

# ARTICLES

## PROCREATIVE SEX AND SAME SEX PARENTS

JEFFREY A. PARNES\* AND ZACHARY TOWNSEND\*\*

I. INTRODUCTION . . . . .	591
II. GOVERNMENTAL DISCRETION ON PARENTAGE AT BIRTH FOR CHILDREN BORN OF SEX. . . . .	594
III. EQUALITY AND SAMENESS FOR STATE-SANCTIONED SAME SEX COUPLES. . . . .	597
IV. NEW STATUTORY PRESUMPTIONS ON PARENTAGE AT BIRTH . . . . .	602
V. NEW ACKNOWLEDGEMENTS OF PARENTAGE AT BIRTH . . . . .	604
VI. CONCLUSION. . . . .	612

### I. INTRODUCTION

New state-sanctioned family units headed by couples in committed relationships are on the rise. They include marriages encompassing same sex couples; civil unions, which may or may not be limited to same sex couples and which coexist with opposite sex marriages; and, domestic partnerships, which typically encompass same sex couples and which also coexist with opposite sex marriages, but usually not with civil unions. These new family units can originate in state statutes<sup>1</sup> or in judicial decisions.<sup>2</sup> The pace of change is so fast that new units occasionally replace units only recently recognized, as when same sex marriages replace civil unions or domestic partnerships.<sup>3</sup>

---

\* B.A. Colby College; J.D. The University of Chicago. Professor Emeritus, Northern Illinois University College of Law.

\*\* B.A. University of Nevada, Las Vegas; J.D. Northern Illinois University. Associate, Crosby and Associates, Rockford, Illinois. © 2012, Jeffrey A. Parnes and Zachary Townsend.

1. See, e.g., 750 ILL. COMP. STAT. ANN. 75/20 (same sex civil unions); R.I. GEN. LAWS ANN. § 15-3.1-2(2) (same sex civil unions); N.J. Stat. 37:1-29 (same sex civil unions); D.C. CODE § 46-401(a) (same sex marriages); OR. REV. STAT. ANN. § 106.305 (West, Westlaw through Ch. 35 of 2012 Reg. Sess.) (same sex domestic partners).

2. See, e.g., *Goodridge v. Dep't of Pub. Health*, 798 N.E.2d 941 (Mass. 2003); *Varnum v. Brien*, 763 N.W.2d 862, 906 (Iowa 2009); *Kerrigan v. Comm'r of Pub. Health*, 957 A.2d 407 (Conn. 2008). A state constitutional equal protection claim involving the right to same sex marriage is pending in Minnesota. See *Benson v. Alverson*, 2012 WL 171399 (Minn. Ct. App. 2012) (reversing a dismissal of the claim and remanding for further proceedings).

3. See, e.g., N.H. REV. STAT. ANN. § 457:46(I)–(II) (no new civil unions after January 1, 2010; earlier couples who were unionized may “receive a marriage license” before January 1, 2011; after January 1, 2011, continuing civil unions (not dissolved or annulled) “deemed” to be marriages); CONN. GEN. STAT. ANN. § 46b-38nn (undissolved or unannulled civil union is merged into a civil marriage). As well, newly recognized same sex family units can be quickly undone. In California a state constitutional referendum

United States Supreme Court precedents grant state governments broad discretion in sanctioning such new families and in recognizing parentage therein.<sup>4</sup> States are increasingly recognizing families headed by same sex partners, rejecting the premise that a central function of marriage is to establish paternity.<sup>5</sup> Discretion on parentage matters is, however, limited by constitutionally-recognized parental rights and interests when children are born of sex.<sup>6</sup> Nevertheless, state governments retain extensive discretion regarding legal parentage at birth.<sup>7</sup> With such discretion and regardless of Maury Povich's rants, at times states can, and do, deny legal parental status at birth to natural fathers.<sup>8</sup> And, as will be shown, states can, and do, recognize parental status under law for men and women who are not natural parents. Differences in sanctioned family units and disparities in parentage laws will likely continue for some time.<sup>9</sup>

When same sex marriages, civil unions, or domestic partnerships are sanctioned by either statute or case law, these new family units typically are deemed equal to, or the same as, longstanding opposite sex marriages.<sup>10</sup> However, when there are children born of sex, equality and sameness are impossible. Same sex couples simply cannot themselves produce children through intrafamily intercourse, as can opposite sex couples. Yet, extrafamily intercourse by those in same sex, as well as opposite sex, families can produce children. Extrafamily intercourse may involve deceiving one's mate; understandings between the copulating couple on what happens if a child is born; and, understandings between family members on what happens if a child is born.

---

defining marriage as between a man and a woman overturned in *In re Marriage Cases*, 183 P.3d 384 (Cal. 2008), which found same sex couples had a state constitutional right to marry. In Maine a 2009 statute recognizing same sex marriage was overturned by a voter referendum. ME. REV. STAT. tit. 19-A, § 650.

4. For an in depth analysis of the major U.S. Supreme Court cases addressing legal parentage in light of constitutional interests, see Jeffrey A. Parness & Zachary Townsend, *Legal Paternity (and Other Parenthood) After Lehr and Michael H.*, 44 U. TOLEDO L. REV. 101 (2012) [hereinafter Parness & Townsend].

5. This premise is, however, still advanced by some. See, e.g., Gage Raley, Note, *The Paternity Establishment Theory of Marriage and Its Ramifications for Same-Sex Marriage Constitutional Claims*, 19 VA. J. SOC. POL'Y & L. 133 (2011).

6. "The Federal Constitution supersedes state law and provides even greater protection for certain formal family relationships." *Lehr v. Robertson*, 463 U.S. 248, 257 (1983).

7. See, e.g., *Sosna v. Iowa*, 419 U.S. 393, 404 (1975) (regulation of domestic relations is within "virtually exclusive province of the State").

8. A common exception involves genetic fathers whose paternity arose from illegal sexual conduct. See, e.g., *Pena v. Mattox*, 84 F.3d 894, 900 (7th Cir. 1996) (excluding genetic father from legal parenthood when child was conceived by statutory rape).

9. For the view that more family law matters should be determined at the federal law (so that more than "exceptional" family matters should be made uniform), see, e.g., Libby S. Adler, *Federalism and Family*, 8 COLUM. J. GENDER & L. 197 (1999).

10. Some legislators do not deem same sex couples equal to opposite sex couples. Designated Beneficiary Agreement Act of 2009, COLO. REV. STAT. ANN. § 15-22-104 (West, Westlaw through Mar. 22, 2012) (affording to same sex partnerships limited rights, including the right to death benefits, make funeral arrangements, and inherit property when a partner dies intestate).

Given the goals of equality and sameness, should any child born through adultery into a state sanctioned family unit always secure a presumption of parentage as now typically operates for a husband in an opposite sex marriage? If so, are new written laws needed, since the existing parentage presumptions for husbands usually require the possibility of genetic ties—an impossibility in same sex settings? Further, are there limits on any equality between same and opposite sex couples? Finally, are additional laws beyond parentage presumptions at birth needed for children born of sex into same sex couples?<sup>11</sup>

This paper posits that explicit statutory presumptions are needed for children born of sex to one partner in a state-sanctioned same sex female couple, although there cannot be significant genetic ties in both mates.<sup>12</sup> Further, it proposes that

---

11. For the view that new statutory presumptions of parenthood are needed for children born to same sex couples via artificial reproductive techniques, see Jennifer L. Rosato, *Children of Same-Sex Parents Deserve the Security Blanket of the Parentage Presumption*, 44 FAM. CT. REV. 74 (2006). Compare Linda D. Elrod, *A Child's Perspective of Defining a Parent: The Case for Intended Parenthood*, 25 BYU J. PUB. L. 245 (2011) (where assisted reproduction is used by agreement of partners, both should be considered parents due to their consent); Courtney G. Joslin, *The Legal Parentage of Children Born to Same-Sex Couples: Developments in the Law*, 39 FAM. L.Q. 683 (2005) (where assisted reproduction is used by same sex couple, each partner should be responsible for support); and Mikaela Shotwell, Note, *Won't Somebody Please Think of the Children?: Why Iowa Must Extend the Marital Presumption to Children Born to Married, Same-Sex Couples*, 15 J. GENDER RACE & JUST. 141 (2012) (arguing the existing Iowa marital presumption applies to children born to same-sex female couples because, inter alia, the Iowa presumption, IOWA CODE ANN. § 252A.3(4), speaks of children born to parents who are married). As the "common law does not come from law students and professors who write law review articles," T.M.H. v. D.M.T., 79 So. 3d 787, 795 (Fla. Dist. Ct. App. 2011), state decisions are key. In the absence of an explicit statute, state courts have taken different approaches when one of the two same sex female partners bears a child via artificial insemination of sperm. See, e.g., Shineovich v. Kemp, 214 P.3d 29 (Or. Ct. App. 2009) (as state statute presumes parentage for consenting husband with no genetic ties where wife delivers child conceived by artificial insemination, state constitutional guarantee of equal privileges and immunities requires similar presumption for consenting females whose same sex female partners (either in a same sex marriage or not) delivered child conceived by artificial insemination during the relationship); H.M. v. E.T., 906 N.Y.S.2d 85 (N.Y. App. Div. 2010) (where same sex partner of a child's biological mother consented to the mother's artificial insemination, an implied promise-equitable estoppel approach supports a child support claim pursued by the mother against her former partner); Charisma R. v. Kristina S., 96 Cal. Rptr. 3d 26 (Cal. Ct. App. 2009) (same sex partner of child's biological mother, registered with the state as a domestic partner of the mother, could be a presumed parent, per § 7611(d) of Family Code, of a child born via artificial insemination if she received the child into her home and openly held the child out as her "natural child"); White v. White, 293 S.W.3d 1 (Mo. Ct. App. 2009) (no standing in former same sex partner as contract or equitable estoppel doctrines are rejected; any in loco parental status ended when partners separated; "exceptional circumstances" doctrine was inapplicable); Bethany v. Jones, 2011 Ark. 67, 2011 WL 553923 (Ark. 2011) (in loco parentis status to former same sex partner so that visitation could be ordered if in the child's best interests); Latham v. Schwerdtfeger, 802 N.W.2d 66 (Neb. 2011) (common law doctrine of in loco parentis applies to requests for custody and visitation); T.M.H., 79 So. 3d at 797 (woman whose fertilized ova was implanted in her former partner who later bore a child had state and federal equal protection and privacy rights involving the child who she later reared for some time "as an equal parental parent[]" with the birth mother, a ruling supported, e.g., by Lehr v. Robertson, 463 U.S. 248, 261 (1983) (unwed father "demonstrates a full commitment to . . . parenthood")); In re L.B., 122 P.3d 161 (Wash. 2005) (mother's former same sex partner could be de facto parent of child born to mother via artificial insemination during the women's relationship).

