. Super. Ct. Ch. Div. 2005); *Shineovich v. Shineovich*, 214 P.3d 29, 40 (Or. Ct. App. 2009).

104. See N.J. STAT. ANN. § 9:17-44 (West 2002).

105. *Robinson*, 890 A.2d at 1042.

106. *Id.* at 1037.

107. *Id.* at 1037-38.

108. *Id.* at 1038.

109. New Jersey adopted the UPA (1973) in 1983. See N.J. STAT. ANN. § 9:17-44 (West 2002).

110. *Robinson*, 890 A.2d at 1038 (quoting the plaintiffs' brief). The couple also argued that if the parentage statute did not apply to a lesbian couple in a domestic partnership, then it violated their equal protection rights under the New Jersey constitution. *Id.*

111. *Id.* at 1041.

born within the circumstances that the AI statute requires¹¹² and granted the nonbiological parent legal parentage.¹¹³

Similarly, in 2005, the Supreme Court of California held that the provision of the California parentage statute—which states that a “*man* is presumed to be the natural *father* of a child” if he receives the child into his home and openly considers the child his own—applies equally to women.¹¹⁴ In *Elisa B. v. Superior Court*, Elisa and Emily were unmarried partners in a committed lesbian relationship who decided to each bear a child through AI and raise the children together in a two-parent family.¹¹⁵ Elisa was to be the primary breadwinner, and Emily was to be the stay-at-home mother.¹¹⁶ Sharing a sperm donor, Elisa gave birth to one child and Emily gave birth to twins.¹¹⁷ After the couple ended their relationship, Elisa refused to pay financial support to Emily and the twins.¹¹⁸ The appellate court held that she had no obligation to pay child support because she was not a parent of the twins within the meaning of the California parentage statute.¹¹⁹

Despite the statute’s inclusion of gender-specific terms, the California Supreme Court held that Elisa was a parent under the statute and required her to pay child support.¹²⁰ The court held that where a nonbiological parent “actively consented to, and participated in, the artificial insemination of her partner with the understanding that the resulting . . . children would be raised by [them] as coparents, and they did act as coparents for a substantial period of time,” the presumption of parenthood applies to the nonbiological parent, regardless of gender.¹²¹ The court noted that “[r]ebutting the presumption that Elisa is the twin’s parent would leave them with only one parent and would deprive them of the support of their second parent,” which would go against the recognized value of “having two parents, rather than one,

112. “As the Artificial Insemination statute requires, we have a child born within the context of a marriage with two spouses, the alternate insemination having been performed by the necessary medical professional.” *Id.* at 1042.

113. *Id.*

114. *Elisa B. v. Superior Court of El Dorado Cnty.*, 117 P.3d 660, 664–65 (Cal. 2005) (emphasis added).

115. *Id.* at 663.

116. *Id.*

117. *Id.*

118. *Id.* at 663–64.

119. *Id.* at 664.

120. *Id.* at 662.

121. *Id.* at 669.

as a source of both emotional and financial support.”¹²² The court deemed Elisa a parent under the California parentage statute.¹²³

In *Shineovich v. Shineovich*, an Oregon appellate court held that that state’s marriage-based AI provision was unconstitutional because it denied parentage based on sexual orientation.¹²⁴ The statute at issue read,

The relationship, rights and obligation between a child born as a result of artificial insemination and the mother’s *husband* shall be the same to all legal intents and purposes as if the child had been naturally and legitimately conceived by the mother and the mother’s *husband* if the *husband* consented to the performance of artificial insemination.¹²⁵

The court concluded that “[t]here appears to be no reason for permitting heterosexual couples to bypass adoption proceedings by conceiving a child through mutually consensual artificial insemination, but not permitting same-sex couples to do so.”¹²⁶ Therefore, the court extended the statute “so that it applies when the same-sex partner of the biological mother consented to the artificial insemination.”¹²⁷

There is also a possible emerging trend in state legislatures of passing new parentage statutes that use gender-neutral language. In 2009, the District of Columbia passed a law conferring the status of legal parent to any nonbiological parent who intends to be a parent to a child born through AI.¹²⁸ Using gender-neutral language, the new law states that a *person* who consents to a woman’s insemination with the intent to be a parent of the resulting child is the parent of the child.¹²⁹ The law also states that “[c]onsent by a woman, and a *person* who intends to be a parent of a child born to the woman by artificial insemination, shall be in writing signed by the woman and the intended par-

122. *Id.*

123. *Id.* at 670.

We conclude, therefore, that Elisa is a presumed mother of the twins under section 7611, subdivision (d), because she received the children into her home and openly held them out as her natural children, and that this is not an appropriate action in which to rebut the presumption that Elisa is the twins’ parent with proof that she is not the children’s biological mother because she actively participated in causing the children to be conceived with the understanding that she would raise the children as her own together with the birth mother, she voluntarily accepted the rights and obligations of parenthood after the children were born, and there are no competing claims to her being the children’s second parent.

Id.

124. *Shineovich v. Shineovich*, 214 P.3d 29, 39–40 (Or. Ct. App. 2009).

125. OR. REV. STAT. § 109.243 (2003) (emphasis added).

126. *Shineovich*, 214 P.3d at 40.

127. *Id.*

128. D.C. CODE ANN. § 16-909 (LexisNexis Supp. 2010).

129. D.C. CODE § 16-909(e)(1) (2008).

ent.”¹³⁰ The law went into effect on July 18, 2009,¹³¹ and is both marital-status neutral and gender neutral.¹³² In the District of Columbia, parentage stems entirely from the intent of the parties as demonstrated through their written consent or behavior.¹³³ New Mexico made a similar revision to the state parentage law, which became effective on January 1, 2010.¹³⁴

As discussed above, some courts have recently begun to apply a gender-neutral interpretation of parentage statutes to enforce child support or grant legal parentage.¹³⁵ These courts have relied on the public policies of the “best interests of the children” and the value of having two parents to ignore gender-specific language in the parentage statutes.¹³⁶ Furthermore, at least two state legislatures have passed new parentage statutes that use gender-neutral language.¹³⁷ While there could be a gender-neutral trend emerging, the majority of states with parentage statutes still use gender-specific language and interpretation.

B. Common Law Doctrines

In many states, lesbian and transgender nonbiological parents are without statutory recourse to preserve their parental rights.¹³⁸ Many courts deny these parents standing to bring claims for parental rights because state parentage statutes do not explicitly cover lesbian or transgender families.¹³⁹ Some nonbiological parents ask the courts to apply “a variety of legal theories” to grant them standing to petition for their parental rights.¹⁴⁰ Two frequently used common law doctrines are *de facto* parenthood and *in loco parentis*.¹⁴¹ However,

130. D.C. CODE § 16-909(e)(1)(A) (emphasis added).

131. 2009 D.C. Laws 18-33.

132. *Id.*

133. See D.C. CODE § 16-909(e)(1)(A)–(B).

134. “A person who provides eggs, sperm or embryos for or consents to assisted reproduction as provided in . . . the New Mexico Uniform Parentage Act with the intent to be the parent of a child is a parent of the resulting child.” N.M. STAT. ANN. § 40-11A-703 (Supp. 2010).

135. See, e.g., *Elisa B. v. Superior Court of El Dorado Cnty.*, 117 P.3d 660, 670 (Cal. 2005); *In re Parentage of Robinson*, 890 A.2d 1036, 1042 (N.J. Super. Ct. Ch. Div. 2005).

136. *Robinson*, 890 A.2d at 1042.

137. D.C. CODE ANN. § 16-909; N.M. STAT. ANN. § 40-11A-703.

138. See *supra* notes 43–102 and accompanying text.

139. See Margaret S. Osborne, Note, *Legalizing Families: Solutions to Adjudicate Parentage for Lesbian Co-Parents*, 49 VILL. L. REV. 363, 376 (2004).

140. *Id.* at 377.

141. While courts have used other common law doctrines, these two are the most common. See *Durkin*, *supra* note 19, at 334–36. The doctrine of equitable parenthood is sometimes applied to heterosexual nonbiological parents’ parental-rights claims. *Id.* at 336. Equitable parenthood recognizes a husband who is not the biological father of a child born to his wife

courts apply vastly different standards for the use of these doctrines, and consequently, nonbiological parents experience vastly different results by jurisdiction.

1. *De Facto Parenthood*

The term “de facto parent” means “parent in fact” and is used to describe a person, with no biological relation to a child, who claims parental rights to that child based on a psychological and functional parent–child relationship.¹⁴² According to the American Law Institute, a de facto parent must have formed a parent–child relationship with the consent of the legal parent and “regularly performed a share of caretaking functions at least as great as that of the parent with whom the child primarily lived.”¹⁴³ If an individual is granted de facto parent status, she has standing to bring custody and visitation claims in a legal proceeding.¹⁴⁴ According to the New Jersey Supreme Court, “At the heart of the [de facto] parent cases is a recognition that children have a strong interest in maintaining the ties that connect them to adults who love and provide for them.”¹⁴⁵

In 1995, the Wisconsin Supreme Court set forth criteria that demonstrate the existence of a psychological parent/de facto parent relationship:

- (1) that the biological or adoptive parent consented to, and fostered, the petitioner’s formation and establishment of a parent-like relationship with the child; (2) that the petitioner and the child lived

during their marriage as the natural father if he meets a certain set of criteria. *Id.* Under the equitable parenthood doctrine, a nonbiological parent may “acquire the rights of [parenthood]” as an equitable parent if

- (1) the husband and the child mutually acknowledge a relationship as father and child, or the mother of the child has cooperated in the development of such a relationship over a period of time prior to the filing of the complaint for divorce, (2) the husband desires to have the rights afforded to a parent, and (3) the husband is willing to take on the responsibility of paying child support.

Atkinson v. Atkinson, 408 N.W.2d 516, 619 (Mich. Ct. App. 1987).

If an individual obtains the status of equitable parent, he or she is a legal parent to the child and the courts will consider the child to have two legal parents when making custody and visitation determinations. See Polikoff, *supra* note 5, at 501. Courts have been hesitant to extend the equitable parenthood doctrine to lesbian or transgender nonbiological parents. Durkin, *supra* note 19, at 336. Because equitable parenthood is currently only used by heterosexual couples, this Comment will not discuss it further.

142. *Janice M. v. Margaret K.*, 948 A.2d 73, 84 (Md. 2008).

143. AMERICAN LAW INSTITUTE, PRINCIPLES OF THE LAW OF FAMILY DISSOLUTION: ANALYSIS AND RECOMMENDATIONS § 203(1)(c) (2002). The definition also notes that the individual must have lived with the child for at least two years and must have performed the caretaking functions for reasons other than financial compensation. *Id.*

144. See Sella, *supra* note 32, at 155.

145. *V.C. v. M.J.B.*, 748 A.2d 539, 550 (N.J. 2000).

together in the same household; (3) that the petitioner assumed obligations of parenthood by taking significant responsibility for the child's care, education and development, including contributing towards the child's support, without expectation of financial compensation; and (4) that the petitioner has been in a parental role for a length of time sufficient to have established with the child a bonded, dependent relationship parental in nature.¹⁴⁶

Some state courts use the Wisconsin criteria to determine *de facto* parentage.¹⁴⁷ Other state legislatures have codified similar criteria for the determination of *de facto* parentage.¹⁴⁸ At least one state only recognizes *de facto* parenthood when the parent is the *primary* caregiver to the child¹⁴⁹ and has parented the child *without* the biological parent.¹⁵⁰ At least four states have recognized the application of the *de facto* parent doctrine to lesbian or transgender nonbiological parents.¹⁵¹

If a nonbiological parent establishes *de facto* parenthood, courts may treat him or her as a parent equal to the biological parent.¹⁵² In *V.C. v. M.J.B.*, the Supreme Court of New Jersey used the *de facto* parent doctrine¹⁵³ to grant a lesbian nonbiological parent standing and

146. *In re Custody of H.S.H.-K.*, 533 N.W.2d 419, 421 (Wis. 1995) (footnotes omitted).

147. *See, e.g., In re Parentage of L.B.*, 122 P.3d 161, 176 (Wash. 2005); *V.C.*, 748 A.2d at 551.

148. *See, e.g., DEL. CODE ANN. tit. 13, § 8-201(c)* (2009). In Delaware, a *de facto* parent (1) [h]as had the support and consent of the child's parent or parents who fostered the formation and establishment of a parent-like relationship between the child and the *de facto* parent; (2) [h]as exercised parental responsibility for the child . . . ; and (3) [h]as acted in a parental role for a length of time sufficient to have established a bonded and dependent relationship with the child that is parental in nature.

Id.

