COMMENT

A Riddle for Dr. Seuss "Are You My (Adoptive, Biological, Gestational, Genetic, De Facto) Mother (Father, Second Parent, or Stepparent)?" And an Answer for Our Times: A Gender-Neutral, Intention-Based Standard for Determining Parentage

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Sometimes the questions are complicated and the answers are simple.

—Dr. Seuss[1]

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1. H. EDWARD WESEMANN, LOOKING TALL BY STANDING NEXT TO SHORT PEOPLE: & OTHER TECHNIQUES FOR MANAGING A LAW FIRM 71 (Author House 2007).

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Dr. Seuss's story "Are You My Mother" features a confused baby bird searching for her mother. "Are you my mother?" is a simple question that in today's world of reproductive technology, expanding family structures, and lagging legal recognition, takes on an apparently complicated facade. The answer remains simple. This Comment outlines relevant adoption statutory schemes and describes the typical effects on same-sex couples. Custody standards and the constitutional right to parent are then outlined. Finally, this Comment argues that legal parentage arising from a gender-neutral, intention-based presumption should apply from the child's birth. The adults who intend and do bring a child into the world are that child's parents regardless of the relationship between the adults—gay, lesbian, heterosexual, married or not.

INTRODUCTION & BACKGROUND

Same-sex parents face obstacles to becoming adoptive parents.[2] Historically, lesbian and gay individuals have faced difficulty in adopting children even as single parents.[3] With a recent decision in Florida,

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2. COURTNEY G. JOSLIN & SHANNON P. MINTER, LESBIAN, GAY, BISEXUAL AND TRANSGENDER FAMILY LAW § 2:10 (West 2009).

3. This Comment discusses the environment faced specifically by same-sex couples and their families. Transgender individuals and persons with other sexual orientations and gender identities face unique situations and obstacles. A full discussion of those issues is outside the scope of this Comment.

however, homosexual adults may now adopt as individuals in all fifty states.[4] Arguments against adoption by lesbian and gay adults include concerns that children of same-sex couples are generally less well-adjusted than their heterosexual parented peers.[5] Empirical studies have debunked these assumptions that children of parents who identify as lesbian or gay do not display markedly different physical or emotional health.[6]

While all fifty states recognize that homosexual individuals have a right to adopt, disagreement persists with respect to joint adoption and second-parent adoption.[7] Joint adoption is legal adoption by a couple where both individuals legally adopt the child.[8] Second-parent adoption is when the unmarried same-sex partner of a child's adoptive or biological parent adopts the child.[9] Adoption of a child by a married couple or a heterosexual stepparent is legal in all states.[10]

Securing lesbian and gay parents' rights is a cornerstone of protecting lesbian- and gay-parented families, but securing parental rights upon dissolution of a same-sex partnership is crucial as well. A significant problem facing same-sex couples is that parentage is not regularly or reliably determined until disputes arise.[11]

Diverse adoption laws among states make allocating parental rights and obligations both overly complex and unjustly simple. Problems abound for men and women in same-sex relationships who seek to terminate their relationship with the child's adoptive or biological parent while retaining parental rights over the child.

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4. *See In re* Adoption of X.X.G. and N.R.G., 45 So. 3d 79 (Fla. Dist. Ct. App. 2010) (holding unconstitutional FLA. STAT. § 63.042(3) (2003), a statute that made it illegal for LGBT individuals to adopt). It is still unclear what the wider implications of *In re Adoption of X.X.G. and N.R.G.* will be for same-sex couples seeking to adopt jointly or for second parents seeking to adopt partners' biological or adopted children.

5. *See* Perry v. Schwarzenegger, 704 F. Supp. 2d 921, 981 (N.D. Cal. 2010) ("Children do not need to be raised by a male parent and a female parent to be well-adjusted, and having both a male and a female parent does not increase the likelihood that a child will be well-adjusted.").

6. *Id.* at 980 ("Children raised by gay or lesbian parents are as likely as children raised by heterosexual parents to be healthy, successful and well-adjusted. The research supporting this conclusion is accepted beyond serious debate in the field of developmental psychology.").

7. *See* JOSLIN & MINTER, *supra* note 2, § 2:10-12.

8. *Id.* § 5:12.

9. *Id.* § 5:3.

10. *See* Christine Metteer Lorillard, *Placing Second-Parent Adoption Along the "Rational Continuum" of Constitutionally Protected Family Rights*, 30 WOMEN'S RTS. L. REP. 1, 1 (2008); JOSLIN & MINTER, *supra* note 2, § 5:4, 12.

11. JOSLIN & MINTER, *supra* note 2, § 5:26. These disputes may arise between parents or between the parents and the state.

I. RELEVANT LAW

A. Joint Adoption

Lesbian and gay adults may adopt as individuals in all fifty states.[12] The status of joint adoption laws, however, is not similarly uniform.[13] Joint adoption is when a couple applies to adopt a child together.[14] The couple may be accepted or rejected.[15] Married couples may take advantage of joint adoption in all states, while only some jurisdictions allow unmarried heterosexual couples to adopt jointly.[16] In states where joint adoption is limited to married couples, same-sex couples who are unable to marry (or enter into any legally recognized relationship) are precluded from jointly adopting.[17] In those states, unmarried opposite-sex couples are likewise prohibited from adopting.[18]

For example, Mississippi expressly forbids same-sex couples from jointly adopting.[19] And until recently, Florida had a statutory provision excluding adoption by any gay person.[20] In Utah, all unmarried couples are expressly prohibited from jointly adopting.[21]

Conversely, other states' statutes and case law allow joint adoption by same-sex couples.[22] In Connecticut, for instance, the sexual orientation of prospective adoptive parents may be considered only in compliance with the state's anti-discrimination laws.[23] In several states the adoption statute does not expressly allow or prohibit joint adoption by

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12. *Id.* § 2:10; *see In re* Adoption of X.X.G. & N.R.G., 45 So. 3d 79 (Fla. Dist. Ct. App. 2010) (holding unconstitutional FLA. STAT. § 63.042(3) (2003), which made it illegal for lesbian and gay individuals to adopt).

13. JOSLIN & MINTER, *supra* note 2, § 5:12.

14. *Id.*

15. *In re* M.M.D. & B.H.M., 662 A.2d 837, 846-47 (D.C. 1995).

