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In Search of Parity: Child Custody/Visitation and Child Support for Lesbian Couples Under "Companion" Cases Debra H. and In Re H.M.

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IN SEARCH OF PARITY: CHILD CUSTODY/VISITATION AND CHILD SUPPORT FOR LESBIAN COUPLES UNDER "COMPANION" CASES *DEBRA H.*[1] AND *IN RE H.M.*[2]

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The United States is engaged in a national debate over whether to grant same-sex couples the rights and privileges of marriage. Supporters of marriage equality flood the media with images of jubilant same-sex couples simply wanting the chance to say their "I dos" and have the state formally recognize their shared love and commitment. The unfortunate reality is, however, that many homosexual relationships, like heterosexual relationships, dissolve. Marriage rights play as important a role at a relationship's dissolution as they do at a relationship's inception. This paper focuses on one such issue often left out of the public discourse over marriage equality: determining parentage for the purposes of child custody/visitation as well as child support in the context of a lesbian relationship that has broken down.

Part I of this paper provides a general discussion of child support and then briefly describes how a member of a now dissolved lesbian partnership may be compelled to provide financial support for a child conceived during or raised by the partnership, where the person is not the birth (biological) or adoptive parent of the child. Part II outlines the role marriage rights play in determining parentage for the purposes of securing child support. Part III discusses the intersection of child custody/visitation jurisprudence and child support jurisprudence and utilizes a critique of New York Court of Appeals "companion"[3] cases *Debra H. v. Janice R.* and *In re H.M. v. E.T.* to highlight the importance of relying on the *same* parentage standard *both* in adjudication of parental rights (child custody/visitation) and parental obligations (child support). Part IV proposes and evaluates possible parentage standards that could be applied in both child

[1] Debra H. v. Janice R., 930 N.E.2d 184 (N.Y. 2010).
[2] In re H.M. v. E.T., 930 N.E.2d 206 (N.Y. 2010).
[3] The word companion is placed in quotes to signal that even though the United States Supreme Court handed down the cases together, the legal theories underlying them are quite different. This is further developed in Part III.

custody/visitation adjudication as well as child support adjudication. Finally, Part V briefly concludes.

I. LEGAL PARENTAGE, CHILD SUPPORT AND SAME-SEX FAMILIES

The 2000 Census reported that 34.3% of lesbian couples were raising children.[4] New technologies have gradually increased the opportunity for lesbian couples to raise biologically related children in addition to adoption. Among lesbian couples, a majority utilizes some method of artificial insemination,[5] one of the oldest and most common forms of assisted-reproduction technology.[6] As a consequence of artificial insemination, the biological mother automatically gains parental status, while the non-biological parent must seek out legal parentage.[7] Some states have hetero-normative artificial insemination statutes that bestow automatic parentage on a husband who consents to his wife's in-vitro fertilization.[8] Only the District of Columbia and New Mexico have explicitly extended these laws to lesbian couples.[9] The only other way to receive automatic parentage rights is if the state legally recognizes the same-sex relationship and provides a presumption of parenthood for any child born to the couple. Again, this is limited to couples living in states that recognize same-sex marriage, or provide a marriage-like status.[10] Adoption is another common method used by lesbians.[11] It is important to differentiate between joint adoption, in which both individuals establish legal adoptive parenthood over a child, and

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[4] *See* Jason N.W. Plowman, *When Second-Parent Adoption is the Second-Best Option: The Case for Legislative Reform as the Next Best Option for Same-Sex Couples in the Face of Continued Marriage Inequality*, 11 SCHOLAR 57, 59 (2008); *see also* Ellen C. Perrin, *Technical Report: Co-parent or Second Parent Adoption by Same-Sex Parents*, 109 PEDIATRICS 341 (2002).

[5] *See* Emily Doskow, *The Second Parent Trap: Parenting for Same-Sex Couples in a Brave New World*, 20 J. JUV. L. 1, 2 (1999).

[6] *See* ROBERT BLANK & JANNA C. MERRICK, HUMAN REPRODUCTION, EMERGING TECHNOLOGIES, AND CONFLICTING RIGHTS 86 (1995); Karin Mika & Bonnie Hurst, *One Way to Be Born? Legislative Inaction and the Posthumous Child*, 79 MARQ. L. REV. 993, 996 (1996). For a general discussion of alternative methods for reproduction, see Charles P. Kindregan, Jr., *Thinking About the Law of Assisted Reproductive Technology*, 27 WIS. J. FAM. L. 123 (2007).

[7] *See* Doskow, *supra* note 5, at 2.

[8] *See* sources and discussion *infra* Part IV.A.

[9] *See* sources and discussion *infra* notes 108-09.

[10] *See* sources and discussion *infra* Part III.

[11] *See* Doskow, *supra* note 5, at 3-4.

second-parent adoption, in which one parent is already the legal, biological parent—either through surrogacy, artificial insemination, or from a previous relationship—and the biological parent's partner must actively seek to establish a legal relationship with the child.[12] Thus, there are many possible scenarios where at the dissolution of a lesbian relationship one partner can find herself without any legal tie to the child they called their own. This complicates both the rights of this partner to custody/visitation as well as obligations to provide child support.

Ensuring financial support of children is a high priority in our country's social policy.[13] Insufficient child support is a leading cause of child poverty.[14] Furthermore, children who receive child support perform better academically, and are more likely to finish school and attend college.[15] Although child support laws are left to the states, the federal government has stepped in to require states to implement stronger child support enforcement measures.[16] In 1996, Congress mandated that states enact the Uniform Interstate Family Support Act in order to receive federal funds in an attempt to make child support awards more uniform and to increase levels and efficiency in proceedings.[17]

Child support can be sought either in an action by the partner with custody of the child following the partnership's dissolution, or in an action by a governmental body attempting to recoup prior or prevent future child support payments, where the child or the custodial parent is receiving public support. Courts are charged with the responsibility of interpreting and applying

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[12] *Id*.
[13] *See* Drew A. Swank, *The National Child Non-Support Epidemic*, 2003 L. REV. MICH. ST. U. DET. C.L. 357, 363-65 (2003) (discussing a brief history of child support enforcement).
[14] *Id*. at 360 ("The possibility of a child escaping poverty often depends on whether or not the owed child support is being paid.").
[15] *See* Michael L. Hopkins, *"What is Sauce for the Gander is Sauce for the Goose:" Enforcing Child Support on Former Same-Sex Partners Who Create a Child Through Artificial Insemination*, 25 ST. LOUIS U. PUB. L. REV. 219, 222 (2006).
[16] *See* Swank, *supra* note 13, at 365.
[17] *See* 42 U.S.C. § 666(f) (2006).

state family law statutes and because most are drafted as general guidelines, the role of the court is substantial in determining parentage and the rights and obligations attendant to that status.[18]

II. IMPACT OF LEGAL RECOGNITION OF SAME-SEX RELATIONSHIPS

The legal nature of the lesbian partnership directly impacts parental determination, which in turn impacts child custody/visitation and support. I divide this section into the following categories of legal recognition: (a) same-sex marriage; (b) civil unions/domestic partnerships; (c) no state recognized status. The latter category I further divide into methods used to formally crate legal parentage: (a) second-parent adoption; and (b) adoption. Finally, there is the category of no legal relationship between the couple and no legal relationship between the non-biological partner and child.

A. MARRIAGE[19]

Marriage-like recognition of same-sex relationships theoretically provides automatic legal parentage by way of the legal connection between the parents. For example, a legally married lesbian couple "engaging in reproduction through artificial insemination would not need to take any steps at all to protect the rights of the partner who did not carry the child, as the latter would be considered to be in the same position as the husband of a heterosexual woman who is inseminated with the semen of another man [whereby the law] . . . deems the husband the legal parent of [the] child born as a result of the insemination, despite the absence of genetic

[18] *See* Hopkins, *supra* note 15, at 222-23.

