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Comment

DON'T LET THE SUN GO DOWN ON SAME-SEX PARENTAL RIGHTS: HOW RELYING ON MUTUAL CONSENT AT THE TIME OF ARTIFICIAL INSEMINATION AND CHILDBIRTH CAN UPHOLD LEGAL PARENTAGE OF SEPARATED SAME-SEX COUPLES*

DANIELLE M. DIGRAZIA**

“When [two] adults participate in parenting a child, they and the child deserve the serenity that comes with legal recognition.”¹

I. COLD, COLD HEARTS, HARDENED BY LAW: AN INTRODUCTION TO SAME-SEX PARENTAL RIGHTS AND LEGAL CHALLENGES THAT ARISE AMIDST SEPARATION AND DIVORCE

In May 2022, an Oklahoma judge struck Kris Williams from her son’s birth certificate during divorce proceedings with her former same-sex spouse.² The judge determined that Williams, who actively raised her son since his birth, was not his legal parent because she was not his biological mother and had not adopted him.³ To add insult to injury, the judge replaced Williams on her son’s birth certificate with the couple’s sperm

* The headings used throughout this Comment were inspired by Elton John’s discography. See *The 75 Best Elton John Songs: Staff List*, BILLBOARD (Mar. 24, 2022), <https://www.billboard.com/lists/top-elton-john-songs-hot-100-hits/> [<https://perma.cc/L7QC-FSAV>].

** J.D. Candidate, 2024, Villanova University Charles Widger School of Law; M.S., 2017, Fordham University; B.S., 2016, Fordham University. This Comment is dedicated to Brittany, my partner in all things, who inspires me to fight for equality for ourselves and others. This Comment is also dedicated to my parents, sisters, and grandparents who always encourage me to chase my dreams. I would like to thank my colleagues at the *Villanova Law Review* for their time, effort, and support throughout this process.

1. *Professional Organizations on LGBTQ Parenting*, HUM. RTS. CAMPAIGN, <https://www.hrc.org/resources/professional-organizations-on-lgbt-parenting> [<https://perma.cc/ETS5-4LQE>] (last visited May 22, 2023) (quoting Comm. on Psych. Aspects of Child & Fam. Health, *Coparent or Second-Parent Adoption by Same-Sex Parents*, 109 AM. ACAD. PEDIATRICS 339, 339 (2002)).

2. See Sarah Luterman & Kate Sosin, *A Lesbian Mom Raised Her Son for Two Years. An Oklahoma Judge Erased That in 15 Minutes.*, 19TH (May 20, 2022, 6:00 AM), <https://19thnews.org/2022/05/oklahoma-custody-case-lgbtq-parenting-marriage-equality/> [<https://perma.cc/4J9B-FBN6>] (noting the couple was legally married and decided to have their child together during their marriage).

3. See *id.* (implying Williams’s consent to have a baby with her ex-wife was not considered by the court). The 19TH article discusses Williams’s involvement in the baby’s life, specifically with respect to reading to him at night, taking him to the park, and playing with him during the pandemic. See *id.*

donor who was petitioning for custody.⁴ After the ruling, Williams shared, “My body instantly started shaking I mean pure terror, as a queer person, to be erased.”⁵ Though the judge subsequently vacated the ruling, Williams’s parental rights are still not guaranteed.⁶

Williams’s terror is shared by same-sex partners in states where courts prefer to focus on biology to determine legal parentage.⁷ For example, Lindsay Gatsby from Idaho is facing a similar threat to her legal parentage because she is not biologically related to her children.⁸ Because they cannot biologically conceive children, same-sex partners often turn to assisted reproductive technologies such as donation, artificial insemination, and surrogacy to expand their families.⁹ For lesbian couples, the sperm of a male donor is often used to inseminate one female partner.¹⁰ For gay couples, the sperm of one male partner and the egg of a female donor are used to create an embryo to be carried by a female surrogate.¹¹ In each case, one same-sex partner is biologically related to the child while the other same-sex partner shares no biological relation, thereby creating uncertainty with respect to the non-biological partner’s legal parental rights.¹²

4. *See id.* (showing the court preferred to grant parentage based on biology rather than intent or function). The 19TH article notes the couple found the sperm donor on a website and all parties agreed the donor “would be involved at a distance.” *Id.*

5. *Id.*

6. *See* Kate Sosin, *Oklahoma Judge Reversed Ruling Taking Lesbian Mom’s Name Off of Her Son’s Birth Certificate*, 19TH (June 7, 2022, 6:00 AM), <https://19thnews.org/2022/06/birth-certificate-ruling-reversed-lgbtq-oklahoma-custody-battle/> [<https://perma.cc/5UGN-8GQJ>] (noting Williams’s parental rights would be decided in a subsequent ruling).

7. *See infra* Part V (outlining recent challenges to separated same-sex partners’ parental rights).

8. *See id.* (describing Gatsby’s fight to maintain legal parentage after divorcing her same-sex partner who was biologically related to their children).

9. *See* *LGBTQ Couples and Babies: Q&A with Dr. Briana Rudick*, COLUM. UNIV. DEP’T OF OB/GYN (June 13, 2021), <https://www.obgyn.columbia.edu/news/lgbtq-couples-and-babies-q-dr-briana-rudick> [<https://perma.cc/3XZ9-VMS2>] (answering questions regarding the process for same-sex couples to become parents).

10. *See id.* (explaining the typical methods used by same-sex couples who seek a biological connection to their child). Dr. Rudick also discusses an option for lesbian couples called “co-maternity in which one female partner donates her eggs for the other female partner to carry.” *Id.* This Comment will primarily focus on lesbian couples who get pregnant by inseminating one female partner with the sperm of a male donor.

11. *Id.*

12. *See* Marisa S. Fein, Note, *An Inequitable Means to an Equitable End: Why Current Legal Processes Available to Non-Biological, LGBTQ+ Parents Fail to Live Up to Obergefell v. Hodges*, 14 DREXEL L. REV. 165, 165 (2022) (noting how uncertainty is deeply rooted in state laws regarding marital presumption, which generally reflect “heteronormative assumptions surrounding family”). The marital presumption “assumes that a child born during a marriage is the biological child of the mother’s husband” and therefore grants paternity, or legal parentage, to the mother’s husband. *See* James J. Vedder & Brittney M. Miller, *Presumptions in Pater-*

For opposite-sex couples, the birth mother is considered a legal parent, and, if she is married, her husband is presumed to be the second legal parent.¹³ The Supreme Court has effectively expanded this so-called “marital presumption” to same-sex couples such that the married partner of the biological parent is automatically presumed to be the second legal parent, irrespective of the fact that there is no biological connection between such partner and the child.¹⁴ However, once a married couple divorces, the marital presumption may no longer be applicable to preserve parental claims by the non-biological parent.¹⁵ Further, same-sex couples who choose not to marry and eventually separate never reap the benefits of the marital presumption.¹⁶ Subsequent challenges to legal parentage by the biological parent—or even the donor—threaten the rights of the non-biological parent after the same-sex couple divorces or separates, especially if the non-biological parent never adopted the child.¹⁷

This Comment argues for the application of a two-part test to uphold separated same-sex partners’ legal parentage over their shared children.¹⁸ First, courts should honor the marital presumption which would have applied during the couple’s marriage, without exception.¹⁹ Second, courts

nity Cases: Who Is the Father in the Eyes of the Law?, 40 FAM. ADVOC. 26, 27 (2018); see also *infra* notes 35–43 and accompanying text.

13. See Fein, *supra* note 12, at 167 (noting the birth mother’s husband typically does not have to prove paternity or go through an adoption process where the marital presumption applies).

14. See generally Pavan v. Smith, 137 S. Ct. 2075 (2017) (confirming an Arkansas law requiring a birth mother’s husband to be listed on her child’s birth certificate applies where the couple has conceived through artificial insemination with sperm provided by an anonymous donor and extending that legal right to same-sex couples).

15. See June Carbone & Naomi Cahn, *Marriage, Parentage, and Child Support*, 45 FAM. L.Q. 219, 229 (2011) (noting states may not uphold marital presumption when a couple divorces and may instead look to principles of estoppel to preserve the husband’s parentage). Carbone and Cahn suggest estoppel can be used to ensure a divorced or unmarried father maintains parentage and provides child support. See *id.* at 230–38.

16. See Zachary Scherer & Lydia Anderson, *How Do People in Same-Sex Couples Compare to Opposite-Sex Couples?*, U.S. CENSUS BUREAU (Apr. 1, 2021), <https://www.census.gov/library/stories/2021/04/how-people-in-same-sex-couples-compare-to-opposite-sex-couples.html> [<https://perma.cc/L5X2-UC5A>] (finding only 58% of couples in roughly 980,000 same-sex households in the United States in 2019 were married while 42% remained unmarried). This statistic shows that, despite the availability of same-sex marriage, a large portion of same-sex couples choose not to marry and therefore may never benefit from the marital presumption if they have children. See *id.* See generally Mary Kay Kisthardt & Richard A. Roane, *Who Is a Parent and Who Is a Child in a Same-Sex Family?—Legislative and Judicial Issues for LGBT Families Post-Separation, Part II: The U.S. Perspective*, 30 J. AM. ACAD. MATRIM. L. 55, 80 (2017) (warning that courts may continue to link parentage to marital status now that same-sex marriage is legal).

17. See Luterman & Sosin, *supra* note 2 (noting Kris Williams’s case could become harmful precedent given the frequency of divorce among same-sex couples).

18. See *infra* Part IV.

19. See *infra* notes 193–195 and accompanying text.

should confirm that both partners consented to the artificial insemination and planned birth of children at both the time of artificial insemination and the time of birth.²⁰ Further, courts should accept a Voluntary Acknowledgment of Parentage signed by both parties as evidence of consent.²¹ Part II of this Comment analyzes the traditional and non-traditional methods of obtaining legal parentage, including the history of the marital presumption and its extension to same-sex couples. Part III provides an overview of the legislation passed to protect same-sex couples' parental rights and the judicial interpretations of such legislation in determining parental rights for same-sex couples who have either divorced or separated. Part IV critically analyzes the standards applied by state courts and argues for a more comprehensive test to determine legal parentage that ultimately aligns with the intent of the marital presumption. Finally, Part V discusses the potential impact of challenges to legal parentage on the rights of same-sex couples and their children.

II. IT'S BEEN A LONG, LONG TIME: HISTORICAL BACKGROUND OF LEGAL PARENTAGE AND ITS RECENT APPLICATION TO SAME-SEX COUPLES

Historically, legal parentage has been determined by biology or marriage.²² Over time, as artificial insemination technologies developed, other factors such as function and intent have proven determinative.²³ Despite the legalization of same-sex marriage in 2015, these recent approaches play a significant role in establishing legal parentage for same-sex couples who cannot both be biologically related to their children and who may choose not to marry.²⁴

A. *Traditional Methods of Establishing Legal Parentage*

Legal parentage recognizes specific adults as a child's parents, "imposes financial obligations, and grants standing to seek visitation and custody."²⁵ States generally consider three factors in determining legal parentage: (1) biology, (2) function, and (3) formalities.²⁶ Biology relates to a birth mother's genetic connection with the child, while function fo-

20. See *infra* notes 196–207 and accompanying text.

21. See *infra* notes 210–216 and accompanying text.

22. Kisthardt & Roane, *supra* note 16, at 57 (acknowledging the "long-standing precedent" for determining parentage based on traditional methods).

23. See *id.* (recognizing assisted reproductive technologies, such as artificial insemination, have created a reality where one parent is not necessarily biologically related to the child).

24. See *id.* at 80 (noting courts may revert to traditional methods of establishing parentage such as marriage now that same-sex marriage is legal).

25. June Carbone & Naomi Cahn, *Parents, Babies, and More Parents*, 92 CHL-KENT L. REV. 9, 14 (2017).

26. See *id.* at 14–15 (recognizing that states take varying approaches to bases of legal parentage).

cuses on assumption of a parental role.²⁷ Formalities include legal actions such as marriage, adoption, and paternity judgments.²⁸ This Comment will focus on legal parentage through biology and formalities, specifically marriage and adoption.

1. *Biology*

The biological or birth mother is generally considered a legal parent due to her “genetic and gestational connection to the child” as well as her function as the parent responsible for the child during pregnancy.²⁹ However, the biological father typically gains legal parentage through some further action, such as marriage, rather than through a similar combination of biology and function.³⁰

Scholars have recognized the disparate treatment of biological mothers and fathers under state law.³¹ Moreover, scholars have acknowledged that such treatment stereotypes women as better parents than men and questioned whether biology plays any significant role as a doctrinal rule.³² However, the Supreme Court has specifically rejected equal protection claims challenging the constitutionality of such disparate treatment.³³ States have therefore continued to grant legal parentage to fathers primarily through marriage.³⁴

27. *See id.* at 14 (explaining function-based approaches recognize an adult without a biological connection to the child as a legal parent through “a combination of intent, assumption of parental role, and/or the consent of the initial legal parent”).

