THE EXTENSION OF THE PRESUMPTION OF LEGITIMACY TO SAME-SEX COUPLES IN NEW YORK

ALEXANDRA EISMAN*

INTRODUCTION

In the fight for a child, a biological father does not always have an automatic guarantee that he will be awarded rights to his child.[1] Even if a paternity test guarantees that a man is the father of a child, the mother and her husband have a right to ensure that the biological father does not have access to the child.[2] In *Michael H. v. Gerald D.*, the United States Supreme Court held Gerald D. was the father of Victoria because he was married to her mother and lived with her at the time of the child's birth.[3] However, Victoria's mother had an adulterous relationship with Michael H., and genetic testing made it apparent that there was a 98.07% chance that Michael H. was Victoria's father.[4] The Supreme Court, in denying Michael any access to his child, paid great deference to the California legislature and acknowledged there is a parentage presumption—known as the "presumption of legitimacy"—establishing that a child born to a married woman is automatically considered the child of her husband, and only the spouses may choose to rebut this presumption.[5]

The presumption of legitimacy has long been recognized as one of the most esteemed doctrines in family law.[6] It requires nothing more than the marriage

---

* Notes Editor, CARDOZO J. L. & GENDER; J.D. Candidate, Benjamin N. Cardozo School of Law, Class of 2013; B.A. Psychology, Emory University, 2010. I would like to thank Dean Edward Stein for his helpful feedback throughout the note writing process. I would also like to thank my brother and friend, Scott Eisman, for his continual guidance and support throughout this process and always. I am grateful for the support of my parents and siblings during my entire law school career. Thank you RPM, JCK, RAR, DBH and BRL for always being there for me and keeping me sane during the Note writing process and the last three years.

[1] Michael H. v. Gerald D., 491 U.S. 110, 129 (1989).

[2] *Id.* at 114-15.

[3] *Id.* at 110.

[4] *Id.*

[5] *Id.* at 111 ("Not only has [Michael] failed to demonstrate that the interest he seeks to vindicate has traditionally been accorded protection by society, but the common-law presumption of legitimacy, and even modern statutory and decisional law, demonstrate that society has historically protected, and continues to protect, the marital family against the sort of claim Michael asserts.").

[6] Susan Frelich Appleton, *Presuming Women: Revisiting the Presumption of Legitimacy in the Same-Sex Couples Era*, 86 B.U. L. REV. 227, 228 (2006). *See also In re* Russell's Estate, 110 S.E. 791, 793 (S.C. 1922) ("The presumption of the fact of legitimacy is one of the strongest known to the law,

between parents.[7] Traditionally, this doctrine has been exclusively applied to heterosexual couples.[8] However, as certain states have started to legalize marriage for same-sex couples, they have also extended the benefits that come with the institution, including the legitimation of children.[9] Although it is one of the most ancient family law doctrines, the presumption of legitimacy has been applied flexibly, and as seen in cases such as *Michael H.*, it does not always favor the child's biological father.[10]

Michael H. demonstrates the importance of the presumption in preserving the family unit.[11] Courts have been willing to look past the biological implications of parenthood and to the core of the family into which the child has been born.[12] With same-sex couples, there have been variations of the traditional idea of the presumption—for example, the California Family Code provides the father of the child to be the one who "receives the child into his home and openly holds out the child as his natural child."[13] Nothing in the code mentions the genetic tie between father and child as a prerequisite to legitimacy.[14]

The presumption of legitimacy is built into the institution of marriage.[15] Once married, heterosexual couples are afforded the privilege of starting a family knowing that their children will automatically be viewed as legitimate in the eyes of the law.[16] The children of married, heterosexual couples automatically receive certain protections immediately after birth: "[w]here a married couple has children, their children are also directly or indirectly, but no less auspiciously, the recipients of the special legal and economic protections obtained by civil marriage."[17] The

---

and it cannot be overthrown, except by evidence which is stronger.").

[7] *See* UNIF. PARENTAGE ACT § 204(a)(1) (2000) (amended 2002) ("(a) A man is presumed to be the father of a child if: (1) he and the mother of the child are married to each other and the child is born during the marriage[.]").

[8] Appleton, *supra* note 6, at 230 (discussing the proposition that the presumption stands for the recognition of the socially constructed relationship between a woman's husband and her child. Since this relationship is not present in a same-sex couple, the presumption has yet to be universally applied in the same way) ("As applied to same-sex couples, of course, the presumption and its variants always diverge from genetic parentage and always produce what might be considered fictional or socially constructed results.").

[9] *See, e.g.*, VT. STAT. ANN. Tit. 15, § 1204(f) (2005); *see also* Goodridge v. Dep't of Public Health, 798 N.E.2d 941 (Mass. 2003).

[10] *See* Appleton, *supra* note 6, at 229 (describing an example of the application of the presumption to heterosexual couples that diverge from genetic parentage). Appleton discusses the importance of social construction in the presumption and highlights different examples. For example, the genetic father of a child might lose in court attempting to gain visitation when the child has developed a strong tie to the mother's husband, who is not in fact the child's biological father.

[11] *See Michael H.*, 491 U.S. at 111, 116, 120. Choosing to favor the mother's husband rather than the actual biological father, the Supreme Court reinforced the relationship between the mother and her husband, Gerald—partially because this represented the family unit. *Id.* at 124.

[12] *Id.* at 124.

[13] *See* CAL. FAM. CODE § 7611(d) (2005).

[14] *Id.*

[15] *See* Appleton, *supra* note 6, at 234 (referring to the presumption as a "marital presumption").

[16] *Id.* at 233.

[17] *See* Goodridge v. Dep't of Public Health, 798 N.E.2d 941, 956 (Mass. 2003).

presumption is a statutory benefit that is considered a material advantage granted to a married couple, solely on the basis of their entrance into marriage.[18]

The presumption of legitimacy instantaneously designates a man as a child's legal father at the time of birth.[19] This man has the opportunity to relinquish his original parental rights so that someone else can adopt the child.[20] That the presumption automatically makes this man the legal father grants him immediate access and rights to the child as soon as the child is born without the need for the lengthy adoption process.[21]

> [H]is own *immediate* status as an "original parent" contrasts with other alternatives, such as becoming a father through adoption (a process entailing considerable state regulation, including some pre-adoption interval)[.] . . . Whether he is genetically related or not, the presumption makes the mother's husband automatically and immediately a full-fledged legal parent, without the need for any additional state intervention.[22]

An example of how the presumption is applied demonstrates how the presumption is actually a misnomer. If a married woman gives birth it is presumed that her husband is the father of the child even if the child has been conceived as a result of an adulterous relationship.[23] Therefore a child might be "legitimate" in the eyes of the law, though she technically was born out of wedlock.[24] Although parents who are not married and conceive a child together are in fact the legal parents of that child, the child is still illegitimate.[25] The presumption can be viewed as a fast-track path for obtaining legal parentage.[26]

A brief look into nontraditional applications of the presumption suggests that courts do not always hinge their decisions on the genetic tie between parent and child.[27] If courts are willing to look beyond the biological tie between parent and child in an effort to legitimize children, they should be willing to broaden their interpretation of the presumption to one that is consistent with the changing definition of marriage. Some states that have legalized same-sex marriage have already embraced this notion, extending the presumption as one of the traditional benefits of marriage to these couples.[28]

---

18 *Id.* at 957 (discussing the "greater ease of access to family-based State and Federal benefits that attend the presumptions of one's parentage").

19 *See* HOMER H. CLARK, THE LAW OF DOMESTIC RELATIONS IN THE UNITED STATES 149 (2d ed. 1988).

20 *See* Appleton, *supra* note 6, at 233.

21 *Id.*

22 *Id.*

23 Michael H. v. Gerald D., 491 U.S. 110 (1989).

24 *Id.* at 110-11. Although the child, Victoria, was born to unmarried parents, Carole and Michael, she was still deemed legitimate because Gerald was deemed her legal parent at the time of her birth. *Id.*

25 CLARK, *supra* note 19.

26 Appleton, *supra* note 6, at 233 (describing the presumption as having immediate effects).

27 *See, e.g.*, *Michael H.*, 491 U.S. 110.

28 *See* Appleton, *supra* note 6, at 228.

On June 24, 2011 the Marriage Equality Act was signed into law in New York State, making New York the sixth and largest state to legalize marriage for same-sex couples.[29] This law will carry along with it important implications for parentage and parenting decisions for same-sex couples.[30]

In light of the Marriage Equality Act, there are new and interesting legal questions for same-sex parents in New York. Although the Marriage Equality Act legalizes marriage for same-sex couples, it does not automatically extend all of the benefits that accompany same-sex marriage to these homosexual couples. These benefits can be extended either with a modification of New York's Domestic Relations Law, or through the judicial process in which the Court of Appeals will be faced with a question of whether or not to extend the presumption. Notably, courts will have to decide whether a child born into a valid legal marriage between same-sex couples is deemed legitimate, thereby nullifying the need for a second-parent adoption. Until the presumption is extended to these nontraditional families, children born to a married same-sex couple will be presumed illegitimate, akin to children born out of wedlock.

This Note describes why the presumption of legitimacy should be applied to same-sex couples in New York. Part I elaborates on the default rule, including the public policy behind the presumption and why it is one of the most venerable doctrines in family law. Additionally, Part I explores New York's view on same-sex parentage prior to the Marriage Equality Act. Last, Part I examines ways in which different states have conferred marital benefits upon same-sex couples.

Part II explores the different ways the presumption can be viewed as applied to lesbian and gay couples, exploring in depth why the application of the presumption to lesbian couples is closer to the traditional concept of the presumption. Additionally, Part II addresses arguments of opponents of the presumption's extension. Finally, Part III discusses the inequalities illegitimate children face in light of the law and how the extension of this doctrine will benefit them. Additionally, Part III examines the presumption from the same-sex parent's perspective, addressing difficulties parents face without the presumption, solidifying the argument that same-sex parents in New York should be afforded the presumption of legitimacy when they choose to enter into marriage and start a family.

