# WE PRESUME TOO MUCH: ABANDONING THE PRESUMPTION OF LEGITIMACY IN CERTAIN ADOPTION MATTERS

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# I. INTRODUCTION

Although Anglo-American courts have long used the presumption of legitimacy of a child born to a married woman in deciding inheritance, custody, child support, and adoption matters, the presumption should not factor into adoption decisions when four conditions are present: the biological mother and her legal spouse did not plan to have or intend to parent the child together, they are living separately from each other, they are not functioning positively as a family, and the mother's spouse is abusive.[1] While the presumption of legitimacy has often protected children's welfare and parents' rights in both "traditional" and same-sex families, in certain situations it can prolong legal proceedings, threaten intact families, and even endanger vulnerable citizens.[2] Clear and convincing evidence can rebut the presumption, but at times, spending resources to do so defies common sense.

[1] *See* discussion *infra* Part V. (Criteria for Selective Abandonment of the Presumption of Legitimacy).

[2] This Note does not use gender-neutral pronouns because its proposal is very narrow. In the Note, the term "mother" encompasses anyone who supplied the egg for, carried the pregnancy of and gave birth to the relevant children, i.e., women, trans men or gender non-binary people. The term "husband" refers to the person married to the mother in question and "father" refers to the relevant child's biological parent. Either of these people could similarly be men, trans women or gender non-binary people. This proposal applies only in cases where adopted children's biological mothers are legally married to but estranged from their abusive male husbands. The presumption of legitimacy is an essential protection in other relationship types, such as same-sex relationships. To protect its members' parental rights, the LGBT community worked long and hard for recognition that the presumption applied to their marriages. For this Note, "traditional" families are defined as those that include two different-sex parents.

This Note identifies one set of circumstances under which the presumption of legitimacy should not apply and proposes that the New York Legislature amend its adoption statute to make the presumption inapplicable in these circumstances. In the alternative or in the interim, I propose that New York courts interpret the current statute so that the presumption is waived in these circumstances. This statutory solution would protect functional family units and parental rights long term, advance adoptive children's welfare, and enhance judicial efficiency.

This issue came to my attention during a legal internship, in the course of which I assisted my New York family law attorney supervisor in an adoption matter.[3] David Spencer and Joshua Richardson had welcomed John Michael Richardson into their home directly from the hospital after his birth and were working with my supervising attorney to finalize his legal adoption in the Surrogate's Court of the State of New York.[4] John's biological mother, Elizabeth Wilson, had submitted an Affidavit Pursuant to Domestic Relations Law ("DRL") Section 111, specifically DRL Section 111-a and Social Services Law Section 384-c stating, "[My husband and I] have not been intimate for more than three years and I am certain that he is not the biological father of my baby."[5] She named Steven Matthews as John's biological father and continued, "The only person with whom I had sexual relations in late April or early May, 2017, the time when my child was conceived, was Steven Matthews." In his Affidavit of Birth Father, Mr. Matthews acknowledged being John's biological father and that he and Ms. Wilson "had sexual intercourse on one or more occasions in late April through early May of 2017, the conceptive period of the adoptive child." He continued, "Upon information and belief, Ms. Wilson did not have sexual intercourse with any other man during that period of time who may be the father of the adoptive child."

Ms. Wilson was still legally married but had long been living separately from her physically abusive husband. She had not had any physical contact with him for several years. Yet New York law relies on the time-honored presumption of legitimacy of a child born to married spouses. New York's statute, DRL Section 24(1), reads:

> A child heretofore or hereafter born of parents who prior or subsequent to the birth of such child shall have entered into a civil or religious marriage, or shall have consummated a common-law marriage where such marriage is recognized as valid, in the manner authorized by the law of the place where such marriage takes place, is the legitimate child of both birth parents

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[4] All names have been changed for confidentiality purposes.

[5] N.Y. DOM. REL. LAW § 111 (McKinney 2016); N.Y. SOC. SERV. LAW § 384-c (McKinney 2013).

> notwithstanding that such marriage is void or voidable or has been or shall hereafter be annulled or judicially declared void.[6]

Another New York statute requires notice to the husband and an opportunity to be heard before finalizing an adoption. That statute, DRL Section 111(1), states, "Subject to the limitations hereinafter set forth consent to adoption shall be required as follows: . . . (b) Of the parents or surviving parent, whether adult or infant, of a child conceived or born in wedlock."[7] DRL Section 111(3)(a) further provides, "Notice of the proposed adoption shall be given to a person whose consent to adoption is required pursuant to subdivision one and who has not already provided such consent."[8]

Ms. Wilson feared for her safety if her estranged husband received notice of John's birth, much less his adoption. With my supervising attorney's guidance, I drafted a brief requesting that the court finalize David Spencer's and Joshua Richardson's adoption of John Michael Richardson without requiring the consent of or notice to the birth mother's estranged, physically abusive husband. Other, similarly situated women should also be exempt from the spousal notice requirement.

The next section, Part II, of this Note discusses why the presumption of legitimacy should be inapplicable in adoption cases such as Ms. Wilson's and previews the ways I propose courts should instead handle these cases. Part III surveys the presumption's history. I discuss the presumption's introduction in the 1600s as virtually irrebuttable, then its softening to a rebuttable presumption over the years—especially since the advent of genetic parentage testing. I then review the impact of courts' expanded recognition of parental rights, New York courts' application of the presumption, and, finally, other states' approaches. In Part IV, I propose that New York "selectively abandon" the presumption in certain adoption cases. Part V fleshes out what I mean by "cases such as Ms. Wilson's," elaborates on the criteria for waiving the presumption, and reminds of the presumption's importance in other adoption situations. In Part VI, I contend that New York courts should interpret current statutes to enable waiver of the presumption in cases like Ms. Wilson's and I recommend that in those cases courts accept the mother's affidavit as sufficient evidence of parentage without requiring notification of her estranged, abusive spouse. I further contend in Part VII that ultimately New York courts should modify DRL Section 111(1)(b) to codify waiver of the presumption in such cases. This solution would ensure that courts use specific statutory elements to decide cases such as Ms. Wilson's, likely resulting in more predictable outcomes than the judiciary

[6] N.Y. DOM. REL. LAW § 24 (McKinney 2008).

[7] N.Y. DOM. REL. LAW § 111 (McKinney 2016).

[8] *Id.*

solution would. In Part VIII, I conclude by emphasizing the importance of waiving the presumption of legitimacy under the circumstances defined in this Note and advocate for my proposed solutions.

## II. REASONS FOR WAIVING THE PRESUMPTION OF LEGITIMACY IN CASES SUCH AS MS. WILSON'S

In Ms. Wilson's case, we offered four reasons the court should not require such notice. First, the husband has no substantive interest in the adoption and should not be permitted to intervene. Second, Ms. Wilson, as a biological parent, has the right to make decisions regarding the care, custody, and control of her child. Allowing the husband to intervene and potentially veto her adoption plan, made in the best interest of her child, would impinge upon her fundamental rights. Third, although New York law presumes the legitimacy of a child born to a married woman, this marital presumption is rebuttable and is rebutted by these parties' clear and convincing evidence. Fourth, policy considerations underlying the presumption of legitimacy support rebuttal in this matter. Elizabeth Wilson and her husband did not intend to be parents together, and John has been living with his adoptive parents, the only family he has ever known, for nearly a year. Yet, at the time we filed our motion, the court had not agreed to finalize his adoption without notice to Ms. Wilson's legal husband.

