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# Voluntary Acknowledgements of Parentage for Same-Sex Couples

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# VOLUNTARY ACKNOWLEDGMENTS OF PARENTAGE FOR SAME-SEX COUPLES

LESLIE JOAN HARRIS\*

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## INTRODUCTION

The law in all states presumes that a husband is the father of his wife's children and gives him the status of the children's legal father.<sup>1</sup> In sixteen states, same-sex couples can marry or enter civil unions or domestic partnerships that give the parties all or almost all the benefits of marriage under state law, including the presumption that the spouse/partner of a legal parent is presumed to be the legal parent of a child born into the relationship.<sup>2</sup> The status of legal parent provides crucial protections to the

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\* Dorothy Kliks Fones Professor, University of Oregon School of Law. Thanks to the other participants in the New Illegitimacy Conference for their feedback and ideas, and particularly thanks to Nancy Polikoff for her insightful questions and suggestions.

1. *See, e.g.*, COLO. REV. STAT. ANN. § 19-4-105 (West 2011) ("A man is presumed to be the natural father of a child if: (a) He and the child's natural mother are or have been married to each other and the child is born during the marriage . . ."); 750 ILL. COMP. STAT. ANN. 45/5 (West 2011) ("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 . . . and the child is born or conceived during such marriage . . .").

2. As of July 2011, seven jurisdictions issued marriage licenses to same-sex couples (Massachusetts, Connecticut, Iowa, Vermont, New Hampshire, New York and

adults and children in a parent-child relationship.<sup>3</sup> For example, adults who consider themselves parents but who are not legally recognized as such are not obliged to support the child and are not entitled to see the child if the child's legal parent objects. If a child's legal parent dies or becomes unable to care for the child, there is no guarantee that an adult who had acted as parent but who did not establish legal parentage will be allowed to continue living with, or even see, the child.<sup>4</sup>

While marriage before a child is born automatically brings legal

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the District of Columbia), and nine additional states allowed couples to enter civil unions or domestic partnerships that provide all or nearly all the rights of marriage under state law (California, Delaware, Hawaii, Illinois, New Jersey, Oregon, Nevada, Rhode Island, and Washington). *Same-Sex Marriage, Civil Unions and Domestic Partnerships*, NAT'L CONFERENCE OF STATE LEGISLATURES, <http://www.ncsl.org/default.aspx?tabid=16430> (last updated July 14, 2011). In 2012 Hawaii will join this group. *Id.* For a discussion of the parental rights of nonbiological parties to Vermont civil unions, see *Miller-Jenkins v. Miller-Jenkins*, 912 A.2d 951 (Vt. 2006).

3. A number of the decisions holding that state constitutions require the extension of the rights of marriage to same-sex couples discuss the importance of the legal recognition of the parents' relationship to the well-being of the children, since this recognition brings with it protection for parent-child relationships as well. For example, in *Goodridge v. Dept. of Pub. Health*, the court said:

Where a married couple has children, their children are also directly or indirectly, but no less auspiciously, the recipients of the special legal and economic protections obtained by civil marriage. Notwithstanding the Commonwealth's strong public policy to abolish legal distinctions between marital and nonmarital children in providing for the support and care of minors, the fact remains that marital children reap a measure of family stability and economic security based on their parents' legally privileged status that is largely inaccessible, or not as readily accessible, to nonmarital children. Some of these benefits are social, such as the enhanced approval that still attends the status of being a marital child. Others are material, such as the greater ease of access to family-based State and Federal benefits that attend the presumptions of one's parentage. (citations omitted).

798 N.E.2d 941, 956 (Mass. 2003); see also *In re Marriage Cases*, 183 P.3d 384, 401 (Cal. 2008) (excluding same-sex couples from marriage violates equal protection to adults and harms children); *Kerrigan v. Comm'r of Pub. Health*, 957 A.2d 407, 474-75 (Conn. 2008) (noting that exclusion of same-sex couples from marriage has an especially deleterious effect on children); *Lewis v. Harris*, 908 A.2d 196, 217-31 (N.J. 2006) (recognizing that although the constitution does not require that same-sex couples be allowed to marry, they must be able to enter a relationship that provides the benefits of marriage, discussing the adverse effect on children if parents cannot marry).

4. See, e.g., *Stanley v. Illinois*, 405 U.S. 645, 657 (1972). Although Peter Stanley, the unmarried father, had lived intermittently with his children and their mother for many years, when she died, because he was never married to the mother, Illinois law did not recognize him as a legal father, and his children were taken into state custody as orphans. *Id.*

Lack of a legally-recognized relationship between the adult and the child can mean that they are ineligible for family-based public assistance and other benefits. See *M.F. v. Dept. Human Servs.*, 928 A.2d 71, 84-85 (N.J. Super. Ct. App. Div. 2007) (denying Temporary Assistance to Needy Families benefits to a lesbian coparent and child after the death of the child's biological mother because of lack of legal relationship between the coparent and child).

parenthood to both adults, if an unmarried woman has a baby, only she is automatically the child's legal parent. Unmarried couples<sup>5</sup> must take additional steps to confer legal fatherhood on the man. Traditionally, an unmarried father became a legal parent only by later marrying the mother or because of a judgment concluding a paternity suit.<sup>6</sup> Today, however, in all states, opposite-sex couples who cannot or do not wish to marry can establish the man as a child's legal father by signing a voluntary acknowledgment of paternity (VAP) and filing it with the state vital statistics office.<sup>7</sup> Voluntary acknowledgments have become the most common way to establish the legal paternity of children born outside marriage. In 2009, 1,693,850 children were born outside marriage.<sup>8</sup> In the same year, paternity was established by a VAP for 1,167,000 children, compared to 643,000 cases in which paternity was established by

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5. At least two North American courts have recognized three people as a child's legal parents for all purposes. *Jacob v. Shultz-Jacob*, 923 A.2d 473, 482 (Pa. Super. Ct. 2007) (awarding custody, and joining the third parent as an indispensable party); *A.A. v. B.B.* (2007), 83 O.R. 3d 561, para. 37 (Can. Ont. C.A.) (upholding an order recognizing three adults as legal parents of a child, where all three adults agreed to the arrangement); see also *Smith v. Cole*, 553 So. 2d 847, 855 (La. 1989) (recognizing dual paternity for purposes of child support duties); *Geen v. Geen*, 666 So. 2d 1192, 1197 (La. App. 1995) (recognizing dual paternity for purposes of custody and visitation). For a discussion of the Louisiana law, see Katherine Shaw Spaht, *Who's Your Momma, Who Are Your Daddies? Louisiana's New Law of Filiation*, 67 LA. L. REV. 307 (2007).

This Article only discusses legal protections for couples who want to raise children together, since recognizing more than two parents brings new practical and legal issues not discussed herein. For arguments in favor of legal regimes that allow more than two legal parents, see, for example, Laura Nicole Althouse, *Three's Company? How American Law Can Recognize a Third Social Parent in Same-Sex Families*, 19 HASTINGS WOMEN'S L.J. 171 (2008); Susan Frelich Appleton, *Parents by the Numbers*, 37 HOFSTRA L. REV. 11 (2008); Katharine K. Baker, *Bionormativity and the Construction of Parenthood*, 42 GA. L. REV. 649 (2008); Katharine T. Barlett, *Rethinking Parenthood as an Exclusive Status: The Need for Legal Alternatives When the Premise of the Nuclear Family Has Failed*, 70 VA. L. REV. 879 (1984); Nancy E. Dowd, *Multiple Parents/Multiple Fathers*, 9 J.L. & FAM. STUD. 231 (2007); Leslie Joan Harris, *Reconsidering the Criteria for Legal Fatherhood*, 1996 UTAH L. REV. 461 (1996); Melanie B. Jacobs, *Why Just Two? Disaggregating Traditional Parental Rights and Responsibilities to Recognize Multiple Parents*, 9 J.L. & FAM. STUD. 209 (2007); Laura T. Kessler, *Community Parenting*, 24 WASH. U. J.L. & POL'Y 47 (2007); 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 (1990); Alison Harvison Young, *Reconceiving the Family: Challenging the Paradigm of the Exclusive Family*, 6 AM. U. J. GENDER & L. 505, 518 (1998).

6. 1 WILLIAM BLACKSTONE, COMMENTARIES \*457 (discussing the treatment of nonmarital children at eighteenth century English common law); MICHAEL GROSSBERG, GOVERNING THE HEARTH: LAW AND THE FAMILY IN NINETEENTH CENTURY AMERICA 198-233 (1985) (discussing parental law in nineteenth century America).

