

## INHERITANCE LAW AND THE MARITAL PRESUMPTION AFTER *OBERGEFELL*

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### I. INTRODUCTION

In the summer of 2015, the country saw a sea change in the rights of same-sex couples to marry.<sup>1</sup> With *Obergefell v. Hodges*, the United States Supreme Court made clear that states could not prohibit same-sex marriage.<sup>2</sup> *Obergefell* created ripple effects in a number of doctrinal areas, including inheritance law.<sup>3</sup>

From an inheritance law perspective, *Obergefell* raises questions about the current nature of the marital presumption.<sup>4</sup> That doctrine—that a child born during an intact marriage is presumed to be the child of the husband—does significant work in inheritance law.<sup>5</sup> The marital presumption provides an efficient resolution of the central question for probate courts in estate administration—is there a parent-child relationship between the decedent and a person claiming a share of the decedent’s estate?<sup>6</sup> Every state has a version of the marital presumption and, although it is no longer irrebuttable in the vast majority of states, it is still a powerful presumption that resolves the question in the majority of cases.<sup>7</sup>

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1. *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015).

2. *Id.*

3. *See id.*

4. *See id.*

5. *See* discussion *infra* Parts III–IV (analyzing case law about the presumption).

6. *See* discussion *infra* Parts III–IV (analyzing case law about the presumption).

7. *See, e.g.*, TEX. FAM. CODE ANN. § 160.204 (West 2015).

With the advent of same sex-marriage as a right in every state, there are a number of interesting questions about the future of the marital presumption.<sup>8</sup> Does *Obergefell* reify marriage and thus the presumption?<sup>9</sup> And is that bad policy?<sup>10</sup> For those who argue that the presumption privileges marital children, should they redouble their efforts to eliminate the marital presumption altogether?<sup>11</sup> Should states revise statutes to reflect the fact that a woman may now be the nonbirth spouse trying to establish a parent-child relationship using a presumption built specifically for men?<sup>12</sup> Should those in inheritance law separate the definition of the parent-child relationship for their purposes from its definition for family law purposes?<sup>13</sup>

This article focuses on the last question—the role of the marital presumption in inheritance law after *Obergefell*.<sup>14</sup> It describes several illustrative cases that have arisen in the family law context, reviews the courts' analysis, and suggests that a conclusive marital presumption be extended to all nonbirth/nongenetic spouses for purposes of inheritance law.<sup>15</sup> Since our system of inheritance law is status-based, establishing the parent-child relationship is the key to determining whether someone inherits through intestacy or when there is a class gift in a governing instrument like a will or trust.<sup>16</sup> This article takes the position that *Obergefell* mandates extension of the current presumption to same-sex, nonbirth/nongenetic spouses in both family law and inheritance law.<sup>17</sup>

The goals of inheritance law in determining parentage include ensuring a child has two parents from whom to inherit if possible, an efficient and fair

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8. See *Obergefell*, 135 S. Ct. at 2584.

9. See Clare Huntington, *Obergefell's Conservatism: Reifying Familial Fronts*, 84 *FORDHAM L. REV.* 23 (2015) (arguing that *Obergefell* "reifies marriage as a key element in the social front of family, further marginalizing nonmarital families."). See also Joanna L. Grossman, *The New Illegitimacy: Tying Parentage to Marital Status for Lesbian Co-Parents*, 20 *AM. U. J. GENDER & SOC. POLICY & L.* 671, 703 (2012) (arguing that tying parental status to civil union or marriage created the risk that lesbian co-parents would face greater restrictions on their ability to claim parentage status).

10. See generally *id.*

11. See generally *infra* Part II (discussing marriage and children).

12. See *infra* Part II.

13. See *infra* Part V.

14. See *infra* Parts II–V.

15. See COURTNEY JOSLIN, SHANNON MINTER & CATHERINE SAKIMURA, *LESBIAN, GAY, BISEXUAL AND TRANSGENDER FAMILY LAW* § 5.22 (2015–2016 ed.) (summarizing the law to date). The cases discussed herein are used merely to illustrate the kinds of analysis courts have applied to the question of extending the marital presumption, and this article does not attempt to cover every state case in this regard. See *id.* Note that I have previously made the argument for a separate definition of parentage for purposes of family law and inheritance law. See Paula A. Monopoli, *Nonmarital Children and Post-Death Parentage: A Different Path for Inheritance Law?*, 48 *SANTA CLARA L. REV.* 857 (2008).

16. Paula A. Monopoli, "Deadbeat Dads": *Should Support and Inheritance be Linked?*, 49 *U. MIAMI L. REV.* 257 (1994).

17. See *infra* Part II.

distribution of assets, and the prevention of fraudulent claims.<sup>18</sup> These goals are not completely aligned with the goal of family law, which is to select the adult best suited to raise the child for a number of years.<sup>19</sup> While this article makes the case for the retention of the presumption, it also makes the case for reconceptualizing the presumption from a doctrine that is a surrogate for discovering a biological connection between fathers and children, to a doctrine based upon the presumed consent of the nonbirth/nongenetic spouse to be the parent of any child born during the marriage.<sup>20</sup> In so doing, it argues that this result can be reconciled with the second and third goals of the original intent of the presumption, legitimizing children and protecting the intact, marital family from intrusion.<sup>21</sup> Those original goals are completely consistent with Justice Kennedy's focus in *Obergefell* on reducing the stigma of children of same-sex couples.<sup>22</sup>

State courts, like the Iowa Supreme Court, faced this issue after extending the right of marriage to same-sex couples.<sup>23</sup> In *Gartner v. Iowa Department of Public Health*, the court considered the question of whether the traditional marital presumption should be extended to a female nonbirth/nongenetic spouse two years after it extended the right to marry in *Varnum v. Brien*.<sup>24</sup> The Iowa Supreme Court decided that it could not interpret the statute, using the existing rules of statutory construction, to include both men and women.<sup>25</sup> However, the Court found that the statute, as applied, was unconstitutional, and thus the benefit of the statute must be extended to female nonbirth/nongenetic spouses.<sup>26</sup>

Like the Iowa Supreme Court in *Gartner*, it is tempting to assume that if the question came up in another state, *Obergefell* would lead that state court to feel compelled to extend the marital presumption to nonbirth/nongenetic female spouses.<sup>27</sup> But, as seen with the next several cases, some courts have refused to extend the presumption.<sup>28</sup> This article first examines those cases, and then the cases that have allowed the extension, arguing the latter is the correct path.<sup>29</sup>

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18. *Lalli v. Lalli*, 439 U.S. 259, 265 (1978); *Trimble v. Gordon*, 430 U.S. 762, 770 (1977). *See also* Paula A. Monopoli, AMERICAN PROBATE: PROTECTING THE PUBLIC, IMPROVING THE PROCESS (2003) at 13–14 (describing the goals and purposes of the American probate process more generally).