28. *See id.* at 15 (noting marriage supposedly established parentage through a combination of biology, function, and formalities). Paternity judgments are court orders that establish custody, support, and visitation of the child. JOHN BOURDEAU & JOHN KIMPLEN, 14 C.J.S. CHILD. OUT OF WEDLOCK § 121 (2023).

29. Carbone & Cahn, *supra* note 25, at 14 (explaining biology is typically automatically determinative to establish parentage for a birth mother).

30. *See id.* (acknowledging biology is not typically automatically determinative to establish parentage for a biological father).

31. *See, e.g.,* Dara E. Purvis, *The Origin of Parental Rights: Labor, Intent, and Fathers*, 41 FLA. ST. U.L. REV. 645, 646–47 (2014) (contrasting a biological father’s need to satisfy certain legal requirements or risk being a legal stranger to his child with a biological mother’s automatic identification as a legal parent under state laws).

32. *See id.* at 647 (questioning why biology is “both necessary and sufficient” to establish child support obligations for an unmarried biological father yet is only necessary but not sufficient for establishing that father’s legal parental rights).

33. *See id.* (citing *Nguyen v. INS*, 533 U.S. 53, 64–65, 68 (2001); *Lehr v. Robertson*, 463 U.S. 248, 265–68 (1983); *Parham v. Hughes*, 441 U.S. 347, 356 (1979)). For example, in *Nguyen*, the Supreme Court confirmed that a federal statute imposing different requirements to acquiring “United States citizenship by persons born to one United States citizen parent and one noncitizen parent when the parents are unmarried and the child is born outside of the United States . . . depending on whether the citizen parent is the mother or father” does not violate the Equal Protection Clause. *Nguyen*, 533 U.S. at 56–57.

34. *See Purvis, supra* note 31, at 679 (noting a biological father can ensure parental rights before birth only through marriage to the biological mother, while a biological father can ensure parental rights after birth in other ways); *see also*

2. *Marriage*

a. Marital Presumption in General

The presumption of legitimacy, otherwise known as the marital presumption, presumes the birth mother's husband is her child's legal, biological father.³⁵ The marital presumption is the "default rule," meaning the birth mother's husband does not need to take any further action to be legally recognized as the father, even if he is not biologically related to the child.³⁶

The marital presumption is deeply rooted in common law.³⁷ Historically, it protected the "property of the father and the legitimacy of the child" because illegitimate children faced significant legal disadvantages.³⁸ For example, illegitimate children were not guaranteed financial support or inheritance from their fathers, but the marital presumption ensured they would receive such support.³⁹ Even though the disparate legal treatment of children born outside of marriage has been largely abandoned, the marital presumption remains one of the most determinative factors of legal parentage.⁴⁰

Because of the benefits afforded to the child, as well as the importance of "promoting the harmony and integrity of the marital family unit," the marital presumption was generally difficult to rebut.⁴¹ Today, most states have permitted certain parties to challenge the marital presumption

Jessica Feinberg, *Restructuring Rebuttal of the Marital Presumption for the Modern Era*, 104 MINN. L. REV. 243, 252 (2019) ("[E]very state continues to apply the marital presumption of paternity in some form.").

35. See Susan Frelich Appleton, *Presuming Women: Revisiting the Presumption of Legitimacy in the Same-Sex Couples Era*, 86 B.U. L. REV. 227, 233 (2006) (noting the presumption of legitimacy is automatically conferred at the time of the child's birth, regardless of the birth mother's husband's genetic connection to the child).

36. See *id.* at 233–34 (distinguishing the original establishment of parentage through the presumption of legitimacy from other methods that occur after the passage of time, such as adoption, estoppel, or *de facto* parentage).

37. See Kisthardt & Roane, *supra* note 16, at 58 (describing the historical roots of the marital presumption in common law where it was known as "Lord Mansfield's rule" and was intended to protect illegitimate children).

38. See *id.*; see also Feinberg, *supra* note 34, at 249 (noting illegitimate status carried a "profound stigma" as well as legal detriments).

39. See Feinberg, *supra* note 34, at 250 (contrasting the disparate amount and duration of support required by fathers for illegitimate children with the unwavering support and care provided by fathers to children through the application of marital presumption).

40. See *id.* at 251–52 (noting the Supreme Court has struck down laws providing for disparate treatment of illegitimate children under the Equal Protection Clause); see also *infra* Part III (outlining the amendments to the Uniform Parentage Act that rebuke the disparate treatment of illegitimate children).

41. See Feinberg, *supra* note 34, at 251. Feinberg notes the presumption was rebuttable only through "proof of the husband's impotence, sterility, lack of cohabitation with or access to his wife during the time of conception, or proof of adultery on the part of the wife," or proof that "the child's race did not match the husband's race." *Id.* at 249.

by presenting genetic evidence.⁴² Even if the genetic evidence is determinative, courts will usually consider the child's best interests when deciding whether to maintain the marital presumption.⁴³

b. Marital Presumption Extended to Cover Artificial Insemination

As technology has evolved such that couples can conceive through assisted reproductive technology, so, too, has the scope of the marital presumption. Generally, the husband in a married opposite-sex couple is considered the legal parent of a child the couple conceived through alternative insemination, regardless of his genetic connection to the child.⁴⁴ The Uniform Parentage Act of 1973 (UPA) confirmed such legal parentage of children born through artificial insemination to married opposite-sex couples.⁴⁵ Courts adhered to this new legislation and often maintained legal parentage for married couples using surrogates.⁴⁶ For example, in *Johnson v. Calvert*,⁴⁷ the Supreme Court of California upheld the married couple's parental rights over a challenge by the surrogate.⁴⁸ The three parties agreed the surrogate would carry an embryo created by the married couples' sperm and egg and would relinquish parental rights upon giving birth.⁴⁹ When the surrogate sought to be declared the

42. *See id.* at 252 (providing examples of eligible parties). For example, a man who conceives a child with a woman married to someone else is generally eligible to challenge the marital presumption. *See id.* In this case, the biological father is not the legal parent because the biological mother's spouse is presumed to be the second legal parent through the marital presumption. *See id.* at 252–53. Other parties eligible to challenge the marital presumption include the birth mother, her spouse, and child support enforcement agencies. *See id.* at 252.

43. *See id.* at 252–53 (noting courts generally consider the child's best interests, the parental role the husband played in the child's life, the husband's ability and willingness to support the child, the bond between the child and the husband, and the potential disruption to the child and the family unit).

44. *See* Courtney G. Joslin, *Protecting Children(?): Marriage, Gender, and Assisted Reproductive Technology*, 83 S. CAL. L. REV. 1177, 1184 (2010) (confirming the husband is still the child's legal parent even if he is not genetically related to the child when the child is born through alternative insemination).

45. *See id.* at 1187–88 (acknowledging the UPA specifically addressed artificial insemination by married opposite-sex couples because they were the most common users of the procedure); *see also* UNIF. PARENTAGE ACT § 5 (UNIF. L. COMM'N 1973) (“If, under the supervision of a licensed physician and with the consent of her husband, a wife is inseminated artificially with semen donated by a man not her husband, the husband is treated in law as if he were the natural father of a child thereby conceived.”); *see also infra* Part III (discussing the amendments to the UPA).

46. *See* Darra L. Hofman, “Mama’s Baby, Daddy’s Maybe:” *A State-by-State Survey of Surrogacy Laws and Their Disparate Gender Impact*, 35 WM. MITCHELL L. REV. 449, 454 n.19 (2009) (listing surrogacy cases in which California courts relied on the UPA and the intent of the parties to establish legal parentage).

47. 851 P.2d 776 (Cal. 1993).

48. *See id.* at 778 (considering a surrogate's claim to legal parentage over the child she carried but had no genetic connection to).

49. *See id.* (noting the parties specifically signed a contract outlining these terms).

mother of the child, the court recognized that both the surrogate and the biological mother had justifiable claims to maternity.⁵⁰ However, the court ultimately declined to recognize three legal parents and instead upheld the legal parentage of the married couple by focusing on their intent to procreate and raise the child as their own.⁵¹

State legislatures historically adopted statutes with terms that prevented unmarried or same-sex couples using artificial insemination from achieving the same parental rights as married opposite-sex couples.⁵² However, some courts were willing to uphold parental rights for same-sex couples even before same-sex marriage was legal. For example, in *Elisa B. v. Superior Court*,⁵³ the Supreme Court of California recognized the parental rights of the former same-sex partner of a woman who gave birth to twins through artificial insemination.⁵⁴ The court noted that the UPA extended the parent-child relationship to each parent and child regardless of the marital status of the parents, and that there was no reason that two women could not both be parents.⁵⁵ Overall, because the non-biological partner agreed to have children, participated in the artificial insemination procedures, supported the household financially, and held the children out as her own, the court concluded she had an obligation to continue supporting the children despite her separation from their biological mother.⁵⁶ Collectively, *Johnson* and *Elisa B.* laid the groundwork for courts to uphold legal parentage for couples—whether married, unmarried, opposite-sex, or same-sex—who conceive through artificial insemination.⁵⁷

50. *See id.* at 780–82 (acknowledging both the surrogate and the biological mother presented acceptable proof of maternity under the relevant statute, which suggested a parent-child relationship may be established by proof of giving birth or by blood testing evidence).

51. *See id.* at 782–83 (finding support in law review articles that confirmed intent should determine legal parentage in artificial reproductive technology cases, specifically because the biological mother and father intended to bring the child into the world and expected to be responsible for the child upon birth).

52. *See generally* Joslin, *supra* note 44, at 1184–87 (explaining state statutes used language such as “husband” and “wife” to cover children born to married couples, and “man” and “woman” to cover children born to heterosexual couples). Joslin provides an example of a Louisiana statute that states, “The *husband* of the mother may not disavow a child born to his *wife* as a result of an assisted conception to which he consented.” *Id.* at 1185 n.28 (emphasis added) (citing LA. CIV. CODE ANN. art. 188 (2005)).

53. 117 P.3d 660 (Cal. 2005).

54. *See id.* at 662 (confirming a woman who agreed to have, raise, and support children with her lesbian partner was in fact the children’s legal parent).

55. *See id.* at 664–66 (citing its decision in *Johnson* and acknowledging the provisions of the UPA applicable to determining a father-child relationship could be applied to a non-biological female partner in this case).

56. *See id.* at 669 (finding it favorable that the non-biological partner also breast-fed the children, claimed them as dependents, and testified that she considered herself to be their mother).

57. *See* Paula Roach, Comment, *Parent-Child Relationship Trumps Biology: California’s Definition of Parent in the Context of Same-Sex Relationships*, 43 CAL. W.L. REV. 235, 260–61 (2006) (arguing the holdings in *Johnson* and *Elisa B.* should extend to

c. Marital Presumption Further Extended to Same-Sex Couples

Historically, same-sex couples were unable to reap the benefits of the marital presumption because they were unable to legally marry.⁵⁸ Two Supreme Court cases and subsequent legislation changed the legal rights afforded to same-sex couples and their children.⁵⁹

In *Obergefell v. Hodges*,⁶⁰ a group of petitioners sought to extend the fundamental right to marry to same-sex couples.⁶¹ Included in the group of petitioners were same-sex couple April DeBoer and Jayne Rowse, who had adopted three children together but could not both be recognized as legal parents under Michigan law.⁶² Justice Kennedy analyzed the right to marry as a fundamental right that should apply to same-sex couples based on four principles.⁶³ First, “the right to personal choice regarding marriage is inherent in the concept of individual autonomy.”⁶⁴ Notably, the Court recognized that choices related to “contraception, family relationships, procreation, and childrearing,” in addition to those related to marriage, are “among the most intimate that an individual can make.”⁶⁵ Second, the right to marry supports a two-person union of great significance to the couple.⁶⁶ Third, the right to marry protects children and families by providing permanency and stability.⁶⁷ The Court also recog-

male same-sex partners and other non-biological parents to “maintain[] parent-child relationships and prevent[] intended parents from abandoning parental responsibilities”).

58. See Feinberg, *supra* note 34, at 254 (acknowledging that same-sex partners previously had no standing to assert the marital presumption because no state had legalized same-sex marriage until Massachusetts in 2004).

59. See *id.* at 255–56 (summarizing the Supreme Court’s decisions to legalize same-sex marriage and subsequently extend the marital presumption to married same-sex couples); see also *infra* notes 60–71, 77–83, and accompanying text.

60. 576 U.S. 644 (2015).

61. See *id.* at 651–56 (noting Petitioners sought “the right to marry or to have their marriages, lawfully performed in another [s]tate, given full recognition”).

62. See *id.* at 658–59 (explaining Michigan law only permitted opposite-sex married couples or single individuals to adopt). DeBoer and Rowse were specifically concerned that, if an emergency or tragedy were to befall one of them, the other would not have any legal rights over their shared children. See *id.* at 659.

63. See *id.* at 664–65 (listing Supreme Court cases that “identif[y] the essential attributes of [the right to marry] based in history, tradition, and other constitutional liberties” and suggesting such attributes apply in same-sex marriages).

64. See *id.* (citing *Loving v. Virginia*, 388 U.S. 1, 12 (1967)). The Court utilized *Loving* to confirm the connection between marriage and liberty. See *id.* In *Loving*, the Court recognized the right of one person to marry a person of another race. See *Loving*, 388 U.S. at 12.