12. Although significant genetic ties with children born into a lesbian couple is impossible for both partners, some children are somewhat tied to both partners in artificial reproduction situations. See, e.g.,

current voluntary parentage acknowledgment processes, now operating for men who prompt children born of sex to married and unmarried women, be expanded to allow certain same sex male mates to become legal parents at birth, or sooner, to children born of sex into their family units.

## II. GOVERNMENTAL DISCRETION ON PARENTAGE AT BIRTH FOR CHILDREN BORN OF SEX

Family law policies are typically left to state governments.<sup>13</sup> However, federal constitutional law is not entirely silent about legal parentage.<sup>14</sup> Constitutional childrearing interests, by way of the liberty provision of the due process clause of the Fourteenth Amendment, constrict state authority.<sup>15</sup> Two U.S. Supreme Court precedents delineate these interests and the limits they impose on state discretion in recognizing parentage at birth: *Lehr v. Robertson*<sup>16</sup> (child born of sex out of wedlock) and *Michael H. v. Gerald D.*<sup>17</sup> (child born of sex into a marriage). In *Lehr*, the court held that women, but not men, automatically have parental rights in their genetic offspring born of sex.<sup>18</sup> For men, the *Lehr* court recognized only a parental opportunity interest in an unwed father, secured by a “significant custodial, personal or financial” relationship between the man and the child.<sup>19</sup> In

---

*K.M. v. C.G.*, 37 Cal. 4th 130, 144 (Cal. 2005) (child from ova of one partner carried to term by the other partner in a lesbian domestic partnership).

13. Guided by the reservation of certain rights to the states under the Tenth Amendment to the federal Constitution, United States Supreme Court precedents have recognized the dominance of American state governments in family law matters. *See, e.g.*, *Prince v. Massachusetts*, 321 U.S. 158, 166 (1944) (“[T]he state as *parens patriae* may restrict the parent’s control by requiring school attendance, regulating or prohibiting the child’s labor, and in many other ways.”) (footnotes omitted); *Sosna v. Iowa*, 419 U.S. 393, 404 (1975) (the regulation of domestic relations historically has been regarded as within the “virtually exclusive province of the States”).

14. For example, as to parental opportunities to childrear, the Supreme Court has “assumed that the Constitution might require some protection of that opportunity.” *Michael H. v. Gerald D.*, 491 U.S. 110, 129 (1989). However, the Supreme Court has not “had occasion to decide whether a child has a liberty interest, symmetrical with that of her parent, in maintaining her filial relationship.” *Id.* at 131.

15. *Lehr*, 463 U.S. at 257–58, 261.

16. 463 U.S. at 265 (natural father fails in attempt to block adoption by stepfather).

17. 491 U.S. at 125 (natural father fails in attempt to exercise visitation with his biological child who was born into an extant marital relationship).

18. *Lehr*, 463 U.S. at 262 (upholding a New York adoption statute challenged by the biological father of a child born of sex whose adoption was sought by the mother’s new husband and explaining that “the mother of an illegitimate child is always within the favored class [having veto power over adoptions], but only certain putative fathers are included”); *see also Caban v. Mohammed*, 441 U.S. 380, 397 (1979) (“The mother carries and bears the child, and in this sense her parental relationship is clear. The validity of the father’s parental claims must be gauged by other measures.”).

19. *Lehr*, 463 U.S. at 262. Under many state laws, parental opportunity interests must be seized prebirth, at birth, or shortly after birth. All states must accord at least a minimum level of paternity opportunity interest; thus state paternity schemes cannot systematically deny genetic fathers chances to step up to legal fatherhood for children born of consensual sex with unmarried mother. *Lehr*, 463 at 263–64 (stating that if a statutory adoption scheme was “likely to omit many responsible fathers, and if qualification for notice were beyond the control of an interested putative father, it might be thought procedurally inadequate”); *see also Jeffrey A. Parness, Systematically Screwing Dads: Out of Control*

*Lehr*, the biological father's conduct was insufficient,<sup>20</sup> so the court held that the federal constitution did not require that the biological father had a right to notice of his child's pending adoption.<sup>21</sup> Had the mother in *Lehr* been married to another man, however, there may have been no need for an inquiry regarding the "custodial, personal, or financial" relationship between biological father and child.<sup>22</sup>

Such was the case in *Michael H. v. Gerald D.*, where a child was born of adulterous sex to a married woman.<sup>23</sup> When the biological father sought child visitation or custody, the Court questioned the "power of the natural father to assert parental rights over a child born into a woman's existing marriage with another man."<sup>24</sup> The *Michael H.* Court held that states need not afford the *Lehr* interest to a genetic father of a child born of sex where the mother was married to another man at the time of conception, during pregnancy and at birth, as long as the mother and her husband lived in a "unitary" family that was committed to raising the child.<sup>25</sup> What constitutes a "unitary" family remains unclear.<sup>26</sup> What is

*Paternity Schemes*, 54 WAYNE L. REV. 641, 642 (2008) (noting that many laws require a putative father to acknowledge paternity "before or shortly after birth, regardless of circumstances").

20. The appellant/biological father in *Lehr* argued that a significant custodial, personal, and financial relationship in fact did exist—claiming to have used a private investigator and to have volunteered to establish a child's trust fund. However, the *Lehr* Court held that the appellant/biological father "never had any significant custodial, personal, or financial relationship with [appellant's biological daughter] Jessica, and he did not seek to establish a legal tie until after she was two years old." *Lehr*, 463 U.S. at 262.

Had there been such a "significant" relationship with Jessica, the father then would be entitled to notice absent clear and convincing evidence that he intended to forgo parental rights, as revealed, e.g., by failure to communicate for a six-month period though able to do so. *See, e.g., In re Zachary*, 910 N.Y.S. 2d 184 (N.Y. App. Div. 2010).

21. After the Supreme Court decided *Lehr* in 1983, "a series of well-publicized adoption cases occurred in which state courts held that nonmarital fathers had not been given proper notice of such proceedings and voided established adoptions. A substantial number of legislatures responded to these decisions by enacting paternity registries similar to the New York statute"; today, paternity registries now exist in most states. Uniform Parentage Act, Art. IV cmt. (2000).

22. Marital presumptions of paternity can occur where genetic ties exist between father and child and also where such genetic ties are absent. N.Y. DOM. REL. LAW § 111-a(2)(g) (McKinney) (recognizing notice rights for a man who married the child's mother before the child was six months old). The New York statute at issue in *Lehr* also granted notice rights for a man "identified as the child's father by the mother in [a] written, sworn statement." *Id.* at § 111-a(2)(f).

23. *Michael H. v. Gerald D.*, 491 U.S. 110, 113–14 (1989).

24. *Id.* at 125.

25. *Id.* at 120 (recognizing that categorical presumptions exclude "inquiries into the child's paternity that would be destructive to family integrity and privacy"); *id.* at 123 (declining to extend *Lehr* rights to a father born to a marriage, due to the "historic respect—indeed, sanctity would not be too strong a term—traditionally accorded to the relationships that develop within the unitary family"). The *Michael H.* Court distinguished the circumstances of the biological father in *Lehr* from the circumstances of the biological father in *Michael H.* in that only the mother in *Michael H.* (and not the mother in *Lehr*) was in a legally recognized relationship. *Id.* at 129.

26. *Michael H.*, 491 U.S. at 124 ("The family unit accorded traditional respect in our society, which we have referred to as the 'unitary family,' is typified, of course, by the marital family, but also includes the household of unmarried parents and their children."); *see also, e.g., Anthony Miller, The Case for the Genetic Parent: Stanley, Quilloin, Caban, Lehr, & Michael H. Revisited*, 53 LOY. L. REV. 395, 439–40 (2007) ("Justice Scalia's 'unitary family' test does not resolve the issue of who falls within the definition

clear, however, is that the opposite sex marital family in *Michael H.* was such a family.<sup>27</sup> Thus in *Michael H.*, there was no federal constitutional impediment<sup>28</sup> favoring the biological father when there was a “categorical” declaration by the state that a husband is usually “conclusively” presumed to be the legal father of a child born of extramarital sex to his wife.<sup>29</sup>

Under *Michael H.*, actual genetic ties need not always be dispositive on legal parenthood at birth, even when some “custodial, personal or financial” relationship exists between biological father and child.<sup>30</sup> Under *Lehr*, there seemed a similar recognition, as the high court found not only an insufficient relationship between the biological father and child, but also employed without comment a New York statute granting adoption notice and veto rights to men who had simply held out the relevant children in their communities as their own.<sup>31</sup> As Justice White observed in his dissent in *Lehr*, biological ties are becoming “unimportant in determining the nature of liberty interests” in childrearing.<sup>32</sup>

of such a family.”); Parness & Townsend, *supra* note 4, at 130–33 (exploring whether same sex or opposite sex couples in relationships not formalized under law could nevertheless form “unitary” families under *Michael H.*).

27. See *Michael H.*, 491 U.S. at 123.

28. Although *Michael H.* found that marital presumptions irrebuttable by biological fathers do not necessarily offend the federal Due Process Clauses, state constitutional provisions sometimes are offended. See, e.g., *In re J.W.T.*, 872 S.W.2d 189, 197 (Tex. 1994) (irrebuttable paternity presumptions can offend state constitutional guarantees, specifically the “Texas due course of law guarantee, which has independent vitality, separate and distinct from the Due Process clause of the Fourteenth Amendment to the U.S. Constitution”); *R. McG. v. J.W.*, 345, 615 P.2d 666, 672 (Col. 1980) (equal protection provision of Colorado Constitution mandated putative father be given standing to establish paternity even though mother was married).

29. *Michael H.*, 491 U.S. at 129–30 (declaring “it is a question of legislative policy and not constitutional law whether California will allow the presumed parenthood of a couple desiring to retain a child conceived within and born into their marriage to be rebutted”).

Seemingly, it is also a legislative policy that dictates when and if a spouse can seek to rebut the marital paternity presumption. See CAL. EVID. CODE § 621 (policy at the time of *Michael H.* did allow a wife or a husband to challenge the categorical declaration regarding the conclusive presumption); see also *State Dep’t of Soc. Servs. v. Drew*, 70 So.2d 1011 (La. App. 2011) (explaining state law changes on which spouse or former spouse can seek to rebut marital presumption; on when rebuttal is allowed; and, on what circumstances might allow additional time for rebuttal). Compare *J.A.S. v. Bushelman*, 342 S.W.3d 850 (Ky. 2011) (paramour had standing to pursue paternity of child born of sex to a woman who was and remained married to another at all relevant times since a “birth out of wedlock” under the state’s Uniform Act on Paternity includes a birth to a married woman where her husband was not the biological father); *J.S. v. S.M.M.*, 67 So.2d 1231, 1233 (Fla. App. 2011) (paramour had no standing to pursue paternity as long as husband and wife were married when child was conceived and born and remain “unified in their opposition” to the paternity action); *Dep’t of Revenue v. Iglesias*, 2012 WL 126053 (Fla. App 2012) (best interests of child determines whether state can rebut marital presumption in order to secure child support from biological father).