19. *See infra* Part V.

20. *See infra* Part V.

21. *Gartner v. Iowa Dep't of Pub. Health*, 830 N.W.2d 335, 345–48 (Iowa 2013).

22. *Obergefell v. Hodges*, 135 S. Ct. 2584, 2600 (2015).

23. *See Gartner*, 830 N.W.2d at 335.

24. *Id.*; *Varnum v. Brien*, 763 N.W.2d 862 (Iowa 2009).

25. *See Gartner*, 830 N.W.2d at 354.

26. *See id.*

27. *See id.*

28. *Paczkowski v. Paczkowski*, 10 N.Y.S.3d 270 (N.Y. App. Div. 2015); *Q.M. v. B.C.*, 995 N.Y.S.2d 470 (N.Y. Fam. Ct. 2014); *Shineovich v. Shineovich*, 214 P.3d 29 (Or. Ct. App. 2009).

29. *See infra* Parts II–V.

## II. OBERGEFELL ON MARRIAGE AND CHILDREN

Justice Kennedy grounded his majority opinion in *Obergefell* in the Fourteenth Amendment's Due Process and Equal Protection clauses.<sup>30</sup> He laid out four principles for protecting the right of same sex couples to marry including individual autonomy, the right to enjoy intimate association, safeguarding children and families, and the fact that marriage is the keystone of our social order.<sup>31</sup> Of the four bases for extending the right to marry to same-sex couples, the third is most salient for the question of whether the marital presumption must be extended to female nonbirth/nongenetic spouses, now that the United States Supreme Court has extended the right to marry.<sup>32</sup>

Justice Kennedy drew the third principle from cases like *Pierce v. Society of Sisters* and *Meyer v. Nebraska*:

A third basis for protecting the right to marry is that it safeguards children and families and thus draws meaning from related rights of childrearing, procreation, and education. The Court has recognized these connections by describing the varied rights as a unified whole: “[T]he right to ‘marry, establish a home and bring up children’ is a central part of the liberty protected by the Due Process Clause.” Under the laws of the several States, some of marriage’s protections for children and families are material. But marriage also confers more profound benefits. By giving recognition and legal structure to their parents’ relationship, marriage allows children “to understand the integrity and closeness of their own family and its concord with other families in their community and in their daily lives.” Marriage also affords the permanency and stability important to children’s best interests.

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Excluding same-sex couples from marriage thus conflicts with a central premise of the right to marry. Without the recognition, stability, and predictability marriage offers, their children suffer the stigma of knowing their families are somehow lesser. They also suffer the significant material costs of being raised by unmarried parents, relegated through no fault of their own to a more difficult and uncertain family life. The marriage laws at issue here thus harm and humiliate the children of same-sex couples.<sup>33</sup>

*Obergefell* clearly reifies marriage and marital privilege.<sup>34</sup> For those who argue that the law should be moving in the opposite direction, one

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30. *Obergefell v. Hodges*, 135 S. Ct. 2584, 2597 (2015).

31. *Id.* at 2589–90.

32. *Id.* at 2600.

33. *Id.* at 2600–01 (citations omitted).

34. *See id.*

alternative to the marital presumption is to move to a purely functional test for parentage.<sup>35</sup> This would no longer privilege marriage but, as I have argued previously, it is inefficient for inheritance law.<sup>36</sup> While functional parentage makes more sense when the issue is who is the adult best suited to raise the child, it is still more resource-consumptive than a parentage rule based on status.<sup>37</sup> A functional approach makes less sense when the issue is simply to whom a decedent's property will be reallocated at death.<sup>38</sup> The probate process needs more bright-line rules, given the few resources afforded to probate courts in this country and the goals of the process, which are to marshal assets, pay creditors, distribute to heirs or beneficiaries, and close the estate as quickly as possible.<sup>39</sup> This article looks at the barriers to making the presumption gender-neutral, as well as the process of reconceptualizing its foundations and moving from a model based on a surrogate for biology to one of consent.<sup>40</sup> It argues for retention of the marital presumption for family law based on presumed consent, giving the nonbirth spouse a chance to rebut the presumption based on lack of consent.<sup>41</sup> This article also argues for a conclusive presumption in the case of inheritance law, given its different goals.<sup>42</sup>

For analytical purposes, this article first considers state cases that have refused to extend the presumption to nonbirth/nongenetic spouses, and then cases that have extended it.<sup>43</sup> Even in the cases that extended the presumption on constitutional grounds, there are statutory construction barriers that warrant consideration.<sup>44</sup> Those barriers may require corrective legislative action to extend the presumption to same-sex spouses in order to guarantee the gender neutral application of the presumption.<sup>45</sup>

### III. CASES THAT HAVE NOT EXTENDED THE MARITAL PRESUMPTION TO SAME-SEX NONBIRTH/NONGENETIC SPOUSES

It is instructive to begin by looking at the language in three opinions in which state courts have refused to extend the marital presumption to same-sex nonbirth/nongenetic spouses.<sup>46</sup> These include *Paczkowski v. Paczkowski*

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35. Monopoli, *Nonmarital*, *supra* note 15, at 859–60.

36. *Id.*

37. *Id.*

38. *Id.*

39. *Id.*

40. *Id.* at 868–99.

41. *See id.* at 881–88.

42. *See id.* at 897–99.

43. *See infra* Part III.

44. *See infra* Part III.

45. *See infra* Part III.

46. *Paczkowski v. Paczkowski*, 10 N.Y.S.3d 270 (N.Y. App. Div. 2015); *Q.M. v. B.C.*, 995 N.Y.S.2d 470 (N.Y. Fam. Ct. 2014); *Shineovich v. Shineovich*, 214 P.3d 29 (Or. Ct. App. 2009).

and *Q.M. v. B.C.* in New York, and *Shineovich v. Shineovich* in Oregon.<sup>47</sup> These cases often analyze the rights of the nonbirth/nongenetic spouse as a third party vis-à-vis the child as opposed to a parent.<sup>48</sup>

*Paczkowski* involved an appeal from the family court dismissing the petition for joint custody of a child.<sup>49</sup> The petitioner was the nonbirth/nongenetic spouse in a same sex marriage.<sup>50</sup> The court focused on the fact that the petitioner could not possibly be the child's biological parent because she had not given birth to the child.<sup>51</sup> In doing so, the court leaves the petitioner in the status of a nonparent, third-party stranger to the child, despite the fact that she was married to the child's birth mother.<sup>52</sup> The appellate division found that the lower court properly dismissed the petition for lack of standing:

A nonparent may have standing to seek to displace a parent's right to custody and control of his or her child, but only upon a showing that "the parent has relinquished that right due to surrender, abandonment, persistent neglect, unfitness, or other extraordinary circumstances." Here, the petitioner, who is neither an adoptive parent nor a biological parent of the subject child, failed to allege the existence of extraordinary circumstances that would establish her standing to seek custody. Contrary to the petitioner's contention, Family Court Act § 417 and Domestic Relations Law § 24 do not provide her with standing as a parent, since the presumption of legitimacy they create is one of a biological relationship, not of legal status, and, as the nongestational spouse in a same-sex marriage, there is no possibility that she is the child's biological parent.<sup>53</sup>

Similarly, the family court in *Q.M. v. B.C.* reasoned that, regardless of the marital status of the female couple, the fact that a man, who was not a spouse of the birth mother, fathered the child distinguished this case from one in which conception was the result of an anonymous sperm donation.<sup>54</sup> *Q.M. v. B.C.* involved a paternity action by a man who sought to be declared the legal father of a child who was born to a woman, B.C., in a same-sex marriage.<sup>55</sup> B.C. and her wife, J.S., argued that their marriage itself should give the nonbirth, nongenetic spouse legal parentage of the child via the marital presumption.<sup>56</sup> Thus, the paternity action should be dismissed.<sup>57</sup> The

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47. *Paczkowski*, 10 N.Y.S.3d at 270; *Q.M.*, 995 N.Y.S.2d at 470; *Shineovich*, 214 P.3d at 29.

48. *Paczkowski*, 10 N.Y.S.3d at 270; *Q.M.*, 995 N.Y.S.2d at 470; *Shineovich*, 214 P.3d at 29.

49. *Paczkowski*, 10 N.Y.S.3d at 270–71.

50. *Id.*

51. *Id.*

52. *See id.*

53. *Id.* at 271 (citations omitted).

54. *Q.M. v. B.C.*, 995 N.Y.S.2d 470, 473–74 (N.Y. Fam. Ct. 2014).

55. *Id.* at 471.

56. *Id.*

57. *Id.*

court disagreed.<sup>58</sup> It noted that, “It has long been presumed that the child born of a marriage was fathered by the husband. The presumption is recognized at common law and codified in Domestic Relations Law § 24 and Family Court Act § 417.”<sup>59</sup>

The court goes on to note that, traditionally, mothers used the presumption to hold fathers to their support obligations, and the focus was on two things: (1) establishing that the child was legitimate in the eyes of the law, and (2) giving the child both a father and a mother for legal purposes.<sup>60</sup> However, the court noted that the world has changed and, given the advent of same-sex marriage, cases have arisen in terms of whether a nonbirth/nongenetic spouse is a child’s legal parent by virtue of the presumption.<sup>61</sup> The court cites *Wendy G-M v. Erin G-M* (discussed above) for the proposition that most of these cases arise in the context of lesbian couples who have a child through artificial insemination of the birth mother with anonymous sperm.<sup>62</sup> In that case, the court did find that the nonbirth/nongenetic spouse was the legal parent via the marital presumption.<sup>63</sup> Distinguishing the facts from *Q.M. v. B.C.*, as the child was not the product of artificial insemination using an anonymous sperm donor, the court said:

Here, the respondents seek to rely on the presumption of legitimacy to establish Ms. S. as J.C.’s second mother, effectively extinguishing J.C.’s right to have a father. Ms. C.’s credible and uncontradicted testimony at the hearing was that she did not have sexual relations with any man other than Mr. M. during the period of J.C.’s conception, and that Mr. M. is J.C.’s father. Thus, there is no dispute that Ms. S. is not, and could not possibly be, the second parent of this child. Moreover, Ms. S. reconciled with Ms. C. after Ms. C. discovered she was pregnant, and presumably after she had been told that the child was fathered by Mr. M.

Ms. C. argues that the rights of “non-biological parents” are entitled to the same constitutional protections afforded biological parents and suggests that the Marriage Equality Act requires that all spouses be treated in a completely gender neutral manner. It is this court’s view that the Marriage Equality Act does not require the court to ignore the obvious biological differences between husbands and wives. For instance, as explained above, Domestic Relations Law § 73 can be easily applied to same-sex female married couples, but not to same-sex male couples, neither of whom are able to bear a child. In the same vein, neither spouse in a same-sex female couple can father a child. Thus, while the language of Domestic Relations Law § 10—a requires same-sex married couples to be treated the same as all

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58. *Id.* at 473.

59. *Id.* (citations omitted).

60. *Id.* at 473.

61. *Id.*

62. *Id.* at 473.

63. *Id.*

other married couples, it does not preclude differentiation based on essential biology.<sup>64</sup>

Again, the problem, of course, is that if courts refuse to designate the nonbirth/nongentic spouse as a legal parent, it leaves that parent with no relationship to the child other than that of a third-party stranger.<sup>65</sup> The court acknowledges this troubling outcome, but it states:

Additionally, the Court of Appeals has repeatedly declined to expand the traditional definition of a parent beyond biological or birth parents and adoptive parents. Specifically, the Court has rejected arguments that non-adoptive or non-biological third parties, such as Ms. S., should be granted parental status based on a claim of a close relationship with the child.

As a result, Ms. S. stands in the position of many loving step-parents, male and female, who are not legal parents and are not entitled to court ordered custody or visitation with their step-children. The fact that she was married to Ms. C. at the time of J.C.'s birth, under the facts here, does not change her status.<sup>66</sup>

So, in essence, the court's analysis is that the marital presumption only applies in a case where there is an anonymous sperm donor and two female spouses.<sup>67</sup> If there is a biological father who is not an anonymous sperm donor, that fact trumps the marital presumption in a case where two women are validly married when the child is born.<sup>68</sup>

Finally, in *Shineovich v. Shineovich*, the Oregon Court of Appeals reviewed a circuit court's dismissal of a petition denying legal parentage to the nonbirth/nongenetic spouse in a same-sex marriage.<sup>69</sup> The case involved a couple who married before the birth of their second child but whose marriage was later declared invalid after a state referendum defined marriage as between one man and one woman.<sup>70</sup> In later separation proceedings, the nonbirth/nongenetic spouse argued that she was the legal parent of the two children born during the relationship, and that the marital presumption should apply as Oregon's policy was to extend all the benefits of marriage to domestic partners.<sup>71</sup> She challenged the constitutionality of the marital presumption statute as applied, and the court said:

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64. *Id.* at 474.

65. *See id.*

66. *Id.* (citations omitted).

67. *See id.*

68. *See id.*

69. *Shineovich v. Shineovich*, 214 P.3d 29 (2009).

70. *Id.*

71. *Id.* at 35–36.



We turn to petitioner's arguments on the merits, beginning with her contention that ORS 109.070(1) is unconstitutional. As she did before the trial court, petitioner contends that the statute affords to married men a privilege—the presumption of being the legal parent of the children of a female spouse—that is not available to her because same-sex couples are not permitted to marry. Accordingly, she argues, the statute violates the right to equal privileges and immunities guaranteed by Article I, section 20, of the Oregon Constitution.