7. For a more detailed discussion of voluntary acknowledgments, see *infra* Section II.

8. BRADY E. HAMILTON ET AL., NAT'L CTR. FOR HEALTH STAT., BIRTHS: PRELIMINARY DATA FOR 2009 (2010), available at [http://www.cdc.gov/nchs/data/nvsr/nvsr59/nvsr59\\_03.pdf](http://www.cdc.gov/nchs/data/nvsr/nvsr59/nvsr59_03.pdf).

adjudicative processes.<sup>9</sup>

In contrast, same-sex couples who cannot or do not want to marry but who would like to be legal parents together do not have a cheap, simple way of achieving this goal. All unmarried parents, including same-sex couples, need to be able to identify themselves as being in a family with their children and to claim the protections of legal parentage for themselves and their children, even though the unmarried parents are not making the commitment to each other that marriage entails. This Article proposes recasting the voluntary acknowledgment of paternity as a voluntary acknowledgement of *parentage*, available to all unmarried couples, same-sex as well as opposite-sex.

Same-sex couples do have ways of establishing both partners as legal parents, at least in some states. The first section of this Article describes these legal devices and explains why they are inadequate for protecting same-sex couples and their children. The second part of this Article describes voluntary acknowledgments of paternity in some detail and how opposite-sex couples use them. Then, this Article argues that voluntary acknowledgments or their legal equivalent should be made available to same-sex couples as well. This part of the Article includes an analysis of possible arguments against my position and my responses. The last section details a proposed set of statutes that would create the equivalent of voluntary acknowledgments for same-sex parents, appropriately adapted to fit the specifics of their situation.<sup>10</sup>

#### I. LEGAL PROTECTIONS FOR ADULT-CHILD RELATIONSHIPS WHERE THE ADULT IS NOT THE CHILD'S BIOLOGICAL PARENT

The law in all states allows at least some adults who are not a child's biological parent to become legal parents by adoption, and statutes and case law in many, but not all, states allow adults who have functioned as a child's parent to be treated, at least to some extent, as the child's legal parent.<sup>11</sup> These devices are available to same-sex functional parents in some, but not all, states. In the states that do not allow same-sex couples to use these tools, the need for the voluntary acknowledgment of parentage or something similar is obvious.

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9. OFFICE OF CHILD SUPPORT ENFORCEMENT, U.S. DEPT. OF HEALTH AND HUMAN SERVS., FY 2009 PRELIMINARY REPORT (2010), *available at* [http://www.acf.hhs.gov/programs/cse/pubs/2010/reports/preliminary\\_report\\_fy2009](http://www.acf.hhs.gov/programs/cse/pubs/2010/reports/preliminary_report_fy2009).

10. *See infra* Section IV.

11. *See, e.g.*, *Smith v. Guest*, 16 A.3d 920 (Del. 2011) (statute permitting a de facto parent to seek custody does not violate the due process rights of the child's other legal parent); *Rubano v. DiCenzo*, 759 A.2d 959, 974 (R.I. 2000) (a person who has no biological relation to a child but who has sufficiently alleged a parent-like relationship can gain custodial rights to the child).

However, even where these devices are available, they have serious limitations. All can be expensive, and all except adoption are available only if, in hindsight, a court determines that an unrelated adult has become a functional parent. The latter feature alone means that unrelated adults who develop relationships with children cannot rely on these devices to protect those relationships. Exacerbating this problem is that all the doctrines that allow courts to protect functional parent-child relationships are indeterminate and discretionary. For all these reasons, same-sex parents in all states need a legal means of voluntarily establishing parentage simply and easily.

#### *A. Second-Parent Adoption*

Same-sex couples who want to raise a child together, with both being recognized as legal parents, face an immediate problem under traditional legal principles.<sup>12</sup> The traditional law of parentage, including adoption law, is premised on the assumption that a child can have at most one parent of each sex.<sup>13</sup> According to this premise, if a child has a living parent, another adult of the same sex can adopt the child only if the parental rights of the pre-existing parent are terminated. But, of course, this is exactly what same-sex couples do not want to do. Instead, they want what is commonly termed “second parent adoption,” which recognizes the legal status of the new parent without eliminating the parental status of the original parent.

Statutes and case law in ten jurisdictions explicitly allow second-parent adoption.<sup>14</sup> California, Connecticut, and Vermont have enacted statutes that authorize second-parent adoption.<sup>15</sup> In the absence of statutory authority, appellate courts in the District of Columbia, Illinois, Indiana, Massachusetts, New Jersey, New York, and Pennsylvania have approved

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12. In addition, in at least four states, the law prohibits any gay man or lesbian from adopting a child, regardless of whether s/he is in a relationship or not. FAMILY EQUALITY COUNSEL, STATE-BY-STATE: GAY ADOPTION LAWS (2008), available at [http://www.familyequality.org/pdf/aoption\\_withcitations.pdf](http://www.familyequality.org/pdf/aoption_withcitations.pdf). This Article does not address this problem, nor does it deal with legal bias against gay and lesbian parents in custody contests with children’s straight parents. For a recent discussion of this issue, see Kim H. Pearson, *Mimetic Reproduction of Sexuality in Child Custody Decisions*, 22 YALE J.L. & FEMINISM 53 (2010).

13. Justice Scalia made this assumption explicit when he wrote, “California law, like nature itself, makes no provision for dual fatherhood. Michael was seeking to be declared the father of Victoria.” *Michael H. v. Gerald D.*, 491 U.S. 110, 118 (1988).

14. See generally Jason C. Beekman, Note, *Same-Sex Second-Parent Adoption and Intestacy Law: Applying the Sharon S. Model of “Simultaneous” Adoption to Parent-Child Provisions of the Uniform Probate Code*, 96 CORNELL L. REV. 139, 149 n.69 (2010).

15. CAL. FAM. CODE §§ 8616.5, 9000 (West Supp. 2010) (allowing only registered domestic partners to adopt without terminating the legal status of the biological parent by post-adoption contract); CONN. GEN. STAT. § 45a-724(a)(3) (West 2009); VT. STAT. ANN. tit. 15A, § 1-102(b) (2002).

second-parent adoption.<sup>16</sup> Second-parent adoptions also occur in states that have no statutes or appellate cases authorizing them, but the exact number is disputed. The Family Equality Council lists eleven jurisdictions that allow second-parent adoptions throughout the entire state (the ten listed above plus Colorado) while sixteen states allow second-parent adoptions in a portion of that state (Alabama, Alaska, Delaware, Hawaii, Iowa, Louisiana, Maryland, Minnesota, Nevada, New Hampshire, New Mexico, Oregon, Rhode Island, Texas, Washington, and West Virginia).<sup>17</sup> The Council identifies three states as explicitly disallowing second-parent adoption (Nebraska, Ohio, and Wisconsin).<sup>18</sup> North Carolina must be added to this since, in 2010, its supreme court interpreted state statutes as precluding second-parent adoption.<sup>19</sup> Thus, an optimistic estimate is that at most half the states allow second-parent adoption,<sup>20</sup> and even where it is allowed, same-sex couples must be willing and able to deal with the unfamiliar demands of the legal system, as well as its expense.

### *B. De Facto and Psychological Parents*

In some states, statutes or case law allow some classes of adults to obtain parental status through litigation, but these doctrines by no means protect all adults and children who regard themselves as families. Usually employing the term “de facto parent,” “psychological parent,” or person standing “in loco parentis,” these statutes<sup>21</sup> and cases<sup>22</sup> allow an adult

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16. *In re M.M.D.*, 662 A.2d 837, 865-66 (D.C. 1995); *In re* Petition of K.M., 653 N.E.2d 888, 899 (Ill. App. Ct. 1995); *In re* Adoption of Infant K.S.P., 804 N.E.2d 1253, 1260 (Ind. Ct. App. 2004); *In re* Adoption of M.M.G.C., 785 N.E.2d 267, 270 (Ind. Ct. App. 2003); *In re* Adoption of Tammy, 619 N.E.2d 315, 319 (Mass. 1993); *In re* Adoption of Two Children by H.N.R., 666 A.2d 535, 540-41 (N.J. Super. Ct. App. Div. 1995); *In re* Jacob, 660 N.E.2d 397, 405 (N.Y. 1995); *In re* Adoption of R.B.F., 803 A.2d 1195, 1202 (Pa. 2002); *see also* Sharon S. v. Superior Court, 73 P.3d 554, 563 (Cal. 2003); Adoption of B.L.V.B., 628 A.2d 1271, 1275 (Vt. 1993) (upholding second-parent adoption in California and Vermont before explicit statutes were enacted).