149. KY. REV. STAT. ANN. § 403.270(1)(a) (LexisNexis 2010):

"[D]e facto custodian" means a person who has been shown by clear and convincing evidence to have been the primary caregiver for, and financial supporter of, a child who has resided with the person for a period of six (6) months or more if the child is under three (3) years of age and for a period of one (1) year or more if the child is three (3) years of age or older or has been placed by the Department for Community Based Services.

150. *Mullins v. Picklesimer*, 317 S.W.3d 569, 574 (Ky. 2010) ("It has been held that parenting the child alongside the natural parent does not meet the *de facto* custodian standard in KRS 403.270(1)(a). . . . Rather, the nonparent must 'literally stand in the place of the natural parent.'" (citations omitted)).

151. *See E.N.O. v. L.M.M.*, 711 N.E.2d 886, 891 (Mass. 1999) (holding that a lesbian nonbiological parent may be found to be a *de facto* parent of a child); *V.C. v. M.J.B.*, 748 A.2d 539, 551-53 (N.J. 2000) (holding that a lesbian nonbiological parent may be found to be a *de facto* parent of a child); *L.B.*, 122 P.3d at 177 (holding that a *de facto* parent stands in legal parity with an otherwise legal parent, whether biological, adoptive, or otherwise); *H.S.H.-K.*, 533 N.W.2d at 421 (holding that a lesbian nonbiological parent can be found to be a psychological parent of a child).

152. *See Rohlf, supra* note 20, at 700.

153. Although the New Jersey parentage statute includes a section on AI based on the UPA (1973), the nonbiological parent in *V.C.* did not attempt to use the statute. 748 A.2d at 550.

subsequent visitation rights to twins conceived by her ex-partner through AI.¹⁵⁴ After ending the relationship, the biological parent refused to allow her ex-partner visitation with the children conceived through AI during their relationship.¹⁵⁵ In arguing that the nonbiological parent had no standing to petition for custody or visitation, the biological parent claimed the nonbiological parent was more of a “helper” than a co-parent.¹⁵⁶ The nonbiological parent, however, argued that because the couple made the decision to have children together, prepared for birth together, opened savings accounts for the children together, and functioned as a family unit, she was a co-parent to the children.¹⁵⁷ The court applied the Wisconsin *de facto* parenthood criteria and held that the nonbiological parent was a *de facto* parent of the children.¹⁵⁸ The court found that the biological parent had ceded over a measure of parental authority and autonomy to the nonbiological parent and that the nonbiological parent had a strong parent–child bond with the children.¹⁵⁹ Therefore, a *de facto* parent–child relationship was “voluntarily created by the legally recognized parent” and “may not be unilaterally terminated after the relationship between the adults end[ed].”¹⁶⁰

Among courts that recognize the *de facto* parenthood doctrine, some will only afford a *de facto* parent *partial* parental status or rights. In *Kazmierazak v. Query*, a Florida appellate court held that while a court may apply a *de facto* parenthood doctrine to grant custody or visitation to a nonbiological parent, the doctrine does not give a *de facto* parent rights that are equivalent to a biological parent.¹⁶¹ In-

However, in *Robinson*, the New Jersey Superior Court granted a petition for a pre-birth order establishing the legal parentage of a lesbian nonbiological parent under the artificial insemination section of the parentage statute. 890 A.2d at 1042.

154. *V.C.*, 748 A.2d at 555. The court stated that the biological and nonbiological parents were “essentially equal,” but only granted visitation rights because the nonbiological parent did not seek joint physical custody. *Id.* She did seek joint legal custody for decision making, but the court held that to interject her as a decision maker after four years of separation from that role would “be unnecessarily disruptive for all involved.” *Id.*

155. *Id.* at 544.

156. *Id.* at 543.

157. *Id.* at 542.

158. *Id.* at 555.

159. *Id.* at 552. The court noted that while a legal parent has the “absolute ability to maintain a zone of autonomous privacy for herself and her child,” she “cannot invite a third party to function as a parent to her child” and expect to maintain the *zone of privacy*. *Id.*

160. *Id.*

161. *Kazmierazak v. Query*, 736 So. 2d 106, 110 (Fla. Dist. Ct. App. 1999); *see also* Nancy S. v. Michele G., 279 Cal. Rptr. 212, 216 (Cal. Ct. App. 1991) (stating that the nonbiological parent in a lesbian couple might be entitled to status as a *de facto* parent, but this status does not necessarily entitle her to “the same rights as a parent to seek custody and visitation over the objection of the children’s natural mother”).

stead, the biological parent has superior rights to the nonbiological parent, except when the biological parent's custody would be detrimental to the child.¹⁶²

Other courts will only grant visitation rights under the de facto parentage doctrine to parents and grandparents.¹⁶³ In *Music v. Rachford*, another Florida appellate court dismissed a lesbian nonbiological parent's claim that she was a de facto parent to the child her former partner conceived through AI.¹⁶⁴ When the couple ended their relationship, the biological parent prohibited the nonbiological parent from seeing the child.¹⁶⁵ The appellate court affirmed the dismissal of the nonbiological parent's complaint, holding that although the nonbiological parent helped make the decision to conceive the child, was present during the birth of the child, and helped raise the child, the court had no authority to grant visitation rights to a party who is neither a parent, grandparent, or great-grandparent.¹⁶⁶

Finally, other state courts refuse to recognize claims under the de facto parenthood doctrine at all.¹⁶⁷ In *Jones v. Barlow*, a lesbian couple entered into a civil union¹⁶⁸ and decided to have a child to-

162. *Kazmierazak*, 736 So. 2d at 108.

163. *See, e.g., Music v. Rachford*, 654 So. 2d 1234, 1235 (Fla. Dist. Ct. App. 1995) (per curium).

164. *Id.* at 1234–35.

165. *Id.*

166. *Id.* The court stated that “[v]isitation rights are, with regard to a non-parent, statutory, and the court has no inherent authority to award visitation.” *Id.* (alteration in original) (quoting *Meeks v. Garner*, 598 So. 2d 261 (Fla. Dist. Ct. App. 1992)).

167. *See, e.g., In re Matter of Visitation with C.B.L.*, 723 N.E.2d 316, 320 (Ill. App. Ct. 1999) (holding that Illinois statutory law supersedes the common law doctrines of de facto parentage and *in loco parentis*, and any petition for parental rights must be brought under the relevant Illinois statutes); *Janice M. v. Margaret K.*, 948 A.2d 73, 74 (Md. 2008) (holding that Maryland law does not recognize de facto parenthood); *Alison D. v. Virginia M.*, 572 N.E.2d 27, 29 (N.Y. 1991) (holding that because the legislature did not recognize de facto parentage, a lesbian nonbiological parent could not use the doctrine to attempt to assert parental rights); *In re Thompson*, 11 S.W.3d 913, 923 (Tenn. Ct. App. 1999) (holding that a nonparent who is not and has not been married to either of the children's parents does not have a statutory, common law, or constitutional right to visitation as a de facto parent); *Titchenal v. Dexter*, 693 A.2d 682, 685 (Vt. 1997) (finding that there is no history in Vermont of interfering with the rights and responsibilities of fit parents absent statutory authority, and declining to do so through the de facto parent doctrine or the *in loco parentis* doctrine); *Stadter v. Siperko*, 661 S.E.2d 494, 499 (Va. Ct. App. 2008) (finding that no appellate court in Virginia ever applied the de facto parent doctrine and declining to do so).

168. *Jones v. Barlow*, 154 P.3d 808, 810 (Utah 2007). In 2006, the Vermont Supreme Court took a different approach to the parentage determination of a nonbiological parent in a civil union. The court affirmed a family court's grant of parental status to a nonbiological parent in a civil union with the biological parent, relying on the intent of the parties to raise the child together and the joint participation in creating the child through AI. *Miller-Jenkins v. Miller-Jenkins*, 912 A.2d 951, 970 (Vt. 2006). The court stated, “[T]he couple's legal union at the time of the child's birth is extremely persuasive evidence of joint parentage.” *Id.* at 971.

gether through AI.¹⁶⁹ Two years after their daughter was born, the couple decided to end their relationship.¹⁷⁰ The nonbiological parent brought suit seeking custody and visitation, claiming she had standing under the common law doctrine of *in loco parentis*.¹⁷¹ The Supreme Court of Utah stated that the nonbiological parent was asking the court to apply the de facto parentage doctrine and refused to “judicially create visitation rights” by adopting the doctrine.¹⁷² While the court recognized that a nonbiological parent may have a strong relationship with a child, it refused to “subtract from the legal parent’s right to direct the upbringing of her child” based on “‘elusive factual determinations’ as to whether she intended to relinquish those rights to a third party.”¹⁷³ Although the court stated that there were principled arguments for adopting a de facto parent doctrine, it noted that these reasons were policy based and that making social policy is a job for the legislature.¹⁷⁴

2. *Standing In Loco Parentis*

In loco parentis is the legal status of a person who assumes parental responsibilities but is neither the biological nor legal parent of a child.¹⁷⁵ *In loco parentis* “literally means ‘in the place of a parent,’ and refers to a party ‘[a]cting as a temporary guardian of a child.’”¹⁷⁶ The *in loco parentis* doctrine is most frequently used to grant visitation rights to a stepparent after a dissolution of the stepfamily.¹⁷⁷ However, some courts have extended the doctrine to grant visitation rights to same-sex nonbiological parents after the termination of the same-sex relationship.¹⁷⁸ To stand *in loco parentis* to a child, a nonbiological parent must (1) assume the status of the parent and (2) discharge parental duties.¹⁷⁹ Unlike the de facto parent doctrine, the *in loco parentis* doctrine does not require an individual to function as a

169. *Jones*, 154 P.3d at 810.

170. *Id.*

171. *Id.*

172. *Id.* at 815. The court also refused to apply the *in loco parentis* doctrine because the termination of the *in loco parentis* relationship also terminates the corresponding parent-like rights and responsibilities. *Id.* at 812.

173. *Id.* at 816 (quoting *Van v. Zahorik*, 575 N.W.2d 566, 570 (Mich. Ct. App. 1997)).

174. *Id.* at 817.

175. *T.B. v. L.R.M.*, 786 A.2d 913, 916 (Pa. 2001).

176. *Janice M. v. Margaret K.*, 948 A.2d 73, 84 n.8 (Md. 2008) (alteration in original) (quoting BLACK’S LAW DICTIONARY 791 (7th ed. 1999)).

177. See *Sella*, *supra* note 32, at 156.

178. See, e.g., *T.B.*, 786 A.2d at 914.

179. *Id.* at 916–17.

child's psychological parent.¹⁸⁰ Instead, it only requires that the individual assume functional parental duties.¹⁸¹ If an individual obtains *in loco parentis* standing to a child, a court may grant her limited parental rights to that child.¹⁸²

Applications of the *in loco parentis* doctrine to nonbiological parents of children conceived through AI vary greatly by jurisdiction. Some states recognize the application of the *in loco parentis* doctrine to lesbian or transgender nonbiological parents' custody or visitation rights.¹⁸³ In *T.B. v. L.R.M.*, the Supreme Court of Pennsylvania held that a lesbian partner who established that she assumed a parental status and completed parental duties with the consent of the biological parent had standing *in loco parentis* to bring action for partial custody.¹⁸⁴ In arguing against the nonbiological parent's standing, the biological parent noted that under Pennsylvania case law, same-sex marriage and adoption by a parent's same-sex partner was prohibited.¹⁸⁵ She argued that because the nonbiological parent could never legally adopt the child, she could not "assume the obligations of a 'lawful parent.'"¹⁸⁶ However, the court held that the "ability to marry the biological parent and the ability to adopt the subject child have never been and are not now factors in determining whether the third party assumed a parental status and discharged parental duties."¹⁸⁷ The biological parent consented to and facilitated the nonbiological parent's parental relationship with the child, and the nonbiological parent assumed a parental status.¹⁸⁸ Therefore, the court found that the nonbiological parent stood *in loco parentis* to the child and had standing to seek partial custody for purposes of visitation.¹⁸⁹

Other courts have only applied the *in loco parentis* doctrine within the context of a marriage. In 1999, a Florida appellate court ad-

180. Sella, *supra* note 32, at 156.

181. *Id.*

182. See Durkin, *supra* note 19, at 335 (stating that courts often limit "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").

183. See, e.g., *In re Parentage of A.B.*, 837 N.E.2d 965, 967 (Ind. 2005) (holding that Indiana courts have the authority to determine whether a nonbiological parent has the rights and obligations of a parent, and to protect the "social, psychological, cultural, and biological considerations that significantly benefit the child"); *J.A.L. v. E.P.H.*, 682 A.2d 1314, 1322 (Pa. 1996) (holding that a lesbian nonbiological parent had standing *in loco parentis* to bring action for partial custody).