16. *See generally id.* (interpreting D.C. CODE § 16-302 (2011) to allow unmarried couples to adopt as a couple and as a second parent).

17. *See* UTAH CODE ANN. § 78B-6-117(3) (West 2008) ("A child may not be adopted by a person who is cohabiting in a relationship that is not a legally valid and binding marriage under the laws of this state."). In Utah, same-sex couples cannot enter into a "binding marriage." UTAH CODE ANN. § 30-1-2.

18. *See* UTAH CODE ANN. § 78B-6-117(3).

19. MISS. CODE ANN. § 93-17-3(5) (West 2007) ("Adoption by couples of the same gender is prohibited.").

20. UTAH CODE ANN. § 78B-6-117(3) ("A child may not be adopted by a person who is cohabiting in a relationship that is not a legally valid and binding marriage under the laws of this state.").

21. FLA. CODE § 63.042(3) (West 2003), *invalidated by In re* Adoption of X.X.G. & N.R.G., 45 So. 3d 79 (Fla. Dist. Ct. App. 2010).

22. *See, e.g.*, *In re* M.M.D. & B.H.M., 662 A.2d 837 (D.C. 1995) (interpreting D.C. CODE § 16-302 (2011) to allow unmarried couples to petition for joint adoption); Adoption of Tammy, 619 N.E.2d 315, 318-19 (Mass. 1993); *In re* Adoption of M.A., 930 A.2d 1088 (Me. 2007).

23. CONN. GEN. STAT. § 45a-726a (2011).

unmarried couples, but case law interprets the statute to allow same-sex joint adoptions.[24]

For example, in Louisiana, single gay individuals may adopt and married couples may jointly adopt.[25] The legislature is silent on the topic of unmarried couples seeking to jointly adopt.[26] While this omission affects unmarried opposite-sex couples, it disparately impacts same-sex couples. An unmarried opposite-sex couple that seeks to adopt a child may cure their statutory disability by getting married.[27] In Louisiana, only opposite-sex couples may legally wed. Same-sex couples seeking to adopt, on the other hand, cannot cure their statutory disability by marrying one another.[28] Thus, same-sex joint adoption is not expressly prohibited in Louisiana, but the language of the statute and the statutory definition of marriage effectively preclude it.

B. Second-Parent Adoptions and Stepparent Provisions

A second-parent adoption is an adoption that does not terminate the legal parent's rights and obligations to the child.[29] Typically second-parent adoptions take the form of stepparent adoptions, whereby a legal parent's spouse adopts the child.[30] Stepparent provisions in statutory adoption schemes allow adoption by the married partner of the child's adoptive or biological parent without terminating the rights and obligations of the child's first legal parent.[31] When stepparent provisions include the requirement that the adopting stepparent be married to the legal parent, same-sex partners in states where same-sex couples are precluded from marrying are unable to take advantage of stepparent

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24. *See In re* Adoption of M.A., 930 A.2d 1088 (Me. 2007); *In re M.M.D. & B.H.M.*, 662 A.2d at 837 (interpreting D.C. CODE § 16-302 to allow unmarried couples to petition for joint adoption); *Adoption of Tammy*, 619 N.E.2d at 318-19.

25. LA. CHILD CODE ANN. art. 1198 (2010) ("A single person, eighteen years or older, or a married couple jointly may petition to adopt a child through an agency.").

26. *Id.*

27. *Id.*

28. LA. CIV. CODE art. 86 (2010).

29. JOSLIN & MINTER, *supra* note 2, § 5:3; *see* Sharon S. v. Superior Court, 73 P.3d 554, 561-62 (Cal. 2003).

30. JOSLIN & MINTER, *supra* note 2, § 5:3; *see Sharon S.*, 73 P.3d at 565.

31. JOSLIN & MINTER, *supra* note 2, § 5:3; *see Sharon S.*, 73 P.3d at 565; *see also In re* M.M.D. & B.H.M., 662 A.2d 837 (D.C. 1995) (holding joint adoption by unmarried same-sex couples is permissible and adoption by second parent of partner's adopted child would not affect the first adoptive parent's rights and obligations).

provisions—no matter how committed the second parent is to the child and the child's biological parent.[32]

Same-sex couples cannot take advantage of second-parent adoption in states where the statute includes a "cut off" provision.[33] For a child to be eligible for adoption, the biological parents' parental rights and obligations must be terminated or "cut off."[34] To allow for stepparent adoption, "stepparent provisions" are added to adoption statutes,[35] which allow the biological parent's opposite-sex spouse to adopt the child without terminating the biological parents' parental rights.[36] The rationale for allowing the stepparent provision to bypass the cut-off provision in adoption statutes is to preclude the absurdity of requiring a parent who will rear the child to terminate his/her parental rights.[37]

Second-parent provisions, like joint adoption laws, vary among states.[38] Nebraska and Wisconsin expressly forbid same-sex partners from becoming adoptive second parents, both by statute and by case law.[39] The Wisconsin Supreme Court relied on the state's termination provisions under which adoption terminates the legal parent's parental rights and obligations.[40] The court refused to read the statute in a manner consistent with the same-sex female couple's intention for both female partners to be legal parents of the child.[41] Similarly, the Nebraska

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32. *See In re* Adoption of Luke, 640 N.W.2d 374, 379 (Neb. 2008) (holding same-sex partner could not adopt partner's biological son who was not eligible for adoption because his mother did not terminate her parental rights).

33. JOSLIN & MINTER, *supra* note 2, § 5:3-:4; *see In re* Adoption of Luke, 640 N.W.2d 374, 379 (Neb. 2008); *see also* LORILLARD, *supra* note 10, at 16-18 (describing the definition and effects of "cut off" provisions).

34. JOSLIN & MINTER, *supra* note 2, § 5:4; *see* LORILLARD, *supra* note 10, at 16-19.

35. *See In re* Adoption of Luke, 640 N.W.2d at 376-77 (citing NEB. REV. STAT. § 43-101 (2010), which requires the termination of parental rights for a child to be eligible to be adopted by a person unless the adoptive parent is the spouse of the child's legal parent).

36. *Id.* at 382-93.

37. *In re* Adoption of Infant K.S.P., 804 N.E.2d 1253, 1257-58 (Ind. Ct. App. 2004) (applying the same rationale to a second-parent adoption).