30. In *Michael H.*, both the biological father and another man, in fact, had such a relationship with the child. *Michael H.*, 491 U.S. at 114 (noting the postbirth acts of Michael in St. Thomas; the postbirth acts of Michael in Los Angeles; and, the postbirth acts of Scott in California).

31. N.Y. Dom. Rel. Law § 111(1)–(4) (requiring consent to adoption from a man “who openly lived with a child for a period of six months within the one year period immediately preceding the placement of the child for adoption and who during such period openly held himself out to be the father of such child”).

32. *Lehr v. Robertson*, 463 U.S. 248, 271 (1983) (White, J., dissenting).

### III. EQUALITY AND SAMENESS FOR STATE-SANCTIONED SAME SEX COUPLES

Under *Michael H.*, there can be parentage at birth for certain noncopulating mates where children are born of sex into their state-sanctioned family units.<sup>33</sup> Today, family units include both same and opposite sex marriages, civil unions, and domestic partnerships.<sup>34</sup> Noncopulating female mates in lesbian family units could be the categorically presumptive parents to children born into their families. If not categorically, the presumption could apply as long as the *Lehr* parental opportunity interests were not seized before or shortly after birth by the copulating males.<sup>35</sup> By contrast, noncopulating male mates in sanctioned gay family units could not categorically become presumptive parents at birth, as under *Lehr*, the mothers automatically had parental rights at birth.<sup>36</sup> Existing rights and interests of biological parents can thus stymie categorical legal parentage for some same sex partners, as no state except Louisiana<sup>37</sup> recognizes the possibility of three parents at birth for one child born of sex.<sup>38</sup>

Unfortunately, case law and statutes on newly sanctioned same sex family units fail to address the implications of *Lehr* and *Michael H.* on parentage at birth for children born of sex into same sex families. Rather, they usually simply extol a desire for equality or sameness for all state-sanctioned family units, a wish that can never be fully fulfilled.

Some states have recognized the interest in equality or sameness in marriage as required by their constitutions. For example, consider *Goodridge v. Department*

---

33. In *Michael H.*, the Court recognized that the “unitary family” does not require a marriage. *Michael H.*, 491 U.S. at 124. Accordingly, lower courts sometimes recognize nonmarital “unitary families.” See, e.g., *Georgina G. v. Terry M.*, 516 N.W.2d 678, 686 (Wis. 1994) (natural mother and her child “form a ‘unitary family’” under *Michael H.*).

34. See, e.g., *Rubano v. DiCenzo*, 759 A.2d 959, 974 (R.I. 2000) (relying on the *Michael H.* plurality’s articulation that the unitary family “also includes the household of unmarried parents and their children” to support its holding that a child/nonbiological mother relationship can trump a child/biological mother relationship in a matter involving visitation where the child was born to a same-sex domestic partnership); see also *Parness & Townsend*, *supra* note 4, at 130–33 (considering possible two adult parent “unitary” families at birth where there are no genetic ties between the infant and at least one parent and no adoption by the parent with no genetic ties).

35. *Lehr*, 463 U.S. at 261 (an unwed genetic father who demonstrates a “full commitment to the responsibilities of parenthood” acquires substantial childrearing interests via the constitutional protections of the Due Process Clauses).

36. *Lehr*, 463 U.S. at 262.

37. See, e.g., *Green v. Green*, 666 So.2d 1192, 1194 (La. App. 1995) (upholding trial court ruling “according joint legal custody to all three parents”); *Smith v. Cole*, 553 So.2d 847 (La. 1989); *T.D. v. M.M.M.*, 730 So.2d 873 (La. 1999).

38. For children born via artificial reproduction, there are more often opportunities for three parents. See, e.g., *Laura Nicole Althouse, Three’s Company? How American Law Can Recognize A Third Social Parent in Same-Sex Headed Families*, 19 HASTINGS WOMEN’S L.J. 171 (2008); compare *In re B.M.H.*, 2011 WL 6039260 (Wash. App. 2011) (stepparent’s de facto parent petition can be heard as long as child has only one other parent); see also *June Carbone & Naomi Cahn, Marriage, Parentage and Child Support*, 45 FAM. L.Q. 219, 238–39 (2011) (a few non-Louisiana cases involving child support recognize the possibility of three parents); *Naomi Cahn, The New Kinship*, 100 GEORGETOWN L.J. 367 (2012) (advocating options beyond “dyadic nuclear-family model” for children born into “donor-conceived communities”).

of *Public Health*, where the Supreme Judicial Court of Massachusetts declared in 2003 that

[l]imiting the protections, benefits and obligations of civil marriage to opposite-sex couples violates the basic premises of individual liberty and equality under law protected by the Massachusetts Constitution.<sup>39</sup>

The chosen remedy was to “construe civil marriage to mean the voluntary union of two persons as spouses, to the exclusion of all others” so as to advance the state interest in “providing a stable setting for childrearing.”<sup>40</sup> All marriages should thus be treated equally.<sup>41</sup> The court stayed the remedy “for 180 days to permit the Legislature to take such action as it may deem appropriate in light” of the judicial ruling.<sup>42</sup> To date, there has been no significant legislation.<sup>43</sup>

Comparably, in *Varnum v. Brien*, the Iowa Supreme Court held in 2009 that the Iowa marriage statute violated the Iowa constitution because “the exclusion of gay and lesbian people from the institution of civil marriage does not substantially further any important governmental objective.”<sup>44</sup> The chosen remedy was to have the statutory language on civil marriage be “interpreted and applied in a manner allowing gay and lesbian people full access to the institution of civil marriage.”<sup>45</sup> Again, there is a mandate for equality and sameness.

Statutory recognition of same sex marriage exists in the District of Columbia, where, since March 3, 2010, “marriage is the legally recognized union of 2

39. *Goodridge v. Dep’t of Pub. Health*, 798 N.E.2d 941, 968 (Mass. 2003).

40. *Goodridge*, 798 N.E.2d at 969 (the only other noted “legitimate” state interest in civil marriage was “conserving State resources”).

41. *See, e.g., Della Corte v. Ramirez*, 2012 WL 285026 (Mass. App. 2012) (same sex female couple married after artificial insemination of one partner are bound by same child custody laws as heterosexual couples, citing *Goodridge*).

42. *Goodridge*, 798 N.E.2d at 970.

43. For a review of the post-*Goodridge* legislative proposals, including attempts to ban same sex marriages via state constitutional amendments, see The Honorable Roderick L. Ireland, *In Goodridge’s Wake: Reflections on the Political, Public, and Personal Repercussions of the Massachusetts Same-Sex Marriage Cases*, 85 NYU L. REV. 1417 (2010) (noting that in 2008 the Massachusetts General Assembly repealed a 1913 statute that prevented nonresident couples, including same sex couples, from marrying in Massachusetts when the couples intended to reside in another state and when the other jurisdiction would not itself permit such a marriage); compare N.J. Stat. 37:1-28e (same sex civil unions statutorily recognized after *Lewis v. Harris*, 188 N.J. 415 (N.J. 2006) (state equal protection violated by denying committed same sex couples the rights and benefits accorded heterosexual counterparts; equality could be achieved by allowing marriages to same sex couples or by enactment of a parallel statutory scheme by another name under which same sex couples are afforded equal rights and benefits)).

44. *Varnum v. Brien*, 763 N.W.2d 862, 906 (Iowa 2009).

45. *Varnum*, 763 N.W.2d at 907. The court expressly rejected a remedy creating a “new distinction based on sexual orientation” of recognized family units as “suspect” and “difficult to square with the fundamental principles of equal protection embodied” in the Iowa constitution. *Id.* at 906; *see also* VT. STAT. ANN. tit. 15, § 8 (West, Westlaw through No. 67 of the 2011–2012 session (2012) of the Vt. Gen. Assembly) (civil marriage is “the legally recognized union of two people” where General Assembly purpose was to afford equality in the civil marriage laws, per 2009, No. 3, § 5 Sec. 2).



persons,” where gender does not matter.<sup>46</sup> Equality and sameness for opposite sex and same sex married couples are contemplated, as any statutory gender-specific terms (like husband) “shall be construed to be gender neutral” in order to “implement the rights and responsibilities relating to the marital relationship or familial relationships.”<sup>47</sup>

In Washington state, which already provided for expanded domestic partnership rights,<sup>48</sup> the Governor announced that she would push for new legislation allowing same sex marriages in early 2012. In her press release, the Governor urged legislators to “join today” to support this “equality” (likening it to equality for “racial minorities, women, people with disabilities and immigrants”).<sup>49</sup> In early February 2012, the Washington General Assembly approved a same sex marriage bill<sup>50</sup> that was signed into law by the Governor, who described the law as one that “[tells] every child of same sex couples that their family is every bit as equal . . . And [takes] a major step toward completing a long and important journey to end discrimination based on sexual orientation.”<sup>51</sup>

In early 2012, Maryland also adopted a same sex marriage scheme that is scheduled to take effect in January 2013.<sup>52</sup> Explaining his support, the Governor in March, 2012 said: “For a free and diverse people . . . the way forward is always to be found through greater respect for the equal rights of all.”<sup>53</sup>

Akin to directives on same sex marriage, American state statutes on civil unions also demand equality and sameness for opposite sex and same sex families. The Illinois Religious Freedom Protection and Civil Union Act,

46. D.C. CODE § 46-401(a). There are some persons who cannot marry. D.C. CODE 46-401.01(2A) & (3) (marriage to certain relatives forbidden, as is marriage by one whose “previous marriage has not been terminated”).

47. D.C. CODE § 46-401(b). In the District there can also be domestic partnerships which qualify both partners for certain benefits, like hospital visitation privileges. D.C. CODE § 32-701(7)(A), § 32-704.

48. See, e.g., WASH. REV. CODE § 26.60.010 (West, Westlaw through Mar. 26, 2012) (as it is impractical [due to some social security and tax laws] for older couples [where at least one is at least 62 years old] to marry, these couples can enter into state registered domestic partnerships).

49. Governor Chris Gregoire, Press Release, *Gov. Gregoire Announces Historic Legislation for Marriage Equality in Washington State* (Jan. 4, 2012), <http://www.governor.wa.gov/news/news-view.asp?pressRelease=1828&newsType=1> (last visited Apr. 9, 2012).

50. Wash. Engrossed Substitute Senate Bill 6239, whose Senate Committee report on public testimony deemed the supporters said the “bill is about equality.”

51. Julia Zebley, *Washington House Approves Same-Sex Marriage Bill*, JURIST (Feb. 9, 2012, 7:43 AM), <http://jurist.org/paperchase/2012/02/washington-house-approves-same-sex-marriage-bill.php>. In early 2012, the Maryland House of Delegates passed a same-sex marriage bill; in 2011 a similar bill passed the Maryland Senate. Jamie Davis, *Maryland House of Delegates Passes Same-Sex Marriage Bill*, JURIST (Feb. 18, 2012, 11:08 AM), <http://jurist.org/paperchase/2012/02/maryland-house-of-delegates-passes-same-sex-marriage-bill.php>.