65. See *Obergefell*, 576 U.S. at 666.

66. See *id.* at 666–67 (citing *Griswold v. Connecticut*, 381 U.S. 479, 486 (1965)). *Griswold* describes marriage as “a coming together for better or for worse.” See *Griswold*, 381 U.S. at 486. In *Griswold*, the Court recognized the right of married couples to use contraceptives. See *id.* at 485.

67. See *Obergefell*, 576 U.S. at 667–68 (asserting the recognition and legality of their parents’ relationship also helps children understand their family structure within their community).

nized that “same-sex couples provide loving and nurturing homes to their children, whether biological or adopted.”⁶⁸ Finally, the tradition of marriage is fundamental in our “social order.”⁶⁹ For example, states generally confer certain rights, benefits, and responsibilities on married couples, including medical decision-making authority, adoption rights, birth and death certificates, and child custody.⁷⁰ Justice Kennedy concluded by acknowledging same-sex couples’ profound respect for marriage in seeking it for themselves and holding that the fundamental right to marry extended to same-sex couples under the Constitution.⁷¹

Though *Obergefell* legalized same-sex marriage, it did not address the legal parentage rights of same-sex couples over their shared children.⁷² A pair of commentators noted that while all states recognized a marital presumption for opposite-sex couples, certain states were more willing to accept rebuttals to the presumption based on biology, intent, or function, which posed unique issues for same-sex couples.⁷³ The commentators acknowledged such legal discrepancies opened doors for states to “prevent

68. *Id.* at 668. The Court also noted hundreds of thousands of children were already being raised by same-sex couples and asserted such children might face stigma knowing their families are afforded lesser legal recognition and protection. *See id.*

69. *Id.* at 669.

70. *See id.* at 669–70 (listing other governmental rights, benefits, and responsibilities conferred on married couples, such as taxation, inheritance, and property rights).

71. *See id.* at 681 (“It would misunderstand these men and women to say they disrespect the idea of marriage. Their plea is that they do respect it, respect it so deeply that they seek to find its fulfillment for themselves.”). Justice Kennedy found support for this holding under both the Equal Protection Clause and the Due Process Clause of the Fourteenth Amendment, noting both clauses “prohibit[ed] this unjustified infringement of the fundamental right to marry.” *Id.* at 675.

72. *See* June Carbone & Naomi Cahn, *Marriage and the Marital Presumption Post-Obergefell*, 84 UMKC L. REV. 663, 663 (2016) (noting the *Obergefell* decision “clearly settled” the issue of same-sex marriage but “left open” the issue of parenthood); *see also* Samantha Bei-wen Lee, Student Article, *The Equal Right to Parent: Protecting the Rights of Gay and Lesbian, Poor, and Unmarried Parents*, 41 N.Y.U. REV. OF L. & SOC. CHANGE 631, 637 n.26 (2017) (citing NAT’L CTR. FOR LESBIAN RTS., PROTECTING YOUR FAMILY AFTER MARRIAGE EQUALITY: WHAT YOU NEED TO KNOW 1, <https://www.nclrights.org/wp-content/uploads/2015/01/Protecting-Your-Family-After-Marriage-Equality.pdf> [<https://perma.cc/S2ND-75NH>] (last visited May 23, 2023) (noting marriage does not guarantee parental rights if they are ever challenged, though an adoption or court judgment could guarantee parental rights)).

73. *See* Carbone & Cahn, *supra* note 72, at 664. Carbone and Cahn discuss certain cases in New York that lead to conflicting results based on whether the court prioritizes marriage or biology. *See id.* at 668–70. In *Wendy G-M v. Erin G-M*, the marital presumption was applied to uphold the legal parental rights of a non-biological lesbian mother who left the house shortly after the baby’s birth. *See id.* at 668 (citing *Wendy G-M v. Erin G-M*, 985 N.Y.S.2d 845 (Sup. Ct. 2014)). In *Q.M. v. B.C.*, the court permitted the biological father to proceed with his paternity petition even though the biological mother was legally married to another woman. *See id.* at 669 (citing *Q.M. v. B.C.*, 995 N.Y.S.2d 470 (Fam. Ct. 2014)).

marriage equality from translating into parenthood equality.”⁷⁴ They ultimately argued for an extension of the marital presumption to same-sex couples to recognize their commitment to the care of their children.⁷⁵

Two years after *Obergefell*, the Supreme Court considered the extension of the marital presumption to same-sex couples.⁷⁶ In *Pavan v. Smith*,⁷⁷ two married lesbian couples who conceived children through anonymous sperm donation challenged an Arkansas marital presumption statute that did not extend to same-sex couples.⁷⁸ The statute required the birth mother’s male spouse to appear on their child’s birth certificate even if he was not biologically related to the child.⁷⁹ However, when the lesbian couples listed both spouses as parents, the state issued birth certificates bearing only the birth mother’s name.⁸⁰ The Supreme Court relied on its decision in *Obergefell* to declare the Arkansas law unconstitutional, finding that it prevented married same-sex couples from enjoying the same “rights, benefits, and responsibilities” as married opposite-sex couples.⁸¹ Notably, the Supreme Court recalled that it had explicitly listed birth certificates in its list of such rights, benefits, and responsibilities in *Obergefell*.⁸² By requiring that married same-sex couples be afforded the same right as married opposite-sex couples to list the name of the birth parent’s spouse on their child’s birth certificate, the Supreme Court effectively extended the marital presumption to married same-sex couples.⁸³

74. See Carbone & Cahn, *supra* note 72, at 673.

75. See *id.* (arguing marriage, and by extension the marital presumption, recognizes the spouses’ mutual consent to care for children born into their relationship).

76. See *infra* notes 77–83 and accompanying text.

77. 137 S. Ct. 2075 (2017).

78. See *id.* at 2077 (explaining the Arkansas state law governing birth certificates did not apply equally to married same-sex couples and married opposite-sex couples).

79. See *id.* (mentioning the Arkansas Supreme Court determined that “[t]he State need not . . . issue birth certificates including the female spouses of women who give birth in the State”).

80. See *id.* (noting the state court relied on a provision within the Arkansas law that explicitly referred to the “mother” and her “husband” in its refusal to list the second female spouse as a parent on the birth certificate).

81. *Id.* at 2078.

82. See *id.* (acknowledging the significance of birth certificates, which are often used to make medical decisions or enroll children in school).

83. See *id.* at 2078–79 (challenging the state’s argument that a birth certificate merely marks biological relationships because it had also used birth certificates to recognize legal parental rights of married opposite-sex couples, and requiring the state to extend this recognition to married same-sex couples).

d. Calls for Reform of the Marital Presumption

Many legal scholars have advocated for the restructuring of the marital presumption to focus more on intent and function than biology.⁸⁴ An intent-based approach would reflect the notion that the birth mother and her spouse mutually intended for the spouse to take on the role of the second parent.⁸⁵ Either spouse could then rebut the presumption by proving lack of intent to parent.⁸⁶ A function-based approach would assume that the birth mother's spouse will support and care for the child as a parent.⁸⁷ Similarly, either spouse could rebut the presumption by proving lack of functioning in a parental role.⁸⁸ Intent or function-based approaches are arguably more adaptable for conception through assisted

84. See Feinberg, *supra* note 34, at 260 (arguing the presumption's primary purpose of granting parentage to the person most likely to be the child's second parent requires that the presumption extend beyond genetics); see also Fein, *supra* note 12, at 197 (proposing a multi-factor test that combines intent, function, and best interests of the child to establish parentage); Lee, *supra* note 72, at 642 (arguing the existing rules that focus on marriage, biology, or adoption to determine parentage "ignore[] a person's intent to become a parent, limit[] a person's choice of co-parent, and unnecessarily create[] a second-class group of parents").

85. See Feinberg, *supra* note 34, at 273 (noting marriage would become a "proxy" for intent to parent children born into the marriage). Feinberg suggests that an intent-based approach is fair in that it "protects the reliance interests and expectations of the spouses stemming from their mutual agreement to become co-parents." *Id.* Moreover, Feinberg notes advocates have argued an intent-based approach promotes a child's best interest because a person's intent to become a child's parent generally indicates desirable parenting behavior. See *id.* She also highlights some questions regarding the adoption of an intent-based approach, including the need to establish the time when intent should be determined. See *id.* at 278–80.

86. See *id.* at 273 (arguing the rebuttal of marital presumption using an intent-based approach is straightforward because it considers one question that requires a yes or no answer: "at the critical point in time, did the individual who gave birth and their spouse mutually intend for the spouse to be a parent to the child?"). Feinberg also suggests the parties can easily record their intent to parent through a written declaration, for example. See *id.* She further acknowledges the need to determine whether standard contract defenses such as fraud or duress could be used by individuals to argue they did not consent to parent to rebut the marital presumption. See *id.* at 280–81.

87. See *id.* at 281 (noting marriage would also become a "proxy" for willingness to function as a parent to children born into the marriage). Feinberg asserts that a function-based approach focuses on the relationship between the child and the parent and therefore most directly promotes the child's best interest. See *id.* at 281–82.

88. See *id.* at 281 (outlining the benefits and detriments of a function-based focus for rebutting the marital presumption). Feinberg recognizes the analysis regarding a function-based approach is complex and fact-intensive, thereby causing uncertainty for parents rebutting the marital presumption. See *id.* at 283–84. Moreover, a function-based approach risks gender stereotyping to determine the traditional functions of parents. See *id.* at 284. She also notes a function-based approach requires post-birth conduct, so a party seeking to rebut the marital presumption could do so simply by initiating an action immediately after the child is born or could prevent the other party from functioning as the child's parent. See *id.* at 286–87.

reproductive technology and more easily extendable to same-sex married couples.⁸⁹ However, very few states have extended intent-based approaches to unmarried couples, and even fewer have extended the approach to unmarried same-sex partners.⁹⁰ While function-based approaches have been applied more broadly, state laws vary in the parental responsibilities conferred through these approaches.⁹¹ Moreover, courts have generally accepted intent and function-based approaches in the context of rebutting the marital presumption rather than initially establishing parental rights.⁹²

3. Adoption

When the marital presumption is inapplicable because the couple is not married, the non-biological parent can adopt the child.⁹³ The non-biological parent can undergo a second-parent adoption without terminat-

89. *Id.* at 263 (noting intent and function-based approaches more closely align with developments in parentage law that focus on establishing parentage through more than biological connection). Feinberg specifically cites *Obergefell* to support the assertion that the intent-based approach typically used to determine parentage for married opposite-sex spouses conceiving through assisted reproductive technologies should extend to same-sex spouses conceiving through the same methods. *See id.*; *see also supra* notes 53–57 and accompanying text (discussing the extension of parental rights for couples conceiving through artificial insemination to same-sex couples).

90. *See* Feinberg, *supra* note 34, at 263–64. As of 2019, only twelve states had statutes establishing parentage for unmarried men who consented to their partner’s use of assisted reproduction with intent to be the second parent. *See id.* at 263. Only nine states had extended this to unmarried same-sex partners. *See id.* at 264.

91. *See id.* at 264–65. As of 2019, at least eighteen states had adopted equitable parenthood doctrines that recognized function-based approaches to establishing parentage. *See id.* at 264. Feinberg notes equitable parenthood doctrines generally grant only child custody or visitation rights, rather than legal parental rights, to those who are not legal parents but have functioned as parents. *See id.* at 265; *see also infra* notes 99–107 and accompanying text (discussing the adoption of equitable parenthood doctrines generally).

92. *See* Feinberg, *supra* note 34, at 266–67 (referencing different scenarios in which courts consider equitable principles when one party attempts to rebut the marital presumption). Feinberg notes equitable principles are generally used to prevent rebuttal by a party when it is in the best interest of the child and when the party has functioned as the parent or demonstrated intent to serve as the parent. *See id.* at 266. In one specific example, she notes courts have used equitable principles to prevent rebuttal by the birth mother where she “encouraged or demonstrated an intent that her spouse assume the role of the child’s parent and the spouse, acting in reliance on the mother’s actions, had in fact functioned in that role.” *Id.* at 267.

93. *See* Fein, *supra* note 12, at 185–86 (listing second-parent adoption, step-parent adoption, and parentage judgments as alternatives to ensure parental rights for non-biological parents); *see also* NAT’L CTR. FOR LESBIAN RTS., LEGAL RECOGNITION OF LGBT FAMILIES, 1–2 (2019), https://www.nclrights.org/wp-content/uploads/2013/07/Legal_Recognition_of_LGBT_Families.pdf [<https://perma.cc/SDW3-YPV3>] (recommending that non-biological parents adopt their child even if they are listed on their child’s birth certificate).

ing the biological parent's rights, such that both parents have equal legal status with respect to their child.⁹⁴ Second-parent adoption laws vary from state to state and the adoption process can be extremely intrusive and expensive.⁹⁵ Alternatively, the non-biological parent can undergo a stepparent adoption, which may be more accessible, faster, and less expensive.⁹⁶ However, requiring parents to adopt their own child can be degrading

94. See Fein, *supra* note 12, at 185–86 (explaining second-parent adoptions are available to all married couples in the United States, regardless of sexual orientation, and permit both parents to make decisions related to the child's health-care, education, and upbringing); see also NAT'L CTR. FOR LESBIAN RTS., *supra* note 93, at 2 (noting second-parent adoption is the most common method used by non-biological parents to establish legal relationships with their child); see also *Equality Maps: Foster and Adoption Laws*, MOVEMENT ADVANCEMENT PROJECT, https://www.lgbtmap.org/equality-maps/foster_and_adoption_laws [<https://perma.cc/5XP8-E3MM>] (last visited May 24, 2023) [hereinafter MAP, *Foster and Adoption Laws*] (listing approximately twenty states, and the District of Columbia, in which a parent can petition for a second-parent adoption regardless of marital status).