This Note proposes that courts hold the marital presumption inapplicable and waive any associated requirements in cases such as Ms. Wilson's. Compliance with or rebuttal of the presumption should be unnecessary. Under my proposal, in cases like Ms. Wilson's, the court would accept the biological mother's affidavit of parentage and not require notice to the woman's estranged, abusive husband before finalizing her child's adoption. This would protect functional family units and parental rights, foster adoptive children's welfare, and enhance judicial efficiency. My proposal defines one narrow set of circumstances where an exception to the presumption would advance these goals and suggests ways to accommodate this exception.

## III. EVOLUTION OF THE PRESUMPTION AND RELATED PARENTAGE DETERMINATION

According to the marital presumption, or presumption of legitimacy of a child born in wedlock, "[c]hildren born within a marriage are children of the spouses."[9] The presumption of legitimacy aims to protect the best

[9] June Carbone & Naomi Cahn, *The Past, Present and Future of the Marital Presumption*, THE INTERNATIONAL SURVEY OF FAMILY LAW, 387, 387 (Bill Atkin ed., 2013), http://ssrn.com/abstract=2316172.

interests of children—their financial support, welfare, and relationships with their fathers—and also to protect fathers' relationships with their children. As Michigan State University Professor of Law Melanie Jacobs writes in Overcoming the Marital Presumption, "Promotion of the nuclear, marital family . . . is embedded within the marital presumption."[10]

The presumption, "deeply rooted in Anglo-American law," is a legal fiction developed centuries before the advent of genetic testing to establish paternity.[11] Renowned English jurist Lord Coke proclaimed in 1628 that under common law, if "the husband be within the four seas," of the then-Kingdom of England, he was the legal father of any child born to his wife.[12] The presumption was "virtually irrebuttable," except where the husband "had been 'beyond the four seas' or proven to be impotent."[13] In fact, Lord Mansfield's Rule, articulated in 1777 in Goodright v. Moss, even prohibited a husband or wife from testifying that the husband was not the biological father of a child.[14] Traditionally,

> [t]he primary policy rationale underlying the common law's severe restrictions on rebuttal of the presumption appears to have been an aversion to declaring children illegitimate, thereby depriving them of rights of inheritance and succession, and likely making them wards of the state. A secondary policy concern was the interest in promoting the "peace and tranquillity [sic] of States and families."[15]

This common-law fiction carried over to American law and has since been encoded into every state's statutes in some form.[16] In "traditional" families, the presumption has often protected children's welfare by ensuring not only inheritance, but also that husbands supported their children after divorce and received custody and visitation rights as appropriate.[17]

### *A. Application of the Presumption of Legitimacy Becomes Less Rigid*

Over time, the presumption's application has become less rigid than in its early days. As then-New York Court of Appeals Chief Judge Benjamin

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[10] Melanie Jacobs, *Overcoming the Marital Presumption*, 50 FAM. CT. REV. 289, 291 (2012), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2101340.

[11] Carbone & Cahn, *supra* note 9, at 387.

[12] SIR HARRIS NICOLAS, A TREATISE ON THE LAW OF ADULTERINE BASTARDY, 77 (1836), https://archive.org/stream/atreatiseonlawa01knolgoog/atreatiseonlawa01knolgoog_djvu.txt.

[13] Carbone & Cahn, *supra* note 9, at 387.

[14] Richard R. Burgee, *The "Lord Mansfield Rule" and the Presumption of Legitimacy – Clark v. State*, 16 MD. L. REV. 336 (1956), http://digitalcommons.law.umaryland.edu/mlr/vol16/iss4/6 (citing Goodright v. Moss, 2 Cowp. 591, Eng. imprints 1257 (1777)).

[15] Michael H. v. Gerald D., 491 U.S. 110, 125 (1989) (collecting cases).

[16] LESLIE HARRIS, JUNE CARBONE, & LEE E. TEITELBAUM, FAMILY LAW 887 (4th ed. 2010).

[17] Mary Louise Fellows, *The Law of Legitimacy, an Instrument of Procreative Power*, 3 COLUM. J GENDER & L. 495, 522 (1993), http://scholarship.law.umn.edu/faculty_articles/266.

N. Cardozo observed in 1930, "We have abandoned the 'nonsense' of the rule of the four seas."[18] Many states now consider the marital presumption rebuttable.[19] For instance, while New York law continues to afford a presumption of parentage to a birth mother's spouse, this presumption is "subject to the sway of reason," as Judge Cardozo's *In re Findlay* opinion held.[20] The marital presumption of legitimacy is strong, but evidence-based, he opined:

> It may even be presumed though the spouses are living apart if there is a fair basis for the belief that at times they may have come together. Whether such a basis exists in any given instance is to be determined, however in the light of experience and reason. The presumption does not consecrate as truth the extravagantly improbable, which may be one, for ends juridical, with the indubitably false.[21]

Further, in *Elizabeth A.P. v. Paul T.P.*, New York's Appellate Division's Fourth Department held that the presumption "may be rebutted by clear and convincing proof excluding the husband as the father or otherwise tending to disprove legitimacy."[22] In *Jeanne C. v Peter W.D.*, the Third Department held that such proof may include the testimony of the mother, evidence that the spouses were not in contact during the conceptive period, and the acknowledgement of paternity by the biological father.[23] The Appellate Division stated that the "Family Court's assessment of the credibility of petitioner's testimony concerning nonaccess by her husband is entitled to be given great weight by this court."[24] The mother's ex-husband had contested paternity, and the court held that genetic-testing results were admissible and that there was sufficient evidence to establish his paternity.

The presumption of legitimacy's power has diminished since DNA testing has simplified parentage determination, but it is still very strong, with some courts even enforcing it despite genetic evidence.[25] Still, "[t]he judiciary can no longer consistently select marital fathers as legal fathers, now that the presumption of legitimacy can be regularly overcome by scientific testing," writes Judge Chris Altenbernd in *Quasi-Marital Children: The Common Law's Failure in Privette and Daniel Calls for Statutory*

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[18] *In re* Findlay, 170 N.E. 471, 475 (N.Y. 1930).

[19] *The Presumption of Paternity—Rebuttable or Conclusive,* Alber v. Alber, 472 P.2d 321 (1970), 1971 WASH. U. L. Q. 492, 493 (1971), http://openscholarship.wustl.edu/law_lawreview/vol1971/iss3/8.

[20] *In re Findlay*, 170 N.E. at 472.

[21] *Id.* at 8.

[22] Elizabeth A.P. v. Paul T.P., 605 N.Y.S.2d 614 (N.Y. App. Div. 4th Dep't 1993).

[23] Jeanne C. v. Peter W.D., 521 N.Y.S.2d 829, 830–31 (N.Y. App. Div. 3d Dep't 1987).

[24] *Id.*

[25] Miller v. Albright, 523 U.S. 420, 484 (1998); *see, e.g.,* Michael H. v. Gerald D., 491 U.S. 110, 125–26 (1989) (denying standing to a biological father who had undergone genetic testing to attempt to establish legal paternity).

*Reform*.[26] Consequently, "[i]f we wish to further the real policies promoted by the presumption of legitimacy, in whole or in part, we must create new substantive law either judicially, on a case-by-case basis, or legislatively in a more structured format."[27] Genetics is an important factor to weigh in many cases involving parentage determination, as Altenbernd suggests, but in some cases, such as custody matters where neither same-sex parent is a biological parent, genetic parentage is irrelevant.[28] In adoption cases such as Ms. Wilson's, where a court must determine whether it should apply the marital presumption of legitimacy, genetics is one factor to weigh, but other factors are at least as important.

