

## Note

### Same-Sex Marriage and Disestablishing Parentage: Reconceptualizing Legal Parenthood Through Surrogacy

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Recently married, Anne and Andrew decide they want to have their first child. After multiple failed attempts, the couple learns that Andrew has a low sperm count, rendering him functionally infertile. Desiring a child that is genetically related to at least one of them, Anne and Andrew pursue alternative biological reproduction in lieu of adoption. They obtain sperm from an anonymous donor and Anne undergoes artificial insemination, resulting in a viable pregnancy. Shortly before the child's birth, however, the couple files for divorce. At this time, Andrew maintains that he is not the child's genetic father and, consequently, should not be responsible for the child upon the dissolution of the marriage. To the contrary, Anne indicates that notwithstanding biology, Andrew is equally the child's legal parent. Can Andrew successfully disestablish his parenthood?

Now, entertain instead an alternative iteration of the above factual scenario: Anne and Andrew are *Bill* and Andrew. Bill and Andrew, a married couple, decide to have a child. Because the couple is structurally infertile, they obtain an egg from an anonymous donor. The couple uses Bill's sperm to create a viable embryo and subsequently implants the embryo into the womb of a third-party gestational carrier. Shortly before the child's birth, however, the couple files for divorce. Can An-

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drew, being genetically unrelated to the child, disestablish his legal fatherhood? Does the answer differ because Bill and Andrew are not Anne and Andrew? What if they were Anne and Barbara instead?

Parenthood is quite easily determined when a married couple conceives a child through sexual reproduction. “The biological mother and father are the child’s legal parents, and marriage unites them in an enterprise of lifelong duration.”<sup>1</sup> However, family law has undergone dramatic changes in recent decades,<sup>2</sup> and the deviation from this historic unification of sex, reproduction, and marriage yields inherent uncertainty underlying the above scenarios. Today, the definition of parentage, and in turn “the determination of which adults receive legal recognition in children’s lives,” represents one of modern family law’s most contentious issues: “Not only are jurisdictions irreconcilably divided in their approach to parentage, decisions under settled law in a given county may not necessarily come out the same way.”<sup>3</sup>

Same-sex couples are uniquely situated in this family law transformation—not only through the advent of same-sex marriage, but also because they cannot procreate through sexual intercourse. Unprecedented advances in technology have increased the frequency of conception through assisted reproductive techniques<sup>4</sup>—and more specifically, surrogacy: when a woman carries and births a child for its intended parents.<sup>5</sup> In turn, surrogacy has increased the complexity of determining parenthood, and parentage laws have not kept pace with this technology.<sup>6</sup> Much akin to the fractured same-sex marriage

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1. June Carbone & Naomi Cahn, *Which Ties Bind? Redefining the Parent-Child Relationship in an Age of Genetic Certainty*, 11 WM. & MARY BILL RTS. J. 1011, 1017 (2003) [hereinafter *Which Ties Bind?*].

2. See *infra* Part I.A.2. See generally Theresa Glennon, *Somebody’s Child: Evaluating the Erosion of the Marital Presumption of Paternity*, 102 W. VA. L. REV. 547, 548–50 (2000) (discussing the rise in children born to unmarried mothers, the dissolution of marriages with children, and the weakening of the marital presumption of paternity).

3. June Carbone, *The Legal Definition of Parenthood: Uncertainty at the Core of Family Identity*, 65 LA. L. REV. 1295, 1295 (2005).

4. E.g., Anne R. Dana, Note, *The State of Surrogacy Laws: Determining Legal Parentage for Gay Fathers*, 18 DUKE J. GENDER L. & POL’Y 353, 353–54 (2011).

5. A surrogate may or may not have a genetic relation to the child she carried based on the type of surrogacy undertaken: traditional or gestational. “What sets gestational surrogacy apart from traditional surrogacy is that the woman who bears the child is not genetically related to the child.” *Id.* at 362.

6. See *id.*

landscape prior to *Obergefell v. Hodges*,<sup>7</sup> “[n]o uniformity exists among states concerning the legal relationships established through collaborative reproduction.”<sup>8</sup> This uncertainty stems from the dissociation of sex and reproduction, which represents a paradigmatic shift in society’s understanding of parentage. Same-sex assisted reproduction erodes the traditional mother-father framework, as well as mother-father duality, by requiring a third individual—not party to the marriage—to play an integral *biological* role in conception (albeit oftentimes with no intent to play a *functional* role as a parent). With more children conceived through alternative reproductive means and born into same-sex marriages, determining parentage proves “increasingly problematic and ripe for growing caseloads.”<sup>9</sup>

Moreover, same-sex marriage yields same-sex divorce, a concept and practice still evolving in the United States.<sup>10</sup> Traditional parentage frameworks were largely contested when divorce rates spiked amongst the heterosexual population during the latter-twentieth century. Previously, husbands would not have inquired into their paternity at divorce, as no confirmatory means then existed. Because the upsurge in divorce occurred at the same time as the advent of near-certain paternity testing, however, an unprecedented wave of presumed fathers—who thought (and held out) a child born during the marriage to be their own—sought to disestablish their parenthood by proving non-biological paternity at divorce.<sup>11</sup> Thus, while advocates and academics stress the importance of clear legal frameworks

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7. The Supreme Court decided the landmark marriage equality decision, *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015), during this Note’s publication. Nonetheless, jurisdictional discord persists around collaborative reproduction and legal parentage.

8. June Carbone & Naomi Cahn, *The Past, Present and Future of the Marital Presumption*, in THE INTERNATIONAL SURVEY OF FAMILY LAW 387, 394 (Bill Atkin & Fareda Banda eds., 2013) [hereinafter *The Past, Present and Future*].

9. Dana, *supra* note 4, at 357.

10. See generally Courtney G. Joslin, *Modernizing Divorce Jurisdiction: Same-Sex Couples and Minimum Contacts*, 91 B.U. L. REV. 1669, 1679 (2011) (outlining the challenge same-sex couples faced in meeting jurisdictional-based divorce residency requirements); Joseph William Singer, *Same Sex Marriage, Full Faith and Credit, and the Evasion of Obligation*, 1 STAN. J. C.R. & C.L. 1, 13–14 (2005) (identifying the geographic limitations of same-sex divorce pre-*Obergefell*).

11. See *infra* Part I.A.2; see, e.g., Jana Singer, *Marriage, Biology, and Paternity: The Case for Revitalizing the Marital Presumption*, 65 MD. L. REV. 246, 261 (2006).

to establish same-sex parentage,<sup>12</sup> its discussion within the context of a same-sex partner's attempt to disestablish parenthood proves equally pressing. As all states begin to recognize same-sex marriages, a subset of these marriages will not only inevitably result in same-sex divorce, but also the birth of children that will only be biologically related to, at most, one of their parents.<sup>13</sup>

This Note explores the currently indeterminate legal status of intended same-sex parents who are party to a surrogacy arrangement, with express concern regarding same-sex marriages that dissolve while a child is still in the womb. Same-sex couples, like infertile heterosexual couples, are different from fertile heterosexual couples in that they must intend a pregnancy for it to occur. Same-sex couples must therefore arrange for the conception of a child with the involvement of a third-party sperm donor, egg donor, and/or surrogate. This need for third-party involvement offers the opportunity to establish intended parentage in writing, and same-sex couples can also arrange for the severance of the parental status of third-party participants. State law ultimately determines the timing of such severance, with some doing so at the time of conception and others after a child's birth. It is possible, however, that a same-sex couple could arrange for the severance of the parental status of other parties, yet be unable to establish the parental status of the intended same-sex parents—namely, the non-biological partner—until after birth. In the period between the severance of the third party's parental status and the establishment of the intended parents' parental status, the marital relationship could end. At this time, the non-biological partner could attempt to disestablish any and all responsibility for the child, leaving the child with the support of only one of its intended parents at birth.

While the discussion focuses namely on the LGBT<sup>14</sup> community, this Note acknowledges that the same uncertainties and resultant concerns can potentially arise with heterosexual

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12. See Dana, *supra* note 4, at 373.

13. Cf. Tiffany L. Palmer, *The Winding Road to the Two-Dad Family: Issues Arising in Interstate Surrogacy for Gay Couples*, 8 RUTGERS J.L. & PUB. POL'Y 895, 916 (2011) ("There have been few reported cases of custody disputes between gay male partners who have co-parented a child through surrogacy, as compared with cases involving lesbian couples [so] embroiled . . .").

14. LGBT is an initialism referring to lesbian, gay, bisexual, and transgender.

marriages that dissolve mid-surrogacy arrangement.<sup>15</sup> Though states can deal with this scenario in a variety of ways, almost all states have used estoppel or intent to lock in an intended parent who participated in bringing about the conception of a child.<sup>16</sup> Same-sex couples, however, are uniquely situated within this family law quandary given the implicit heterosexism—the implicit social, legislative, and judicial preference for children having both a mother and a father<sup>17</sup>—that pervades social structures in the United States.<sup>18</sup> Accordingly, this Note’s proposed solutions are drafted to enhance legal certainty for same-sex couples procreating through surrogacy, but are also designed to uniformly apply to the heterosexual population.

Meaningful examination of this issue first requires an understanding of the basis for modern social perceptions of parenthood and their deficiencies as broadly applied to same-sex couples choosing to procreate through alternative reproductive means. Part I examines the evolution of legal parenthood, the transformation of the American family unit, and the frameworks now employed in heterosexual contested parentage cases. Next, Part II posits that laterally applying current parentage frameworks to procreative same-sex parents unduly allows a non-biological intended parent to disestablish future parenthood. In response, Part III proposes model surrogacy statutes, influenced by intent-based and labor-based parentage theories, which will better define the legal roles and responsibilities—both pre-conception and pre-birth—of intended parents and surrogates alike.

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15. *E.g.*, *In re Marriage of Buzzanca*, 72 Cal. Rptr. 2d 280 (Ct. App. 1998) (involving the legal parentage determination of a child conceived with donor egg and donor sperm and carried by a gestational surrogate whose intended parents’ heterosexual marriage ended mid-pregnancy).

16. See Interview with June Carbone, Robina Chair in Law, Sci., & Tech., Univ. of Minn. Law Sch., in Minneapolis, Minn. (Mar. 6, 2015).

17. Compare *In re Baby M*, 537 A.2d 1227 (N.J. 1988) (“There is nothing in our culture or society that even begins to suggest a fundamental right on the part of the father to the custody of the child as part of his right to procreate when opposed by the claim of the [natural] mother to the same child.”), with *A.G.R. v. D.R.H.*, No. FD-09-001838-07 (N.J. Super. Ct. Ch. Div. Dec. 23, 2009) (granting parental rights to a same-sex couple’s gestational carrier who had no genetic link to the children).

18. For a succinct overview of heterosexism and gender bias, see Dana, *supra* note 4, at 373–74.

## I. WHAT IT MEANS TO BE A PARENT: THEN AND NOW

Discussion of disestablishing same-sex parentage is inextricably linked to the foundational underpinnings of establishing traditional parentage, still deeply rooted in American society and law. To further illustrate the uncertainty around disestablishing same-sex parentage, this Part traces the evolution of family law and parentage. Section A describes the development of the marital presumption and its subsequent weakening alongside the decline of the traditional family unit. Section B then explains the current jurisdictional split as to the presumption's application given new societal perceptions and values around the meaning of "parentage." Lastly, Section C introduces the evolution of same-sex marriage, reproduction, and parenthood.

### A. DEFINING PARENTHOOD IN THE CONTEMPORARY UNITED STATES

In the United States today, no express legal construct imposes a lifetime of ostracism and economic hardship on children born out of wedlock. Even so, modern conceptions of parentage display vestiges of early common law when such illegitimacy resulted in severe social stigma. Cognizing contemporary notions of parenthood necessitates understanding not only its common law roots, but its swift evolution during the latter-twentieth century.