---

[29] Chris Rovzar, *Marriage Equality Act Passed by State Senate 33-29,* NY MAG. (Jun. 24, 2011), http://nymag.com/daily/intel/2011/06/marriage_equality_act_state_se.html.

[30] Abby Tolchinsky & Ellie Wertheim, *Creative Parenting Agreements Still Needed With Same-Sex Marriage,* N.Y. L.J. (Aug. 29, 2011), *available at* http://www.newyorklawjournal.com/ PubArticleNY .jsp?id=1202512535876.

I. BACKGROUND: TRACING THE HISTORY OF THE PRESUMPTION THROUGH ITS MODERN APPLICATION

A. The Default Rule and Its Underlying Public Policy

The presumption of legitimacy is said to be one of the strongest doctrines in family law.[31] It has been suggested "we might think of the presumption of legitimacy as a default rule that determines parentage in the absence of further action, whether an attempt to rebut the presumption . . . or proceedings to transfer parental rights to another."[32]

The presumption of legitimacy dates back to the early nineteenth century, when the laws surrounding this doctrine were referred to as "bastardy" law.[33] Paternity was inextricably linked to the succession of property rights, with illegitimate children left out of the succession order for inheritance of property.[34] Illegitimate children were seen differently in the eyes of the law than legitimate children. "At one time, birth out of wedlock initiated a life of stigma and material deprivations. A 'filius nullius' (child of no one) certainly had no legally recognized father obligated to provide support[.]"[35] Although differential treatment of the two categories of children is not always pervasive, it can still leave an indelible and harmful impression on illegitimate children.[36]

While the presumption has harmed illegitimate children by depriving them of their inheritance and other rights that legitimate children enjoy,[37] it has also "serve[d] a child-welfare objective."[38] Over time, American courts have consistently shown adherence to Lord Mansfield's Rule, a common law rule of evidence that bars testimony from spouses trying to show another man's paternity.[39] "By continuing to deny married couples the most effective means of

---

[31] *In re* Russell's Estate, 110 S.E. 791, 793 (S.C. 1922); *see also* Hynes v. McDermott, 91 N. Y. 451 (1883) ("The presumption of marriage from a cohabitation, apparently matrimonial, is one of the strongest known to the law, especially in cases involving legitimacy. Where there is enough to create a foundation for the presumption, it can be repelled only by the most cogent and satisfactory evidence."); *see also In re* Matthews' Estate, 47 N.E. 901-02 (N.Y. 1897) (elaborating on the importance of legitimacy in the eyes of the law) ("The presumption of the law was that he was her legitimate son, and those who assume the fact of illegitimacy have cast upon them the onus of establishing it. The law is unwilling to bastardize children, and throws the proof on the party who alleges illegitimacy; and, in the absence of evidence to the contrary, a child, eo nomine, is, therefore a legitimate child.").

[32] Appleton, *supra* note 6, at 234.

[33] MICHAEL GROSSBERG, GOVERNING THE HEARTH: LAW AND THE FAMILY IN NINETEENTH-CENTURY AMERICA 220 (1985).

[34] *Id.*

[35] Appleton, *supra* note 6, at 243.

[36] *See* Zepeda v. Zepeda, 190 N.E.2d 849 (Ill. App. Ct. 1963). This was the first wrongful life suit, in which son sought damages from his father for the harm inflicted by his illegitimate status. *Id.*

[37] *See* Mathews v. Lucas, 427 U.S. 495 (1976) (upholding a section of the Social Security Act depriving certain nonmarital children of survivors' benefits); *see also* Lalli v. Lalli, 439 U.S. 259 (1978) (upholding a statute providing that nonmarital children could inherit intestate from father only if court declared paternity during the lifetime of the father).

[38] Appleton, *supra* note 6, at 243.

[39] *Prohibiting Nonaccess Testimony by Spouses: Does Lord Mansfield's Rule Protect*

establishing the illegitimacy of a child[] (Lord Mansfield's rule,) the courts placed child welfare above paternal rights[.]"[40]

The presumption is not as pervasive as it used to be, with the Supreme Court finding that treating children of unmarried parents differently than those of married parents violates the United States Constitution's Equal Protection Clause.[41] However, many scholars still find the presumption to be relevant and workable in today's world. The presumption is still reflective of a judicial consensus that children's best interests are served through parentage in marriage.[42] Even the dissenting justice in the pivotal case of *Goodridge v. Dep't of Public Health*, which legalized same-sex marriage in Massachusetts, recognized that children born to married parents reap more benefits, eloquently stating that:

> No one disputes that the plaintiff couples are families, that many are parents, and that the children they are raising, like all children, need and should have the fullest opportunity to grow up in a secure, protected family unit. Similarly, no one disputes that, under the rubric of marriage, the State provides a cornucopia of substantial benefits to married parents and their children. The preferential treatment of civil marriage reflects the Legislature's conclusion that marriage "is the foremost setting for the education and socialization of children" precisely because it "'encourages parents to remain committed to each other and to their children as they grow."[43]

If, as many courts have acknowledged, marriage is the best environment for children to flourish, since the government affords preferential treatment to legitimate children, same-sex couples should be granted the automatic presumption of legitimacy. In other words, "to the extent that a generalized preference for two parents joined by a legal relationship explains the presumption, applying the presumption to [same-sex] couples joined in marriages, civil unions, or domestic partnerships furthers this goal."[44]

B. States Embrace Gender Neutral Parentage Rules: Extending the Presumption to Same-Sex Couples

In their governance of same-sex couples, multiple states have moved towards gender-neutral parentage rules. Vermont, Massachusetts, and California all have laws extending the same rights to same-sex couples that are extended to

---

Illegitimates?, 70 MICH. L. REV. 1457 (1977).

[40] Appleton, *supra* note 6, at 243 (quoting GROSSBERG, *supra* note 33, at 218-19).

[41] *E.g.*, Levy v. Louisiana, 391 U.S. 68 (1968); Glona v. American Guarantee & Liability Ins. Co., 391 U.S. 73 (1968); Weber v. Aetna Casualty & Surety Co., 406 U.S. 164 (1972) (exclusion from workers' compensation invalidated); Gomez v. Perez, 409 U.S. 535 (1973). The failure to provide support rights for nonmarital children violates equal protection. *Id.*

[42] Appleton, *supra* note 6, at 245.

[43] Goodridge v. Dep't of Public Health, 798 N.E.2d 941, 964 (Mass. 2003) (Cordy, J., dissenting).

[44] Appleton, *supra* note 6, at 245.

heterosexual couples.[45] For example, the Vermont legislature has provided that the rights of the parties to a civil union are the same as those of a married couple.[46] California adopted the Uniform Parentage Act (UPA) in order to eliminate distinctions in status based on whether children were legitimate. The UPA "bases parent and child rights on existence of a parent and child relationship rather than on the marital status of the parents."[47] The Supreme Court of California, in its movement towards the gender-neutralization of California's laws, has applied the UPA to same-sex couples in an attempt to continue the mission of the Act and ensure for the legitimation of children.

Perhaps the best illustration of these states' adoption of gender-neutral laws can be seen in practice. In *Elisa B. v. Superior Court*, the Supreme Court of California held that the presumption applied to a lesbian couple whose children were born through artificial insemination.[48] The court held that Elisa—who agreed to raise children with her partner Emily, supported her artificial insemination, and took the twin children into her home—was considered a parent under the UPA and had an obligation to support the children.[49]

Although the California court recognized in *Johnson v. Calvert* that each child has only one natural mother,[50] the court held that this prior holding did not bar Elisa from recognition as the children's legal parent. Referencing California's domestic partnership laws, the court ultimately held:

> [T]wo women "who have chosen to share one another's lives in an intimate and committed relationship of mutual caring" and have a common residence can file with the Secretary of State a Declaration of Domestic Partnership . . . [which] provides, in pertinent part: "The rights and obligations of registered domestic partners with respect to a child of either of them shall be the same as those of spouses."[51]

---

[45] *See* VT. STAT. ANN. tit. 15, § 1204(f)(2005) ("The rights of parties to a civil union, with respect to a child of whom either becomes the natural parent during the term for the civil union, shall be the same as those of a married couple, with respect to a child of whom either spouse becomes the natural parent during the marriage."); *see also* CAL. FAM. CODE § 297.5(d) (West 2004) ("The rights and obligations of registered domestic partners with respect to a child of either of them shall be the same as those of spouses."); in holding that same-sex couples have a constitutional right to marry, the Supreme Judicial Court of Massachusetts acknowledged the importance of protecting children. *Goodridge*, 798 N.E.2d at 963 ("Ours is an era in which logic and compassion have impelled the law toward unburdening children from the stigma and the disadvantages heretofore attendant upon the status of illegitimacy") (quoting Powers v. Wilkinson, 506 N.E.2d 842, 848 (Mass. 1987)).

[46] VT. STAT. ANN. tit. 15, § 1204(f) (2005).

[47] *See* Johnson v. Calvert, 851 P.2d 776, 779 (Cal. 1993) (quoting WEST'S ANN. CAL. FAM. CODE § 7600 (1993)).

[48] Elisa B. v. Superior Court, 117 P.3d 660, 667, 670 (Cal. 2005).

[49] *Id.* at 662.

[50] *See Johnson*, 851 P.2d at 782 (holding that a surrogate had no legal right to a child born through artificial insemination and that the child's mother and father were the biological and intended parents who provided the child with a stable and supportive home).

[51] *Elisa B.*, 117 P.3d at 666.