### *B. Courts Expand Recognition of Parental Rights*

Overall, courts' recognition of parental rights has expanded in recent years. In Stanley v. Illinois, the U.S. Supreme Court first recognized the parental rights of an unmarried biological father in a custody matter, when the father had lived with his children and held himself out as a father for years.[29] Underscoring the legal significance of a father's parental role, a year later the 1973 Uniform Parentage Act ("UPA") encoded protection of nonmarital children's relationships with their fathers in adoption and custody cases as well as in inheritance and related cases.[30] "Most importantly, the 1973 UPA provided that an unmarried man's paternity would be presumed if he received a child into his home and held the child out as his."[31] The latest incarnation of the UPA goes further, notes Courtney Joslin in Nurturing Parenthood Through the UPA: (2017): "[It] expands the ways in which a nonbiological parent may establish her or his parentage." [32] The 2017 UPA applies the "holding yourself out as a parent" provision to both men and women and removes other provisions whose applications vary according to gender.[33] "By adopting the UPA (2017) and making these changes, states can reform parentage law to more evenhandedly protect all parent-child relationships," Joslin writes.[34]

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[26] The Honorable Chris W. Altenbernd, *Quasi-Marital Children: The Common Law's Failure in Privette and Daniel Calls for Statutory Reform*, 26 FLA. ST. U. L. REV. 219, 237 (1999).

[27] *Id.*

[28] *Id.*

[29] Stanley v. Illinois, 405 U.S. 645, 646 (1972).

[30] Unif. Parentage Act (Unif. Law Comm'n 1973).

[31] Leslie Joan Harris, *Reforming Paternity Law to Eliminate Gender, Status, and Class Inequality*, 2013 MICH. ST. L. REV. 1295, 1301 (2013).

[32] Courtney G. Joslin, *Nurturing Parenthood Through the UPA (2017)*, 127 YALE L.J. F. 589 (2018), http://www.yalelawjournal.org/forum/nurturing-parenthood-through-the-upa-2017; Unif. Parentage Act (Unif. Law Comm'n 2017).

[33] *Id.*

[34] *Id.*

### *C. Insufficient Family Law Recognition of LGBT and Nonbiological Parental Rights*

However, the common-law presumption of legitimacy has traditionally favored two-parent heterosexual families and failed to acknowledge parental bonds in "nontraditional" families, such as those with same-sex parents. In a broader sense, family law has failed to acknowledge the parental rights of LGBT and nonbiological parents.[35] Marriage equality, as established in Obergefell v. Hodges,[36] aimed to protect LGBT parental rights as well as marital ones, explains Professor Douglas NeJaime, Yale School of Law, in The Nature of Parenthood .[37] But, he argues,

> Courts and legislatures claim in principle to have repudiated the privileging of men over women and different-sex over same-sex couples in the legal regulation of the family. But in parentage law, such privileging remains. . . . [T]hose who break from traditional norms of gender and sexuality—women who separate motherhood from biological ties (for instance, through surrogacy), and women and men who form families with a same-sex partner—often find their parent-child relationships discounted.[38]

In her article on the 2017 UPA, Joslin concurs:

> As NeJaime carefully demonstrates in The Nature of Parenthood, parentage law in most states continues to "reflect and perpetuate inequality based on gender and sexual orientation." As a result, the law often leaves LGBT parents and women who separate social parenthood from genetic parenthood inadequately protected under the law. These legal inadequacies harm not only adults, but also the children in these families.[39]

### *D. Some New York Courts Apply the Presumption to Same-Sex Marriages*

Very recently, three New York court decisions have held that the presumption of legitimacy applies to same-sex marriages, a huge boon to the LGBT community that must be protected when carving out any exception to

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[35] Samantha Bei-wen Lee, *The Equal Right to Parent: Protecting the Rights of Gay and Lesbian, Poor, and Unmarried Parents*, 41 NYU REV. L. & SOC. CHANGE, 631 (2017), https://socialchangenyu.com/wp-content/uploads/2017/11/lee_final_9-10-17.pdf.

[36] Obergefell v. Hodges, 135 S. Ct. 2584, 2600–01 (2015).

[37] Douglas NeJaime, *The Nature of Parenthood*, 126 YALE L.J. 2260, 2290–91 (2017), https://www.yalelawjournal.org/article/the-nature-of-parenthood.

[38] *Id.* at 2265–66.

[39] Joslin, *supra* note 32 at 613.

applying the presumption in adoption cases.[40] In the landmark 2016 Brooke S.B.[41] case, after a lesbian couple divorced, the New York Court of Appeals used the presumption to uphold the parentage of their child's nongenetic mother, securing her custody and visitation rights.[42] This case overruled Alison D. v. Virginia M., one of the proceedings jokingly dubbed a "lesbians behaving badly" case.[43] In Alison D., a nonbiological mother, Virginia M., petitioned to obtain visitation rights after the end of her relationship with Alison D., the biological mother of the child the two had planned to have and were raising together.[44] The Court of Appeals held that Virginia M. was not a "parent," within the meaning of the statute that allowed "either parent" to apply for a writ of habeas corpus to determine an issue of visitation rights following termination of the parties' relationship .[45] Brooke S.B. also abrogated Debra H. v. Janice R, in which the Court of Appeals cited Alison D in holding that while a nonbiological mother—a "biological stranger"—lacked parental standing to petition for custody and visitation after her relationship with their child's biological mother ended, it was in the best interests of the child to allow the petition.[46] This holding, however, did not necessarily indicate that she would prevail on the merits, and Janice R. was not permitted to invoke the equitable estoppel doctrine to bar Debra H. from denying her parental relationship with the child.[47]

Attorney Alexander Newman, in Same-Sex Parenting Among A Patchwork of Laws: An Analysis of New York Same-Sex Parents' Options for Gaining Legal Parental Status, observed that the court's decision in Debra H. turned on the fact that state statutes did not define "parents," and the court felt only the legislature should redefine the term to include same-sex

[40] Jason Grant, *For 3rd Time, 'Presumption of Legitimacy' for Same-Sex Couples Recognized*, N.Y. L. REV., Feb. 22, 2018, https://www.law.com/newyorklawjournal/2018/02/22/for-3rd-time-presumption-of-legitimacy-for-same-sex-couples-recognized/.

[41] Matter of Brooke S.B. v. Elizabeth A.C.C., 61 N.E.3d 488 (N.Y. 2016).

[42] *Id.* at 490 ("[W]here a partner shows by clear and convincing evidence that the parties agreed to conceive a child and to raise the child together, the non-biological, non-adoptive partner has standing, as a parent, to seek visitation and custody.").

[43] *Alison D. v. Virginia M.*, 572 N.E.2d 27 (N.Y. 1991); *see, e.g.*, Ronald FF. v. Cindy GG., 511 N.E.2d 75 (N.Y. 1987); Multari v. Sorrell, 731 N.Y.S.2d 238 (N.Y. App. Div. 3d Dep't 2001); Matter of White v. Wilcox, 4 N.E.3d 970 (N.Y. 2013); *see also* Jen Christensen, *Parent vs. Parent: Gay Dads and Lesbian Moms Are Winning New Recognition of Their Rights, but Many Still Lose Their Children*, THE ADVOCATE, December 21, 2004, at 27 ("Some ex-partners use antigay laws to deny the other custody. 'We jokingly call those the "lesbians behaving badly" cases,' says Patricia Logue, senior counsel with Lambda Legal's Midwest office. 'They really mirror the complexity of where the country stands on gay relationships.'").

[44] *Alison D.*, 572 N.E.2d at 28–29.

[45] N.Y. Const. art. VI, § 7; N.Y. DOM. REL. LAW § 70 (McKinney).

[46] *Brooke S.B.*, 61 N.E.3d at 502; *see also Debra H. v. Janice R.*, 930 N.E.2d 184 (N.Y. 1991); *Alison D.*, 572 N.E.2d at 27.