[19] Currently, same-sex couples can marry in Connecticut, Iowa, Massachusetts, New Hampshire, Vermont, and the District of Columbia. New York and Maryland recognize marriages between same-sex couples entered into in other jurisdictions. *See* Human Rights Campaign, *Marriage Equality & Other Relationship Recognition Laws*, updated Feb 25, 2011, http://www.hrc.org/documents/Relationship_Recognition_Laws_Map.pdf. California recognizes marriages between same-sex couples entered into prior to November 5, 2008; marriages between same-sex couples entered into on or after November 5, 2008 will be accorded all of the state-conferred rights and responsibilities of marriage, but will not be accorded the designation. *See* CAL. FAM. CODE § 308 (West 2010); Strauss v. Horton, 207 P.3d 48 (Cal. 2009) (holding that marriages between same-sex couples entered into in California prior to November 5, 2008, are valid for all purposes); National Center for Lesbian Rights and Equality, *SB 54 and Same-Sex Couples Who Marry Outside of California*, updated Oct. 20, 2009, www.nclrights.org/SB54FAQ.

connection."[20] Extending this to lesbian couples, a partner in a legal same-sex marriage is presumed to be the parent and would have standing to contest custody/visitation as well as be potentially liable for child support.

B. CIVIL UNIONS/DOMESTIC PARTNERSHIPS[21]

In most states that provide civil unions or domestic partnerships, the rights and responsibilities bestowed by that status are very similar to those of marriage, particularly with respect to parentage determination for children born during the relationship.[22] Thus, similar to same-sex marriage states, in most of these civil union/domestic partnership states, the non-biological partner is presumed to be a legal parent. For example, in *Baker v. State*,[23] the Supreme Court of Vermont held that "the State is constitutionally required to extend to same-sex couples the common benefits and protections that flow from marriage under Vermont law."[24] Soon after, the Vermont legislature formally defined these protections by enacting the Civil Union Act, affording same-sex couples all the legal benefits of marriage without the specific status declaration.[25] One provision of the Civil Union Act specifically relates to parentage: "The rights of parties to a civil union, with respect to a child of whom either becomes the natural parent

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[20] Doskow, *supra* note 5, at 3-4.

[21] Hawaii, Illinois, and New Jersey permit same-sex couples to enter into civil unions, a status that provides all of the state conferred rights and responsibilities of marriage. California, Nevada, Oregon, Washington, and Washington D.C. permit same-sex couples to enter into registered domestic partnerships, which provide all or almost all of the state-conferred rights and responsibilities of marriage. *See* Human Rights Campaign, *Marriage Equality & Other Relationship Recognition Laws*, updated Feb 25, 2011, http://www.hrc.org/documents/Relationship_Recognition_Laws_Map.pdf. Among other protections, all of these statuses confer upon the couple the same rights and responsibilities with regard to a child born to the couple as are conferred on heterosexual married couples. *See, e.g.*, CAL. FAM. CODE § 297.5(d) (West 2010) ("The rights and obligations of registered domestic partners with respect to a child of either of them shall be the same as those of spouses."); N.J. STAT. ANN. § 37:1-31(e) (West 2010) ("The rights of civil union couples with respect to a child of whom either becomes the parent during the term of the civil union, shall be the same as those of a married couple with respect to a child of whom either spouse or partner in a civil union couple becomes the parent during the marriage.").

[22] *See* sources cited *supra* note 21.

[23] 744 A.2d 864 (Vt. 1999).

[24] *Id.* at 867.

[25] *See* VT. STAT. ANN. tit. 15, §§ 1201–07 (LexisNexis 2002).

during the term of the civil union, shall be the same as those of a married couple, with respect to a child of whom either spouse becomes the natural parent during the marriage."[26] Therefore, a Vermont civil union provides a rebuttable marriage-like presumption that the non-biological, non-adoptive parent is a legal parent.[27]

C. NO LEGAL RECOGNITION OF THE SAME-SEX RELATIONSHIP

Finally, the following thirty-two states provide no legal recognition for same-sex couples: Alaska, Alabama, Arizona, Arkansas, Delaware, Florida, Georgia, Idaho, Indiana, Kansas, Kentucky, Louisiana, Michigan, Minnesota, Mississippi, Missouri, Montana, Nebraska, New Mexico, New York, North Carolina, North Dakota, Oklahoma, Pennsylvania, South Carolina, South Dakota, Tennessee, Texas, Utah, Virginia, West Virginia, and Wyoming.[28] It is important to note that a separate issue apart from a state's own laws regarding same-sex marriage concerns recognition of other states' same-sex marriage laws. Currently, only New York and Maryland fully acknowledge out-of-state same-sex marriages.[29]

In the absence of a legal parent-child relationship automatically formed via the legal relationship between the same-sex partnership, legal parental status can be sought through adoption. It is important to distinguish between joint and second-parent adoption. The term joint adoption generally refers to a couple together adopting a child who is not the biological or pre-existing adoptive child of either of them.

I. JOINT ADOPTION

Formal adoption provides standing to contest child custody/visitation as well as provides a prima facie case of liability against a former domestic partner to pay child support. However,

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[26] *Id.* tit. 15, § 1204(f).
[27] *See id.*
[28] *See* Human Rights Campaign, *Marriage Equality & Other Relationship Recognition Laws*, updated Feb 25, 2011, http://www.hrc.org/documents/Relationship_Recognition_Laws_Map.pdf.
[29] *Id.*

not all states allow homosexuals to adopt. Until very recently Florida law expressly prohibited "homosexual" individuals from adopting.[30] Similarly, as of 2000, Mississippi law expressly prohibits "adoption by couples of the same gender."[31] Utah prohibits adoption "by a person who is cohabiting in a relationship that is not a legally valid and binding marriage."[32] Utah defines cohabitation as "residing with another person and being involved in a sexual relationship with that person."[33] Even when available, joint-adoption is not ideal in the majority of lesbian families where one of the partners is already the biological parent because it requires severing the pre-existing relationship between the biological parent and child in order to allow both individuals to jointly adopt the child. [34]

II. SECOND PARENT ADOPTION

Some states explicitly permit legal adoption by a second parent in a same-sex relationship without terminating the legal status of the biological parent.[35] In these states, "the adoptive

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[30] *See* FLA. STAT. ANN. § 63.042(3) (West 2002) ("No person eligible to adopt under this statute may adopt if that person is a homosexual.").

[31] MISS. CODE ANN. § 93-17-3(5) (West 2007) ("Adoption by couples of the same gender is prohibited.").

[32] UTAH CODE ANN. § 78-30-1(3)(b) (LexisNexis 2008).

[33] *Id.*

[34] Most states passed adoption statutes with cut-off provisions in order to effectuate a "fresh start" policy that protects the new adoptive parents from claims of the child's biological parents. *See* In re Estates of Donnelly, 502 P.2d 1163, 1166–67 (Wash. 1972) (stating that the purpose of these types of severing provisions gives the adopted child a "'fresh start' by treating him as the natural child of the adoptive parent, and severing all ties with the past."). For an example of a cut-off provision, *see* UNIF. ADOPTION ACT §1-105, 9 U.L.A. 23 (1994). In order to avoid the cut-off provision terminating the biological parent's rights (for the majority of states that include such a provision), the biological parent may willingly terminate his or her parental rights to the child in order to become a joint adoptive parent alongside her partner. If the court approves the joint adoption, then both parents will be legal parents for all purposes.

[35] *See* Family Equality Council, *State-by-State: Second Parent Adoption Laws*, May 2008, http://www.familyequality.org/pdf/secondparent_withcitations.pdf. Second-parent adoption is available by statute in California, Connecticut, and Vermont. *See* CAL. FAM. CODE §§ 297, 9000(g) (West 2010) (allowing only registered domestic partners to adopt without terminating the legal status of the biological parent); CONN. GEN. STAT. § 45a-724(a)(3) (West 2009); VT. STAT. ANN. tit. 15A, § 1-102(b) (2002). Appellate court decisions in the following jurisdictions have also approved second-parent adoption: California, the District of Columbia, Illinois, Indiana, Massachusetts, New Jersey, New York, Pennsylvania, and Vermont. *See* Sharon S. v. Superior Court, 73 P.3d 554, 562–63 (Cal. 2003); In re M.M.D., 662 A.2d 837, 862 (D.C. 1995); In re Petition of K.M., 653 N.E.2d 888, 898 (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, 270–71 (Ind. Ct. App. 2003); 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, 405–06 (N.Y. 1995); In re Adoption of R.B.F., 803 A.2d 1195, 1202 (Pa. 2002); Adoption of B.L.V.B., 628 A.2d 1271, 1275 (Vt. 1993).

parent stands in parity with the biological parent and has all the rights and responsibilities that flow from legal parenthood."[36] Second-parent adoption is modeled on stepparent adoption, a statutory scheme that allows a biological (or adoptive) parent's spouse to adopt a child without terminating that parent's legal rights.[37] Although most states are not explicit in terms of whether second-parent adoption is available for same-sex families, some states do explicitly provide for same-sex second-parent adoption by statute, while others provide for same-sex second-parent adoption through appellate court decisions.[38] Vermont is a unique example because it provides protection for same-sex families through a family law code that is gender neutral rather than specifically applying only to homosexual couples, stating "[i]f a family unit consists of a parent and the parent's partner, and adoption is in the best interest of the child, the partner of a parent may adopt a child of the parent. Termination of the parent's parental rights is unnecessary in an adoption under this subsection."[39]

In a family structure in which only one parent is the biological parent, second-parent adoption is often thought of as the best solution to legalize the relationship between the non-biological parent and the child.[40] However, second-parent adoptions are far from a panacea.[41]

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[36] Margaret S. Osborne, Note, *Legalizing Families: Solutions to Adjudicate Parentage for Lesbian Co-Parents*, 49 VILL. L. REV. 363, 369 (2004).