184. *T.B.*, 786 A.2d at 914.

185. *Id.* at 918.

186. *Id.*

187. *Id.* at 918-19.

188. *Id.* at 919.

189. *Id.* at 920.

dressed the *in loco parentis* doctrine as it applied to a lesbian nonbiological parent.¹⁹⁰ In *Kazmierazak v. Query*, the nonbiological parent claimed that she stood *in loco parentis* to the child conceived by her ex-partner, and thus she should be granted parental rights to the child.¹⁹¹ The court held that although the Florida courts applied the *in loco parentis* doctrine to find that a nonbiological parent has an obligation of support, the doctrine applies “only in the context of a marital relationship.”¹⁹² Because the nonbiological parent and biological parent in this case were not married, the court held that the doctrine was inapplicable.¹⁹³

Other courts have held that a nonbiological parent can only stand *in loco parentis* to a child when the nonbiological parent and child are currently living together.¹⁹⁴ In *White v. White*, the nonbiological parent, Leslea, argued that she had standing to bring action based on her *in loco parentis* relationship to her nonbiological child because she and the biological parent, Michelle, “jointly raised the children with each other’s consent, and treated each child, and held each child out to the world, as the children of both of them.”¹⁹⁵ Although Leslea was no longer living with the child, she claimed that she stood *in loco parentis* to the child.¹⁹⁶ The Missouri appellate court interpreted the *in loco parentis* doctrine to follow the same rules as the stepparent parental rights statute in Missouri, which states that “a stepparent shall support his or her stepchild . . . so long as the stepchild is living in the same home as the stepparent.”¹⁹⁷ Therefore, the court held that even if Leslea stood *in loco parentis* to the child while the couple lived together, “that status terminated when they separated.”¹⁹⁸

Finally, some courts have refused to adopt the *in loco parentis* doctrine at all.¹⁹⁹ In *In re Visitation with C.B.L.*, an Illinois appellate

190. *Kazmierazak v. Query*, 736 So. 2d 106, 107 (Fla. Dist. Ct. App. 1999).

191. *Id.* at 109.

192. *Id.* at 110.

193. *Id.*

194. *White v. White*, 293 S.W.3d 1, 16 (Mo. Ct. App. 2009); *see also* *Jones v. Barlow*, 154 P.3d 808, 815 (Utah 2007) (“While Jones may have stood *in loco parentis* to the child during the time she was actually living with her and providing for her care, her *in loco parentis* status terminated when Barlow and the child moved out. According to common law principles, Jones does not have standing to extend the *in loco parentis* relationship against Barlow’s wishes.”).

195. *White*, 293 S.W.3d at 15.

196. *Id.* at 6–7.

197. MO. REV. STAT. § 453.400 (2000).

198. *White*, 293 S.W.3d at 16.

199. *See, e.g., In re Visitation with C.B.L.*, 723 N.E.2d 316, 321 (Ill. App. Ct. 1999) (holding that Illinois statutory law supersedes the common law doctrines of *de facto* parentage and *in loco parentis* and any petition for parental rights must be brought under the relevant Illinois statutes); *Titchenal v. Dexter*, 693 A.2d 682, 685 (Vt. 1992) (finding that there was no history in Vermont

court held that a lesbian nonbiological parent could not assert standing to petition for visitation under the common law doctrine of *in loco parentis* or de facto parentage.²⁰⁰ The nonbiological parent was in a long-term lesbian relationship with the biological parent, and the child was conceived via AI and born during their relationship.²⁰¹ For the first year and a half of the child's life, the couple raised the child together as a family.²⁰² After the couple ended their relationship, the biological parent cut off all communication between the child and the nonbiological parent.²⁰³ The nonbiological parent claimed that she had standing to petition for visitation of the child under the common law doctrines of de facto parentage and *in loco parentis*.²⁰⁴ The court, however, held that the Marriage Act superseded the common law visitation doctrines in Illinois and that any standing must be found within the specific provisions of that Act.²⁰⁵ Because the nonbiological parent conceded that she did not have standing under the Act, the court affirmed the dismissal of her petition.²⁰⁶

C. *Second-Parent Adoption*

While this Comment focuses on the current means for lesbian and transgender nonbiological parents to assert their parental rights *after* the deterioration of a relationship, it is worth noting that lesbian or transgender nonbiological parents may attempt to sidestep the issues associated with statutory or common law remedies through second-parent adoption.²⁰⁷ In a second-parent adoption, "a child born to one partner is adopted by his or her nonbiological or non-legal second parent, with the consent of the legal parent, and without changing the latter's rights and responsibilities."²⁰⁸ If the nonbiological parent can adopt the child as a second parent she "stands in parity with the bio-

of interfering with the rights and responsibilities of fit parents absent statutory authority, and declining to do so through the de facto parent doctrine or the *in loco parentis* doctrine).

200. *C.B.L.*, 723 N.E.2d at 321.

201. *Id.* at 317.

202. *Id.*

203. *Id.*

204. *Id.* at 318.

205. *Id.* at 321.

206. *Id.* at 320–21.

207. Ralph Ranalli, *A Victory For Gay Mothers, But This Case Called Unique*, BOSTON GLOBE, Aug. 11, 2000, at B1 ("Most lesbian couples who have children through artificial insemination must go through the process of having the non-birth parent legally adopt the child in order to be granted joint custody.").

208. Emily Doskow, *The Second Parent Trap: Parenting for Same-Sex Couples in a Brave New World*, 20 J. JUV. L. 1, 5 (1999).

logical parent and has all the rights and responsibilities that flow from legal parenthood.”²⁰⁹

However, as with the parentage statutes, case law, and common law doctrines, the adoption statutes and case law vary widely by state. While a few states explicitly allow second-parent adoption in their statutes²¹⁰ or case law,²¹¹ one state’s statutes still explicitly prohibit same-sex partners from adopting children.²¹² Other states limit second-parent adoption by allowing the sexual orientation of prospective parents to be considered in adoption proceedings,²¹³ or effectively prohibit second-parent adoption by either requiring the biological parent to relinquish all parental rights before adoption may take place²¹⁴ or limiting second-parent adoption to stepparents or spouses.²¹⁵

The UPA (1973) and the UPA (2000) were created to fill a gap in parentage law for children conceived through AI. Although the Conference intended these model acts to create a uniform parentage law across the country, an examination of state statutes illustrates that parentage laws vary widely across jurisdictions. Furthermore, common law doctrine applications vary greatly by jurisdiction. Therefore, a lesbian or transgender nonbiological parent who is claiming parentage of a child conceived through AI will succeed or fail depending on her state of residence.

209. See Osborne, *supra* note 139, at 369 (citing Susan N. Gary, *The Parent-Child Relationship Under Intestacy Statutes*, 32 U. MEM. L. REV. 643, 660 (2002)).

210. CAL. FAM. CODE § 9000(b) (West 2004 & Supp. 2011); CONN. GEN. STAT. ANN. § 46b-38nn (West 2009 & Supp. 2010) (repealed 2009); VT. STAT. ANN. tit. 15A, § 1-102(b) (2009).

211. See, e.g., *In re Adoption of Tammy*, 619 N.E.2d 315, 318 (Mass. 1993) (holding that a same-sex partner may adopt the child of a legal co-parent in Massachusetts); *In re Adoption of R.B.F. & R.C.F.*, 803 A.2d 1195, 1199, 1202 (Pa. 2002) (holding that although the Pennsylvania statute required that legal parents give up their parental rights in a second-parent adoption, except in the case of stepparent adoptions, the statute also gave the courts discretion to permit adoptions in the best interests of the children when not all of the statutory requirements were met).

212. FLA. STAT. ANN. § 63.042 (West 2005) (repealed 2010). The statute states, “No person eligible to adopt under this statute may adopt if that person is a homosexual.” *Id.*

213. See, e.g., CONN. GEN. STAT. ANN. § 45a-726a (West 2004).

214. See, e.g., *In re Adoption of Cassandra B.*, 540 N.W.2d 554, 559 (Neb. 1995); *In re Angel Lace M.*, 516 N.W.2d 678, 682 (Wis. 1994). “States with statutes of this type tend to construe them to mean that in order for the natural parent’s same-sex partner to adopt the child, the legal parent has to relinquish his or her parental rights, which is obviously not the result that same-sex couples desire.” Laura L. Williams, Note, *The Unheard Victims of the Refusal to Legalize Same-Sex Marriage: The Reluctance to Recognize Same-Sex Partners as Parents Instead of Strangers*, 9 J. GENDER RACE & JUST. 419, 430–31 (2005).

215. Williams, *supra* note 214, at 430–31.

III. ANALYSIS

When a lesbian or transgender couple terminates its relationship, the biological parent may attempt to terminate the nonbiological parent's relationship with the child.²¹⁶ The nonbiological parent has no other choice but to turn to a legal system that currently applies varied principles of law, often with inequitable outcomes for lesbian and transgender families.²¹⁷ With diverse statutes, common law doctrine, and applications across jurisdictions, there is a need for a new, uniform approach to parentage determinations for nonbiological parents.

Section A of this Part illustrates the current system's weaknesses in determining the parentage of nonbiological parents whose ex-partners have conceived children through AI.²¹⁸ Section B of this Part proposes a uniform, equitable solution in the law of contracts that respects both the best interest of the child and the couple's autonomous decision to parent the child together.²¹⁹ Section C of this Part notes the current arguments against using contract principles in a family law context.²²⁰ Section D of this Part establishes that it is legally appropriate to enforce pre-insemination agreements granting legal parentage to a nonbiological parent.²²¹

A. *Weaknesses in Current Approaches*

Courts often reject the lesbian or transgender nonbiological parent's claim of parental rights under the relevant state statute or theories of common law.²²² This "not only disadvantage[s] the non-legal co-parent, but also risk[s] harm to the child by denying the child the stability of a continuing relationship with both of her [parents] without any justification related to the quality of the non-legal co-parent's performance of her parental duties."²²³ This outcome disregards both the best interest of the children and the parents' autonomous decision to co-parent the children. In addition, the current system leads to gross inconsistencies between states and inequitable outcomes for les-

216. See Crary, *supra* note 4.

217. See Jacobs, *supra* note 4, at 348; Williams, *supra* note 214, at 426.

218. See *infra* notes 222–65 and accompanying text.

219. See *infra* notes 266–313 and accompanying text.

220. See *infra* notes 314–28 and accompanying text.

221. See *infra* notes 329–49 and accompanying text.

222. See Jacobs, *supra* note 4, at 344–45; see also Crary, *supra* note 4.

223. E. Gary Spitko, *Reclaiming the "Creatures of the State:" Contracting for Child Custody Decisionmaking in the Best Interests of the Family*, 57 WASH. & LEE L. REV. 1139, 1149 (2000).

bian and transgender families.²²⁴ Therefore, there is “a growing need for clear standards determining parentage for [these] couples.”²²⁵

1. *The Current System Is Not Uniform Across Jurisdictions*

State parentage statutes vary widely across the United States. While some states have adopted the UPA (1973), others adopted the UPA (2000), and still others adopted neither. Furthermore, of those that have adopted a version of the UPA, some modified it before adoption. The different statutes lead to different results across jurisdictions for lesbian and transgender nonbiological parents and their children. Courts also vary in whether they strictly interpret gender-specific language or marriage-specific language in their statutes to exclude lesbian, transgender, or unmarried couples.

The application of common law doctrines to grant legal parentage also varies by state. Some courts allow the use of common law principles, such as *de facto* parentage and *in loco parentis*, when there is no available statutory recourse. Other courts have held that any standing for parental or visitation rights must be found solely within the parentage statutes. Yet even when the courts apply common law doctrines to parentage determinations, some courts only apply common law doctrine within the context of a marriage or cohabitation.

As the Conference recognized when drafting both the UPA (1973) and the UPA (2000), there is a need for consistency in the law across jurisdictions.²²⁶ Yet the various statutory and common law approaches result in vastly different outcomes for similarly situated nonbiological parents seeking custody or visitation of a child conceived through AI. For example, while a lesbian nonbiological parent who signed a pre-insemination agreement to co-parent a child may be granted parental status in California,²²⁷ she would likely be denied parentage in Missouri²²⁸ under the same facts.²²⁹ Because heterosexual, lesbian, and transgender couples “are increasingly choosing to conceive by artificial insemination,” there is a growing need for pre-

224. See Polikoff, *supra* note 5, at 483 (noting that there are “gross inconsistencies across state lines [and] inconsistencies within states” in how courts apply these doctrines).