[47] *Debra H. v. Janice R.*, 930 N.E.2d at 193.

parents.[48] New York's Marriage Equality Act,[49] passed a year later, "does not explicitly include a definition, but it does make it clear that it intends to expand the privileges of marriage, including child rearing, to same-sex couples."[50] Since then, Newman notes, some—but only some—New York courts have allowed same-sex couples to use equitable estoppel to claim parentage.[51]

On two occasions in 2018, the New York Appellate Division has used the presumption to prevent sperm donors from claiming parental rights to married lesbian couples' children.[52] In Joseph O. v. Danielle B., the New York Appellate Division held that the presumption of legitimacy alone was insufficient to "warrant the summary denial of a paternity petition," but that "the doctrine of equitable estoppel may be raised to prevent a biological father from asserting paternity rights in order to preserve the status of legitimacy for the child or to otherwise protect a child's established relationship with another who has assumed the parental role."[53] In Christopher YY. v. Jessica ZZ the same court held that the presumption of legitimacy applied to a child born to a lesbian married couple, that equitable estoppel precluded the sperm donor from asserting paternity, and that ordering genetic tests would not serve the best interests of the child.[54] This approach keeps children's welfare front and center, as should always be the case, according to Kimberly Montanari in Does the Presumption of Legitimacy Actually Protect the Best Interests of the Child? Department of Health & Rehabilitative Services v. Privette.[55] Citing Christopher YY, she writes, "The welfare of the child should be the primary focus in a case where the presumption of legitimacy is implicated."[56]

### *E. States' Uneven Application of the Presumption of Legitimacy*

However, while the presumption of legitimacy is included in every state's statutes, there is significant variation among those statutes and,

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[48] Alexander Newman, *Same-Sex Parenting Among A Patchwork of Laws: An Analysis of New York Same-Sex Parents' Options for Gaining Legal Parental Status*, 2016 CARDOZO L. REV. DE NOVO 77, 107 (2016); *Debra H. v. Janice R.*, 930 N.E.2d at 193–94.

[49] Marriage Equality Act, 2011 N.Y. LAWS 95.

[50] Newman, *supra* note 48 at 107.

[51] *Id.* at 90.

[52] Joseph O. v. Danielle B., 71 N.Y.S.3d 549, 553–54 (N.Y. App. Div. 2d Dep't 2018); Christopher YY. v. Jessica ZZ., 69 N.Y.S.3d 887, 891, 896 (N.Y. App. Div. 3d Dep't 2018).

[53] *Joseph O.*, 71 N.Y.S.3d at 553.

[54] *Christopher YY*, 69 N.Y.S.3d at 898–99.

[55] Kimberly G. Montanari, *Does the Presumption of Legitimacy Actually Protect the Best Interests of the Child? Department of Health & Rehabilitative* Services v. Privette*, 617 So. 2d 305 (Fla. 1993),* 24 STETSON L. REV. 809 (1995).

[56] Montanari, *supra* note 55 at 829; *Christopher YY*, 69 N.Y.S.3d at 896.

consequently, in courts' application of the presumption.[57] In some states, "courts reject biological evidence and blindly apply the presumption. This creates a situation where a man who is not the biological father of a child is forced to continue to support the child," writes Munonyedi Ugbode in Who's Your Daddy?: Why the Presumption of Legitimacy Should Be Abandoned in Vermont.[58] Some courts fail to recognize relationships between biological fathers and their children if the biological mother was married to another man at the time of birth, in the interest of protecting marriages.[59] "Courts can avoid these problems by using other methods to determine paternity that do not ignore biological evidence," suggests Ugbode.[60]

The majority of states now allow challenges to the presumption, "with many effectively saying that biology confirms parenthood, and that an unmarried father has a right to a relationship with the child, particularly if he insists on doing so with[in] a short time after the child's birth," observe Carbone and Cahn.[61] These states' policies seek to support relationships between biological parents and their children.[62] In other states, biology is not dispositive and the presumption recognizes parenthood where the husband is functioning as a parent and the biological father is not.[63] Some do so even when the woman and her partner are not married.[64] Still other states uphold the presumption "because of the states' commitment to marriage, but without agreement on what that means."[65]

### *F. The Presumption of Legitimacy Should Be Abandoned, Selectively*

Because science and family structure—among other factors—have evolved dramatically since the presumption of legitimacy's inception, some scholars advocate abolishing it altogether.[66] Ugbode writes, "Courts created the presumption of legitimacy at a time when the only way to prove paternity was through circumstantial and testimonial evidence. At that time, marriage was thought to be the most efficient and reliable way of determining paternity."[67] In contrast, he continues, "today genetic testing is widely available and would be feasible for courts to apply in paternity cases. In light

[57] Carbone & Cahn, *supra* note 9, at 388.

[58] Munonyedi Ugbode, *Who's Your Daddy?: Why the Presumption of Legitimacy Should Be Abandoned in Vermont*, 34 VT. L. REV. 683, 684 (2010).

[59] *Id.*

[60] *Id.*

[61] Carbone & Cahn, *supra* note 9, at 388.

[62] *Id.* at 391.

[63] *Id.* at 388.

[64] *Id.*

[65] *Id.*

[66] *See* Ugbode, *supra* note 58.

[67] *Id.*

of DNA tests, artificial insemination, and the recognition of same-sex marriages and civil unions, the presumption of legitimacy should no longer apply to paternity cases."[68]

While Ugbode's proposal may make sense regarding the determination of a child's genetic parentage, that is just one piece of the parentage puzzle. Familial relationships form another important piece. Protecting those relationships often necessitates applying the presumption of legitimacy, while as I propose, at times it requires waiving that presumption. As Melanie Jacobs writes in Overcoming the Marital Presumption, "There are benefits to the presumption to be sure; however, rigid application of the presumption perverts the goal of family preservation."[69] Her article focuses on instances where such application "foreclose[es] the possibility of the child having a relationship with her or his biological and functional father."[70] She refers to a "not too common yet persistent line of cases [where] an unwed, biological father has assumed parental duties and held himself out as the child's father but is precluded from establishing his legal paternity because he is unable to rebut the marital presumption."[71] These cases, she argues, along with cases that use biology alone to determine parentage, demonstrate the need to recognize "functional parents," or those acting in a parental role, in determining legal parentage.[72] Rather than emphasizing parentage by marriage or parentage by genetics, we should emphasize parentage by function and intention. "Integrating these newer doctrines within the old paradigm will yield better results for children and their parents."[73]

For instance, prospective adoptive parents who have functioned as parents of their children since birth arguably form an intact family deserving of protection. The U.S. Supreme Court considers preservation of the family unit to be paramount, as Justice Holmes' dissent in Moore v. East Cleveland illustrates: "Our decisions establish that the Constitution protects the sanctity of the family precisely because the institution of the family is deeply rooted in this Nation's history and tradition. It is through the family that we inculcate and pass down many of our most cherished values, moral and cultural."[74]

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[68] *Id.* at 684.

[69] Jacobs, *supra* note 10, at 290.

[70] *Id.*

[71] *Id.*

[72] *Id.* ("I use the term 'functional parent' to refer to a person who has assumed the daily responsibilities of parenting, such as providing food, shelter, clothing, nurturance, and emotional support for the child.").

[73] *Id.* at 295.

[74] Moore v. East Cleveland, 431 U.S. 494, 503–04 (1977).

Therefore, this Note does not advocate wholesale abandonment of the presumption, but argues that making it inapplicable in certain adoption cases will, as Ugbode writes, "not negatively impact parentage."[75] Instead, I argue that only in particular sets of circumstances, "by abandoning the presumption, courts will ensure the best interests of the child, the biological parent, and the interest of the courts in judicial efficiency."[76] By confining any exception to the presumption of legitimacy to certain, narrowly defined adoption cases—this Note focuses on New York law and cases—this "selective abandonment" will also favor the best interests of nonbiological parents who are functioning parents.