38. Some states allow second-parent adoption by those who meet the statutory definition of a stepparent—the adult is married to the child's adoptive or biological parent. LA. CHILD. CODE ANN. art. 1243 (2010). Other states allow second-parent adoption by non-married partners of the child's biological or adoptive parent. *See, e.g.*, CAL FAM. CODE § 9000(b) (2011). *See generally*, LORILLARD, *supra* note 10, at 10-16 (discussing the rationale for allowing second-parent adoption laws).

39. *In re Adoption of Luke*, 640 N.W.2d at 372; *In re* Angel Lace M., 516 N.W.2d 678 (Wis. 1994); *see also* UTAH CODE ANN. § 78B-6-117(3) (West 2008) ("A child may not be adopted by a person who is cohabiting in a relationship that is not a legally valid and binding marriage under the laws of this state."); *In re* Adoption of Jane Doe, 719 N.E.2d 1071 (Ohio Ct. App. 1998) (holding the biological mother's parental rights would terminate upon adoption by mother's same-sex partner because the same-sex partner was not a "spouse").

40. *In re Angel Lace M.*, 516 N.W.2d at 683-85.

41. *Id.* at 684-85.

Supreme Court held that the cut-off provision in the Nebraska statutory adoption scheme precluded the adoption of a mother's biological son by her "unmarried partner" without terminating the biological mother's parental rights.[42]

States that expressly allow second-parent adoptions include California, Connecticut, and Vermont.[43] The Vermont Supreme Court, citing the best interest of the child, refused to interpret the termination clause of the state adoption statute to prohibit a biological parent from consenting to a second-parent adoption when the parent intended to rear the child with the second parent.[44] New York and Indiana also authorize second-parent adoption by same-sex couples.[45]

Narrowly applying stepparent provisions means that same-sex partners of biological parents are unable to adopt a child who they helped plan, conceive, and bring into the world together.[46] Conversely, second husbands and wives, who may not know their partner's child until the child is an adolescent, are nevertheless able to adopt him/her as a young adult.[47]

C. Parentage Presumptions

When a child is born to a married opposite-sex couple the husband is the presumed father of the child regardless of his actual biological relationship to the child.[48] For same-sex couples there is no presumption in favor of the same-sex partner of the biological parent as the child's second legal parent.[49]

The Uniform Parentage Act (UPA) is proposed uniform state legislation promulgated by the National Conference of Commissioners of

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42. *In re Adoption of Luke*, 640 N.W.2d at 372. The case involved a lesbian couple but the court's language referred only to the biological mother's unmarried partner.

43. CAL. FAM. CODE § 9000(b) (West 2004); CONN. GEN. STAT. ANN. § 45a-724(a)(3) (West 2004); VT. STAT. ANN. tit. 15A, § 1-102(b) (2002); *see also* LORILLARD, *supra* note 10, at 5-6 n.24.

44. *In re* Adoption of B.L.V.B., 628 A.2d 1271, 1274-76 (Vt. 1993) (finding that prohibiting a second-parent adoption on the basis of the termination clause for a lesbian couple who conceived and raised a child together would cause the irrational result of prohibiting an adoption that is in the best interest of the child).

45. *In re* Jacob, 86 N.Y.2d 651, 657-65 (N.Y. 1995) (rejecting an interpretation of the termination clause in the state adoption statute that would prohibit second-parent adoption); *In re* Adoption of Infant K.S.P., 804 N.E.2d 1253, 1258-60 (Ind. Ct. App. 2004).

46. JOSLIN & MINTER, *supra* note 2, § 5:3.

47. *Id.*

48. *Id.* § 3:5 (citing the Uniform Parentage Act § 204 (2002), under which a husband consenting to artificial insemination of wife is presumed father of child regardless of his biological relationship to the child).

49. *Id.* § 5:2.

Uniform State Laws (NCCUSL).[50] Under the UPA, marriage creates a presumption of paternity, such that in the context of reproductive technology, the mother's husband is the presumed father of the child regardless of his biological connection to the child.[51] Furthermore, under the 2002 amendments, any man who consents to the artificial insemination of a woman is the child's presumed father, regardless of the marital relationship between him and the mother.[52]

Sections 204(5) and 703 of the 2002 UPA also provide a paternity presumption for a child in the absence of a martial relationship between the parents.[53] California has applied this paternity presumption as a parentage presumption to a woman who held out her partner's children as her own and later refused to pay child support.[54] The Court found that her act of holding the children out as her own was sufficient to raise a presumption of parentage under California's version of the UPA, regardless of the statute's gendered pronouns.[55]

D. Equitable Remedies for Determining Legal Parentage

Biological parentage is more complicated than merely identifying the genetic mother and father of the child. Indeed, with the help of modern medicine a child can have up to six parents who are either biological, adoptive, or some combination of both.[56]

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50. UNIF. PARENTAGE ACT § 204 (2002).

51.

> Presumption of Paternity (a) A man is presumed to be the father of a child if: (1) he and the mother of the child are married to each other and the child is born during the marriage; (2) he and the mother of the child were married to each other and the child is born within 300 days after the marriage is terminated . . . (4) after the birth of the child, he and the mother of the child married each other in apparent compliance with law . . . and he voluntarily asserted his paternity of the child, and: (A) the assertion is in a record filed with [state agency maintaining birth records]; (B) he agreed to be and is named as the child's father on the child's birth certificate; or (C) he promised in a record to support the child as his own; or (5) for the first two years of the child's life, he resided in the same household with the child and openly held out the child as his own.

Id. Note in this definition there is no distinction between a genetic and gestational mother.

52. *See id.* § 703; *see* JOSLIN & MINTER, *supra* note 2, § 3:5.

53. UNIF. PARENTAGE ACT § 204(a)(5), 703.

54. Elisa B. v. Superior Court, 117 P.3d 660, 670-72 (Cal. 2005).

55. *Id.*

56. There may be a genetic mother, a gestational mother, and an adoptive mother as well as an adoptive father, genetic father, and the husband of the gestational mother. Linda S. Anderson, *Adding Players to the Game: Parentage Determinations When Assisted Reproduction Technology is Used to Create Families*, 62 ARK. L. REV. 29, 32 (2009).