52. Civil Marriage Protection Act, found in Article-Family Law, Sections 2-201 and 2-202.

53. Governor O’Malley, *Senate President Miller and Speaker Busch Sign the Civil Marriage Protection Act of 2012*, OFFICE OF GOVERNOR MARTIN O’MALLEY (Mar. 1, 2012), <http://www.governor.maryland.gov/blog/?p=4554>.

effective June 2011, recognizes both same sex and opposite sex civil unions.<sup>54</sup> It grants unionized persons “the same legal obligations, responsibilities, protections and benefits as are afforded . . . to spouses” in civil marriages,<sup>55</sup> which remain available only to opposite sex couples.<sup>56</sup>

Rhode Island also provides for same sex civil unions, as of July 1, 2011.<sup>57</sup> A party to such a union has “all the rights, protections, and responsibilities . . . as people joined” in civil marriage.<sup>58</sup> The Delaware civil union provisions, within the Civil Union and Equality Act of 2011, effective January 1, 2012, are similar.<sup>59</sup>

Hawaii authorized civil unions (same sex and opposite sex) as of January 1, 2012, whose “partners” “shall have the same rights, benefits, protections, and responsibilities under law, whether derived from statutes, administrative rules, court decisions, the common law, or any other source of civil law, as are granted to those who” are married.<sup>60</sup>

New Jersey has allowed same sex civil unions since February 19, 2007, whose parties generally “receive the same benefits and protections” and are “subject to the same responsibilities as spouses in a marriage.”<sup>61</sup> These parties, in particular, are statutorily accorded an equality in parentage matters that is impossible to achieve because of federal constitutional precedents on parental interests. The relevant act says:

54. 750 ILL. COMP. STAT. ANN. 75/10 (West, Westlaw through P.A. 97-679 of the 2011 Reg. Sess.) (civil unions are “between 2 persons, of either the same or opposite sex”).

55. 750 ILL. COMP. STAT. ANN. 75/20 (West, Westlaw through P.A. 97-679 of the 2011 Reg. Sess.).

56. Before civil unions in Illinois, same sex partners jointly rearing children seemingly could establish guardianships in the partners with no parental status under law per the Probate Code; once established, guardianships could not be terminated, even by one who was the initial and only parent under law (i.e., birth mother), if the guardian desired to continue as guardian and demonstrated by clear and convincing evidence that continuation was in the children’s best interests. *See, e.g., In re T.P.S.*, No. 5-10-0617, 2011 WL 2472671 (Ill. App. Ct. 2011).

57. R.I. GEN. LAWS ANN. § 15-3.1-2(2) (West, Westlaw through ch. 409 of 2011 Reg. Sess.).

58. R.I. GEN. LAWS ANN. § 15-3.1-6 (West, Westlaw through ch. 409 of 2011 Reg. Sess.). “Marriage refers only to a union between a man and a woman.” *Chambers v. Ormiston*, 935 A.2d 956, 962 (R.I. 2007).

59. DEL. CODE ANN. tit. 13, § 201 (West, Westlaw through 78 Laws 2011) (same sex civil unions); *id.* § 212(a) (West, Westlaw through 78 Laws 2011) (civil union parties “shall have all the same rights, protections and benefits, and shall be subject to the same responsibilities . . . as are granted to . . . or imposed upon married spouses”).

60. Hawaii Senate Bill 232 HD1. Notwithstanding the imminent implementation of the new civil union law, on December 7, 2011, two plaintiffs sued in the federal district court in Hawaii alleging that the Hawaii statute, HAW. REV. STAT. ANN. § 572-1, limiting marriage to people of opposite sex was unconstitutional under federal Fourteenth Amendment Due Process and Equal Protection. *Jackson v. Abercrombie*, CV 11, 00734, ACK KSC (outlining earlier challenges to the Hawaii marriage statute under the Hawaii constitution).

61. N.J. STAT. ANN. § 37:1-29 (West, Westlaw through 2012). In February, 2011 the New Jersey General Assembly approved a same-sex marriage bill which was vetoed by Governor Chris Christie, who called for a voter referendum to decide the issue. Michael Haggerson, *New Jersey Governor Vetoes Same-Sex Marriage Bill*, JURIST (Feb. 18, 2012, 3:20 PM), <http://jurist.org/paperchase/2012/02/new-jersey-governor-vetoes-same-sex-marriage-bill.php>. In February 2012, a federal constitutional equality challenge to the New Jersey Civil Union Act was allowed by a New Jersey state trial court to proceed. *Garden State Equality v. Dow*, 2012 WL 540608 (N.J. Super. Ct. Law Div. 2012).

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.<sup>62</sup>

Children born of sex into same sex male unions cannot be deemed categorically the children of noncopulating males as these children already have two parents, the copulating male and the birth mother.

As with same sex marriage and civil unions, statutes recognizing domestic partnerships for same sex couples also call for equality with opposite sex married couples. The Nevada Domestic Partnership Act<sup>63</sup> allows “two persons” to enter into a social contract,<sup>64</sup> which, when completed, provides the domestic partners with “the same rights, protections and benefits, and . . . the same . . . duties under law . . . as are granted to and imposed upon spouses.”<sup>65</sup>

The Oregon Family Fairness Act<sup>66</sup> establishes a domestic partnership system for the purpose of “ensuring more equal treatment of gays and lesbians and their families under Oregon law.”<sup>67</sup> The system is available only to “two individuals of the same sex.”<sup>68</sup> In Oregon “any privilege, immunity, right or benefit granted . . . to an individual because the individual is or was married . . . is granted on equivalent terms, substantive and procedural, to an individual because the individual is or was in a domestic partnership.”<sup>69</sup>

Equality and sameness is typically demanded for all new state-sanctioned family units. But at least as to parentage at birth for a child born of sex, this demand is often constitutionally forbidden,<sup>70</sup> as when a child is born to an unwed

62. N.J. STAT. ANN. § 37:1-31e (West, Westlaw through L. 2012, c. 1). Incidentally, there is some confusion in the last section of the sentence as between marriages and unions (e.g., spouses and partners). As well, the section effectively denies equality to same sex couples whose union ends shortly before birth since the section speaks only of births “during the term of the civil union” and since there is, by contrast, a presumption of paternity in a man in New Jersey whose marriage ends shortly before birth. N.J. STAT. ANN. § 9:17-43 (West, Westlaw through L. 2012, c. 1).

63. NEV. REV. STAT. ANN. §§ 122A.010 et seq. (West, Westlaw through 2011 76th Reg. Sess.).

64. NEV. REV. STAT. ANN. § 122A.040 (West, Westlaw through 2011 76th Reg. Sess.).

65. NEV. REV. STAT. ANN. § 122A.200 (West, Westlaw through 2011 76th Reg. Sess.).

66. OR. REV. STAT. ANN. §§ 106.300 et seq. (West, Westlaw through Ch. 35 of 2012 Reg. Sess.).

67. OR. REV. STAT. ANN. § 106.305 (West, Westlaw through Ch. 35 of 2012 Reg. Sess.).

68. OR. REV. STAT. ANN. § 106.310(1) (West, Westlaw through Ch. 35 of 2012 Reg. Sess.).

69. OR. REV. STAT. ANN. § 106.340 (West, Westlaw through Ch. 35 of 2012 Reg. Sess.); *see also* WIS. STAT. ANN. § 770.05(5) (West, Westlaw through 2011) (domestic partnerships only for “members of the same sex”); WIS. STAT. ANN. § 770.001 (West, Westlaw through 2011) (status of domestic partnership is not substantially similar to that of marriage).

70. In nonparentage settings there will be fewer constitutional barriers. *See, e.g.*, Peter Nicolas, *The Lavender Letter: Applying the Law of Adultery to Same-Sex Couples and Same-Sex Conduct*, 63 FLA. L. REV. 97, 99 (2011) (“the same equality principles that have resulted in the extension of the right to marry to same-sex couples likewise require the application of adultery laws and related doctrine to same-sex couples and same-sex conduct.”).

woman and to a man in a sanctioned same sex relationship.<sup>71</sup>

#### IV. NEW STATUTORY PRESUMPTIONS ON PARENTAGE AT BIRTH

Existing statutory presumptions on parentage at birth in states recognizing married, unionized, and/or domestically partnered same sex couples typically afford presumptive parentage only to husbands whose sex with their wives could have prompted birth.<sup>72</sup> For example in Vermont,<sup>73</sup> where there are civil marriages, in Illinois,<sup>74</sup> where there are civil unions, and in Nevada,<sup>75</sup> where there are domestic partnerships, a man is presumed to be the “natural” parent of a child born to his wife “during” the marriage. Women are never presumed to be (nor should they be) the “natural” parents of children born to their husbands out of extramarital affairs as there is no chance that the sex acts of the wives prompted the births.

Presumptions of paternity are often based on marriage, but not always.<sup>76</sup> In Nevada, for example, there is also a presumption that a man is “the natural father of a child” if he and the child’s mother “were cohabitating for at least 6 months before the period of conception and continued to cohabit through the period of conception.”<sup>77</sup> This constitutes a recognition of a “unitary” family, under *Michael H.*, that has never been recognized via a state-sanctioned ceremony before birth<sup>78</sup> and which may never be so recognized after birth. The Nevada statute extends no similar analogous presumptions to those in same sex relationships whose mates become natural parents through sex outside the relationships. Here, as with the opposite sex marital couple, the possibility of

71. *Lehr v. Robertson*, 463 U.S. 248, 262 (1983) (automatic constitutional childrearing interest in birth mother, but only a constitutional parental opportunity interest in genetic father).

72. The Uniform Parentage Act (2000) [hereinafter UPA] (which many states have adopted in some form) similarly extends a presumption of parentage to children born into a marriage, but not to children born to a same sex partnership or a civil union. UPA § 204(a)(2) (“A man is presumed to be the father of a child if . . . he and the mother of the child were married to each other and the child is born within 300 days after the marriage is terminated by death, annulment, declaration of invalidity, or divorce [or after a decree of separation].”) Because of the statutory gap regarding same sex female couples, in one UPA state a court considered whether the noncopulating female partner [not in a state-recognized marriage, union or domestic partnership] was a *de facto* parent. *In re Custody of A.F.J.*, 260 P.3d 889 (Wash. Ct. App. 2011) (where partner was also a foster parent as a result of the mother’s drug use which prompted a dependency proceeding).

73. VT. STAT. ANN. tit. 15, § 308(4) (West, Westlaw through No. 67 of 2011–2012 Sess.).

74. 750 ILL. COMP. STAT. ANN. 45/5(a)(1) (West, Westlaw through P.A. 97-679 of the 2011 Reg. Sess.).