## IV. NEW YORK SHOULD MAKE THE PRESUMPTION OF LEGITIMACY INAPPLICABLE IN CERTAIN ADOPTION CASES

### *A. To Intervene in an Adoption, a De Jure Married Father Must Have Standing*

Ms. Wilson's plight illustrates one case in which waiving the presumption of legitimacy would be in the best interests of her child and of his nonbiological adoptive parents. Had she and her husband been legally divorced or separated before John's birth, in order to qualify as the father of the adoptive child—entitled to receive notice of the adoption or give/deny consent—her husband would have to meet the standards of New York's DRL Section 111(1)(d) or (e).[77] While those regulations pertain only to "out-of-

[75] Ugbode, *supra* note 58 at 710.

[76] *Id.*

[77] N.Y. DOM. REL. LAW § 111(1) (McKinney 2016). Section (d) mandates that consent to adoption shall be required "[o]f the father, whether adult or infant, of a child born out-of-wedlock and placed with the adoptive parents more than six months after birth, but only if such father shall have maintained substantial and continuous or repeated contact with the child as manifested by: (i) the payment by the father toward the support of the child of a fair and reasonable sum, according to the father's means, and either (ii) the father's visiting the child at least monthly when physically and financially able to do so and not prevented from doing so by the person or authorized agency having lawful custody of the child, or (iii) the father's regular communication with the child or with the person or agency having the care or custody of the child, when physically and financially unable to visit the child or prevented from doing so by the person or authorized agency having lawful custody of the child. The subjective intent of the father, whether expressed or otherwise, unsupported by evidence of acts specified in this paragraph manifesting such intent, shall not preclude a determination that the father failed to maintain substantial and continuous or repeated contact with the child. In making such a determination, the court shall not require a showing of diligent efforts by any person or agency to encourage the father to perform the acts specified in this paragraph. A father, whether adult or infant, of a child born out-of-wedlock, who openly lived with the child for a period of six months within the one year period immediately preceding the placement of the child for adoption and who during such period openly held himself out to be the father of such child shall be deemed to have maintained substantial and continuous contact with the child for the purpose of this subdivision." *Id.* at § 111(1)(d). Section (e) mandates that consent to adoption must be obtained "[o]f the father, whether adult or infant, of a child born out-of-wedlock who is under the age of six months at the

wedlock" births, I propose that in circumstances such as Ms. Wilson's, a still-legally wed husband should be required to meet the same standards. The regulation's provisions require that unwed fathers have a biological tie to and an actual relationship with the child, established by communicating with, visiting, and providing financial support for the child before adoptive placement.[78] The U.S. Supreme Court affirmed the D.R.L. Section 111 relationship provision in Caban v. Mohammed, holding, "In those cases where the father never has come forward to participate in the rearing of his child, nothing in the Equal Protection Clause precludes the State from withholding from him the privilege of vetoing the adoption of that child."[79]

In Matter of Raquel Marie X, the New York Court of Appeals emphasized the importance of a putative father's role in establishing a relationship with an adoptive child:

> An unwed father who has been physically unable to have a full custodial relationship with his newborn child is also entitled to the maximum protection of his relationship, so long as he promptly avails himself of all the possible mechanisms for forming a legal and emotional bond with his child. . . . This implies, however, that in order to have the benefit of the maximum protection of the relationship—the right to consent to or veto an adoption—the biological father not only must assert his interest promptly (bearing in mind the child's need for early permanence and stability) but also must manifest his ability and willingness to assume custody of the child.[80]

Matter of Baby Girl affirms the importance of establishing a parental relationship.[81] There, a mother did not tell a biological father serving in the military of her pregnancy, but she did not conceal it.[82] She placed her child with a couple who later filed an adoption petition.[83] The biological father appealed the pending adoption more than a year after the child's placement, claiming he had been unaware of the birth.[84] The court denied the appeal, holding that the birth father knew or should have known of the pregnancy and "failed to do all that he could to establish a parental relationship within

time he is placed for adoption, but only if: (i) such father openly lived with the child or the child's mother for a continuous period of six months immediately preceding the placement of the child for adoption; and (ii) such father openly held himself out to be the father of such child during such period; and (iii) such father paid a fair and reasonable sum, in accordance with his means, for the medical, hospital and nursing expenses incurred in connection with the mother's pregnancy or with the birth of the child." *Id*. at § 111(1)(e).

[78] N.Y. DOM. REL. LAW § 111(1)(d), (e), (McKinney 2016).

[79] Caban v. Mohammed, 441 U.S. 380, 392 (1979); *see also* N.Y. DOM. REL. LAW § 111 (McKinney 2016).

[80] *In re* Raquel Marie X., 559 N.E.2d 418, 424 (N.Y. 1990) (internal citations omitted).

[81] Matter of Baby Girl, 615 N.Y.S.2d 800, 801 (N.Y. App. Div. 4th Dep't 1994).

[82] *Id.*

[83] *Id.*

[84] *Id.*

the six months immediately preceding the child's placement for adoption."[85] Similarly, in Mr. Spencer and Mr. Richardson's case, Ms. Wilson's husband has no familial relationship with the birth mother or the adoptive child and is not the biological father. Under such circumstances, despite a mother's de jure marriage, the husband should be held to the same standard as the Matter of Baby Girl biological father.[86] He has no substantive interest in the case and no standing to veto the adoption.

### *B. A Husband May Not Impinge Upon a Biological Mother's Parental Rights*

Further, applying the presumption of legitimacy in such circumstances and insisting on related statutory requirements would impinge on the parental rights of Ms. Wilson and similarly situated women. The U.S. Supreme Court opined in Troxel v. Granville, "The interest of parents in the care, custody, and control of their children . . . is perhaps the oldest of the fundamental liberty interests recognized by this Court."[87] The Court held that, in allowing grandparents increased visitation with their grandchildren against the wishes of the children's mother, a lower court "failed to provide any protection for [the mother's] fundamental constitutional right to make decisions concerning the rearing of her own daughters."[88] The Troxel decision references a long line of cases in which the Supreme Court's holdings have upheld that liberty interest.[89] "In light of this extensive precedent," the decision reads, "it cannot now be doubted that the Due Process Clause of the Fourteenth Amendment protects the fundamental right of parents to make decisions concerning the care, custody, and control of their children."[90] The court held,

> The decisional framework employed by the Superior Court directly contravened the traditional presumption that a fit parent will act in the best interest of his or her child . . . . In that respect, the court's presumption failed to provide any protection for Granville's fundamental constitutional right to make decisions concerning the rearing of her own daughters.[91]

I assert that women such as Ms. Wilson have the same fundamental right to make decisions about the care, custody, and control of their children without interference. In a case like Ms. Wilson's, where the mother has selected adoptive parents to serve her child's best interests, and her sworn statement avers that her estranged husband is not the child's father, courts

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[85] *Id.*

[86] *Id.*

[87] Troxel v. Granville, 530 U.S. 57, 65 (2000).

[88] *Id.* at 69.

[89] *Id.* at 65.

[90] *Id.*

[91] *Id.* at 69.

should consider the presumption of legitimacy rebutted without need for further evidence. It should waive the statutory requirement to provide the husband with notice of and an opportunity to consent to or veto the adoption.

## V. CRITERIA FOR SELECTIVE ABANDONMENT OF THE PRESUMPTION OF LEGITIMACY

Because maintaining the presumption of legitimacy is so critical in other situations—to protect same-sex and other parents' access to their children, for example—it is vital to clearly define the circumstances in which the presumption should be legally inapplicable. It is essential to carefully delineate what I mean by "a woman such as Ms. Wilson," to whom a waiver of the presumption would apply: I propose that a woman should not have to notify her legal, but abusive and long-estranged husband, who is clearly not biologically related to the child, during her child's adoptive placement. In contrast, the presumption should apply, for instance, if a woman's husband is her child's biological father and/or has functioned as her child's father. It would be unjust if, by claiming the husband was abusive or estranged, she could prohibit him from involvement in a child's adoption.