#### 1. The Evolution of the Marital Presumption and the American Family Unit

Influenced by Ancient Roman law, early English common law deemed a child born outside of marriage *filius nullius*: literally, no one's son.<sup>19</sup> Such a framework yielded dire consequences to bastard children. As the "son of nobody," bastardy subjected a child to discrimination "in all realms of life," and nullified the right to parental support—in turn severing the line of succession.<sup>20</sup> Hence developed "one of the most firmly-

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19. Glennon, *supra* note 2, at 553.

20. *Id.* at 563; see also Mikaela Shotwell, Note, *Won't Somebody Please Think of the Children?: Why Iowa Must Extend the Marital Presumption to Children Born to Married, Same-Sex Couples*, 15 J. GENDER RACE & JUST. 141, 143–44 (2012) (addressing the marital presumption as it applies to same-sex couples and their children under Iowa law).

established and persuasive precepts known in law”: the marital presumption of parenthood.<sup>21</sup>

Under English common law, the marital presumption served a twofold function. When a child was born into a marriage, the woman, having given birth as a function of biology, was presumed the child’s mother; likewise, the woman’s husband, by virtue of marriage to the mother, was presumed the child’s father.<sup>22</sup> This effectively framed parenthood biologically, but during an era wherein genetic certainty lay only with the mother (as no method existed to confirm a father’s genetic relation to a child).<sup>23</sup> Nonetheless, a child’s legitimacy filled “society’s need for stability and certainty in family relationships.”<sup>24</sup> The marital presumption thus restricted evidence “that might disprove a husband’s [biological] paternity . . . [and] call into question the child’s identity and inheritance,” thereby limiting any post-birth inquiry around illegitimacy and rendering the presumption of parenthood virtually irrebuttable.<sup>25</sup>

The marital presumption of parentage framework later crossed the Atlantic and was absorbed into early American law.<sup>26</sup> This absorption effectively imbedded the marital presumption within the United States’ sociocultural landscape, bolstering the cultural unification of sex, reproduction, and

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21. Rhonda Wasserman, *DOMA and the Happy Family: A Lesson in Irony*, 41 CAL. W. INT’L L.J. 275, 280 (2010).

22. *Id.* at 279.

23. See Glennon, *supra* note 2, at 555.

24. *Id.* at 563.

25. *Which Ties Bind?*, *supra* note 1, at 1019, 1050. *But see id.* at 1018 (noting the presumption was not *absolute*, but administered so as to avoid introducing facts at odds with irrefutability); *cf.* Glennon, *supra* note 2, at 562–63 (“The mother and presumed father could only rebut that presumption by proving that the husband did not have access to his wife during the crucial period of conception.”). The presumption went beyond establishing and ensuring legitimacy, however: the doctrine also implicitly reinforced a sociocultural stigma attached to nonmarital sexual relations and childrearing. See *Which Ties Bind?*, *supra* note 1, at 1018. In buttressing marriage’s societal function, the marital presumption created a system rooted in the number two, “channel[ing] childrearing into two parent families and keep[ing] it there.” *The Past, Present and Future*, *supra* note 8, at 387. Indeed, most states still refuse to recognize more than two legal parents for a child. See, e.g., Ann E. Kinsey, Comment, *A Modern King Solomon’s Dilemma: Why State Legislatures Should Give Courts the Discretion To Find that a Child Has More than Two Legal Parents*, 51 SAN DIEGO L. REV. 295, 297–98 (2014).

26. And its vestiges still run deep in American family law. See, e.g., *Lehr v. Robertson*, 463 U.S. 248, 257 (1983) (“[S]tate laws [still] almost universally express an appropriate preference for the formal family.”).

childrearing.<sup>27</sup> Marrying “until death do us part” and establishing a traditional household comprised of a husband, wife, and children became reinforced as an expected (and perhaps unquestioned) trajectory for the majority of Americans.<sup>28</sup> Indeed, this strong presumption applied in strict form in the United States through the mid-twentieth century.<sup>29</sup>

Beginning in the 1960s, however, the United States experienced revolutionary social change. The confluence of second-wave feminism, sexual liberation, and the availability of birth control yielded an unprecedented transformation of sex, marriage, and parenthood.<sup>30</sup> With sex severed from marriage, more births occurred out of wedlock, unraveling the strong tether between marriage and parenthood.<sup>31</sup> And as jurisdictions increasingly recognized no-fault divorce, marriages dissolved at a staggering rate.<sup>32</sup>

Thus, the prototypical traditional family unit, albeit expected in theory, proves exceptional in fact.<sup>33</sup> Whereas 72% of American adults were married in 1960, this figure decreased to 52% in 2008.<sup>34</sup> Likewise, down from 40% in 1970, only 20% of

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27. See *Which Ties Bind?*, *supra* note 1, at 1020.

28. See generally Brigid Schulte, *Unlike in the 1950s, There Is No “Typical” U.S. Family Today*, WASH. POST (Sept. 4, 2014), <http://www.washingtonpost.com/news/local/wp/2014/09/04/for-the-first-time-since-the-1950s-there-is-no-typical-u-s-family> (recognizing the predominance of the traditional breadwinner-homemaker families in the 1950s).

29. See Glennon, *supra* note 2, at 553–54.

30. See JANE F. GERHARD, *DESIRING REVOLUTION: SECOND-WAVE FEMINISM AND THE REWRITING OF AMERICAN SEXUAL THOUGHT, 1920 TO 1982*, at 1–50 (2001).

31. Between 1960 and 2008, the share of children born to unmarried mothers rose eightfold, from 5% to 41%. *The Decline of Marriage and Rise of New Families*, PEW RES. CTR. (Nov. 18, 2010), <http://www.pewsocialtrends.org/2010/11/18/the-decline-of-marriage-and-rise-of-new-families/2>.

32. During the same period, the share of American adults currently divorced or separated increased from 5% to 14%. *Id.*

33. See Deborah H. Wald, *The Parentage Puzzle: The Interplay Between Genetics, Procreative Intent, and Parental Conduct in Determining Legal Parentage*, 15 AM. U. J. GENDER SOC. POL'Y & L. 379, 381 (2007) (noting that the “model ‘traditional’ family” is neither the norm nor the majority); cf. David D. Meyer, *Parenthood in a Time of Transition: Tensions Between Legal, Biological, and Social Conceptions of Parenthood*, 54 AM. J. COMP. L. 125, 132 (2006) (describing today’s American domestic unit as a “crazy quilt of one-parent households, blended families, singles, unmarried partnerships, and same-sex unions” (internal quotations omitted)).

34. *The Decline of Marriage and Rise of New Families*, *supra* note 31.

American households today are comprised of married couples living with their own children.<sup>35</sup>

## 2. Rebutting the Once-Irrebuttable Presumption: A Rise in Contested Parentage at Divorce

Although illegitimacy once resulted in a life of social stigma and economic deprivation, the Supreme Court has recognized the “unfairness of punishing children for the circumstances of their conception.”<sup>36</sup> Though this benefits children born out of wedlock, this notion places children born into a dissolved marriage in a precarious position. With the social disadvantages of illegitimacy lessened, the strength of the marital presumption—designed to insulate society from the harms of bastardy—also has diminished in turn.<sup>37</sup>

Given higher rates of divorce, both law and society increasingly view former marital partners as “independent persons who owe each other nothing after divorce.”<sup>38</sup> Similarly, based on the notion that “a parent owes a duty of support only to his or her natural or legally adopted child,” a number of state courts hold that “men who are presumed to be fathers through marriage may challenge their paternity at the time of divorce.”<sup>39</sup> The net effect of a weaker presumption of parenthood, staggering divorce rates, and the advent of reliable paternity testing is a wave of presumed fathers—upon discovering they are not genetically related to at least one of their children—seeking to rebut the marital presumption and *disestablish* their paternity.<sup>40</sup>

The success of rebuttal varies with any given court’s view of the marital presumption’s underlying purpose. Challenges to the marital presumption are complex, resulting in a “doctrinal

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35. JONATHAN VESPA ET AL., U.S. CENSUS BUREAU, AMERICA’S FAMILIES AND LIVING ARRANGEMENTS 5 (2013), <http://www.census.gov/prod/2013pubs/p20-570.pdf>.

36. Susan Frelich Appleton, *Presuming Women: Revisiting the Presumption of Legitimacy in the Same-Sex Couples Era*, 86 B.U. L. REV. 227, 243–44 (2006).

37. See Singer, *supra* note 11, at 255.

38. Glennon, *supra* note 2, at 560.

39. *Id.* at 578.

40. See, e.g., NPA v. WBA, 380 S.E.2d 178 (Va. Ct. App. 1989). See generally Tamar Lewin, *In Genetic Testing for Paternity, Law Often Lags Behind Science*, N.Y. TIMES (Mar. 11, 2001), <http://www.nytimes.com/2001/03/11/us/in-genetic-testing-for-paternity-law-often-lags-behind-science.html> (“[T]he unseemly thing . . . is forcing a man . . . to assume financial responsibility for children . . . another man should be supporting.”).

chaos” of “dramatically different substantive and procedural law applied . . . in different states.”<sup>41</sup> For example, some jurisdictions view the presumption as a marital safeguard, and in the event of divorce, there no longer exists a “salvageable marriage to preserve.”<sup>42</sup> Such courts permit divorce to end the marital presumption, allowing a father to overcome his presumed parenthood by confirming non-paternity through genetic testing. In contrast, other courts “are [not] as openly dismissive of the marital presumption,” instead viewing the presumption as protecting reasonable expectations.<sup>43</sup> In such jurisdictions, equitable doctrines such as estoppel, laches, and the best interests of the child, are applied to prevent blanket disestablishment of parentage, viz. rendering once-legitimate children illegitimate en masse.<sup>44</sup>

In short, whereas the marital presumption once proved nearly ironclad,<sup>45</sup> “the destruction of the system that tied children to two married parents,” coupled with sophisticated genetic testing, effectively turned the presumption on its face.<sup>46</sup> Consequently, a new understanding of legal parentage has evolved alongside this starkly changing family landscape.

#### B. FUNCTION, BIOLOGY, OR MARRIAGE? JURISDICTIONAL DISCORD OVER REBUTTING THE PRESUMPTION

Marriage is an institution in decline. Compared with earlier eras in which the majority of marriages did not end in divorce and scientific knowledge did not enable near-certain ge-

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41. Glennon, *supra* note 2, at 566.

42. See Wasserman, *supra* note 21, at 282–83. See generally T.P.D. v. A.C.D., 981 P.2d 116 (Alaska 1999); Walter v. Gunter, 788 A.2d 609 (Md. 2002); Williams v. Williams, 843 So. 2d 720 (Miss. 2003) (en banc); Doran v. Doran, 820 A.2d 1279 (Pa. Super. Ct. 2003).

43. Singer, *supra* note 11, at 257.

44. See Glennon, *supra* note 2, at 566; see also Wasserman, *supra* note 21, at 283 (discussing courts’ best interest determinations). See generally Pedregon v. Pedregon, 132 Cal. Rptr. 2d 861 (Ct. App. 2003); Ferguson v. Winston, 996 P.2d 841 (Kan. Ct. App. 2000); S.R.D. v. T.L.B., 174 S.W.3d 502 (Ky. Ct. App. 2005); J.C. v. J.S., 826 A.2d 1 (Pa. Super Ct. 2003). Indeed, the Uniform Parentage Act imposes an equitable bar such that no individual can challenge a presumed father’s paternity more than two years after the child’s birth. UNIF. PARENTAGE ACT § 607 (UNIF. LAW COMM’N 2002). *But cf.* Glennon, *supra* note 2, at 570–71 (“Given the dramatic differences in judicial interpretations . . . this provision is unlikely to create uniformity in . . . challenges to the paternity of presumed fathers.”).