The UPA establishes a presumption of paternity where a man "receives the child into his home" and "holds out" the child as his own.[57] The 2002 UPA also includes a "holding out" provision under which a man is the presumed father if he lived in the same household for the first two years of the child's life and held the child out as his own.[58]

The American Law Institute distinguishes between a *de facto* parent and a parent by estoppel but both theories offer a more inclusive conception of parentage.[59] "Parent by estoppel" is a designation used to protect the parental relationship between an acting parent and nonbiological child.[60] The American Law Institute endorses the use of parentage by estoppel where an individual "lived with the child since the child's birth, holding out and accepting full and permanent responsibilities as parent" and when "recognition of the individual as a parent is in the child's best interests."[61]

A *de facto* parent is one who is not related to the child but acts as the child's parent in day-to-day activities and care-giving responsibilities.[62] Recently the Delaware Supreme Court held that a biological mother's same-sex partner had standing to seek custody based on her status as the child's *de facto* parent.[63]

In sum, the law has the capacity and framework to expand traditional definitions of parentage, that are now limited to biology and adoption, to include more families.

E. Custody Standards

Custody standards vary with the legal status of the acting parents.[64] Frequently, legal parentage determinations do not affect same-sex couples and their children's day-to-day lives until a dispute arises—

57. JOSLIN & MINTER, *supra* note 2, § 5:25; *Elisa B.*, 117 P.3d at 678-82 (finding a same-sex female partner was required to pay child support when she held the child out as her own).

58. UNIF. PARENTAGE ACT § 204(a)(5).

59. ALI Principles § 2.03(b)(c) (2002).

60. *Id.*; JOSLIN & MINTER, *supra* note 2, § 7:5 (citing Jean Maby H. v. Joseph H., 246 A.D.2d 282 (N.Y. App. Div. 1998) (holding a nonbiological father was a parent by estoppel to child)).

61. A.L.I., PRINCIPLES OF THE LAW OF FAMILY DISSOLUTION: ANALYSIS AND RECOMMENDATIONS § 2.03(b) (2000).

62. ALI Principles § 2.03(c).

63. Smith v. Guest, 16 A.3d 920, 930-35 (Del. 2011) (applying S.B. 84, 145th Gen. Assemb. (Del. 2009)). Alaska uses the term "psychological parent" to describe a nonlegal parent who cares for the child and with whom the child has formed a parent-child relationship. Kinnard v. Kinnard, 43 P.3d 150, 154-55 (Alaska 2002).

64. *See* Black v. Simms, 12 So. 3d 1140 (La. Ct. App. 2009) (applying a different standard for a nonlegal acting parent than would be applied to a legal parent seeking custody or visitation).

whether it is between the parents themselves or between the parents and the state.[65] Indeed, the first time same-sex couples must confront the legal status of one another as parents to their child may be when there is a problem.

For example, in Louisiana custody disputes, nonlegal parents are treated as legal strangers to their children. Where both parents are legally recognized, joint legal custody and shared physical custody are presumed.[66] Conversely, former same-sex partners of adoptive or biological parents are treated as legal strangers to the child under Louisiana law.[67] As a legal stranger, the partner can seek custody or visitation under a more stringent standard. The nonlegal parent must first show that "substantial harm" would come to the child if sole custody were granted to the biological parent.[68] Only after the nonlegal parent makes the substantial harm showing is the best interest standard applied to determine if placing the child with the nonlegal parent is in the child's best interest.[69] [rewrite]

Denying the child access to a former parental figure does not alone amount to "substantial harm." In *Black v. Simms*, the Louisiana Court of Appeals for the Third Circuit analogized a biological mother's termination of contact between her daughter and her former same-sex partner (who had been the child's mother for the eight-year-old's entire life) to telling the child she could "no longer associate with a family friend that had been close to the family for years."[70] Adding insult to injury, the court stated in no uncertain terms that the child only had one legitimate mother.[71]

Conversely, the Alaska Supreme Court identified an acting nonlegal mother as a "psychological parent."[72] The court found removing the child from the psychological parent constituted "severe and irreparable harm"

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65. There are serious consequences for children of same-sex couples who are denied the legal parentage of both. Children with only one legal parent are denied benefits afforded to their peers who were born or adopted into families with two legal parents. Children with an unrecognized parent may not inherit from him/her in the event the parent dies intestate or collect government benefits if the nonlegal parent dies. *See* JOSLIN & MINTER, *supra* note 2, § 2:10. Furthermore, the nonlegal parent may be unable to make educational or medical decisions for the child. *Id.*

66. LA CIV. CODE art. 132.

67. *See Black*, 12 So. 3d at 1144.

68. LA CIV. CODE art. 132; *see Black*, 12 So. 3d at 1144.

69. *Black*, 12 So. 3d at 1144.

70. *Id.* at 1145.

71. *Id.* ("Plain and simple, Ms. Simms is the mother of Braelyn and has the right to direct how Braelyn is raised.").

72. Kinnard v. Kinnard, 43 P.3d 150, 154-55 (Alaska 2002).

to the child.[73] While the parents in the Alaska Supreme Court case were an opposite-sex couple, the court appropriately focused on the best interest of the child, not the relationship between the child's caregivers. The court recognized that permanent removal of the child from an acting parent's care is significantly harmful to the child.[74] When courts recognize "psychological parents" or "*de facto* parents" the best interest standard may be applied without the initial hurdle of showing the child would experience "substantial harm" if the legal parent had sole custody.[75]

Different custody standards between legal and nonlegal parents within states is detrimental to children of same-sex couples and other nontraditional families. The same hurdles same-sex partners and parents face are faced by aunts, uncles and siblings who seek to formalize their parental roles.[76] Finally, different custody standards among states—and the different public policies on same-sex relationships—are not only detrimental to the affected children, but also to the efficient administration and adjudication of the disputes.

Miller-Jenkins v. Miller-Jenkins,[77] a well-known custody case involving a same-sex couple, reached across state lines and into courts of both Virginia and Vermont.[78] The litigation featured both forum-shopping and parental kidnapping—phenomena addressed and discouraged by federal statutory schemes. The Uniform Child Custody Jurisdiction and Enforcement Act (UCCJEA) and Parental Kidnapping Prevention Act (PKPA) both address the pervasive problem of forum-shopping by parents who dislike initial custody adjudications and move to another state—sometimes removing children from their legal guardians in the former state.[79]

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73. *Id.*

74. *Id.*

75. *See* Smith v. Guest, 16 A. 3d 920, 925-36 (Del. 2011) (applying the inclusion of *de facto* parent in the definition of parent under S.B. 84, 145th Gen. Assemb. (Del. 2009)).