225. Nilsson, *supra* note 43, at 483 (citing Jacobs, *supra* note 4, at 342).

226. UNIF. PARENTAGE ACT prefatory note, at 1 (2000) (revised 2002); UNIF. PARENTAGE ACT prefatory note, at 1 (1973).

227. See, e.g., *Elisa B. v. Superior Court of El Dorado Cnty.*, 117 P.3d 660, 664 (Cal. 2005).

228. See, e.g., *White v. White*, 293 S.W.3d 1, 11 (Mo. Ct. App. 2009).

229. Although both of these states adopted the UPA (1973), Missouri courts have refused to apply the AI section protections to a lesbian nonbiological parent, while California courts have held that the AI section applies equally to a lesbian nonbiological parent. See *supra* notes 227–28 and accompanying text.

dictable law and precedent on which all nonbiological parents can rely to establish parentage.²³⁰ Although there may be a small but increasing trend of gender-neutral statutes or interpretation, “realistically, legislatures nationwide are not likely to undertake statutory reform of the laws regarding parenthood.”²³¹

2. *The Current System Yields Inequitable Results for Lesbian and Transgender Families*

While many state parentage statutes grant parental status to married or male nonbiological parents of children born via AI, the vast majority of them do not explicitly grant parentage to lesbian or transgender²³² nonbiological parents.²³³ Courts have consistently refused to apply a gender-neutral interpretation to state parentage statutes. In *In re Marriage of Simmons*, an Illinois appellate court held that while the parties were married and signed a pre-insemination agreement to co-parent the child, the AI section of the Illinois Parentage Act²³⁴ does not apply to a transsexual nonbiological parent who has not completed sex reassignment surgery.²³⁵ Because the transsexual nonbiological parent was not legally male, the couple’s marriage was an invalid same-sex marriage.²³⁶ The court noted that the Illinois legislature meant the parentage statute to “apply to ‘husbands’ and ‘wives’ as those terms are ordinarily and popularly understood,” which did not include transsexuals who are in the process of becoming male.²³⁷ Had the nonbiological parent been born a male, or had he completed his sexual reassignment surgery by the time of the legal proceedings, the court would have likely determined he was a legal parent to his nonbiological child under the AI section of the Illinois

230. Meghan Anderson, Note, *K.M. v. E.G.: Blurring the Lines of Parentage in the Modern Courts*, 75 U. CIN. L. REV. 275, 305 (2006).

231. See Sella, *supra* note 32, at 161.

232. See *In re Marriage of Simmons*, 825 N.E.2d 303, 308–09, 311 (Ill. App. Ct. 2005) (refusing to grant parental rights to a transsexual nonbiological parent who had not completed his sex reassignment surgery because he was not considered male under the law).

233. See *supra* notes 43–102 and accompanying text.

234. See 750 ILL. COMP. STAT. 40/3(a) (2008).

235. *Simmons*, 825 N.E.2d at 309–11.

236. *Id.* at 309.

237. *Id.* at 311.

Parentage Act.²³⁸ Instead, the court treated the couple's marriage as invalid and refused to grant parentage to the nonbiological parent.²³⁹

As noted by one court, "no [legitimate] reason exists to provide the children born to lesbian parents through the use of reproductive technology with less security and protection than that given to children born to heterosexual parents through artificial insemination."²⁴⁰ The court went on to state that while the current statutory framework does not explicitly accommodate lesbian families in this situation, "we cannot close our eyes to the legal and social needs of our society."²⁴¹ Courts should apply the same law and principles in AI parentage cases regardless of the gender or sexual orientation of the nonbiological parent.

3. *The Current System Disregards the Parties' Autonomous Decisions to Create Families*

Generally, a couple that chooses to use AI to conceive a child has made a thoughtful, informed decision to bear that child.²⁴² They have invested significant financial resources into conception and have discussed co-parenting the child.²⁴³ As one commentator noted,

238. The court noted in *Simmons* that the AI agreement was invalid regardless of the same-sex marriage because the physician who performed the procedure did not certify the signatures and date of the insemination on the consent agreement. 825 N.E.2d at 311. However, had the nonbiological parent been legally male, he would have retained his right to parentage under the presumption of parenthood in the Illinois Parentage Statute. *Id.* at 312. The court quoted the Illinois Parentage Act:

Section 5 of the Parentage Act . . . states in relevant part:

"(a) 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;

(2) after the child's birth, he and the child's natural mother have married each other, even though the marriage is or could be declared invalid, and he is named, with his written consent, as the child's father on the child birth certificate[.]"

Id. at 311 (alteration in original). However, the court held that this presumption of parenthood did not apply to the transsexual nonbiological parent because it "confers a presumption on a 'man' to be the natural father of a child" and "is based on the premise that the parties who are involved are a man and a woman." *Id.* at 312.

239. *Id.* at 315.

240. *In re Parentage of A.B.*, 818 N.E.2d 126, 131 (Ind. Ct. App. 2004) (alteration in original) (quoting the appellant's brief), *vacated by* King v. S.B., 837 N.E.2d 965, 966 (Ind. 2005).

241. *Id.*

242. Harvey L. Fiser & Paula K. Garrett, *It Takes Three, Baby: The Lack of Standard, Legal Definitions of "Best Interest of the Child" and the Right to Contract for Lesbian Potential Parents*, 15 *CARDOZO J. L. & GENDER* 1, 27 (2008) (citing Michael Hopkins, "What Is Sauce for the Gander Is Sauce for the Goose:" *Enforcing Child Support on Former Same-Sex Partners Who Create a Child Through Artificial Insemination*, 25 *ST. LOUIS U. PUB. L. REV.* 219, 220 (2006)).

243. *See id.*

“[W]hen one is artificially inseminated . . . one acts directly and unambiguously to achieve procreation.”²⁴⁴ Despite the existence of an informed, autonomous decision to parent between two parties, courts have used gender-specific or marital status-specific language in parentage statutes to effectively terminate longstanding parent–child relationships in lesbian or transgender families.²⁴⁵ Courts have also refused to grant lesbian or transgender nonbiological parents their parental rights under the various equitable common law doctrines discussed in the previous Part.²⁴⁶

Judicial refusal to grant parental rights to nonbiological parents who helped make the decision to conceive children, intended to raise the children in a family unit with the biological parents, and fulfilled parental responsibilities since the children’s birth, ignores the parties’ autonomous intentions to create a family.²⁴⁷ As a New Jersey court noted when granting parentage to a nonbiological lesbian parent, the couple had “availed themselves of every legal opportunity open to them to declare they are committed domestic partners, a married couple and a dedicated family.”²⁴⁸ In other words, their intent to create a family together as co-parents was clear. The court also noted that the AI section of the state parentage statute makes clear that parentage determinations are based on intent.²⁴⁹

Courts should not disregard a couple’s autonomous decision to create a family by terminating a healthy parent–child relationship. The nonbiological parent should not be denied her parental rights when she and her partner made the mutual decision to become parents together, simply because she is not biologically tied to the child.²⁵⁰

244. Marjorie Maguire Shultz, *Reproductive Technology and Intent-Based Parenthood: An Opportunity for Gender Neutrality*, 1990 WIS. L. REV. 297, 310.

245. See *supra* notes 43–102 and accompanying text.

246. See *supra* notes 138–206 and accompanying text.

247. See Rachel E. Shoaf, Note, *Two Mothers and Their Child: A Look at the Uncertain Status of Nonbiological Lesbian Mothers Under Contemporary Law*, 12 WM. & MARY J. WOMEN & L. 267, 293 (2005) (citing *Palmore v. Sidoti*, 466 U.S. 429, 434 (1984); *Loving v. Virginia*, 388 U.S. 1, 11–12 (1967)) (“The United States Supreme Court has firmly held that, in family life, individuals should be allowed to direct their families’ own destinies and that prejudice is not a valid reason for disallowing that autonomy.”).

248. *In re Parentage of Robinson*, 890 A.2d 1036, 1041 (N.J. Super. Ct. App. Div. 2005).

249. *Id.* at 1042. “The designation of parent at birth is not limited by the strict definition of paternity. Rather, the individual seeking equal treatment under the Artificial Insemination statute must show indicia of commitment to be a spouse and to be a parent to the child.” *Id.*

250. See, e.g., *Elisa B. v. Superior Court of El Dorado Cnty.*, 117 P.3d 660, 670 (Cal. 2005):

Elisa is a presumed mother of the twins . . . because she received the children into her home and openly held them out as her natural children, and that this is not an appropriate action in which to rebut the presumption that Elisa is the twins’ parent with proof that she is not the children’s biological mother because she actively participated in

Some lesbian or transgender couples go so far as to create pre-insemination parentage agreements, in which both parties agree to parent the resulting child, to settle any future question about legal parentage.²⁵¹ As one commentator notes, “When two competent individuals enter into a decision to start a family and go through the legal processes to ensure that both of them will be considered equal parents to a child under the law, that decision should be binding.”²⁵²

4. *The Current System Disregards the Best Interests of the Child*

Perhaps most importantly, depriving a child of a fit²⁵³ parent disregards the best interest of that child. The lesbian and transgender nonbiological parents in the cases discussed above provided physical, emotional, mental, and financial support to their children, some for many years.²⁵⁴ If, after the termination of the lesbian or transgender couple’s relationship, the biological parent chooses to prohibit visitation between the nonbiological parent and the child, she is depriving the child of a longstanding parent–child relationship.²⁵⁵

The courts consider the best interest of the child to be “paramount and [it] will, at times, take priority over the interest of parents.”²⁵⁶ It is in a child’s best interest, and it is a “compelling state interest,” for a child to have “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.”²⁵⁷ As the Supreme Court of New Jersey stated, “[C]hildren have a strong interest in

causing the children to be conceived with the understanding that she would raise the children as her own together with the birth mother.

251. See, e.g., *In re Marriage of Simmons*, 825 N.E.2d 303, 310 (Ill. App. Ct. 2005).

252. Shoaf, *supra* note 247, at 293.

253. As the United States Supreme Court stated in *Troxel v. Granville*,

[S]o long as a parent adequately cares for his or her children (*i.e.*, is fit), there will normally be no reason for the State to inject itself into the private realm of the family to further question the ability of that parent to make the best decisions concerning the rearing of that parent’s children.

530 U.S. 57, 68–69 (2000) (citing *Reno v. Flores*, 507 U.S. 292, 304 (1993)).

254. See, e.g., *V.C. v. M.J.B.*, 748 A.2d 539, 555 (N.J. 2000) (“[The nonbiological parent] and [the biological parent] are essentially equal. Each appears to be a fully capable, loving parent committed to the safety and welfare of the twins.”); *In re Parentage of L.B.*, 122 P.3d 161, 164 (Wash. 2005) (“[T]he trial judge found that ‘there is a substantial relationship between [the nonbiological parent] and the child in this case’ and that ‘both parties care deeply’ for the child.”).

255. See, e.g., *Elisa B.*, 117 P.3d at 669 (“Rebutting the presumption that Elisa is the twin’s parent would leave them with only one parent and would deprive them of the support of their second parent.”).

256. *In re Parentage of Robinson*, 890 A.2d 1036, 1042 (N.J. Super. Ct. Ch. Div. 2005).

257. *Elisa B.*, 117 P.3d at 669; see also *Robinson*, 890 A.2d at 1038.

In *Robinson*, the New Jersey Superior Court stated,

maintaining the ties that connect them to adults who love and provide for them. That interest, for constitutional as well as social purposes, lies in the emotional bonds that develop between family members as a result of shared daily life.”²⁵⁸ Another court noted that the AI section of the state parentage statute “has as its underpinning the interest in identifying a child’s [second] parent *for the benefit of the child* and, secondarily, to repose financial responsibility upon that parent rather than upon the citizenry.”²⁵⁹

If a child has two fit, loving parents, it is beneficial for that child to maintain relationships with both of those parents, regardless of their sexual orientation.²⁶⁰ For this reason, courts should extend the best interest of the child principle to all families, regardless of the sexual orientation of the parents. An appellate court in Indiana noted,

[The courts’] paramount concern should be with the effect of our laws on the reality of children’s lives. It is not the courts that have engendered the diverse composition of today’s families. It is the advancement of reproductive technologies and society’s recognition of alternative lifestyles that have produced families in which a biological, and therefore a legal, connection is no longer the sole organizing principle. But it is the courts that are required to define, declare and protect the rights of children raised in those families, usually upon their dissolution.²⁶¹

Yet despite the well-established public policy of the child’s best interest taking precedent over other interests, children of lesbian and transgender parents are often denied the benefit of two fit parents, which goes against the children’s best interests.²⁶²

Some courts use common law doctrine to establish the parentage of lesbian or transgender nonbiological parents in order to serve the best

Arguably, the benefits to a child of having two legal parents are numerous and would certainly include economic security such as the right to support, the right to inherit by intestacy . . . , and the right to inherit free of the fifteen percent New Jersey inheritance tax. Additionally, the child would be eligible for health insurance as a dependent . . . and would be entitled to insurance and social security benefits in the event of [the nonbiological parent’s] death.