45. See Singer, *supra* note 11, at 248.

46. *Which Ties Bind?*, *supra* note 1, at 1021–22 (noting this “historically unprecedented issue”).

netic testing, marriage today proves a less-secure standard for measuring parentage.<sup>47</sup> The Supreme Court nonetheless upheld the presumption's constitutionality in the 1989 landmark plurality decision *Michael H. v. Gerald D.*<sup>48</sup> The extraordinary facts involved a child, Victoria, born into the marriage of Carole D. and Gerald D.<sup>49</sup> Unbeknownst to Gerald, who was listed on the birth certificate, Victoria was the biological daughter of Michael H., the family's neighbor.<sup>50</sup> Shortly after Victoria's birth, Carole informed Michael of his possible paternity.<sup>51</sup> Within five months, Carole and Gerald separated, and Carole allowed Michael to establish a relationship with his daughter.<sup>52</sup> But when Carole reconciled with Gerald, she severed the relationship between Michael and Victoria, and Michael sought to establish paternity and visitation rights.<sup>53</sup> The Supreme Court ultimately affirmed California's ruling: Gerald's presumed paternity, stemming from his marriage to Carole at the time of Victoria's birth, barred conferring any parental rights to Michael, notwithstanding his biological connection to and relationship with Victoria.<sup>54</sup>

This outcome is significant in that the Court refused to hold the marital presumption unconstitutional in order to protect and preserve the "integrity of the marital union."<sup>55</sup> But more importantly, in upholding the constitutionality of the presumption, the Court did not *require* the marital presumption's use.<sup>56</sup> Because *Michael H.* has not been overturned or successfully challenged, states are granted "wide latitude in constructing children's relationships to their parents."<sup>57</sup>

"All states continue to recognise [sic] least a *rebuttable* presumption that a child born within marriage is the child of the husband . . . ."<sup>58</sup> But when parentage is contested, viz. a pre-

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47. Cf. June Carbone, *Out of the Channel and into the Swamp: How Family Law Fails in a New Era of Class Division*, 39 HOFSTRA L. REV. 859, 881 (2011) [hereinafter *Out of the Channel*] (discussing the competing objectives of privileging marriage, biological paternity, and functional parenthood).

48. 491 U.S. 110 (1989) (plurality opinion).

49. *Id.* at 113.

50. *Id.* at 113–14.

51. *Id.* at 114.

52. *Id.*

53. *Id.* at 115.

54. *Id.* at 131.

55. *Id.*

56. *Id.* at 129–30.

57. *Which Ties Bind?*, *supra* note 1, at 1050.

58. *The Past, Present and Future*, *supra* note 8, at 390 (emphasis added).

sumed parent seeks disestablishment, many states have reshaped parentage laws to advance certain objectives in the modern family unit.<sup>59</sup> In turn, marriage—though a valid benchmark when presuming legal parentage—does not serve as the exclusive factor for *disestablishing* parentage. Disestablishment frameworks instead have evolved disparately amongst the states,<sup>60</sup> yielding a clear jurisdictional split. While some states continue to back marriage as the determinative consideration, other states look to a presumed parent's function or biology in adjudicating such parentage contests.<sup>61</sup>

### 1. Assuming Responsibility: The Functional Approach

In the realm of contested parentage, California represents the paradigmatic example of a state's judicial recognition of functional parenthood. The "true test of [parent]hood" in California is the "actual caretaking" role and an "investment in the relationship with the child."<sup>62</sup> Two primary motivating factors toward this doctrinal shift include "the conviction that two parents are better than one, and the functional assumption that the responsibilities of parenthood are more important than biology or marriage."<sup>63</sup> Within such a framework, the resolution of disputed parenthood is neither contingent upon establishing a genetic connection to the child, nor merely assigned through marriage to a biological parent.<sup>64</sup>

This is not to say that biology and marriage are unimportant or inconsequential social roles. Indeed, each is recognized as a foundational underpinning for establishing a parent-

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59. See Meyer, *supra* note 33, at 144 (noting the difficulty of balancing "respect for tradition" with the "changing realities of the American family").

60. See Glennon, *supra* note 2, at 552 (highlighting this "extraordinary lack of consistency").

61. See *Out of the Channel*, *supra* note 47; see also Melanie B. Jacobs, *Overcoming the Marital Presumption*, 50 FAM. CT. REV. 289, 289 (2012) (identifying the competing roles of biology, function, and intent in parentage determinations).

62. Glennon, *supra* note 2, at 589.

63. June Carbone, *From Partners to Parents Revisited: How Will Ideas of Partnership Influence the Emerging Definition of California Parenthood?*, 7 WHITTIER J. CHILD & FAM. ADVOC. 3, 8 (2007); see also *id.* at 15 (noting a judicial recognition of the emotional and financial stability derivative of the support of two parents).

64. Glennon, *supra* note 2, at 589; cf. Leslie Joan Harris, *The Basis for Legal Parentage and the Clash Between Custody and Child Support*, 42 IND. L. REV. 611, 612 (2009) ("Functioning as a parent is considered, if at all, only when the primary issue is custody or access to a child.").

child relationship.<sup>65</sup> But when an individual attempts to disestablish parenthood, or two presumed fathers compete for parentage as in *Michael H.*, California courts will not give undue weight to biology or marriage in its determination. Rather, the court will holistically weigh “considerations of policy and logic in determining the most appropriate parent[s]” to continue in a child’s life.<sup>66</sup>

## 2. Genetic Ties Prevail: The Biological Approach

“As biological certainty increases, and family forms multiply, the genetic link has assumed greater importance.”<sup>67</sup> Texas, so aligned with this approach, utilizes biological relationships as a “dominant basis” for settling parentage disputes.<sup>68</sup> The impetus of such a policy decision is, in part, that biological parents constitute the “readiest source of support” when compared against a functional parent, for whom the legal status with and obligations to a child are comparatively uncertain (and potentially transitory).<sup>69</sup> This approach also signifies a judicial response to *Michael H.*, which prevented the biological parent from asserting parental rights over the non-biological parent.<sup>70</sup>

A framework wherein biology prevails, though grounded in undisputed genetic certainty, produces unique (and inconsistent) results. For example, a parent, while raising a child as his own since birth, effectively becomes a “third party to the child” in the event genetic testing establishes that he is not the biological father—with no biological ties to the child, a subsequent divorce would confer “the right to simply walk away from parenting and child support.”<sup>71</sup> Moreover, a contested parentage dispute, such as in *Michael H.*, would permit an unmarried biological father to establish legal parentage of a child born into a marriage “over the objections of the mother’s husband . . . even when that means extinguishing a substantial pre-existing

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65. See Glennon, *supra* note 2, at 589. Under such a functional approach, marriage still serves as a presumption that a spouse has assumed a parental role, and biology still factors when there is no presumed second parent fulfilling a child’s need.

66. See Meyer, *supra* note 33, at 139 (internal quotations omitted); see, e.g., *In re Nicholas H.*, 46 P.3d 932, 937 (Cal. 2002).

67. *Which Ties Bind?*, *supra* note 1, at 1024; see also Harris, *supra* note 64 (“[B]iological parenthood is usually controlling when the issue is liability for child support.”).

68. Glennon, *supra* note 2, at 588.

69. See *Which Ties Bind?*, *supra* note 1, at 1024–25.

70. E.g., *In re J.W.T.*, 872 S.W.2d 189, 198 (Tex. 1994).

71. Glennon, *supra* note 2, at 588.

parent-child bond.”<sup>72</sup>

### 3. Marriage as Sacrosanct: The Marital Approach

Lastly, some states such as Utah continue to treat parenthood and marriage as non-severable. Pursuant to this framework, contested parentage disputes are resolved not by holistically weighing who would best fulfill a parental role or who has established a biological relationship to the child; the individual married to the mother at the time of birth is favored regardless of the foregoing considerations.<sup>73</sup> The primary goal underlying this clear preference is to preserve family integrity by distilling a child’s best interests to birth within a marriage.<sup>74</sup> In other words, “[t]he legal commitment of marriage to the child’s mother would form the basis of the opportunity to parent as well as the *responsibility* to do so.”<sup>75</sup>

A parent’s ability to disestablish parentage upon establishing non-paternity proves exceedingly difficult when parent-child relationships are formed through a marriage.<sup>76</sup> Indeed, in the event of a paternity dispute similar to *Michael H.*, the goal of preserving the family unit will trump an unmarried biological father’s claim to a relationship with a biological child.<sup>77</sup> Establishing a judicial commitment to preserving marriage necessarily will “foreclose[] the possibility of the child having a relationship with her or his biological and functional father . . . even if that is not a result that matches the child’s best interests.”<sup>78</sup>

## C. THE MODERN FAMILY LANDSCAPE: SAME-SEX MARRIAGE AND CO-PARENTAGE

Since the 1960s, the United States has experienced a breakdown of the traditional family.<sup>79</sup> But juxtaposed against this institutional decline is the rise of same-sex marriage, which has gained significant support and momentum.<sup>80</sup> This

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72. Meyer, *supra* note 33, at 138–39.

73. See Jacobs, *supra* note 61, at 291.

74. Cf. *Which Ties Bind?*, *supra* note 1, at 1016 (“Some legislatures equate children’s well-being with the existence of a two-parent family.”).

75. Glennon, *supra* note 2, at 589 (emphasis added).

76. See, e.g., *Pearson v. Pearson*, 2008 UT 24, 182 P.3d 353, 354, 359.

77. See Jacobs, *supra* note 61, at 291.

78. *Id.* at 290–91.

79. See *supra* notes 30–35 and accompanying text.

80. Whereas in 2001, “Americans opposed same-sex marriage by a 57% to 35% margin,” 55% of Americans now “support same-sex marriage, compared

unparalleled development has further altered traditional notions around the American family and marriage landscapes. Before the Supreme Court decided *Obergefell* in June 2015,<sup>81</sup> thirty-seven states and the District of Columbia had legalized same-sex marriage, with increasing numbers of children growing up within such unions.<sup>82</sup>

When a state sanctions same-sex marriages, “these new family units typically are deemed equal to, or the same as, longstanding opposite sex marriages.”<sup>83</sup> Though a portion of these children will be adopted, several will be born into a same-sex marriage through productive means.<sup>84</sup> However, two genetic parents are required to conceive a child—one providing sperm and the other an ovum. Same-sex couples lack one of these biological components, meaning they necessarily cannot conceive their own biological children without third-party contribution of the missing reproductive cell.<sup>85</sup> Thus, because same-sex couples “simply cannot themselves produce children through intrafamily [sic] intercourse, as can opposite sex couples,” “equality and sameness are impossible.”<sup>86</sup>

In short, centuries of longstanding precepts of parenthood quickly evolved in response to paradigmatic shifts in family law during the twentieth century. With the emergence of same-sex marriage and extraordinary alternative avenues to biological reproduction, continued application of modern family law doctrine will be inadequate to meet the demands of contemporary families. As with the breakdown of the traditional family unit,

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with 39% who oppose it.” *Changing Attitudes on Gay Marriage*, PEW RES. CTR. (July 29, 2015), <http://www.pewforum.org/2015/07/29/graphics-slideshow-changing-attitudes-on-gay-marriage>.

81. The Supreme Court decreed nationwide marriage equality during this Note’s publication. *See supra* note 7.

82. Of the approximately 783,100 same-sex households in the United States, 334,829 are now legally married. *See* U.S. CENSUS BUREAU, CHARACTERISTICS OF SAME-SEX COUPLE HOUSEHOLDS: 2014 (2014), <http://www.census.gov/hhes/samesex/data/acs.html> [hereinafter U.S. CENSUS BUREAU 2014] (select link to “XLSX” document to download and view).

83. Jeffrey A. Parness & Zachary Townsend, *Procreative Sex and Same Sex Parents*, 13 GEO. J. GENDER & L. 591, 592 (2012).

84. Within the population of same-sex married couples, 12.1% live with their own biological children, and about 17.3% of *all* same-sex couples have children in their household. *See* U.S. CENSUS BUREAU 2014, *supra* note 82.

85. Albeit beyond this Note’s scope, the only conceivable exception is a transgendered individual who preserves her or his ova or sperm before transitioning to the other gender and, subsequent to transition, utilizes assisted reproductive technology to reproduce with a person of the same sex.

86. Parness & Townsend, *supra* note 83.

what it means to be a parent will require further social reconceptualization.