76. *See generally* NANCY POLIKOFF, BEYOND (STRAIGHT & GAY) MARRIAGE (2008).

77. Miller-Jenkins v. Miller-Jenkins, 12 A.3d 768 (Vt. 2010); Miller-Jenkins v. Miller-Jenkins, 661 S.E.2d 822 (Va. 2008).

78. Lorraine Ali, *Mrs. Kramer v. Mrs. Kramer*, DAILYBEAST.COM (Dec. 5, 2008), http://www.thedailybeast.com/newsweek/2008/12/05/mrs-kramer-vs-mrs-kramer.html.

79. Parental Kidnapping Prevention Act (PKPA), 28 U.S.C. § 1738A (2006); 1997 UNIF. CHILD CUSTODY JURISDICTION & ENFORCEMENT ACT (1997).

F. The Child's Rights

The development of the law with respect to legitimate and illegitimate children illustrates that children should neither be punished, nor treated differently, under the law for the actions of their parents.[80]

When an employee parent is injured or killed on the job, workmen's compensation provides benefits and support to surviving dependent children.[81] Under the statutory scheme reviewed in *Weber v. Aetna Casualty & Surety Co.*, the workmen's compensation law provided equal benefits to legitimate and acknowledged illegitimate children,[82] both of whom could receive benefits before, and to the exclusion of, unacknowledged illegitimate children.[83] The Court noted that for purposes of workmen's compensation, the distinction between legitimate and acknowledged illegitimate children, as opposed to unacknowledged illegitimate children, was "impermissible discrimination."[84] All of the decedent's children, both legitimate and illegitimate, were equally dependent on him for support.[85]

The Court evaluated the workmen's compensation classification under the Equal Protection Clause of the Fourteenth Amendment.[86] While the Court did not rule on the state's offered purpose for the distinction—to promote and protect legitimate family relationships—the Court did reject the relationship between the protection of legitimate familial relations and distinguishing among dependents for purposes of workmen's compensation.[87] The Court rejected the notion that "persons will shun illicit relations because the offspring may not one day reap the benefits of workmen's compensation."[88] The Court clarified that its decision was not meant to require the state to seek out all illegitimate children that might exist, but rather to treat all similarly-situated

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80. *See* Weber v. Aetna Cas. & Surety Co., 406 U.S. 164, 169-70 (1972).

81. *Id.* at 166.

82. To acknowledge an illegitimate child in Louisiana at the time, the mother and father must have been able to legally contract a marriage at the time of the conception of the child. In this case, the decedent's wife was committed to a mental institution and he was living with another woman. His children with his live-in partner could not be acknowledged because he was not able to marry his partner, as he was still married to his wife. *Id.* at 170-71.

83. *Id.* at 167-68.

84. *Id.* at 169.

85. *Id.* at 169-70.

86. *Id.* at 172-73.

87. *Id.* at 173.

88. *Id.*

dependent children equally, regardless of the status of the father's relationship with the mother.[89]

Not all claims relating to the constitutional rights of the child are successful.[90] In a case addressing the legality of a second-parent adoption by the biological mother's same-sex partner, the Supreme Court of Wisconsin rejected the argument that denying the same-sex partner parental rights interfered with the child's due process or familial associational rights.[91] The court held the statute did not violate the child's due process rights under the Federal Constitution because the child's right to have her best interest be the paramount consideration was neither a property nor a liberty interest.[92] Additionally, adoption, unlike parenting one's biological child, does not impute an adult's fundamental right.[93] The court noted that its refusal to allow the adoption did not interfere with the child's right to associate with her biological mother's partner, but "merely" kept the biological mother's partner from acquiring a legally recognized relationship with the child.[94]

G. The Constitutional Right to Parent

The Supreme Court recognizes parents' fundamental right to the "care, custody, and control of their children."[95] The Court recognizes the parents' right to make decisions affecting the care, custody and control of their children.[96] Moreover, there is a presumption that fit parents make decisions that are in the best interest of their children.[97]

In *Troxel v. Granville*, the Court evaluated a Washington statute that allowed any third party to petition and gain visitation with a child if the court decided such visitation would be in the child's best interest.[98] The Court found the statute, as applied to the plaintiff and her children, provided no presumption that the plaintiff's decisions, as a fit parent,

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89. *Id.* at 174-75 ("The status of illegitimacy has expressed through the ages society's condemnation of irresponsible liaisons beyond the bonds of marriage. But visiting this condemnation on the head of an infant is illogical and unjust.").

90. *See generally In re* Angel Lace M., 516 N.W.2d 678 (Wis. 1994).

91. *Id.* at 685-86.

92. *Id.*

93. *Id.* at 685 (citing Lindley for Lindley v. Sullivan, 889 F.2d 124, 131 (7th Cir. 1989)).

94. *In re Angel Lace M.*, 516 N.W.2d at 685-86. The court also relied on the adoption statute's termination clause. Because the child's biological mother did not terminate her parental rights, the child was not eligible for adoption. *Id.* at 682-83.

95. Troxel v. Granville, 530 U.S. 57, 65 (2000).

96. *Id.*

97. *Id.* at 68-69 (quoting Parham v. J.R., 442 U.S. 584, 602 (1979)).

98. *Troxel* involved paternal grandparents seeking visitation with their recently deceased son's children. The mother agreed to visitation but disputed the amount sought by the grandparents. *Id.* at 61-63.

were in the best interest of her children.[99] The statute, as applied, ignored the fit parent presumption and placed an impermissible burden on the mother to demonstrate her decisions were in the best interest of her children.[100] The burden, the Court noted, should be on the third party seeking access to the child, not the parent.[101]

The Court clarified that there is no per se rule that third party visitation statutes violate the Due Process Clause,[102] but did not address whether all nonparental visitation statutes must include "a showing of harm or potential harm to the child as a condition precedent to granting visitation."[103] Nor did the Court offer a holding or dicta on whether removing a child from the custody of an acting parent would constitute substantial harm to the child.[104]

II. PROOF

A. *States Should Adopt a Gender-Neutral, Intention-Based Presumption in Favor of a Child's Second Parent*

Diversity in the law within, and among, states regarding adoption leaves same-sex parents in precarious positions—unsure if their status as parents will be recognized. While states develop public policy on same-sex marriage, same-sex couples are forming families.[105] Whether states recognize same-sex relationships does not affect the actual existence of families for whom current parentage and custody law is insufficient. By using a gender-neutral, intention-based standard to establish the legal parents of a child, parents could rely on their legal status before disputes arise or before the parents' relationship dissolves.[106]

Objections to an intention-based standard may include concern that courts are not equipped to determine the intent of persons in intimate relationships. Ascertaining intent, however, is a task with which courts in this country are intimately familiar.