95. See Fein, *supra* note 12, at 186–88 (explaining all second-parent adoption applicants generally have to submit a variety of personal information and undergo a background check and home study). Fein also notes the adoption process can take between six and nine months and can cost more than \$4,000. *Id.* at 188; see also Elizabeth A. Harris, *Same-Sex Parents Still Face Legal Complications*, N.Y. TIMES (June 20, 2017), <https://www.nytimes.com/2017/06/20/us/gay-pride-lgbtq-same-sex-parents.html> [<https://perma.cc/8J8V-Y5W5>] (highlighting a lesbian couple's experience undergoing a second-parent adoption in New York). Specifically, the adopting parent had to be fingerprinted, undergo home visits with a social worker, and provide every address where she lived. See *id.* The couple expected the process to take about a year and cost about \$4,000. See *id.*; see also Mikhal Weiner, *Why Are Queer Parents Still Paying for Second-Parent Adoption?*, PARENTS (June 24, 2021), <https://www.parents.com/parenting/adoption/why-are-queer-parents-still-paying-for-second-parent-adoption/> [<https://perma.cc/M55G-CELM>] (detailing a same-sex couple's decision to undergo a second-parent adoption and experience with the process). The couple specifically decided to undergo a second-parent adoption, though it is not legally necessary, to ensure that both parents could authorize medical treatment, pick up their child from daycare, travel with their child, and maintain contact with their child should they separate in the future. *Id.* The couple's experience included substantial paperwork and thousands of dollars in fees, as well as a home study where a social worker checked to see if they were fit to be their own child's parents. See *id.*

96. See Fein, *supra* note 12, at 190 (suggesting stepparent adoptions and second-parent adoptions have similar legal effects, but the word "stepparent" does not accurately reflect the non-biological parent's role as the child's true parent); see also NAT'L CTR. FOR LESBIAN RTS., *supra* note 93, at 2 (highlighting that only married couples or couples in a domestic partnership or civil union may benefit from stepparent adoption); see also MAP, *Foster and Adoption Laws*, *supra* note 94 (explaining married couples or couples in other legally recognized relationships can generally petition for stepparent adoptions in all fifty states).

and intrusive, and can ultimately undermine the parent-child relationship.⁹⁷ Even the terms “second-parent” and “stepparent” themselves imply a secondary relationship rather than an equal one.⁹⁸

B. *Non-Traditional Methods of Establishing Legal Parentage*

There are various non-traditional methods of establishing legal parentage other than biology, marriage, or adoption.⁹⁹ Specifically, parentage judgments offer an alternative method to ensure the legal parentage of non-biological, non-adoptive parents.¹⁰⁰ To obtain a parentage judgment, non-biological, non-adoptive parents can file an action in state court asking the court to establish legal parentage that may be recognized and enforced anywhere in the United States.¹⁰¹

Other equitable remedies for establishing legal parentage include *de facto* parentage, psychological parentage, and *in loco parentis*.¹⁰² *De facto* parentage analyzes certain factors that imply a parent-child relationship to determine parentage when an individual other than the legal parent acts as the legal parent.¹⁰³ Psychological parentage focuses on the best inter-

97. See Fein, *supra* note 12, at 187–89 (highlighting negative past experiences same-sex couples have had with the adoption process, including unequal and unfair treatment); see also Harris, *supra* note 95 (recalling a lesbian mother undergoing a second-parent adoption saying, “having to adopt your own child feels way more invasive, upsetting, disturbing”); NAT’L CTR. FOR LESBIAN RTS., *supra* note 93, at 2 (arguing same-sex parents who plan the adoption of their child together should both be parents, not stepparents, and should not have to adopt their own child in the first place).

98. See Fein, *supra* note 12, at 188–89 (referencing a mother’s experience adopting her son through second-parent adoption and feeling “lesser than” and “unequal” compared to same-sex couples who are simply called “mom” and “dad” rather than “first” or “second” parent).

99. See notes 100–107 and accompanying text; see also Fein, *supra* note 12, at 191–94 (explaining parentage judgments and introducing equitable remedies).

100. See NAT’L CTR. FOR LESBIAN RTS., *supra* note 93, at 4 (noting a partner’s name on a child’s birth certificate is an inadequate protection of parental rights, while a parentage judgment offers complete protection).

101. See Mariette Geldenhuys, *Beyond Surrogacy: Parentage Under the Child Parent Security Act*, N.Y. STATE BAR ASS’N (May 25, 2021), <https://nysba.org/beyond-surrogacy-parentage-under-the-child-parent-security-act/> [https://perma.cc/82PK-RXWQ] (explaining parentage judgments are “not necessary to establish parentage, but . . . offer[] important protection[s]” for same-sex couples traveling between states).

102. See Kisthardt & Roane, *supra* note 16, at 63–66 (discussing the equitable remedies that caregivers can seek if they cannot establish legal parentage through marriage, biology, or adoption).

103. See *id.* at 62–63 (classifying the definition of a *de facto* parent as “extremely narrow” and implying *de facto* parents essentially compete with legal parents for parental rights by asserting they are the primary caregivers and supporters of the children). The factors used to establish *de facto* parentage include:

(1) the natural or legal parent consented to and fostered the parent-like relationship; (2) the petitioner and the child lived together in the same household; (3) the petitioner assumed obligations of parenthood without expectation of financial compensation; and (4) the petitioner has been in

est of the child and primarily considers the child's bond with the parental figure.¹⁰⁴ Finally, *in loco parentis* parentage depends on who "has been treated as a parent by the child and has formed a meaningful parental relationship with the child for a substantial period of time."¹⁰⁵ Though these equitable remedies seem to offer the most comprehensive bases for establishing parentage for same-sex couples, many courts refuse to use them.¹⁰⁶ Further, equitable remedies may be limited to affording custody and visitation rather than full legal parentage if there are other legal parents.¹⁰⁷

a parental role for a length of time sufficient to have established with the child a bonded, dependent relationship, parental in nature.

Id. at 64 (citing *In re Parentage of L.B.*, 122 P.3d 161, 176 (Wash. 2005) (finding that courts still consider whether to award parental rights and responsibilities based on the best interests of a child even when a *de facto* parent satisfies the four requirements)).

104. *See id.* (noting the psychological parent doctrine focuses more on the potential impact of ending the parental relationship on the child than the legal relationships between the parental figures and the child).

105. *Id.* at 66 (explaining the *in loco parentis* doctrine also focuses on the child's best interests and the child's perception of the parent).

106. *See id.* at 68–69 (citing *Mabry v. Mabry*, 882 N.W.2d 239 (Mich. Ct. App. 2016) (discussing how *Mabry* limited the *de facto* parentage doctrine to married couples, and arguing that such a holding would negatively impact same-sex couples who couldn't marry pre-*Obergefell*, separated before *Obergefell*, and had a custody dispute)); *see also* 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, 679 (2012) (noting *de facto* parentage is not universally recognized). Grossman acknowledges courts' concerns with recognizing *de facto* parentage, including the potential intrusion on the "constitutionally protected parental rights" of the biological mother, "the lack of certainty about parental status," and "the lack of statutory authority to create a quasi-parental status not obviously provided for by the legislature." *See id.* at 679–80. Grossman also provides examples of two New York Court of Appeals cases decided nearly twenty years apart, *Alison D. v. Virginia M.* and *Debra H. v. Janice R.*, that both rejected the *de facto* parentage doctrine. *See id.* at 680–85 (citing *Alison D. v. Virginia M.*, 572 N.E.2d 27 (N.Y. 1991); *Debra H. v. Janice R.*, 930 N.E.2d 184 (2010), *abrogated by* *Brooke S.B. v. Elizabeth A.C.C.*, 61 N.E.3d 488 (N.Y. 2016)). Grossman notes the New York court's primary goal in affirming the holding of *Alison D.* in the *Debra H.* case, and thereby rejecting the *de facto* parentage doctrine once again, was to provide "certainty in the wake of domestic breakups." *See id.* at 684 (quoting *Debra H.* 930 N.E.2d at 191). Though the New York Court abrogated *Debra H.* in *Brooke S.B. v. Elizabeth A.C.C.*, *Brooke S.B.* only granted standing by the non-biological, non-adoptive partner to seek visitation and custody where such partner has proven with "clear and convincing evidence that he or she has agreed with the biological parent of the child to conceive and raise the child as co-parents." *See Brooke S.B.*, 61 N.E.3d at 501; *see also infra* note 121 and accompanying text (listing the states that currently recognize or do not recognize *de facto* parents).

107. *See* Kisthardt & Roane, *supra* note 16, at 69 (emphasizing that children may not receive the same benefits, such as Social Security, from an equitable parent as they would from a legal parent).

III. STATE COURTS GO BREAKING SEPARATED SAME-SEX PARTNERS'
HEARTS: ANALYZING CONTRASTING INTERPRETATIONS OF THE
UNIFORM PARENTAGE ACT

The Uniform Parentage Act, promulgated by the Uniform Law Commission (the Commission), is the leading legislation on parentage.¹⁰⁸ Originally introduced in 1973, the UPA rebuked disparate treatment of illegitimate children and provided various presumptions to determine legal parentage.¹⁰⁹ The initial goal of the UPA was “to ensure that all children and all parents have equal rights with respect to each other, regardless of the marital status of the parents.”¹¹⁰ As technology advanced and provided more options for family expansion, the Commission amended the UPA in 2002 to include “nonjudicial acknowledgment-of-paternity procedure[s] equivalent to a court adjudication of parentage” (known as voluntary acknowledgments of parentage (VAPs)), and “rules for determining the parentage of children conceived with assisted reproductive technologies.”¹¹¹ Specifically, a man who consented to assisted reproduction by a woman with the intent to be the second parent was considered the legal parent.¹¹²

The Commission amended the UPA again in 2017 to reflect the changes to the family structure after *Obergefell* and *Pavan*.¹¹³ One amendment was the addition of gender-neutral terms to the marital presumption, voluntary acknowledgement, and assisted reproduction provisions so that same-sex couples had equal parentage rights as opposite-sex couples.¹¹⁴ The assisted reproduction provisions “focus on intentional

108. See UNIF. PARENTAGE ACT (UNIF. L. COMM'N 1973); see Jamie D. Pedersen, *The New Uniform Parentage Act of 2017*, 40 FAM. ADVOC. 16, 16 (2018) (noting the act is meant to bring “clarity and stability” to parentage determinations, typically a matter for review under state law).

109. See Pedersen, *supra* note 108, at 16 (responding to Supreme Court decisions declaring “differential treatment of nonmarital children was unconstitutional”).

110. *Id.*

111. *Id.* Though the amendments reflected technological advancements, they did not reflect the “growing reality” of procreation by same-sex couples. See *id.* A VAP allows a parent to acknowledge parentage immediately before or after the birth of a child. See GLAD, *FAQ: Voluntary Acknowledgment of Parentage (VAP)*, <https://www.glad.org/voluntary-acknowledgment-of-parentage/> [https://perma.cc/YXZ5-GE8K] (updated July 2022) (explaining how VAPs are especially useful for LGBTQ+ couples because they provide a quick route to establishing legal parentage).

112. See Pedersen, *supra* note 108, at 16 (citing UNIF. PARENTAGE ACT § 703 (UNIF. L. COMM'N 2002)).

113. See *id.* at 18 (noting the changes were meant to ensure children born to same-sex couples were treated equally compared to those born to opposite-sex couples).

114. See *id.* (providing an example in which two lesbian mothers having a child through assisted reproduction can both be the legal parents of the child and can sign a VAP that would be respected as a judgment no matter where the couple travels or moves); see also UNIF. PARENTAGE ACT § 703 (UNIF. L. COMM'N 2017) (“An

parenthood regardless of genetic contribution.”¹¹⁵ Another amendment established *de facto* parentage for those who function as a child’s parent but do not have a biological or marital connection.¹¹⁶ Collectively, these provisions reflect the Commission’s leniency in establishing legal parentage beyond the context of traditional opposite-sex married couples and into the realm of same-sex couples.¹¹⁷

While all states honor the marital presumption for married same-sex couples, state legislatures have not uniformly adopted all provisions of the amended UPA.¹¹⁸ With respect to assisted reproduction, sixteen states plus the District of Columbia recognize the non-biological parent as a legal parent, regardless of the same-sex couple’s marital status, if the non-biological parent consents to the conception of a child born using assisted reproduction methods such as artificial insemination.¹¹⁹ The other thirty-four states recognize the non-biological parent as a legal parent if the couple is married, but do not have clear laws for couples who are not married.¹²⁰ With respect to *de facto* parentage, thirty-six states recognize the doctrine, nine states’ laws do not clearly recognize or reject the doctrine, and five states explicitly do not recognize the doctrine.¹²¹

individual who consents under Section 704 to assisted reproduction by a woman with the intent to be a parent of a child conceived by the assisted reproduction is a parent of the child.” (emphasis added)).