In a state where marriage was not legal between same-sex couples, the court held that the presumption could be extended to a lesbian couple, thereby mandating that Elisa pay child support.[52]

Another illustration of the presumption in practice is found in *Miller-Jenkins v. Miller-Jenkins*.[53] In that case, the parties, Lisa and Janet, entered into a civil union in Vermont. Following their civil union, Lisa became pregnant through artificial insemination. Janet participated in the pregnancy process and helped select the donor.[54] After the couple separated, Lisa denied Janet access to their child and argued the temporary order of visitation granted by the lower court should be vacated because Janet was not the parent of their child.[55] Applying the Vermont Domestic Relations Law and its extension of marital rights to same-sex couples,[56] the court held that the presumption of parentage applied to Janet, "just as it would have applied to Lisa's husband if she had one at the time of the birth."[57]

Applying the law in an effort to bring equality to the children of same-sex couples, the Vermont Supreme Court held that the rights afforded to couples entering civil unions were the same as those entering marriage: "[t]he disruption that would be caused by requiring adoption of all children conceived by artificial insemination by nonbiological parents is particularly at variance with the legislative intent for civil unions."[58] These cases are illustrative of the principle that states are starting to interpret the law to be consistent with an evolving society. In turn, courts are starting to acknowledge that nontraditional families exist and that there is a need in today's world to apply the laws accordingly.[59]

C. The Marriage Equality Act: New York's Stance on Parentage Before Marriage Equality

The case of *Allison D. v. Virginia M.* is reflective of New York's current stance on same-sex parentage.[60] In interpreting section 70 of the New York Domestic Relations Law,[61] the New York Court of Appeals refused to read the term "parent" to include non-parents who have developed a relationship with a

---

[52] *Id.*

[53] Miller-Jenkins v. Miller-Jenkins, 912 A.2d 951 (Vt. 2006).

[54] *Id.* at 956.

[55] *Id.* at 965-66.

[56] *Id.* at 966 (quoting WEST'S ANN. VT. FAM. CODE § 1204 (2010)) ("The law of domestic relations, including annulment, separation and divorce, child custody and support, and property division and maintenance shall apply to parties to a civil union.").

[57] *Id.*

[58] *Id.* at 968.

[59] *See Elisa B.*, 117 P.3d 660; *Miller-Jenkins*, 912 A.2d 951.

[60] Allison D. v. Virginia M., 572 N.E.2d 27 (N.Y. 1991).

[61] N.Y. DOM. REL. § 70(a) ("Where a minor child is residing within this state, either *parent* may apply to the supreme court for a writ of habeas corpus to have such minor child brought before such court; and on the return thereof, the court, on due consideration, may award the natural guardianship, charge and custody of such child to either parent for such time[.]") (emphasis added).

child or who have had previous relationships with a child's parent.[62] This interpretation applied to Allison D., Virginia's partner. The two women decided to have a child together and Virginia became pregnant through artificial insemination.[63] Ultimately their relationship dissolved and Virginia denied Allison access to their son.[64] The court refused to extend section 70 to Allison and held "[t]o allow the courts to award visitation—a limited form of custody—to a third person would necessarily impair the parents' right to custody and control."[65] The New York Court of Appeals suggested that any change in the meaning of the word "parent" under New York Domestic Relations Law should be made by the legislature.[66]

Four years after the decision in *Allison D.*, the Court of Appeals construed section 110 of the Domestic Relations Law to permit "the unmarried partner of a child's biological mother, whether heterosexual or homosexual, who is raising the child together with the biological parent, [to] become the child's second parent by means of adoption."[67]

In the 2010 case of *Debra H. v. Janice R.*, the Court of Appeals affirmed its holding in *Allison D.* and refused to apply the parentage presumption to the domestic partner of a child's biological mother.[68] Judge Robert Smith, in his concurring opinion, recognized the need to extend the presumption to same-sex partners in New York.[69] He noted that refusing to extend the presumption would ultimately harm children born to same-sex couples, and emphasized the intention of these couples to bring the children into a two-parent family. "I would apply the common-law presumption . . . and would hold that where a child is conceived . . . by one member of a same-sex couple living together, with the knowledge and consent of the other, the child is as a matter of law . . . the child of both."[70] In light of the Marriage Equality Act and the underlying desire to ensure that children are legitimate, Judge Smith's plea to extend the presumption carries more weight than ever. In recognition of current trends, the New York legislature should listen to the Court of Appeals and change the meaning of the word "parent" under New York Domestic Relations Law to ensure that nontraditional families are afforded broader rights under the law in today's evolving society.[71]

---

[62] *Allison D.*, 572 N.E.2d at 27.

[63] *Id.* at 28.

[64] *Id.* at 28-29.

[65] *Id.* at 29.

[66] *See* Debra H. v. Janice R., 930 N.E.2d 184, 199 (N.Y. 2010) ("[I]t is more appropriate for the Legislature to develop the standards and procedures under which parenthood will be determined for same-sex couples in the artificial insemination . . . context[.]").

[67] *See In re* Jacob, 660 N.E.2d 397, 398 (N.Y. 1995).

[68] *See Debra H.*, 930 N.E.2d at 203.

[69] *Id.* at 204-05 (Smith, J., concurring).

[70] *Id.* at 205.

[71] *See, e.g.*, Allison D. v. Virginia M., 572 N.E.2d 27 (N.Y. 1991). The Court of Appeals refused to extend the word 'parent' to a non-biological parent who was the same-sex partner of the child's

D. The Marriage Equality Act: A Statutory Grant of Same-Sex Marriage

Currently in the United States, nine states and the District of Columbia permit same-sex marriage.[72] Same-sex marriage was legalized in these states in different ways: marriage equality for same-sex couples in New York was statutorily granted;[73] same-sex marriage in other states, like Massachusetts and Iowa, was established through decisions of those states' highest courts.[74] Nine other states have laws that recognize civil unions or domestic partnerships—relationships that afford same-sex couples varying degrees of the benefits associated with marriage, and, in some cases, all of the benefits associated with marriage.[75]

It is important to take a brief look at other states where same-sex marriage is legal, or other relationships of same-sex couples—like civil unions—are valid, and compare the way these states have conferred marriage benefits upon same-sex couples. New York could look to these other states as a guide when determining how to implement the conferral of marriage benefits, such as the presumption of legitimacy, to same-sex couples.

Vermont was the first state to give same-sex couples the same benefits under state law that it provided to married heterosexual couples.[76] States with only the availability of non-marital relationships have adopted Vermont's approach to affording benefits to same-sex couples.[77]

In the eight jurisdictions besides New York that allow for same-sex marriage, all have granted identical benefits to same-sex couples as they have to heterosexual couples.[78] Even states that grant only non-marital relationships to same-sex

---

biological parent. *Id.*

[72] The nine states allowing marriage between same-sex couples are Connecticut, Iowa, Maine, Maryland, Massachusetts, New Hampshire, New York, Vermont, and Washington. *See Same-sex marriage status in the U.S., state-by-state*, WASH. POST, http://www.washingtonpost.com/wp-srv/special/politics/same-sex-marriage/ (last visited Mar. 1, 2013). *See also* Edward Stein, *The Topography of Legal Recognition of Same-Sex Relationships*, 50 FAM. CT. REV. 181 (2012).

[73] Rovzar, *supra* note 29.

[74] *See, e.g.*, Goodridge v. Dep't of Public Health, 798 N.E.2d 941 (Mass. 2003); Varnum v. Brien, 763 N.W.2d 862 (Iowa 2009).

[75] Civil unions or domestic partnerships are available in California, Delaware, Hawaii, Illinois, Nevada, New Jersey, Oregon, Wisconsin, and Rhode Island. *See Civil Unions & Domestic Partnership Statutes*, NAT'L CONF. OF STATE LEGISLATURES (Feb. 2013), http://www.ncsl.org/issues-research/human-service/civil-unions-and-domestic-partnership-statutes.aspx (last visited Mar. 1, 2013).

[76] *Id.* ("[S]upreme Court unanimously held that Vermont's constitution required same-sex couples to be able to obtain the same benefits available to different-sex couples through marriage. The court thus ordered the state legislature to give same-sex couples access to the same benefits as married different-sex couples.") (discussing *Baker v. Vermont*, 744 A.2d 864, 888-89 (Vt. 1999)).

[77] Stein, *supra* note 72, at 188 (discussing the states which allow same-sex couples identical benefits offered to heterosexual married couples) ("Specifically, California, Delaware, Hawaii, Illinois, New Jersey, Oregon, and Washington give parties to a civil union or domestic partnership the same rights, benefits, and duties as parties to a marriage by taking roughly the same approach as Vermont: giving the particular nonmarital relationship the same rights, benefits, and duties associated with marriage in that jurisdiction."). Vermont passed same-sex marriage in May 2009, and civil unions are no longer available in that state; however, civil unions entered into prior to September 2009 are still valid in Vermont. *See Civil Unions & Domestic Partnership Statutes, supra* note 75.

[78] *See generally* VT. STAT. ANN. tit. 15, § 1204(a) (2005) ("Parties to a civil union shall have all the

couples have embraced the trend of providing benefits to same-sex couples that are indistinguishable from those provided to heterosexual married couples.[79] For example, although the New Jersey Supreme Court, in its holding in *Lewis v. Harris*, did not legalize same-sex marriage, it held that certain rights could not be denied a couple solely on the basis of sexual orientation.[80] The court in *Lewis* held that it was a violation of the state constitution to deny same-sex couples any of the benefits afforded to heterosexual couples: "the unequal dispensation of rights and benefits to committed same-sex partners can no longer be tolerated under our State Constitution."[81] Since the equalization of all marriage benefits between same-sex and heterosexual couples has not been addressed in the New York courts or legislature, New York should look to its predecessors, and extend marital benefits without distinction between the two types of couples consistent with the Marriage Equality Act.[82]

II. EXTENDING THE PRESUMPTION: DIFFERENCES IN APPLICATION TO GAY AND LESBIAN COUPLES

A. The Preference for Extending the Presumption to Lesbian Couples

There is no automatic parentage presumption for same-sex couples. When the presumption is applied to same-sex couples, it is socially constructed and analogized to the presumption granted to heterosexual couples.[83] Some courts employ the best interest of the child standard in making determinations regarding the presumption.[84] The best interest standard ensures that court orders will be

---

same benefits, protections, and responsibilities under law, whether they derive from statute, administrative or court rule, policy, common law, or any other source of civil law, as are granted to spouses in a civil marriage."); 2005 Conn. Pub. Acts No. 05-10 § 14 ("Parties to a civil union shall have all the same benefits, protections and responsibilities under law, whether derived from the general statutes, administrative regulations or court rules, policy, common law or any other source of civil law, as are granted to spouses in a marriage, which is defined as the union of one man and one woman."); *Goodridge*, 798 N.E.2d at 968 ("Limiting 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."); *Varnum*, 763 N.W.2d at 883 (Iowa 2009) ("Moreover, official recognition of their status provides an institutional basis for defining their fundamental relational rights and responsibilities, just as it does for heterosexual couples. Society benefits, for example, from providing same-sex couples a stable framework within which to raise their children and the power to make health care and end-of-life decisions for loved ones, just as it does when that framework is provided for opposite-sex couples."); Abby Goodnough, *New Hampshire Legalizes Same-Sex Marriage*, NY TIMES (Jun. 3, 2009), *available at* http://www.nytimes.com/2009/06/04/us/04marriage.html.