## II. LATERAL APPLICATION OF EXISTING PARENTAGE FRAMEWORKS FAIL PROCREATIVE SAME-SEX COUPLES AND THEIR CHILDREN

The LGBT community has gained remarkable social acceptance in the United States.<sup>87</sup> Notwithstanding the momentum reshaping marriage laws across the country, “the law still lags behind when it comes to protecting the family relationships these individuals build . . . as the legal system has been slow to recognize families that do not fit the traditional heterogeneous structure.”<sup>88</sup> New technology creates extra uncertainty for LGBT family structures, for in lieu of adoption, “many LGBT individuals and couples seek to build their families through [assisted reproductive technology (ART)], so that at least one partner in the relationship has a genetic relationship to the resulting child.”<sup>89</sup>

Given this dearth of legal certainty and protection, this Part posits that laterally applying current parentage frameworks to procreative same-sex parents unduly allows a non-biological intended parent to disestablish parenthood of a child still in utero. Section A explores why applying the marital presumption to instances of ART, albeit important, proves inade-

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87. Compare Bruce Drake, *As More Americans Have Contacts with Gays and Lesbians, Social Acceptance Rises*, PEW RES. CTR. (June 18, 2013), <http://www.pewresearch.org/fact-tank/2013/06/18/as-more-americans-have-contacts-with-gays-and-lesbians-social-acceptance-rises> (noting that “68% of those who know a lot of gays and lesbians” say they support same-sex marriage), and Lydia Saad, *U.S. Acceptance of Gay/Lesbian Relations Is the New Normal*, GALLUP (May 14, 2012), <http://www.gallup.com/poll/154634/acceptance-gay-lesbian-relations-new-normal.aspx> (noting the increase in the percentage of American adults who consider gay and lesbian relations morally acceptable from 38% in 2002 to 56% in 2011), with Lila Shapiro, *LGBT Americans Feel Growing Acceptance, Lingering Discrimination, Survey Finds*, HUFFINGTON POST (June 13, 2013), [http://www.huffingtonpost.com/2013/06/13/lgbt-americans-survey\\_n\\_3437253.html](http://www.huffingtonpost.com/2013/06/13/lgbt-americans-survey_n_3437253.html) (describing a survey wherein 53% of LGBT adults said there continues to be a lot of discrimination against LGBT people), and Mackenzie Yang, *LGBT Americans Feel More Accepted, but Still Claim Discrimination*, TIME (June 13, 2013), <http://newsfeed.time.com/2013/06/13/lgbt-americans-feel-more-accepted-but-still-claim-discrimination> (listing the various ways in which LGBT adults have faced discrimination).

88. Dana, *supra* note 4, at 373. This is likely attributable, in part, to implicit heterosexism: a generalized “institutional discomfort” with recognizing two mothers or two fathers for a child, as well as “judicial bias” reflecting a partiality toward heterosexual procreation. *See id.* at 353, 375.

89. Palmer, *supra* note 13, at 896.

quate. Section B analyzes how current disestablishment frameworks fail as applied to procreative methods of same-sex parents—specifically, surrogacy. Finally, Section C examines alternative parentage frameworks purported by scholars that will better support and define the legal status of same-sex parents. This broad examination of the shortcomings of current contested parentage frameworks as applied to procreative same-sex couples will enable discussion around reconciling and resolving the indeterminate legal status of intended same-sex parents who are party to a surrogacy arrangement.

#### A. APPLYING THE MARITAL PRESUMPTION IS INADEQUATE FOR SAME-SEX PARENTS

With the rise of same-sex marriage, several states have begun expanding the marital presumption to children born into same-sex marriages.<sup>90</sup> This proves pivotal in achieving stability and legitimacy for these family units: “To the extent that a generalized preference for two parents joined by a legal relationship explains the presumption,” applying the presumption to same-sex parents helps to realize this goal.<sup>91</sup> The biological realities of same-sex procreation nonetheless frustrate lateral applicability of the marital presumption to surrogacy agreements.

Amongst heterosexual couples, pregnancy may occur accidentally, and further still, may occur extramaritally. Absent confirmatory paternity testing, a husband may not even be aware of his potential non-paternity at the time of conception. Accordingly, the presumption exists to unify reproduction and childrearing to *sex within the marriage*—in turn creating legal parenthood in the father by presuming a child’s biological legitimacy.<sup>92</sup> Though childbirth once resulted exclusively from heterosexual intercourse, modern technology facilitates reproduction notwithstanding functional and structural infertility.<sup>93</sup>

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90. See *The Past, Present and Future*, *supra* note 8, at 397.

91. Appleton, *supra* note 36, at 245. “Indeed, gay marriage advocates often invoke protection of the relationship between a child and both of her same-sex parents as a reason for allowing same-sex couples to marry.” Nancy D. Polikoff, *A Mother Should Not Have To Adopt Her Own Child: Parentage Laws for Children of Lesbian Couples in the Twenty-First Century*, 5 STAN. J. C.R. & C.L. 201, 247 (2009).

92. See Dara E. Purvis, *The Origin of Parental Rights: Labor, Intent, and Fathers*, 41 FLA. ST. U. L. REV. 645, 662 (2014) (“Historically, the marital presumption codified an assumed biological link.”); see also *supra* notes 19–35 and accompanying text.

93. Functional infertility occurs when an individual cannot reproduce

Consequently, lesbian and gay couples—though structurally infertile—can utilize various assisted reproductive techniques to procreate.<sup>94</sup>

As a result, “same-sex couples do not conceive children by accident.”<sup>95</sup> For lesbian couples, “both women know from the moment of pregnancy that the partner is not the child’s biological parent.”<sup>96</sup> Likewise for gay couples, only one of the men can fertilize the egg to be utilized in surrogacy. When same-sex couples procreate biologically, this not only circumvents sex within the marriage, but also necessarily inhibits biological connection for at least one intended parent from the outset.<sup>97</sup> The inherent impossibility of genetic relation to at least one intended parent contravenes the underlying purpose of the marital presumption, rendering its application to same-sex couples a biological fallacy.<sup>98</sup>

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with her or his partner for medical reasons, such as unviable ova or sperm, whereas structural infertility “applies to the situation of individuals who are single or those who have a partner of the same sex, and therefore require another party’s biological assistance to reproduce.” Dana, *supra* note 4, at 359.

94. For lesbian same-sex couples, each partner possesses not only ova, but also a womb. As a result, “artificial insemination-based arrangements, where one partner is inseminated with donor sperm and the biological mother and her partner co-parent the child, are often feasible and inexpensive.” Palmer, *supra* note 13, at 898. Nonetheless, to ensure a physical connection between the child and each partner, lesbians may elect *in vitro* fertilization, removing ova from one partner (the biological mother), inseminating them with donor sperm, and implanting them in the other partner (the gestational mother). See, e.g., K.M. v. E.G., 117 P.3d 673, 675–76 (Cal. 2005). Lesbian couples accordingly need not turn to surrogacy to conceive a child. But in the event neither partner can carry a child to term the couple may seek donor sperm and contract for a surrogate. In contrast, “[g]ay male couples face an obvious problem—neither individual has the means to carry a child.” Palmer, *supra* note 13, at 898 (emphasis added). Lacking ova and a womb to carry the child, the only way to conceive a child is through surrogacy arrangements. See Dana, *supra* note 4, at 371–72. Unlike lesbian couples, technology does not currently permit both gay partners to have a genetic or physical connection to the child. They must either artificially inseminate a traditional surrogate with one partner’s sperm, or turn to gestational surrogacy, for which the couple obtains donated ova, creates an embryo with one partner’s sperm, and implants the fertilized egg into a gestational carrier. Cf. Palmer, *supra* note 13, at 896–97.

95. Palmer, *supra* note 13, at 896. However, one of the partners independently can accidentally conceive a child in the event of a heterosexual extramarital affair.

96. Polikoff, *supra* note 91, at 249.

97. See Dana, *supra* note 4, at 363.

98. Biological fallacy aside, the marital presumption should nevertheless apply equally to same-sex couples, insofar as one of the presumption’s purposes is to “lock in” two parents who can assume responsibility for a child. See Wasserman, *supra* note 21, at 289 (“As a normative matter . . . the marital presumption of parentage should apply to children born during a same-sex

Notwithstanding this fallacy, several states now expand the marital presumption to children born into same-sex marriages.<sup>99</sup> This represents a positive trend in family law in theory, for the presumption's equal application helps to realize stability and legitimacy for these family units. However, such presumptive parentage, as applied to heterosexual procreative parents, in fact yields uncertainty as to the status of the non-biological intended parent. Indeed, lateral application of the marital presumption to same-sex parenthood displays inadequacies unique to surrogacy arrangements, necessitating further statutory reform to define legal parentage for this arising reproductive population.<sup>100</sup>

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marriage. Children of lesbian and gay parents benefit from having two legal parents (especially two legal parents who are obligated to provide financial support).”). Indeed, “even in the face of the ability to determine biological connection to a virtual certainty[,] . . . [w]e do not do genetic testing of every child born to a married woman to determine if that child is the biological child of her husband, although it would be easy to do so.” Polikoff, *supra* note 91, at 212. Instead, marriage still holds an esteemed role in parentage determinations. A husband, up to the point of a parentage contest, receives the status of presumed legal father by virtue of marriage—and marriage alone—to the birth mother. “The presumption can be challenged by specified parties on specified grounds, but a husband does not have to prove his fertility and a history of sexual intercourse with his wife to show the possibility of biological connection . . . [in order to] get the presumption . . .” *Id.* at 216 (emphasis omitted). This continued practice intimates that, with regard to legal parentage, marriage retains social weight that has yet to be wholly extinguished by biology. Consequently, so far as state-sanctioned same-sex marriages are to be viewed in legal parity to longstanding heterosexual marriages, an intended non-biological parent should similarly receive presumed legal parentage by virtue of marriage—and marriage alone—to her or his same-sex partner who will serve as the intended biological parent. In fact, marriage often serves as an avenue to parenthood for heterosexual couples conceiving through assisted reproduction. “For a married woman who gives birth to a child conceived using an anonymous sperm donor, the law will recognize her husband as the father of the child.” Palmer, *supra* note 13, at 907. This should theoretically apply to same-sex parents as well.

99. See *supra* notes 90–91 and accompanying text.

100. Before publication, this Note originally highlighted another area of concern necessitating further statutory reform, cross-jurisdictional recognition. The U.S. Constitution states that “Full Faith and Credit shall be given in each State to the public Acts, Records, and judicial Proceedings of every other State.” U.S. CONST. art. 4, § 1, cl. 1. Because states hold an interest in their citizens’ family units, however, states need not recognize an extraterritorial marriage should it directly conflict with local values and customs reflected in the state’s statutes and constitution. See Mark Strasser, *Judicial Good Faith and the Baehr Essentials: On Giving Credit Where It’s Due*, 28 RUTGERS L.J. 313, 334–35 (1997). The then-surviving section of the Defense of Marriage Act (DOMA) codified this public policy exception as federal law: that no state is required to recognize same-sex relationships granted by other states in spite of the full faith and credit clause. 28 U.S.C. § 1738C (2012). Thus, states needed

When compared with artificial insemination, surrogacy proves problematic largely due to the visibility of the third party's biological role in the reproduction process. When a woman's partner (either woman or man) consents to her impregnation by a third party's sperm, the donor's active role ends within seconds, rendering the donor "essentially invisible."<sup>101</sup> Because only the intended parents are present between conception and birth, the woman's partner more easily receives the presumption. In contrast, when a same-sex couple procreates through surrogacy, third-party anonymity is impossible given a surrogate's active nine-month involvement in the reproduction process. A number of states in fact recognize a surrogate mother as a legal parent absent a post-birth adoption that transfers parentage to another adult.<sup>102</sup> As with artificial insemination, the

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not "articulate a sufficiently compelling public policy against recognition of same-sex marriages, nor . . . assert a significant interest in the marital status of the couple in order to deny recognition of extraterritorial same-sex marriage." Julie L. B. Johnson, *The Meaning of "General Laws": The Extent of Congress's Power Under the Full Faith and Credit Clause and the Constitutionality of the Defense of Marriage Act*, 145 U. PA. L. REV. 1611, 1634 (1997). Because not all states recognized same-sex marriage, this "lack of a court judgment . . . render[ed] presumptive parenthood deriving from the status of the couple vulnerable to challenge in other jurisdictions." Polikoff, *supra* note 91, at 216. As a result, if a married same-sex couple, comprised of one biological parent and one presumed parent, moved to a state that did not recognize their marriage, there no longer existed a marriage to which the presumption of parenthood could attach—effectively revoking any status the non-biological parent once held toward the child. To ensure continued presumptive parentage of the non-biological partner, a mere presumption, without more, effectively locked same-sex couples to living exclusively in states that will recognize their marriage. *See, e.g.*, Wasserman, *supra* note 21, at 303 ("When a heterosexual couple marries, the partners . . . strengthen their legal ties to their children. It is deeply ironic, then, that when a gay and lesbian couple makes the same choice—to marry—DOMA threatens, rather than strengthens, any parent-child relationship that derives from the marriage."); *cf.* Palmer, *supra* note 13, at 907 ("[L]egislative restrictions on the recognition of same-sex marriage mean that same-sex couples—even those legally married in a state that allows same-sex marriage—cannot rely upon marital presumptions to confer parental rights.").