17. THE FAMILY EQUALITY COUNCIL, STATE-BY-STATE: SECOND PARENT ADOPTION LAWS (2008), available at [http://www.d1083684.domain.com/down/secondparent\\_withecitations.pdf](http://www.d1083684.domain.com/down/secondparent_withecitations.pdf).

18. *Id.*

19. *See* *Boseman v. Jarrell*, 704 S.E.2d 494, 501 (N.C. 2010) (prohibiting second parent adoption because statutes do not authorize it).

20. *See also* *Adoption and Parenting*, LAMBDA LEGAL, <http://www.lambdalegal.org/issues/adoption-and-parenting> (last visited Nov. 1, 2011).

21. COLO. REV. STAT. ANN. § 14-10-123(1)(c) (West 2011); D.C. CODE § 16-831.01(1) (2011); IND. CODE ANN. §§ 31-17-2-8.5, 31-9-2-35.5 (West 2011); MINN. STAT. ANN. § 257C.08(4) (West 2011); OR. REV. STAT. ANN. § 109.119(1) (West 2011); TEX. FAM. CODE ANN. § 102.003(a)(9) (West 2011); WYO. STAT. ANN. § 20-7-102(a) (2011).

22. *See, e.g., In re E.L.M.C.*, 100 P.3d 546 (Colo. App. 2004); *Smith v. Guest*, 16 A.3d 920 (Del. 2011); *E.N.O. v. L.M.M.*, 711 N.E.2d 886 (Mass. 1999); *C.E.W. v. D.E.W.*, 845 A.2d 1146 (Me. 2004); *V.C. v. M.J.B.*, 748 A.2d 539 (N.J. 2000), *cert.*

caregiver who is not biologically related to a child to seek custodial or visitation rights because the adult has formed a functional parent-child relationship with the child. In some states, the de facto parent is in effect a legal parent and stands on equal footing with other legal parents.<sup>23</sup> In others, the de facto or psychological parent is not a legal parent, and must overcome the constitutionally-mandated assumption that the legal parent's decisions regarding the child should control.<sup>24</sup>

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*denied*, 531 U.S. 926 (2000); *Boseman*, 704 S.E.2d at 494; *Jones v. Jones*, 884 A.2d 915 (Pa. Super. Ct. 2005); *In re Clifford K.*, 619 S.E.2d 138 (W. Va. 2005); *In re Custody of H.S.H.-K.*, 533 N.W.2d 419 (Wis. 1995). For discussions of the claims of lesbian coparents, see generally Melanie B. Jacobs, *Applying Intent-Based Parentage Principles to Nonlegal Lesbian Coparents*, 25 N. ILL. U. L. REV. 433 (2005); Polikoff, *supra* note 5.

Often the issue arises when a child was conceived by assisted reproduction. California has the most extensive line of cases on the legal consequences of assisted reproductive technology. See, e.g., *Johnson v. Calvert*, 851 P.2d 776, 781 (Cal. 1993); *In re Marriage of Buzzanca*, 72 Cal. Rptr. 2d 280, 291 (App. 1998). For discussions of issues relating to parenthood from assisted reproduction, see generally JANET L. DOLGIN, *DEFINING THE FAMILY: LAW, TECHNOLOGY, AND REPRODUCTION IN AN UNEASY AGE* (1997); R. Alta Charo, *And Baby Makes Three—or Four, or Five, or Six: Redefining the Family After the Reprotech Revolution*, 15 WIS. WOMEN'S L.J. 231 (2000); Marjorie Maguire Shultz, *Reproductive Technology and Intent-Based Parenthood: An Opportunity for Gender Neutrality*, 1990 WIS. L. REV. 297 (1990); Richard F. Storror, *Parenthood By Pure Intention: Assisted Reproduction and the Functional Approach to Parentage*, 53 HASTINGS L.J. 597 (2002).

23. See, e.g., *C.E.W. v. D.E.W.*, 845 A.2d 1146, 1151 (Me. 2004); *V.C.*, 748 A.2d at 549; *In re Parentage of L.B.*, 122 P.3d 161, 180-81 (Wash. 2005) (en banc); see also *Smith v. Guest*, 16 A.3d 920, 931 & n.61 (Del. 2011) (citing cases); *infra* notes 25-31.

In California, the courts have applied a statute providing that a man who takes a child into his home and holds himself out as the child's parent is presumed to be the parent to lesbian functional parents. The effect is to give the women the status of legal parents. *Elisa B. v. Superior Court*, 117 P.3d 660, 666 (Cal. 2005); *K.M. v. E.G.*, 117 P.3d 673, 682 (Cal. 2005); *Kristine H. v. Lisa R.*, 117 P.3d 690, 695-96 (Cal. 2005). The statute is based on a provision of the Uniform Parentage Act (UPA) of 1973 that provides that a man is presumed to be the child's father if he has taken the child into his home and held himself out as the father for two years. UNIF. PARENTAGE ACT § 4(4) (1973), 9B U.L.A. 393-94 (2001). The 2002 UPA requires that the period of holding out occur for the first two years of the child's life and is, therefore, more limited than the 1973 version. UNIF. PARENTAGE ACT § 204(5) (amended 2002), 9B U.L.A. 22-23 (Supp 2011). A similar provision has been enacted in at least nine states; most do not impose the two-year time limit. CAL. FAM. CODE § 7611(d) (West 2011); HAW. REV. STAT. § 584-4(a)(4) (West 2011); IND. CODE ANN. § 31-14-7-2 (West 2011); MASS. GEN. LAWS ANN. ch. 209C, § 6(a)(4) (West 2011); MINN. STAT. ANN. § 257.55 (1)(d) (West 2011); MONT. CODE ANN. § 40-6-105(1)(d) (2011); NEV. REV. STAT. ANN. § 126.051(1)(d) (West 2011); 23 PA. CONS. STAT. ANN. § 5102(b)(2) (West 2011). Statutes that impose a two-year time limit include DEL. CODE ANN. tit. 13, § 8-204(b) (5) (West 2011); WYO. STAT. ANN. § 14-2-504(v) (2011). However, statutes of this type have not been applied to same-sex couples in any state except California.

24. This requirement is imposed by *Troxel v. Granville*, 530 U.S. 57, 65 (2000). Among the cases holding that *Troxel* requires adults who alleged that they have functioned as parents but who are not legal parents to carry a heavy burden to overcome parental objections are *Mason v. Dwinell*, 660 S.E.2d 58, 70 (N.C. Ct. App. 2008); *Estraff v. Chatterjee*, 660 S.E.2d 73, 75 (N.C. Ct. App. 2008); *Jacob v. Shultz-Jacob*, 923 A.2d 473, 477 (Pa. Super. Ct. 2007); and *Stadter v. Siperko*, 661 S.E.2d 494, 496 (Va. Ct. App. 2008). See also *In re Clifford K.*, 619 S.E.2d 138, 153-54 (W. Va. 2005).



Litigation in Delaware, culminating in a 2011 decision from the state supreme court, clearly illustrates this distinction. When Lynn Smith and Carol Guest broke up in 2004, they began a long legal struggle over custody of a child who had been adopted by Smith but not Guest.<sup>25</sup> In the first round of the fight, a state trial court held that Guest could petition for joint legal custody, even though she was not a legal parent under the then-existing version of the state parentage act, because she was a de facto parent.<sup>26</sup> The state supreme court reversed, holding that a nonparent could petition for custody only if the child were neglected and allowing the petition was in the child's best interests.<sup>27</sup> The state legislature then amended the statutory definition of legal parent to include de facto parents,<sup>28</sup> and Guest refiled under the new statute. Smith responded, arguing that the statutory amendment was unconstitutional.<sup>29</sup> The trial court rejected this argument, found that Guest was a de facto parent, and awarded joint custody.<sup>30</sup> The Delaware Supreme Court affirmed, concluding that the U.S. Supreme Court's holding in *Troxel* did not limit the authority of a state to define who is a legal parent.<sup>31</sup> The effect was that both women were recognized as legal parents and could both seek custody of the child. As in other custody disputes between two legal parents, the case would be decided based on the child's best interests, a legal standard that does not automatically favor either parent.

The first limitation of this solution for a functional parent who is denied access by a child's legal parent is that not all states accept the de facto/psychological parent doctrine.<sup>32</sup> For example, the New York Court of Appeals recently affirmed an earlier case that took this position. The court wrote:

[Allowing a de facto or psychological parent to seek custody or visitation] threatens to trap single biological and adoptive parents and their children in a limbo of doubt. These parents could not possibly

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25. *Smith v. Gordon*, 968 A.2d 1 (Del. 2009) (superseded by statute).