Respondent argues, among other things, that the presumption created by ORS 109.070(1) relates to *biological* paternity. Given that there is no dispute about whether petitioner is P's biological parent, she argues that the statute cannot be applied to petitioner.

We agree with respondent. Even if the statute were broadened so as not to exclude any individual from its reach on the basis of gender or marital status, the presumption still would not apply to petitioner.<sup>72</sup>

Like the courts in *Paczkowski* and *Q.M. v. B.C.*, the *Shineovich* court focuses on the text of the statute and its intent in terms of excluding certain husbands who cannot be biologically connected to a child born to that man's wife.<sup>73</sup> The court takes great pains to point out that the statute, in its view, seeks to determine biological paternity, in part because a man who is not physically capable of fathering the child cannot be the legal parent of that child under the terms of the statute:

To construe the statute, we begin by examining the text of ORS 109.070 (2003) in context. We may also consider its legislative history and, if necessary, other interpretive aids. Here, the text, read in context, is dispositive. ORS 109.070(1) (2013) creates a presumption as to who is the biological parent of a child. 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. The purpose of ORS 109.070(1) (2003) is to establish *paternity*. "Paternity" means "origin or descent from a father" or "male parentage." *Webster's Third New Int'l Dictionary* 1654 (unabridged ed 2002). Even if the gender aspect of the word is disregarded, "paternity" refers to the genetic relationship between parent and child. See ORS 109.251 (defining "blood tests" to include "any test for genetic markers to determine paternity"); *Webster's* at 1654 (defining "paternity test" as "a test to determine whether a given man could be father to a particular child made by comparison of the blood groups of the mother, child, and suspected man, a negative result proving that the man cannot be the father while a positive result shows only that it is biologically possible that he may be"). Indeed, the conclusive presumption of paternity does not

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72. *Id.*

73. *Id.*

apply to a married man who is not biologically capable of having conceived a child borne by his wife: ORS 109.070(1)(a) (2003) provides, “The child of a wife cohabiting with her husband *who was not impotent or sterile at the time of the conception of the child* shall be conclusively presumed to be the child of her husband.” (emphasis added).<sup>74</sup>

The court concludes that because the nonbirth/nongenetic partner cannot possibly be the biological parent of the child at issue, there is no constitutional infirmity because the presumption does not apply to those persons who are not even conceivably biologically related to the child.<sup>75</sup> Even if marital status or gender were removed, the statute would still not apply to her.<sup>76</sup> The court finds that she is not “entitled to a declaration of legal parentage under the statute.”<sup>77</sup>

#### IV. CASES THAT HAVE EXTENDED THE MARITAL PRESUMPTION TO SAME-SEX NONBIRTH/NONGENETIC SPOUSES

Other state courts have come to a different conclusion; there are cases where state courts have agreed to extend the marital presumption to same-sex nonbirth/nongenetic spouses despite the marital presumption’s historical foundation in biology.<sup>78</sup>

*Barse v. Pasternak* involved a dissolution of marriage action in which the spouses sought custody of the child of the marriage.<sup>79</sup> The trial court awarded sole custody to the nongenetic/nonbirth spouse.<sup>80</sup> After a number of procedural appeals, the Superior Court took up the issue of whether the nonbirth/nongenetic spouse was properly found to be the child’s legal parent under the marital presumption where there had been no adoption of the child.<sup>81</sup> That court said that the common-law presumption of legitimacy, also known as the marital presumption, was “well founded in Connecticut’s common law.”<sup>82</sup> The court noted the reciprocal nature of the determination of parentage:

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74. *Id.* at 36 (citations omitted).

75. *Id.*

76. *Id.*

77. *Id.* (Note that while the Shineovich court refused to confer legal parentage on the female nonbirth spouse under the marital presumption statute, ORS 109.070(1) (2003), it went on to confer legal parentage on the spouse under a separate statute, ORS 109.243, that confers legal parentage on the husband of a woman who had undergone artificial insemination by extending that statute to include female nonbirth spouses.

78. *See, e.g., Barse v. Pasternak*, No. HHBFA124030541S, 2015 WL 600973, at \*1 (Conn. Super. Ct. Jan. 16, 2015); *Wendy G-M. v. Erin G-M.*, 985 N.Y.S.2d 845 (N.Y. Sup. Ct. 2014); *Gartner v. Iowa Dep’t of Pub. Health*, 830 N.W.2d 335 (Iowa 2013); *Della Corte v. Ramirez*, 961 N.E.2d 601 (Mass. App. Ct. 2012).

79. *Barse*, 2015 WL 600973, at \*1.

80. *Id.* at \*1.

81. *Id.* at \*1–2.

82. *Id.* at \*8.

The phrases “presumption of legitimacy” and “marital presumption” are used interchangeably. “[T]he concept of ‘child of the marriage’ defines who is a parent for purposes of awarding custody in a dissolution action. The child of the marriage and the parent of the child are two sides of the same coin.” In other words, if a minor child is “issue” or “child” of the parties’ marriage, he or she is presumed to be legitimate (*i.e.*, the presumption of legitimacy), and the parties to the marriage are presumed to be the legal parents of that child (*i.e.*, the marital presumption).<sup>83</sup>

The *Barse* court sets the stage for its analysis by noting that this was a case of first impression in Connecticut, having found no precedent for whether the marital presumption should extend to same-sex marriages.<sup>84</sup> The court looked to *Kerrigan v. Commissioner of Public Health* for some insight into how to approach the novel question.<sup>85</sup> Like Justice Kennedy in *Obergefell*, the court focuses in particular on the benefits that flow to children from allowing same-sex marriages:

In *Kerrigan*, the Supreme Court found that same-sex couples cannot be denied the constitutional right to marry. In reaching this conclusion, the court examined the economic and sociological implications of granting same-sex couples, the right to marry. . . . The Supreme Court also noted the positive effects that affording same-sex couples the right to marry would have on children: “Because of the significance of marriage in our society, the freedom to marry is an extraordinarily important right for all persons who wish to exercise it. As the Alliance for Marriage acknowledged in its amicus brief in support of the defendants, children reared by married couples and married couples themselves benefit greatly from marriage—apart from any legal benefits conferred on the family. Benefits to the married couple include greater longevity, greater wealth, more fulfilling sexual relationships, and greater happiness.” Further, “the ban on same sex marriage is likely to have an especially deleterious effect on the children of same sex couples. A primary reason why many same sex couples wish to marry is so that their children can feel secure in knowing that their parents’ relationships are as valid and as valued as the marital relationships of their friends’ parents. Excluding same-sex couples from civil marriage will not make children of opposite-sex marriages more secure, but it does prevent children of same-sex couples from enjoying the immeasurable advantages that flow from the *assurance of a stable family structure in which the children will be reared, educated, and socialized.*”<sup>86</sup>

The court went on to state that, given the clear mandate of *Kerrigan*, it was bound to find that the common law presumption of legitimacy and the

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83. *Id.* (citations omitted).