[37] *See* Nancy D. Polikoff, *A Mother Should Not Have To Adopt Her Own Child: Parentage Laws for Children of Lesbian Couples in the Twenty-first Century*, 5 STAN. J. C.R. & C.L. 201, 205 (2009) [hereinafter *Parentage Laws*].

[38] *See* sources cited *supra* note 35.

[39] VT. STAT. ANN. tit. 15A, § 1-102(b) (2002).

[40] There are other non-litigious options for co-parents, including co-parenting agreements, pre-birth decrees, and visitation agreements subsequent to the dissolution of the relationship. *See* Osborne, *supra* note 36, at 367–68. Co-parenting agreements are simple, contract-like legal documents outlining the particular rights and responsibilities of each parent. *Id.* at 370–71. Yet, courts often refuse to enforce co-parenting agreements on the grounds that biological parents cannot contract away any portion of their constitutional right to guide the upbringing of their children. *Id.* Pre-birth decrees attempt to adjudicate parenthood from conception (be it by in vitro sperm donation, surrogacy, or other method). *Id.* at 371–72. This option is only available to those parents seeking to legally solidify their relationship with an as yet unborn child. *Id.* Visitation agreements, even if prepared preemptively before the dissolution of a relationship, are often unenforceable because courts are reluctant to allow parties to independently contract for child custody without a court applying a best interest of the child standard. *Id.* at 372–74. Despite these other attempts to avoid a post-dissolution adversarial court determination of parental rights, second-parent adoption is the most robust non-litigious option to formally establish a legal parent–child relationship. *Id.* at 367–68.

[41] See sources and discussion *infra* notes 65-66.

Part III below discusses some of the problems in placing too much of an emphasis on second-parent adoption as the New York Court of Appeals did in *Debra H*.

III. THE INTERSECTION OF CHILD CUSTODY/VISITATION AND CHILD SUPPORT AND THE CONCERNING PRECEDENT OF "COMPANION" CASES *DEBRA H.* AND *IN RE H.M.*

The New York Court of Appeals handed down *Debra H.* and *In re H.M.* the same day—May 4, 2010. Both involved lesbian families. Both were child-related cases; *Debra H.* addressing a petitioner seeking visitation and *In re H.M.* addressing a petitioner seeking child support. Both were to be treated under a similar "best interest of the child" standard. Yet, these cases are anything but "companion" cases. Taken together, these cases establish a legal regime for lesbian partners where for the purposes of contesting child custody the court takes a narrow view of legal parenthood, requiring that the non-biological partner formally adopt the child through second-parent adoption, but for securing child support against a non-biological parent, the court takes a much more expansive view of legal parenthood.

Debra H. held that absent a second-parent adoption, a non-biological parent does not have standing to seek custody or visitation with the child she helped raise.[42] The compelling facts of *Debra H.* are common to these types of cases. Respondent Janice R. conceived through artificial insemination and gave birth to M.R. after Janice R. and Debra H. entered into a civil union in the State of Vermont.[43] While Debra H. did not take the step of formally adopting M.R. as a second parent, for much of his life, Janice R. held Debra H. out—both to the world and to M.R.—as M.R.'s mother and the two women raised M.R. together until they separated in 2006.[44]

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[42] *See* Debra H. v. Janice R., 930 N.E.2d 184, 191 (N.Y. 2010). However, the court did end up upholding the parental rights of the non-biological mother based on the fact that the couple entered into a Vermont civil union and comity principles required that the court follow Vermont law. *Id*. at 196-97. Therefore, the New York Court of Appeals ultimately held that Debra H. is the legal parent of M.R. and thus entitled to seek custody and visitation with her son. The precedential value of this decision in terms of bestowing parenthood based on an out-of-state civil union remains to be seen.

[43] *See id.* at 186.

[44] *Id.* at 186-88.

Indeed, even after they separated, Debra H. continued to act as M.R.'s parent.[45] It was not until May 2008, when M.R. was almost five years old, that Janice R. abruptly and unilaterally sought to sever all forms of contact between Debra H. and M.R.[46]

The New York Court of Appeals was quite divided in its analysis in *Debra H.*, evident by four separate concurrences. However, the majority clearly expressed the court's reaffirmation of the court's precedent established in *In re Alison D. v. Virginia M*[47] nearly twenty-years prior. In *Alison D.*, the Court of Appeals of New York addressed whether a non-biological, non-adoptive "stranger" had standing to seek visitation under applicable New York domestic relations law.[48] The facts of *Alison D.*, similar to the facts of *Debra H.*, are quite compelling. Together Alison D. and respondent Virginia M. planned for the conception and birth of the child and agreed to share jointly in all the privileges and obligations of parenthood.[49] The child was given Alison's last name as his middle name and Alison shared in both pre-birth and post-birth expenses.[50] In fact, until the child was two years and four months, both individuals jointly cared for and made decisions regarding the child.[51] Yet, the court followed a bright-line rule, holding that without a formal second-parent adoption, "although [Alison] apparently nurtured a close and loving relationship with the child, she is not a parent."[52]

Lower New York courts have long criticized *Alison D.*[53] In 2008, a New York trial court stated: "In the seventeen years since *Alison D.*, under constraint of that decision, courts have continued to deny the proactive efforts of a non-biological, non-adoptive domestic partner or

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[45] *Id.*
[46] *Id.*
[47] 572 N.E.2d 27 (N.Y. 1991).
[48] *See id.* at 27.
[49] *Id.*
[50] *Id.*
[51] *Id.*
[52] *Id* at 28.
[53] *See, e.g.*, Beth R. v. Donna M., 853 N.Y.S.2d 501 (N.Y. Sup. Ct. 2008)

spouse to obtain custodial rights, notwithstanding the ties that may have developed between that person and the child."[54] The court argued that "if the concern of both the legislature and the Court of Appeals is what is in the child's best interest, a formulaic approach to finding that a 'parent' can only mean a biologic or adoptive parent may not always be appropriate."[55]

Despite *Debra H*. presenting the perfect opportunity for the Court of Appeals to revise its ruling in *Alison* D., the court instead authoritatively rejected arguments that *Alison D.* should be overruled because it is outmoded, unworkable and does not take into account the best interests of the child.[56] The court remained stubbornly steadfast, holding that "*Alison D.*, in conjunction with second-parent adoption, creates a bright line rule that promotes certainty in the wake of domestic breakups."[57] Preferring an arguably naive sense of certainty and predictability over the best interest of the child in maintaining a meaningful relationship, the court refused to utilize its common law and equitable powers to expand its definition of a parent to include "*de facto*" parenthood or parent "by estoppel."[58] Granted, a more equitable or functional analysis is more subjective than biology; however, as Judge Smith, concurring in *Debra H* and *In re H.M.*,. correctly understands, "it is not possible for both members of a same-sex couple to become biological parents of the same child . . . [t]hese differences seem . . . to warrant different treatment."[59] Different treatment does not mean worse treatment; requiring a lesbian couple to seek a formal second-parent adoption is much more of a burden than the burden on heterosexual couples to take a DNA test.

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[54] *Id*. at 507.
[55] *Id*.
[56] *See Debra H.*, 930 N.E.2d at 191-93.
[57] *Id*. at 191.
[58] *Id*. at 192-93.
[59] *Id*. at 250 (Smith, J., concurring).