79 *See* Stein, *supra* note 72.

80 *See* Lewis v. Harris, 908 A.2d 196 (N.J. 2006).

81 *Id.* at 200.

82 *See Goodridge*, 798 N.E.2d 941; *Varnum*, 763 N.W.2d 862 (extending the benefits of marriage to same-sex couples).

83 Appleton, *supra* note 6, at 230.

84 *Determining the Best Interests of the Child: Summary of State Laws*, CHILD WELFARE INFORMATION GATEWAY, http://www.childwelfare.gov/systemwide/laws_policies/statutes/best_interest.cfm ("Although there is no standard definition of 'best interests of the child,' the term generally refers to the deliberation that courts undertake when deciding what types of services, actions, and orders will best

made in a manner that will best serve a child and that the child will be placed in the custody and control of a caretaker who is best suited to care for him or her.[85] Courts employing the best interest of the child standard can render biology an irrelevant factor in determining to whom the presumption extends, favoring for example the person with whom the child has developed a close bond rather than her actual genetic father.[86] Additionally, the presumption, as applied to heterosexual couples, operates in a gendered way, making a married man the father of his wife's biological child.[87] However, the presumption does not make a married woman the legal mother of her husband's biological child.[88] Courts have been willing to acknowledge the social relationship between fathers and their children; however, they have not been willing to do the same for mothers.

When it comes to the relationship between mothers and their children, courts have stressed the biological tie between the two.[89] Courts have viewed the process of childbirth as a guarantee that a biological tie automatically exists between a mother and her child—and it is the biological tie between mother and child that allows courts to justify disparate treatment of males and females.[90] For example, in *Nguyen v. INS*, the Supreme Court upheld a federal statute that distinguished between illegitimate children who were born abroad to citizen fathers and those to citizen mothers.[91] The Court upheld requirements that made it more tedious for a child born to a citizen father rather than a citizen mother to become a United States citizen, holding "[t]he mother's relation is verifiable from the birth itself and is documented by the birth certificate or hospital records and the witnesses to the

---

serve a child as well as who is best suited to take care of a child."). *See also* Appleton, *supra* note 6, at 234-35 ("An even greater number of jurisdictions[] . . . now allow rebuttal of the presumption if doing so is deemed to serve the child's best interests."). *Id.*

85 *Determining the Best Interests of the Child*, *supra* note 84.

86 *See* Michael H. v. Gerald D., 491 U.S. 110 (1989) (extending the presumption to the mother's husband, rather than the biological father of the child).

87 Appleton, *supra* note 6, at 237-38.

88 *See* Robert B. v. Susan B., 135 Cal. Rptr.2d 785 (Cal. Ct. App. 2003) (holding that due to a mistake at the fertility clinic, the woman who birthed a child using her eggs—believing she received semen from a man who had signed away his rights—and the semen of a man—who thought he and his wife had obtained a surrogate to birth them a child—was the legal mother of the child and the man's wife was not the legal mother).

89 *Id.*

90 *See* Nguyen v. INS, 533 U.S. 53 (2001) (elaborating on "real differences" that exist between a mother and father and their relationship to their children) ("Congress' decision to impose different requirements on unmarried fathers and unmarried mothers is based on the significant difference between their respective relationships to the potential citizen at the time of birth . . . [T]he imposition of the requirement for a paternal relationship, but not a maternal one, is justified by . . . [the] governmental interest . . . to ensure that the child and citizen parent have some demonstrated opportunity to develop a relationship that consists of real, everyday ties providing a connection between child and citizen parent . . . [s]uch an opportunity inheres in the event of birth in the case of a citizen mother and her child, but does not result as a matter of biological inevitability in the case of an unwed father. He may not know that a child was conceived, and a mother may be unsure of the father's identity.").

91 *Id.*

birth. However, a father need not be present at the birth, and his presence is not incontrovertible proof of fatherhood."[92]

In emphasizing the importance of the biological connection between mother and child, courts have recognized the relationship that is fostered during the nine-month gestational period.[93] No such relationship exists during that time between father and child, as he is not required to remain a part of the mother's life during this period. Additionally, the father might not even be aware of the pregnancy.[94] Marriage is often seen as the act that ensures that the father will be bound to his wife and child.[95] Unlike the relationship between mother and child, which is readily identifiable through the biological processes of pregnancy and birth, "there is no corresponding process for creating a relationship between father and child . . . [M]arriage fills this void by formally binding the husband-father to his wife and child, and imposing on him the responsibilities of fatherhood." [96]

In stressing the biological connection between mother and child, it appears that courts would more readily hold that the presumption is applicable to gay couples, because they are more willing to acknowledge a socially constructed relationship between man and child than woman and child.[97] However, the biological tie between the mother and her child has made it easier for courts to envision the possibility of the presumption extending to lesbian couples than to gay couples, often analogizing the biological mother's partner to a child's father.[98]

Immediately following the Massachusetts Supreme Judicial Court decision in *Goodridge* in 2003, allowing same-sex couples to marry, opponents of marriage equality attempted to overturn this decision by amending the state constitution.[99] The state senate requested an opinion from the justices on the court as to the constitutionality of a bill prohibiting same-sex couples from entering into marriage.[100] Although he approved the bill, Justice Cordy—a dissenter in

---

[92] *Id.* at 54.

[93] *See generally Nguyen*, 533 U.S. 53; Goodridge v. Dep't of Public Health, 798 N.E.2d 941, 996 (Mass. 2003).

[94] *Nguyen*, 533 U.S. at 54 (suggesting the importance of the gestational period, which fosters a relationship between mother and child, as well as the potential that a father might not know about the pregnancy, and if he does know, might not be involved—ultimately requiring additional steps to prove a relationship exists between child and father).

[95] *Goodridge*, 798 N.E.2d at 956 (Cordy, J., dissenting).

[96] *Id.*

[97] *See* CAL. FAM. CODE § 7611(d) (2005) (recognizing the social, rather than biological implications of a father and child relationship).

[98] Appleton, *supra* note 6, at 260 (describing courts as more willing to extend the presumption to lesbian couples as this extension is more closely analogous to the presumption for heterosexual couples) ("These considerations all support the application of the presumption of legitimacy to lesbian couples . . . following the law's preference for two-parent families to conclude that both parents can be women.").

[99] Opinion of the Justices to the Senate, 802 N.E.2d 565, 581 n.3 (Mass. 2004) (Cordy, J., dissenting).

[100] *Id.* at 566.

Goodridge—recognized the fact that it made more sense to analogize the parentage presumption to lesbian, rather than gay couples:

> Applying these concepts to same-sex couples results in some troubling anomalies: applied literally, the presumption would mean very different things based on whether the same-sex couple was comprised of two women as opposed to two men. For the women, despite the necessary involvement of a third party, the law would recognize the rights of the "mother" who bore the child and presume that the mother's female spouse was the child's "father" or legal "parent." For the men, the necessary involvement of a third party would produce the exact opposite result—the biological mother of the child would retain all her rights, while one (but not both) of the male spouses could claim parental rights as the child's father.[101]

If marriage is the tie that binds father and husband to child and wife, then legalized marriages between lesbian couples could be analogized to stand for the same proposition. As Justice Cordy suggests, it would not be difficult to envision a woman's partner to be the other legal parent of the child.[102] If the biological tie already exists, all the legislature must do in extending the presumption is analogize a woman's partner to a father. The use of in vitro fertilization for lesbian couples makes the analogy to a heterosexual couple employing donor insemination even more seamless—a married woman's husband would become the father of her children that she bears via donor insemination, as a married woman's female partner should become the legal mother of her children.[103]

New York should follow states like Vermont, which extended the presumption to the lesbian partner of a woman who used artificial insemination.[104] There are a variety of ways that New York could effectuate the extension of the presumption to lesbian couples. First, as the Court of Appeals suggested,[105] the legislature could implement a statutory change in Domestic Relations Law to accompany the Marriage Equality Act. The New York legislature could emulate other states, such as Vermont and Connecticut, which have extended not only the right to same-sex marriage, but all the benefits that accompany marriage to same-sex couples.[106]

Alternatively, change could come about through the judicial process. Although there are no pending cases in New York in which a same-sex couple has moved to gain access to all the benefits of marriage that are granted to heterosexual

---

[101] *Id.*

[102] *Id.* at 581 n.3.

[103] *See* Appleton, *supra* note 6, at 247 (discussing the process of *in vitro* fertilization; how the semen donor relinquishes rights to the child, thereby ensuring two legal parents) ("The same approach that makes a married woman's husband the father of children that she bears via donor insemination also dictates that the semen donor has no legal status.").

[104] *See* Miller-Jenkins v. Miller-Jenkins, 912 A.2d 951 (Vt. 2006).

[105] *See* Allison D. v. Virginia M., 572 N.E.2d 27, 29 (N.Y. 1991).