84. *Id.*

85. *Id.* at \*9.

86. *Id.* at \*9 (citations omitted).

marital presumption applied to the children of same-sex married couples.<sup>87</sup> After finding that the presumption applied, the court went on to address corollary issues with regard to whether the birth spouse could be estopped from rebutting the presumption, as a wife might be in an opposite-sex marriage context if she sat on her rights and treated the husband as if he were the father, and he suffered detriment as a result:

In *Weidenbacher*, the court held that the presumption of legitimacy is rebuttable by a person “who presents clear, convincing and satisfactory evidence that the mother’s husband is not the child’s natural father.” Applying this standard to the case at bar, the defendant can easily meet her burden because the parties have stipulated that the plaintiff has no genetic relationship to the minor child. Consequently, the court must consider whether there are any circumstances under which the defendant may be precluded from rebutting the presumption that the plaintiff is the minor child’s legal parent. The plaintiff argues that such circumstances reside in the law of equity, and in particular under the doctrine of equitable estoppel.<sup>88</sup>

In an opposite-sex marriage, the presumption would typically be rebutted by DNA evidence today.<sup>89</sup> The court would order genetic testing and, if the husband had no genetic link to the child, the court may determine that he is not the legal parent.<sup>90</sup> Courts do retain the equitable power to declare that, even despite a genetic connection and the rebuttal of the presumption, the child’s best interests require the husband to retain legal parentage.<sup>91</sup> The *Barse* court found that equitable estoppel is available as a defense on the part of the nonbirth/nongenetic spouse in this case, but that whether it applies in this case is a factual matter to be determined by a separate, evidentiary hearing.<sup>92</sup> However, the court does not address how to rebut such a presumption by an admittedly nonbirth/nongenetic female spouse. But the gravamen of such a rebuttal presumably lies in a lack of consent to the artificial insemination procedure.<sup>93</sup>

The *Barse* court also addressed the consent requirements and whether a failure to strictly adhere to those requirements automatically results in a husband losing his presumptive parental status.<sup>94</sup> Citing to a New York case, *W. v. W.*, the court noted that there may be issues of equity which defeat this

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87. *Id.* at \*10.

88. *Id.* at \*11 (citations omitted).

89. See Jana Singer, *Marriage, Biology, and Paternity: The Case for Revitalizing the Marital Presumption*, 65 MD. L. REV. 246, 253 (2006).

90. See *id.*

91. *Barse*, 2015 WL 600973, at \*12.

92. *Id.* at \*14.

93. *Id.*

94. *Id.* at \*11–12.

result.<sup>95</sup> The court then cited *Wendy G-M v. Erin G-M*, discussed next, to conclude that the birth mother may not use the nonbirth mothers' noncompliance to strip her of parentage.<sup>96</sup> Once again, the *Barse* court focused on the legislative goal of giving children legitimate status whenever possible in reaching its decision.<sup>97</sup>

In *Wendy G-M v. Erin G-M*, the New York court reviewed a case in which the child was conceived using an anonymous sperm donor, in contrast to the New York case of *Q.M.* discussed above.<sup>98</sup> In *Wendy G-M*, the court does address how the marital presumption applied to same-sex couples intersects with the consent issue, stating that:

In response to the presumption created by marriage, the birth mother argues before this court that if a biological stranger were presumed to be a parent, the potential exists for a birth mother to have artificial insemination, without the permission of the married spouse, and then the unknowing, non-biological, marital partner could be "obligated for 21 years of support." The argument does not defeat the holding here. A consent, properly executed and acknowledged under DRL § 73, is irrefutable. The presumption that arises in this case—the presumption of a spouse's consent to artificial insemination—is not irrefutable. The marital consent presumed in this case may be rebutted by either spouse in the same-sex marriage. The birth-mother could produce evidence that she never intended her spouse to be the parent of the AID child. The unknowing spouse would be faced with a presumption of consent to parenthood by virtue of the marriage and would have ample opportunity to rebut the presumption with evidence that the birth mother failed to obtain *any* consent prior to the conception. The unknowing, non-biological spouse, would be required to overcome the presumption of consent, and prove lack of consent.<sup>99</sup>

In holding that the marital presumption must apply to same-sex nonbirth/nongenetic spouses, the *G.M.* court once again relied on the New York law legalizing same-sex marriage and its necessary implications that all the same benefits that flow from marriage extend to same-sex couples, not simply the right to marry.<sup>100</sup>

The Marriage Equality Act swept away many of the sex-based distinctions in New York's Domestic Relations Law in the spirit of individuals making their own choices in both entering and living a married life, free from unreasonable restraints. Section 2 of the MEA mandates that not only

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95. *Id.*

96. *Id.* at \*6–7.

97. *Id.* at \*8.

98. *Wendy G-M v. Erin G-M*, 985 N.Y.S.2d 845, 847 (N.Y. Sup. Ct. 2014); *Q.M. v. B.C.*, 995 N.Y.S.2d 470 (N.Y. Fam. Ct. 2014).

99. *Wendy G-M*, 985 N.Y.S.2d at 859 (citations omitted).

100. *Id.* at 860.

statutes, but the common law as well, are gender neutral with respect to all the legal benefits, obligations, etc. arising from marriage. DRL § 10-a(2). In *Laura WW. v. Peter WW.*, the Third Department predicated the husband's parental status on the fact of marriage, without regard to the husband's biological connection to the child or to his fertility in general. To impose the presumption of consent to AID for couples in a heterosexual marriage, but not for those in a same-sex one, when both are similarly situated, but for sexual orientation, would reverse the gender-neutral approach to New York's families canonized in the MEA. In *Laura WW. v. Peter WW.*, the Third Department properly started New York down the path of presuming that the child of either partner in a married same sex couple will be presumed to be the child of both, even though the child is not genetically linked to both parents. . . . This court will not stop that march to greater equality for all lawfully married couples. The pervasive and powerful common law presumptions that link both spouses in a marriage to a child born of the marriage-the presumption of legitimacy within a marriage and the presumption of a spouse's consent to artificial insemination-apply to this couple. This court holds that the non-biological spouse is a parent of this child under the common law of New York as much as the birth-mother.<sup>101</sup>

Finally, the Iowa Supreme Court's reasoning in *Gartner v. Iowa Department of Public Health* is particularly salient regarding how to extend the marital presumption after that state's highest court approved same-sex marriage.<sup>102</sup> In *Gartner*, a same-sex couple wanted to list the nonbirth/nongenetic spouse's name on their child's birth certificate.<sup>103</sup> The couple was validly married when their child was born, as the Iowa Supreme Court previously struck down its Defense of Marriage Act in *Varnum v. Brien*.<sup>104</sup> The Iowa Department of Health refused to put the nonbirth/nongenetic spouse's name on the child's birth certificate because that spouse had not adopted the child.<sup>105</sup> The Department's position was that, "[t]he system for registration of births in Iowa currently recognizes the biological and 'gendered' roles of 'mother' and 'father,' grounded in the biological fact that a child has one biological mother and one biological father."<sup>106</sup> The couple subsequently brought an action to have the nonbirth/nongenetic spouse named as a parent on the birth certificate.<sup>107</sup> The district court ordered the department to do so, and the case went up on appeal to the Iowa Supreme Court.<sup>108</sup>

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101. *Id.* at 860-61 (citations omitted).