In the end, however, the court found Debra H. had standing to seek custody, recognizing her parenthood by way of the Vermont civil union she entered into with Janice R.[60] The court found the civil union "as determinable as whether there had been a second-parent adoption," because "both civil union and adoption require the biological or adoptive parent's legal consent, as opposed to the indeterminate implied consent featured in the various [equitable] tests proposed to establish de facto or functional parentage."[61] However, does Janice R. holding Debra H. out to the world as M.R.'s mother, and the two women together raising M.R. for over two years, not convey a determinable level of consent?[62] In Part IV below I further combat the court's assertion that it was forced to maintain the *Alison* D. parental requirements of biology or adoption for the proffered reasons of certainty and predictability.

While the court finds fault in other potential theories of parenthood, it does not adequately acknowledge the faults in requiring a second-parent adoption. Instead, the court merely pointed to its thought process behind opening the door for same-sex second-parent adoption in *In re Jacob*.[63] The court "stressed that permitting such second-parent adoptions 'allows . . . children to achieve a measure of permanency with both parent figures and avoids the sort of disruptive visitation battle [the court] faced in [*Alison D.*].'"[64] However, there is a difference between allowing second-parent adoption and *requiring* it. Heterosexual parents simply need to take a DNA test to be considered a parent with standing to contest custody/visitation. Yet, the court is comfortable requiring homosexual parents to go through a

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[60] *See id.* at 196-97.
[61] *Id*. Judge Graffeo made a similar argument in his concurrence. *See id*. at 197 (Graffeo, J., concurring) ("Rather than employing an 'equitable estoppel' or 'in loco parentis' basis for establishing parental status, *Alison D.* created a bright-line rule that made it possible for biological and adoptive parents to clearly understand in what circumstances a third party could obtain status as a parent and have standing to seek visitation or custody with a child.").
[62] *See id.* at 186-88.
[63] 660 N.E.2d 397 (N.Y. 1995).
[64] Debra H. v. Jannice R., 930 N.E.2d 184, 190 (N.Y. 2010) (internal citations removed).

second-parent adoption, a process that is at best, a time-consuming, expensive and intrusive.[65] The couple must hire a lawyer and participate in what will likely be a long, drawn-out process. Many families remain unfamiliar with these procedures, or even if familiar when them, are unable to amass the resources necessary to fully pursue them. It can also be emotionally taxing; until a judge signs the adoption decree, the non-biological mother and her child are legal strangers.[66]

Same-sex couples likely do not even consciously consider the importance of a second-parent adoption. Similar to many newlyweds who find it unnecessary to sign pre-nuptial agreements because they could never see the relationship dissolving, same-sex couples might not subject themselves to the expensive, drawn out process of second-parent adoption because they similarly are too blinded by love to ever consider the legal ramifications should the couple break up.[67] Thus, requiring a second-parent adoption closes the door to maintaining relationships with both parents in households headed by a same-sex couple for whom adoption may not be a practical option for any number of reasons.

Judge Kaye, dissenting in *Alison D.*, warned that the best interest of the child is ignored when requiring second-parent adoption "limit[s] their opportunity to maintain bonds that may be crucial to their development."[68] Thus, Judge Kaye would have remanded *Alison D.* for the lower court to assess Alison's parenthood based on a theory of *in loco parentis* to see if it was in the

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[65] *See Parentage Laws*, *supra* note 37, at 267 ("Even where available, however, recognition of a child's family should not depend upon the family's access to court proceedings that require a lawyer and take two precious and limited commodities-time and money."); *see also* In re Parentage of Robinson, 890 A.2d 1036 (N.J. Ct. Ch. Div. 2005) (noting that the couple decided not to seek a second-parent adoption because they did not want the child in legal limbo for the two years it would take to finalize the adoption).

[66] *See Parentage Laws*, *supra* note 37, at 208.

[67] *See* A.H. v. M. P., 857 N.E.2d 1061, 1066 n.6 (Mass. 2006) ("The plaintiff states that she had no sense of urgency to formalize the relationship to the child because she never imagined a possible threat to her parental status. . . she viewed the adoption as a formality necessary only in the unlikely event of a 'worst case scenario.'").

[68] *See* Alison D. v. Virginia M., 77 N.Y.2d, 651, 658 (N.Y. 1991) (Kaye, J. dissenting). This same idea is echoed in Judge Ciparick's concurrence in *Debra H*. 930 N.E.2d at 201 (Ciparick, J., concurring).

best interest of the child to allow visitation.[69] This is similar to what the Court of Appeals should have done in *Debra H.*; and, in fact, it is what the trial court did by applying principles of equity to find Debra H. a *de facto* parent.[70]

Such an equity-based approach to parentage would parallel the Court of Appeals approach to parentage determination in *In re H.M.*, thereby placing parentage standards for child custody/visitation standing in parity with parentage for adjudicating child support. In *Shondel J.*, the New York Court of Appeals held that despite a lack of genetic connection, the doctrine of equitable estoppel prohibited a man who had held himself out to be the father of a child from denying paternity for purposes of paying child support.[71]

The divergence between New York's parentage determination in lesbian family child custody/visitation and child support cases grew in *In re H.M.*[72] where the court applied a similar equitable parentage determination as in *Shondel J.* H.M. and her partner H.M. planned to conceive and raise a child together, discussing, among other things, available methods of conception, child-rearing practices, and whether the child would be raised as a sibling of E.T.'s children from a prior relationship.[73] After several failed attempts, H.M. finally became pregnant by artificial insemination through a procedure E.T. performed and helped finance.[74] E.T. was present in the delivery room at birth, and participated in the child's care until the couple ended

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[69] *Alison D.*, 77 N.Y.2d at 33.
[70] *See* H v. R, No. 106569/08, 2008 WL 7675822 (N.Y. Sup. Ct. Oct. 2., 2008) ("The facts as alleged by petitioner, if found to be true, establish a prima facie basis for invoking the doctrine of equitable estoppel . . . of particular significance are her allegations that the parties moved in together and consulted an adoption attorney prior to M.R's birth, sent out birth announcements together, were both listed as M.R.'s parents on the child-naming certificate and on some of M.R.'s school and camp documents, and that petitioner was present in the delivery room at M.R.'s birth and cut his umbilical cord, and that M.R. was given petitioner's last name as a middle name on his original birth certificate.").
[71] *Id.*
[72] *See* In re H.M. v. E.T., 930 N.E.2d 206, 209 (N.Y. 2010).
[73] *See id.* at 207.
[74] *See id.*

their relationship four months later.[75]

Following more of an *Alison D.*-type parentage determination, the New York Appellate Division denied jurisdiction to entertain H.M.'s petition for child support, highlighting the fact that "H.M. [was] never married to or in a civil union with E.T., [and yet] seeks to have E.T., a woman having no biological or legal connection to the subject child, adjudicated a parent of that child and required to pay child support."[76] The New York Court of Appeals reversed, holding that the lower family court could hear a claim from H.M. that E.T., the non-biological and non-adoptive partner, is liable for child support.[77] Far from the court's analysis in *Debra H.,* the Court of Appeals in *H.M.* focused heavily on equitable considerations. The court did not even acknowledge that the defendant was not a "legal" parent under *Alison D*. All the reasons the court articulated for maintaining *Alison D*. in the child custody/visitation context completely disappeared in the child support context.