26. *Id.*

27. *Id.* at 15.

28. S.B. 84, 145th Gen. Assemb. (Del. 2009) (amending 13 DEL. CODE. §§ 8–201, 2302(13) (West 2011)).

29. *Smith v. Guest*, 16 A.3d 920, 924 (Del. 2011).

30. *Id.* at 925.

31. *Id.* at 931 (citing *In re Parentage of L.B.*, 122 P.3d 161 (Wash. 2005) (en banc), cert. denied sub nom. *Britain v. Carvin*, 547 U.S. 1143 (2006)); see also *id.* at 931 n.61 (citing cases from other states as “supporting” decision).

32. See, e.g., *Wakeman v. Dixon*, 921 So. 2d 669, 675 (Fla. Dist. Ct. App. 2006); *In re C.B.L.*, 723 N.E.2d 316, 320-21 (Ill. App. 1999); *Alison D. v. Virginia M.*, 572 N.E.2d 27, 32 (N.Y. 1991); *In re Thompson*, 11 S.W.3d 913, 923 (Tenn. App. 1999); *Jones v. Barlow*, 154 P.3d 808, 812 (Utah 2007); *Ticthenal v. Dexter*, 693 A.2d 682, 689 (Vt. 1997).

know for sure when another adult's level of involvement in family life might reach the tipping point and jeopardize their right to bring up their children without the unwanted participation of a third party. Significantly, 'the interest of parents in the care, custody, and control of their children[ ] is perhaps the oldest of the fundamental liberty interests recognized by' the United States Supreme Court (*Troxel v. Granville*, 530 U.S. 57, 65 (2000)). Courts must be sensible of 'the traditional presumption that a fit parent will act in the best interest of his or her child' and protect the parent's 'fundamental constitutional right to make decisions concerning the rearing of' that child (*id.* at 69-70).<sup>33</sup>

Even where the *de facto* parent or psychological parent doctrine is accepted, it has serious limitations. In states that do not treat a *de facto* or psychological parent as a legal parent, the doctrine only protects relationships when a court finds that the legal parent has waived his or her parental rights by allowing the development of the relationship or that the legal parent's failure to allow the relationship to continue is harmful to the child or both. In all states, the doctrines are triggered only after the adult and child have been in a relationship for a significant amount of time, and their application requires highly specific fact-finding. In other words, these doctrines require that a claimant be able to bear the burden of extensive litigation, and even then, outcomes are unpredictable.

## II. VOLUNTARY ACKNOWLEDGMENTS OF PATERNITY FOR UNMARRIED, OPPOSITE-SEX PARENTS

A voluntary acknowledgment of paternity (VAP) is a document signed by a child's mother and the putative father that identifies the man as the father. When the document is filed with the state office of vital statistics, it establishes legal paternity. The VAP is a creature of federal child support law, but its use and social impact extend beyond the child support arena.

The federal government provides millions of dollars to states to fund their child welfare programs, provided that they enact a wide range of statutes and regulations required by federal laws. The federal funding is so critical to the functioning of the state programs that all states comply with these federal mandates, for the most part. The Temporary Assistance to Needy Families (TANF) legislation imposes many of these requirements to facilitate child support enforcement. The most important requirement for purposes of this Article is that states must authorize VAPs.<sup>34</sup> VAPs have become an exceptionally important way of establishing legal paternity. In

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33. *Debra H. v. Janice R.*, 930 N.E.2d 184, 193, 280 (N.Y. 2010) (parallel citations omitted) (holding that New York would recognize that a child born in Vermont to a lesbian couple in a civil union was the legal child of both women as a matter of comity).

34. 42 U.S.C. § 666(a)(5)(C) (2006).

2009, forty-one percent of all births in the United States were to unmarried women.<sup>35</sup> For most of these children, legal paternity was established, most often by a VAP.<sup>36</sup>

Federal law imposes additional rules to govern VAPs. States may not require blood testing as a precondition to signing a VAP.<sup>37</sup> The law must treat a VAP as if it resolves a legal dispute; when a VAP is filed with the state office of vital statistics, it has the legal effect of a judicial determination of paternity.<sup>38</sup> The state cannot condition the validity of the acknowledgment on any kind of proceeding.<sup>39</sup> States must give full faith and credit to acknowledgments signed in other states if they contain the information required by federal standards and have been executed in compliance with the procedures required by the state in which they were signed.<sup>40</sup>

Voluntary acknowledgment forms must be offered to all parents at all birthing facilities and birth records offices in the state.<sup>41</sup> Each party must be given oral and written notice of the alternatives to, legal consequences of, and rights and responsibilities arising from the signed acknowledgment.<sup>42</sup> Either party must be able to rescind the acknowledgment within sixty days of the child's birth or the date of any judicial or administrative proceeding relating to the child, whichever occurs first.<sup>43</sup> After that, an acknowledgment can be challenged only on the ground of fraud, duress, or material mistake of fact.<sup>44</sup>

While the federal legislation contemplated that VAPs would be used simply to establish paternity, usually for the sake of collecting child

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35. HAMILTON ET AL., *supra* note 8, at 4. In 2009, 72.8 percent of births among non-Hispanic Black women were to unmarried women, compared to 65.4 percent to American Indian or Alaska Natives, 53.2 percent to Hispanic women, 29 percent to non-Hispanic white women, and 17.2 percent to Asian or Pacific Islanders. *Id.*

36. In 2009, 1,693,000 children were born outside marriage. *Id.* In the same year, paternity was established by a VAP for 1,167,000 children. THE OFFICE OF CHILD SUPPORT ENFORCEMENT, *supra* note 9. VAPs are most often signed at or soon after the time of birth, as discussed in the text *infra* notes 46-48.

37. 45 C.F.R. 302.70 (a)(5)(vii) (2009); SHERRI Z. HELLER, U.S. DEP'T OF HEALTH AND HUMAN SERVS., POLICY INTERPRETATION QUESTION 03-01: PATERNITY DISESTABLISHMENT (2003).

38. 42 U.S.C. § 666 (a)(5)(D)(ii) (2006). The name of a man who is not married to the mother can appear on a child's birth certificate only if the voluntary acknowledgment has been filed or a court or administrative agency has determined that he is the father. *Id.* § 666 (a)(5)(D)(i).

39. *Id.* § 666 (a)(5)(E).

40. *Id.* § 666 (a)(5)(C)(iv).

41. *Id.* § 666 (a)(5)(C)(ii).

42. *Id.* § 666 (a)(5)(C)(i).

43. *Id.* § 666 (a)(5)(D)(ii).

44. *See id.* However, Section 666 does not define or address circumstances that could establish fraud or duress.

support, empirical evidence indicates that unmarried parents are using VAPs for another purpose: to identify themselves as a child's co-parents and to memorialize that relationship. The most complete, recent evidence about unmarried parents and their children comes from the Fragile Families and Child Wellbeing study, a longitudinal study of about 5,000 children and their parents that is generalizable to all urban areas with a population of over 200,000.<sup>45</sup> Researchers using this data found that at the time of birth, the great majority of unmarried parents are strongly connected to each other and to their children, and that they regard themselves as families. At the time of birth, fifty-one percent of unmarried parents are living together, and thirty-one percent are dating each other.<sup>46</sup> Most of these parents sign VAP forms soon after birth. The Fragile Families researchers found that in urban areas, the paternity establishment rate is sixty-nine percent and that eighty-one percent of the paternity establishments are in the hospital or birthing center.<sup>47</sup> While the paternity establishment rate for couples not living together is lower, it is still fifty-eight percent, although only forty-two percent of these establishments occur in the hospital.<sup>48</sup>

No report from the Fragile Families Study examines the parents' attitudes toward or use of genetic testing as a precursor to signing a VAP, but an independent Michigan study found that even when free genetic testing was offered to anyone who requested it before signing a VAP, only a tiny fraction asked for the test. Of the 1,660 nonmarital births examined, a VAP was signed in seventy-eight and a half percent, and only in 112 cases was a genetic test requested.<sup>49</sup> Parents who establish paternity by

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45. SARA McLANAHAN ET AL., THE FRAGILE FAMILIES AND CHILD WELLBEING STUDY: BASELINE NATIONAL REPORT 1 (2003). The study includes children born in seventy-five hospitals in twenty cities in the U.S. with populations over 200,000. *Id.* The study uses baseline data collected between 1998 and 2000. *Id.* Mothers and fathers were interviewed at birth, and follow-up interviews were done when the children were one, three and five years old.