[106] *See* VT. STAT. ANN. tit. 15, § 1204(a) (2005); *see also* 2005 Conn. Pub. Acts No. 05-10 § 14.

couples, a suit could be brought in the near future and thus a change could ultimately come through case law. As in Massachusetts, along with the grant of same-sex marriage, the court held that all the benefits that went along with heterosexual marriage should be granted to same-sex couples.[107]

The New York state legislature can modify New York's Domestic Relations Law to extend the benefits of marriage to same-sex couples, or in the interim, a case could arise in which the Court of Appeals, in light of the Marriage Equality Act, will be faced with the question of whether or not to extend the presumption. No matter the way in which this change comes about, New York should recognize that the extension to lesbian couples is not far removed from the traditional application of the parentage presumption.

B. A Further Leap: Applying the Presumption to Gay Couples

1. Dual Paternity

Although courts have been willing to hold that the presumption should extend to lesbian couples,[108] there is a gendered stereotyping that exists in which it is easier for courts to see lesbian couples as conforming more closely to heterosexual couples than gay male couples do.[109] Perhaps it is because a lesbian couple involves only two parents, as one of the partners is capable of carrying and birthing the child with donor insemination, whereas gay couples must use a surrogate, which introduces an even more likely potential third parent into the equation.[110] As Justice Cordy highlights in his suggestion to the Massachusetts Senate, the extension of the presumption to gay male couples is more difficult to envision than the extension to lesbian couples.[111] The obvious fact that neither male is capable of birthing the child himself means that a surrogate would be involved in the gestation and birthing process. As Justice Cordy suggests, this surrogate, the birthmother of the child, would be considered the legal parent of the child.[112]

Multiple theories have emerged as to how to apply the presumption to gay male couples. If the presumption were extended, it would give legal status to the genetic father's partner. One scholar, Susan Frelich Appleton, highlights the

---

[107] *See* Goodridge v. Dep't of Public Health, 798 N.E.2d 941, 968 (Mass. 2003) ("Limiting 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.").

[108] *See* Elisa B. v. Superior Court, 117 P.3d 660 (Cal. 2005); *Miller-Jenkins*, 912 A.2d 951.

[109] Appleton, *supra* note 6, at 260 (describing the differences in extending the presumption to lesbian couples and gay couples and highlighting the inequalities that exist) ("Whatever the gendered stereotypes that might call to mind the lesbian couple and their children as the paradigm case for modernized parentage rules, gay male couples also have families that include children.").

[110] *Id.* at 260-61 ("While lesbians can use donor insemination . . . gay male couples must turn to some sort of surrogacy arrangement . . . Yet whom does the law recognize as the parents of a child born as the result of such arrangements?").

[111] Opinion of the Justices to the Senate, *supra* note 99, at 581 n.3.

[112] *Id.*

difficulty in this approach in examining what the extension to a gay male's partner would mean in the context of traditional, heterosexual couples.[113] Appleton analogizes the extension of this assumption to one of a married man conceiving a child with a woman other than his wife.[114] In this scenario, when a man has a genetic child with a woman who is not his wife, the presumption is not extended to his wife; the woman who birthed the child is the child's mother.[115] However, the extension of the presumption to a gay male's partner is more akin to using a surrogate, when the parties all intend that the birthmother relinquish her legal rights to a child.

Among the various approaches to the application of the presumption to gay male couples, one such approach would provide the child with three legal parents—the male couple and the birthmother.[116] The heterosexual equivalent of this theory is referred to as dual paternity.[117] A three-parent structure is becoming more common in the United States:[118] lesbian couples often use sperm donors they know who maintain relationships with the children they help create.[119] An emerging trend shows that American women are choosing to help gay male couples by serving as their surrogates.[120] Courts have upheld parenting agreements in which same-sex couples share custody with the third person who made the birth possible—the sperm donor (in the case of lesbian couples) or the surrogate (in the case of gay couples).[121]

In recognizing the importance of a child's ties to her biological parent and her other parent's partner, scholars have proposed dual paternity so that a child can maintain relationships with all "parents."[122] Based on the facts above, the extension of dual paternity to gay male couples is not an implausible solution.[123] As in any three-parent structure, if a woman birthed the child and wanted to retain some legal rights, the child could have visitation with her birthmother and her

---

113 *See* Appleton, *supra* note 6, at 263.

114 *Id.*

115 *See* Robert B. v. Susan B., 135 Cal. Rptr.2d 785 (Cal. Ct. App. 2003).

116 *See* Appleton, *supra* note 6, at 244-45.

117 *Id.*

118 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).

119 *Id.* at 176.

120 *Id.* at 172 (describing that a relationship often continues between the surrogate and the baby after birth) ("Surrogates who work with gay couples are also often much more involved in early parenting duties. Some of these surrogates act as a third social parent in these families, or at least maintain their connections with the family as the child grows up.").

121 *See* Jacob v. Shultz-Jacob, 923 A.2d 473, 482 (Pa. Super. Ct. 2007) (upholding a custody order granting shared physical custody to a lesbian couple and their sperm donor for their two children).

122 *See* Theresa Glennon, *Somebody's Child: Evaluating the Erosion of the Marital Presumption of Paternity*, 102 W. VA. L. REV. 547, 602-03 (2000); *see also* LA. CIV. CODE ANN. art. 191 (2005).

123 Althouse, *supra* note 118, at 171, 179 (acknowledging the rise of the three-parent structure in the United States and dual paternity as one possible method of ensuring each parent involved would be granted legal rights to the child).

genetic father's partner.[124] At the very least, this option would allow the child to develop a strong tie to multiple parents who wish to have a role in her life. "[D]ual paternity [is] a possible solution that would properly put the interest of children front and center by recognizing that sometimes children have ties worth maintaining with both a biological father and a mother's husband[]"—or in this case, a biological mother and a father's husband.[125]

Although dual paternity is one viable option for gay male couples, these couples might face an uphill battle—some courts have even declined to apply this approach toward heterosexual couples.[126] For example, in *Michael H. v. Gerald D*, the court rejected the idea of a child having two legal fathers and one mother, holding it was in the best interest of the child to have a relationship with her mother's husband, as opposed to both her mother's husband and her biological father.[127] Additionally, in *Johnson v. Calvert*, the Supreme Court of California refused to recognize two mothers for a child born through in vitro.[128] Unable to have her own children due to a hysterectomy, Crispina Johnson employed Anna Calvert as a surrogate.[129] When the relationship between the Johnsons and Anna deteriorated, Anna attempted to claim legal rights to the child.[130] In holding that the child should only have one natural mother—Crispina—the court placed great weight on the intent of the parties when entering into this arrangement.[131] It was clear all parties intended for Crispina to be the child's only natural mother.[132]

Since courts have declined to apply dual paternity to heterosexual couples,[133] it is important to consider other alternatives to this theory to ensure that the presumption can be extended to gay couples as well as lesbian couples.

2. Gay Couples and the Use of Surrogacy: The Recognition of Two Legal Parents

An alternative theory to dual paternity proposes that the birthmother relinquish her rights to the child, and therefore have no legal claim, making the genetic father and his partner the two legal parents of the child.[134] In its adoption

---

124 *See generally*, Appleton, *supra* note 6, at 244-45.

125 *Id.*

126 *See* Michael H. v. Gerald D., 491 U.S. 110, 118 (1989) ("California law, like nature itself, makes no provision for dual fatherhood."); *see also* Johnson v. Calvert, 851 P.2d 776 (Cal. 1993).

127 *See Michael H.*, 491 U.S. at 116 ("[A]llowing such visitation [of Michael H.] would 'violat[e] the intention of the Legislature by impugning the integrity of the family unit.'").

128 *See Johnson*, 851 P.2d 776.

129 *Id.* at 778.

130 *Id.*

131 *Id.* at 782.

132 *Id.* ("Mark and Crispina are a couple who desired to have a child of their own genetic stock but are physically unable to do so without the help of reproductive technology. They affirmatively intended the birth of the child, and took the steps necessary to effect in vitro fertilization. But for their acted-on intention, the child would not exist.").

133 *See* Michael H. v. Gerald D., 491 U.S. 110, 118 (1989); *Johnson*, 851 P.2d 776.

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

of the intent theory, *Johnson v. Calvert* tells us that it is critical to consider the parties' intent when entering into a surrogacy arrangement.[135] The use of advanced reproductive techniques allows adults entering into these arrangements to take time to consider who will obtain legal rights over a child.[136]

The National Conference of Commissioners on Uniform State Laws drafted the Uniform Parentage Act, which is intended to serve as model legislation on parentage proceedings and promote uniformity among the states.[137] The UPA looks to the intent of the parties in creating gestational surrogacy agreements.[138] Recognizing the parties' intent, the UPA allows intended parents to become the legal parents of the child.[139] The UPA was amended in 2000 and 2002 to include provisions pertaining to gestational surrogacy.[140] Although the UPA is adopted in part in only nine states, it reflects a movement towards embracing the intent doctrine for gestational surrogacy agreements.[141]

It should be necessary to honor the intentions of a gay male couple if they, in conjunction with the surrogate, agree that she will relinquish her legal rights to the child. "Within the context of artificial reproductive techniques, intentions that are voluntarily chosen, deliberate, express and bargained-for ought presumptively to determine legal parenthood."[142]

Instead of analogizing a gay couple's parentage to that of a heterosexual father who has a child with someone other than his wife, this form of parentage should be analogized to a heterosexual couple that uses a surrogate to have a child.[143] Recent case law suggests a model in which gay couples are automatically granted the presumption over children born through surrogacy. For example, in the case *Raftopol v. Ramey*, the Connecticut Supreme Court issued a groundbreaking decision, holding the presumption of legitimacy should extend to the domestic partner of the genetic father of twins born through surrogacy.[144] This case is of particular importance because the holding is an appropriate model for other courts to adopt when faced with cases of same-sex couple surrogacy agreements.