890 A.2d at 1038.

258. *V.C.*, 748 A.2d at 550.

259. *Robinson*, 890 A.2d at 1042 (emphasis added).

260. The American Psychological Association (APA) publicly supports two-parent gay and lesbian families. “Research and clinical experience indicate that when children have been raised from birth or an early age by lesbian couples, co-parent adoption will ordinarily provide significant psychological and social benefits to them and therefore will ordinarily be in their best interests.” Brief for the American Psychological Association as Amici Curiae, *In re Adoption of Luke*, 640 N.W.2d 374 (Neb. 2002) (No. S-01-0053).

261. *In re Adoption of K.S.P.*, 804 N.E.2d 1253, 1259 (Ind. Ct. App. 2004) (quoting *In re Adoption of B.L.V.B. & E.L.V.B.*, 628 A.2d 1271, 1276 (Vt. 1993)).

262. See *supra* notes 43–206 and accompanying text.

interests of the children.²⁶³ As the Supreme Court of Washington stated, the Washington legislature intended “a strong presumption in favor of parental involvement, fostering and protecting a child’s significant relationships” when creating the legal visitation system.²⁶⁴ The “best interest of the child is ordinarily served when the existing pattern of interaction between a parent and child is altered only to the extent necessitated by the changed relationship of the parents or as required to protect the child from physical, mental, or emotional harm.”²⁶⁵ As the Washington court noted, cutting ties between a child and her nonbiological parent, whom she has known to be her parent all her life, goes directly against her interest in maintaining familial relationships.

While courts almost always grant legal parent status to heterosexual nonbiological parents of children conceived through AI through parentage statutes or common law doctrine, they often deny legal parent status to similarly situated lesbian or transgender nonbiological parents. These nonbiological parents then lack standing to seek custody or visitation with the minor children, despite their intentions and actions to parent the children. This discrepancy results in a lack of uniformity in parentage decisions, is inequitable, ignores the autonomy of the parties, and disregards the child’s best interests. There is a need for a new approach that can and will be applied to all nonbiological parents, regardless of their sexual orientation or gender identity.

B. A Solution in the Law of Contracts

Without reliable statutory or common law recourse, lesbian and transgender couples may sign pre-insemination contracts to attempt to “mitigate the effects of uncertain legal consequence of AI.”²⁶⁶ These contracts establish that the sperm donor is not a parent to the resulting child.²⁶⁷ They also establish that the biological parent’s partner, or

263. See, e.g., *T.B. v. L.R.M.*, 786 A.2d 913, 917–18 (Pa. 2001) (quoting *J.A.L. v. E.P.H.*, 682 A.2d 1314, 1319–20 (Pa. Super. Ct. 1996)); see also *In re Parentage of L.B.*, 122 P.3d 161, 166 (Wash. 2005) (“Washington courts have consistently invoked their equity powers and common law responsibility to respond to the needs of children and families in the face of changing realities.”).

264. *L.B.*, 122 P.3d at 172.

265. *Id.* at 173.

266. *Fiser & Garrett*, *supra* note 242, at 19.

267. *Id.* at 20. However, as noted by this Comment, the UPA (2000) provides, “[T]he rights of a donor are often clearly expressed by legislation, as the ‘donor is not a parent of a child conceived by means of assisted reproduction.’” *Id.* (citing UNIF. PARENTAGE ACT § 702 (2000) (revised 2002)).

the nonbiological parent, is an equal co-parent to the resulting child.²⁶⁸

Many state courts hold that the existence of these pre-insemination agreements, or even an oral agreement, can establish a nonbiological parent's legal parentage.²⁶⁹ A grant of legal parentage to a nonbiological parent simultaneously grants parental rights and responsibilities.²⁷⁰ It also grants a *child* the right to receive various types of parental support from that nonbiological parent.²⁷¹ Although some courts argue that contract principles have no place in parentage decisions,²⁷² courts should reconceive contract principles as applicable to parentage determinations, especially in the case of assisted reproductive technology where the intent of the parties plays a key role in the creation of a family.

Courts should rely on pre-insemination parentage contracts to determine a party's legal parentage, regardless of the nonbiological parent's gender or marital status.²⁷³ The future biological and nonbiological parents—private parties to the contracts—enter into these agreements in order to illustrate their intentions to parent their children together.²⁷⁴ The agreements also illustrate the parents' inten-

268. *Id.* at 20–21.

269. *See, e.g.,* *Elisa B. v. Superior Court of El Dorado Cnty.*, 117 P.3d 660, 670 (Cal. 2005) (“As we noted in the context of a husband who consented to the artificial insemination of his wife using an anonymous sperm donor, but later denied responsibility for the resulting child: ‘One who consents to the production of a child cannot create a temporary relation to be assumed and disclaimed at will, but the arrangement must be of such character as to impose an obligation of supporting those for whose existence he is directly responsible.’”) citing *People v. Sorensen*, 437 P.2d 495, 499 (Cal. 1968)); *In re Parentage of G.E.M.*, 890 N.E.2d 944, 954 (Ill. App. Ct. 2008) (“The Act allows that fatherhood is not always created by pure genetics. Consent is as legally binding on a parent as a DNA determination when that unconditional acceptance of the role of parent is voluntarily accepted for purposes of an adoption or a voluntary acceptance of paternity.”); *L.M.S. v. S.L.S.*, 312 N.W.2d 853, 855 (Wis. Ct. App. 1981) (“We hold that a husband who, because of his sterile condition, consents to his wife’s impregnation, with the understanding that a child will be created whom they will treat as their own, has the legal duties and responsibilities of fatherhood, including support.”).

270. *See, e.g.,* *Melanie B. Jacobs, Why Just Two? Disaggregating Traditional Parental Rights and Responsibilities to Recognize Multiple Parents*, 9 J. L. & FAM. STUD. 309, 314 (2007) (“Legal parentage entitles a parent to all the rights, responsibilities, privileges, and benefits of parentage. Lack of parental status often renders other adults as legal strangers without standing or recourse to establish or maintain a relationship with a child.”).

271. *See, e.g.,* 750 ILL. COMP. STAT. 45/1.1 (2008) (“Illinois recognizes the right of every child to the physical, mental, emotional and monetary support of his or her parents under this Act.”).

272. *See, e.g.,* *T.F. v. B.L.*, 813 N.E.2d 1244, 1251 (Mass. 2004).

273. *See Fiser & Garrett, supra* note 242, at 20 (“One strategy for mitigating judicial bias and clearly establishing intentionality has been a two-step contract to ensure the rights of co-parents. . . . [T]he first step includes terminating the parental rights of the donor, and the second step involves providing rights to the nonbiological co-parent. . . .” (citing *Durkin, supra* note 19, at 342)).

274. *Id.*

tion to give the child the benefit of both parents' support. As required by the UPA (1973), the supervising physician may certify these agreements.²⁷⁵ When a biological parent terminates the child's relationship with the nonbiological parent, she is breaching the pre-insemination contract by denying the child his right to the support of his nonbiological parent. As third-party beneficiaries to the agreements, the children should be able to bring an action against the breaching parties for specific performance of the pre-insemination contracts.

First, before an agreement is "deemed a third party beneficiary contract, it must . . . be deemed a contract."²⁷⁶ To create a valid contract, the parties must have objectively intended to contract and there must have been valid consideration.²⁷⁷ Without the means to reproduce their own biological children, lesbian and transgender couples rely on the principle of intent to establish their families. As noted by several commentators, "There is a distinct difference between parents of a child created by accident during heterosexual intercourse and parents of a child born through AI processes. Most often, a great amount of thought and often significant financial outlay has occurred in AI cases."²⁷⁸ The conscious decision to parent that corresponds with the process of AI is evidence that the parties intended to create a family with a binding pre-insemination agreement.

The question becomes whether there was valid consideration for both parties. To constitute consideration, a performance must be bargained for, or sought by the promisor in exchange for his promise and given by the promisee in exchange for that promise.²⁷⁹ The performance itself "may consist of (a) an act other than a promise, or (b) a forbearance, or (c) the creation, modification, or destruction of a legal relation."²⁸⁰ If the contract lacks consideration, it is not a valid and enforceable contract.²⁸¹ The contracting parties, not the third-party beneficiaries, must supply the requisite consideration.²⁸²

275. UNIF. PARENTAGE ACT § 5(a) (1973) ("The physician shall certify their signatures and the date of the insemination, and file the husband's consent with the [State Department of Health], where it shall be kept confidential and in a sealed file." (alteration in original)).

276. 13 SAMUEL WILLISTON & RICHARD A. LORD, A TREATISE ON THE LAW OF CONTRACTS § 37:23 (4th ed. 2000); *see also* RESTATEMENT (SECOND) OF CONTRACTS § 309(1) (1981).

277. *See* WILLISTON, *supra* note 276, § 37:23.

278. Fiser & Garrett, *supra* note 242, at 27 (citing Hopkins, *supra* note 242, at 220).

279. RESTATEMENT (SECOND) OF CONTRACTS § 71.

280. *Id.* § 71(3).

281. *See id.* § 71.

282. *See* WILLISTON, *supra* note 276, § 37:23 ("[T]he general rule, adopted by the overwhelming majority of jurisdictions, is that the plaintiff beneficiary is not required to furnish the consideration. So long as there is consideration for the promisor's undertaking, the promise is enforceable by the third party beneficiary." (footnote omitted)).

There is valid consideration between the biological and nonbiological parent in a pre-insemination contract. The parties agree to establish the legal parentage of the nonbiological parent, despite her lack of a biological connection to the child.²⁸³ The biological parent promises to hold her partner as a second, equal parent to the child. The nonbiological parent promises to “assume the duties of parenthood in exchange for the coordinate rights.”²⁸⁴

Parental responsibilities go far beyond financial obligations and include “the obligation to insure the physical, mental, and emotional well-being of the child.”²⁸⁵ The Illinois Supreme Court, for example, recognized these broader rights and responsibilities under the Illinois Parentage Act:

[T]he purpose of [the Illinois Parentage Act] is to further the public policy of Illinois to “recognize[] the right of every child to the physical, mental, emotional and monetary support of his or her parents under this Act.” . . . The provisions of the Parentage Act underscore that the importance of parentage hinges upon the rights and responsibilities that are attendant to the parent and child relationship. As such, the Parentage Act defines the term “parent and child relationship” as “the legal relationship existing between a child and his natural or adoptive parents incident to which the law confers or imposes rights, privileges, duties and obligations.”²⁸⁶

If a court refuses to recognize the parentage of a nonbiological parent, she has “no legal authority to make important medical or educational decisions for [her] children, or to influence religious or moral decisions.”²⁸⁷

The responsibilities attendant to the creation of a parent–child relationship, as detailed above, serve as valid consideration for the pre-insemination contracts. The nonbiological parent is seeking these rights and in exchange, promising to meet these responsibilities for the child. Simultaneously, the biological parent is promising to uphold the nonbiological parent as a legal parent in exchange for the nonbiological parent’s promise to meet all the responsibilities of parentage, including financial responsibilities in case the couple separates. Therefore, as long as the agreement meets all other requirements to constitute a valid contract, it is a contract.

283. See, e.g., UNIF. PARENTAGE ACT § 703 (2000) (revised 2002) (allowing such agreements for a “man” and “woman”); UNIF. PARENTAGE ACT § 5(a) (1973) (allowing such agreements for a “husband” and “wife”).

284. See Durkin, *supra* note 19, at 345.

285. *In re Parentage of G.E.M.*, 890 N.E.2d 944, 953 (Ill. App. Ct. 2008).

286. *J.S.A. v. M.H.*, 863 N.E.2d 236, 246 (Ill. 2007) (second alteration in original) (quoting 750 ILL. COMP. STAT. 45/2 (2008)).