Judge Smith, concurring in both *Debra H.* and *Matter of H.M.*, acknowledged that "[both cases] present (though neither majority decision ultimately turns on) the question of whether a person other than a biological or adoptive mother or father may be a "parent" under New York law."[78] Although agreeing with the ultimate outcome in both—recognizing Debra H.'s parental status under the law of Vermont and providing jurisdiction in family court to adjudicate child support—Judge Smith was rightfully concerned about the divergent nature of the underlying basis for adjudication parentage in each. For that reason, Judge Smith advocated departing from *Alison D.*, *both* for visitation and child support.[79] According to Judge Smith, "there is much to be

[75] *See id.*
[76] H.M. v. E.T., 881 N.Y.S.2d 113, 116 (N.Y. App. Div. 2009).
[77] *See H.M.*, 930 N.E.2d at 209.
[78] *Id*. (Smith, J., concurring).
[79] *See id.*

said for reaffirming *Alison D*. . . . [but] there is even more to be said against it."[80] Although acknowledging the need for predictability and certainty in cases of parental rights and obligations, Judge Smith felt that this should not overshadow the desire to act in the best interest of the child to maintain important child-parent relationships.[81] Judge Ciparick also expressed concern that "the [*Debra H.*] majority sees no inconsistency in applying equitable estoppel . . . for purposes of support, but not to create standing when visitation and child custody are sought."[82] Judge Ciparick eloquently described how "the duty to support and the rights of parentage go hand in hand and it is nonsensical to treat the two things as severable."[83] Finally, Judge Jones, dissenting in *In re H.M.* stated most authoritatively that "the position taken by the majority [in *In re H.M.*] is inconsistent with [the] Court's holding today in *Debra H.*"[84]

In their concurrences, Judge Smith and Judge Ciparick both propose alternative parentage standards, based more on the court's common law and equitable powers, to replace *Alison D.* Both of these are further discussed in the possible solutions discussion in Part IV. Judge Smith proposed a version of a solution discussed in Part IV.A.i.: "where a child is conceived through [artificial insemination] by one member of a same-sex couple living together, with the knowledge and consent of the other, the child is a matter of law—at least in the absence of extraordinary circumstances—the child of both."[85] Judge Ciparick proposed a version of a solution I discuss in Part IV.A.ii. In addition to biological and adopting parents, Judge Ciparick would also bestow parentage on an individual who can show that: (1) the biological or adoptive parent consented to and encouraged the formation of a parental relationship; and (2) the petitioner intended to and actually did assume the typical obligations and roles associated with

[80] *Id*.
[81] *See id.*
[82] Debra H. v. Janice R., 930 N.E.2d 184, 201-02 (N.Y. 2010) (Ciparick, J., concurring).
[83] *Id*.
[84] *Id*. at 214 (Jones, J., dissenting).
[85] *H.M.*, 930 N.E.2d at 211 (Smith, J., concurring).

parenting the child.[86] Both of these, Judge Smith focusing more on consent to insemination, and Judge Ciparick focusing more on intent and *de facto*/functional parenthood, are viable options and preferable to *Alison D.*

IV. POSSIBLE PARENTAGE THEORIES FOR CHILD CUSTODY/VISITATION AND CHILD SUPPORT

Below I briefly describe possible parentage theories in the context of lesbian families that should be applied to determine parentage both in actions for child custody/visitation as well as actions for child-support. I evaluate each theory and stress the importance of focusing on the relationship between child and partner and less on the relationship between the partners.

A. READ APPLICABLE PARENTAGE STATUTES IN A GENDER-NEUTRAL WAY

i. ASSISTED REPRODUCTION STATUTES

Many states have enacted laws, or developed doctrines through the court's common law and equitable powers, to grant automatic legal parentage to a woman's husband who consents to her artificial insemination.[87] Read in a gender-neutral way, these should apply to same-sex couples if they are in a legally recognized same-sex marriage or marriage-like arrangement.[88] Several state courts have gone a step further and formally and explicitly extended these statutes and doctrines to lesbian couples.[89] For example, the Vermont Supreme Court addressed the legal parentage of a child born through assisted reproduction to a same-sex couple in a civil union and held that both spouses were the legal parents of the resulting child.[90] The court stated that "[i]f Janet had been Lisa's husband, these factors would make Janet the parent of the child born from

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[86] *See Debra H.*, 930 N.E.2d at 202-03 (Ciparick, J., concurring).
[87] *See* Hopkins, *supra* note 5, at 221-22.
[88] *See* sources and discussion *supra* Part II.
[89] *See, e.g.*, CAL. FAM. CODE § 297.5(d) (West 2011)("The rights and obligations of registered domestic partners with respect to a child of either of them shall be the same as those of spouses."); Elisa B. v. Superior Court, 117 P.3d 660, 666 (Cal. 2005) (noting in dicta that children born to registered domestic partners are considered the legal children of both partners); Shineovich v. Kemp, 214 P.3d 29 (Or. Ct. App. 2009) (noting that 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 the same).
[90] Miller-Jenkins v. Miller-Jenkins, 912 A.2d 951, 970 (Vt. 2006), *cert. denied*, 550 U.S. 918 (2007).

the artificial insemination" and because Vermont law requires "the equality of treatment of partners in civil unions," the same result must be true as to a same-sex civil union spouse.[91]

However, there are still the majority of states that do not legally recognize same-sex relationships. Thus, the focus on the legal status of the same-sex couple makes the widespread implementation of this solution somewhat problematic. However, the problem with these statutes and doctrines requiring marriage goes beyond applicability; courts should be looking more at the relationship between the child and partner and less at the relationship between the partners.[92] Marriage should never play an important role; courts certainly do not hesitate to enforce child support obligations on biological un-wed parents of children who are conceived by accident.[93] Thus, including marital status in a doctrine or statute that might lead to child support payments, for example, is arguably unconstitutional since it discriminates against children of non-married couples. Such discrimination against "illegitimate" children of non-married couples—the status of most in same-sex families since the majority of states do not recognize same-sex relationships[94]—has long been ruled unconstitutional. A series of U.S. Supreme Court decisions between 1968 and 1983 and the enactment of the Uniform Parentage Act (UPA) eliminated legal discrimination based on the "legitimacy" of a child.[95] The UPA includes Section 202, which

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[91] *Id*.

[92] *See* In re Parentage of Robinson, 890 A.2d 1036 (N.J. Ct. Ch. Div. 2005) (noting the state's artificial insemination statute required marriage, and thus only extended the statute to the lesbian couple at hand because the child was born in the context of a same-sex Canadian marriage).

[93] *See* Hopkins, *supra* note 15, at 240.

[94] *See* sources cited *supra* Part II.

[95] *See* Clark v. Jeter, 486 U.S. 456, 465 (1988) (striking down a six-year Pennsylvania statute limiting the time to bring a support action for non-marital children, because the statute did not withstand the heightened scrutiny test under the Equal Protection Clause when compared to support rights of marital children); Gomez v. Perez, 409 U.S. 535, 539 (1973) (holding that there was a constitutional duty of both parents to support a non-marital child, once paternity had been proved); Weber v. Aetna Casualty & Surety Co., 406 U.S. 164, 165 (1972) (holding that a non-marital child could also recover under state worker's compensation laws); Levy v. Louisiana 391 U.S. 68, 70-72 (1968) (holding that non-marital children were clearly persons within the meaning of the Equal protection Clause of the United States Constitution, and it would be "invidious to discriminate against them."); *see also* UNIF. PARENTAGE ACT, § 202 (2001) (2002), 9B U.L.A. 309 (Supp. 2010); Annette Ruth Appell, *Uneasy Tensions Between Children's Rights and Civil Rights*, 5 NEV. L. J. 141, 154 (2004).

states that a child born to parents who are not married to each other has the same rights under the law as a child born to parents who are married to each other.[96] Furthermore, with regard to child support, the Equal Protection Clause of the Constitution requires states to enforce child support regardless of whether the parents of the child were ever married.[97]

Rather than focus on the same-sex couple's legal status, these statutes and doctrines should focus more on parental behavior. Judge Smith recognized this fact in his proposed solution in *Debra H.*, focusing on consent to insemination and intent to parent rather than focusing on the legal status of the parents' relationship.[98] When a child is conceived through the process of artificial insemination into a union of two women, "the decision to create the child is even more conscious and deliberate than the decision that is made by some couples who are both biological parents and conceive a child by direct sexual intercourse."[99] It demonstrates a well-thought-out decision and steadfast commitment to care and support the child. Thus, under an ideal artificial insemination statute, the consenting non-biological parent, with an intent to parent the child, would be presumed to be a legal mother of the child, irrespective of the legal status of the couples relationship, and can only be rebutted by clear and convincing evidence.[100] In the absence of any such evidence, the partner would be able both to seek custody/visitation as well as be chargeable with the duty of child support.