115. Camille Workman, Comment, *The 2017 Uniform Parentage Act: A Response to the Changing Definition of Family?*, 32 J. AM. ACAD. MATRIM. L. 233, 238 (2019).

116. *See id.* at 240–41 (noting the UPA provisions provide for *de facto* parents, though each state addresses the doctrine differently).

117. *See generally id.* at 250 (concluding the main goal of the 2017 UPA changes was to provide equal treatment to children born to same-sex couples due to medical, technological, and social advancements).

118. *See infra* notes 119–121 and accompanying text.

119. *See Equality Maps: Other Parental Recognition Laws*, MOVEMENT ADVANCEMENT PROJECT, https://www.lgbtmap.org/equality-maps/other_parenting_laws [<https://perma.cc/ZN54-DESX>] (last visited May 24, 2023) [hereinafter MAP, *Other Parental Recognition Laws*] (listing California, Colorado, Connecticut, Delaware, Illinois, Maine, Massachusetts, Nevada, New Hampshire, New Mexico, New York, North Dakota, Rhode Island, Vermont, Washington, and Wyoming as such states).

120. *See id.* (listing Alabama, Alaska, Arizona, Arkansas, Florida, Georgia, Hawaii, Idaho, Indiana, Iowa, Kansas, Kentucky, Louisiana, Maryland, Michigan, Minnesota, Mississippi, Missouri, Montana, Nebraska, New Jersey, North Carolina, Ohio, Oklahoma, Oregon, Pennsylvania, South Carolina, South Dakota, Tennessee, Texas, Utah, Virginia, West Virginia, and Wisconsin as such states).

121. *See Equality Maps: Other Parental Recognition Laws*, MOVEMENT ADVANCEMENT PROJECT, https://www.lgbtmap.org/equality-maps/other_parenting_laws/de_facto_parenting_statutes [<https://perma.cc/76ED-SEBG>] (last visited May 24, 2023) [hereinafter MAP, *De Facto Parenting Laws Map*] (highlighting diverging laws among the states). In nine states and four territories—including New York, Virginia, Georgia, Alabama, Florida, Louisiana, South Dakota, Wyoming, and Idaho—recognition of *de facto* parentage is uncertain, or the state may require the parent to provide specific evidence to gain *de facto* parentage status. *See id.* The five states that do not recognize *de facto* parentage include Michigan, Utah, Iowa, Illinois, and Tennessee. *See id.*

Despite the protective goals of the amended UPA, as well as the trend away from traditional methods of establishing parentage, the determinative factor in many decisions remains to be whether the same-sex couple ever married.¹²² This Part analyzes how different courts determine parental rights of former same-sex couples who never married compared to those who did marry.¹²³ Overall, this Part proves that current laws fall short of fully protecting the parental rights of unmarried same-sex couples.¹²⁴

A. *Same-Sex Couples Who Never Married and Separated*

A non-biological, non-adoptive partner in a former same-sex couple that never married generally faces a more difficult battle in court, which seems to reflect certain courts' preference to honor biological or adoptive relationships if the marital presumption is not applicable.¹²⁵

For instance, in *Hawkins v. Grese*,¹²⁶ the Court of Appeals of Virginia held that a non-biological former same-sex partner was not a parent to her child because she was not the biological parent and had never adopted the child.¹²⁷ Hawkins and Grese were in a ten-year relationship, but they never married or entered into a civil union.¹²⁸ When the couple decided to have a child, Grese became pregnant through artificial insemination and therefore automatically became the child's legal parent.¹²⁹ Two years later, Grese and Hawkins separated, and Grese cut contact between Hawkins and their son.¹³⁰ The court first concluded parentage could only exist through genetics or legal adoption, and because Hawkins had neither relationship, she was not her son's legal parent.¹³¹ The court also dis-

122. See *infra* Section III.A.

123. See *infra* Section III.A and Section III.B.

124. See generally 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, 225–26 (2009) (noting two shortcomings of the current laws are the lack of clarity on when and how the parentage presumption can be rebutted and the insufficient protection for couples who never marry). Polikoff suggests current laws still relegate children born to same-sex unmarried couples to “second-class status,” which fully contrasts with the intent of the amended UPA. See *id.* at 226.

125. See generally Fein, *supra* note 12, at 167–68 (explaining a non-biological partner in a same-sex couple must take additional legal steps to adopt the child to ensure full parental rights).

126. 809 S.E.2d 441 (Va. Ct. App. 2018).

127. See *id.* at 446, 449 (relying on the Virginia statute that defines “parent” based on genetics or adoption).

128. See *id.* at 443 (noting the couple shared a home throughout their relationship).

129. See *id.* (acknowledging the couple mutually decided to have a child).

130. See *id.* (noting the couple “informally shared custody” after they separated).

131. See *id.* at 446, 449 (relying on traditional methods to establish parentage). In reaching this conclusion, the court held that a “person with a legitimate interest” in seeking custody and visitation was a party other than a parent, so the

missed Hawkins's request to extend the familial protections of *Obergefell* because the couple had never married.¹³² Finally, there were no extraordinary reasons for taking the child from Grese, so Hawkins did not sufficiently rebut the parental presumption in favor of custody by Grese.¹³³ Although the court acknowledged Hawkins's visitation rights, it ultimately denied her legal parental rights.¹³⁴

Similarly, in *Sheardown v. Guastella*,¹³⁵ the Court of Appeals of Michigan upheld a Michigan custody statute that declared a parent as the natural or adoptive parent and dismissed a non-biological, non-adoptive partner's custody claim over the child she shared with her former same-sex partner.¹³⁶ The former same-sex partners entered into an agreement with a sperm donor that declared their intention to be the legal parents of the child born as a result of the insemination and denied the donor's potential parentage rights.¹³⁷ The couple never married and ultimately separated a few years after their child's birth, thereby leading the non-biological, non-adoptive partner to seek custody.¹³⁸ The court gave no weight to the coparenting agreement between the parties.¹³⁹ Instead, like the Virginia court in *Hawkins*, the Michigan court focused on the fact that the parties had never married and therefore were not entitled to any of

fact that Hawkins challenged Grese, a legal parent, for custody and visitation implied that she was not a parent herself. *See id.* at 446 (quoting VA. CODE ANN. § 20-124.1 (2018)). The court also noted that Virginia had not adopted *de facto* or psychological parent doctrines. *See id.*

132. *See id.* at 447–49. The court confirmed the Equal Protection Clause was not violated because the benefits typically afforded to married couples are not extended to both unmarried opposite-sex couples and unmarried same-sex couples alike. *See id.* at 448–49.

133. *See id.* at 452 (suggesting the non-biological mother would have to prove the biological mother was an unfit mother for an extraordinary circumstances exception to apply).

134. *See id.* (noting the “emotional bond” between Hawkins and her child would support a visitation award, thereby implying that bond was not sufficient to support legal parentage).

135. 920 N.W.2d 172 (Mich. Ct. App. 2018).

136. *See id.* at 174 (finding the Michigan Child Custody Act at issue was not unconstitutional). Specifically, the statute at issue defines “parent” as “the natural or adoptive parent of a child.” MICH. COMP. LAWS § 722.22(i) (2018).

137. *See Sheardown*, 920 N.W.2d at 174 (referring to the agreement as a contract between the same-sex couple and the sperm donor). The sperm donor agreed to assist the couple with becoming pregnant and promised not to try to become a legal parent or seek custody or visitation. *See id.*

138. *See id.* (confirming the non-biological parent also did not seek to adopt the child throughout the relationship).

139. *See id.* at 176 (listing two reasons why the non-biological, non-adoptive partner could not establish a constitutional violation). The court specifically noted there was no violation of the Due Process Clause because the couple was not married, and there was no violation of the Equal Protection Clause because the non-biological, non-adoptive partner was not treated differently than a heterosexual unmarried person would be treated under the statute. *See id.* Throughout its analysis of these two issues, the court never mentioned the coparenting agreement to show the former couple's intent to parent their child together. *See id.* at 176–79.

the benefits of marriage afforded to couples under *Obergefell* and *Pavan*.¹⁴⁰ Further, the court determined the custody statute did not violate *Obergefell* and *Pavan* because the statute applied equally to same-sex and opposite-sex couples.¹⁴¹ The court maintained the constitutionality of the custody statute and thus prevented the non-biological, non-adoptive partner from obtaining custody.¹⁴²

The Supreme Court of Kansas strayed from these decisions in *In re M.F.*¹⁴³ and upheld the legal parentage of the non-biological, non-adoptive partner because the birth mother consented to the shared parentage at the time of the child's birth, even though the couple never married.¹⁴⁴ In *In re M.F.*, an unmarried lesbian couple in a long-term relationship decided to have a baby through artificial insemination.¹⁴⁵ The couple never entered into a written or oral coparenting agreement.¹⁴⁶ The non-biological partner nonetheless attended the successful insemination procedure as well as the baby's birth, and took additional actions showing her intent to be the baby's second parent.¹⁴⁷ After the couple split, the non-biologi-

140. *See id.* at 177 (“Plaintiff is not in a position to argue that she was denied a benefit granted to a heterosexual *married* person, because she was never married to defendant.”). The dissent argued the majority improperly focused on the fact the couple never married because marriage was not yet legal in Michigan while the couple was together. *See id.* at 179 (Fort Hood, J., dissenting).

141. *See id.* at 177–79 (majority opinion) (noting nothing within the language of the statute distinguishes between same-sex and opposite-sex couples). The dissent argued the non-biological, non-adoptive partner was in fact subject to different treatment than a former partner in an opposite-sex relationship that produced a child because such partner would have a biological connection to the child and would therefore have standing to seek custody under the statute. *See id.* at 183 (Fort Hood, J., dissenting).

142. *See id.* at 179 (majority opinion) (reiterating that the plaintiff could not claim the benefits of marriage extended by *Obergefell* without being married).

143. 475 P.3d 642 (Kan. 2020).

144. *See id.* at 644. The Supreme Court of Kansas reached the same conclusion in another case with similar facts, *In re W.L.*, decided on the same day as *In re M.F.* *See In re W.L.*, 475 P.3d 338, 341 (Kan. 2020). The cases are often discussed together in scholarly articles, though this Comment will focus on the facts in *In re M.F.* *See, e.g.*, Matthew Goodwin, *Kansas Supreme Court Creates Broad Path for Unmarried Lesbian Co-Parents to Seek Parental Rights*, 2020 LGBT L. NOTES 6.

145. *See In re M.F.*, 475 P.3d at 645. Before deciding to have a baby, the couple lived in a shared home, had a joint bank account, and were on one shared health insurance plan. *See id.* at 644.

146. *See id.* at 645 (highlighting the failure to reach a coparenting agreement as a significant point of contention throughout the case). The biological partner argued a written coparenting agreement was required for the non-biological partner to have any parental rights based on the Kansas Supreme Court's decision in *Frazier v. Goudschaal*, in which the court upheld a non-biological lesbian mother's parental rights based on a written coparenting agreement between her and the biological lesbian mother prior to the artificial insemination procedure. *See id.* at 647, 650–51 (citing *Frazier v. Goudschaal*, 295 P.3d 542 (Kan. 2013)).

147. *See id.* at 645 (discussing the non-biological partner's involvement). The non-biological partner attended the pre-insemination session with a social worker and the successful insemination procedure. *See id.* The court also acknowledged the non-biological mother was given a “mother” security bracelet at the hospital

cal partner sought to establish parentage.¹⁴⁸ The lower court denied her parentage because the parties did not have a written coparenting agreement evidencing a “meeting of the minds,” nor did the non-biological partner openly and notoriously assert her parenthood.¹⁴⁹

The Supreme Court of Kansas noted the Kansas Parentage Act (KPA) explicitly established parentage through biology or adoption but also granted parentage for a consenting husband and wife whose child is conceived through artificial insemination.¹⁵⁰ Though consent is generally proven through a written acknowledgment by the husband, wife, and individual who performed the insemination procedure, the court expanded proof of consent to include implicit or explicit consent by the biological parent.¹⁵¹ The court also confirmed the time of consent should be at the time of the baby’s birth to ensure stability for the baby despite “relationship disappointments that are bound to occur.”¹⁵² The court ultimately reversed and remanded the case to the district court to apply the facts of the case using these more generous interpretations of the KPA.¹⁵³

when the baby was born and attended childbirth classes. *See id.* at 646. Also, their families gave them both a baby shower, the biological partner gave her Mother’s Day cards, and the non-biological partner opened a bank account for the baby with herself listed as the parent. *See id.*

148. *See id.* at 645 (noting the non-biological partner’s legal actions and arguments). Specifically, the non-biological partner wanted the court to apply the presumption within the Kansas Parentage Act (KPA), which presumes a man to be the father of a child if he notoriously or in writing recognizes paternity of the child through some form of voluntary acknowledgment. *See Goodwin, supra* note 144, at 6–7.