101. Dana, *supra* note 4, at 381.

102. Pursuant to traditional surrogacy arrangements where the surrogate is the child's genetic mother, almost all states recognize the surrogate as the legal parent; a minority of states also recognize gestational carriers, notwithstanding no genetic relation, as the legal parent absent a post-birth adoption. Interview with June Carbone, *supra* note 16. *But see* WIS. STAT. §§ 69.14, 891.40 (2009) (codifying both a surrogate's legal parenthood and a marital presumption of fatherhood in her husband); Thomas J. Walsh, *Viewpoint: Wisconsin's Undeveloped Surrogacy Law*, 85 WIS. LAW. (2012), <http://www.wisbar.org/newspublications/wisconsinlawyer/pages/article.aspx?Volume=85&Issue=3&ArticleID=2445> ("[A] woman desiring to be a surrogate for a sperm donor

law *theoretically* should recognize a non-biological parent who consents to her or his partner contributing genetic material to a surrogate based on intent to parent.<sup>103</sup> The problem is that some jurisdictions are opposed to surrogacy in principle, and more are concerned about surrogate exploitation.<sup>104</sup> With only one of the intended parents and a third party contributing important biological roles, there is greater hesitance to automatically presume parenthood for the non-biological—albeit intended—parent: “[A] third party is always present to assert a competing claim of [biological] parentage.”<sup>105</sup>

In spite of the above shortcomings, when a same-sex couple chooses to procreate through ART, presumptive parenthood should apply to the non-biological intended parent by virtue of marriage—as it has for centuries. This lateral application will help to realize society’s desire to channel children into two-parent families. Nonetheless, presuming parentage will inevitably result in presumption rebuttals at the time of divorce. Just as the law struggled with a wave of presumed fathers seeking to disestablish parenthood upon the advent of near-certain paternity testing, there exists a void for how to manage non-biological parents seeking to disestablish future parenthood vesting through surrogacy arrangements.

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and using her own egg may have problems legally separating herself from the child. A parentage action would also need to be filed in a situation in which the child was fertilized in vitro and the surrogate mother is not biologically related to the child.”).

103. Lesbian same-sex couples may need to pursue a surrogacy arrangement for reasons of functional infertility. But the biological reality is that whereas many lesbian couples can procreate through artificial insemination, not having a womb *requires* gay same-sex couples to seek a surrogate. Thus, while lesbian parents experience difficulties with establishing parentage, the law disproportionately impacts gay parents, as they cannot exploit presumption loopholes currently available through artificial insemination. See Appleton, *supra* note 36, at 264–65. Indeed, due to the surrogate’s visibility, the law has “never applied the presumption rule to homosexual male couples.” Dana, *supra* note 4, at 381.

104. See Interview with June Carbone, *supra* note 16.

105. Dana, *supra* note 4, at 378. Indeed, “if a married man impregnates a woman who is not his wife, the law contains no presumption that overrides the biological mother’s status and presumes the child to be that of the biological father’s wife.” Appleton, *supra* note 36, at 261 (quoting *In re Opinion of the Justices to the Senate*, 802 N.E.2d 565, 577 n.3 (Mass. 2004) (Cordy, J., dissenting)).

B. THE MARITAL PRESUMPTION, AS APPLIED TO SURROGACY,  
CREATES AN UNDUE UNCERTAINTY FOR REBUTTING THE  
PRESUMPTION WHILE A CHILD IS IN UTERO

With the rise of surrogacy, the judicial system experienced an unforeseen onslaught of contested parentage cases, wherein surrogates sought to trump the parental rights of the child's intended parents in an effort to establish their own.<sup>106</sup> "[I]t is a sad, but real, possibility that future challenges to the validity of . . . parental rights to a child conceived through surrogacy will not be brought by the surrogates, but instead, by one member of a couple during a separation."<sup>107</sup> It is likewise a sad, but real, possibility that these challenges will occur while the child is still in utero.<sup>108</sup> Whereas the marital presumption should—in theory—apply equally, the presumption of parenthood “does not adequately address the new legal issues created by surrogacy,”<sup>109</sup> for there exists a “lack of statutory clarity on when . . . and on what basis the parentage presumption can be *rebutted*.”<sup>110</sup>

When a woman conceives through heterosexual procreative sexual intercourse, the woman who carries the child, by virtue of biology, has undisputed genetic relation to her child. Lest there be a void between the birth and the assumption of parental status, the mother becomes her child's legal parent. And by way of the marital presumption, biological legitimacy, namely genetic relation to the husband, is presumed.<sup>111</sup> Because presumed fathers sought to rebut the presumption well before society comprehended the dawn of same-sex marriage and assisted reproduction, disestablishment frameworks initially

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106. Most contested cases involve individuals entering private surrogacy agreements (especially with relatives and friends), rather than through clinics. See, e.g., *Johnson v. Calvert*, 851 P.2d 776 (Cal. 1993); *In re Baby M*, 537 A.2d 1227 (N.J. 1988); *A.G.R. v. D.R.H.*, No. FD-09-001838-07 (N.J. Super. Ct. Ch. Div. Dec. 23, 2009).

107. Palmer, *supra* note 13.

108. See, e.g., *In re Marriage of Buzzanca*, 72 Cal. Rptr. 2d 280 (Ct. App. 1998). Here, a heterosexual couple contracted for a surrogate, but divorced while the child was still in utero. Though the intended mother indicated that there were children from the marriage, the intended father maintained that he would not be held legally liable for child support on two grounds: (1) that the child was not genetically his; and (2) that the child in utero was being gestated by a third party.

109. Dana, *supra* note 4, at 381.

110. Polikoff, *supra* note 91, at 225 (emphasis added).

111. See *supra* notes 22–29 and accompanying text.

developed in the realm of traditional procreative sex.<sup>112</sup> Under these frameworks, the child's mother served as the only biological constant, and a contested parentage dispute arose with courts evaluating claims by one presumed father—and possibly one biological father.

Procreation through surrogacy frustrates this traditional framework for rebutting the marital presumption.<sup>113</sup> With procreative sex, a presumed parent seeks to disestablish parenthood based upon *discovered* non-paternity.<sup>114</sup> Contrarily, a presumed non-biological parent knows from the outset that she or he will intend to parent and be responsible for a child bearing no genetic relation to her or him: biology constitutes a known variable from the *moment of conception* pursuant to a surrogacy arrangement.<sup>115</sup> “If such a presumption could be rebutted by anyone at any time on the basis of lack of biological connection between the [parent] and the child, then the presumption would be meaningless for a [same-sex] couple.”<sup>116</sup> In other words, a non-biological parent would *always* be able to disestablish parentage, severing any liability for future support.<sup>117</sup> However, when states extend the marital presumption to same-sex parents, frameworks tend not to delineate clearly when biology will trump a presumption vesting in the context of surrogacy.<sup>118</sup>

Furthermore, surrogacy frustrates rebutting the presumption by pushing centuries-old conceptions of biology and motherhood to new limits. A surrogate requires societal reconceptualization of a woman who carries and births a child as *not* the

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112. See *supra* notes 38–44 and accompanying text.

113. Cf. Appleton, *supra* note 36, at 261 (noting that “[a]pplying these concepts to same-sex couples results in some troubling anomalies”) (quoting *In re Opinion of the Justices to the Senate*, 802 N.E.2d 565, 577 n.3 (Mass. 2004) (Cordy, J., dissenting)).

114. With the ease and accessibility of genetic testing, “courts and legislatures have moved to allow men to discard their status as fathers” when they “feel victimized by an obligation to support a child born of their wives’ infidelity” upon discovering their genetic non-paternity. Meyer, *supra* note 33, at 138.

115. This does not apply to gay men who deliberately mix their sperm prior to insemination. For purposes of discussion, however, this Note presumes the couple has identified which individual will contribute sperm.

116. Polikoff, *supra* note 91, at 248.

117. Cf. Meyer, *supra* note 33, at 137–38 (noting that given the “ease with which genetic parentage can now be determined,” genetics are experiencing a “resurgence in the law governing ‘disestablishment’ of paternity”).

118. Cf. Polikoff, *supra* note 91, at 255 (arguing that states “need to revisit their parentage statutes and make an explicit decision about when biology will be permitted to trump the child’s intact family unit”).

mother of that child.<sup>119</sup> Because the surrogate bears the child on behalf of the intended parents, she enters into a contract specifying that she will not assume the role of mother after the child's birth.<sup>120</sup> In the context of lesbian surrogacy arrangements, this instead requires "having *another* woman take on that role."<sup>121</sup> For gay couples, this arrangement "challenge[s] societal norms even further by creating a family where *no one* is the [legal] mother of the child."<sup>122</sup> Thus, when a non-biological intended parent seeks to rebut the presumption and disestablish parenthood, the formula changes. There are instead three parties, comprised of either: two intended mothers—one biological and one non-biological—and a birth mother; or, two intended fathers—one biological and one non-biological—and a birth mother.

Whereas frameworks to rebut the presumption and disestablish parenthood evolved in the context of heterosexual procreation, same-sex marriage and procreation through surrogacy inherently challenges the underlying traditional and societal conceptions of biology and motherhood. Should a non-biological intended parent seek to disestablish parenthood before a child is born to a surrogate, the parties must rely on a court's determination—employing current presumption and disestablishment frameworks—absent a state statute addressing surrogacy. Most states, however, remain "simply silent on parentage determinations in situations involving surrogacy arrangements."<sup>123</sup> As a result, there is an "unacceptable level of uncertainty"<sup>124</sup> around how such challenges will be resolved, necessitating reconceptualization of how to define legal parentage stemming from surrogacy.

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119. See Palmer, *supra* note 13, at 899.

120. See *id.* at 902.

121. *Id.* at 899–900 (emphasis added) (noting further that society prefers this outcome to gay male surrogacy arrangements, for at least "*someone* is the mother of the child").

122. *Id.*; see also Dana, *supra* note 4, at 363, 377 ("If the intended parents are homosexual, this only compounds the difficulty of determining parentage because having two fathers conflicts with traditional notions of family formation . . . . Without another woman to step in to be the child's mother, a surrogate will not be viewed as a 'surrogate uterus; she [will be] the mother.'").

123. Dana, *supra* note 4, at 369.

124. Polikoff, *supra* note 91, at 225–26.

C. SCHOLARS AND COURTS ALIKE ADVOCATE FOR REFRAMING MODERN PARENTAGE DOCTRINE

Traditional conceptions of family law as they have existed for centuries do not translate into a society experiencing same-sex marriage and parenthood through surrogacy. Family law scholars argue that with most courts making parentage decisions based on marriage and biology, the continued use of the marital presumption for same-sex parents—especially in contested surrogacy agreements—will fail to realize and protect children’s best interests.<sup>125</sup> As explained by June Carbone and Naomi Cahn:

With the changing conceptions of the family, we must face the issue of how society ensures children’s well-being, and whether we should continue to police family structure or become more willing to focus attention on children’s individual needs . . . .