287. See Jacobs, *supra* note 4, at 347.

In Illinois, for example, pre-insemination agreements are mandatory contracts for partners in a married couple and their parentage statuses.²⁸⁸ As the Illinois Supreme Court held in *In re Parentage of M.J.*, “The failure to provide or obtain written consent will preclude a claim for paternity and child support under the Illinois Parentage Act.”²⁸⁹ The nonbiological parent must sign a pre-insemination agreement for each AI procedure completed “under the supervision of a licensed physician” and “acknowledged by both the husband and wife.”²⁹⁰

Second, in order to rely on contract law to establish parentage, the child must show that she is a third-party beneficiary to the contract. While “[a]s a general rule, strangers to a contract acquire no rights under such a contract,” the doctrine of third-party beneficiary contracts is an established exception.²⁹¹ Under this doctrine, “an individual who is not a party to a contract can enforce the contract” if he is a beneficiary of the promise.²⁹² A third person is a beneficiary if “the promisee intends to give the beneficiary the benefit of the promised performance.”²⁹³ If the third party is only an *incidental* beneficiary, he is not a beneficiary with rights under the contract.²⁹⁴ If the third party is an *intended* beneficiary, the promisor has a contract duty to both the promisee and the third party.²⁹⁵ It must appear from the facts and circumstances surrounding the contract that it was made for the direct benefit of the third person.²⁹⁶ Furthermore, “if the beneficiary would be reasonable in relying on the promise as manifesting an intention to confer a right on him, he is an intended beneficiary.”²⁹⁷

In the case of pre-insemination AI agreements, the resulting child is an intended third-party beneficiary to her parents’ contract. One pur-

288. *In re Parentage of M.J.*, 787 N.E.2d 144, 149 (Ill. 2003).

289. *Id.*

290. 750 ILL. COMP. STAT. 40/3 (2008).

291. See WILLISTON, *supra* note 276, § 37:1 (quoting *N. Nat’l Bank v. N. Minn. Nat’l Bank*, 70 N.W.2d 118, 123 (Minn. 1955)).

292. See *id.* (citing RESTATEMENT (SECOND) OF CONTRACTS ch. 14 (1981)).

293. RESTATEMENT (SECOND) OF CONTRACTS § 302(1)(b). The *Restatement (Second)* specifically distinguishes between intended beneficiaries and incidental beneficiaries. *Id.*

294. See RESTATEMENT (SECOND) OF CONTRACTS § 302 & cmt. a; 3 E. ALLAN FARNSWORTH, FARNSWORTH ON CONTRACTS § 10.3 (2d ed. 1998).

295. RESTATEMENT (SECOND) OF CONTRACTS § 305. See also FARNSWORTH, *supra* note 294, § 10.3; WILLISTON, *supra* note 276, § 37:1 (“[T]he third party beneficiary doctrine [also] either dispenses with the need for privity or asserts that privity, by virtue of the party’s status as a third party beneficiary . . .”).

296. See WILLISTON, *supra* note 276, § 37:27. However, “[i]t is not essential to the creation of a right in an intended beneficiary that he be identified when a contract containing the promise is made.” RESTATEMENT (SECOND) OF CONTRACTS § 308.

297. RESTATEMENT (SECOND) OF CONTRACTS § 302 cmt. d.

pose of these contracts is to establish that the biological parent and her partner will both be equal, legal parents to the child.²⁹⁸ The promise indicates, or specifies, that they will both provide physical, emotional, and financial support to the child.²⁹⁹ This agreement directly benefits the child, who receives the support of two parents. Both parents intend to give the child—beneficiary the benefit of the promised performance.³⁰⁰ While the contract might not explicitly state “the resulting child is a direct beneficiary of this agreement,” the language of the contract illustrates that the contract is made with the intention to benefit the child with two sources of parental support.

Once it is established that the AI contract is valid and enforceable and that the child is a third-party beneficiary, the child should be able to bring action for specific performance if one of the parties breaches the contract.³⁰¹ Specific performance is a form of equitable relief that “may be granted after there has been a breach of contract by either nonperformance or repudiation.”³⁰² An order of specific performance “is intended to produce as nearly as is practicable the same effect that the performance due under a contract would have produced.”³⁰³ It often orders a party who breached his contract duty to perform a specific act that was promised in the contract.³⁰⁴ The order may be directed at the injured party as well, if appropriate to achieve justice.³⁰⁵ A court may also grant relief by ordering an injunction against the violation of a negative promise.³⁰⁶

Courts grant specific performance of a contract duty at their discretion and generally will only grant equitable relief if damages are inadequate to protect the expectation interest of the injured party.³⁰⁷ For

298. See Fiser & Garrett, *supra* note 242, at 27.

299. See *id.* at 20.

300. See Shultz, *supra* note 244, at 351. Shultz states,

Enforcing reproductive and parental agreements would make such commitments binding at an earlier stage than is now typical. However, the fact that the intentions at issue here are formed before any child is conceived—that the expectations and reliance include the very creation of the child itself—suggests that there are strong reasons to accept an earlier cutoff point.

Id.

301. See FARNSWORTH, *supra* note 294, § 10.7.

302. *Id.* § 12.5.

303. RESTATEMENT (SECOND) OF CONTRACTS § 357 cmt. a (1981).

304. *Id.* § 357.

305. See FARNSWORTH, *supra* note 294, § 12.5.

306. See WILLISTON, *supra* note 276, § 67:53.

307. See RESTATEMENT (SECOND) OF CONTRACTS § 357; see also FARNSWORTH, *supra* note 294, § 12.6. According to Williston, there are six factors that may affect the granting or denial of specific performance:

- (1) [T]here must be no adequate remedy at law;
- (2) there must be a contract sufficiently explicit and certain to warrant enforcement;

example, damages may be insufficient “because the subject matter of the contract is so unique or of such a special nature that it resists translation into quantitative terms” or “because it is impossible to arrive at a legal measure of damages at all, or at least with any sufficient degree of certainty.”³⁰⁸

As third-party beneficiaries, children conceived through AI should be entitled to specific performance of pre-insemination contracts. The biological parent may breach the contract by terminating the child’s relationship with the nonbiological parent when the relationship between the two parents ends.³⁰⁹ If the biological parent refuses to allow the child to have a relationship with the nonbiological parent, damages are an inappropriate remedy for breach of the pre-insemination parentage agreement because the loss of a parent’s emotional and mental support cannot be substituted for dollars.³¹⁰ The only remedy that can protect a child’s interest in maintaining the support of his nonbiological parent is specific performance.³¹¹

The performance of sharing custody or visitation, or securing the “performance of promises regarding who will be the parent” are “relatively easy for a court to supervise . . . [because] legal designation of parental status is directly within the law’s control.”³¹² Therefore, “an order specifically to perform—together with an order declaring legal parental status according to the terms of the agreement—may well be appropriate.”³¹³ As a third-party beneficiary to the pre-insemination parentage agreement, the child should be able to bring an action under the contract to stop the biological parent from denying the par-

(3) the consideration underlying the contract must be adequate and not disproportionate;

(4) enforcement must not result in undue hardship;

(5) the decree must not be futile, as where performance is impossible; and,

(6) the suit must be timely; that is, the parties seeking enforcement must not be guilty of laches.

WILLISTON, *supra* note 276, § 67:62 (footnotes omitted).

308. *See* WILLISTON, *supra* note 276, § 67:8.

309. *See* Sella, *supra* note 32, at 162–63.

310. *Accord id.* Sella states,

Ordinarily, in the event of a contract breach, money damages are awarded. Yet, in the area of a parent-child relationship, a monetary remedy would be inappropriate. Money would not compensate for the loss of a parent-child relationship nor make the breached party whole. Thus, should the relationship between the mothers end and a breach of the parental rights agreement occur, the appropriate remedy would be specific performance in the form of shared custody or visitation.

Id.

311. *Accord id.* at 163.

312. Shultz, *supra* note 244, at 365.

313. *Id.* at 368.

entage (and corresponding rights and responsibilities) of the nonbiological parent.

C. Arguments Against Using Contract Principles in Family Law

While some state statutes assert that pre-insemination private contracts between the intended parents shall determine parentage, “enforceability remains the problem.”³¹⁴ First, some biological parents have argued that nonbiological parents should not be granted parental status through a pre-insemination contract due to the public policy of judicial deference to the legal parent.³¹⁵ Federal and state law both “give significant deference to legal parents” to make decisions about the care, custody, and control of their children.³¹⁶

In *Troxel v. Granville*, the U.S. Supreme Court further solidified this public policy when determining whether a child’s grandparents could be granted visitation rights against the wishes of the child’s legal parent.³¹⁷ The Court stated, “The liberty . . . interest of parents in the care, custody, and control of their children [] is perhaps the oldest of the fundamental liberty interests recognized by this Court.”³¹⁸ The Court recognized that the “Due Process Clause of the Fourteenth Amendment protects the fundamental right of parents to make decisions concerning the care, custody, and control of their children,”³¹⁹ and held that so long as the parent is fit, “there will normally be no reason for the State to inject itself into the private realm of the family to further question the ability of that parent to make the best decisions concerning the rearing of that parent’s children.”³²⁰ Therefore, the Court refused to grant the child’s grandparents standing to assert their visitation rights over the wishes of the legal parent.³²¹ Relying on *Troxel*, some courts have held that a contract for custody or visitation rights between a legal parent and a non-legal parent cannot su-

314. Fiser & Garrett, *supra* note 242, at 22.

315. See, e.g., *In re Parentage of L.B.*, 122 P.3d 161, 177 (Wash. 2005) (“[The biological parent] asserts the recognition of [the nonbiological parent] as a *de facto parent* . . . violates [the biological parent’s] constitutionally protected liberty interest to care for and control her child without unwarranted state intervention . . .”).

316. Jacobs, *supra* note 4, at 348. Jacobs notes that “[i]n their attempts to seek legal recognition of their parenthood and to maintain contact with their children, lesbian coparents have been treated as third parties. . . . [B]y categorizing lesbian coparents as mere third party petitioners or ‘legal strangers,’ courts overlook the actual parental relationship that has been established.” *Id.* at 349–50.

317. *Troxel v. Granville*, 530 U.S. 57, 60 (2000).

318. *Id.* at 65.

319. *Id.* at 66.

320. *Id.* at 68–69.

321. *Id.* at 73.

persede the policy of deference to the legal parent.³²² This “strong parental preference in custody cases has hurt the claims of legally unrecognized parents in planned lesbian and gay families.”³²³

Second, courts will often refuse to “enforce provisions concerning parentage of a child” because they consider it “abhorrent to public policy” to use contract law in parentage determinations.³²⁴ One court stated that “the decision to become, or not to become, a parent is a personal right of ‘such delicate and intimate character that direct enforcement . . . by any process of the court should never be attempted.’”³²⁵ Therefore, even if a clear pre-insemination parentage contract exists, some courts ignore the agreement and rely solely on the state’s parentage statutes or common law doctrine to make a parentage determination.³²⁶ As one commentator noted, some courts resist applying the impersonal, marketplace rules of contract to the family.³²⁷ Other courts will only enforce a parentage agreement if they determine that the results are also consistent with the best interest of the child.³²⁸

322. See, e.g., *Wakeman v. Dixon*, 921 So. 2d 669, 671 (Fla. Dist. Ct. App. 2006) (“Florida law does not recognize a claim for specific performance of a contract for visitation with an unrelated third party.”); *T.F. v. B.L.*, 813 N.E.2d 1244, 1250–51 (Mass. 2004).

323. Nancy D. Polikoff, *The Impact of Troxel v. Granville on Lesbian and Gay Parents*, 32 *RUTGERS L.J.* 825, 855 (2001).

324. *Williams*, *supra* note 214, at 428.

325. *T.F.*, 813 N.E.2d at 1250–51 (quoting *A.Z. v. B.Z.*, 725 N.E.2d 1051 (Mass. 2000) (stating that although “[c]ontracts between unmarried same-sex couples concerning the welfare and support of a child stand on the same footing as any other agreement between unmarried cohabitants,” a contract establishing a person’s parental status is unenforceable, and noting that “[p]arenthood by contract” is not the law in Massachusetts)). However, a few years prior, the same court saw “a written coparenting agreement as demonstrative of the biological mother’s consent to and encouragement of the plaintiff’s de facto parental relationship with the child, as well as indicative of the parties’ belief regarding the child’s best interest; hence, the agreement could factor into the judge’s decision regarding visitation.” Deborah L. Forman, *Same-Sex Partners: Strangers, Third Parties, or Parents? The Changing Legal Landscape and the Struggle for Parental Equality*, 40 *FAM. L.Q.* 23, 41 (2006) (citing *E.N.O. v. L.M.M.*, 711 N.E.2d 886, 892 n.10 (Mass. 1999)).

326. See, e.g., *T.F.*, 813 N.E.2d at 1250–51. As noted by commentators, courts should not use the “best interest of the child” standard to determine parentage, but to make custody, visitation, and support determinations after parentage has already been established by the pre-insemination contract. See, e.g., *Fiser & Garrett*, *supra* note 242, at 30.

327. Katharine K. Baker, *Bargaining or Biology? The History and Future of Paternity Law and Parental Status*, 14 *CORNELL J. L. & PUB. POL’Y* 1, 29 (2004) (citing JANET L. DOLGIN, *DEFINING THE FAMILY: LAW, TECHNOLOGY AND REPRODUCTION IN AN UNEASY AGE* 180–81 (1997)). Baker also states, however, that “the law was indisputably comfortable with letting marriage determine paternity. . . . Many children today are conceived by means other than sexual intercourse.” *Id.* at 23. And “[c]ourts . . . almost always use contract to identify the children’s parents.” *Id.* at 26.