149. *See In re M.F.*, 475 P.3d at 646. The lower court relied on the fact that the biological parent did all of the “hands-on parenting” on a “day-to-day basis.” *See id.* at 646–47.

150. *See id.* at 652 (recognizing artificial insemination is legally equivalent to natural conception under Kansas law). The court relied on *Frazier* to declare a “legal fiction” of biological parentage when the same-sex couple has consented to shared parenting at the time of the child’s birth. *See Valerie Moore, Navigating Same-Sex Parentage Cases*, 91 J. KAN. B. ASS’N 42, 42, 46 (2022).

151. *See In re M.F.*, 475 P.3d at 661 (permitting the use of circumstantial, testimonial, or documentary evidence in proving the biological mother’s consent to shared parenting).

152. *See id.* The court was explicitly concerned about giving either party a “veto” after the couple had consented to shared parenting and after the child had arrived and parental bonds had begun to form. *See id.* Moreover, the court argued that both partners must have made up their minds to parent as of the time of the baby’s arrival. *See id.*

153. *See id.* at 662 (suggesting the lower court can request additional evidence, presumably to find consent to parentage at the time of the child’s birth).

B. *Same-Sex Couples Who Married and Divorced*

Alternatively, a non-biological, non-adoptive partner in a former same-sex couple that did marry and subsequently divorced generally fares better in court.¹⁵⁴ In *Harrison v. Harrison*,¹⁵⁵ the Court of Appeals of Tennessee upheld the parental rights of a non-biological, non-adoptive partner in a formerly married same-sex couple.¹⁵⁶ Pamela Harrison and Shannon Hickman married in 2011, and Shannon took Pamela's last name.¹⁵⁷ Because the couple wanted children, Shannon underwent artificial insemination using sperm from a male acquaintance, Joseph Compton.¹⁵⁸ The process was successful two different times, and Shannon gave birth to two children—one in 2014 and one in 2015.¹⁵⁹ When Pamela filed for divorce in 2018, Shannon asserted that Pamela did not have parental rights because she was not the biological parent and had never adopted their children.¹⁶⁰ Shannon also filed an affidavit signed by the sperm donor in which he asserted his parental rights as the biological father.¹⁶¹ The lower court found Shannon and Pamela intended to raise the children as a family and the sperm donor was merely a donor with no intent to be a legal parent.¹⁶² When the donor appealed, the Court of Appeals of Tennessee upheld the lower court's ruling based on the state's artificial insemination statute.¹⁶³ The court also rejected the donor's claim that an express written agreement was required for the artificial in-

154. See *infra* notes 155–174 and accompanying text.

155. 643 S.W.3d 376 (Tenn. Ct. App. 2021), *appeal denied*, No. M2020-01140-SC-R11-CV, 2022 Tenn. LEXIS 47 (Tenn. Feb. 10, 2022).

156. See *id.* at 378 (denying the sperm donor the right to be named a legal parent and the right to visitation).

157. See *id.* (explaining the couple married in Iowa because Tennessee did not recognize same-sex marriages at the time).

158. *Id.*

159. See *id.* (mentioning the children referred to both women using different forms of the word “mother”).

160. See *id.* (acknowledging Pamela's name was missing from one of their child's birth certificates).

161. See *id.* at 378–79 (reciting the sperm donor's assertions that he provided the sperm, never signed an agreement waiving parental rights and never intended to waive such rights, wanted to be a part of the children's lives, intended to establish himself as the children's father, and believed it was in the children's best interests for him to be a part of their lives).

162. See *id.* at 380. The sperm donor was married and agreed with his wife to be a sperm donor but was not involved in the insemination process and never acted as a father to the children. See *id.* at 379.

163. See *id.* at 381–83 (reciting Tennessee's artificial insemination statute). The statute provides, “A child born to a married woman as a result of artificial insemination, with consent of the married woman's husband, is deemed to be the legitimate child of the husband and wife.” *Id.* at 381 (footnote omitted) (quoting TENN. CODE ANN. § 68-3-306 (2021)). The court interpreted the statute to include gender neutral terms based on the Supreme Court decisions in *Obergefell* and *Pavan*. See *id.* at 383.

semination statute to apply but acknowledged the importance of taking intent into account in establishing parentage.¹⁶⁴ The court ultimately denied the sperm donor parental rights.¹⁶⁵

Similarly, in *Soon v. Kammann*,¹⁶⁶ the Court of Appeals of New Mexico also did not deny the parental rights of a non-biological, non-adoptive partner in a formerly married same-sex couple.¹⁶⁷ Soon and Kammann married in 2015 and decided to conceive a child through artificial insemination.¹⁶⁸ After several unsuccessful procedures, Soon conceived twins in 2016.¹⁶⁹ However, while Soon was pregnant, she filed for divorce, and a contentious parentage dispute arose.¹⁷⁰

Soon tried to rebut Kammann's presumed parentage through the marital presumption by arguing Kammann was not the biological or genetic parent of their children.¹⁷¹ However, the court determined the lack of biological or genetic connection was insufficient to rebut a parentage presumption based on the legislative intent of the New Mexico UPA.¹⁷² The court also held that a signed consent for the specific artificial insemi-

164. *See id.* at 383–84 (noting the statute doesn't explicitly require a written agreement but does require artificial insemination to be performed "with consent"). The court relied on the record to determine the same-sex couple intended to parent the children, and the biological mother never intended for the donor to be a father to the children. *See id.* at 384.

165. *See id.* at 386 (upholding the non-biological partner's rights). *But see* Pippin v. Pippin, No. M2018-00376-COA-R3-CV, 2020 WL 2499633, at *1 (Tenn. Ct. App. May 14, 2020) (denying a non-biological, non-adoptive former same-sex partner parental and visitation rights). Both cases come from Tennessee state courts but reach different results on legal parentage depending on whether the couple was married. In *Pippin*, the court strictly interpreted the Tennessee artificial insemination statute to only apply to married couples, and the couple in the case had never married. *See id.* at *6. Moreover, the court refused to adopt the *de facto* parentage doctrine and provide visitation rights based on precedent. *See id.* at *7–8.

166. 521 P.3d 110 (N.M. Ct. App. 2022), *cert. granted* S-1-SC-39544, 2022 N.M. LEXIS 97 (N.M. Oct. 5, 2022).

167. *See id.* at 112 (finding a lack of genetic relationship and lack of written consent to the specific artificial insemination procedure resulting in pregnancy were not outcome determinative).

168. *See id.* (noting the couple's "mutual desire to have children").

169. *See id.* (mentioning the couple began such procedures shortly before getting married).

170. *See id.* (acknowledging "Soon initially conceded that Kammann was a parent . . . and the two enacted a child support and visitation plan," but Soon later tried to deny Kammann's custody claim).

171. *See id.* (recalling Kammann's arguments that the marital presumption should still apply because the children were born during the marriage and that she consented to the conception of the children through artificial insemination and intended to be the parent).

172. *See id.* at 114–17. Though Kammann admitted she was not the children's genetic or biological parent, the court interpreted the New Mexico UPA statute strictly and determined that presumed parentage may only be disproved by admissible results of genetic testing, not personal admissions. *See id.* at 117. The court also considered the children's best interests to reach this conclusion. *See id.*

nation procedure that resulted in pregnancy was not required, though it did want to see evidence of consent to artificial insemination generally.¹⁷³ The court ultimately remanded the case with instructions for the district court to determine “whether the parties’ written evidence establishes Kammann’s consent to assisted reproduction.”¹⁷⁴

IV. KEEPING SEPARATED SAME-SEX PARTNERS STILL (LEGALLY) STANDING:
CRITICAL ANALYSIS OF PRECEDENT AND ARGUMENT FOR
UPHOLDING PARENTAL RIGHTS BY PRIORITIZING
BOTH PARTNERS’ INTENT TO PARENT

State court interpretations of UPA provisions and subsequent determinations of legal parentage result in disparate treatment for separated same-sex couples.¹⁷⁵ To ensure consistency and equality for separated same-sex couples no matter the jurisdiction, courts should apply a two-part test to confirm legal parentage: (1) uphold marital presumption for divorced partners; and (2) confirm both partners consented to artificial insemination and consented to shared parentage at the time of the child’s birth.¹⁷⁶ Moreover, legislatures should mandate VAPs and courts should utilize them to confirm such consent.¹⁷⁷

A. *Critical Analysis of State Court Precedent*

As evidenced by the cases above, courts still prefer to apply traditional methods, such as biology, marriage, and adoption, to determine legal parentage.¹⁷⁸ Reliance on traditional methods poses unique issues for same-sex couples who cannot biologically conceive children together, who

173. *See id.* at 117–19. The court noted the New Mexico UPA focuses on the parties’ consent to assisted reproduction and intent to parent the resulting child rather than the timing of such consent. *See id.* at 118. Despite the biological mother’s insistence that the non-biological mother had to explicitly consent to the specific artificial insemination procedure that resulted in pregnancy, the court noted the impracticability of this approach and focused on consent before artificial insemination more generally. *See id.* at 118–19.

174. *Id.* at 119.

175. *See infra* Section IV.A.

176. *See infra* Section IV.B.

177. *See infra* Section IV.C.

178. *See supra* Part III; *see also* Jessica Feinberg, *A Logical Step Forward: Extending Voluntary Acknowledgments of Parentage to Female Same-Sex Couples*, 30 YALE J.L. & FEM. 99, 115 (2018) (noting courts’ continued reliance on “tying genetic connections to the establishment of legal parent status”); Susan Hazeldean, *Illegitimate Parents*, 55 U.C. DAVIS L. REV. 1583, 1598 (2022) (noting courts’ reluctance to acknowledge ongoing discrimination against LGBTQ people post-*Obergefell*). Hazeldean asserts that courts believe LGBTQ people are no longer disadvantaged because they can legally marry and can therefore obtain parental rights through the marital presumption or through stepparent adoptions. *See id.*

sometimes choose not to marry, and who may be severely insulted by the requirement to adopt their own children.¹⁷⁹ Moreover, same-sex couples may struggle to assert legal parentage depending on their resources.¹⁸⁰

The recognition of same-sex marriage in *Obergefell* and the extension of the rights and benefits of marriage to same-sex couples through *Pavan* and the UPA expanded the marital presumption to married same-sex couples who could not both be biological parents of their shared children.¹⁸¹ Even in the case of a married same-sex couple that subsequently divorces, courts are generally willing to honor the marital presumption and uphold the non-biological partner's legal parentage.¹⁸² For instance, the Court of Appeals of New Mexico in *Soon* could have relied on the marital presumption alone to uphold the non-biological partner's legal parentage.¹⁸³ Interestingly, however, the court bolstered its analysis by analyzing whether the non-biological partner consented to the artificial insemination of her then-wife.¹⁸⁴ New Mexico is one of the sixteen states that recognizes the non-biological parent as a legal parent regardless of marital status if such parent consents to the conception of a child born using assisted reproduction.¹⁸⁵ If Michigan and Virginia adopted similar

179. See Hazeldean, *supra* note 178, at 1585–86 (describing historic concerns that the marriage equality movement would force LGBTQ couples to get married or “face further marginalization”). Hazeldean recalls other scholars warning “marriage equality would undermine efforts to secure relationship recognition outside of marriage” and suggests such scholars had a valid reason to be skeptical. See *id.* Specifically, Hazeldean's research showed “only eleven states provide robust legal rights to unmarried same-sex couples . . . thirty provide only limited or uncertain protection, and nine offer no recognition.” See *id.* at 1586.

180. See *id.* at 1603–04 (describing the different options for same-sex couples to build their families). Hazeldean acknowledges same-sex couples have different options depending on their “financial and reproductive resources,” including assisted reproductive technology, adoption, alternative insemination procedures, and surrogacy. See *id.* at 1603; see also Feinberg, *supra* note 178, at 101 (arguing same-sex couples who wish to establish legal parentage face a potential economic and emotional strain compared to opposite-sex couples). For instance, same-sex couples must have significant “time and resources” to ensure legal parentage for the non-biological parent. See *id.* Moreover, same-sex parents and their children can face “significant harm and instability” if the non-biological parent cannot establish legal parentage. See *id.*

181. See Hazeldean, *supra* note 178, at 1596–97 (noting marriage equality led to a newfound right to legal parentage for the non-biological, non-adoptive parent); see also Courtney G. Joslin, *Nurturing Parenthood Through the UPA* (2017), 127 YALE L.J.F. 589, 592 (2018) (listing the changes to the UPA that comply with *Obergefell* and *Pavan*).

182. See *supra* Section III.B.

183. See *Soon v. Kammann*, 521 P.3d 110, 114 (N.M. Ct. App. 2022) (interpreting the New Mexico UPA statute to confirm the non-biological parent is presumed to be a parent of the children born during her marriage to the biological parent), *cert. granted* S-1-SC-39544, 2022 N.M. LEXIS 97 (Oct. 5, 2022).