. . . . The issue for children therefore is to determine what set of relationships between the adults is most likely to promote children’s well-being and how to encourage those relationships in a modern society.<sup>126</sup>

Indeed, the law “cannot protect all children from abandonment and conflict created by their parents, biological or social.”<sup>127</sup> But given “current legal chaos and uncertainty”<sup>128</sup> surrounding parentage determinations through existing frameworks, children conceived by same-sex parents through surrogacy arrangements are placed in unduly precarious circumstances from the moment of conception.<sup>129</sup> Before the child’s birth, both the accountability between the biological intended parent and the non-biological intended parent, and the legal status of the non-biological parent toward her or his future child, are equivocally defined.

Absent any clear social consensus on the indispensable determinants of parenthood,<sup>130</sup> legislation and jurisprudence

125. See *Which Ties Bind?*, *supra* note 1, at 1011, 1039.

126. *Id.*

127. Glennon, *supra* note 2, at 587.

128. *Id.*

129. See Jacobs, *supra* note 61, at 294 (noting how the status quo often unreasonably places “the sanctity of the marital presumption before the best interests of the child”).

130. Instead of explaining why one is—or is not—positioned to fill a parental role, parentage determinations today rely on “unspoken assumptions regarding how parental status is generated . . . ‘implicitly appeal[ing] to some preanalytic concept of parenthood.’” Purvis, *supra* note 92, at 651 (quoting Dara E. Purvis, *Intended Parents and the Problem of Perspective*, 24 *YALE J.L. & FEMINISM* 210, 360 (2012)).

must advance new benchmarks for what constitutes a legal parent who will be responsible for a child's well-being.<sup>131</sup>

### 1. Moving Toward Intent-Based Parentage Determinations

When sex, marriage, and reproduction are effectively dissociated—and when parents can reproduce outside traditional procreative intercourse—neither marriage nor biological relation to a child are guaranteed variables upon a child's birth. For enhanced certainty behind parentage determinations in a rapidly evolving family law era, scholars assert that legal parentage should be based not on a presumption or biology, but on the more meaningful measure of one's established parenting *intention*.<sup>132</sup>

Such a benchmark aids same-sex intended parents who elect to procreate through surrogacy.<sup>133</sup> The marital presumption and current disestablishment frameworks both center on marriage and biology. In contrast, intent-based evaluations make parentage independent from “a state's view of same-sex relationships”<sup>134</sup> and “place[] diminished importance on genetic or biological connection.”<sup>135</sup> Should a non-biological intended parent seek to avoid legal obligation toward a future child, intent-based parentage circumvents judicial determinations of presuming and rebutting parenthood under traditional frameworks. Instead, the two parties who intend to parent the child at its birth are more readily identified as the future child's legal parents, regardless of their marital relation to each other or their genetic relation to the child.<sup>136</sup>

This also helps to realize the best interests of the child con-

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131. See Meyer, *supra* note 33, at 136; see also Purvis, *supra* note 92, at 645 (“[W]hy does a biological relationship generate parental rights?”). *But see* Lehr v. Robertson, 463 U.S. 248, 271 (1983) (White, J., dissenting) (rejecting the notion that biological connection between parent and child is “unimportant in determining the nature of liberty interests”).

132. See Jacobs, *supra* note 61, at 291; see also *Which Ties Bind?*, *supra* note 1, at 1047 (questioning to what extent a child's relationship with a parent depends on a parent's relationship to her or his other parent).

133. “A pure intent test is the only available method for courts to determine parentage without gender, marital, or sexual orientation biases affecting the outcome.” Dana, *supra* note 4, at 358. Conversely, accidental pregnancies frustrate intent-based standards, as there may be no intent to become a parent. This Note presumes surrogacy arrangements do not yield accidental pregnancies.

134. Lynda Wray Black, *The Birth of a Parent: Defining Parentage for Lenders of Genetic Material*, 92 NEB. L. REV. 799, 837 (2014).

135. Meyer, *supra* note 33, at 136.

136. See Black, *supra* note 134.

ceived through surrogacy, even while in utero.<sup>137</sup> An intent-based inquiry reinforces parental status prior to birth based on “significant actions being undertaken by either party”: in the context of a surrogacy arrangement, the deliberate fertilization of an egg to create a life.<sup>138</sup> In the event that a non-biological intended parent does not want to hold the child out as her or his own prior to its birth, an intent-based inquiry will identify the parent as a presumed legal parent to be held financially responsible,<sup>139</sup> notwithstanding a divorce from the biological intended parent, or want of biological relation.<sup>140</sup>

## 2. Establishing Parentage Through Theories of Labor

Similarly related to an intent-based theory of parenthood, other reform proponents view parentage not as a “product of biology or a natural inheritance,” but instead “understood as the product of a Lockean labor interest.”<sup>141</sup> This underlying consideration confers parentage status through “investing labor and money into a resource . . . thus generating a claim to that resource.”<sup>142</sup>

Such a theory proves especially applicable to surrogacy arrangements. Procreation through the use of a surrogate is time-consuming and requires a “significant financial and emotional investment.”<sup>143</sup> But for the labor and investment of the intend-

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137. An intent-based determination also helps to protect gestational surrogates. A gestational mother—entering into an arrangement anticipating not to be responsible for the child upon its birth—should not be held responsible should the intended parents seek to renege on their responsibilities toward the child.

138. Dana, *supra* note 4, at 383.

139. “Once the status of legal parent is recognized, it is a profoundly powerful position.” Purvis, *supra* note 92, at 649; *see* Dana, *supra* note 4, at 383 (justifying this outcome through the “states’ interest in having all children be financially supported”).

140. This is not to suggest, however, that presumed parental status becomes ironclad in such instances. For example, a contract or consent form can serve as a clear indication of intent, rebuttable upon a showing of fraud, duress, misrepresentation, or incapacity.

141. Purvis, *supra* note 92, at 654. *See generally* E. Gary Spitko, *The Constitutional Function of Biological Paternity: Evidence of the Biological Mother’s Consent to the Biological Father’s Co-Parenting of Her Child*, 48 ARIZ. L. REV. 97 (2006) (arguing a father’s biological connection to a child is constitutionally significant because it provides evidence that the biological mother consented to the father’s relationship with the child).

142. Purvis, *supra* note 92, at 655.

143. Dana, *supra* note 4, at 382. Between legal fees, medical procedure expenses, and surrogate compensation, the process can easily cost \$100,000. *See id.* at 363.

ed parents, the child would not exist.<sup>144</sup> One can tangibly measure pre-birth labor through preparations undertaken when expecting a future child. This can include signing a surrogacy contract, attending fertilization appointments, requesting future work accommodations, enrolling in parenting classes, readying a nursery, et cetera.<sup>145</sup> Labor-based parentage determinations thus serve a concrete standard that “operationalizes [the objectives of] intent as a parentage rule.”<sup>146</sup>

Because labor-based understandings can be employed “regardless of the sexual orientation of the parents . . . [whether] married or not,”<sup>147</sup> a labor benchmark, as applied to same-sex procreative parents, yields similar outcomes to intent-based considerations.<sup>148</sup> In effect, a gestational carrier serves as the initial legal parent, the biological intended parent becomes the second legal parent, and the non-biological intended parent becomes a parent with the transfer of rights from the surrogate after birth. An equitable estoppel, based on the non-biological parent’s labor in engineering the birth, would estop the non-biological parent from denying parentage at the point where the surrogate disclaims maternity, notwithstanding an attempt of pre-birth disestablishment or divorce.

### 3. Judicial Calls for Legislative Action

Same-sex couples today can “proudly form families that would have been both legally and socially unthinkable in an earlier era.”<sup>149</sup> In response to such modern family law developments, intent-based and labor-based parentage theories represent important stepping stones for the reconceptualization of what it now means to be a parent. However, because legal parentage is a matter of law by definition,<sup>150</sup> such theories alone do not suffice to resolve unprecedented parentage issues surrounding surrogacy.

Under current legal frameworks, procreative same-sex couples “have little, if any, opportunity to establish legal parentage early on for both parents.”<sup>151</sup> Absent such early legal

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144. *See id.* at 382–83.

145. *See Purvis, supra* note 92, at 681.

146. *Id.* at 680.

147. *Id.* at 687.

148. *See supra* notes 133–39 and accompanying text.

149. Polikoff, *supra* note 91, at 212.

150. *Id.* at 207.

151. Parness & Townsend, *supra* note 83, at 614.

sanction, many families headed by same-sex parents will thrive nevertheless. In the event of a parentage dispute, however, parties will need to rely on court determinations, as the majority of states fail to statutorily define legal parentage through surrogacy.<sup>152</sup> But even though surrogacy and same-sex parentage do not fit existing doctrine, courts nonetheless hesitate to redefine legal parentage absent legislative action.<sup>153</sup> The present system instead observes judges “clutching at overly rigid approaches to determining parentage . . . that do not allow for the full range of human procreative and parental conduct.”<sup>154</sup>

Thus, a new basis to define legal parentage when same-sex couples procreate through surrogacy is necessary.<sup>155</sup> This requires not only social reconceptualization,<sup>156</sup> but also legislative action toward statutory clarification.<sup>157</sup>

### III. PROPOSALS FOR ALTERNATIVE STATUTORY SCHEMA

Family law is at a new crossroads. Traditional conceptions of marriage, reproduction, and parenthood were challenged with rapid social and technological revolution in the latter-twentieth century—resulting in jurisprudence struggling with how to disestablish paternity in light of a weakening marital presumption.<sup>158</sup> Today’s twenty-first-century crossroad stems from a modern era wherein individuals of the same sex can marry, divorce, and reproduce biologically. Understandings of parentage must be reconceptualized once more so as to be reconciled with marriage equality and assisted reproductive technology. Surrogacy can serve as a keystone to pioneer family law

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152. See Dana, *supra* note 4, at 369.

153. See *In re C.K.G.*, 173 S.W.3d 714, 736 (Tenn. 2005) (“We, as interpreters of the law, not makers of the law, are powerless . . . to reach a different resolution.”); see also *In re Marriage of Buzzanca*, 72 Cal. Rptr. 2d 280, 293 (Ct. App. 1998) (“[W]e must call on the Legislature to sort out the parental rights and responsibilities of those involved in artificial reproduction.”).

154. Wald, *supra* note 33, at 410.

155. See Polikoff, *supra* note 91, at 235 (noting the “dramatic increase in the use of ART” necessitates clarifying “the parentage of all of the children born as a result of modern science” (quoting UNIF. PARENTAGE ACT § 703, cmt. (UNIF. LAW COMM’N 2002))).

156. See *supra* notes 132–46 and accompanying text.

157. See *In re Adoption of Matthew B.*, 284 Cal. Rptr. 18, 37 (Ct. App. 1991) (urging the legislature to act expeditiously); *Belsito v. Clark*, 644 N.E.2d 760, 767 n.3 (Ohio Ct. Com. Pl. 1994) (asking the legislature to act and end the uncertainties of surrogacy).

158. See *supra* notes 30–46 and accompanying text.

away from its seventeenth century common law vestiges, and into a technological era wherein the prototypical traditional family unit, although expected in theory, indeed proves exceptional in fact.<sup>159</sup>

Under the status quo, rigid application of existing frameworks means that same-sex parents who dissolve their relationship consequently will “often leave their children without legal ties” to both intended parents.<sup>160</sup> In response, this Part proposes two model statutory frameworks that will better define the legal roles and responsibilities—both pre-conception and pre-birth—of intended parents and surrogates alike. Section A explores the necessary considerations underlying statutory reform. Section B next recommends two model statutes upon which states can frame surrogacy laws: one that transfers parental rights to intended parents pre-conception; and an alternative that, based on pre-birth intent and labor, transfers rights to intended parents post-birth. Lastly, Section C weighs the benefits and critiques of each.