There are sobering examples of one parent depriving another of custody and/or visitation rights to her children in LGBT families in the aforementioned "lesbians behaving badly" cases, where after a same-sex couple separated, the biological mother successfully sued to terminate the nonbiological mother's parental rights because she was not genetically related to the children, despite the second mother's close personal relationship to the children.[92] The Alison D. v. Virginia M. line of cases illustrates this phenomenon.[93] As discussed above, the Brooke S.B. holding gave nonbiological same-sex parents additional legal protections, but hostile biological mothers might still try to prevent loving parents from seeing their children.[94] The presumption of legitimacy is vital to family protection under these circumstances.

### *A. The Presumption Must Protect "Intended Parents"*

The presumption is also warranted where intended parents planned to have children together, did so, and cared for them jointly. If these parents

[92] *See* discussion *supra* Part III(d).

[93] *Alison D. v. Virginia M.*, 572 N.E.2d 27 (N.Y. 1991); *see also* Ronald FF. v. Cindy GG., 511 N.E.2d 75 (N.Y. 1987); Multari v. Sorrell, 731 N.Y.S.2d 238, 239–240 (N.Y. App. Div. 3d Dep't 2001); Matter of White v. Wilcox, 4 N.E.3d 970 (N.Y. 2014).

[94] Matter of Brooke S.B. v. Elizabeth A.C.C., 61 N.E.3d 488, 490 (N.Y. 2016) ("[W]here a partner shows by clear and convincing evidence that the parties agreed to conceive a child and to raise the child together, the non-biological, non-adoptive partner has standing, as a parent, to seek visitation and custody.").

later separate or divorce, the law should not punish a nonbiological parent by depriving him or her of custody and/or visitation rights to any children conceived during marriage. A New York case, In re Maria-Irene D., illustrates the protection the marital presumption, or presumption of legitimacy, can provide to such parents.[95] In this case, two men, Marco D. and Han Ming T., married and had a child using egg and sperm donors.[96] They later separated, Marco D. was granted sole custody of the child, and he entered a new relationship.[97] Marco D.'s partner sought to adopt the child, and although Han Ming T. had not lived continuously with Marco D. for four years, he wanted to preserve his parental rights.[98] He contested the proceeding and New York's Appellate Division upheld vacating the adoption, holding that the presumption arose that the child born during marriage was the legitimate child of both men, the "intended parents."[99] This result fits with the concept that the presumption should protect intended parents.

### *B. The Presumption Should Not Protect "Negatively Functional" Families*

Contrarily, in cases such as Ms. Wilson's, in which legally married spouses are not intended parents, and are not functional families—are not fulfilling the obligations of marriage—they should not get the benefits of marriage as regards parentage. Cardozo Law Professor Edward Stein, in Looking Beyond Full Relationship Recognition for Couples Regardless of Sex: Abolition, Alternatives, and/or Functionalism, advocates "functionalism" as a way to identify familial relationships.[100] "Under this approach, the characteristics of a relationship—rather than, or in addition to, its formal legal status—determine how a relationship should be treated under the law."[101] Stein explains that by examining a relationship, namely by looking at characteristics such as

the emotional and financial commitment and entanglement involved; the mutual reliance for shelter, food, and health care; and how the two people in the relationship have conducted themselves in their personal life—the

[95] *In re* Maria-Irene D., 61 N.Y.S.3d 221 (N.Y. App. Div. 1st Dep't 2017).

[96] *Id.* at 222.

[97] *Id.*

[98] *Id.* at 223.

[99] *Id.* at 223.

[100] Edward Stein, *Looking Beyond Full Relationship Recognition for Couples Regardless of Sex: Abolition, Alternatives, and/or Functionalism*, 28 U. MINN. L.J. 345, 365 (2010).

[101] *Id.*

functional approach to relationship recognition determines whether a relationship should get a benefit typically associated with marriage.[102]

Some relationships, such as a common law marriage, exhibit positive functional factors, Stein notes.[103] "A common law marriage becomes legally valid when two people capable of marrying (1) cohabitate, (2) intend and agree to be married, and (3) hold themselves out to their community as married. These marriages are obtained without marriage licenses and the other standard formal procedures for marrying."[104] Accordingly, DRL Section 24(1) explicitly applies the presumption of legitimacy to common law marriages.[105]

There is also "negative functionalism" in "a relationship that satisfies the traditional/bright-line definition of what qualifies as a marriage," but where the couple does not behave as if married.[106] For instance, the law does not treat a "dead marriage," where the spouses are estranged and the relationship "is now moribund," as a marriage for some purposes.[107]

### *C. The Presumption is Rebutted for "Dead Marriages" Where One Party is Abusive and the Parties are not Intended Parents*

I argue that the presumption of legitimacy should not apply to "negatively functional" relationships, where a once-legitimate marriage is now a "dead marriage." A relationship such as Ms. Wilson's is a dead marriage, meeting one test for rebutting the presumption that the parties can claim certain legal benefits of marriage. Where one spouse is also abusive and is not an intended or a biological parent, the presumption is rebutted. The parties are not legally separated or divorced, but they no longer have certain obligations to each other. Where paternity is not contested in an adoption of the biological mother's child in such a case, the presumption of legitimacy is rebutted by the mother's affidavit of parentage, which is clear and convincing evidence. Although DRL Section 111 explicitly applies to void or voidable marriages, my proposed exception to applying the marital presumption should encompass scenarios like these.[108] In cases such as Ms. Wilson's, then, a mother should not be required to notify her estranged, abusive spouse, who is not her child's biological father or intended parent, before finalizing that child's adoption.

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[102] *Id.* at 366.

[103] *Id.* at 368.

[104] *See In re* Marriage of Winegard, 278 N.W.2d 505, 510 (Iowa 1979).

[105] N.Y. DOM. REL. LAW § 24 (McKinney 2016).

[106] Stein, *supra* note 100, at 368. Although Stein does not use the term negative functionalism in his article, he refers to "negative functional factors." *Id.* at 368.

[107] *Id.*

[108] N.Y. DOM. REL. LAW § 111 (McKinney).

The "lesbians behaving badly" cases and In re Maria-Irene D. demonstrate the need for caution in defining any exception to the presumption of legitimacy, and there are likely other such contexts.[109] I propose that an exception should apply only where a woman's spouse was not an intended parent. In other words, she and the spouse did not plan the child together, the spouse did not communicate with her about the pregnancy, was not present at the birth, did not say publicly that the expected child was his, or in any way purport to be the child's intended parent. Further, the exception should only apply where the woman's spouse is not a biological parent and is estranged and abusive. These last two criteria should apply where a couple has been living apart with no contact for one year immediately prior to the child's birth, and the woman fears for her safety because her spouse abused her physically and/or psychologically. The abuse requirement is necessary to ensure that the presumption is waived only when its application would likely result in real harm to the woman—not when a woman just has animus toward a former spouse and wants to deny the spouse's parental rights. Not every spousal abuser should be barred from access to his children, but when the spouse is also not an intended or functioning parent and the marriage is dead, applying the presumption of legitimacy serves no purpose.