184. See *id.* at 117–20 (considering the time requirement for giving consent, how long consent is effective, and whether consent must be written).

185. See MAP, *Other Parental Recognition Laws*, *supra* note 119.

laws based on the amended provisions of the UPA for artificial insemination, the courts in *Hawkins* and *Sheardown* might have upheld the legal parentage of the non-biological, non-adoptive mothers.¹⁸⁶

Instead, large gaps in the law remain for same-sex couples who choose not to marry.¹⁸⁷ The Supreme Court of Kansas tried to fill the gap by upholding legal parentage for a non-biological partner who never married her same-sex partner.¹⁸⁸ Specifically, the court considered whether the biological partner consented to shared parentage at the time of the child's birth.¹⁸⁹ Though no formal agreement was required, the court focused on the fact that each partner had "made up her mind as of the time of the baby's arrival."¹⁹⁰ This assessment arguably extended unmarried lesbian partners "something like a marital presumption," which ensured the establishment of legal parentage despite the absence of a truly traditional method.¹⁹¹

B. *Proposed Standard to be Applied by Courts*

Combining the courts' analyses in *Harrison*, *In re M.F.*, and *Soon* results in a multi-part test that can be applied to future challenges to legal parentage by former same-sex partners.¹⁹² First, if a couple was previously mar-

186. See *Hawkins v. Grese*, 809 S.E.2d 441, 448 (Va. Ct. App. 2018) (discussing the holdings of *Obergefell* and *Pavan* and the recognition of parental rights for couples who conceived through anonymous sperm donors only in the context of married couples); see also *Sheardown v. Guastella*, 920 N.W.2d 172, 176 (Mich. Ct. App. 2018) (same).

187. See *Hazeldean*, *supra* note 178, at 1597 (warning that, while marriage provides benefits to a non-biological partner through the marital presumption and the option to adopt with the spouse, failure to marry leaves the non-biological partner with no parental rights and makes such partner "vulnerable to losing their children if the relationship with the biological parent ends"). Moreover, the courts in the cases above that denied the non-biological, non-adoptive partner parental rights indicated their decisions may have been different if the couple had been married. See, e.g., *Hawkins*, 809 S.E.2d at 446–47 (refusing to acknowledge the former same-sex couple's relationship as the "functional equivalent of marriage" and thereby rebuking the non-biological parent's argument that her relationship with her child was "constitutionally a parent-child relationship"); *Sheardown*, 920 N.W.2d at 177 (confirming the relevant Michigan custody statute applied equally to same-sex and heterosexual married couples but did not apply in this case because the parties never married); *In re M.F.*, 475 P.3d 642, 653–54 (Kan. 2020) (noting an individual can seek to establish parentage under the Kansas statute through the marital presumption if the child is born during the marriage).

188. See *In re M.F.*, 475 P.3d at 644 (holding the non-biological, non-adoptive former same-sex partner should be recognized as a legal parent).

189. See *id.* at 661 (reiterating the birth mother must consent to shared parenting, but such consent can come in many different forms).

190. *Id.*; see also *Goodwin*, *supra* note 144, at 6, 7 (quoting the court's decision to start its analysis by considering whether the individual alleging parentage held herself out and recognized herself as the parent).

191. See *Goodwin*, *supra* note 144, at 8 (noting the court's goal was to provide stability to the child and eliminate uncertainty about the identity of the child's parents at the time of birth).

192. See *infra* notes 193–207 and accompanying text.

ried, a court should uphold the marital presumption without any possibility of rebuttal through biological evidence.¹⁹³ Upholding the marital presumption in these circumstances honors the historical tradition of the marital presumption and fully respects the rights of married same-sex couples who have fought for and earned marriage equality.¹⁹⁴ Further, this first step acknowledges courts' willingness to continue following traditional methods of establishing legal parentage.¹⁹⁵

Next, combining the holding in *Soon* with the holding in *In re M.F.* would achieve the most comprehensive protection of legal parentage for separated same-sex couples who never married.¹⁹⁶ Courts should first confirm that both partners consented to the artificial insemination process.¹⁹⁷ The court in *Soon* only required the lower court on remand to consider whether the non-biological partner explicitly consented to assisted reproduction.¹⁹⁸ Presumably, the biological partner's consent was implied because she was the one physically undergoing the artificial insemination procedure.¹⁹⁹ Requiring consent of both partners, not just the non-biological partner, at the time of artificial insemination recog-

193. See Carbone & Cahn, *supra* note 72, at 673 (arguing the marital presumption should be used to recognize two same-sex spouses "as the parents of children born into their relationship with the consent of both parties"); see also *Harrison v. Harrison*, 643 S.W.3d 376, 383 (Tenn. Ct. App. 2021) (interpreting the relevant Tennessee statutes to confirm the non-biological, non-adoptive partner's parental rights because the children were born to the biological partner via artificial insemination during the couple's marriage), *appeal denied* No. M2020-01140-SC-R11-CV, 2022 Tenn. LEXIS 47 (Tenn. Feb. 10, 2022); *Soon v. Kammann*, 521 P.3d 110, 117 (N.M. Ct. App. 2022) (refusing to allow an admission by a non-biological parent that she shared no genetic connection to the child to rebut the parentage presumption without considering the best interests of the child), *cert. granted* S-1-SC-39544, 2022 N.M. LEXIS 97 (Oct. 5, 2022).

194. See Hazeldean, *supra* note 178, at 1641 (noting *Obergefell* "arguably cemented marital supremacy" by ruling same-sex couples had the fundamental right to marriage rather than simply striking down state laws that discriminated against same-sex couples).

195. See *supra* note 178 and accompanying text.

196. See generally Hazeldean, *supra* note 178, at 1635 (acknowledging states that make parental rights for non-biological, non-adoptive same-sex parents contingent on marriage exact a "harsh penalty" on those who exercise their right to decline marriage). Further, Hazeldean argues same-sex couples should not be denied parental rights simply because they are not married because such a regime would disparately impact minorities and low-income people who marry less frequently than white and wealthy adults. See *id.* at 1636-37.

197. See Joslin, *supra* note 44, at 1222 (arguing for the extension of the "consent = legal parent rule to all children born through assisted reproduction, regardless of the marital status, gender, or sexual orientation of the intended parents" (footnote omitted)); see also Feinberg, *supra* note 178, at 109 (suggesting the same-sex spouse of a woman having a child can consent to artificial insemination in the same way as a husband can consent to his wife's procedure to show intent to parent).

198. See *Soon*, 521 P.3d at 119.

199. See *id.* at 112.

nizes that a couple has jointly decided to start a family through assisted reproductive technologies, regardless of whether they are married, and aligns with the amended language of the UPA that focuses on intent.²⁰⁰

Courts should then confirm that both partners consented to shared parentage at the time of the child's birth.²⁰¹ The court in *In re M.F.* required that the biological mother implicitly or explicitly consent to the shared parenting of her child at the time of the child's birth.²⁰² As the court noted, Kansas law recognizes whether a child has one or two parents at birth.²⁰³ The court further noted consent at the time of the child's birth is necessary to establish stability for the child despite potential future turmoil between the parents.²⁰⁴ However, to more accurately reflect the couple's shared intent to parent, the question of consent should be posed to *both* parents rather than just the birth mother.²⁰⁵ If both parents decided to share custody, responsibility, and control of the child at the time the child entered the world, courts should not ignore such commitment and later revoke the parental rights of one partner upon the couple's sep-

200. See Joslin, *supra* note 44, at 1224–25 (“Specifically, the law should provide that an individual who consents to alternative insemination by a woman with the intent to be a parent of the resulting child *and with the consent of the woman* is a parent of the resulting child.”). Joslin suggests it remains important for the biological parent to consent to retain control over the child's second parent. See *id.* at 1225; see also Workman, *supra* note 115, at 238 (contrasting the amended language of the UPA, which focuses on general consent to the use of assisted reproductive technologies, with the original language of the UPA, which only addressed assisted reproductive technologies “in terms of a married couple using a sperm donor”). Specifically, the amended language of the UPA is meant to determine parentage based on “intentional parenthood.” See *id.*; see also Noy Naaman, *Timing Legal Parenthood*, 75 ARK. L. REV. 59, 87 (2022) (noting “self-identification as a parent” may develop much earlier than the birth of the child). Naaman suggests the timeframe spanning the conception of a child by assisted reproductive technology through the child's birth and the content of that timeframe should be considered in determining legal parentage because that timeframe spans “[t]he process of becoming a parent.” See *id.* at 92–93. For example, during such timeframe, the couple mutually decides to conceive and raise a child, decides who will raise the child, decides who will provide the sperm, and decides who the doctors will be. See *id.* at 93.

201. See Naaman, *supra* note 200, at 69 (declaring the birth of a child as the time when a legal parent is also born).

202. See *In re M.F.*, 475 P.3d 642, 661 (Kan. 2020) (requiring the time of birth as the time of consent to shared parenting to reduce the chance of giving the birth mother a “veto” of the arrangement).

203. See *id.* (citing KAN. STAT. ANN. § 23-2208 (2023)).

204. See *id.*; see also Naaman, *supra* note 200, at 76–78 (arguing delaying the recognition of the non-biological parent as a legal parent and thereby creating a hierarchy within the family can ultimately cause conflict within the couple's relationship).

205. See generally Feinberg, *supra* note 178, at 132–33 (arguing for consent by both parties). See also Grossman, *supra* note 106, at 720 (arguing the non-biological partner's function as a parent, “particularly if the partner was involved in the decision to conceive a child in the first place,” is a better indicator of consent to shared parentage than whether the couple was married).

aration.²⁰⁶ Further, fully establishing the couple's commitment at multiple phases of the childbirth process aligns with the intent of the marital presumption to establish two parents who are willing to care for and support the child, regardless of their gender or marital status.²⁰⁷

C. Proposed Legislation

Effectuating these changes starts with state legislatures. First, the outstanding thirty-four state legislatures that currently only recognize the non-biological parent as a legal parent if the couple is married should amend their UPAs.²⁰⁸ Specifically, these amendments should acknowledge the non-biological parent as a legal parent, regardless of marital status or gender, if the non-biological parent consents to the artificial insemination of her partner.²⁰⁹

Another legislative option is to mandate VAPs for all children born through artificial insemination, regardless of whether the parents are a same-sex couple or opposite-sex couple.²¹⁰ Federal law currently requires states to make VAPs available upon childbirth, and many unmarried parents choose to establish legal parentage through VAPs.²¹¹ However, only eleven states currently allow same-sex parents to establish parentage through a VAP.²¹²

206. See generally Naaman, *supra* note 200, at 78 (recognizing the potentially unjust advantage conferred on the biological parent if the non-biological parent's legal parentage is delayed). Naaman provides an example in which the same-sex couple's relationship deteriorates before the non-biological parent establishes parentage. See *id.* In such a case, the biological parent who is conferred parentage upon the birth of the child could theoretically deny the non-biological parent "custodial, visitation, or other rights with respect to the child." See *id.*

207. See generally Feinberg, *supra* note 34, at 257–58 (offering a lingering justification for the marital presumption as "providing children with two legal parents from birth, each of whom has a duty to care for and support the child"). Feinberg argues for a restructuring of the marital presumption to focus on intent, which considers whether the couple mutually intended to parent the child at the time of assisted reproduction, function, which considers whether the non-biological partner functioned as a parent throughout the child's life, or a combination of both. See *id.*; see also *supra* Section II.A.2.d.

208. See generally MAP, *Other Parental Recognition Laws*, *supra* note 119 (listing the thirty-four states that do not offer clear laws for unmarried couples).

209. See Joslin, *supra* note 181, at 606–08 (noting the gender-neutral terms of the amended UPA's assisted reproduction provisions provide an option for intended parents in a same-sex couple to establish parentage).

210. See *id.* at 603–05 (noting the amended UPA expanded the availability of VAPs to same-sex couples by renaming such agreements to "Voluntary Acknowledgments of Parentage" rather than "Voluntary Acknowledgments of Paternity"). Joslin recognizes the struggle of same-sex parents to establish parentage when at least one parent is not biologically related to the child. See *id.* at 603–04; see also Joslin, *supra* note 44, at 1225–26 (arguing the non-biological partner's consent to alternative insemination should be in writing).

211. See GLAD, *supra* note 111 (discussing the availability and function of VAPs).

212. See *id.* (including California, Colorado, Connecticut, Maine, Maryland, Massachusetts, Nevada, New York, Rhode Island, Vermont, and Washington).