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99. *Id.* at 69.
100. *Id.*
101. *Id.*
102. *Id.* at 73.
103. *Id.*
104. *See id.*
105. Sabrina Tavernise, *Parenting by Gays More Common in the South, Census Shows*, N.Y. TIMES, Jan. 18, 2011, http://www.nytimes.com/2011/01/19/us/19gays.html (reporting on same-sex-parented families and noting that the majority of same-sex couples raising children are doing so in the South).
106. ANDERSON, *supra* note 56.

First, the definition of criminal acts in the United States is not merely that the act alone constitutes a crime, but requires that the actor must also possess a guilty mind.[107]

Courts and juries determine the intent of the actor—the thoughts in his mind—by referring to the severity of his/her acts or behavior before and after the event.[108] Indeed, hate crimes are a class of crimes predicated on the prejudicial intentions or inner-thoughts of the actor.[109] Likewise, contract law is largely based on the court's ability to determine the parties' intent to contract.[110]

In the family law context, courts historically determined whether parties were living in a common-law marriage by evaluating several factors including the couples' intent.[111] Even states that do not recognize common law marriages will honor common law marriages from states that recognize them as valid.[112]

Under the UPA, when a heterosexual couple gives birth to a child, they are the presumed parents of the child regardless of the child's biological connection to either the father or the mother.[113] For example, a couple that conceives through artificial insemination with the sperm of an anonymous donor are both still the presumed parents of the child, in spite of the husband's lack of a biological relationship with the child.[114] This presumption can be described as "intent overrid[ing] biology."[115] If gender-neutral language was used in the UPA, the presumption could be applied to same-sex couples.[116]

A presumption for same-sex couples who plan, conceive and bring children into the world should be based on the intentions of the biological or adoptive parent and the putative second parent.[117] By employing

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107. *See* Bryan v. United States, 524 U.S. 184, 191-92 (1998).

108. *See* State v. Thompson, 65 P.3d 420, 426-27 (Ariz. 2003) (en banc).

109. 34A N.Y. JUR. 2D *Criminal Law: Procedure* § 3004 (2011).

110. 11 RICHARD A. LORD, WILLISTON ON CONTRACTS § 31:4 (4th ed. 2010).

111. *See, e.g.*, Adams v. Adams, 559 So. 2d 1084 (Ala. 1990).

112. *See* Fritsche v. Vermillion Parish Hosp., 893 So. 2d 935 (La. Ct. App. 2005). When a wife sued for the wrongful death of her husband, the Louisiana courts gave full faith and credit to their common-law marriage from Texas. *Id.* (citing Parish v. Mineville, 217 So. 2d 684 (La. Ct. App. 1969)).

113. Linda S. Anderson, *Protecting Parent-Child Relationships: Determining Parental Rights of Same-Sex Parents Consistently Despite Varying Recognition of Their Relationship*, 5 PIERCE L. REV. 1, 9-10 (2006).

114. *Id.*

115. *Id.* at 10.

116. Even without gender-neutral language, the California court applied the parentage presumption to a mother's former same-sex partner who held the children out as her own but later refused to pay child support. Elisa B. v. Superior Court, 117 P.3d 660, 670-72 (2005).

117. *See id.*

gender-neutral language, the intention-based parentage presumption will clarify the parents' rights and obligations in their resident states. Regardless of public policy, social acceptance or formal recognition, parentage will continue to evolve with modern medicine and technology. The law has not caught up and will continue to fall further behind.[118]

B. Public Policy Regarding Same-Sex Marriage Should Not and Does Not Have To Trump Public Policy in Favor of the Best Interest of the Child

States' public policy debates on same-sex marriage are in the news, headlining papers and prompting national debate. Adoption and custody disputes, however, implicate the best interest of the child—not public policy on adults' relationships. Regardless of whether courts approve of same-sex relationships or not, same-sex couples are rearing children together. Public policy placing definitive weight on the best interest of the child must govern the child's relationship with the parents, not public policy regarding the relationship between the child's parents.

The Federal Government enforces the Defense of Marriage Act (DOMA) and the Family Medical Leave Act (FMLA) concurrently, despite the fact that the two acts take different, though not mutually exclusive, stances on recognition of familial relationships.[119]

Congress passed DOMA in response to a Hawaii Supreme Court case that found the statutory prohibition of same-sex marriage constituted sex discrimination under the Hawaii constitution.[120] Following the court's decision, the Hawaii legislature passed a constitutional amendment that defined marriage as between one man and one woman.[121] In response, the federal government passed a similar statutory definition of marriage as between one man and one woman.[122]

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118. *Id.* at 55-56 (referring to other types of reproductive technology that may eventually be used to create families including cloning and transferring genetic material from one female's eggs to another's).

119. Defense of Marriage Act (DOMA), 1 U.S.C. § 7 (1996); Family Medical Leave Act (FMLA), 29 C.F.R. § 825 (1993).

120. Baehr v. Miike, 852 P.2d 44, 65-68 (Haw. 1993).

121. HAW. REV. STAT. § 572-1 (2005).

122. Defense of Marriage Act (DOMA) 28 U.S.C. § 1738C (1996), 1 U.S.C. § 7 (1996). Efforts by former President George W. Bush to pass a federal constitutional amendment defining marriage as between one man and one woman failed. The Obama Administration declined to defend the constitutionality of DOMA in court. Charlie Savage & Sheryl Gay Stolberg, *In Shift, U.S. Says Marriage Act Blocks Gay Rights*, N.Y. TIMES, Feb. 23, 2011, http://www.nytimes.com/2011/02/24/us/24marriage.html?scp=5&sq=DOMA&st=cse. In spite of the administration's decision not to defend DOMA in court, the House of Representatives has opted to defend DOMA. Jennifer Steinhauer, *House Republicans Move To Uphold Marriage Act*, N.Y. TIMES,

DOMA also provided that states are not required to recognize same-sex marriages granted in other states.[123] Additionally, many states have passed "mini DOMAs," which are state versions of the federal statutory scheme, under which states do not recognize other states' same-sex marriages (or other legally acknowledged relationships).[124]

The FMLA is a federal statutory scheme that provides three months unpaid leave for employees to take care of ill family members.[125] The United States Wage and Hour Division recently clarified that family members who stood *in loco parentis* to the employee, or for whom the employee stands *in loco parentis*, are "family members" under the FMLA.[126] For example, an employee whose aunt acted as her parent during her childhood is entitled to FMLA leave to care for that elderly aunt. Similarly, an employee who acts as a parent to her same-sex partner's legal child is entitled to FMLA leave to care for that child. The FMLA recognizes and protects these relationships, and it is enforced concurrently with DOMA without rendering DOMA toothless.