102. *See Gartner v. Iowa Dep't of Pub. Health*, 830 N.W.2d 335, 353 (Iowa 2013).

103. *See id.* at 341-42.

104. *Id.* at 341.

105. *Id.* at 341-42.

106. *Id.* (citation omitted).

107. *Id.*

108. *Id.*

After reciting the facts of the case, the court in *Gartner* laid out the marital presumption in Iowa:

For purposes of preparing a birth certificate, the Code includes a presumption of parentage. The legislature articulated the following procedure for preparing a child's birth certificate, based upon the presumption of parentage:

If the mother was married at the time of conception, birth, or at any time during the period between conception and birth, the name of the husband shall be entered on the certificate as the father of the child unless paternity has been determined otherwise by a court of competent jurisdiction, in which case the name of the father as determined by the court shall be entered by the department.

The statute is rebuttable under the preponderance standard “by clear, strong and satisfactory evidence.” The challenging party must also demonstrate a parental relationship with the child. Here, rebutting the presumption is a nonissue, because Heather conceived Mackenzie using an anonymous sperm donor.<sup>109</sup>

The *Gartner* court effectively lays out the origins and goals of the marital presumption.<sup>110</sup> This description is helpful in thinking about how to link the presumption's original intent and goals with the brave new world of same-sex marriage and nonbirth/nongenetic spouses after *Obergefell*.<sup>111</sup>

The presumption of parentage is a fundamental legal construct originating in common law.

....

Legislatures across the nation have adopted statutes codifying a presumption of parentage in order to address several key social policies. Specifically, “the presumption protected the legitimacy of children, which in turn entitled them to the financial support, inheritance rights, and filiation obligations of their parents.” It thwarted the possibility that children would become wards of the state and promoted familial stability by preventing “a third-party putative father from insinuating himself onto an intact family by claiming to have sired one of the family's children.” Moreover, at a time when “genetic origins were more a matter of suspicion than science,” the presumption served judicial efficiency by curtailing debates between parents as to the biological nature of their parent–child relationship.

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109. *Id.* at 344 (citations omitted).

110. *Id.* at 344–48.

111. *Id.*

Based on these social policies, . . . [s]pecific to Iowa, our court long ago articulated the principal bases for presuming a child born in wedlock is the legitimate issue of the marital spouses:

“This rule is founded on decency, morality, and public policy. By that rule, the child is protected in his inheritance and safeguarded against future humiliation and shame. Likewise, under the rule, the family relationship is kept sacred and the peace and harmony thereof preserved. No one, by incompetent evidence, can malign the virtue of the mother, and no one, by such evidence, can interrupt the harmony of the family relationship and undermine the sanctity of the home.”

Taking these policies individually, we recognize the strong stigma accompanying illegitimacy. The presumption counteracts the stigma by protecting the integrity of the marital family, even when a biological connection is not present.<sup>112</sup>

While acknowledging all the benefits of the marital presumption, the *Gartner* court found that the district court was wrong to extend those benefits to same-sex marital couples simply by means of statutory interpretation.<sup>113</sup> Iowa law on this point did not allow for a general neutral interpretation of the marital presumption:

The district court interpreted section 144.13(2) to require the Department to list Melissa as Mackenzie’s second parent on the birth certificate. We do not agree the statute can be interpreted in this way.

. . . .

A specific rule of construction found in Iowa Code section 4.1 applies to statutes containing gendered terms and assists us in ascertaining the legislature’s intent. Section 4.1 provides: “Words of one gender include the other genders.” This is not, however, a blanket rule applicable to all types of statutes. Instead, courts construing statutes can only utilize this rule when the statute uses a specific type of gendered language.

When the statute refers to only *one* gender and the gender referenced is *masculine*, section 4.1(17) extends the statute to include females. . . .

However, when the statute refers to only *one* gender and the gender referenced is *feminine*, section 4.1(17) does not extend the scope of the statute to include males. There, the court found that a husband could not recover under a pension statute, because the court could not enlarge the term

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112. *Id.* at 345–48 (citations omitted).

113. *Id.* at 341.



“widow,” as it referred to the surviving spouse who was eligible for survivor benefits, to include “widowers.”

Finally, when the statute employs *both* masculine and feminine words, section 4.1(17) does not apply. Reading such a statute in a gender-neutral manner “would destroy or change” the plain and unambiguous language, and would “nullif[y] the intent of the Legislature.”

Iowa’s presumption of parentage statute expressly uses *both* masculine and feminine words by referring to a mother, father, and husband. Accordingly, section 4.1(17) does not apply. If we applied the rule and imposed a gender-neutral interpretation of the presumption, we would destroy the legislature’s intent to *unambiguously* differentiate between the roles assigned to the two sexes. Only a male can be a husband or father. Only a female can be a wife or mother. The legislature used plain and unambiguous language to convey its intent. Thus, we cannot nullify the intent of the legislature by finding otherwise through statutory construction.

Finally, the district court relied on our decision in *Varnum* to compel its statutory construction analysis. At the time of enactment, the legislature made a conscious choice to use the word “husband.” It could have chosen to use spouse or other such language, but it did not. *Varnum* was decided thirty-nine years after the legislature enacted section 144.13(2). Hence, it is doubtful the legislature considered same-sex marriages when it enacted section 144.13(2). Husband was an unambiguous term at the time of passing section 144.13(2). Therefore, we cannot use the rules of statutory construction to extend, enlarge, or otherwise change the plain meaning of section 144.13(2).<sup>114</sup>

Unable to use statutory construction to gender-neutralize the marital presumption, the *Gartner* court turned to constitutional means of doing so.<sup>115</sup> The court looked to the state constitution’s equal protection guarantee.<sup>116</sup> Harkening back to its decision in *Varnum*, the court stated:

Thus, with respect to the subject and purposes of Iowa’s marriage laws, we find the Gartners similarly situated to married opposite-sex couples. The Gartners are in a legally recognized marriage, just like opposite-sex couples. The official recognition of their child as part of their family provides a basis for identifying and verifying the birth of their child, just as it does for opposite-sex couples. Additionally, married lesbian couples require accurate records of their child’s birth, as do their opposite-sex counterparts. The distinction for this purpose between married opposite-sex couples and married lesbian couples does not exist and cannot defeat an equal protection analysis. Therefore, with respect to the government’s purpose of

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114. *Id.* at 348–50 (citations omitted).