Scholars have argued for the expanded use of VAPs as a logical, efficient method of establishing legal parentage for same-sex couples.²¹³ In particular, VAPs would relieve some of the burden faced by same-sex couples in achieving legal parentage rights.²¹⁴ Further, requiring signatures on VAPs at both the time of artificial insemination and the time of childbirth, though arguably a more invasive requirement of couples, would ensure same-sex couples can more easily establish legal parentage by reinforcing consent and intent to parent at critical moments in the childbearing process.²¹⁵ Such an expanded function of VAPs would effectively eliminate any uncertainty as to whether the couple consented to parenting at the time of artificial insemination, a determinative factor in *Soon*, and at the time of birth, a determinative factor in *In re M.F.*²¹⁶

213. See Hazeldean, *supra* note 178, at 1665–67 (noting VAPs provide a cheap and certain option to establish parentage upon birth); see also Feinberg, *supra* note 178, at 125–26 (proposing the federal government require states to extend the use of VAPs to female same-sex couples who conceive with sperm provided in compliance with state donor non-paternity laws that automatically relinquish the donor’s paternity). Feinberg notes such an extension of VAPs would also align with the original goal of VAPs to identify two legal parents responsible for financially supporting the child upon birth. See *id.* at 126.

214. See Feinberg, *supra* note 178, at 102–03 (recognizing the challenges unmarried same-sex couples face in establishing legal parentage under current laws, including spending extra time, cost, and resources than their opposite-sex counterparts). Feinberg explains second parent adoption is the most commonly used method by same-sex couples to establish legal parentage and acknowledges the extensive financial burden and time spent to undergo such an adoption. See *id.* at 111–13.

215. See Gregg Strauss, *Parentage Agreements Are Not Contracts*, 90 *FORDHAM L. REV.* 2645, 2650–51 (2022) (noting preconception agreements permit the spouse of a birth mother to consent to assisted reproduction and prove intent to parent the child). Strauss argues that, despite the perceived similarity of contracts and parentage agreements such as consent to artificial insemination and VAPs, parentage agreements are not actually enforceable as contracts. See *id.* at 2672. Specifically, Strauss asserts parentage agreements do not “fix the content of parental rights and duties,” but they do explicitly establish parentage. See *id.* at 2663; see also Hazeldean, *supra* note 178, at 1665 (noting VAPs “clearly identify[] the parents responsible for the child as soon as possible after birth” and can be signed while the family is still in the hospital after birth). The current options to establish parentage upon artificial insemination through consent or upon birth through VAPs prove that these two times are critical in confirming the intended parents and establishing their parental rights. See Feinberg, *supra* note 178, at 106 (describing how an unmarried man can generally establish parentage either by consenting to his partner’s use of alternative reproductive technologies or by executing a VAP). Further, requiring signatures at multiple points in time alleviates concerns that VAPs are too easy to sign and risk signatories waiving certain rights without fully understanding the consequences. See Hazeldean, *supra* note 178, at 1664–65.

216. See Strauss, *supra* note 215, at 2650 (confirming consent to assisted reproduction must be in writing); see also Feinberg, *supra* note 178, at 132 (arguing VAPs provided to same-sex partners “should explicitly state that both parties understand that the person identified as the child’s second parent will obtain legal parent status regardless of whether the person shares any genetic or biological connections to the child”).

V. A LONG WAY FROM HAPPINESS: IMPACT ON SEPARATED SAME-SEX
COUPLES AND THEIR CHILDREN

Same-sex couples will likely continue to face threats to their legal parentage because they cannot both be biologically related to their children and adoption is not an equitable or easily attainable method for securing parentage.²¹⁷ When a same-sex couple has been married and subsequently divorces, honoring the marital presumption to maintain the former partners' respective parental rights would fully respect Supreme Court precedent from *Pavan*.²¹⁸ When a same-sex couple has never married and subsequently separates, adhering to a consent-based approach to parentage at multiple stages of the childbearing process furthers the goals of the marital presumption by ensuring stability and more accurately reflects the reality of a same-sex couple choosing to start a family together.²¹⁹

Overall, the most important consideration in maintaining legal parentage of both former partners, irrespective of their marital status, should be the wellbeing of their shared children.²²⁰ The Supreme Court rulings

217. See Hazeldean, *supra* note 178, at 1587 (finding a majority of states do not provide comprehensive custody and parentage laws for a non-biological, non-adoptive, unmarried parent, though states have amended their laws to better protect non-biological, non-adoptive, married parents); see also Julie Moreau, *Changes to State Parenting Laws Help Fill Gaps for Same-Sex Couples*, NBC NEWS (Aug. 1, 2020, 4:30 AM), <https://www.nbcnews.com/feature/nbc-out/changes-state-parenting-laws-help-fill-gaps-same-sex-couples-n1235517> [<https://perma.cc/KB5M-PUER>] (noting how gaps in laws and variation of laws between states continue to pose challenges to same-sex couples seeking to establish parental rights). Moreau's article highlights changes to state laws in New Hampshire and Rhode Island that afford same-sex unmarried couples more options to establish parentage, showing a trend in the right direction. See *id.*

218. See Hazeldean, *supra* note 178, at 1597 ("Marriage thus provides lesbian couples who conceive a child through donor insemination a marital presumption that the nonbiological mother is the child's second parent."); see also *Pavan v. Smith*, 137 S. Ct. 2075, 2078–79 (2017) (extending marital presumption to same-sex couples).

219. See Joslin, *supra* note 44, at 1223–24 (arguing consent-based approaches reflect a couple's intent to bring a child into the world and intent to parent that child); see also Polikoff, *supra* note 124, at 206 (recognizing lesbian couples generally plan for children together rather than individually).

220. See Fein, *supra* note 12, at 201–02 (noting the many factors to be considered when assessing the best interests of the child, including the child's emotional ties to the parent, the parent's ability to provide for the child, and others); see also Joslin, *supra* note 44, at 1182 (calling for changes to laws to ensure the financial stability and security of children born to unmarried couples through assisted reproductive technologies). Other scholars have recognized that the best interests of the same-sex parents, who seek to maintain their legal parentage, may conflict with the best interests of the child, who may be interested in knowing about their biological connections. See Suzanne Davies, Note, *Queering America's Heteronormative Family Law Through "Well-Conceived" Legislation (or, Genetic Parents Exist and Sometimes Your Kid Might Want to Know Them)*, 46 AM. J.L. & MED. 89, 107–08 (2020). Davies suggests limiting legislation so families can "live their lives free of inappropriate intervention, while reserving for donor-conceived children the power to make autonomous choices about their identities, lives, and futures." *Id.* at 110.

in *Obergefell* and *Pavan* sought to prevent children of same-sex couples from feeling inferior in the eyes of the law and society.²²¹ However, scholars have noted current remedies of establishing legal parentage for non-biological same-sex parents remain legally inferior and may leave children unprotected if their parents subsequently separate.²²² Scholars *do* seem optimistic that focusing on consent will ensure protections for children born to parents regardless of their marital status, gender, or sexual orientation.²²³

Though progress has generally been made in expanding the legal parental rights of same-sex couples, recent cases have caused concern that courts may backtrack.²²⁴ Specifically, Justice Thomas's concurring opinion in *Dobbs v. Jackson Women's Health Organization*²²⁵ suggested the Supreme Court should reconsider past rulings establishing the constitutional right to same-sex marriage.²²⁶ The Senate quickly responded to the *Dobbs* decision by passing the Respect for Marriage Act (the RMA), which protects the fundamental right to decide "whether to marry" and "who to

221. See Joslin, *supra* note 181, at 596 (implying the laws pre-*Obergefell* and pre-*Pavan* harmed children by failing to "recognize and protect functional or social parent-child relationships"); see also *Obergefell v. Hodges*, 576 U.S. 644, 667–68 (2015) (arguing legalizing same-sex marriage would help the children of same-sex parents understand both their own family structure and their family's compatibility with other families).

222. See Joslin, *supra* note 44, at 1198 (arguing equitable remedies may not maintain protections for children upon divorce). Joslin suggests possible solutions to protect the parentage of children born through assisted reproductive technologies to unmarried couples, including the expansion of equitable parenting theories, the liberalization of adoption, the adoption of a contract-based theory of parentage, and the expansion of consent to assisted reproductive technologies. See *id.* at 1217–23.

223. See *id.* at 1222–23 (proposing a consent-based rule that determines parentage before birth to reflect a couple's intent to parent, ensures financial support for the child, and is marriage-neutral); see also Fein, *supra* note 12, at 203–04 (proposing an expanded marital presumption that presumes parentage after weighing whether (1) the spouses intended to co-parent the child before birth, (2) the spouse acted as a functional parent after birth, and (3) maintaining parentage is in the child's best interest).

224. See Erin Kilbride, *Lesbian Parents in the US Should Not Need to Adopt Their Own Children: Oklahoma Case Highlights Precarity of LGBT Parenthood*, HUM. RTS WATCH (June 30, 2022, 6:00 AM), <https://www.hrw.org/news/2022/06/30/lesbian-parents-us-should-not-need-adopt-their-own-children> [<https://perma.cc/HD3Y-QBUU>] (discussing same-sex couples' fear that their rights could be scaled back after the Supreme Court overturned abortion rights).

225. 142 S.Ct. 2228 (2022).

226. See *id.* at 2300–02 (Thomas, J., concurring) (arguing there are no substantive due process rights, so the *Obergefell* decision that rests on substantive due process rights is "demonstrably erroneous"). Justice Thomas called for the review of other substantive due process precedents as well, including *Griswold v. Connecticut*, 381 U.S. 479, 485 (1965) (finding a substantive due process right for married persons to use contraceptives) and *Lawrence v. Texas*, 539 U.S. 558, 578 (2003) (finding a substantive due process right for same-sex couples to engage in private, consensual sexual acts). *Dobbs*, 142 S. Ct. at 2301 (Thomas, J., concurring).

marry.”²²⁷ The RMA was signed into law by President Biden on December 13, 2022.²²⁸ However, like the *Obergefell* decision, the RMA focuses on marriage equality rather than parentage equality, which may exacerbate courts’ focus on and preference for marriage in establishing parentage.²²⁹

At the state level, some courts have fully revoked the parental rights of non-biological former same-sex partners who were previously married to the biological partners.²³⁰ In circumstances similar to the Oklahoma decision that threatened Kris Williams’s parental rights last year, an Idaho court recently revoked Lindsay Gatsby’s parental rights because she was not the biological parent of her shared children with her former same-sex spouse.²³¹ These cases highlight how far discrimination against same-sex couples can go, even when they take the generally preferable step of getting married.²³² With courts showing willingness to revoke same-sex couples’ rights, it is critical for state legislatures to update statutes and

227. See Joseph Biden, President & Kamala Harris, Vice President, Remarks at the Signing of H.R. 8404, the Respect for Marriage Act (Dec. 13, 2022), <https://www.whitehouse.gov/briefing-room/speeches-remarks/2022/12/13/remarks-by-president-biden-and-vice-president-harris-at-signing-of-h-r-8404-the-respect-for-marriage-act/> [<https://perma.cc/U8UZ-TVZW>]. President Biden recognized the historically disparate treatment of interracial and same-sex couples and declared federal law now requires interracial and same-sex marriage to be legally recognized in every state. See *id.*

228. See *id.*

229. See Grossman, *supra* note 106, at 719 (arguing courts’ preference for bright-line rules has resulted in a trend toward focusing on marital status rather than function to determine parentage, which has the effect of “pushing the law of parentage for children of gays and lesbians back through time rather than forward”).

230. See Kilbride, *supra* note 224 (highlighting Kris Williams’s fight in Oklahoma for legal parentage over the child she had with her wife during their marriage). Kilbride believes Williams’s case shows “what happens when states get to decide which rights queer people deserve.” See *id.*; see also Colleen Anderson Hartley & Breanna L. Young, *LGBTQ Families: What you Need to Know About Confirmatory Adoptions to Protect Your Family*, DENTONS: DIVORCE AND FAM. L. INSIGHTS (July 25, 2022), <https://www.dentons.com/en/insights/newsletters/2022/july/25/divorce-and-family-law-insights/lgbtq-families> [<https://perma.cc/SEM9-N77L>] (providing details on state procedures for confirmatory adoptions given the “uncertainty surrounding the future of LGBTQ Americans’ rights”). Hartley and Young’s article points to both Kris Williams’s case in Oklahoma as well as Lindsay Gatsby’s case in Idaho. See *id.*

231. See Ellen Trachman, *Parents By Sperm Donation Should Be Very Concerned About this Idaho Supreme Court Ruling*, ABOVE THE L. (Oct. 13, 2021, 5:17 PM), <https://abovethelaw.com/2021/10/parents-by-sperm-donation-should-be-very-concerned-about-this-idaho-supreme-court-ruling/> [<https://perma.cc/8VQ9-CQKD>]. In the case of Lindsay Gatsby, Lindsay and Kylee Gatsby were married in 2015 and shortly thereafter decided to conceive through artificial insemination with sperm donated by a mutual friend. See *id.* After the couple was involved in a violent altercation, Lindsay filed for divorce, and Kylee insisted Lindsay had no parental rights because she was not the biological parent. See *id.* The court agreed with Kylee, ruling she had successfully rebutted the marital presumption by proving she was the biological parent. See *id.*

232. See *supra* notes 178–179 and accompanying text.

recognize same-sex couples' parental rights over children conceived through artificial insemination, regardless of their marital status, to preserve the hard-earned rights of same-sex couples.²³³

233. *See supra* note 200 and accompanying text.