C. Children Subject to Disparate Treatment on the Basis of Their Parents' Relationship Have an Equal Protection Claim

1. Custody Presumptions for Children of Homosexual Parents are Different than Custody Presumptions for Children of Heterosexual Parents

Expressly forbidding same-sex partner adoption under joint adoption and stepparent provisions creates a disparity between the rights afforded children of opposite-sex couples and those afforded children of

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Mar. 4, 2011, http://www.nytimes.com/2011/03/05/us/politics/05marriage.html?_r=1&scp=13&sq=DOMA&st=cse.

123. *Id.*

124. When DOMA was first enacted, there was significant debate about whether DOMA would survive constitutional scrutiny, particularly under the Full Faith and Credit Clause (which requires states to respect the judgments of other states). *See* Andrew Koppelman, *Litigating the Defense of Marriage Act: The Next Battleground for Same-Sex Marriage*, 117 HARV. L. REV. 2684, 2684 (2004); Emily J. Sack, *The Retreat from DOMA: The Public Policy of Same-Sex Marriage and Theory of Congressional Power Under the Full Faith and Credit Clause*, 38 CREIGHTON L. REV. 507, 510 (2005); *see also* Oren Goldhaber, Note, *"I Want My Mommies": The Cry for Mini-DOMAs to Recognize the Best Interests of the Children of Same-Sex Couples*, 45 FAM. CT. REV. 287, 290-91 (2007) (outlining the background of DOMA's interaction with the Full Faith and Credit clause and arguing for visitation and custody decisions based on the child's best interest regardless of the state's mini DOMA).

125. Family Medical Leave Act (FMLA), 29 C.F.R. § 825 (1993).

126. U.S. Wage and Hour Division, Fact Sheet #28B, DEP'T OF LABOR (July 2010), http://www.dol.gov/whd/regs/compliance/whdfs28B.pdf; U.S. Wage and Hour Division, Fact Sheet #28C, DEP'T OF LABOR (July 2010), http://www.dol.gov/whd/regs/compliance/whdfs28C.pdf (July 2010).

same-sex couples.[127] The child of an opposite-sex couple has legally obligated support from two parents, whereas the child of a same-sex couple only has the legally obligated support of one parent.[128] The latter child is precluded from enjoying the support of a second parent even in situations where former same-sex partners seek parental rights and obligations to the child.[129] Children of nonlegal parents are not presumed heirs when the nonlegal parent dies. They may be excluded from the nonlegal parent's employment benefits, denied government benefits if the nonlegal parent dies, or denied access to a nonlegal parent if the legal parent dies or the parents' relationship dissolves.[130]

In Louisiana, when opposite-sex couples are both the legal parents of a child and are in a custody dispute, there is a presumption in favor of joint legal custody and shared physical custody.[131] Conversely, when a legal parent and a nonlegal parent are in a custody dispute the presumption favors sole custody for the legal parent.[132] The nonlegal parent is treated as a legal stranger to the child.[133] As a result, the nonlegal parent must first show that substantial harm will come to the child if he or she is placed in the sole custody of the legal parent.[134] After showing substantial harm, the nonlegal parent must then show that it is in the child's best interest to be placed with the nonlegal parent.[135]

The use of the substantial harm test for children of gay couples, before application of the best interest standard subverts the policy goal behind the best interest standard. The application of the substantial harm test when a child has two parents of the same sex takes the focus away from the child's rights and needs and places it on the relationship between the parents.

Furthermore, Louisiana courts have rejected the argument that severing the relationship between a child and a nonlegal parent is sufficient substantial harm to preclude the removal.[136] The result of applying the substantial harm standard before the best interest standard is

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127. JOSLIN & MINTER, *supra* note 2, § 5:1.
128. *See id.*
129. *See id.*
130. *See id.*
131. LA. CIV. CODE art. 132.
132. *Id.* art. 133; Black v. Simms, 12 So. 3d 1140, 1143-45 (La. Ct. App. 2009).
133. *See* LA. CIV. CODE art. 133; *Black*, 12 So. 3d at 1144.
134. LA. CIV. CODE art. 133; *see also Black*, 12 So. 3d at 1144.
135. *Black*, 12 So. 3d at 1144.
136. *Id.* at 1144-45. *But see* Kinnard v. Kinnard, 43 P.3d 150 (Alaska 2002) (holding that removal of child from psychological mother's care could be considered substantial harm in determining a custody dispute between the legal father and nonlegal stepmother of the child).

that the child is treated as if she has one parent, when in reality she has two parents.[137]

The Alaska Supreme Court accepted the argument that removing the psychological parent from the child's life would be detrimental to the child.[138] In the context of an opposite-sex relationship between a child's father and the child's stepmother, the Alaska Supreme Court identified the stepmother as a psychological parent who could seek custody based on the best interest of the child.[139] The court stated that finding an adult to be the psychological parent of the child was based, at least in part, on whether the adult "intends to assume that obligation."[140]

When courts refuse to recognize the role of a psychological/*de facto* parent, courts reach the absurd result of the child having a parent who the court treats as a legal stranger to the child. The harm is borne by the child. An intention-based analysis of who the child's parents are, like the one used by the Alaska Supreme Court, will correct the incongruous result.[141]

2. The Different Treatment is Analogous to Treating Legitimate and Illegitimate Children Differently Under Workmen's Compensation Statutes

In *Weber v. Aetna Casualty & Surety Co.*, the distinction between the decedent father's legitimate and illegitimate children was based on the state's refusal to recognize as legitimate the relationship between the father and the mother at the time of the child's conception; not on any relevant difference in the children's dependency on the father.[142] Similarly, when a biological parent's same-sex partner seeks to adopt, he or she is precluded from doing so, not based on the dependency of the child, but instead on a state's public policy choice to not recognize the parents' relationship.