#### A. CONSIDERATIONS UNDERLYING STATUTORY REFORM

Prevailing theories of parentage often fail to identify the origins of parenthood, instead hinging the right to parent on marital status or biology.<sup>161</sup> For same-sex parents procreating by way of surrogacy, parenthood should not and cannot vest through these benchmarks.<sup>162</sup> Surrogacy entails calculated and concerted efforts to conceive a child—a child that may not share genetic relation to one of her or his future intended parents. And in the context of same-sex intended parents, this further breaks from archetypal mother-father duality. Thus, surrogacy obliges reexamining issues of marriage, biology, and parental intentionality.<sup>163</sup>

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159. “In an era of readily available divorce and DNA testing, we need to reexamine the policies likely to promote permanent ties . . . .” *Which Ties Bind?*, *supra* note 1, at 1012.

160. Parness & Townsend, *supra* note 83, at 614.

161. *Cf.* Purvis, *supra* note 92, at 645 (“[T]he law has shifted over time, from favoring a property right based in genetics to a Lockean theory of property rights earned through labor.”).

162. *See supra* Part II.A–B.

163. *Cf.* Wald, *supra* note 33, at 383 (explaining further that surrogacy “calls into question the value we place on genetics in assigning parental rights”).

### 1. What Makes a Person a Parent?

In statutorily defining parenthood through surrogacy, legislatures must keep “the question whether a child was born into a marriage” separate from “whether that child has two parents.”<sup>164</sup> After all, marriage historically constituted a proxy for presumed biology. In the context of same-sex parents who plan to conceive a child together through surrogacy, however, marriage *cannot* serve as a proxy for biology due to innate structural infertility. Marriage instead would seem “a proxy for consent of the definite legal parent—the biological [intended parent]—to share parental rights” with the non-biological intended parent.<sup>165</sup>

If the actual underlying consideration is consent to parent, legislatures should draft statutory language that does not utilize marriage as the mechanism to confer parenthood to a non-biological intended parent.<sup>166</sup> Instead, surrogacy statutes should attach parental rights to a non-biological parent based exclusively on measures that capture her or his consent to parent the future child.

### 2. What Triggers Severing a Surrogate’s Parental Status?

Surrogacy proves problematic due to an additional third party fulfilling an indispensable biological role in the reproduction process. In other words, “a third party is always present to assert a competing claim of parentage.”<sup>167</sup> Thus, a statute that confers parental status to a non-biological intended parent must simultaneously address what rights and responsibilities—if any—will vest in a surrogate who carries the child to term. Due to constitutional concerns, however, legislatures may not treat traditional and gestational surrogacy as existing in parity.<sup>168</sup>

#### *a. Statutes Addressing Traditional Surrogacy*

When a same-sex couple procreates through traditional

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164. Joanna L. Grossman, *The New Illegitimacy: Tying Parentage to Marital Status for Lesbian Co-Parents*, 20 AM. U. J. GENDER SOC. POL’Y & L. 671, 720 (2012); see also *Which Ties Bind?*, *supra* note 1, at 1047 (noting that marriage should not continue as the primary vehicle for establishing parent-child relationships).

165. Grossman, *supra* note 164, at 718.

166. Cf. Polikoff, *supra* note 91, at 212 (“[O]nce marriage does not determine parental rights and responsibilities, the law must decide what does.”).

167. Dana, *supra* note 4, at 378.

168. See *supra* note 94 for further definition around this distinction.

surrogacy, a statute cannot automatically strip a surrogate's parentage rights and vest them in a non-biological intended parent. Traditional surrogates utilize their own ova in the reproduction process, creating a biological link between the surrogate and the future child. And the Constitution recognizes a fundamental interest in the companionship of one's natural child.<sup>169</sup> While entering the agreement knowing she bears the child on behalf of its intended parents, a surrogate very well may deem herself unable to part with her child at the time of birth.<sup>170</sup> Accordingly, a statutory provision divesting a biological mother of legal parentage of a child at its birth may be deemed unconstitutional.<sup>171</sup> A non-biological intended parent's legal status instead must be conferred through an adoption only after a traditional surrogate's rights are severed.<sup>172</sup>

*b. Statutes Addressing Gestational Surrogacy*

In contrast, a statute addressing gestational surrogacy can strip a surrogate's parentage rights and vest them in a non-biological intended parent from the moment of birth or before.<sup>173</sup> Unlike traditional surrogates, gestational surrogates do not utilize their own ova in the production process. The fundamental interest in the companionship of a natural child, recognized in traditional surrogacy, arguably diminishes in gesta-

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169. See U.S. CONST. amends. I, IX, XIV, § 1; see also *Wilke v. Culp*, 483 A.2d 420, 425 (N.J. Super Ct. App. Div. 1984) ("It has . . . been held that a parent's right to the care and companionship of his or her child are so fundamental as to be guaranteed protection under the . . . Constitution."). This right is not absolute, however. The State may infringe upon a legal parent's right to custody and control over a child if the parent endangers the health or safety of the child. See *V.C. v. M.J.B.*, 748 A.2d 539, 548 (N.J. 2000). But absent a showing of unfitness, abandonment, or gross misconduct, there is no reason to interfere with a parent's constitutional prerogatives. *Id.* at 549.

170. See, e.g., *In re Baby M*, 537 A.2d 1227, 1236 (N.J. 1988).

171. Only Virginia's surrogacy statute allows traditional surrogates to sever parental rights through a contract pre-authorized by the court, while reserving for the surrogate a 180-day contract termination period. See VA. CODE ANN. §§ 20-156 to -165. Because this statute has not been used or tested in court, its constitutionality is unresolved. Absent a contrary statute, however, states will view the traditional surrogate as the legal parent, and little sentiment exists for changing this result. See Interview with June Carbone, *supra* note 16; cf. *Baby M*, 537 A.2d at 1242.

172. See Dana, *supra* note 4, at 365 (analogizing a traditional surrogacy agreement to an adoption). In pursuit of uniformity, however, legislatures can promulgate one statute for traditional and gestational surrogacy, both held to the higher constitutional threshold potentially required for the former.

173. See UNIF. PARENTAGE ACT § 801 (UNIF. LAW COMM'N 2002).

tional surrogacy.<sup>174</sup> With no genetic link existing between the gestational carrier and the future child, the surrogate “is ‘not exercising her own right to make procreative choices; she is agreeing to provide a necessary and profoundly important service’ to parents who ‘intended to procreate a child genetically related to them by the only available means.’”<sup>175</sup> Thus, a legislature can constitutionally promulgate statutes wherein legal parent status never bestows in a gestational surrogate.

### 3. How To Create a Portable Set of Parentage Rights

Intended same-sex parents cannot rely exclusively on the marital presumption to confer legal parenthood through surrogacy.<sup>176</sup> Legislatures must instead enact statutory provisions that clarify legal parentage during early stages of a surrogacy agreement, so as to effectively create more concrete rights and responsibilities in non-biological intended parents—regardless of marital status upon a child’s birth. Furthermore, the legal recognition bestowed through surrogacy must simultaneously be enforceable across jurisdictions. Such outcomes are achievable by way of birth certificate recognition.

Birth certificates constitute the official legal record evidencing a child’s parentage.<sup>177</sup> For a child born through surrogacy, the biological intended parent would appear on the birth certificate. However, competing claims for the birth certificate’s remaining blank space exist between the non-biological intended parent and the surrogate. In the event of traditional surrogacy, the birth mother does not intend to serve as a child’s legal parent; and in the event of gestational surrogacy, not only does the gestational carrier not intend to serve as a child’s legal parent, but no genetic link exists between the surrogate and the

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174. Some may disagree with this assertion, arguing that gestation would confer parental rights on the basis of nature by definition. This Note, however, advocates for a diminished parental right absent a genetic link. “The argument that a woman cannot knowingly and intelligently agree to gestate and deliver a baby for intending parents carries overtones of the reasoning that for centuries prevented women from attaining equal economic rights.” See Dana, *supra* note 4, at 368.

175. *Id.* (quoting *Johnson v. Calvert*, 851 P.2d 776, 787 (Cal. 1993)).

176. See *supra* Part II.A.

177. Birth certificates do not *establish* legal parentage, but instead dictate parentage in the state of issue. Because parents’ names are entered onto a birth certificate by virtue of marriage, states that did not recognize same-sex marriage before *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015), were not required to recognize the birth certificate either. See Polikoff, *supra* note 91, at 238–39.

future child. Because gestational carriers often regard intended parents as parents,<sup>178</sup> the stronger claim arguably rests with the non-biological parent who intended to parent the child from the moment of conception.<sup>179</sup> But the underlying problem remains that “parentage statutes that remain gender-specific, with one individual identified as mother and the other identified as father, simply do not contemplate or accommodate parentage by same-sex couples.”<sup>180</sup>

Reform thus requires reconceptualizing birth certificates as reflecting a child’s intended parentage instead of biological parentage.<sup>181</sup> Placing a non-biological intended parent on the birth certificate will minimize the opportunity and success of disestablishing parentage of a child conceived and birthed through surrogacy.<sup>182</sup>

## B. PROPOSED MODEL SURROGACY STATUTES

Acknowledging that not all states will permit gestational surrogacy,<sup>183</sup> whereas others will not permit traditional surrogacy,<sup>184</sup> this Note proposes two distinct solutions—one intended expressly for gestational surrogacy arrangements, and another that states can tailor for purposes of either traditional or gesta-

178. See *What Motivates Gestational Carriers?*, RESOLVE: NAT’L INFERTILITY ASS’N (2015), <http://www.resolve.org/family-building-options/surrogacy/what-motivates-gestational-carriers.html>. See generally Todd D. Pizitz et al., *Do Women Who Choose To Become Surrogate Mothers Have Different Psychological Profiles Compared to a Normative Female Sample?*, 26 WOMEN BIRTH 15 (2013) (noting that surrogate mothers are both resilient and aware of the importance of emotional boundary setting during the surrogacy process).

179. See generally D.C. CODE §§ 7-205(e)(3), 16-909(e) (2015); Civil Code of Québec, S.Q. 1991, c 64, art 538–39 (Can.); cf. Polikoff, *supra* note 91, at 239.

180. Black, *supra* note 134, at 808.

181. This will require cooperation of state divisions of vital records to modify birth certificates to list parents as “parents” rather than “mother” and “father.” See *id.* at 841.

182. A birth certificate, while “not definitive proof” of parentage, “is the one piece of commonly accepted evidence.” Polikoff, *supra* note 91, at 238–39. Thus, intended parents can simultaneously obtain a parentage judgment to bolster the birth certificate’s strength and to ensure recognition of a non-biological intended parent’s rights. NAT’L CTR. FOR LESBIAN RIGHTS, LEGAL RECOGNITION OF LGBT FAMILIES (2015), [http://www.nclrights.org/wp-content/uploads/2013/07/Legal\\_Recognition\\_of\\_LGBT\\_Families.pdf](http://www.nclrights.org/wp-content/uploads/2013/07/Legal_Recognition_of_LGBT_Families.pdf); cf. Parness & Townsend, *supra* note 83, at 607 (noting that such acknowledgments make disestablishment more difficult).

183. *E.g.*, ARIZ. REV. STAT. ANN. § 25-218 (2011); D.C. CODE §§ 16-401, -402 (2009); IND. CODE § 31-20-1-1 (2010).

184. *E.g.*, LA. REV. STAT. ANN. § 9:2713 (1987); N.D. CENT. CODE §§ 14-18-05, 08 (2009); UTAH CODE ANN. § 78B-15-801 (2008).

tional surrogacy. Thus, to effectuate the aforementioned considerations underlying statutory reform despite inevitable state-by-state variation, this Section proposes two model statutes upon which states can frame surrogacy laws: one that transfers parental rights to intended parents pre-conception; and an alternative that transfers rights to intended parents post-birth.