115. *Id.* at 344.

116. *Id.* at 351.

identifying a child as part of their family and providing a basis for verifying the birth of a child, married lesbian couples are similarly situated to spouses and parents in an opposite-sex marriage.<sup>117</sup>

The Public Health Department argued that there were three important governmental objectives in putting the male spouse's name on a birth certificate but refusing to do so for a nonbirth/nongenetic female spouse: (1) the accuracy of birth certificates; (2) the efficiency and effectiveness of government administration; and (3) the determination of paternity.<sup>118</sup> The court considered and dismissed each governmental interest in turn:

First, we understand that ensuring the accuracy of birth records for identification of biological parents is a laudable goal. However, the present system does not always accurately identify the biological father. When a married opposite-sex couple conceives a child using an anonymous sperm donor, the child's birth certificate reflects the male spouse as the father, not the biological father who donated the sperm. In that situation, the Department is not aware the couple conceived the child by an anonymous sperm donor.

Furthermore, the Department claims that the only way a married lesbian couple, who uses an anonymous sperm donor to conceive the child, can list the nonbirthing spouse as the parent on the birth certificate is to go through an adoption proceeding. This will not make the birth certificate any more accurate than applying the presumption of parentage for married lesbian couples, because the birth certificate still will not identify the biological father. The birth records of this state do not contain a statistical database listing the children conceived using anonymous sperm donors. Thus, the classification is not substantially related to the asserted governmental purpose of accuracy.

The Department next asserts the refusal to apply the presumption of parentage to nonbirthing spouses in lesbian marriages serves administrative efficiency and effectiveness. The Department argues that it takes valuable resources to reissue a birth certificate when a challenger successfully rebuts the presumption of parentage. However, when couples use an anonymous sperm donor, there will be no rebuttal of paternity. Moreover, even when couples conceive without using an anonymous sperm donor, there is no showing in the record that the presumption of paternity in opposite-sex marriages is rebutted in a significant number of births.

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117. *Id.*

118. *Id.*

The third proffered reason for the Department's action is the government's interest in establishing paternity to ensure financial support of the child and the fundamental legal rights of the father. When a lesbian couple is married, it is just as important to establish who is financially responsible for the child and the legal rights of the nonbirthing spouse.<sup>119</sup>

In the end, the *Gartner* court found that the marital presumption statute violated the Iowa Constitution's Equal Protection clause as applied to lesbian couples, reiterating the import of the same-sex marriage case, not just that the right to marry was upheld, but that all the benefits of marriage for the couple and their children were to be extended as well:

It is important for our laws to recognize that married lesbian couples who have children enjoy the same benefits and burdens as married opposite-sex couples who have children. By naming the nonbirthing spouse on the birth certificate of a married lesbian couple's child, the child is ensured support from that parent and the parent establishes fundamental legal rights at the moment of birth. Therefore, the only explanation for not listing the nonbirthing lesbian spouse on the birth certificate is stereotype or prejudice. The exclusion of the nonbirthing spouse on the birth certificate of a child born to a married lesbian couple is not substantially related to the objective of establishing parentage.<sup>120</sup>

However, instead of striking down the statute, the court "preserve[d] it as to married opposite-sex couples and require[d] the Department to apply the statute to married lesbian couples."<sup>121</sup> The court affirmed the district court and ordered the Department to issue a birth certificate naming Melissa Gartner as the parent of Mackenzie Gartner.<sup>122</sup> While that decision may make people feel assured that the marital presumption will automatically apply to same-sex spouses, several courts, as discussed above, have refused to extend it to same-sex couples, even in states that allow same-sex marriage.<sup>123</sup> Their reasoning is grounded in the lack of fit between the original presumption grounded in biology, and the structure of same-sex marriage, where two parents cannot both be the biological parents of the children of the marriage.<sup>124</sup> So, any judicial or legislative resolution to extend the marital presumption must involve a reconceptualization of the basis of the presumption and moving it away from biology to presumed consent.<sup>125</sup>

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119. *Id.* at 352–53.

120. *Id.* at 353–54.

121. *Id.* at 354.

122. *See id.*

123. *See supra* Part III.

124. *See supra* Part III.

125. *See supra* Part III.

V. SHIFTING THE FOUNDATION OF THE MARITAL PRESUMPTION FROM  
BIOLOGY TO CONSENT

The theme sounded by the courts that refused to extend the marital presumption to same-sex couples was that the marital presumption had its origins in establishing that the husband of a couple was the biological father of a child born to the wife during the marriage.<sup>126</sup> Those courts cite the use of the words “father” and “paternity” and the inclusion of exemptions for husbands who were not physically or otherwise capable of fathering the child as proof of this purpose.<sup>127</sup> They focus less on the presumption’s goals of having certainty for the child in terms of legitimacy, having two parents for legal purposes, and the protection of the intact, marital family from external intrusion.<sup>128</sup> If those goals become the focus, then the following move from biology to consent becomes consistent with the original purposes of the marital presumption.<sup>129</sup>

The courts that extended the marital presumption to same-sex couples have focused on the implications of case law validating same-sex marriage and the import of the court’s reasoning in those cases.<sup>130</sup> The state cases that validated same-sex marriage prior to *Obergefell* focused on the dignity of the marriage and the benefits to the children of the marriage.<sup>131</sup> Instead of focusing on only one of the original goals of the presumption, establishing a surrogate for biology, these courts focus on the goal of legitimizing children and extending benefits meant to flow from their state courts’ decision allowing same-sex couples to marry.<sup>132</sup> This shift in focus allows the second group of courts to reach conclusions about the presumption grounded in the law’s shift to recognize such marriages and the children who are within their protective ambit.<sup>133</sup>

So there is a way to reconcile the original goals of the presumption with *Obergefell*.<sup>134</sup> If the focus is primarily on the role of the marital presumption as a means to legitimize children, give a child two parents, and protect the marital family—rather than as a surrogate for a biological connection to the husband of a wife who gives birth—then there is a consistent reading of the original intent of the marital presumption with *Obergefell*’s focus on legitimizing children of same-sex couples and ensuring that all the benefits of marriage extend to those children.<sup>135</sup>

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126. See *supra* Part III.