The plaintiffs in *Raftopol* were domestic partners who entered into a written gestational agreement with Karma Ramey, in which she agreed to act as the

---

[135] *See Johnson*, 851 P.2d 776 (emphasizing the *intent* of the parties as the ultimate and decisive factor in any determination of parenthood).

[136] *See* Shultz, *supra* note 134.

[137] Laura Wish Morgan, *The New Uniform Parentage Act (2000): Parenting for the Millennium*, SUPPORT GUIDELINES (May 19, 2001), http://www.childsupportguidelines.com/articles/art200104.html.

[138] *Id.*

[139] *See* UNIF. PARENTAGE ACT § 801(a) (2000) (amended 2002).

[140] *Id.*

[141] Morgan, *supra* note 137 ("The prospective gestational mother, her husband if she is married, and the donors must relinquish all rights and duties as the parents of a child conceived through assisted reproduction.").

[142] *See* Shultz, *supra* note 134, at 323.

[143] *Id.* at 366.

[144] *Id.*

plaintiffs' gestational carrier.[145] Eggs were harvested from a third party donor and fertilized with Anthony Raftopol's sperm.[146] As a result of the insemination, Ramey gave birth to twins in April 2008.[147] Under their agreement, Ramey agreed to relinquish all rights to the children and support the adoption of the children by Raftopol's partner Shawn Hargon.[148]

Before the birth of the children, Raftopol and Hargon brought an action for a declaratory judgment that the agreement was valid, that plaintiffs were legal parents of the children, and for a replacement birth certificate reflecting that they were the parents of the children.[149] The trial court held that the agreement was valid, and that Raftopol and Hargon were the legal fathers of the children. The court called for the Department of Public Health to issue a new birth certificate reflecting as much. The Department of Public Health appealed, claiming that Hargon was not the legal parent of the children.[150] On appeal, the Connecticut Supreme Court held that under Connecticut's General Statute section 7-48, "an intended parent who is a party to a *valid* gestational agreement [can] become a parent without first adopting the children, without respect to that intended parent's genetic relationship to the children."[151]

Unlike the New York Court of Appeals in *Allison D.*, the Connecticut Supreme Court was willing to construe the word "parent" to include a non-genetic parent who was intended to be the child's legal parent.[152] The decision in *Raftopol* was the first of its kind in the nation, extending the parentage presumption before birth of the child through contract.[153] Victoria Ferrara, the Connecticut-based lawyer who represented the fathers in this case, said:

> It's a tremendous benefit to any couple who have to use donated genetic material—egg donor or sperm donor. So whether it's a gay male couple or a straight couple, that couple can now establish legal parental rights ahead of the birth of the child, so the child is then born with two legal parents. That's crucial. It's crucial to the child, and it's crucial to the couple having the baby.[154]

Raftopol serves as a model that other states should adopt. In recognizing the importance of ensuring that a child is born with two legal parents, the Connecticut

---

145 *Id.* at 787.

146 Raftopol v. Ramey, 12 A.3d 783 (Conn. 2011).

147 *Id.* at 787.

148 *Id.* at 807-08.

149 *Id.* at 786.

150 *Id.* at 793.

151 *Id.*

152 *Raftopol*, 12 A.3d 783; Allison D. v. Virginia M., 572 N.E.2d 27 (N.Y. 1991).

153 *See* Thomas B. Scheffey, *Special Delivery*, CONN. LAW TRIBUNE (Jan. 24, 2011), http://www.ctlawtribune.com/getarticle.aspx?ID=39424.

154 *Id.*

Supreme Court issued a pivotal decision.[155] Now that New York has legalized same-sex marriage, the next move should be to extend the benefits of marriage to all same-sex couples choosing to enter into this union. Unlike Connecticut's General Statute, New York Domestic Relations Law does not recognize surrogate parenting contracts, holding them void as contrary to public policy.[156] However, New York should look to Connecticut and this groundbreaking case as a model for extension of the presumption.[157]

C. The Inadequacies of the Arguments Against the Extension of the Presumption

Applying the parentage presumption to lesbian and gay couples alike would greatly benefit the non-biological parent and the child born to the couple.[158] Although the presumption would allow for many benefits and protections to inure to both the parent and child, scholars and judges still make arguments about why the parentage presumption should be confined to heterosexual couples and their families.[159]

Many opponents of the extension of the presumption ground their arguments in overbroad generalizations with little or no scientific or factual support—mainly the proposition that raising a child with same-sex parents will harm the child and therefore there should be nothing to incentivize this process.[160] Some argue that a household with parents of two different sexes is optimal for a child because it is critical that children have both male and female role models.[161] However, this argument is flawed, as children often establish role models outside the home.

---

155 *Raftopol*, 12 A.3d 783.

156 *See* N.Y. DOM. REL. LAW § 122 (declaring surrogate parenting contracts contrary to the public policy of this state, and hereby void and unenforceable).

157 *Raftopol*, 12 A.3d 783.

158 *See* Scheffey, *supra* note 153.

159 *See infra* Part IV (describing benefits of the protection for both children and their parents).

160 *See* Jennifer L. Rosato, *Children of Same-Sex Parents Deserve the Security Blanket of the Parentage Presumption*, 44 FAM. CT. REV. 74 (2006).

161 *See* Goodridge v. Dep't of Public Health, 798 N.E.2d 941, 1003 (Mass. 2003) (Cordy, J., dissenting) ("There is no question that many same-sex couples are capable of being good parents, and should be (and are) permitted to be so."). However, Justice Cordy then contends that the legislature postpone granting marriage and parentage rights to same-sex couples until there is firm scientific data to ensure that same-sex parents can serve as an optimal home environment for children–yet Justice Cordy proposes no possible time from for which to hold off on granting these rights to same-sex couples, making this proposition unfounded and inequitable. Justice Cordy states that:

> The policy question that a legislator must resolve . . . turns on an assessment of whether the marriage structure proposed by the plaintiffs will[] . . . prove to be as stable and successful a model as the one that has formed a cornerstone of our society since colonial times, or prove to be less than optimal, and result in consequences, perhaps now unforeseen, adverse to the State's legitimate interest in promoting and supporting the best possible social structure in which children should be born and raised. Given the critical importance of civil marriage as an organizing and stabilizing institution of society, it is eminently rational for the Legislature to postpone making fundamental changes to it until such time as there is unanimous scientific evidence, or popular consensus, or both, that such changes can safely be made. *Id.*

Children are exposed to many men and women on a daily basis—their teachers, coaches, parents' friends, friends' parents. As there are places outside of the home where children can develop relationships with other male and female role models, the argument that children must be raised by both genders lacks any real foundation.[162]

Some who claim that heterosexual households are the optimal environment in which to raise children assert sweeping claims about all of the downfalls of living in a same-sex household and even acknowledge they lack evidence to support their claims.[163] "In his recent testimony before the Senate Judiciary Committee, former Massachusetts Governor Mitt Romney expressed his support of a federal constitutional amendment banning same-sex marriage, [stating,] '[t]he children of America have the right to have a mother and a father,' '[n]ot a village, not parent A and parent B.'"[164] Romney argued that same-sex households could potentially affect how children develop and thereby influence future society. However, Romney then admitted that "existing scientific studies do not support his assertions, and he predicts it could take generations until social scientists complete the necessary studies. In the meantime, no changes in family structure should take place."[165] Without any evidence to support these claims, it is grossly inequitable to same-sex couples to postulate that same-sex parenting should be postponed indefinitely until this data surfaces. If the goal of opponents such as Romney is to prevent same-sex couples from rearing children, denying them marriage benefits will not stop them from starting families.[166] Therefore, there is no reason to strip them of the dignity that comes with the epithet of marriage.

Some challengers argue that the lack of concrete evidence on the effects of same-sex parenting is a reason to postpone granting any further rights to these nontraditional family units.[167] These opponents claim that since same-sex

---

162 *See* Rosato, *supra* note 160.

163 *See Goodridge*, 798 N.E.2d at 1000 (Cordy, J., dissenting). Arguing that a heterosexual environment is better for children because the alternative—a same-sex household—"has not yet proved itself beyond reasonable scientific dispute to be as optimal as the biologically based marriage norm." Yet Justice Cordy provides no affirmative evidence supporting his proposition, just the lack of evidence in favor of a same-sex household. *Id.*

164 *See* Rosato, *supra* note 160, at 78 (citing Mitt Romney, Federal Document Clearing House Congressional Hearings Political Transcripts, June 22, 2004, *available at* http://www.lexis.com/research/retriev?_m=fdec6e6a5b74510b026fd9ba9014f9dd@docnu).

165 *Id.*

166 *See* Althouse, *supra* note 118, at 172 (discussing the increasing trend for gay couples to use surrogates to have children).

167 *Goodridge*, 798 N.E.2d at 979-980 (Sosman, J., dissenting) (elaborating on the need to allow more time to pass to fully comprehend the effects of same-sex parentage on children) ("Conspicuously absent from the court's opinion today is any acknowledgment that the attempts at scientific study of the ramifications of raising children in same-sex couple households are themselves in their infancy and have so far produced inconclusive and conflicting results . . . [S]tudies to date reveal that there are still some observable differences between children raised by opposite-sex couples and children raised by same-sex couples . . . Gay and lesbian couples living together openly, and official recognition of them as their children's sole parents, comprise a very recent phenomenon, and the recency of that phenomenon has not yet permitted any study of how those children fare as adults and at best minimal study of how they

parenting is such a new phenomenon, time must pass to ensure that the harm to children of same-sex parents is minimal or nonexistent.[168] This argument only leads to questions of how much time must pass before these opponents are satisfied and how much data must be collected to show that there is in fact no harm to children raised by same-sex couples. Of course many of those in opposition to same-sex parentage will never be satisfied. Many opponents speak of their fear of harm to the child in order to mask that their biases surrounding same-sex marriage are what truly underlie their objections.[169]

Some arguments against the presumption do not rule out the extension to same-sex couples altogether; instead, they propose rather that the presumption cover lesbian couples and not gay couples.[170] This argument is rooted in the belief that it is easier to analogize lesbian couples to heterosexual couples because that parenting scheme involves two parents only, whereas gay couples add a third parent—the birthmother—into the equation.[171] The gay couple parentage presumption seems unworkable with a third parent involved, and this is not a problem for lesbian couples—"[i]n short, if the law can presume a mother's husband to be her child's legal parent, then the law can readily do the same for a mother's female spouse or partner[.]"[172]

Although it might be more difficult to envision the presumption covering a same-sex male couple and the birthmother, this extension is not an impossible one.[173] Gay couples can opt either to keep the birthmother involved, creating a three-parent structure for the child and ensuring that the child has three legal parents as opposed to only one.[174] Alternatively, gay couples could choose to contract with their surrogate to guarantee that the surrogate relinquish legal rights to the child.[175] As *Raftopol* suggests, it is possible to make sure that the genetic father and his partner are both listed on the birth certificate when the child is born—ensuring the presumption is extended at birth of the child and both parties have automatic legal rights to the baby.[176]

---

fare during their adolescent years.").