46. *Id.* at 8; see also LARRY BUMPASS, L. & HSIEN-HEN LU, TRENDS IN COHABITATION AND IMPLICATIONS FOR CHILDREN'S FAMILY CONTEXTS IN THE UNITED STATES (2000).

47. Ronald Mincy et al., *In-Hospital Paternity Establishment and Father Involvement in Fragile Families*, 67 J. MARRIAGE & FAM. 611, 611, 615 (2005).

48. *Id.* at 615. A smaller Wisconsin study found that almost half of all unmarried parents in that state in 2005 filed VAPs near the time of their children's birth. Older parents were more likely to use VAPs than younger parents, and college-educated mothers used VAPs at twice the rate of mothers who had not finished high school. PATRICIA R. BROWN & STEVEN T. COOK, INST. FOR RESEARCH ON POVERTY, UNIV. OF WIS., A DECADE OF VOLUNTARY PATERNITY ACKNOWLEDGMENT IN WISCONSIN: 1997-2007 (2008), available at <http://www.ssc.eisc.edu/irpweb/research/childsup/scpolicy/pdfs/T12-VolPat97-07-Report.pdf>. Seldom do parents marry and then file a VAP after the birth of their child; in 2005, the number was less than one percent of all nonmarital births. *Id.*

49. Compare OFFICE OF CHILD SUPPORT, STATE OF MICH., FAMILY INDEPENDENCE AGENCY, 100% PATERNITY ESTABLISHMENT PROGRAM, ONE YEAR PILOT SUMMARY, available at <http://michigan.gov/documents/FIA-Pub-45-Paternity-Establishment->

signing VAPs, like married parents, generally do not want to challenge the integrity of their relationships by requesting genetic testing at the time of birth.<sup>50</sup>

VAPs were invented to facilitate child support enforcement by establishing legal paternity; they were not originally intended to allow unmarried parents to memorialize their relationship as co-parents and to identify themselves and their child as a family. The Fragile Families Study reports show, though, that many unmarried parents regard a VAP as having this significance. For these parents VAPs provide a clear, inexpensive way to establish a legal parent-child relationship for all purposes between the man and the child<sup>51</sup> and to identify the man and woman as the child's co-parents. Same-sex couples who decide to become parents together need a mechanism like a VAP, to make their intentions clear and to provide legal protections to themselves and to their child without unnecessary expense or delay.

### III. SHOULD VAPs BE RESERVED FOR BIOLOGICAL, OPPOSITE-SEX COUPLES?

In response to my proposal, it might be argued that same-sex couples

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Project\_339177.pdf (23.2 percent of men tested were excluded as the biological father), with David Bishai et al., *A National Sample of US Paternity Tests: Do Demographics Predict Test Outcomes?*, 46 *TRANSFUSION* 849, 849 (2006) (in national study, 72 percent probability of men who underwent paternity testing in a child support office were found to be the child's biological father). This does not mean, of course, that in almost a quarter of all cases in which a man is believed to be the biological father of a child, he is not. Almost always, the man identified as a child's legal father is the biological father. *Nearly All Paternity Tests Back Dad's Biological Claim*, HEALTHDAY (Apr. 17, 2006) (citing Kermyt G. Anderson, *How Well Does Paternity Confidence Match Actual Paternity? Results from Worldwide Nonpaternity Rates*, 48 *CURRENT ANTHROPOLOGY* 513, 515 (2006)) (noting that in the U.S., ninety-eight percent of men raising children they believe to be their biological children are correct, and only thirty percent of men who seek blood tests to confirm paternity are not the biological father).

50. Notwithstanding the evidence about people's wishes, a number of commentators have argued that genetic testing be required before legal parenthood is established. See, e.g., June Carbone & Naomi Cahn, *Which Ties Bind? Redefining the Parent-Child Relationship in an Age of Genetic Certainty*, 11 *WM. & MARY BILL RTS. J.* 1011, 1067 (2003); Niccol D. Kording, *Little White Lies that Destroy Children's Lives—Recreating Paternity Fraud Laws to Protect Children's Interests*, 6 *J.L. & FAM. STUD.* 237, 239 (2004); Anne Greenwood, Comment, *Predatory Paternity Establishment: A Critical Analysis of the Acknowledgment of Paternity Process in Texas*, 35 *ST. MARY'S L.J.* 421, 451 (2004); cf. Jana Singer, *Marriage, Biology and Paternity: The Case for Revitalizing the Marital Presumption*, 65 *MD. L. REV.* 246, 266 (2006) (rejecting mandatory paternity testing for married mothers as inconsistent with the policy of promoting marriage).

51. At common law, an unmarried father often had the duty to support a child without having any custodial rights. Today, however, ordinarily legal parenthood is a package that includes both child support duties and custodial rights. Leslie Joan Harris, *The Basis for Legal Parentage and the Clash Between Custody and Child Support*, 42 *IND. L. REV.* 611, 618 (2009).

with a child are inherently unlike opposite-sex couples because both cannot be the biological parent of the child (setting aside those lesbian couples in which one woman is the genetic mother and the other the gestational mother). Instead, they are like opposite-sex couples in which one partner has a child from another relationship; in this situation, the partner who is not the legal parent is a stepparent, a figure sharply distinct from a legal parent with few legal rights and duties.<sup>52</sup> For a stepparent to become a legal parent, he or she must adopt the child. Those who believe that same-sex partnerships are more like relationships between legal and stepparents would, therefore, conclude that “second parents” in same-sex relationships should also be required to adopt if they want to become legal parents.

A couple of unstated assumptions underlie this argument: first, that VAPs are reserved for biological parents, so that that a man who is not the child’s biological father cannot validly execute a VAP; and second, that unmarried same-sex partners cannot be similarly situated to unmarried opposite-sex partners for purposes of their legal relationship to children born to the couple. This section analyzes both assumptions.

#### *A. Is Biological Paternity a Prerequisite for a Valid VAP?*

Federal statutes that require states to establish VAPs do not provide that the man signing a VAP must aver that he is the child’s biological father.<sup>53</sup> As discussed above, federal law requires that a VAP must become final sixty days after it is filed unless a challenger can prove that it was obtained by fraud, duress, or material mistake of fact.<sup>54</sup> The most common challenge to a VAP after the sixty-day rescission period is that the woman committed fraud by misleading the man about his biological paternity or that there is a material mistake of fact because the man is not the biological father.

Federal law does not define fraud or mistake of fact, but it does provide that a VAP must have the legal effect of a final judgment.<sup>55</sup> If a VAP were truly to be treated like a judgment, the success of such a challenge would turn on whether the man had exercised due diligence in attempting to

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52. See Margaret M. Mahoney, *Support and Custody Aspects of the Stepparent-Child Relationship*, 70 CORNELL L. REV. 38, 40 (1984) (discussing the limited legal rights available to stepparents).

53. The Uniform Parentage Act, which was intended to comply with federal law, is ambivalent. Compare UNIF. PARENTAGE ACT § 301 (amended 2002), 9B U.L.A. 26-27 (Supp. 2011) (for voluntary acknowledgment to be valid, the man must be the biological father), with *id.* § 308(a) (amended 2002), 9B U.L.A. 317 (2001), and *id.* § 609(b) (amended 2002), 9B U.L.A. 56 (Supp. 2011) (providing that challenges to voluntary acknowledgments based on duress, fraud or material mistake of fact must be brought within two years of when acknowledgment was filed).

54. 42 U.S.C. § 666 (a)(5)(D)(iii) (2006).

55. *Id.* § 666 (a)(5)(D)(ii).

discover the truth before signing the VAP.<sup>56</sup> Given the ready availability of genetic testing, this would be a difficult hurdle to overcome.<sup>57</sup>

However, of the states that have decided the issue, most allow challenges to VAPs based on genetic tests showing that the man is not the biological father. In at least sixteen states, statutes explicitly allow a voluntary acknowledgment of paternity to be set aside after the sixty-day rescission period when genetic testing shows that the man is not the biological father.<sup>58</sup> In at least six of these states, the statute also requires the court to consider whether the challenger is estopped to deny paternity, whether vacating the VAP would be inconsistent with the child's best interests, or both.<sup>59</sup>

In states whose statutes do not explicitly address whether genetic testing is sufficient to justify setting aside a VAP, the case law is mixed. Case law in at least six states allows courts to set aside voluntary acknowledgments after the rescission period in some situations, based on genetic testing, either without requiring proof of fraud, duress or mistake or by liberally construing those terms so that they can be satisfied by little more than proof that the man is not the biological father.<sup>60</sup> However, eight states have held

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56. RESTATEMENT (SECOND) OF JUDGMENTS § 70(2) (1982).