#### 1. Pre-Conception Birth Order Statute

To ensure that a non-biological intended parent cannot disestablish parentage while the child remains in utero, this statutory framework suggests requiring a pre-conception parentage order for gestational surrogacy arrangements. A pre-conception order would confer legal parent status to the two intended parents and would occur before a medical professional implants a viable embryo in the surrogate for gestation.<sup>185</sup> Thus, from the point the surrogate begins her active role in the reproduction process, the future child will not be viewed as the child of the gestational carrier, but instead the intended parents.<sup>186</sup> And, upon the child's birth, the intended parents identified on the pre-conception order will be placed on the birth certificate.<sup>187</sup> In the context of same-sex intended parents, this signifies that both the biological parent and non-biological parent will be recognized at the child's birth notwithstanding marital status or biology.

### PROPOSED STATUTE

#### Subdivision 1. Pre-Conception Parentage Order.

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185. Cf. Polikoff, *supra* note 91, at 249–50 (“[B]oth . . . know from the moment of pregnancy that [one] partner is not the child’s biological parent. The decisions the two [intended parents] make at that point have consequences for the child and should have legal consequences.”).

186. See UNIF. PARENTAGE ACT § 801 (UNIF. LAW COMM’N 2002). “Because the mother’s gestational labor has not yet begun, she does not have a greater claim to the status of parent and the attendant decisionmaking [sic] abilities.” Purvis, *supra* note 92, at 668.

187. “[T]he law must recognize as parent any individual (regardless of gender, sexual orientation, or marital status) who is biologically related to a child.” Black, *supra* note 134, at 812–13. Thus, such a statute cannot apply to traditional surrogacy. Instead, a non-biological intended parent can only be recognized through a second-parent adoption proceeding upon the surrogate’s voluntary waiver of parentage.

- a) Any person who intends to parent a child born through gestational surrogacy must sign a pre-conception parentage order (order) prior to a surrogate's gestation of a fertilized ovum or ova.
  - 1) At least one person, and no more than two persons, shall be identified on the order as intending to parent the future child.
    - A) If one person is identified on the order, that person shall be recognized as the future child's parent.
    - B) If two persons are identified on the order, those persons shall be recognized as the future child's parents.
  - 2) The gestational surrogate shall sign the order, indicating her understanding that she will not be recognized as the future child's parent.
- b) The order shall be enforceable, notwithstanding:
  - 1) marital status of the person(s) identified on the order;
  - 2) genetic relation between the person(s) identified on the order and the future child;
  - 3) sex of the person(s) identified on the order.

**Subdivision 2. Recognition of Parents at Birth.**

- a) After the child's birth, the person(s) identified on the order shall appear on the child's birth certificate, notwithstanding:
  - 1) marital status of the person(s) identified on the order;
  - 2) genetic relation between the person(s) identified on the order and the child;
  - 3) sex of the person(s) identified on the order.
- b) The gestational surrogate shall not appear on the child's birth certificate.

**2. Intent/Labor-Based Parentage Statute**

A legislature may be uncomfortable with divesting a gestational surrogate of any parentage rights to a future child prior to the commencement of her gestational role.<sup>188</sup> Thus, statutory provisions can analogize surrogacy to a quasi-adoption arrangement, recognizing a surrogate—either traditional or gestational—as the legal mother before and at the child's birth. While such a framework offers surrogates an enhanced role relative to the pre-conception parentage order statute, intent-based and labor-based considerations can protect the intended

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188. See *supra* Part II.B.

parents' indispensable role in the reproduction process. And further, safeguards can be codified to ensure that a non-intended biological parent cannot move to disestablish parenthood while the child is in utero, despite the surrogate's recognition as the legal mother.

## PROPOSED STATUTE

### Subdivision 1. Pre-Birth Parentage Order.

- a) Any person who intends to parent a child born through traditional or gestational surrogacy must sign a pre-birth parentage order (order) after a surrogate's post-conception gestation of a fertilized ovum or ova begins, but prior to the child's birth.
  - 1) At least one person, and no more than two persons, shall be identified on the order as intending to parent the future child.
    - A) If one person is identified on the order, that person shall be recognized as the future child's parent.
    - B) If two persons are identified on the order, those persons shall be recognized as the future child's parents.
  - 2) The surrogate shall be recognized as the future child's legal mother during gestation.
- b) The order shall be enforceable, notwithstanding:
  - 1) marital status of the person(s) identified on the order;
  - 2) genetic relation between the person(s) identified on the order and the future child;
  - 3) sex of the person(s) identified on the order.

### Subdivision 2. Recognition of Parents at Birth.

- a) After the child's birth, the surrogate—traditional or gestational—and any person identified on the order who shares genetic relation with the child shall be recognized as the child's parents.
- b) Traditional Surrogacy. The surrogate shall have up to 72 hours after the child's birth to seek recognition as the child's legal parent.<sup>189</sup>

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189. Such a time frame may appear unduly unequivocal. The time frame provision, however, draws heavily from current adoption statutes. For example, forty-seven states and the District of Columbia statutorily specify "when a birth parent may execute consent to adoption." CHILD WELFARE INFO. GATEWAY, CONSENT TO ADOPTION 4 (2013), <https://www.childwelfare.gov/pubPDFs/consent.pdf>. Thirty-one states require a post-birth waiting period, "[t]he most common waiting period . . . [being] 72 hours." *Id.*

- 1) The surrogate will automatically receive recognition as a legal parent.
- 2) If the surrogate fails to act within 72 hours after the child's birth, the person(s) identified on the order shall appear on the child's birth certificate, notwithstanding:
  - A) marital status of the person(s) identified on the order;
  - B) genetic relation between the person(s) identified on the order and the child;
  - C) sex of the person(s) identified on the order.
- c) Gestational Surrogacy. The surrogate shall have up to 72 hours after the child's birth to seek recognition as the child's legal parent.
  - 1) A gestational surrogate will not automatically receive recognition as a legal parent. The court shall weigh the surrogate's parentage claim against that of the person(s) identified on the order.
    - A) Any person(s) identified on the order shall receive recognition by way of:
      - (i) intent to parent;
      - (ii) time, money, and labor invested in executing the surrogacy agreement;
      - (iii) the child's best interests;
      - (iv) other equitable factors.
    - B) A gestational surrogate will only be recognized if the court deems such recognition in the child's best interests.
  - 2) If the surrogate fails to act within 72 hours after the child's birth, the person(s) identified on the order shall appear on the child's birth certificate, notwithstanding:
    - A) marital status of the person(s) identified on the order;
    - B) genetic relation between the person(s) identified on the order and the child;
    - C) sex of the person(s) identified on the order.

### C. WEIGHING THE OPTIONS

Each of the above statutes has respective strengths and weaknesses, with both resulting in positive and negative consequences around surrogacy arrangements. After weighing and critiquing both models, each state will need to decide which op-

tion best matches the needs, and socioeconomic and political composition, of its constituency.

At least in the realm of gestational surrogacy, the pre-conception birth order statute displays the opportunity for the clearest and most consistent outcomes: the future child will not be viewed as the child of the gestational carrier, but instead of the intended parents. Due to constitutional concerns,<sup>190</sup> such certainty cannot attach to traditional surrogacy arrangements; as a result, same-sex parents, choosing to procreate through this avenue, must rely on comparatively more-uncertain pre-birth parentage orders or traditional adoptions. Statutorily codifying such a disparity, however, can be justified as simply following trends in surrogacy arrangements. Indeed, “ninety-five percent of surrogacy arrangements in the United States are gestational.”<sup>191</sup> As a result, implementing statutes requiring a pre-conception parentage order would create certainty in legal parenthood for almost all surrogacy arrangements.

Though such certainty appears attractive, the corollary is that such statutes may incentivize individuals to pursue gestational surrogacy when they would otherwise prefer traditional surrogacy arrangements—the ultimate effect being the herding of collective procreative decision-making in the LGBT community. Furthermore, preference aside, such incentivization toward gestational surrogacy may price future parents out of the option. From conception to birth, the average gestational surrogacy costs approximately \$100,000, after taking legal fees, medical procedure expenses, and surrogate compensation into account.<sup>192</sup> Individuals desiring the statutory certainties of gestational surrogacy may be unable to afford this avenue, forcing them either to pursue a traditional surrogacy arrangement or to leave the surrogacy market altogether.

Surrogacy also poses quandaries amongst select demographics throughout the United States, with opponents severely opposed to its practice on ethical grounds.<sup>193</sup> Based on

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190. See *supra* Part III.A.2.a.

191. Dana, *supra* note 4, at 363.

192. See *supra* note 143 and accompanying text.

193. See generally Rosalie Ber, *Ethical Issues in Gestational Surrogacy*, 21 THEORETICAL MED. & BIOETHICS 153 (2000) (arguing that gestational surrogacy is a form of prostitution and slavery as well as an exploitation of the poor); Jennifer Lahl & Christopher White, *Why Gestational Surrogacy Is Wrong*, NAT'L REV. ONLINE (Apr. 10, 2014), <http://www.nationalreview.com/article/375364/why-gestational-surrogacy-wrong-jennifer-lahl-christopher-white> (arguing that there are medical and moral consequences of paying

the demographic composition of a given state, legislatures may feel inherent discomfort with advocating for pre-conception parentage orders. Wholly divesting gestational surrogates of any parentage rights before her gestational role begins would certainly meet political backlash in states where surrogacy is already ethically suspect. In response, pre-birth parentage orders effectively make surrogacy appear more akin to a quasi-adoption process, which can have the effect of increased institutional support for—or alternatively, reduced inherent discomfort with—surrogacy. While this provides less certainty than the pre-conception corollary, it can achieve overall enhanced legal certainty in defining parenthood, as compared to surrogacy arrangements pursued absent statutory safeguards.

Unlike the pre-conception parentage order statute, this approach does not implicate constitutional concerns around traditional surrogacy, as it does not entail divesting parentage rights in a surrogate pre-birth. This results in a policy tradeoff. Though pre-birth parentage orders offer less certainty than pre-conception parentage orders, it permits a more equal level of protection between traditional and gestational surrogacy agreements. As a result, couples that prefer traditional surrogacy for personal and economic reasons are afforded more uniform parentage safeguards, instead of being herded toward gestational surrogacy or forced to exit the surrogacy market.

It will be for each state to decide ultimately which model framework will best fit its needs and the needs of its constituency. In so electing, states must keep in mind the fundamental problem underlying reform: existing frameworks do not currently guarantee that children born to same-sex parents will maintain legal ties to both intended parents upon dissolution of the relationship. To the extent that there remains a generalized preference for children having two parents, either of these statutes will help to effectuate and realize that goal.

### CONCLUSION

Parenthood was once easily determined: when a married couple conceived of a child through sexual reproduction, the mother and her husband were legally bound as parents. The deviation from the historic unification of sex, reproduction, and marriage during the late-twentieth century, however, introduced inherent uncertainty of what it means to be a parent.

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women to gestate babies and that women and children are exposed to exploitation).

This collapse of the prototypical traditional family unit necessitated revisualization of centuries-old common law. Today, social perceptions around parenthood are now challenged once more by way of same-sex couples not only receiving legal marital recognition, but also the capacity to reproduce biologically through assisted reproductive means. Yet, intended same-sex parents cannot rely exclusively on the current frameworks to confer legal parenthood through surrogacy.

With family law arriving at a new crossroads, a new basis to define legal parentage when same-sex couples procreate through surrogacy is necessary. Such redefinition requires not just social reconceptualization, but legislative action toward statutory clarification. This Note posits two model frameworks for states to adopt and tailor: one requiring a pre-conception parentage order, and the other requiring a pre-birth parentage order. These statutory frameworks will not only create a portable set of cross-jurisdictional parentage rights, but will also better define what makes a person a parent as well as what triggers severing a surrogate's parental status. To the extent that a generalized preference exists for children being raised with the support of two parents, such statutory proposals will help achieve a child's best interests regardless of the sex or marital status of her or his parents when she or he is born.