168 *Id.*

169 *See* Rosato, *supra* note 160.

170 *See* Appleton, *supra* note 6, at 265.

171 *Id.* Present day case law is demonstrative of support for this principle: *Miller-Jenkins* and *Elisa B.* illustrate that "applying the presumption to lesbian couples [is] less problematic than applying it to gay male couples." *Id.* at 241-42, 265.

172 *Id.* at 265.

173 *See supra* Part III.B (discussing both the options of dual paternity and surrogacy—intent based parentage—for gay couples).

174 *See* Appleton, *supra* note 6, at 244-45 (describing the process involved in dual paternity).

175 *See* Shultz, *supra* note 134.

176 Raftopol v. Ramey, 12 A.3d 783 (Conn. 2011).

III. INEQUALITIES STEMMING FROM THE LACK OF THE PRESUMPTION

A. Children Without Protection

1. Legal and Social Problems Faced by Children without the Protection of the Presumption

It is estimated that there are at least one million children of same-sex couples living in the United States—and this number is on the rise.[177] These children have a right to be treated indistinguishably from children of heterosexual parents.[178] Extension of the presumption of legitimacy is one way to ensure the protection of these children. Today, the presumption serves an important child-welfare objective.[179] Starting in 1968, the Supreme Court used the Equal Protection Clause of the Fourteenth Amendment as a means to invalidate statutes that discriminated on the basis of legitimacy.[180] The Court recognized the importance of granting illegitimate children access to legal rights and benefits that they would otherwise be denied.[181] Although this string of Supreme Court cases seemingly eliminates legal distinctions between legitimate and illegitimate children, there are still important implications for extending the parentage presumption to children of same-sex couples.[182]

Perhaps one of the most serious consequences of the failure to extend the presumption of legitimacy to the non-biological parent is seen from a financial perspective.[183] Like many areas of family law, dissolution disputes between same-sex parents have been resolved using a myriad of legal theories: "[c]ourts in some jurisdictions have held that a partner who can establish . . . that her relationship

---

[177] *See, e.g.*, Ellen C. Perrin, *Technical Report: Coparent or Second Parent Adoption by Same-Sex Parents*, 109 PEDIATRICS 341 (2002) (there are between one and nine million gay parents).

[178] *See* Goodridge v. Dep't of Public Health, 798 N.E.2d 941, 956-57 (Mass. 2003) (noting that presumption of legitimacy is a material and critical marital benefit) ("[T]he fact remains that marital children reap a measure of family stability and economic security based on their parents' legally privileged status that is largely inaccessible, or not as readily accessible, to nonmarital children. Some of these benefits are social, such as the enhanced approval that still attends the status of being a marital child. Others are material, such as the greater ease of access to family-based State and Federal benefits that attend the presumptions of one's parentage.").

[179] *See* Appleton, *supra* note 6, at 243.

[180] Levy v. Louisiana, 391 U.S. 68 (1968).

[181] *See id.* at 70 (striking down Louisiana's wrongful-death statute, which forbade parents from recovering for the wrongful deaths of their illegitimate children) ("[I]llegitimate children are not 'nonpersons.' They are humans, live, and have their being. They are clearly 'persons' within the meaning of the Equal Protection Clause of the Fourteenth Amendment."); *see also* Glona v. American Guarantee & Liability Ins. Co., 391 U.S. 73, 75-76 (1968) (holding a wrongful-death statute unconstitutional under the Equal Protection Clause which forbade illegitimate children from recovering for the wrongful death of their mothers); *see also* Weber v. Aetna Casualty & Surety Co., 406 U.S. 164, 175 (1972) (holding a Louisiana workmen's compensation statute—which treated illegitimate children differently from their legitimate siblings—unconstitutional. Justice Powell stressed the injustice of distinguishing on the basis of legitimacy) ("[V]isiting this condemnation on the head of an infant is illogical and unjust.").

[182] *See* Rosato, *supra* note 160.

[183] *Id.*

with the child was 'parent-like' is entitled to be treated as more than a 'mere third party.' In a number of other cases, however, the courts did not recognize the former partner as anything more than a third party."[184] Regardless of jurisdictional issues, one overarching theme is clear: due to the lack of an automatic parentage presumption for the non-biological parent, if a second-parent adoption has not occurred, children of same-sex parents are not entitled to the same financial security as are children of heterosexual married parents.[185] Courts have found that same-sex partners who have cared for their partners' biological children and have been involved in the upbringing of the children are not required to pay child support once the couple has separated.[186]

Elisa B. is illustrative of the economic vulnerability of children who lack protection of the presumption of legitimacy.[187] The California Court of Appeals held that Elisa was not the genetic or gestational mother, had not adopted the children, and thus was not a legal parent.[188] Therefore, Elisa had no obligation to pay child support.[189] The Supreme Court of California reversed the Court of Appeals decision, treated Elisa B. as a legal parent, required her to pay child support, and held that having two parents is critically important to ensure that children are provided adequate financial protection.[190] Ultimately, the Supreme Court of California determined that the policies of stability and fair treatment of children are of the utmost importance.[191] "However, there is no assurance that other courts will prioritize children's welfare in this manner. And even if the children ultimately prevail in these cases, it may take years of contentious litigation which further harms the children."[192]

There are other basic rights afforded to children of married heterosexual parents to whom the presumption of legitimacy was automatically extended upon their birth.[193] Many of these rights, although not expressly denied to children of same-sex couples, have yet to be litigated individually, and without the automatic

---

[184] Sara R. David, *Turning Parental Rights into Parental Obligations—Holding Same-Sex, Non-Biological Parents Responsible for Child Support*, 39 NEW ENG. L. REV. 921, 934 (2005).

[185] *See* Rosato, *supra* note 160.

[186] In one case, for example, the plaintiff, T.F., and the defendant, B.L., are two women who lived together from 1996 to 2000. During this time, the plaintiff became pregnant through artificial insemination, and in July 2000, after the couple had separated, she gave birth to a child; the parties worked together to select an anonymous donor. The couple used joint funds for insemination and prenatal care expenses. Court held that defendant was not in fact a parent of the child and therefore owed no support obligations to the child born through artificial insemination to the plaintiff. T.F. v. B.L., 813 N.E.2d 1244 (Mass. 2004).

[187] Elisa B. v. Superior Court, 117 P.3d 660 (Cal. 2005).

[188] *Id.*

[189] *Id.*

[190] *Id.*

[191] *Id.*

[192] *See* Rosato, *supra* note 160.

[193] *Id.*

presumption they are not granted to a child of same-sex parents if the second parent has not adopted:

> [C]hildren can be recognized as the undisputed children of both parents, benefit from the increased financial security that accompanies marriage, and benefit from the medical decisions made on their behalf by either parent. Upon divorce, children can receive the application of predictable rules of custody, support, and visitation. Upon hospitalization of either parent, children receive priority in visitation over strangers. Upon the death of either parent, such children can inherit from a non-biological or non-adoptive parent without a will, sue for the parent's wrongful death, and receive survivors' benefits. Upon the death of both parents, such children can be recognized as next of kin and receive rights superior to those of more distant relatives (such as aunts, uncles, or cousins) with respect to burying a parent's remains or electing to make anatomical gifts.[194]

These rights, which many children and their parents take for granted, are important to the stability and wellbeing of any child, regardless of the structure of her family unit—traditional or non-traditional, heterosexual or homosexual.[195]

2. Protection Without the Presumption

Although the extension of the presumption is a guaranteed way to ensure that children born to married same-sex parents are as equally protected as children born to married heterosexual parents, this is only one protection for these children.[196] Prior to a second-parent adoption, the partner of the genetic parent will be considered a "non-parent" of the child in question.[197] Despite the lack of interstate uniformity in family law, all fifty states have taken measures to ensure that non-parents are granted some kind of access to children if they can demonstrate a meaningful and worthy relationship with these children.[198]

Courts have employed three contract theories to ensure that children are not left entirely without support and parents, or "non-parents," are not left entirely without access.[199] The first of these theories is *in loco parentis*—in order to stand *in loco parentis* with respect to a child, an individual must have "assume[d] all obligations incident to the parental relationship, though it is unnecessary to adopt the child."[200] An individual who is found to have stood *in loco parentis* to the

---

194 *See* Benjamin G. Ledsham, *Means to Legitimate Ends: Same-Sex Marriage Through the Lens of Illegitimacy-Based Discrimination*, 28 CARDOZO L. REV. 2373 (2007).

195 *See generally* Rosato, *supra* note 160.

196 *See generally* David, *supra* note 184, at 934 (discussing the concepts of *in loco parentis*, de facto parents and parents who are equitably estopped from denying parentage).

197 *Id.* at 921.

198 *See* Kyle C. Velte, *Towards Constitutional Recognition of the Lesbian-Parented Family*, 26 N.Y.U. REV. L. & SOC. CHANGE 245, 256 (2000).

199 *See generally* David, *supra* note 184, at 936.