57. The UPA is, again, ambiguous. It gives the court authority to block a challenge to the marital presumption or to a paternity judgment based on a finding that the party bringing the challenge is estopped to deny paternity and that it would be inequitable to disprove the father-child relationship. UNIF. PARENTAGE ACT § 608(a) (amended 2002), 9B U.L.A. 53-54 (Supp. 2011). Those provisions require that challenges to paternity based on the marital presumption and the presumption arising from holding be based on genetic test evidence, and only court-ordered tests are admissible unless all parties agree to the admission of other test results. *Id.* § 309(d) (amended 2002), 9B U.L.A. 318 (2001). The provisions governing adjudications of paternity apply to actions challenging voluntary acknowledgments. *Id.* § 621(c)(2) (amended 2002), 9B U.L.A. 346 (2001). The court's analysis must take into account the child's age, the child's relationships to the husband and the man alleged to be the genetic father, and the facts surrounding the husband's discovery of his possible nonpaternity. *Id.* § 608(b) (amended 2002), 9B U.L.A. 53-54 (Supp. 2011). These provisions seem to assume that the challenge would at least be founded on evidence that the man is not the biological father, but as a whole, they clearly mean that not all challenges will be allowed.

58. ALA. CODE § 26-17-308(a)(2) (2011); CAL. FAM. CODE § 7575(b) (West 2011); COLO. REV. STAT. ANN. § 19-4-107.3(1) (West 2011); CONN. GEN. STAT. ANN. § 46b-172(a)(2) (West 2011); FLA. STAT. ANN. § 742.18(1)(b) (West 2011); GA. CODE ANN. § 19-7-54(a)(2) (West 2011); IOWA CODE ANN. § 600B.41A(3)(f)(2) (West 2011); KY. REV. STAT. ANN. § 406.025(3) (West 2011); MD. CODE ANN., FAM. LAW § 5-1038(a)(2)(i)(2) (West 2011); MICH. COMP. LAWS ANN. § 722.1011(2) (West 2011); MINN. STAT. ANN. § 257.62(1) (West 2011); MISS. CODE ANN. §§ 93-9-9(4)(c)-(d), 93-9-28(2)(c)-(d) (West 2011); MO. ANN. STAT. § 210.854(2) (West 2011); OR. REV. STAT. ANN. § 109.070(6) (West 2011); UTAH CODE ANN. § 78B-15-307(5) (West 2011); VA. CODE ANN. § 20-49.10 (2011).

59. ALA. CODE § 26-17-608(a); COLO. REV. STAT. ANN. § 19-4-105(2)(c); UTAH CODE ANN. § 78B-15-608.

60. *See State ex rel. Sec'y Soc. & Rehab. Serv. v. Kimbrel*, 231 P.3d 576, 582 (Kan. Ct. App. 2010) (allowing the rebuttal of the presumption of paternity if a man who has signed a voluntary acknowledgment of paternity can establish by clear and

that a VAP should not be vacated, despite evidence that the man was not the biological father.<sup>61</sup> The cases in these states do not say that biology is irrelevant but rather require evidence beyond the genetic test to prove fraud or mistake,<sup>62</sup> or they provide that a VAP may not be set aside if the

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convincing evidence that he is not the biological father); *Rousseve v. Jones*, 704 So. 2d 229, 232-33 (La. 1997) (voluntary acknowledgment of paternity is based on the belief that the man is the biological father and, if genetic testing shows this statement to be false, the acknowledgment is nullified); *see also* *Dep't Human Serv. v. Chisum*, 85 P.3d 860, 862-63 (Okla. Civ. App. 2004) (permitting the rebuttal of the presumption of paternity when plaintiff's voluntary acknowledgment of parentage was based on mistake of fact); *Glover v. Severino*, 946 A.2d 710, 717-18 (Pa. Super. Ct. 2008) (permitting the rebuttal of a voluntary acknowledgment of paternity when a mother misled the plaintiff to believe he was the biological father); *R.W.E. v. A.B.K.*, 961 A.2d 161, 166 (Pa. Super. Ct. 2008) (duress, fraud, or mistake of fact can be shown by genetic testing); *Jones v. State ex rel. Coleman*, No. W2006-00540-COA-R3-JV, 2006 WL 3613612, at \*9 (Tenn. Ct. App. Dec. 12, 2006) (ordering DNA testing after holding that fraud was found when the mother of the child failed to inform the plaintiff that she had an affair and participated in activities that could cause her to be pregnant by another man); *State ex rel. Dancy v. King*, No. W2010-00934-COA-R3-JV, 2011 WL 1235597, at \*16 (Tenn. Ct. App. Apr. 5, 2011) (evidence warranted a paternity test more than five years after the voluntary acknowledgment of paternity was signed); *State ex rel. W. Va. Dep't Health & Human Res.*, 531 S.E.2d 669, 676-77 (W. Va. 2000) (proof by clear and convincing evidence of fraud, duress, material mistake of fact, or similar circumstance is necessary for a court to entertain a challenge to the validity of acknowledgment).

61. *See In re Parentage of G.E.M.*, 890 N.E.2d 944, 964 (Ill. App. Ct. 2008) (trial court had no subject matter jurisdiction to "revisit or re-determine the existence of a father and child relationship for a child who already had a legal father"); *A.E. v. J.E.*, No. 69A01-0901-CV-31, 2009 WL 1562993, at \*4 (Ind. Ct. App. June 4, 2009) (voluntary paternity acknowledgment cannot be challenged after the statutory time period unless duress, fraud, or misrepresentation of fact is established); *In re Paternity of H.H.*, 879 N.E.2d 1175, 1178 (Ind. Ct. App. 2008) (forbidding a challenge to a voluntary acknowledgment of paternity after the statutory time limit); *In re Paternity of E.M.L.G.*, 863 N.E.2d 867, 871 (Ind. Ct. App. 2007) (failure to file for genetic testing within the sixty-day time limit provided under state law precludes a man from challenging the voluntary acknowledgment of parentage after the deadline); *In re Paternity of Cheryl*, 746 N.E.2d 488, 500 (Mass. 2001) (statute of limitations); *Ex rel Melissa B. v. Robert W.R.*, 803 N.Y.S.2d 672, 679 (App. Div. 2005) (defendant not entitled to genetic testing unless he can prove fraud, duress, or material mistake of fact); *In re Support Obligation of Do Rego*, 620 N.W.2d 770, 771 (S.D. 2001) (genetic evidence cannot rebut the presumption of legitimacy unless it is either within the sixty-day statute of limitations or in cases of fraud, duress or material mistake of fact); *DNW v. Wyo. Dep't of Family Servs.*, 154 P.3d 990, 994 (Wyo. 2007) (legislature intended to make paternity finding final as stated in statutory affidavit); *see also* *Andrew R. v. Ariz. Dep't Econ. Sec.*, 224 P.3d 950, 959 (Ariz. Ct. App. 2010) (applying limitations period in rule of civil procedure governing challenges to judgments); *In re Williams v. Carlson*, 701 N.W.2d 274, 279 (Minn. Ct. App. 2005) (enforcing the sixty-day time limit to rebut the presumption of parentage once the voluntary acknowledgment of parentage is filed); *In re Gendron*, 950 A.2d 151, 156 (N.H. 2008) (refusing to set aside a VAP from Massachusetts because the genetic testing was not contested within the Massachusetts statute of limitations); *In re Elliott*, No. 12-10-02, 2010 WL 4471277, at \*5 (Ohio Ct. App. Nov. 8, 2010) ("[O]nce the timeframe for filing a rescission action has lapsed, the man who signed the affidavit of paternity is deemed to be the child's father.").

62. *See Parentage of G.E.M.*, 890 N.E.2d at 955-56 (refusing "to allow a man . . . to undo his voluntary acknowledgment years later on the basis of DNA results, when his paternity was based . . . on the conscious decision to accept the legal responsibility of being the child's father"); *Paternity of H.H.*, 879 N.E.2d at 1178 (holding that the



evidence shows that to do so would be contrary to the child's best interests<sup>63</sup> or that the petitioner is estopped from challenging the VAP.<sup>64</sup>

Further, it should be noted that even in states that allow a VAP to be set aside upon proof that the man is not the child's biological father, a man who is not the biological father can still sign a VAP, since genetic testing cannot be required. If paternity is never challenged, he remains the child's legal father.