328. According to the *Restatement (Second) of Contracts*, “A promise affecting the right of custody of a minor child is unenforceable on grounds of public policy, unless the disposition as to

D. Pre-Insemination Contracts Are an Appropriate Means to Establish Parentage

Judicial hesitation to apply the principles of contract law is a disservice to both lesbian and transgender nonbiological parents and their children. Where a pre-insemination agreement establishes parentage of a nonbiological parent, that agreement is a clear indication that both parties intended for the nonbiological parent to be a legal parent to the child.³²⁹ The child should have the legal right to enforce that agreement and continue to receive the love and support of her nonbiological parent that she has enjoyed throughout her life.

It is appropriate to use contract law to establish parentage of all nonbiological parents, regardless of their gender or marital status. First, the use of contract principles in a family law context does not violate the public policy of parental deference espoused in *Troxel*. Second, courts already commonly use contract law in the family law context, with marriage presumptions, surrogacy agreements, and AI agreements in UPA (1973) or UPA (2000) states.

1. Contract Law Does Not Violate the Public Policy of Parental Deference

The use of contract principles to grant parentage to a nonbiological parent does not interfere with the liberty interest established in *Troxel*. As some courts have recognized, the lesbian and transgender nonbiological parents who seek legal parentage in these cases are not third parties; they are *second parents* to the children at issue.³³⁰ The parental deference principle established in *Troxel* is not used to weigh the competing interests of two parents, but to weigh the interest of a parent more heavily than that of a third party who seeks visitation rights to a child.³³¹ As one commentator stated, “These [lesbian or transgender] nonbiological parents are very different from third par-

custody is consistent with the best interest of the child.” RESTATEMENT (SECOND) OF CONTRACTS § 191 (1981). However, the *Restatement* also notes that “the fact that the person to whom custody is transferred is a *parent* is an important, although not controlling, factor in showing that the transfer is in the interest of the child.” *Id.* § 191 cmt. a.

329. See UNIF. PARENTAGE ACT § 703 (2000) (revised 2002); UNIF. PARENTAGE ACT § 5(a) (1973).

330. See, e.g., *In re Parentage of L.B.*, 122 P.3d 161, 178 (Wash. 2005).

331. *Id.* at 178 (“[A] fit parent’s right vis-à-vis a complete stranger is one thing; her right vis-à-vis another parent or a *de facto* parent may be another.” (quoting *Troxel v. Granville*, 530 U.S. 57 100–01 (2000) (Kennedy, J., dissenting))). The Washington Supreme Court held that “the rights and responsibilities which we recognize as attaching to *de facto* parents do not infringe on the fundamental liberty interests of the other legal parent in the family unit.” *Id.* at 179.

ties in that they actually plan and intend to be a parent to the child, just as heterosexual married couples plan to have a child together.”³³²

Troxel places no “constitutional limitations on the ability of states to legislatively, or through their common law, define a parent or family.”³³³ The parental deference principle cannot be used to prohibit nonbiological (but legal) parents from bringing contract claims for custody or visitation to their children, or to prohibit the children from bringing contract claims for access to their nonbiological parents. Thus, because the nonbiological parents in these cases are not third parties, but second parents, *Troxel* does not apply.

Second, even if *Troxel* did apply, the liberty interest should apply to children as well as parents. As Justice Stevens stated in his dissent in *Troxel*,

While this Court has not yet had occasion to elucidate the nature of a child’s liberty interests in preserving established familial or family-like bonds . . . it seems to me extremely likely that, to the extent parents and families have fundamental liberty interests in preserving such intimate relationships, so, too, do children have these interests, and so, too, must their interests be balanced in the equation. . . . The constitutional protection against arbitrary state interference with parental rights should not be extended to prevent the States from protecting children against the arbitrary exercise of parental authority that is not in fact motivated by an interest in the welfare of the child.³³⁴

If the courts were to recognize the child’s liberty interest in “preserving established familial or family-like bonds,” they would also recognize that this interest is bolstered by the use of contract law to establish parentage. As discussed above, the welfare of the child is implicated when a biological parent terminates a longstanding parental relationship between the child and her nonbiological parent. The child loses an established relationship with a parent, whom she has known her entire life. Children have an undeniable interest in maintaining the support of both of their parents. Contract law enables the child to bring an action for her right to emotional and financial support from her nonbiological parent. Therefore, the use of contract law to establish legal parentage bolsters the child’s interest in maintaining familial relationships and parental support by permitting the child to enforce these rights.

332. Williams, *supra* note 214, at 427.

333. *L.B.*, 122 P.3d at 178; *see also* Polikoff, *supra* note 323, at 834 (“The grandparents in *Troxel* had never assumed a parental role in the children’s lives. Thus, *Troxel* does not define parenthood nor affect the ability of states to do so. Legally unrecognized lesbian mothers are parents. . . . Such recognition . . . guarantees equal status for both parents.”).

334. *Troxel*, 530 U.S. at 88–89 (Stevens, J., dissenting).

2. Courts Currently Use Contract Law to Establish Parentage or Non-Parentage

Arguments that contract law has no place in a family law context ignore the fact that contracts are already relied upon to determine parentage in many situations. Some examples include the presumptions of parenthood that accompanies a marriage, AI contracts, and surrogacy contracts. First, there is a “common law presumption that the husband of a woman who gives birth to a child is the father of the child.”³³⁵ When a couple entered into a marriage, “[they] were [traditionally] agreeing to support and raise any children born to the marriage. Because [they] agreed to raise children, they were bound to be [parents], regardless of whether the children born to the marriage were biologically related.”³³⁶ This presumption may be rebuttable, depending on the state.³³⁷

Second, in some states, sperm donors and heterosexual couples engaging in AI currently rely on contracts to establish their parental statuses. The sperm donor signs a contract disavowing “his rights and obligations as a father. The law honors the sperm donor’s intent not to be a father and the contract in which he makes that intent known.”³³⁸ The male partners of the biological mothers often sign pre-insemination agreements establishing their intentions to be the nonbiological, but legal, parents to the children.³³⁹ Under the UPA and the adoptive states’ statutes, courts recognize these parentage contracts as valid by recognizing male nonbiological parents as legal parents when the couple terminates its relationship.³⁴⁰

Finally, most states also enforce surrogacy contracts, which determine the parentage and non-parentage of the intended parent and the surrogate, respectively.³⁴¹ It is “through the contract, not the genetic contribution, that the ‘intended’ parents acquire their parental rights.”³⁴² In *Johnson v. Calvert*, for example, both the surrogate birth mother and the intended mother “presented acceptable proof of maternity,” so the court stated that legal parentage of the child must be

335. Baker, *supra* note 327, at 12.

336. *Id.* at 25.

337. *Id.* at 12 (citing LESLIE J. HARRIS & LEE E. TEITELBAUM, FAMILY LAW 995–96 (2d ed. 2000) (“Today, all states, by statute or common law, provide that a married woman’s husband is at least rebuttably presumed to be the father of her children.”)).

338. *Id.* at 26.

339. *See id.*

340. *See* UNIF. PARENTAGE ACT § 703 (2000) (revised 2002); UNIF. PARENTAGE ACT § 5(a) (1973).

341. *See* Baker, *supra* note 327, at 26.

342. *Id.*

decided by “enquiring into the parties’ intentions as manifested in the surrogacy agreement.”³⁴³ The court found that all three parties intended to work together to bring the child into the world for the intended parents.³⁴⁴ The birth mother was *never intended* to be the child’s mother.³⁴⁵ The court repeated one commentator’s argument that “[w]ithin the context of artificial reproductive techniques . . . intentions that are voluntarily chosen, deliberate, express and bargained-for ought presumptively to determine legal parenthood.”³⁴⁶ Using these principles, the court relied on the surrogacy contract in this case to hold that the intended parents were the legal parents of the child under California law.³⁴⁷

Contract law is not just an appropriate means to determine parentage; it is a well-established tool in certain family law contexts. Similar to the other contract applications in family law, a pre-insemination parentage “contract between [a] lesbian [or transgender couple] promotes rather than violates public policy by protecting the expectations of the parties and encouraging the formation and stability of families.”³⁴⁸ Therefore, it is appropriate to consider a solution in contract law to the issue of parentage determinations for lesbian and transgender nonbiological parents.

In sum, when a lesbian or transgender couple ends its relationship and the biological parent attempts to terminate the nonbiological parent’s relationship with the child, the nonbiological parent has no other choice but to turn to a legal system that currently applies varied principles of law.³⁴⁹ With often inequitable outcomes for lesbian and transgender persons across jurisdictions, a consistent disregard for the parents’ autonomous decisions to create a family, and a consistent disregard for the best interest of the child, there is a need for a new approach to parentage determinations for nonbiological parents. Under a contractual framework, a child can bring an action as a third-party beneficiary to a pre-insemination contract for specific performance of her nonbiological parent’s support. The courts should recognize contract principles as applicable to the creation of families, and

343. *Johnson v. Calvert*, 851 P.2d 776, 782 (Cal. 1993).

344. *Id.*

345. *Id.*

346. *Id.* at 783 (quoting Shultz, *supra* note 244, at 323).

347. *Id.* at 787. The court discussed possible public policy arguments against enforcement of a surrogacy contract, and held that the enforcement of the contract was not inconsistent with public policy. See *id.* at 783–86.

348. See Sella, *supra* note 32, at 161–62.

349. *Accord Jacobs*, *supra* note 4, at 348; *Williams*, *supra* note 214, at 426.

grant parentage to a child's nonbiological parent through a child's action for the specific performance of the pre-insemination agreement.

IV. IMPACT

The current legal system for determining the parentage status of nonbiological parents in AI cases disproportionately denies children in lesbian or transgender families relationships with one of their parents.³⁵⁰ When a court refuses to recognize a nonbiological parent's standing to petition for custody or visitation due to her gender, marital status, or lack of a biological relation to the child, the child is adversely affected by losing her "involved, nurturing, loving, and supportive parents."³⁵¹ The contractual model for determining parentage would treat children of lesbian or transgender couples the same as children of heterosexual couples that use AI to conceive. Parental intent would govern parentage determinations, and children would no longer be denied the support of their parents due to their parents' gender or marital status.

Section A of this Part illustrates that unlike the current legal system, contract law provides a uniform, equitable solution to the question of nonbiological parentage, respecting both the best interest of the children and the parents' autonomous decision to parent their children together.³⁵² Section B of this Part discusses the substance and implementation of the pre-insemination parentage contracts.³⁵³

A. *Strengths in a Contract Approach to Parentage Determinations*

As discussed above, the current system for determining parentage in AI cases disadvantages both lesbian or transgender nonbiological parents and their children. Courts often reject lesbian or transgender nonbiological parents' claims of parentage under various statutes or common law doctrine, disregarding the parties' autonomous decision to co-parent the children and the best interests of the children. The various statutes and common law doctrines also yield inconsistent and often inequitable results for lesbian and transgender families. The enforcement of AI contracts in parentage determinations would resolve these issues for lesbian or transgender nonbiological parents and their children. The application of contract law in this context would establish a uniform approach across jurisdictions, yield equitable results for

350. See *supra* note 2.

351. Jacobs, *supra* note 4, at 350.

352. See *infra* notes 354–73 and accompanying text.

353. See *infra* notes 374–85 and accompanying text.

all families, respect the parties' autonomous decisions to co-parent, and take into account the best interests of the children.

First, a contract approach to all parentage determinations would alleviate inconsistency in the law by creating uniform standards across jurisdictions, regardless of the parties' gender or marital statuses.³⁵⁴ In most states, lesbian and transgender nonbiological parents cannot rely on state statutes to protect their parentage rights.³⁵⁵ Many courts also do not apply the relevant common law doctrines to same-sex couples, even where they do apply those doctrines to heterosexual couples.³⁵⁶ If, regardless of their jurisdiction, all nonbiological parents were able to rely on the courts to enforce private contracts that clearly indicate their intentions to co-parent children, there would be "[p]redictable and consistent results in every state."³⁵⁷ This "would keep [biological parents] from forum shopping, disrupting families and relocating children in order to obtain a ruling that might preclude the other party from claiming parental rights" and nonbiological parents from doing the same in order to find a jurisdiction that grants them standing to bring custody and visitation claims.³⁵⁸

Second, although the law "provides parental status to heterosexual married" nonbiological parents, "[the] courts refuse to extend the same rights and obligations to members of same-sex couples."³⁵⁹ While some courts cite the gender of lesbian or transgender nonbiological parents as the reason they cannot establish parentage under their statutes or common law doctrines, others cite their marital status.³⁶⁰ Regardless of the reason for the courts' refusal to treat these nonbiological parents differently, it is an inequitable result for lesbian and transgender nonbiological parents and their children. As commentators have noted, "Equity and reason should hold that those parties who joined together with the intent to create a child—whether gay, straight, unmarried, or married—should be allowed to legally protect their interests as legal parents."³⁶¹ The enforcement of pre-insemination parentage contracts would provide an equal opportunity

354. Under the contract approach, courts would determine parentage based on the existence of a pre-insemination contract, regardless of marital status or gender. *See supra* notes 290–348 and accompanying text.