Legislation in the District of Columbia and New Mexico provide a good model for an ideal assisted reproduction statute. The D.C. legislation reads: "A person who consents to the artificial insemination . . . with the intent to be the parent of her child, is conclusively established

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[96] *See* UNIF. PARENTAGE ACT, § 202 (No Discrimination Based on Marriage).
[97] *See Gomez*, 409 U.S. at 538.
[98] *See* Debra H. v. Janice R., 930 N.E.2d 184, 211 (N.Y. 2010) (Smith, J., concurring).
[99] T.F. v. B.L., 813 N.E.2d 1244 (Mass. 2004) (Greaney, J., dissenting).
[100] *See, e.g.*, Elisa B. v. Superior Court, 117 P.3d 660, 667 (Cal. 2005).

as a parent of the resulting child."[101] Similarly, the New Mexico statute reads: "A person who . . . consents to assisted reproduction . . . with the intent to be the parent of a child is a parent of the resulting child."[102] Both correctly focus on the deliberate and intentional participation in the decision to bring a child into the world rather than on the legal status of the same-sex couple. In 2008, The American Bar Association lent its approval to this formulation by approving a Model Act Governing Assisted Reproductive Technology: "An individual who . . . consents to assisted reproduction by a woman . . . with the intent to be a parent of her child is a parent of the resulting child."[103]

II. HOLDING OUT PROVISIONS IN STATE FAMILY LAW STATUTES

Most state parentage laws are based on the UPA.[104] The UPA includes a "holding out" presumption, which many states have thereby incorporated into their own parentage laws.[105] The "holding out" presumption is a provision that establishes a presumption of parentage for a man if, "while the child is under the age of majority, he receives the child into his home and openly

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[101] D.C. CODE § 16-909(e)(1)(2001). *See* also D.C. CODE § 16-909(e)(1)(A) and (B) (2001) ("(A)Consent by a woman, and a person who intends to be a parent of a child born to the woman by artificial insemination, shall be in writing signed by the woman and the intended parent. (B) Failure of a person to sign a consent required by subparagraph (A) of this paragraph, before or after the birth of the child, shall not preclude a finding of intent to be a parent of the child if the woman and the person resided together in the same household with the child and openly held the child out as their own.").

[102] N.M. STAT. ANN. § 40-11A-703 (West 2010).

[103] MODEL ACT GOVERNING ASSISTED REPROD. TECH. § 603 (2008).

[104] *See Uniform Parentage Act Summary*, NCCUSL, http://www.nccusl.org/nccusl/uniformact_summaries/uniformacts-s-upa.asp (last visited May 10, 2011). The Uniform Law Commission (ULC), previously known as the National Conference of Commissioners on Uniform State Laws (NCCUSL) promulgated a version of the UPA in 1973. The Act reflects both federal requirements and state best practices in the paternity area. Fourteen states have adopted a version of the 1973 UPA: Alabama, California, Colorado, Hawaii, Illinois, Kansas, Minnesota, Montana, New Jersey, North Dakota, Ohio, Rhode Island, Texas, Washington. *See* NCCUSL, http://www.nccusl.org/Act.aspx?title=Parentage%20Act%20(1973) (last visited May 10, 2011). The NCCUSL approved a new version of the UPA in 2002. Only nine states have formally enacted a version of the most recent UPA: Alabama, Delaware, New Mexico, North Dakota, Oklahoma, Texas, Utah, Washington, Wyoming. *See* http://www.nccusl.org/LegislativeFactSheet.aspx?title=Parentage%20Act (last visited May 10, 2011). Although other states have not formally adopted the UPA, it still influences the creation of state parentage laws.

[105] *See id.*

holds out the child as his natural child."[106] Thus far, California is the only state that has addressed whether such a holding out can be read in a gender neutral way and thereby apply to a woman in a same-sex relationship.[107] In *Elisa B. v. Superior Court*, [108] the California Supreme Court determined that the non-biological parent, Elisa, was a legal parent under California's holding out presumption because she received the children into her home and openly held them out as her natural children.[109] The court concluded that the parentage presumption was not rebutted simply by the fact that she was not the biological parent.[110] The judges focused on the best interest of the child in establishing a child-parent relationship, regardless of the marital status of the parents. Specifically, the court spoke of the fact that Elisa "actively participated in causing the children to be conceived with the understanding that she would raise the children as her own together with the birth mother" and also that after birth, she "voluntarily accepted the rights and obligations of parenthood."[111] Both parties breast-fed the children, chose the children's names, giving them all hyphenated combination of their surnames, and co-parented the children until they were approximately two years old.[112] Justice Kennard in his concurring opinion put it well: "Had a man who, like Elisa, lacked any biological connection to the twins received them into his home and held them out as his natural children, this case would . . . undoubtedly have resulted in determination that he met the statutory criteria for being the presumed father of the twins."[113]

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[106] UNIF. PARENTAGE ACT, § 4(a)(4) (1973).
[107] California's "holding out" provision is based on Section 4 of the 1973 UPA. *See* CAL FAM. CODE §7611 (West 2004) (stating that a man is presumed to be a parent of a child if "he receives the child into his home and openly holds out the child as his natural child").
[108] 117 P.3d 660 (Cal. 2005).
[109] *See id.* at 669-73.
[110] *Id*.
[111] *Id.* at 670.
[112] *Id.* at 663.
[113] *Id*. at 673 (Kennard, J., concurring).

In terms of the sufficient amount of time a parent must "hold out" a child as her own before considered a "legal parent" under the "holding out" presumption, in *Charisma R. v. Kristina S.*, the California Court of Appeal held that Charisma was entitled to a presumption of parentage even though she co-parented the child for only thirteen weeks.[114] With regard to the short duration, the court emphasized that "[o]n its face, the [California] statute contains no durational requirement; it does not, for example, state that the child must be received or held out 'for a significant period of time.'"[115]

This is a solution with much potential, especially since the presence of the 1973 UPA "holding out" presumption, or something similar, is quite widespread across the 50 states. [116] In addition, nine states have adopted the 2002 version of the UPA which also includes a holding out provision, however unlike the open-ended 1973 version, the 2002 version has a specific durational requirement, providing that the person must have lived with and held the child out as her own for the first two years of the child's life.[117]

Arguably the only concern with this solution is one shared among many of the equity-based solutions. While the "holding out" presumption appropriately looks at the relationship between the child and parent rather than between the parents, it focuses too much on post-birth behavior. Therefore, it may be difficult for the non-birth parent to seek custody/visitation, and likewise for the biological parent to seek support, if the couple ended their relationship prior to the birth of the child. For example, in two cases in which the lesbian couple terminated their

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[114] Charisma R. v. Kristina S., 96 Cal. Rptr. 3d 26, 39 (Cal. Ct. App. 2009).
[115] *Id*.
[116] *See, e.g.*, COLO. REV. STAT. ANN. § 19-4-105(1)(d) (West 2010); HAW. REV. STAT. § 584-4(a)(4) (West 2010); IND. CODE ANN. 31-14-7-2(a) (West 2010); MINN. STAT. ANN. § 257.55(1)(d) (West 2010); N.H. REV. STAT. ANN. § 168-B:3(I)(d) (West 2010); NEV. REV. STAT. ANN. 126.051(1)(d) (West 2010); N.J. STAT. ANN. 9:17-43(a)(4) & (5) (West 2010); 20 PA. CONS. STAT. ANN. § 2107(c)(2) (West 2010); TENN. CODE ANN. § 36-2-304(4) (West 2010).
[117] *See* UNIF. PARENTAGE ACT, § 204(a)(5) (2002) ("[A] man is presumed to be the father of a child if . . . for the first two years of the child's life, he resided in the same household with the child and openly held out the child as his own."); *see also* sources cited *supra* note 105.

relationship prior to the birth of children conceived through alternative insemination, appellate courts in both Massachusetts and Washington concluded that the non-birth partner was not a legal parent and did not have any legal obligation to support the resulting child.[118] Perhaps then, this solution would be stronger if more weight was placed on the intent to have a child in the first place by, for example, looking at consent to the partner's artificial insemination, attendance at birthing classes, and other pre-birth behavior. In assessing child support for heterosexual couples, a man cannot escape his obligation merely by running out on the family. It should not be any different for homosexual couples.