75. NEV. REV. STAT. ANN. § 126.051(1)(a) (West, Westlaw through 2011 76th Reg. Sess.).

76. In Pennsylvania, a presumption of paternity exists prompting “rights and privileges” regarding the child “if, during the lifetime of the child, it is determined by clear and convincing evidence that the father openly holds out the child to be his and either receives the child into his home or provides support for the child.” 23 PA. CONS. STAT. ANN. § 5102 (West, Westlaw through 2011 Reg. Sess.).

77. NEV. REV. STAT. ANN. § 126.051(1)(b) (West, Westlaw through 2011 76th Reg. Sess.).

78. Not all state-recognized couples in family units need a ceremony, however. *See, e.g.*, Oregon Family Fairness Act, OR. REV. STAT. ANN. § 106.325 (paper filing with state agency) (West, Westlaw through Ch. 35 of 2012 Reg. Sess.).

genetic ties is not necessary but seems important.<sup>79</sup>

By contrast, in the District of Columbia, where there are both same sex marriages and domestic partnerships,<sup>80</sup> there are some very different presumptions. One law says: “A child born to parents in a domestic partnership shall be treated for all legal purposes as a child born in wedlock.”<sup>81</sup> This law is suspect as, at least for same sex male couples, there is no statutory recognition of the automatic parenthood status of the unwed mother of a child born of sex with one of the two males.<sup>82</sup> Unlike Louisiana, most American jurisdictions permit only two parents for each child born of sex.<sup>83</sup> The District of Columbia seemingly does not provide written guidance, as California does,<sup>84</sup> on how to select between competing claims to parentage by more than two people, as between the birth mother and the noncopulating domestically partnered male who has parented the child from birth. The D.C. law is similarly problematic as applied to same sex female couples, since there is no statutory recognition of the potential legal parentage of the biological father under *Lehr*, rendering it potentially unconstitutional.<sup>85</sup>

79. There is no exemption for men who are impotent or sterile as there is with the California opposite sex marital presumption of parentage in the husband. CAL. FAM. CODE § 7540 (West, Westlaw through Ch. 8 of 2012 Reg. Sess.) (declaring that “the child of a wife cohabiting with her husband, who is not impotent or sterile, is conclusively presumed to be a child of the marriage”).

80. D.C. CODE § 46-401(a) (marriages); D.C. CODE § 32-701(7), § 32-704 (partnerships).

81. D.C. CODE § 16-907(c).

82. For married or partnered opposite sex couples, the parentage presumption in the man may be overcome upon proof that the man is “not the child’s genetic parent.” D.C. CODE § 16-909(b)(1) (presumed male parent may, however, under certain circumstances, continue as the child’s parent even though there are no genetic ties). A birth mother’s parentage at birth is automatic for a child born of sex, per *Lehr*.

83. See, e.g., Deborah H. Wald, *The Parentage Puzzle: The Interplay Between Genetics, Procreative Intent, and Parental Conduct in Determining Legal Parentage*, 15 AM. U. J. GENDER SOC. POL’Y & L. 379 (2007) (reviewing two parent limits while advocating legal recognition of three or more parents in settings serving children’s best interests). Courts find ways to recognize two parents rather than one even where written laws present obstacles. See, e.g., *In re M.M.D. & B.H.M.*, 662 A.2d 837 (D.C. 1995) (recognizing both stepparents and homosexual mates living in committed personal relationships can adopt their partners’ children without negatively impacting their partners’ parental rights, whether acquired when the children were born of sex or when children were adopted).

84. CAL. FAM. CODE § 7612(b) (when two or more parentage presumptions “conflict with each other, . . . the presumption which on the facts is founded on the weightier considerations of policy and logic controls”); see also *In re Jesusa V.*, 10 Cal. Rptr. 3d 205, 219 (Cal. 2004) (two men vie for legal parentage status at birth in order to rear the child, one is the husband to the birth mother and the other is the man whose sex with the mother led to the child’s birth and who held himself out in the community as the child’s father); *In re M.C.*, 123 Cal. Rptr. 3d 856 (Cal. Ct. App. 2011) (two people vie for legal parentage at birth in order to secure dependency status, one is the woman married to the birth mother and the other is the man whose sex with the birth mother led to the child’s birth); *In re S.N.V.*, No. 10CA1302, 2011 WL 6425562 (Colo. App. 2011) (using best interests of child test to determine competing claims to motherhood by wife of biological father and woman who bore child as a result of consensual sex); compare Diane M. Goodman, *Why Can’t Children Have Three Parents?*, 34 L.A. LAW. 36 (2011).

85. It is unlikely, for example, that the District would, or could, give constitutionally, “categorical” parental preference to a female domestic partner who formally committed to another woman who gave birth to a child born of sex one day after the commitment, at least where the biological father desired and fully supported the pregnancy, and wished to parent after birth. See, e.g., *Venable v. Parker*, 706 S.W.2d

Comparably, the Delaware Civil Union and Equality Act of 2011<sup>86</sup> declares:

The rights of parties to a civil union, with respect to a child of whom either party becomes the parent during the term of the civil union, shall be the same as the rights (including presumptions of parentage) of married spouses with respect to a child of whom either spouse becomes the parent during the marriage.<sup>87</sup>

Again, biological parents are not considered and there are no norms for selecting between competing claims to parenthood by three (or more) persons with constitutional or statutory interests.<sup>88</sup>

A different District of Columbia law says: “There shall be a presumption that a woman is the mother of a child if she and the child’s mother are or have been married, or in a domestic partnership, at the time of either conception or birth, or between conception [and] birth, and the child is born during the marriage or domestic relationship, or within 300 days after the termination of the marital cohabitation by reason of death, annulment, divorce, or separation ordered by a court, or within 300 days after the termination of the domestic partnership.”<sup>89</sup> This law is suspect as well, at least in application, because *Lehr* requires recognition of the potential legal parentage of the biological father (at least when a child is born of sex), in the absence of a “categorical” presumption founded on possible genetic ties.<sup>90</sup>

#### V. NEW ACKNOWLEDGEMENTS OF PARENTAGE AT BIRTH

With current parentage presumption laws unable to secure equality or sameness for same sex couples who parent children born of sex, how might security be achieved? Besides rewriting presumption laws,<sup>91</sup> which do not

---

211, 214 (Ga. Ct. App. 2011) (Dillard, J., concurring) (“[O]ur decision leaves open for another day whether a putative biological father might, in certain circumstances [cite to *Lehr*], have standing to ask a court to compel genetic testing . . . based on a constitutional right to familial relations with the child, notwithstanding the lack of any statutory authority for doing so.”).

86. DEL. CODE ANN. tit. 13, § 204. The marital presumption appears in DEL. CODE ANN. tit. 13, § 8-204 (which, under the title of paternity presumption “in context of marriage,” recognizes a presumption of fatherhood in a man who resided with the child for the first two years of life and openly held the child out as his own). For children born in Delaware to unionized couples via assisted reproduction, see Susan F. Paikin & William L. Reynolds, *Assisted Reproduction, Civil Unions and Parentage*, 29 DEL. LAW. 24 (2011).

87. *Id.*

88. See, e.g., CAL. FAM. CODE § 7612(b).

89. D.C. CODE § 16-909(a-1)(2).

90. The marital presumption of paternity in the husband in D.C. seemingly is not categorical as it is subject to rebuttal by a biological father. D.C. CODE § 16-909(a). And even some categorical presumptions may be unconstitutional. See *supra* note 65.

91. For a current example of a parentage presumption statute involving no state-sanctioned family and no genetic ties, thus grounding paternity on receipt of a child into a home and holding oneself out as a

always reflect intended parentage, states could expand parentage acknowledgment opportunities where intended parentage is always required.

As a condition to federal funding,<sup>92</sup> American states must afford unwed parents involved in certain public aid programs, including the Temporary Assistance for Needy Families program, an opportunity for paternity establishment outside of court proceedings (in large part to facilitate increased child-support payment reimbursements by fathers of children benefiting from public aid).<sup>93</sup> These Congressional efforts have led states to implement mechanisms that allow all unwed parents, not just those involved with public aid, to acknowledge paternity of children born of sex via a simple form.<sup>94</sup> Consequently, many unwed biological parents of children born of sex in the United States<sup>95</sup> can establish paternity under law by filing a validly executed voluntary paternity acknowledgment with the appropriate state agency.<sup>96</sup> States typically consider a properly signed and filed voluntary acknowledgment to constitute a legal finding of parentage.<sup>97</sup>

---

natural parent (while knowing one is not), see ALA. CODE § 26-17-204(a)(5), as read in *Ex parte T.J.*, 2012 WL 415480 (Ala. 2012).

92. In the Personal Responsibility and Work Opportunity Reconciliation Act of 1996 (codified in scattered sections of 42 U.S.C.), Congress invited U.S. states to participate in a program of block grants for low income families aided by the Temporary Assistance for Needy Families program (codified in 42 U.S.C. § 601 (2006)).

93. 42 U.S.C. § 666(a)(5)(D)(ii) (2006); *see also* Unif. Parentage Act Art. III cmt. (2000) (stating that “in order to improve the collection of child support, especially from unwed fathers, the U.S. Congress mandated a fundamental change . . . [that] conditions receipt of federal child support enforcement funds on state enactment of laws that greatly strengthen the effect of a man’s voluntary acknowledgment of paternity”).

94. 42 U.S.C. § 666(a)(5)(D)(ii) (2006).

95. Unwed biological parents often include couples whose sexual encounters prompted births, where one or both biological parents are married to others. Such couples would not be included in instances where a mother’s husband can block any attempt at disestablishing his marital presumption of paternity by not signing a parentage acknowledgment form. *See, e.g.*, WYO. STAT. ANN. § 14-2-602 (“An acknowledgment of paternity is void if it states that another man is a presumed father, unless a denial of paternity signed or otherwise authenticated . . . or falsely denies the existence of a presumed, acknowledged or adjudicated father of the child.”). Conversely, a biological father may block a husband’s efforts to disestablish paternity in some settings: “If the mother was married at the time of either conception or birth, or between conception and birth, and the husband is not the father of the child, the husband may file an executed and notarized affidavit of nonpaternity if it is accompanied by a voluntary acknowledgment of paternity signed and notarized by the mother and the alleged father.” IDAHO CODE ANN. § 7-1106. Yet in Idaho a husband’s nonpaternity might be able to be established through court proceedings.

96. Related federal legislation declares that for voluntary acknowledgments to be effective, parents “must be given notice, orally, or through the use of video or audio equipment, and in writing, of the alternatives to, the legal consequences of, and the rights (including, if one parent is a minor, any rights afforded due to minority status) and responsibilities that arise from, signing the acknowledgment.” 42 U.S.C. 666(a)(5)(C)(i).