355. *See supra* notes 43–102 and accompanying text.

356. *See supra* notes 139–206 and accompanying text.

357. Horstmeyer, *supra* note 17, at 699–700.

358. *Id.* at 700.

359. Williams, *supra* note 214, at 422.

360. *See, e.g., In re Marriage of Simmons*, 825 N.E.2d 303, 311 (Ill. App. Ct. 2005); *White v. White*, 293 S.W.3d 1, 11 (Mo. Ct. App. 2009).

361. Fiser & Garrett, *supra* note 242, at 28.

for lesbian and transgender nonbiological parents to establish full parental status, regardless of their gender or marital status.

Third, unlike some heterosexual couples who accidentally create a child through intercourse, a couple that uses AI to conceive has generally made the autonomous decision to bear a child and parent that child together.³⁶² A pre-insemination contract can provide a clear indication of a couple's intent to co-parent a child conceived through AI.³⁶³ In fact, some same-sex couples enter into these agreements "to serve as evidence of their intent at the time they decided to have a child, rather than assessing their intent following their separation."³⁶⁴ As one commentator notes, "[B]ecause its terms are drafted specifically for each couple, [a] contract best reflects the wishes of each lesbian [or transgender] couple."³⁶⁵

Some state statutes explicitly take note of the parties' intent to co-parent a child conceived through AI. As noted above, the UPA (2000), which only applies to heterosexual couples, bases parentage determinations on the parties' intent to parent children together. As one commentator stated, "[T]he court's failure to recognize the nonbiological parent in a same-sex couple as a legal parent to the child ignores the fact that he or she consented to the production of the child. This denies the nonbiological parent the parental rights he or she voluntarily assumed"³⁶⁶ Parents, regardless of their gender or marital status, should be able to rely on the courts to enforce their informed and autonomous decisions to parent a child as laid out in their private contracts.³⁶⁷

Fourth, "[t]he law of contracts offers a solution for children raised in lesbian [or transgender] coparent relationships that is consistent with the best interests of those children."³⁶⁸ If the courts enforce pre-insemination agreements establishing the parentage of the nonbiological parent, the child will have access to two parents. It is in a child's best interest to have "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."³⁶⁹

362. *Id.* at 27.

363. *Id.*

364. *See Williams, supra* note 214, at 428.

365. *See Sella, supra* note 32, at 162.

366. *Williams, supra* note 214, at 423.

367. *Accord Fiser & Garrett, supra* note 242, at 30.

368. *Durkin, supra* note 19, at 342.

369. *Elisa B. v. Superior Court of El Dorado Cnty.*, 117 P.3d 660, 669 (Cal. 2005); *see also In re Parentage of Robinson*, 890 A.2d 1036, 1038 (N.J. Super. Ct. Ch. Div. 2005). The New Jersey Superior Court stated,

Terminating the child's relationship with her nonbiological parent does more than remove a source of child support from the child's life; it causes a lack of security and stability.³⁷⁰ As one commentator notes, "Continuity and consistency are fundamental requirements for a child's healthy development."³⁷¹ These concerns are as applicable to children of lesbian and transgender parents as they are to children of heterosexual parents.³⁷² While the current system does not provide a solution for children of same-sex parents consistent with their best interests, enforcing parentage contracts between couples undergoing AI would provide *all* children with the support of both parents.

In the hypothetical situation laid out in this Comment's introduction, the lesbian couple made the decision to have a family together. They expressed their intentions to co-parent their child by signing a pre-insemination parentage agreement. This agreement explicitly stated that both partners would be legal parents to the child. They were their daughter's co-parents for ten years. Yet, when they ended their relationship, the courts denied the ten-year-old girl the support of her nonbiological mother, despite the existence of a private, signed agreement between her parents stating their intentions to co-parent their child together. Had the girl's parents been in a heterosexual relationship, their pre-insemination parentage contract would have been enforceable under the state's parentage laws. The nonbiological mother would have had standing to bring action for the enforcement of the contract, and the child's relationship with her nonbiological mother would have been effectively uninterrupted by the legal system. Instead, the state parentage act's exclusion of same-sex couples "cause[d] the severance of a valued parent-child relationship and force[d] [the] child to lose a person . . . she has known as nothing other than a parent for . . . her entire life."³⁷³

The law of contracts provides the best solution. If the private agreement establishing legal parentage was enforceable in court, the girl would still have the support of and a relationship with her nonbiological mother. Her parents' intentions to create a family and co-parent

Arguably, the benefits to a child of having two legal parents are numerous and would certainly include economic security such as the right to support, the right to inherit by intestacy . . . and the right to inherit free of the fifteen percent New Jersey inheritance tax. Additionally, the child would be eligible for health insurance as a dependent . . . and would be entitled to insurance and social security benefits in the event of [the nonbiological parent's] death.

Robinson, 890 A.2d at 1038.

370. See *Durkin*, *supra* note 19, at 346.

371. *Id.* at 345-46.

372. See *Williams*, *supra* note 214, at 425 (citing *Jacobs*, *supra* note 4, at 375).

373. *Williams*, *supra* note 214, at 425.

their children would be respected. It takes into account what is in her best interest, as she is best served by having access to both of her fit, loving parents. Finally, this is the only equitable result for the nonbiological mother and her daughter. To remove this child's mother from her life simply because her parents were in a same-sex relationship discriminates against her for not being the child of a heterosexual couple.

In sum, the courts, using state statutes and various common law doctrines, often fail to recognize lesbian or transgender nonbiological parents as second parents to children conceived through AI. A contract law solution rightfully provides the children of all parents who use AI—regardless of gender or marital status—with two legal parents to provide support, so long as they both intended to co-parent the child together.

B. *Substance and Implementation of Pre-Insemination Parentage Contracts*

Pre-insemination parentage agreements “are legal documents that a . . . couple uses to explain the rights and responsibilities of each co-parent.”³⁷⁴ The document “should state clearly the parties’ intention that the wife be inseminated . . . [and] that the child so conceived shall be treated as the natural child of the parties.”³⁷⁵ The agreements also bar the donor from bringing a parentage claim. The physician often provides the form, and an attorney for one of the parties may make changes to the standard form.³⁷⁶ In practice, the biological parent, the nonbiological parent, and the supervising physician all often sign the agreement.³⁷⁷

While couples’ pre-insemination parentage contracts will not be identical, *In re Marriage of Simmons* provides an example of an agreement that would have been a legally binding document had the nonbiological partner been legally married to his wife:

“It is further agreed that [at] the moment of conception, the *husband* hereby accepts the act as his own, and agrees:

1. That such child or children so produced are his own legitimate child or children and are heirs of his body; and
2. That he hereby completely waives forever any right which he might have to disclaim such child or children as his own; and

374. Osborne, *supra* note 139, at 370 (citing *Rompala*, *supra* note 6, at 1946).

375. ANN M. HARALAMBIE, *HANDLING CHILD CUSTODY CASES* § 17.03 (1983).

376. *Id.*

377. *Id.*

3. That such child or children so procedure [*sic*] are, and shall be considered to be, in all respects including descent of property, child or children of his own body.”³⁷⁸

However, as a transsexual male who had not yet completed his sex reassignment surgery, the Illinois court found the nonbiological parent legally female.³⁷⁹ Therefore, his marriage to the female biological parent was an invalid same-sex marriage, and the pre-insemination parentage agreement was unenforceable.³⁸⁰

To protect children from losing their relationships with their lesbian or transgender nonbiological parents, pre-insemination agreements should be gender neutral, use the gender of the nonbiological parent, or specifically name the nonbiological partner as the legal co-parent. For example,

It is further agreed that at the moment of conception, [the nonbiological parent] hereby accepts the act as his/her own, and agrees:

1. That such child or children so produced are [his/her] own legitimate child or children and are heirs of [his/her] body; and
2. That [(s)he] hereby completely waives forever any right which [(s)he] might have to disclaim such child or children as [his/her] own; and
3. That such child or children are, and shall be considered to be, in all respects including descent of property, child or children of [his/her] own body.

Had the parties in *Simmons* used the gender-neutral agreement above, the Illinois court would still not be likely to grant the nonbiological parent standing to seek custody or visitation of the child under state law.³⁸¹ The Illinois Parentage Act, which uses the language of the UPA (1973), only protects nonbiological parents that are legally married.³⁸²

However, in states that have gender-neutral statutes or no applicable parentage statutes, courts could enforce the gender-neutral parentage agreement above for a lesbian or transgender couple within state law. In those states with gender-specific parentage statutes, the courts should follow New Jersey and California courts in interpreting those

378. *In re Marriage of Simmons*, 825 N.E.2d 303, 310 (Ill. App. Ct. 2005) (alterations in original) (quoting the parties' agreement).

379. *Id.* at 309.

380. *Id.*

381. The court stated, "It is clear from reading the statute in question that the legislature intended that this statute apply to 'husbands' and 'wives' as those terms are ordinarily and popularly understood." *Id.* at 311.

382. 750 ILL. COMP. STAT. 40/3 (2008).

statutes to include same-sex couples.³⁸³ In *Robinson*, for example, the New Jersey court noted that although the state parentage statute applied only to “husbands” and “wives” on its face, the lesbian couple had clearly demonstrated their intent to parent the child together.³⁸⁴ Therefore, the court granted legal parent status to the nonbiological parent.³⁸⁵

In sum, where the current system fails the children of lesbian and transgender nonbiological parents, contract law should protect them. When the courts consider parties’ pre-insemination agreements to be contracts establishing the legal parentage of the nonbiological parents, they respect the autonomous decisions of those parties to parent, regardless of their marital status or gender. Furthermore, while the contracts may vary slightly by couple, consistent judicial enforcement of these contracts will result in predictable solutions for nonbiological parents. These parents will be able to protect their relationships with their children by entering into pre-insemination parentage agreements before conception. Finally, consistent enforcement of pre-insemination parentage agreements is also in the best interest of the children, who are better served by maintaining relationships with both fit parents.

V. CONCLUSION

In the case of Susan and Jane, the courts denied Jane standing to fight for custody or visitation of Lesley. After ten years of being a parent, Jane was left without means to access her child. This tragic outcome is not uncommon. Courts often deny children conceived through AI in non-heterosexual families the support of their nonbiological parents, even when they would recognize parentage in a heterosexual family with the same fact pattern.

The current system disadvantages same-sex couples and their children. It yields inequitable results for lesbian and transgender families, is far from uniform across jurisdictions, disregards the parties’ autonomous decisions to create families, and most importantly, disregards the best interests of the children in these custody battles. Therefore, there is a need for a more equitable and uniform approach to parentage determinations.

The law of contracts provides that approach. A couple preparing to undergo AI to conceive a child often signs a private pre-insemination

383. See *Elisa B. v. Superior Court of El Dorado Cnty.*, 117 P.3d 660, 664 (Cal. 2005); *In re Parentage of Robinson*, 890 A.2d 1036, 1041 (N.J. Super. Ct. Ch. Div. 2005).

384. *Robinson*, 890 A.2d at 1041.

385. *Id.* at 1042.

agreement establishing the legal parentage of the nonbiological parent. These agreements are valid contracts, illustrating both parents' intentions to grant legal parentage to the nonbiological parent. When Susan terminates the relationship between Jane and Lesley, she breaches that contract. As a third-party beneficiary to a pre-insemination parentage agreement between her biological and nonbiological parents, Lesley should be able to bring an action for specific performance of Jane's financial and emotional support.

Allowing these contracts to be enforceable in court ensures that children like Lesley will no longer be denied parental support, simply because of their parents' gender or marital status. A contract approach is also consistent with the best interest of the children at issue. Instead of being traumatized by the loss of her second mother, who has provided her love and support throughout her entire life, Lesley would be entitled to bring action for the specific performance of that parental relationship. Finally, enforcement of pre-insemination contracts respects the intentions of the parties to create families. Instead of denying Lesley and Jane their cherished parent-child relationship, a court should enforce Jane and Susan's parentage agreement and allow Lesley the opportunity to grow up with the love and support of both of her parents.

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