*B. Equal Protection Requires That Same-Sex Couples Have Access to VAPs or Their Equivalent*

Unmarried same-sex partners who wish to establish legal parenthood between children and the partner who is not the biological parent have two equal protection arguments to support the claim that VAPs should be available to them. The first argument, available only to women, is that allowing men to establish paternity but not allowing women to establish maternity constitutes prohibited gender-based discrimination. The second argument, available to all same-sex couples, is that denying them access to VAPs amounts to unconstitutional discrimination based on sexual orientation. A challenge claiming that denying women access to VAPs amounts to gender discrimination should receive heightened scrutiny under the Equal Protection Clause,<sup>65</sup> and at least under some state constitutions, a challenge based on sexual orientation discrimination will also warrant

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trial court erred in allowing mother to challenge a voluntary acknowledgment by demanding genetic testing after the statute of limitations had expired); *Demetrius H.*, 827 N.Y.S.2d 810, 810 (2006) (party must show fraud, duress or material mistake of fact before the court is required to order a DNA test); *DNW*, 154 P.3d at 994 .

63. *Kimbrel*, 231 P.3d at 582 (genetic testing was appropriate because it was in the best interests of the child); *Paternity of Cheryl*, 746 N.E.2d at 495 (“Where a father challenges a paternity judgment [the] consideration of what is in a child’s best interests will often weigh more heavily than the genetic link between parent and child.”); *In re J.B. & J.G.*, 953 A.2d 1186, 1190 (N.H. 2008) (awarding standing to a petitioner because it is in the best interest of the child).

64. *See J.E.*, 2009 WL 1562993, at \*4 (“[W]here the party seeking to rescind a paternity affidavit is a man who falsely attested to a belief that he was the child’s biological father, he is collaterally estopped from challenging the affidavit’s validity.”); *Melissa B.*, 803 N.Y.S.2d at 678 (“[E]quitable estoppel may be invoked to preclude a father . . . from denying paternity to avoid support obligations where the invocation of the doctrine is in the best interests of the child.”) (internal citations omitted); *State ex rel Wernke v. Cortez*, 783 N.W.2d 852, 854 (S.D. 2010) (recognizing that statute of limitations bars challenge to voluntary acknowledgment); *Do Rego*, 620 N.W.2d at 771-72 (estopping the mother from challenging the presumption that her ex-husband was the father of her child and attempting to obtain child support for over ten years from her past lover).

65. *Craig v. Boren*, 429 U.S. 190, 197 (1976) (“To withstand constitutional challenge, previous cases establish that classifications by gender must serve important governmental objectives and must be substantially related to achievement of those objectives.”); *see Caban v. Mohammed*, 441 U.S. 380, 388 (1979) (discussing *Boren*).

heightened scrutiny.<sup>66</sup>

The first issue when either equal protection claim is made would be whether the group that cannot use VAPs is similarly situated to the group that can use them. For purposes of the challenge raised by women, the question is whether women are similarly situated to men for purposes of access to the VAP to establish parentage. In *Caban v. Mohammed*, the Supreme Court rejected essentialist claims that mothers and fathers are inherently different for purposes of parental rights.<sup>67</sup> This supports the conclusion that men and women are similarly situated for purposes of a VAP process that does not presuppose a biological relationship between the child and both adults. In *Caban*, the Court said:

Contrary to appellees' argument . . . maternal and paternal roles are not invariably different in importance. Even if unwed mothers as a class were closer than unwed fathers to their newborn infants, this generalization concerning parent-child relations would become less acceptable as a basis for legislative distinctions as the age of the child increased. The present case demonstrates that an unwed father may have a relationship with his children fully comparable to that of the mother. Appellant Caban, appellee Maria Mohammed, and their two children lived together as a natural family for several years. As members of this family, both mother and father participated in the care and support of their children. There is no reason to believe that the Caban children—aged 4 and 6 at the time of the adoption proceedings—had a relationship with their mother unrivaled by the affection and concern of their father. We reject, therefore, the claim that the broad, gender-based distinction of [the challenged statute] is required by any universal difference between maternal and paternal relations at every phase of a child's development.<sup>68</sup>

At least one state court, the Oregon Court of Appeals, has decided a case turning on a claim of sexual-orientation discrimination very similar to that posited here. Earlier Oregon cases had held that granting a benefit only to married couples discriminated against same-sex couples on the basis of their sexual orientation in violation of the state constitution.<sup>69</sup> In 2009, the

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66. See *Kerrigan v. Comm'r Pub. Health*, 957 A.2d 407, 431-32 (Conn. 2008) (sexual orientation is a quasi-suspect class); *Varnum v. Brien*, 763 N.W.2d 862, 896 (Iowa 2009) (“[L]egislative classifications based on sexual orientation must be examined under a heightened level of scrutiny.”); *Shineovich v. Kemp*, 214 P.3d 29, 40 (Or. Ct. App. 2009) (classification based on sexual orientation requires heightened scrutiny); see also *In re Marriage Cases*, 183 P.3d 384, 444 (Cal. 2008) (strict scrutiny applies to statutes that impose differential treatment on the basis of sexual orientation).

67. See *Caban*, 441 U.S. at 388.

68. *Id.* at 389.

69. *Tanner v. Or. Health Sci. Univ.*, 971 P.2d 435, 448 (Or. Ct. App. 1998) (concluding that denial of health insurance dependent's benefits to the domestic partner of a state employee in a same-sex relationship violated Art. 1, Sec. 20 of the state constitution). As is still true today, at the time *Tanner* was decided, same-sex couples

court applied this principle in *Shineovich v. Kemp*<sup>70</sup> to hold that a state statute governing the parentage of children conceived by artificial insemination must be interpreted to establish legal maternity in the lesbian partner of a child's biological mother. The statute as enacted provides that the husband of a woman who conceives a child by artificial insemination is the legal father. Concluding that the statute must be interpreted to apply when a same-sex couple conceives a child by artificial insemination,<sup>71</sup> the *Shineovich* court said:

We can see no justification for denying that privilege on the basis of sexual orientation, particularly given that same-sex couples may become legal coparents by other means – namely adoption. There 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.<sup>72</sup>

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could not marry in Oregon.

70. 214 P.3d at 29.

71. *Id.* at 40.

72. *Id.*; see also *Varnum v. Brien*, 763 N.W.2d 862, 883-84 (Iowa 2009); *Kerrigan v. Comm'r of Pub. Health*, 957 A.2d 407 (Conn. 2008) (holding that marriage must be available to same-sex couples and that, for purposes of marriage, same-and opposite-sex couples are similarly situated). The court in *Varnum*, reasoned:

Plaintiffs are in committed and loving relationships, many raising families, just like heterosexual couples. Moreover, official recognition of their status provides an institutional basis for defining their fundamental relationship rights and responsibilities, just as it does for heterosexual couples. Society benefits, for example, from providing same-sex couples a stable framework within which to raise their children . . . just as it does when that framework is provided for opposite-sex couples. . . . In short, for purposes of Iowa's marriage laws, which are designed to bring a sense of order to the legal relationships of committed couples and their families in myriad ways, plaintiffs are similarly situated in every important respect, but for their sexual orientation.

763 N.W.2d at 884. Similarly, the court in *Kerrigan*, wrote:

With respect to their first claim, the defendants assert that the plaintiffs are not similarly situated to opposite sex couples, thereby obviating the need for this court to engage in an equal protection analysis, "because the conduct that they seek to engage in—marrying someone of the same sex—is fundamentally different from the conduct in which opposite sex couples seek to engage." We disagree. It is true, of course, that the plaintiffs differ from persons who choose to marry a person of the opposite sex insofar as each of the plaintiffs seeks to marry a person of the same sex. Otherwise, however, the plaintiffs can meet the same statutory eligibility requirements applicable to persons who seek to marry, including restrictions related to public safety, such as age . . . . The plaintiffs also share the same interest in a committed and loving relationship as heterosexual persons who wish to marry, and they share the same interest in having a family and raising their children in a loving and supportive environment. Indeed, the legislature itself recognized the overriding similarities between same sex and opposite sex couples when, upon passage of the civil union law, it granted same sex couples the same legal rights that married couples enjoy. We therefore agree with the California Supreme Court and conclude that the defendants' contention that same sex and opposite sex

At the time the Oregon Court of Appeals decided *Shineovich*, the Oregon legislature had enacted a comprehensive domestic partnership act for same-sex couples that grants all the rights of marriage available under state law.<sup>73</sup> However, the statute did not protect the plaintiff in *Shineovich* because the children that her partner bore were conceived before the domestic partnership act was enacted. Some language in *Shineovich* suggests that enactment of the domestic partnership statute cures the problem created by the artificial insemination statute, since same-sex couples can now become domestic partners and gain the protection of the statute.<sup>74</sup> Even if this argument is correct, so that the artificial insemination statute does not have to be extended to same-sex couples, my argument that same-sex couples should have access to something like a VAP still remains. The parentage presumption now establishes the paternity of the husband of a married woman who gives birth during the marriage, and it establishes the parentage of the domestic partner of a biological parent when a child is born during the partnership. But opposite-sex couples do not have to marry (or participate in a filiation suit) to become the legal parents of a child; instead, they can sign and file a VAP. Under *Shineovich*, same-sex couples must have the same opportunity.