97. *See, e.g.*, 42 U.S.C. 666(a)(5)(D)(ii) (2006) (federally subsidized state welfare schemes); *see also* Unif. Parentage Act §305 (stating that a validly executed acknowledgment of paternity “is equivalent to an adjudication of paternity of a child and confers upon the acknowledged father all of the rights and duties of a parent”); Unif. Parentage Act § 311 (requiring full faith and credit to an acknowledgment or denial of paternity that is formalized in another state).

Although acknowledgment forms<sup>98</sup> and marital presumptions<sup>99</sup> both trigger a recognition of legal parentage, only acknowledgments require formal affirmative acts by parents before parenthood is recognized. As well, undoing parentage arising from a presumption is different from undoing parentage arising from an acknowledgment. Parentage by marital presumption may be “conclusive” as to an unwed biological father, in that such a father may need the husband’s assent before an acknowledgement is allowed.<sup>100</sup> Or, a marital paternity presumption favoring the husband may be rebuttable long after birth with only proof regarding the husband’s lack of genetic ties.<sup>101</sup> Parentage by acknowledgement can be easily rescinded within sixty days of signing,<sup>102</sup> assuming no pending related administrative or judicial proceeding.<sup>103</sup> But after sixty days, a signed voluntary parentage-acknowledgment may be rescinded only on the “basis of fraud, duress, or material mistake of fact, with the burden of proof upon the challenger.”<sup>104</sup>

Limitations currently exist both for those seeking to execute and for those seeking to rescind paternity acknowledgements. For example, voluntary acknowledgments are sometimes limited to nonmarital families.<sup>105</sup> Certain states,

98. Parentage by acknowledgement (also termed “a determination of parentage”) means “the establishment of the parent-child relationship by the signing of a valid acknowledgment of paternity.” Unif. Parentage Act § 102(7).

99. *Id.* A presumed father “means a man who, by operation of law . . . is recognized as the father of a child until that status is rebutted or confirmed in a judicial proceeding.” Unif. Parentage Act § 102(16).

100. *See, e.g.*, WYO. STAT. ANN. § 14-2-602 (“An acknowledgment of paternity is void if it states that another man is a presumed father, unless a denial of paternity signed or otherwise authenticated . . . or falsely denies the existence of a presumed, acknowledged or adjudicated father of the child.”).

101. On the differing state standards for rebutting marital presumptions of paternity, *see, e.g.*, Donald M. Zupanec, Annotation, *Who May Dispute Presumption of Legitimacy of Child Conceived or Born During Wedlock*, 90 A.L.R. 3d 1032 (1979). Rebuttals with only proof regarding actual genetic ties occur in both child support and child custody/visitation settings. *See, e.g.*, Rydberg v. Rydberg, 678 N.W.2d 534, 539 (N.D. 2004) (dismissing a petition to compel child support from nongenetic presumptive father because “biological evidence is clear and convincing enough to rebut the presumption of paternity”); Courtney v. Roggy, 302 S.W.3d 141, 146–47 (Mo. Ct. App. 2009) (upholding lower court’s determination that biological ties alone were sufficient to rebut marital presumption while sustaining an order granting the biological father visitation).

102. Many states only require a properly filed rescission form to nullify a voluntary acknowledgment of parentage—other states require a judicial proceeding. *Compare e.g.*, ILLINOIS DEP’T OF PUB. HEALTH, DIV. OF VITAL RECORDS, FORM NO. DPA 3416BC4, VOLUNTARY ACKNOWLEDGMENT OF PATERNITY (2000) (explaining that “either the mother or father may withdraw the action by signing . . . a Rescission of VAP”), with WYO. STAT. ANN. § 14-2-607(a) (explaining that “a signatory may rescind an acknowledgment of paternity or denial of paternity by commencing a proceeding to rescind”).

103. 42 U.S.C. § 666(a)(5)(D)(ii)(I)–(II) (providing opportunity to rescind voluntary acknowledgments “within the earlier of (1) 60 days [of the signing] or (2) the date of an administrative or judicial proceeding relating to the child (including a proceeding to establish a support order) in which the signatory is a party”). The implementation of these rescission standards occasionally proves challenging. *See* N.J. STAT. ANN. § 9:17-41b (West, Westlaw through 2012) (providing for rescission within sixty days); N.J. STAT. ANN. § 26:8-30 (declaring that rescission may occur within sixty days only for “fraud, duress, or material mistake of fact”).

104. 42 U.S.C. 666(a)(5)(D)(iii). The type of conduct (typically of the mother) that qualifies as “fraud, duress, or material mistake of fact” varies interstate.

105. For example, Pennsylvania excludes marital children by captioning the form “Acknowledgment of Paternity for a Child Born to an Unmarried Woman.” PENNSYLVANIA DEP’T OF PUB. WELFARE, BUREAU



however, permit married parents to execute a voluntary acknowledgment of parenthood.<sup>106</sup> The effect, if not purpose, of an acknowledgement by a husband and wife is to make paternity disestablishment more difficult; marital presumptions often are more easily overcome than paternity acknowledgments.

Some paternity acknowledgment limits involve genetics. Acknowledgment forms in Maine warn that it is “a crime for you to sign this form knowing that the man signing is not the biological father of the child.”<sup>107</sup> Similarly, the lack of genetic ties effectually bars the use of acknowledgement forms elsewhere, including West Virginia<sup>108</sup> and Washington.<sup>109</sup> By contrast, some American state acknowledgment forms, including those in Alaska<sup>110</sup> and Nevada,<sup>111</sup> do not address whether genetic ties are required, or even preferred. Where genetic ties are or can be established, acknowledgment forms may also be used at least in some places by unwed sperm donors where children are born of artificial insemination.<sup>112</sup>

Certain limitations on parentage acknowledgments involve same sex couples. Some states do not explicitly address whether same sex parents may utilize

---

OF CHILD SUPPORT ENFORCEMENT, FORM NO. PA/CS 611, ACKNOWLEDGEMENT OF PATERNITY FOR A CHILD BORN TO AN UNMARRIED WOMAN (2006). Similarly, mothers signing in Massachusetts must attest, “I swear . . . I was not married.” MASSACHUSETTS DEP’T OF REVENUE, CHILD SUPPORT ENFORCEMENT DIV., FORM NO. R-132-04, VOLUNTARY ACKNOWLEDGMENT OF PARENTAGE (2004); *see also* GEORGIA DEP’T OF HUMAN RES., VITAL RECORDS, FORM NO. 3940, PATERNITY ACKNOWLEDGMENT OF MARITAL CHILD (2008) (explaining that it “cannot be completed if the mother was married to anyone within the 10 months prior to the birth of this child”).

106. *See, e.g.*, WISCONSIN DEP’T OF HEALTH SERVS., DIV. OF PUB. HEALTH, FORM NO. F-05023, ACKNOWLEDGEMENT OF MARITAL CHILD (2008). Although a parentage acknowledgment form exists for a child born into a Wisconsin marriage, no similar form exists for a child born to a Wisconsin domestic partnership. Wisconsin has recognized domestic partnerships since 2009. WIS. STAT. ANN. § 770.001.

107. MAINE DEP’T OF HEALTH AND HUMAN SERVS., OFFICE OF VITAL RECORDS, FORM NO. VS-27C, VOLUNTARY ACKNOWLEDGMENT OF PATERNITY (2005).

108. WEST VIRGINIA DEP’T OF HEALTH AND HUMAN RES., VITAL REGISTRATION OFFICE, FORM NO. WVDHHR, DECLARATION OF PATERNITY AFFIDAVIT (2007) (warning, “If the man named above is not the biological father of the child, do not sign the document”).

109. Washington’s acknowledgement form instructs, “Sign this form only if you are sure that you are the only possible biological parent of this child.” WASHINGTON STATE DEP’T OF HEALTH, CTR. FOR HEALTH STATISTICS, FORM NO. DOH/CHS 021, PATERNITY AFFIDAVIT (2007); *see also* Unif. Parentage Act § 302(a)(4) (requiring that acknowledgments of paternity must “state whether there has been genetic testing and, if so, that the acknowledging man’s claim of paternity is consistent with the results of the testing”).

110. ALASKA BUREAU OF VITAL STATISTICS, FORM NO. 06-5376 VS FORM 16, AFFIDAVIT OF PATERNITY (2009).

111. NEVADA VITAL RECORDS, FORM NO. NSPO, DECLARATION OF PATERNITY (2008).

112. *See, e.g.*, *Breit v. Mason*, 2011 WL 6780930 (Va. Ct. App. 2011) (mother and father lived together as an unmarried couple when the child was conceived; jointly executed a sworn “Acknowledgment of Paternity a day after birth; gave the child a hyphenated surname comprising mother’s and father’s surname; jointly mailed out birth announcements; and represented to friends and family the semen donor was the “legal and biological father”).

parentage acknowledgement forms.<sup>113</sup> While most state acknowledgment forms do not speak to the sexual orientation of hopeful parents, they typically require information and signatures from a “mother” and “father.”<sup>114</sup> Even where there are same sex marriages and domestic partnerships, signatures from a “mother” and “father” typically are required.<sup>115</sup> In Colorado, the instruction page accompanying the paternity acknowledgment form explicitly states that the form “may not be used for same sex parents.”<sup>116</sup>

Legislative recognition of parentage within family units headed by same sex adult couples would often serve the best interests of the children as well as the adults.<sup>117</sup> Yet to date, there are no state laws regulating parentage acknowledgments by same sex partners, though they would seem to be highly desired by many same sex couples who wish the benefits (and obligations) of secure parenthood at the time of birth. Explicit statutory recognition of acknowledgment opportunities for same sex partners could avoid much of the need for, and the confusion arising out of, such common law doctrines as *de facto* parenthood and parentage by estoppel. Such statutory regimes would also address the fact that socially, as genetic testing for natural ties has advanced, the importance of such ties in many parentage settings outside of same sex relationships has diminished.<sup>118</sup>

---

113. One court recognized that lawmakers who crafted legislation on voluntary paternity acknowledgments “ignored one salient question—whether paternity affidavits are intended only for biological fathers.” *Burden v. Burden*, 945 A.2d 656, 663 (Md. Ct. App. 2008).

114. *See* NEW HAMPSHIRE DEP’T OF HEALTH AND HUMAN SERVS., DIV. OF CHILD SUPPORT SERVS., FORM NO. DCSS §698, AFFIDAVIT OF PATERNITY (2006); WASHINGTON STATE DEP’T OF HEALTH, CTR. FOR HEALTH STATISTICS, FORM NO. DOH/CHS 021, PATERNITY AFFIDAVIT (2007); NORTH DAKOTA DEP’T OF HEALTH, DIV. OF VITAL RECORDS, FORM NO. SFN 8195, ACKNOWLEDGMENT OF PATERNITY (2005).