127. See *supra* Part III.

128. See *supra* Part III.

129. See *supra* Part III.

130. See *supra* Part IV.

131. See *supra* Part IV.

132. See *supra* Part IV.

133. See *supra* Part IV.

134. See *supra* Parts I–IV.

135. See *supra* Parts I–IV.

Rather than the legal fiction that the husband of every wife who bears a child within marriage is the biological child of that man, the new presumption would be grounded in the concept that presumes every spouse consents to a child who is born during the marriage and intends that child to be his or hers, unless evidence is presented to rebut the presumption of consent.<sup>136</sup> A spouse's evidence of deception would be sufficient to rebut the presumption.<sup>137</sup> But evidence of a biological connection with someone outside the marriage would not be sufficient—absent evidence of deception.<sup>138</sup>

### A. Inheritance Law

With the exception of *Gartner*, most of the cases discussed involved divorce in the context of family law.<sup>139</sup> In those cases, a same-sex female couple was divorcing, and the nonbirth/nongenetic spouse was seeking custody and/or visitation.<sup>140</sup> These cases do not consider the marital presumption in the context of inheritance law and distributing a decedent's estate after she has died.<sup>141</sup> However, they do provide a place to begin the analysis for inheritance law, although the goals of that area of law differ markedly from family law in terms of the parent-focused nature of the cases brought in family law.<sup>142</sup> *Gartner*, in particular, provides a sound analytical basis for extending the presumption in family law and inheritance law.<sup>143</sup> In inheritance law, rather than an adult seeking a declaration as the legal parent of a child, it is the child who is seeking to establish the parent-child relationship.<sup>144</sup> The child seeks this determination of parentage, not for caregiving purposes, but for eligibility to receive a share of the decedent's estate.<sup>145</sup> If the language of *Obergefell* is taken seriously seriously—that the dignity and protection of children of the family is of utmost importance in its decision to extend marriage to same-sex couples—the focus should be on protecting that child's right to have two parents for all purposes, including inheritance.<sup>146</sup>

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136. See *supra* Parts I–IV.

137. See *supra* Parts I–IV.

138. See *supra* Parts I–IV.

139. See *supra* Parts II–IV.

140. See *supra* Parts II–IV.

141. See *supra* Parts II–IV.

142. See *supra* Parts II–IV.

143. *Gartner v. Iowa Dept. of Pub. Health*, 830 N.W.2d 335 (Iowa 2013).

144. Ralph C. Brashier, *Children and Inheritance in the Nontraditional Family*, 1996 UTAH L. REV. 93, 95.

145. See *id.* at 120–22.

146. See *supra* Part II.

As noted above, American inheritance law is a status-based system.<sup>147</sup> People inherit based on their relationship to the decedent.<sup>148</sup> So establishing a parent-child relationship is central to determining if a child will inherit from a decedent.<sup>149</sup> In the absence of an adjudication of the issue during life—which would be dispositive—parentage issues may arise after someone has died during the course of estate administration.<sup>150</sup> The decedent may have died intestate and the statute provides for the estate to go to “issue”, or someone may have left a class gift in her will to her children or her son’s children.<sup>151</sup> In either case, there needs to be a quick, easy way to determine parentage when it has not been adjudicated during life.<sup>152</sup> The marital presumption provides one way to efficiently make this determination at death.<sup>153</sup> Extending the marital presumption to same-sex nonbirth/nongenetic spouses for purposes of inheritance law supports the goals of a child having two legal parents from whom he or she can inherit and the orderly administration of estates.<sup>154</sup>

An action in federal court striking down one of the state codifications of the marital presumption that is not gender neutral could extend the marital presumption to same-sex couples.<sup>155</sup> For example, the Texas statute says, “A man is presumed to be the father of a child if . . . he is married to the mother of the child and the child is born during the marriage.”<sup>156</sup> The marital presumption could also be extended state by state via legislative action.<sup>157</sup> In keeping with that idea, the Uniform Probate Code could amend Article II to add its own gender-neutral presumption akin to that found in the Arkansas statutes: “A child born or conceived during a marriage is presumed to be the legitimate child of both spouses.”<sup>158</sup>

The Uniform Probate Code does not currently have its own presumption; rather it incorporates the Uniform Parentage Act presumption by reference.<sup>159</sup> In addition to creating a gender-neutral presumption in the

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147. See *supra* Parts I, IV.

148. Monopoli, *Deadbeat*, *supra* note 16, at 259.

149. See *supra* Part I.

150. See Monopoli, *Deadbeat*, *supra* note 16, at 259–60.

151. See TEX. EST. CODE ANN. §§ 201.001–.003, 255.401 (West 2015).

152. See *id.*

153. See *supra* Part IV.

154. See *supra* Part IV.

155. Joan M. Burda, Obergefell v. Hodges: *The Effect of the Decision and Estate Planning for LGBT Couples*, 87 N.Y. ST. B. J. 10, 12 (2015).

156. TEX. FAM. CODE ANN. § 160.204(a)(1) (West 2012).

157. See Burda, *supra* note 155, at 13–14.

158. ARK. CODE ANN. § 28-9-209(a)(2) (2011).

159. See UNIF. PROB. CODE § 2-115 Legislative Note: “States that have enacted the Uniform Parentage Act (2000, as amended) should replace “applicable state law” in paragraph (5) with “Section 201(b)(1), (2), or (3) of the Uniform Parentage Act (2000), as amended”. Two of the principal features of Articles 1 through 6 of the Uniform Parentage Act (2000, as amended) are (i) the presumption of paternity and the procedure under which that presumption can be disproved by adjudication . . .” I would also advocate for the Uniform Probate Code to similarly create a gender-neutral presumption akin to the

Uniform Probate Code itself, I would make the presumption conclusive.<sup>160</sup> In family law, having a rebuttable presumption makes sense given the profound implications of giving an adult the significant duties of parentage during a child's life.<sup>161</sup> If a nonbirth spouse did not consent to being a parent, the presumption should not apply.<sup>162</sup> However, in inheritance law, making the presumption conclusive or irrebuttable, as it was historically, makes more sense.<sup>163</sup> In inheritance law, the goal is to determine the eligible takers based on their relationship to the decedent and move the assets to them as efficiently as possible.<sup>164</sup> Having a conclusive presumption accomplishes this goal.<sup>165</sup>

Such a rule would bring fairness to same-sex couples and stability, a touchstone of Justice Kennedy's opinion in *Obergefell*, to their children.<sup>166</sup> It would also bring state statutes in line with the spirit of *Obergefell* to provide all the benefits of marriage to same-sex couples and their children.<sup>167</sup> Finally, it would ensure that every child has two parents for purposes of inheritance, and it would further the efficient, orderly administration of estates, which are both major goals of American inheritance law.<sup>168</sup>

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Uniform Parentage Act's presumption in favor of nonmarital children as well so that marital status would not be the exclusive means by which parentage could be determined. See UNIF. PARENTAGE ACT §§ 204(a)(4) and (5).

160. See *id.*

161. See Monopoli, *Nonmarital*, *supra* note 15, at 880–84.

162. See *id.*

163. See *id.* at 880.

164. See *supra* Part IV.

165. See *supra* Parts II–III.

166. See *supra* Part II.

167. See *supra* Parts II–IV.

168. See *supra* Part IV.