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137. *See* Goldhaber, *supra* note 124, at 291 ("However, the United States has a long-standing rule that the welfare of a child is of primary consideration when a court determines custody rights of children.").

138. *Kinnard*, 43 P.3d at 154.

139. *Id.* at 154-55.

140. *Id.* at 154.

141. *See id.*; *see also* Smith v. Guest, 16 A. 3d 920, 930-35 (Del. 2011) (applying a statutory definition of *de facto* parent allocating standing to *de facto* parents as legal parents). *De facto* parentage and parentage by estoppel expand, but do not alone cure, how the law traditionally defines and recognizes families.

142. 406 U.S. 164, 169-70 (1972). The distinction under the workmen's compensation statute was meant to promote legitimate familial relationships. *Id.* at 173. The court rejected the relationship between promoting legitimate familial relationships and precluding a dependent child from recovering under workmen's compensation provisions. *Id.*

In *Weber*, even if the father wanted to acknowledge his illegitimate children, he was statutorily precluded from doing so because he was not legally able to marry their mother when the children were conceived.[143] Similarly, same-sex couples who want to take advantage of stepparent provisions cannot do so because they are statutorily unable to marry one another.[144] The parents' inability to legally formalize their relationship because they are of the same sex does not change the child's financial or emotional dependence on either parent.

3. Different Custody Standards for Children of Homosexual and Heterosexual Parents Do Not Promote an Important Governmental Interest[145]

The classification in *Weber* with respect to workmen's compensation failed because the classification did not advance the state's interest in promoting legitimate familial relationships.[146] It is absurd to consider that people will forgo extra-marital relationships because their offspring may not be able to collect under a workmen's compensation statute.[147]

In *Weber*, the reason the illegitimate children were not recognized by the workmen's compensation statute was because their parents were unable to marry at the time of their conception.[148] Likewise for same-sex couples, the reason that the putative second parent is a third party, and not a parent, is because the biological parent and the putative second parent cannot marry.[149] Similarly, the distinction in custody standards employed for children of married opposite-sex parents, or unmarried

143. *Weber*, 406 U.S. at 171.

144. This is not to say that marriage is the only answer to the inequalities facing lesbian- and gay-parented families. To grant affirmative rights to married couples disadvantages other nontraditional families including, but not limited to, lesbian- and gay-parented households. *See generally* POLIKOFF, *supra* note 76.

145. For the sake of the analogy to *Weber*, I suggest the constitutional standard would be rational basis but the classification among children is based on the sex of the child's putative second parent. If analyzed as sex discrimination, the appropriate level of scrutiny is intermediate. *See, e.g.*, Perry v. Scwarzenegger, 704 F. Supp. 2d 921 (N.D. Cal. 2010).

146. *Weber*, 406 U.S. at 173.

147. *Id.*

148. *Weber*, 406 U.S. at 171.

149. Again, I am not arguing that same-sex marriage is the only way to address this situation. This situation also arises for opposite-sex couples who are not married. The assignment of positive rights to married persons is a policy choice that devalues other familial structures—including those who are unmarried by choice or by legal preclusion. *See generally* Polikoff, *supra* note 76.

parents of the same sex, however, will not stop the formation of these families.[150]

D. Intention-Based Parentage Presumptions Better Comport with Judicial Efficiency and with Federal Policy Against Parental Kidnapping

If states adopted presumptions for second parents that arise when children are born, custody standards for children of same-sex couples would be more fair, uniform, and efficient. Nonuniform parentage laws create a series of perverse incentives. The harm of nonuniform parentage laws is borne, first and foremost, by children. The burden spreads to the courts when parents move from one state to another, undermining previous orders and judgments.[151]

Forum-shopping may be abused by legal parents, nonlegal parents, those who remove children from the reach of nonlegal parents, and those who seek to legalize their parental rights.[152]

Uniformity exists in proposed statutory schemes like the Uniform Parentage Act (UPA), the Uniform Child Custody Jurisdiction and Enforcement Act (UCCJEA), and in federal statutory schemes like the Parental Kidnapping Prevention Act (PKPA),[153] but abuse continues.[154] *Miller-Jenkins* illustrates both the cost of forum-shopping and the dangers of parental kidnapping. Uniformity of laws will protect children and judicial resources, neither of which should suffer at the hands of the public policy debate over consensual adult relationships.

III. CONCLUSION

A gender-neutral, intention-based parentage standard is an equitable alternative to formal parentage definitions that do not consider the realities of modern families. The inquiry, "are you my mother?," may seem confusing today, but a gender-neutral standard and intention-based presumption simplifies both the question and the answer. A gender-neutral intention-based presumption will benefit not just same-sex

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150. These families exist in all fifty states, regardless of the legal protections that are withheld from them.

151. *See, e.g.*, Miller-Jenkins v. Miller-Jenkins, 12 A.3d 768 (Vt. 2010).

152. *See id.* at 771-74.

153. Parental Kidnapping Prevention Act (PKPA), 28 U.S.C. § 1738A (2006); UNIF. CHILD-CUSTODY JURISDICTION & ENFORCEMENT ACT (1997); UNIF. PARENTING ACT (2002).

154. *Miller-Jenkins*, 12 A.3d at 781 (Skoglund, J., concurring) ("Parental kidnapping is the most common form of abduction in the United States with more than 200,000 children victims each year.").

couples seeking legal protection for their families, but other nontraditional families too.[155] A gender-neutral, intention-based presumption provides reliability and protection for acting parents. The presumption would also protect the right of the child to the same recognized parentage enjoyed by his or her more traditionally-parented peers. The gender-neutral, intention-based standard keeps the focus off of the public policy debate regarding same-sex relationships and onto the best interest of the child, where it belongs.

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155. Neither unmarried opposite-sex couples nor unmarried same-sex couples should be required to get married to secure protections for their children, though all couples should have the equal opportunity to choose to do so. *See generally* POLIKOFF, *supra* note 76.