200 *Id.*

child has the same responsibilities to the child, and therefore would be required to pay child support.[201] Although this theory is one possible protection for children without two legal parents, there are very few cases in which one partner has succeeded in gaining support payments from the other based on the theory of *in loco parentis*.[202]

Equitable estoppel is a second contract theory applied to help children and their biological parents. This theory is intended to protect children who have relied on the support—financial or emotional—of their parent's partner.[203] An equitable parent is "a nonbiological parent upon whom the court confers the rights and obligations of a biological parent based on that individual's conduct as a parent."[204] However, in some instances, an equitable parent has been deemed insufficient in comparison with an actual legal parent to warrant the payment of child support.[205]

Last, courts have applied the theory of de facto parenthood to same-sex partners who have not adopted the child.[206] "A de facto parent is that person who, on a day-to-day basis, assumes the role of parent, seeking to fulfill both the child's physical needs and his psychological need for affection and care."[207] In determining whether a de facto relationship exists, judges will consider three distinct factors: whether the relationship was at least six years in length; "whether the relationship involved reciprocal conduct between the child and the de facto parent which the child manifests expressly or impliedly" or whether the child is old enough to understand the meaning of the parental relationship; and last, whether there would be a detriment to the child if left only with the custodial parent.[208]

Similar to equitable parenthood and *in loco parentis*, de facto parenthood has significant limitations.[209] The non-biological parent is restricted in his ability to assert his parental rights in a multitude of situations.[210] For example, a non-biological parent wishing to assert his claim over a newborn or a child who was too

---

[201] *Id.*

[202] L.S.K. v. H.A.N. 813 A.2d. 872, 876 (Pa. Super. Ct. 2002). ("[A] parent cannot use *in loco parentis* status to gain rights to custody or visitation while at the same time deny any obligation to make child support payments, as to do so would be inequitable."). As of 2005, this was the only case in which a woman successfully sought to receive child support payments from her former same-sex partner for children conceived during their relationship based on *loco parentis*. David, *supra* note 184, at 941.

[203] *See generally* David, *supra* note 184, at 936.

[204] *See* Carmel B. Sella, Note, *When a Mother is a Legal Stranger to Her Child: The Law's Challenge to the Lesbian Nonbiological Mother*, 1 UCLA WOMEN'S L.J. 135, 157 (1991).

[205] *See* Washington v. Wood, 34 P.3d 887 (Wash. Ct. App. 2001) (holding that estoppel and breach of promise theories were insufficient to impose a child support obligation on a non-biological, same-sex parent whose former partner gave birth to a child conceived during their relationship through artificial insemination).

[206] *See generally* David, *supra* note 184, at 936.

[207] *See in re* B.G., 523 P.2d 244, 253 n.18 (Cal. 1976).

[208] *See* Sella, *supra* note 204, at 155.

[209] David, *supra* note 184, at 921.

[210] *Id.*

young to articulate the existing relationship would have difficulty establishing that a de facto relationship exists.[211] Additionally, non-biological parents often fail in proving the child will not prosper in the care and control of the biological parent: "it is often difficult to prove that a child will suffer a detriment by being raised solely by the biological parent."[212]

Although there are alternatives for a not-yet-legal parent to ensure that she has some access to her child, these contractual theories all fall short, leaving the child with no guarantee of financial and emotional security in the absence of an adoption.[213] Additionally, the partners of biological parents have no guarantee that they will have any access to their partner's child without undergoing the long and onerous process of a second-parent adoption.[214] These alternative theories do not automatically allow children the same protections they would be afforded if they were born to married heterosexual parents.[215] "The law must step in to affirmatively protect a vulnerable group of children. The best way to protect these children would be for states to include a statutory-based parentage presumption that would provide the children of same-sex couples benefits as a matter of right."[216]

B. Parents Without Access: The Problem of the "Legal Stranger"

Children are not the only ones at risk without the full protection of the presumption. Their non-biological parents face the possibility that in the case of the dissolution of their relationship with the child's biological parent, the "non-parents" might have no opportunity to be granted any legal rights to their children.[217] "Upon the dissolution of a same-sex relationship . . . one parent's relationship to the child is usually shifted to . . . 'legal stranger.'[218] Even if certain rights are granted, they often fail to amount to complete recognition as a 'legal parent,' short-changing homosexual parents and their children in ways traditional families need not even consider."[219]

---

211 *Id.*

212 *Id.* at 946.

213 *Id.* at 934 (discussing the concepts of *in loco parentis,* de facto parents and parents who are equitably estopped from denying parentage).

214 It is important to note that second-parent adoptions are only available in a few states as of this writing: California, Connecticut, Illinois, Massachusetts, New Jersey, New York, Pennsylvania, and Vermont. In eighteen other states second-parent adoptions have been granted at the trial court level—meaning they have been approved in certain counties only. These states are Alabama, Alaska, Delaware, Hawaii, Indiana, Iowa, Louisiana, Maryland, Michigan, Minnesota, Nevada, New Hampshire, New Mexico, Ohio, Oregon, Rhode Island, Texas and Washington. David, *supra* note 184, at 927-928.

215 *See* Rosato, *supra* note 160.

216 *Id.*

217 *Id.*

218 *See* Shank v. Dep't of Soc. Services, 230 S.E. 2d 454, 457 (Va. 1976) (describing the concept of legal stranger—a parent is a "legal stranger to the child" when all parental rights have been severed).

219 Alison M. Schmieder, *Best Interests and Parental Presumptions: Bringing Same-Sex Custody Agreements Beyond Preclusion by the Federal Defense of Marriage Act*, 17 WM. & MARY BILL RTS. J. 293 (2008).

Prior to adoption, a non-biological parent runs the risk of losing custody, visitation, or any legal rights to the child that they intended to be theirs. *Miller-Jenkins* is illustrative of this phenomenon.[220] Although the family court in Vermont held that Janet was the legal parent of the child born to her partner Lisa through artificial insemination, Lisa took the child to Virginia where the Virginia County Circuit Court refused to accord "full faith and credit" to the Vermont court's decision.[221] The Frederick County Court found Lisa to be the sole biological and natural parent of the child and precluded Lisa's visitation rights.[222] Its decision was based in part on Lisa's argument that Janet could not be a parent of her child because she was not biologically connected to the child.[223] Although the Supreme Court of Vermont ultimately held that Janet was in fact entitled to legal rights to the child in question, the kidnapping of the child as well as the Virginia Court's willingness to disregard the holding of the Vermont Court show the inherent dangers a non-biological parent faces without the automatic application of the presumption.[224]

Although *Miller-Jenkins* might be an extreme case, and not all custody disputes between same-sex couples involve parental kidnapping, it highlights the dangers that non-biological parents face in the eyes of some courts.[225] Had the presumption of legitimacy been extended in Vermont upon the birth of Lisa's child, the Frederick County Court would have had no right to hold that Lisa retained sole legal rights to her child. *Alison D.* is another case reflective of the dangers a non-biological parent can face.[226] In denying access to a son born to her partner through artificial insemination, the New York Court of Appeals held that "a party who is neither the biological nor the adoptive parent of a child lacks standing to seek custody or visitation rights under Domestic Relations Law § 70[.]"[227] Thus, without a second-parent adoption—which could take years to complete—a non-biological parent might not even have standing in a New York court to seek any access to his child.[228]

---

220 *See* Miller-Jenkins v. Miller-Jenkins, 912 A.2d 951 (Vt. 2006).

221 *Id.* at 956.

222 *Id.* at 957.

223 *Id.* at 965-66.

224 *Id.* at 951.

225 *Id.* If the initial custody determination was in the Virginia Family Courts, Janet would have been denied access to the child because the court held that Lisa was the sole biological parent and therefore entitled to sole physical and legal custody. *Id.*

226 *See* Allison D. v. Virginia M., 572 N.E.2d 27 (N.Y. 1991).

227 Debra H. v. Janice R., 930 N.E.2d 184, 188 (N.Y. 2010) (discussing the holding of *Allison D.*, 572 N.E.2d 27).

228 David, *supra* note 184; *see also* Goodridge v. Dep't of Public Health, 798 N.E.2d 941, 963 (Mass. 2003) (discussing the necessity of having an automatic parentage presumption) ("While establishing the parentage of children as soon as possible is crucial to the safety and welfare of children, . . . same-sex couples must undergo the sometimes lengthy and intrusive process of second-parent adoption to establish their joint parentage.").

There are simple rights that a legal parent has over his child, which although not expressly denied to non-biological parents, are not inherent in his or her relationship to the child:

> Parents have the right to custody of their child; to discipline the child; to make decisions about education, medical treatment, and religious upbringing; to assign the child a name; to receive the child's earnings and services; to decide where the child shall live; to receive information gathered by others about the child and to exclude others from that information; to speak for the child and assert or waive the child's rights; to determine who may visit the child; and to place their child in another's care. In sum, parents must care for their child, support the child financially, see to the child's education, provide the child proper medical care, control the child, and answer for the child's wrongdoings if they fail to control him or her.[229]

These rights appear to be so basic that parents might take them for granted. However, in the months or years it takes for a second-parent adoption to go through, non-biological parents would have no rights to make any of these decisions for those children they have chosen with their partners to help raise, support, and parent.

CONCLUSION

This Note stresses the importance, both to children and their non-biological parents, of extending the presumption of legitimacy to these nontraditional families. Because of the Marriage Equality Act, same-sex couples can now legally marry in New York.[230] Like heterosexual couples, same-sex couples should be afforded all of the material benefits that accompany a legal marriage—one of the foremost being the presumption of legitimacy. As with heterosexual parents, the presumption should automatically be triggered at the time of the child's birth, ensuring that the child enters the world with two legal parents, and not one genetic parent and one legal stranger. The extension of the presumption is an important benefit that should not be denied to same-sex couples. Marriage equality is not truly equal in New York until same-sex couples are granted all of the benefits that accompany the institution of marriage.

---

229 *See* Ledsham, *supra* note 194.

230 Rovzar, *supra* note 29.