However, another portion of the *Shineovich* decision raises a problem for this analysis. The plaintiff also argued that the statute providing establishing the marital presumption of paternity<sup>75</sup> would violate the state constitution if the marital presumption were not extended to same-sex couples.<sup>76</sup> The court of appeals rejected this argument on the basis that the marital presumption concerns biological paternity. The court said, “By the very terms of the statute, for the presumption of parentage to apply, it must be at least possible that the person is the biological parent of the child.”<sup>77</sup>

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couples are not similarly situated clearly lacks merit. “[B]oth [same sex and opposite sex couples] consist of pairs of individuals who wish to enter into a formal, legally binding and officially recognized, long-term family relationship that affords the same rights and privileges and imposes the same obligations and responsibilities. Under these circumstances, there is no question but that these two categories of individuals are sufficiently similar to bring into play equal protection principles that require a court to determine whether distinctions between the two groups justify the unequal treatment.”  
957 A.2d at 423-34 (internal citations omitted).

73. OR. REV. STAT. §§ 106.300-106.340 (West 2011); *see id.* § 106.305 (describing the goal of the legislation as extending the “benefits, protections and responsibilities to committed same-sex partners and their children that are comparable to those provided to married individuals and their children”).

74. *See Shineovich*, 214 P.3d at 40.

75. OR. REV. STAT. § 109.070(1).

76. At the time the children in this case were born, the women not only could not marry but also could not otherwise formalize their relationship, since the domestic partnership statute had not been enacted, as noted above.

77. *Shineovich*, 214 P.3d at 36.

This same argument might be made about the VAP; that it is intended to be used only to make a child's biological father the legal father.

This argument directly and explicitly raises the question of whether a statute that denies a benefit on the basis of a preference for biological parenthood is constitutional, at least when its effect is to deny same-sex couples access to a benefit available to opposite-sex couples. It may be possible to avoid this argument in Oregon and other states with domestic partnership and civil union laws that extend the marital presumption of parentage to same-sex couples who have become formal partners. In these states, the presumption does not necessarily purport to establish only biological parents as legal parents, since lack of biological parentage cannot be used to rebut the presumption when it is invoked in a same-sex relationship.<sup>78</sup> Even in states without domestic partnership or civil union statutes, it may be argued that the VAP is not necessarily about biological paternity, at least if proof of lack of biological paternity does not create a *per se* basis for invalidating the VAP.<sup>79</sup>

What, though, of states that do invalidate VAPs when lack of biological paternity is proven? Same-sex couples still might argue that denying them access to an equivalent means of establishing legal parentage without marrying (or entering a domestic partnership or civil union) is unconstitutional for the same reason that the Massachusetts Supreme Judicial Court held that the state goal of privileging procreation that occurs within marriage is invalid. The court in *Goodridge v. Department of Public Health* said:

The 'marriage is procreation' argument singles out the one unbridgeable difference between same-sex and opposite-sex couples, and transforms that difference into the essence of legal marriage. Like 'Amendment 2' to the Constitution of Colorado, which effectively denied homosexual persons equality under the law and full access to the political process, the marriage restriction impermissibly 'identifies persons by a single trait and then denies them protection across the board.' *Romer v. Evans*, 517 U.S. 620, 633 (1996) . . . . In so doing, the State's action confers an official stamp of approval on the destructive stereotype that same-sex relationships are inherently unstable and inferior to opposite-sex relationships and are not worthy of respect.<sup>80</sup>

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78. See Susan Frelich Appleton, *Presuming Women: Revisiting the Presumption of Legitimacy in the Same-Sex Couples Era*, 86 B.U. L. REV. 227, 238 (2006) (providing that if the marital presumption applies to a same-sex couple, it cannot be rebutted proof of no biological relationship with the child).

79. See *supra* Part III.A.

80. 798 N.E.2d 941, 962 (Mass. 2003).

## IV. VAPs FOR SAME-SEX COUPLES

While I have argued that unmarried same-sex couples may successfully argue that they are constitutionally entitled to use existing VAP statutes to establish legal parentage for the partner who is not the biological parent of a child born in the relationship, I think a better course is for states to enact statutes based on the VAP that are adapted to the particular circumstances of same-sex couples. This section sketches the major ways in which such a statutory scheme would be different from the standard statutes governing VAPs today.

The process for establishing parentage by means of a VAP should remain unchanged in many ways. The law should still require full disclosure to the adults of the legal consequences of signing and filing the VAP, no prerequisite or ratification requirement should be imposed, and filing with the state bureau of vital statistics should be sufficient to establish legal parenthood in both adults. Either party should be able to rescind the VAP for a fixed period, and after that, the VAP should become final and have the effect of a legal judgment.

In addition, if the child's other biological parent, that is, the parent who is not part of the same-sex couple intending to become parents, is known, he or she should have to sign a document relinquishing parental status before or simultaneous with the signing of the VAP.<sup>81</sup> This rule upholds the principle that a child has at most two legal parents at one time. A VAP signed in violation of this rule would be voidable if the biological parent, who was not a party to the VAP, challenged it. However, consistent with the rules regarding dissolution proposed below, neither of the same-sex partners who signed the VAP would be able to challenge the VAP on this basis, regardless of whether he or she knew the identity of the other biological parent.

After the rescission period, I propose that the parties should be able to rescind the VAP by mutual agreement. The only nonmutual basis for vacating a VAP should be proof that continuing the parent-child relationship would seriously harm the child. Because this proposal makes it quite difficult to set aside a VAP after the rescission period, I recommend that the period be longer, perhaps six months, to give the parents time to reflect after the rosy glow accompanying signing the VAP has faded.

Opening VAPs to same-sex couples, either by interpreting existing statutes so that they apply or by enacting new statutes, recognizes that

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81. Compare UNIF. PARENTAGE ACT §§ 302(a)(3)(A) (amended 2002), 9B U.L.A. 314-15 (2001), with §§ 304-05 (amended 2002), 9B U.L.A. 315-16 (2001) (allowing a married woman, her husband, and another man to execute a document in which all agree that the husband is not the father of a child born during the marriage and that instead the other man is).

many of these couples are raising children together and that the children will be better protected if their relationship to their parents can be formally recognized from the time the children are born. In this sense, my argument is similar to arguments accepted by a number of courts in granting access to marriage, or at least the state law benefits of marriage to same-sex couples.<sup>82</sup>

However, the law should not limit this protection to children of same-sex couples who marry or enter civil unions or domestic partnerships. Just as the law recognizes that all children of opposite-sex couples need to be able to have a legal relationship to their fathers as well as their mothers, it should recognize that children of same-sex couples have the same need. Failure to allow unmarried same-sex couples a means of voluntarily establishing the legal parenthood of both partners discriminates against their children on the basis of marriage, as did the traditional law of illegitimacy. The Supreme Court has largely mandated the dismantling of this discriminatory regime for children born to opposite-sex couples and recognizes that the law should treat children born out of wedlock like children born to married parents except in unusual circumstances.<sup>83</sup> Children born to unmarried parents of the same-sex deserve no less.

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82. See, e.g., cases discussed *supra* note 3.

83. See *Trimble v. Gordon*, 430 U.S. 762, 776 (1977) (holding unconstitutional a statute that denied the right to inherit to a nonmarital child, even though paternity had been established during the father's lifetime); see also *Stanley v. Illinois*, 405 U.S. 645 (1972) (declaring a statute that denied all unmarried fathers parental rights unconstitutional). At common law, nonmarital children had no inheritance rights. Harry Krause, *ILLEGITIMACY; LAW AND SOCIAL POLICY* 105-06 (1971). Unmarried fathers had no custodial rights even if the mothers were unavailable. WALTER C. TIFFANY, *PERSONS AND DOMESTIC RELATIONS* § 114 (1921).