115. *See, e.g.*, IOWA DEP’T OF PUB. HEALTH, BUREAU OF VITAL RECORDS, FORM NO. BVR#588-0037, VOLUNTARY PATERNITY AFFIDAVIT (2009); NEW YORK STATE DEP’T OF HEALTH, OFFICE OF TEMP. AND DISABILITY ASSISTANCE, FORM NO. LDSS-4418, ACKNOWLEDGMENT OF PATERNITY (1998); CONNECTICUT DEP’T OF PUB. HEALTH, OFFICE OF VITAL RECORDS PATERNITY REGISTRY, FORM NO. VS-56, ACKNOWLEDGMENT OF PATERNITY (2002).

116. COLO. DEP’T OF PUBLIC HEALTH AND ENFORCEMENT, COLO. HEALTH STATISTICS & VITAL RECORDS, VOLUNTARY ACKNOWLEDGMENT OF PATERNITY (2003).

117. *Standhardt v. Superior Court ex rel. Cnty. of Maricopa*, 77 P.3d 451, 463 (Ariz. Ct. App. 2003) (“The line drawn between couples who may marry (opposite-sex) and those who may not (same-sex) may result in some inequity for children raised by same-sex couples.”). Legislation addressing same sex couples who parent can also mitigate inequality among children, as marriage is only one of several vehicles that determines parentage.

118. *See, e.g.*, *Satterly v. Meredith*, 2012 WL 967502 (Ky. Ct. App. 2012) (citing KY. REV. STAT. ANN § 403.270) (awarding joint custody to a grandmother with her daughter, the natural mother, as the grandmother was a “*de facto* custodian”); *Best v. Gallup*, 2011 WL 4389734 (N.C. Ct. App. 2011) (with her boyfriend, child’s aunt “informally” adopts her niece and then the aunt later adopts, but is thereafter left by the boyfriend; boyfriend wins a “custodial schedule” as aunt/mother acted inconsistently with her paramount custodial interest). For concerns over these developments, see Katharine E. Baker, *Homogenous Rules for the Heterogeneous Families: The Standardization of Family Law When There Is No Standard Family*, 2012 U. ILL. L. REV. 319 (an enforceable system of family obligation is benefitted by restricted legal definitions of family, even when they reflect a normative vision of family that, for most people, has ceased to exist).

How might new written laws allow recognition of parentage at birth for a same sex couple when a child is born of sex into its unitary family? Guided by state experiences with paternity disestablishment/new paternity establishment forms for wed and unwed opposite sex couples, American state legislators should allow at least married, unionized or partnered same sex female couples to recognize their joint parenthood for children born of sex into their unitary families, as long as paternity has been disestablished, or paternity opportunities lost for the biological fathers. Joint parenthood could be accomplished via acknowledgement forms that require neither formal judicial proceedings nor DNA testing. Forms (paternity disestablishment/parentage establishment) could be made available for completion prebirth so that, at birth, the unitary family encompassing a same sex female couple and a child would be officially recognized.<sup>119</sup> In Iowa in 2012, a state trial judge ruled that a nonbiological female parent of a child born to a woman, via artificial insemination, who was married to the other parent had the right to have her name placed on the child's birth certificate around the time of birth.<sup>120</sup> The same right should be accorded a same sex female partner regarding a child born of sex where the biological father has relinquished his paternal opportunity interests under *Lehr*.<sup>121</sup>

Comparably, a same sex married, unionized or partnered male couple should be able to recognize joint parentage of a child born of sex to one of the mates. But here, recognition forms should be available only postbirth, as prebirth parental

---

119. The forms now used by American states, and their important variations, are described in Jeffrey A. Parness & Zachary Townsend, *For those Not John Edwards: More and Better Paternity Acknowledgements at Birth*, 40 U. BALT. L. REV. 53, 97 (2010) ("Prebirth time constraints deter acknowledgments without good reason by some genetic fathers [as men in Iraq or Afghanistan] who are not able to be present for their children's births."); see also TEX. FAM. CODE ANN. § 160.304(b) (acknowledgment of paternity may be signed before the birth of the child).

Official recognition at birth could also be accomplished via a guardianship in the nonchildbearing partner. Yet here, should the couple separate, the nonchildbearing mother may need to show, in order to continue parenting, that her continuation as a guardian is in the child's best interests. See, e.g., *In re T.P.S.*, 954 N.E.2d 673 (Ill. App. Ct. 2011). Of course, official recognition may come later for a nonchildbearing (former) same-sex female partner, as via precedents employing a functional or intended parenthood analysis. These analyses are often not legally recognized and provide much uncertainty about legal parentage even when available; thus, established and loving adult-child parentlike relationships may be ended without examining a child's best interests. See, e.g., Suzanne B. Goldberg, Harriet Antczak & Mark Musico, *Family Law Scholarship Goes to Court: Functional Parenthood and the Case of Debra H. v. Janice R.*, 20 COLUM. J. GENDER & L. 348 (2011) (amicus brief examining cases).

120. *Gartner v. Iowa Dept. of Public Health*, No. CE67807 (Dist. Ct., Polk County Jan. 4, 2012) (no concern for paternity disestablishment/paternity opportunity interest as child was conceived via an anonymous sperm donor; state argued nonbiological parent needed to adopt in order to be placed on birth certificate).

121. For us more difficulties arise where one of two same sex partners adopts a child and the other seeks a declaration of legal parentage as of the time of birth or shortly thereafter, as here each partner may have had the chance to adopt (and if not, as due to a law barring same sex couples from adopting jointly, parentage recognition in the other partner may violate adoption law principles). But see *S.Y. v. S.B.*, 134 Cal. Rptr. 3d 1 (Cal. Ct. App. 2011) (nonadopting same sex female partner was adoptive children's presumed parent because she received the children into her home and openly held out the kids as her "natural" children).

rights terminations are not nearly as well-recognized for biological mothers as are prebirth paternity disestablishments and prebirth paternity opportunity losses for biological fathers.<sup>122</sup> Biological mothers of children born of sex always have childrearing rights, while biological fathers often do not. Thus, after a postbirth parental disestablishment by a birth mother, a same sex male couple should be able to recognize via a form the joint parentage within their unitary family.

Before undertaking new parental acknowledgement forms for married, unionized and partnered same sex couples, state legislators will need to explore some important policy questions. For example, how far should they go in recognizing parentage at birth for one with no chance of biological ties without a governmental inquiry into parental fitness, the circumstances of the unitary family, or the child's best interests? For opposite sex married couples, the disestablishment of a husband as the presumed father and the acknowledgement by another man of legal fatherhood of a child born of sex usually (but not always) is dependent upon at least the possibility of biological ties, though no DNA tests may ever be taken.<sup>123</sup> For a state-sanctioned same sex couple hoping to parent a child born of sex to one of the mates, biological ties to the other mate are impossible. Here, there should be some definition of a unitary family embodying a same sex couple who wish to parent from birth via a form. The definition would better secure the societal interest (and the child's) in the child's well-being. For example, the same sex couple may need to be formally sanctioned at the time of birth. Or, to achieve sameness with married opposite sex couples, the state's marital presumption of paternity for opposite sex couples should operate comparably for same sex couples, assuming the constitutional childrearing interests of the nonparenting biological mothers and fathers have been respected. In this setting, however, there is no possibly relevant sex and, more importantly, no statement of a desire and intent to parent. For some lawmakers, new public policies may depend upon the evidence about the effectiveness of parenting by same sex couples and about the longevity of same sex relationships.

While considering parental interests within married, unionized and partnered same sex couples, state legislators should also consider possible parental interests when children are born of sex into unitary families comprised of same sex couples whose relationships have not been formally sanctioned by the state.

---

122. For example, in some jurisdictions only men (and not mothers) can consent to the adoption of their future offspring. *See, e.g.*, DEL. CODE ANN. tit. 13, § 1106 ("A mother whose consent to the termination of parental rights is required may execute a consent only after the child is born. Consent by the father or presumed father may be executed either before or after the child is born."); NEV. REV. STAT. ANN. § 127.070 ("All . . . consents to adoption executed . . . by the mother before the birth of a child or within 72 hours after the birth . . . are invalid. . . . A . . . consent to adoption may be executed by the father before the birth . . . if the father is not married to the mother."); N.C. GEN. STAT. ANN. § 48-3-604 (a man can consent to adoption before or after birth, while a mother can consent "at any time after the child is born but not sooner.").

123. *See, e.g.*, WYO. STAT. ANN. § 14-2-602 ("An acknowledgment of paternity is void if it states that another man is a presumed father, unless a denial of paternity signed or otherwise authenticated . . . or falsely denies the existence of a presumed, acknowledged or adjudicated father of the child.").

Should the failure to seek state sanction where available (via marriage, union or domestic partnership) foreclose the mate with no biological ties from prebirth or at birth parentage?<sup>124</sup> If not, before any presumptions arise or parentage acknowledgements are available, should there be governmental inquiry into the prebirth duration of the unitary family, parenting fitness, and/or best interests? Where state sanction of the couple as a unitary family is not available, what should happen?<sup>125</sup> Should presumptions arise or acknowledgments be available, or must any parentage in the mate with no genetic ties only come via a more traditional adoption, assuming it is even available to a same sex couple?

We support, at least, applying the state's marital paternity presumption for opposite sex couples to state-sanctioned same sex female couples (whether married, unionized or partnered) when children are born of sex to one of the two mates, as long as the biological fathers have been fairly treated and as long as the same sex family units were sanctioned prior to conception and remained intact until birth.<sup>126</sup> This policy would advance the stated goals of sameness and equality for same sex and opposite sex couples. We also support, at the least, the creation of comparable parentage presumptions for same sex female couples whose relationships began before conception and continued until birth and who resided all the while in states where same sex marriage, unions or domestic partnerships were unavailable. Federal constitutional interests in unitary family

124. Consider, as well, that some jurisdictions recognize common law marriages, as in Iowa, where traditional (and statutory) marital relationships are also available to both same sex and opposite sex couples. *See, e.g.*, IOWA CODE ANN. § 425.17 (common law marriage requirements for income tax and property tax purposes). There are nine states recognizing common law heterosexual marriages (some of which do not recognize statutorily same sex marriages). *See, e.g.*, Edra J. Pollin, *When Does Cohabitation Become A Common Law Marriage?*, HUFFINGTON POST (Jan. 14, 2012), <http://www.huffingtonpost.com/edra-j-pollin/when-does-cohabitation-be-b-1184994.html>.

125. *See, e.g.*, *T.M.H. v. D.M.T.*, 79 So. 3d 787 (Fla. Dist. Ct. App. 2011) (certifying the following question to the Florida Supreme Court, having answered it in the affirmative: Does application of section 742.14 to deprive parental rights to a lesbian woman who provided her ova to her lesbian partner so both women could have a child to raise together as equal parental partners and who did parent the child for several years after its birth render the statute unconstitutional under the Equal Protection and Privacy clauses of the Federal State Constitutions?)