During the adoption process, a woman could submit an affidavit attesting to estrangement and abuse, and that her spouse was not an intended or a biological parent. A judge could approve the affidavit during adoption finalization and waive the presumption, eliminating the requirement to provide notice to the husband. Estrangement can be objectively described as living apart and having no contact. Abuse is trickier to objectively define and prove, but the bar should be lower where the woman merely wishes to avoid spousal notification rather than to pursue criminal or civil remedies against her spouse. Nonetheless, she should take care to adequately document the abuse and show that her allegations are not fraudulent.

### *D. Affidavit Demonstrating Spousal Abuse*

To demonstrate that her spouse has been abusive, a woman and her attorney should prepare an affidavit that shows the spouse's conduct violated one of New York law's family offenses. New York's Office for the Prevention of Domestic Violence defines an abusive relationship as one where a partner attempts to "gain power and control over" the other.[110] Spousal abuse can include isolating a spouse from friends and family or

[109] *In re* Maria-Irene D., 61 N.Y.S.3d 221, 223 (N.Y. App. Div. 1st Dep't 2017).

[110] *What is Domestic Violence*, OFF. FOR THE PREVENTION OF DOMESTIC VIOLENCE, http://www.opdv.ny.gov/help/fss/part4.html (last visited December 23, 2018).

economic abuse—having complete control over the couple's financial resources.[111] It can also include verbal, emotional, or psychological abuse—name calling, belittling a spouse publicly, or criticizing the spouse's abilities as a parent or partner.[112] Spousal abuse can further include coercion, threats, intimidation, or physical abuse—pushing, grabbing, hitting, slapping, punching, kicking, strangling, burning, stabbing, or shooting a spouse.[113] Sexual abuse of a spouse—such as forcing unwanted sex or prostitution—is also spousal abuse.[114] Some spouses even use children to perpetrate abuse—undermining a spouse's authority, threatening to take the children by kidnapping or gaining custody, turning children against a spouse, or threatening to harm them if the spouse seeks help or leaves.[115] Abusive spouses often then minimize, deny, or blame a spouse for their own abusive acts.[116]

New York's family courts and criminal courts have concurrent jurisdiction over domestic violence claims, and the civil protection afforded by the family courts is intended "for the purpose of attempting to stop the violence, end the family disruption and obtain protection."[117] Aware that many pro se litigants file domestic violence claims, courts construe the pleadings liberally and "[d]efects shall be ignored if a substantial right of a party is not prejudiced."[118] In filing a domestic abuse petition, a person must provide factual evidence establishing the elements of a family offense as defined in Family Court Act Section 812(1) to make a prima facie case, and the allegations must be "supported by a fair preponderance of the evidence."[119] Family offenses include, inter alia, harassment, stalking, strangling, and identity theft.[120]

The petition should be as specific as possible; trial courts dismiss claims if no allegations satisfy the elements of one of the family offenses. For instance, in M.T. v. E.T., the Nassau County Family Court held that the husband's claims that his wife was an alcoholic, that they had marital problems, and that the wife called the husband a derogatory name and pointed a finger in his face during an argument about a family vacation did not rise to the level of a family offense.[121] The name-calling was meant to annoy and

111 *Id.*

112 *Id.*

113 *Id.*

114 *Id.*

115 *Id.*

116 *Id.*

117 N.Y. FAM. CT. ACT § 812 (McKinney 2019).

118 N.Y. C.P.L.R. 3026 (McKinney 1964).

119 N.Y. FAM. CT. ACT § 832 (McKinney 1963).

120 *Id.*

121 Matter of M.T. v. E.T., 864 N.Y.S.2d 877, 879 (N.Y. Fam. Ct. 2007).

harass the husband, the court opined, but the conduct "describes an isolated incident, not a course of conduct."[122] There was also no allegation that the "activities failed to serve a legitimate purpose," and although "the respondent displayed some ugly behavior," it did "not render the incident a family offense."[123] It will be important for a woman such as Ms. Wilson, when working with counsel to prepare an affidavit of abuse—or when addressing a court pro se—to identify the family offense that her spouse's conduct violates and satisfy the elements necessary to prove that the greater weight, or preponderance, of the evidence supports her claim.

### *E. Requiring Evidence of Abuse Guards Against Overly Broad Application of Exceptions to the Presumption of Legitimacy*

The majority opinion in Planned Parenthood v. Casey informs the need for demonstrating spousal abuse as a criterion for waivers of the presumption of legitimacy.[124] Unlike obtaining an exception to the presumption, as here, in Casey, the mother's interest in obtaining an abortion was far greater than the father's in preventing it.[125] The U.S. Supreme Court observed that the constitution places limits on a state's right to interfere with a person's most basic decisions about family and parenthood, as well as bodily integrity.[126] The court invalidated as an undue burden a Pennsylvania state law requiring a woman to notify her husband before obtaining a legal abortion, opining, "A significant number of women will likely be prevented from obtaining an abortion just as surely as if Pennsylvania had outlawed the procedure entirely."[127] Even if fewer than one percent of women were affected, it "[did] not save [the state statute] from facial invalidity, since the proper focus of constitutional inquiry is the group for whom the law is a restriction, not the group for whom it is irrelevant."[128] The spousal notification requirement was unconstitutional regardless of whether the husband was physically or psychologically abusive, because of the woman's comparatively higher interest in gaining relief. "It is an inescapable biological fact that state regulation with respect to the fetus will have a far greater impact on the pregnant woman's bodily integrity than it will on the husband."[129]

The issue at hand here is also a basic decision about family and parenthood, although adoption restrictions, as opposed to abortion

[122] *Id.* at 880.

[123] *Id.*

[124] Planned Parenthood of Southeastern Pennsylvania v. Casey, 505 U.S. 833 (1992).

[125] *Id.* at 896.

[126] *Id.* at 849.

[127] *Id.* at 837.

[128] *Id.* at 837.

[129] *Id.* at 838.

restrictions, do not violate a woman's bodily integrity. The interests of a biological or positively functional father are nearly equal to those of a biological mother in most cases. That is why this Note does not propose abandoning the presumption of legitimacy and its notification requirements entirely, which in many cases would impinge on the parental rights of a biological parent or nonbiological-but-positively-functional parent. However, if a woman's husband is abusive, fear for her safety might prevent her from placing a child with adoptive parents. As in Casey this would preclude her from exercising a fundamental right under the Due Process Clause of the Fourteenth Amendment to make decisions concerning the care, custody, and control of her children. In this case that means her right to voluntarily surrender her parental rights in the best interest of her child. If her marriage is also dead or negatively functional, and her husband was not an intended or a biological parent, her interest in the outcome is greater than that of her de jure spouse. Waiving the presumption of legitimacy and its spousal notification requirement would eliminate this infringement of Ms. Wilson's parental rights—or those of other similarly situated women—in accordance with Troxel v. Granville.[130]

This delineates what I mean by "a woman such as Ms. Wilson" for the purposes of overriding the presumption of legitimacy. The woman's spouse was not an intended parent or a biological parent, and the still-legally married couple is not a functional family—the woman's spouse is estranged and abusive. Meeting just one or two of the criteria is not sufficient to waive the presumption—it is necessary to confine the exception so that the presumption of legitimacy is applied where needed to protect families. There might be other narrowly defined circumstances in which the presumption should be waived, and exploration of such circumstances is a subject for further research.

## VI. NEW YORK COURTS SHOULD INTERPRET CURRENT STATUTES TO ENABLE WAIVER OF THE PRESUMPTION OF LEGITIMACY IN ADOPTION CASES THAT MEET CERTAIN CRITERIA

With existing laws in effect, in adoption cases that meet the above criteria, New York Courts should interpret DRL Section 111 so as to waive the presumption of legitimacy.[131] This judicial solution would allow courts to expeditiously begin resolving cases such as Ms. Wilson's in the best interests of functioning families. Yet, since judges have discretion in using a variety of factors to achieve equitable results in the best interests of

[130] Troxel v. Granville, 530 U.S. 57 (2000).