B. UTILIZE EQUITABLE DOCTRINES SUCH AS *IN LOCO PARENTIS*, *DE FACTO* PARENTHOOD, AND ESTOPPEL.

In the absence of the above possible solutions, common law and equitable considerations should be applied to determine parentage for both child custody/visitation and child support for a parent with no biological, adoptive, or other legal connection to the child. Courts have long recognized their authority "in the absence of legislative mandates . . . [to] construct a fair, workable and responsible basis for protection of children, aside from whatever rights the adults may have vis a vis each other."[119] Therefore, courts in a growing number of states have applied long standing common law or equitable doctrines, including *in loco parentis*, *de facto* parenthood, psychological parent, or parent by estoppel to conclude that a person who is not biological or adoptive relationship with a child, but who has functioned as a parent, is entitled to some rights and responsibilities with respect to the child.[120] While preferable to the parentage

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[118] *See* T.F. v. B.L., 813 N.E.2d 1244 (Mass. 2004); State ex. rel. D.R.M., 34 P.3d 887, 890-92 (Wash. Ct. App. 2001).

[119] L.S.K. v. H.A.N., 813 A.2d 872, 878 (Pa. Super. Ct. 2002).

[120] *See, e.g.*, Mason v. Dwinnell, 660 S.E.2d 58 (N.C. Ct. App. 2008) (holding that a lesbian co-parent had standing to seek custody where the parties had jointly planned for the birth of the child and had jointly parented the child after the child's birth); In re Parentage of L.B., 122 P.3d 161,178 (Wash. 2005) (holding that a woman who had co-parented a child with her same-sex partner was a de facto parent and, therefore, stood "in parity with biological and adoptive parents in [Washington state]"); In re Clifford K., 619 S.E.2d 138 (W. Va. 2005) (holding that, in

standard set in *Debra H.*, it is important to note that adjudicating parenthood under statutory "holding out" provisions in the state's family law or under a gender-neutral reading of an artificial insemination statute is preferable to the application of common law and equitable doctrines because persons found to be protected under equitable and common law doctrines might not be granted full legal parental status.

i. PSYCHOLOGICAL PARENT

The Colorado Court of Appeals held that a "psychological parent" is a person with whom the child has "deep emotional bonds such that the child recognizes the person, independent of the legal form of the relationship, as a parent from whom they receive daily guidance and nurturance."[121] Alaska, New Jersey, New Mexico, and West Virginia, among others, also have utilized a "psychological parent" standard when adjudicating parentage.[122]

II. *IN LOCO PARENTIS*

While utilizing a different term, *in loco parentis*, states including Arkansas, Indiana, Mississippi, Nebraska, and Pennsylvania follow a similar standard as "psychological parent" by looking at the relationship between a child and a person who has acted as a parent but who has

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exceptional circumstances, a "psychological parent" may intervene in a custody proceeding); In re E.L.M.C., 100 P.3d 546, 562 (Colo. App. 2004) (holding that a lesbian co-parent had standing to seek custody where the legal parent consented to and fostered the formation of a bonded parent-child relationship between the child and the parent's former partner); T.B. v. L.R.M., 786 A.2d 913, 917 (2001) (holding that a lesbian co-parent had standing to seek custody under the in loco parentis doctrine because, with the consent of the child's legal parent, she had assumed the obligations incident to the parental relationship); V.C. v. M.J.B., 748 A.2d 539, 550 (N.J. 2000) (holding that a former same-sex partner had standing to seek custody or visitation as a "psychological parent" because, with the consent of the legal parent, she had formed a parent-child bond and had taken on the responsibilities of parenthood); Laspina-Williams v. Laspina-Williams, 742 A.2d 840 (Conn. Super. Ct. 1999) (holding that non-biological lesbian co-parent had standing to seek visitation with child where she demonstrated that she assumed a significant role in the life of the child); E.N.O. v. L.M.M., 711 N.E.2d 886 (1999) (holding that former same-sex partner was a de facto parent entitled to seek visitation and holding that a de facto parent is a person who, despite a lack of biological connection to a child, lived with the child and, with the consent of the legal parent, functioned as a parent to the child).

[121] *In re E.L.M.C.*, 100 P.3d at 559.

[122] *See, e.g.*, Kinnard v. Kinnard, 43 P.3d 150 (Alaska 2002); *V.C.*., 748 A.2d at 539; *In re Clifford K.*, 619 S.E.2d at 138; A.C. v. C.B., 829 P.2d 660 (N.M. Ct. App. 1992); Matter of Adoption of Francisco A., 866 P.2d 1175 (N.M. Ct. App. 1993).

no biological, adoptive or other legal tie.[123] The Pennsylvania Supreme Court first established the doctrine of *in loco parentis*, recognizing parenthood for an individual who acts like a parent and voluntarily takes on parental obligations as if she were a natural parent. [124] *Spells v. Spells* first formulated the *in loco parentis* doctrine:

> [A] person may put himself in the situation of a lawful parent by assuming the obligations incident to the parental relationship without going through the formality of a legal adoption. [The status of in loco parentis] embodies two ideas first, the assumption of a parental status, and second, the discharge of parental duties.[125]

III. *DE FACTO* PARENTHOOD

Maine, Massachusetts, Minnesota, North Carolina, Washington, and Wisconsin, among others, use the term *de facto* parent or custodian to describe a person who has functioned as a child's parent and established a parent-child bond.[126] In a decision often cited by other courts, the Wisconsin Supreme Court in *In re Custody of H.S.H-K.*[127] established a four-part test for demonstrating a *de facto* parent relationship: (1) whether the legal parent consented to or fostered the relationship between the *de facto* parent and the child; (2) whether the *de facto* parent lived with the child; (3) whether the *de facto* parent assumed the obligations of parenthood by taking significant responsibility for the child's care, education and development, including contributing towards the child's support, without expectation of financial compensation; and (4) whether a parent-child bond was formed.[128] Courts in New Jersey, Massachusetts, South Carolina, and

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[123] *See, e.g.*, Robinson v. Ford-Robinson, 196 S.W.3d 503 (Ark. Ct. App. 2004), *aff'd*, 208 S.W.3d 140 (Ark. 2005); King v. S.B., 837 N.E.2d 965 (Ind. 2005); Logan v. Logan, 730 So. 2d 1124 (Miss. 1998); Russell v. Bridgens, 647 N.W.2d 56 (Neb. 2002); *T.B.*, 786 A.2d at 913.

[124] *See* 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, 502 (1990) [hereinafter *Redefining Parenthood*].

[125] 378 A.2d 879, 881-82 (Pa. Super. Ct. 1977); *see also Redefining Parenthood*, *supra* note 124, at 502-03.

[126] *See, e.g.*, C.E.W. v. D.E.W., 845 A.2d 1146 (Me. 2004); E.N.O. v. L.M.M., 711 N.E.2d 886 (1999); Soohoo v. Johnson, 731 N.W.2d 815 (Minn. 2007); Mason v. Dwinnell, 660 S.E.2d 58 (N.C. Ct. App. 2008); *In re Parentage of L.B.*, 122 P.3d at 161; In re Custody of H.S.H.-K., 533 N.W.2d 419 (Wisc. 1995).

[127] 533 N.W.2d 419, 435-36 (Wisc. 1995).

[128] *See id.*

Washington, among others, have directly adopted this test.[129] Courts in other states have adopted similar versions of this test.[130] However, similar to the problems with the "holding out" solution, this theory of parentage focuses heavily on post-birth behavior and might prove problematic if the relationship dissolved before the child's birth.