The concurring opinion in *T.M.H.* lamented the lack of any best interests analysis, stating the following:

I write . . . to highlight the unfortunate absence of an important consideration that should inform our decision in cases such as this. Yes, I know, as did the able trial judge, that the best interests of the child is ordinarily not the test to be applied . . . I think that we need to find a way to redirect our focus in cases of this kind so that best interests becomes part of the decisional matrix. Surely we have to make room for that factor in the crucible. Exploring the parental rights of one litigant or the other should not be the end of our deliberations. In the final analysis, we still ought to come to grips with what is best for the child. Here, having two parents is better than one.

*T.M.H.*, 79 So. 3d at 804 (Monaco, J., concurring).

126. Presumptions of maternity can sometimes apply notwithstanding the undisputed absence of biological ties. *See, e.g.*, *In re Salvador M.*, 4 Cal. Rptr. 3d 705, 709 (Cal. Ct. App. 2003) (directing the trial court to enter an order granting a biological sister presumed mother status).

matters<sup>127</sup> as well as sound public policies, including childrens' best interests, would be promoted.

We further support at birth and postbirth parentage acknowledgment opportunities for state-sanctioned same sex male couples (whether married, unionized or partnered) when children are born of sex to one of the two mates, as long as the biological mothers have been treated fairly. Our strongest support lies with same sex male couples whose unitary families existed preconception and continued through pregnancy and birth.

Finally, we support new legislative initiatives on parentage establishment via acknowledgement at or shortly after birth for children born of sex to same sex couples who could have, but did not, acquire state sanction of their unitary family status via marriage, union or partnership.<sup>128</sup> Here, we believe, there should be reasonable requirements involving duration of the relationship, and/or postbirth state sanction via marriage, union or domestic partnership, and/or formal commitments to both childrearing and child support when the couples do not marry, unionize or undertake a state-sanctioned partnership.<sup>129</sup>

## VI. CONCLUSION

Parentage presumptions and the availability of voluntary parentage acknowledgements for children born of sex to same sex couples are consistent with (and perhaps constitutionally required of) state legislation on same sex marriages, civil

---

127. These interests seemingly are shared by the adults in the family and are distinct from any individual constitutional interests (i.e., privacy or equal protection) held by the adults individually, as in *T.M.H.*, 79 So. 3d 787.

128. *See, e.g.*, *S.Y. v. S.B.*, 134 Cal. Rptr. 3d 1, 3–4 (Cal. Ct. App. 2011) (former same sex partner of adoptive mother achieves parentage presumption when couple separates because both she and adoptive mother received the children into their home shortly after their births and held them out as their own, where adoptive mother was encouraged by former partner to adopt; adoptive mother coparented children since birth; there were no other claims to parenthood; public policy favored two parents for every child; the alleged mother would not have jointly adopted even if the relevant laws permitted as she was in the military and did not wish to jeopardize her military career or possibly be court martialled; and, the adoptive mother would not have agreed to joint adoptions even if the laws allowed them).

129. *See, e.g.*, *E.C. v. J.V.*, No. C064745, 2012 WL 165081 (Cal. Ct. App. 2012) (former same sex partner of birth mother, who bore child of sex while friends with former partner, could be a presumed parent under statute where former partner and mother moved in together when child was three months old and raised child together for five years; there was never established a domestic partnership; former partner was in the military; biological father only visited his child "a few times when she was an infant" and never sought to establish paternity and never provided any financial support; the former partner and mother began a sexual relationship sometime after they moved in together; public policy supports two parents for every child; the former partner was deemed to have held out the child as her own though there was "no genetic connection" and no state-sanctioned relationship with the mother; and, birth mother allowed—and even encouraged—her former partner "to coparent" although she may never have intended for her "to obtain any legal rights to the minor"); *see also* Cynthia Grant Bowman, *The Legal Relationship Between Cohabitants and Their Partners' Children*, 13 *THEOR. INQUIRIES IN L.* 127 (2012) (advocating new statutory standards on when cohabitants can seek custody or visitation with their former mates' children, as well as on when cohabitants should be responsible for child support after the couples separate).

unions and domestic partnerships. They promote equality and sameness. And they further societal goals of insuring that each child born of sex has two responsible parents. Although a parentage presumption as applied to same sex couples would almost always benefit children,<sup>130</sup> the voluntary parentage acknowledgement is a better vehicle in many settings because of its voluntariness, as well, there are fewer chances to violate the constitutional mandates involving the potential parental interests of men whose consensual sexual led to birth.<sup>131</sup>

As *Lehr* and *Michael H.* suggest, socially we are moving toward a more functional approach to legal parentage and away from a biology-centered approach.<sup>132</sup> Lower courts now often de-emphasize biological ties, as where there are voluntary acknowledgements of parentage by intended parents.<sup>133</sup> For unitary families,<sup>134</sup> as well as for the legal status of parentage outside of unitary families,<sup>135</sup> genetic ties are increasingly unnecessary. Family units afforded traditional respect in our society today (and the deference relegated to the states

---

130. See *V.C. v. M.J.B.*, 748 A.2d 539, 550 (N.J. 2000) (“Children have a strong interest in maintaining the ties that connect them to adults who love and provide for them,” which stem from “emotional bonds that develop between family members as a result of shared daily life.”).

131. See *Lehr v. Robertson*, 463 U.S. 248, 261 (1983) (quoting *Caban v. Mohammed*, 441 U.S. 380, 392 (1979)) (“When an unwed father demonstrates a full commitment to the responsibilities of parenthood by ‘com[ing] forward to participate in the rearing of his child,’ his interest in personal contact with his child acquires substantial protection under the due process clause.”).

132. *Michael H.* teaches that an extant marital relationship can sometimes trump an established relationship between a biological father and child. *Michael H. v. Gerald D.*, 491 U.S. 110, 129 (1989); see also Shari Motro, *Preglimony*, 63 STAN. L. REV. 647, 694 (2011) (“family law trends diminish the focus on blood ties for purposes of determining paternity in favor of more functional approaches”); *V.C.*, 748 A.2d at 550 (arguing that *Lehr* stands for the principle that it is not the biological relationship with a child but the “actual relationship” with a child that is the determining factor when considering the degree of protection that the parent-child link must be afforded”).

133. See, e.g., *In re Paternity of Cheryl*, 746 N.E.2d 488, 497 (Mass. 2001) (upholding non-biological father’s voluntary acknowledgement of paternity as in the best interest of the child); *In re J.B.*, 953 A.2d 1186, 1189 (N.H. 2008) (upholding non-biological father’s voluntary acknowledgement of paternity); *Andrew R. v. Ariz. Dep’t of Econ. Sec.*, 224 P.3d 950, 957–58 (Ariz. Ct. App. 2010) (upholding voluntary acknowledgement of paternity despite evidence of another man’s biological ties); *Burden v. Burden*, 945 A.2d 656, 659 (Md. Ct. App. 2008) (reversing trial court order that acknowledging man was not financially responsible for child when parties stipulated man had no biological ties to child); *Jerry C. v. April H.*, 2011 WL 439567, at \*3 (Cal. Ct. App. Feb. 9, 2011) (“Even when genetic tests show that a man who signed a declaration of paternity is not the child’s biological father, the court may decide that denying an action to set aside the declaration is in the child’s best interests.”); *Hooks v. Quaintance*, 71 So. 3d 908, 909 (Fla. Dist. Ct. App. 2011) (upholding trial court’s denial of appellant’s petition to disestablish appellant’s voluntary acknowledged paternity, despite “DNA test results, which showed that he was not the biological father of the child”).

134. *Michael H.* holds that where a “child is born into an extant marital family, the natural father’s unique opportunity conflicts with the similarly unique opportunity of the husband of the marriage; and it is not unconstitutional for the State to give categorical preference to the latter.” *Michael H.*, 491 U.S. at 129.

135. *Lehr* implicitly recognizes that a nonbiological father need not be married to, or in some other unitary family relationship with, the mother in order to secure constitutionally-protected paternity interests in the adoption by another child he has helped to raise. *Lehr*, 463 U.S. at 274.

to protect unitary families) are not always confined by biology.<sup>136</sup> Parent-child relationships can transcend biological bounds.<sup>137</sup> “The importance of the familial relationship, to the individuals involved and to society, stems from the emotional attachments that derive from the intimacy of daily association, and from the role it plays in ‘promot[ing] a way of life’ through the instruction of children.”<sup>138</sup>

Unitary families that do not receive legal sanction will exist and thrive regardless of any new legislation. But same sex co-parents who dissolve their relationships often leave their children without legal ties to their two loving and fit parents. Same sex couples that head unitary families now have little, if any, opportunity to establish legal parentage early on for both parents.<sup>139</sup> This does not further the state interest of “providing a stable setting for childrearing.”<sup>140</sup> This does not accommodate parental desires. Children of same sex partners do not now receive the promise of support under law that exists for children—even nonbiological children—of opposite sex partners, though equality and sameness are desired.<sup>141</sup> Lawmakers should cure the inequities among children by amending the laws on parentage presumptions and creating new mechanisms for voluntary parentage acknowledgments by same sex couples.

---

136. “The mere fact of biological parenthood . . . does not always endow the biological parent with the absolute right to prevent all third parties from ever acquiring any parental rights vis-a-vis the child.” *Rubano v. DiCenzo*, 759 A.2d 959, 976 (R.I. 2000); see also *In re Raphael P.*, 118 Cal. Rptr. 2d 610, 617 (Cal. Ct. App. 2002) (“It is clear that a man is not required to produce evidence of biological paternity to be declared a presumed father.”).

137. See, e.g., JOSEPH GOLDSTEIN, ANNA FREUD & ALBERT J. SOLNIT, *BEYOND THE BEST INTERESTS OF THE CHILD* 17, 19 (1979).

For the child, the physical realities of his conception and birth are not the direct cause of his emotional attachment. This attachment results from day-to-day attention to his needs for physical care, nourishment, comfort, affection and stimulation. Whether any adult becomes the psychological parent of a child is based thus on day-to-day interaction, companionship, and shared experiences. The role can be fulfilled either by a biological parent or by an adoptive parent or by any other caring adult—but never by an absent, inactive adult, whatever his biological or legal relationship to the child may be. *Id.*

138. *Lehr*, 463 U.S. at 261 (quoting *Smith v. Org. of Foster Families for Equality & Reform*, 431 U.S. 816, 844 (1977)).

139. Adoption is frequently unavailable. Where available, it can be quite expensive.

140. *Goodridge v. Dep’t of Pub. Health*, 798 N.E.2d 941, 969 (Mass. 2003). Nor does the absence of same sex parentage advance the “state’s interest in preserving and protecting the developed parent-child and sibling relationships which give young children social and emotional strength and stability.” *Michelle W. v. Ronald W.*, 703 P.2d 88, 93 (Cal. 1985).

141. Even where biological ties are absent, financial support of children is often mandatory for both partners in an opposite sex marriage. See, e.g., *Wener v. Wener*, 312 N.Y.S. 2d 815, 819 (N.Y. App. Div. 1970) (husband must support child he neither fathered nor adopted, where husband had agreed at one time to adopt and had treated the child as his own before the marital separation).