[131] N.Y. DOM. REL. LAW § 111 (McKinney 2016).

children, a legislative solution would provide more long-term certainty and stability. I propose implementing the judicial solution while advocating for legislative change. Since the legislative process can move slowly, the judicial solution would provide a stopgap measure.

Short term, when interpreting existing statutes, courts should determine that a mother's (and the child's biological father's if available) affidavit of parentage—ordinarily submitted with adoption petitions—is sufficient to prove parentage on its own when parentage is uncontested. There is no need for genetic testing, although, pursuant to the New York Family Court Act, courts can require genetic testing to establish paternity. "The court, on its own motion or motion of any party, when paternity is contested, shall order the mother, the child and the alleged father to submit to one or more genetic marker or DNA marker tests . . . ."[132] However, by implication, when a child's paternity is not contested, a court need not require such testing. This could be the case where a birth mother's husband has neither biological nor relationship ties to a child, is abusive, and the birth mother's affidavit gives clear and convincing evidence to rebut the marital presumption of legitimacy. In the example of David Spencer and Joshua Richardson's proposed legal adoption of John Michael Richardson, both biological parents, Ms. Wilson and Mr. Mathews, offer proof that Ms. Wilson's husband is not John's parent. In such cases—and even if a biological father's affidavit is unavailable—courts should accept that evidence as proof of parentage and waive the requirement for further proof.

## VII. THE NEW YORK LEGISLATURE SHOULD MODIFY ITS STATUTES TO ENABLE WAIVER OF THE PRESUMPTION OF LEGITIMACY IN CERTAIN ADOPTION CASES

Ultimately, the New York Legislature should modify DRL Section 111(1)(b) with regard to adoption proceedings meeting the criteria for waiver that this Note identifies. This will ensure that courts use specifically tailored statutory elements to decide cases such as Ms. Wilson's. Case outcomes are likely to be more predictable than with a judicial-interpretation solution, despite changes in the judiciary, or other factors that could influence decisions based on a new interpretation of the existing statute. The current statute reads: "Subject to the limitations hereinafter set forth consent to adoption shall be required as follows: . . . (b) Of the parents or surviving parent, whether adult or infant, of a child conceived or born in wedlock."[133]

[132] N.Y. FAMILY CT. ACT § 532 (McKinney 1976).

[133] N.Y. DOM. REL. LAW § 111 (McKinney 2016).

The current statute requires consent by "parents" to adoptions, including women's husbands, whether or not they have any relationship to the woman or the adoptive child. I propose that the legislature modify provision (1)(b) to set forth a limitation to its consent requirement excepting a biological mother's de jure spouse who is not the intended parent of the adoptive child, is not the child's biological father, and who is estranged from and abusive toward the mother. This modification would waive the presumption of legitimacy under the specified circumstances. I also propose that DRL Section 111(1)(b) incorporate requirements currently included in DRL Section 111(1)(d) and (e).[134] The existing DRL Section 111(1)(d) requires consent to the adoption of an out-of-wedlock child aged six months or older by a parent who has held himself out as the father of the adoptive child as specified in (1)(d). Provision (1)(e) specifies when consent of such fathers is required for out-of-wedlock children under the age of six months. I propose that the right to consent of a spouse such as Ms. Wilson's be evaluated using the same criteria by which an unwed father's right is evaluated. If a woman's de jure spouse made efforts to see, communicate with, or support the adoptive child for a period of six months in the time immediately preceding the child's adoptive placement, he is entitled to consent to the adoption.

The proposed new DRL Section 111(1)(b) follows. The language in provisions (b)(i) to (b)(iv) create my proposed exception to the marital presumption of legitimacy. The (b)(v) language is similar to the existing DRL Section 111(1)(d), with the exception of the italicized portions, which apply this provision to a married woman's spouse. The language in proposed provision (b)(vi) is the same as the existing DRL Section 111(1)(e), with the exception of the italicized portions, which apply the provision to a married woman's spouse. This new (1)(b) would allow courts to waive the marital presumption of legitimacy under circumstances such as Ms. Wilson's. It would also protect the right to consent of a de jure husband who is an adoptive child's biological father or who has held himself out as that child's father. The existing provisions DRL Section 111(1)(d) and (e) would still apply to unwed fathers. The proposed provision (1)(b) would read:

> [Consent will be required] (b) Of the father or child's mother's spouse, whether adult or infant, of a child conceived or born in wedlock, unless the child's mother's spouse: (i) did not plan the child's birth with or intend to parent the child together with the child's mother as certified by her; (ii) is not biologically related to the child as certified by the child's biological mother; (iii) was physically or psychologically abusive to the child's mother as certified by her; (iv) lived separately from the child's mother and had no

[134] *See* discussion *supra* Part IV(A).

> contact with her for at least one year before the child's birth; (v) did not openly live with the child for a period of six months within the one-year period immediately preceding the placement of the child for adoption or during such period openly hold himself out to be the father of such child or maintain substantial and continuous or repeated contact with the child as manifested by: the child's mother's spouse (1) making payment toward the support of the child of a fair and reasonable sum, according to his means, and either (2) visiting the child at least monthly when physically and financially able to do so and not prevented from doing so by the person or authorized agency having lawful custody of the child, or (3) having regular communication with the child or with the person or agency having the care or custody of the child, when physically and financially unable to visit the child or prevented from doing so by the person or authorized agency having lawful custody of the child. The subjective intent of the child's mother's spouse, whether expressed or otherwise, unsupported by evidence of acts specified in this paragraph manifesting such intent, shall not preclude a determination that the child's mother's spouse failed to maintain substantial and continuous or repeated contact with the child. In making such a determination, the court shall not require a showing of diligent efforts by any person or agency to encourage the child's mother's spouse to perform the acts specified in this paragraph. (vi) If the child was under the age of six months at the time of placement for adoption, consent of a child's mother's spouse is required only if such spouse (1) openly lived with the child or the child's mother for a continuous period of six months immediately preceding the placement of the child for adoption; and (2) openly held himself out to be the father of such child during such period; and (3) paid a fair and reasonable sum, in accordance with his means, for the medical, hospital and nursing expenses incurred in connection with the mother's pregnancy or with the birth of the child.

This would hold a putative father in the circumstances of Ms. Wilson's husband to the same legal standards an unmarried father would be required to meet. DRL Section 111(3)(a), "[n]otice of the proposed adoption shall be given to a person whose consent to adoption is required pursuant to subdivision one and who has not already provided such consent," would not then require notice to Ms. Wilson's husband, or to spouses in similar circumstances.[135] Such women could finalize their children's adoptions in the child's best interest without fear of harm at the hands of their husbands, in the most lawfully efficient manner available. The requirement to satisfy all five elements of the statute ((b)(i) – (iv) and either (v) or (vi), depending on the age of the child) would ensure that the presumption of legitimacy—essential under so many circumstances—is only waived when its application would likely cause real harm to a mother placing her child for adoption.

[135] *Id.*

## VIII. CONCLUSION

The presumption of legitimacy of a child born in wedlock is often essential for protecting children's welfare and parents' rights in both different-sex and same-sex families, but in certain narrowly defined adoption matters it can prolong legal proceedings, threaten families, and even endanger mothers and children. Under these circumstances, spending judicial resources to require the parties' rebuttal of the presumption beyond providing affidavits of parentage is not warranted. Under the circumstances this Note defines, the presumption of legitimacy should not apply. New York courts should interpret the current adoption statute accordingly. The New York Legislature should then amend its adoption statute to make the presumption inapplicable in those adoption cases. This would protect functional family units and parental rights, foster adoptive children's welfare, and enhance judicial efficiency.