IV. EQUITABLE ESTOPPEL

Courts have also followed principles of equitable estoppel in determinating parentage by looking at behavior pre-conception and post-birth to see whether a reasonable expectation formed that the non-biological, non-adoptive parent would support the child. While courts have so far used this theory to enforce child support based on a theory of reliance, there is no reason this should not also be used as a parentage standard in child custody/visitation cases.[131] In the first appellate court decision in the nation to apply the estoppel doctrine in the child support context, *L.S.K. v. H.A.N.*,[132] the Pennsylvania Superior Court found sufficient facts to infer that the partner's actions, both pre-conception and post birth, and both financially and emotionally, caused the mother to form the reasonable expectation that the partner would support the child.[133] The court explained that equitable estoppel is a doctrine of fundamental fairness designed to preclude a party from depriving another of a reasonable expectation when the party inducing the expectation knew or should have known that the other party would rely upon that conduct to his or her detriment.[134] Thus, the court used the estoppel doctrine to preclude a former domestic partner from defending against paying child support by arguing that a lack of biological

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[129] *See* V.C. v. M.J.B., 748 A.2d 539 (N.J. 2000); Marquez v. Caudill, 656 S.E.2d 737 (S.C. 2008); In re Parentage of L.B., 122 P.3d 161, 176. (Wash. 2005)
[130] *See, e.g.*, *In re E.L.M.C.,* 100 P.3d at 546; *E.N.O.*, 711 N.E.2d at 891; J.A.L. v. E.P.H., 682 A.2d 1314, 1320 (Pa. 1996); In re Jonathan G., 482 S.E.2d 893, 911–12 (W. Va. 1996).
[131] *See* Hopkins, *supra* note 15, at 234.
[132] 813 A.2d 872 (Pa. Super. Ct. 2002).
[133] *See id.*
[134] *Id.*

connection prevented a child support obligation.[135] The Superior Court focused on how H.A.N. "acted as a 'co-parent' . . . in all areas concerning the children's conception, care and support."[136] Besides agreeing to have children through artificial insemination, H.A.N. was an active participant in childbirth classes and in the delivery room itself, as well as assisted in selecting the names of the children.[137] After birth she stayed home with the children while L.S.K. continued her career; therefore, H.A.N. was intimately involved in the children's day-to-day care and schooling as well as health needs for over eight years.[138]

V. AMERICAN LAW INSTITUTE (ALI) PRINCIPLES OF THE LAW OF FAMILY DISSOLUTION

Despite differences in terminology, the equitable doctrines discussed above generally have similar focuses and describe a person who does not have a biological, adoptive, or other legally recognized relationship with the child, but who should be entitled to seek parental rights and protections by virtue of having established an actual parent-child relationship.[139] While state courts generally use the terms "psychological parent," *in loco parentis*, *de facto* parent, and "parent by estoppel" interchangeably, the drafters of the ALI Principles of Family Dissolution (ALI Principles)[140] distinguished these terms from one another. The ALI Principles narrows the definition of *de facto* parent and gives the terms "parent by estoppel" and "*de facto"* parent significantly different meanings. The ALI Principles also explicitly gives *de facto* parentage a lesser status than parentage by estoppel.

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[135] *See* Hopkins, *supra* note 15, at 235.
[136] *L.S.K.*, 813 A.2d at 877.
[137] *See id*. at 878.
[138] *Id*.
[139] *See* In re Parentage of L.B., 122 P.3d 161, 168 n.7 (Wash. 2005) ("Our cases, and cases from other jurisdictions, interchangeably and inconsistently apply the related yet distinct terms of *in loco parentis*, psychological parent, and *de facto* parent."); V.C. v. M.J.B., 748 A.2d 539 (N.J. 2000) (observing that "the terms psychological parent, *de facto* parent, and functional parent are used interchangeably").
[140] AMERICAN LAW INSTITUTE, Principles of the Law of Family Dissolution: Analysis and Recommendations § 2.03(1) (2002) [hereinafter ALI Principles].

The ALI Principles might prove confusing since it adopts the same terms utilized by state courts, but with different meanings. Most courts that use the term "*de facto* parent" give it a broader meaning similar to what the ALI Principles refer to as a "parent by estoppel." For illustration, the Washington Supreme Court's four factor test to establish *de facto* parenthood is nearly identical to the criteria for parentage by estoppel under the ALI Principles.[141] The ALI Principles define a parent by estoppel, in relevant part, as:

> An individual who, though not a legal parent, … lived with the child since the child's birth, holding out and accepting full and permanent responsibilities as a parent, as part of a prior co-parenting agreement with the child's legal parent (or, if there are two legal parents, both parents) to raise a child together each with full parental rights and responsibilities, when the court finds that recognition of the individual as a parent is in the child's best interests; or … lived with the child for at least two years, holding out and accepting full and permanent responsibilities as a parent, pursuant to an agreement with the child's parent (or, if there are two legal parents, both parents), when the court finds that recognition of the individual as a parent is in the child's best interests.[142]

Thus, under the ALI Principles, a person can become a parent by estoppel only where the child's legal parent has agreed to share full parental rights and responsibilities and only when the court finds that recognition as a parent is in the child's best interests. Similar to *de facto* parenthood as it is understood by most states, a parent by estoppel under the ALI Principles stands in legal parity with a legal parent, whether biological, adoptive, or otherwise.[143]

In contrast, the ALI Principles defines *de facto* parent, in part, as someone, *other* than a legal parent or a parent by estoppel, who has lived with the child for at least two years; and "for reasons primarily other than financial compensation, and with the agreement of the legal parent to form a parent-child relationship, or as a result of a complete failure or inability of any legal parent to perform caretaking functions, (A) regularly performed a majority of the caretaking

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[141] *In re Parentage of L.B.,* 122 P.3d at 176–77 (citing the four-part test first articulated in *In re Custody of H.S.H.-K*, 533 N.W.2d 419 (Wisc. 1995)).
[142] ALI Principles, § 2.03(1).
[143] *See id.*

functions for the child, or (B) regularly performed a share of the caretaking functions at least as great as that of the parent with whom the child primarily lived."[144] Under the ALI Principles definition, a *de facto* parent may not be awarded a majority of custodial responsibility for the child if a legal parent or parent by estoppel is fit and willing to care for the child.[145]

There are confusing differences in the definitions of these doctrines, but the main components of all these equitable theories are the same under the ALI Principles as under the common state court definitions discussed above. There are, however, differences in terms of the legal consequences attached to the theory by which an individual is determined to be a parent. In sum, under the ALI Principles, a parent by estoppel is someone who has entered into an agreement with the legal parent to assume full, permanent, and co-equal parental responsibility for a child and who has the same rights and responsibilities as a legal parent. A *de facto* parent is someone who develops a parent-like relationship with a child as a result of stepping in to perform caretaking functions; therefore, *de facto* parentage is a lesser status, and provides fewer rights, than legal parentage or parentage by estoppel.

Unlike *Debra H.*'s reliance on *Alison D.*, which requires same-sex couples in New York to have a formalized second-parent adoption, equitable remedies such as those discussed in this Part are designed to protect children's important relationships with parents who are not in a legal same-sex relationship that bestows automatic parental rights and obligations and either cannot or do not take steps to formalize their parent-child bonds through adoption. New York is out of step with most courts which reject a *Debra H.*-type parentage standard, holding instead that a person's inability or failure to adopt is not a bar to establishing parentage.[146] For example, the

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[144] *Id.* at § 2.03(1)(c).
[145] *See id.* at § 2.18(1)(a).
[146] *See generally* Debra L. Forman, *Same-Sex Partners: Strangers, Third Parties, or Parents? The Changing Legal Landscape and the Struggle for Parental Equality*, 40 FAM. L. Q. 23, 46 (2006) ("If we look at these cases from the

Pennsylvania Supreme Court has held that: "[t]he ability to marry the biological parent and the ability to adopt the subject child have never been and are not now factors in determining whether the third party assumed a parental status and discharged parental duties."[147] Similarly, the Vermont Supreme Court has rejected the view that couples who use assisted reproduction should be required to adopt in order to gain parental status, recognizing "[t]he disruption that would be caused by requiring adoption of all children conceived by artificial insemination." [148] The ALI Principles also expressly states that "[n]either the unavailability of adoption nor the failure to adopt when adoption would have been available forecloses parent-by-estoppel status."[149]

V. CONCLUSION

Looking at *Debra H*. and *H.M*. together, one can clearly see an alarming development: eliminated the applicability of equitable principles to provide legal parental status for a non-biological, non-adoptive parent to contest custody/visitation, while at the same time relying on such principles to force child support payments on the same individuals. Child visitation jurisprudence and child support jurisprudence should stand in parity, making it so an individual would simply be adjudicated a parent, not a parent solely for contesting child custody/visitation or a parent solely for child support. Otherwise, not only is the best interest of the child lost, but so too is the principle of fundamental fairness on the part of the defendant partner.

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children's perspective, it becomes clearer that whether the partner adopted or not, the completion of a formal adoption seems beside the point, especially if she functioned as a parent and developed the resulting psychological attachment with the child.").

[147] *See, e.g.*, T.B. v. L.R.M., 786 A.2d 913 (Pa. 2001).

[148] Miller-Jenkins v. Miller-Jenkins, 912 A.2d 951, 966–71 (Vt. 2006), *cert. denied*, 167 L. Ed. 2d 863 (2007).

[149] ALI Principles, § 2.03 comment b (iii), at 114.