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SAME-SEX COUPLES: THEIR RIGHTS AS PARENTS, AND THEIR CHILDREN’S RIGHTS AS CHILDREN

Kathy T. Graham

I. INTRODUCTION

Fifty years ago, the American family usually consisted of a married couple with children. When we thought of family, we thought of relationships created by affinity, consanguinity, or by adoption. Over the past years, the American family has changed in a number of ways. Divorce has changed the fabric of our society by transforming a number of families into single parent families. Divorce is no longer an unusual occurrence; in fact, it is commonplace.1 After remarriage, the family unit often transforms again with a new marital partner becoming the stepparent to children from a previous union.2 A number of parents also choose to have children without marrying and choose to raise their children outside marriage.3

Along with these changes, or perhaps in part because of these changes, same-sex couples are more visible in our society. Same-sex couples are creating family units that often include children, either from a pre-existing heterosexual relationship or children born during the same-sex relationship. Sometimes, the children are conceived by one of the partners through artificial means or the children may be adopted. Today many children are being raised by same-sex

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1. See Patricia H. Shiono & Linda Sandham Quinn, Epidemiology of Divorce, 4 THE FUTURE OF CHILDREN 15, 21-26 (1994) (“The changes in the marriage, divorce, and remarriage rates over the past seventy years have had a profound effect on the living arrangements of children. A growing number of children are being raised by single parents or by stepparents.”).
2. See id.
3. See id.
couples in family units. Information from the 2000 census counted about 594,000 same-sex households; twenty-seven percent of those households included children. The total number of children of same-sex couples totals at least 166,000.4

As a result of these changes in the American family, our concept of family is changing. Much has been written about the legal definition of marriage and whether it includes same-sex partnerships. The federal government and the states have examined this question and answered it in different ways. The impact of these decisions on the parent-child relationships included in same-sex families has not been the primary focus of the discussion. This paper considers the legal rights of same-sex partners as parents and the rights of their children.

Given the unwillingness of courts and legislatures to recognize same-sex partners as married, marriage and divorce and parentage laws cannot provide same-sex partners with the legal protection that heterosexual partners are provided. Also, their children do not have the protection of laws that establish parentage and legal obligations for care and support.

For instance, a husband who is married at the time his wife conceives and gives birth is presumed to be the father of the child.5 Even if the husband is not the natural father, he will be regarded as the natural father until some other man is legally established as the child’s father. If the father and mother were not married, but cohabited and had a child outside of marriage, a paternity action may be used to establish the father-child relationship.6


5. Most states have statutes that establish the paternity link between a husband and a child born to his wife during marriage. See CAL. EVID. CODE § 621 (West 1995) (“[T]he issue of a wife cohabiting with her husband, who is not impotent or sterile, is conclusively presumed to be a child of the marriage.”).

6. A paternity action is one way that the parent-child connection can be established between a father and a child if the parents are not married. See OR. REV. STAT. § 109.070 (2007) (listing a number of ways that the connection can be established when the mother and father are not married including acknowledgment).
But for a same-sex couple, it is not as easy to establish the parent-child link for the parent who is not the natural parent. The relationship between the natural mother and her child defines the mother's relationship, but the other parent may have no legal rights to custody of the child or no responsibility for the child if the couple splits up. If the second parent adopted the child, then she will be recognized as the child's parent. Otherwise, the law does not protect the relationship between the child and the non-birth parent in a same-sex relationship.

The purpose of this article is to explore the legal treatment of gay and lesbian parents. Part II discusses the history of same-sex union recognition. Part III discusses the legal rights of heterosexual parents. Part IV discusses how the parent-child relationship is established for gay and lesbian partners. Last, part V suggests proposals to recognize parents' rights to their children, regardless of the two parent partner's sex.

II. RECOGNITION OF SAME-SEX UNIONS

For years, same-sex partners were not recognized or protected by family law. In older American cases, gays and lesbians were not successful in their efforts, but more recently, they have had some success in attaining legal protection. Early cases rejected the conceptual notion that marriage could be flexible enough to include same-sex unions.

A. State Court Decisions Providing Legal Protection to Same-Sex Relationships

The states have addressed the protection of same-sex relationships in a variety of ways. Three recent state supreme court cases held a restriction on marriage to heterosexual couples unconstitutional. The plaintiffs in these cases argued, and the courts found, that such a marital restriction

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8. See Baker v. Nelson, 191 N.W.2d 185, 186 (Minn. 1971) (“The institution of marriage is a union of man and woman, uniquely involving the procreation and rearing of children within a family, is as old as the book of Genesis.”).
violated state constitutional provisions. The petitioners argued that the restriction of marriage to heterosexual couples violated the petitioners’ rights to marry.

In *Goodridge v. Department of Public Health*, the Massachusetts Supreme Court stated that, “barring an individual from the protections, benefits, and obligations of civil marriage solely because that person would marry a person of the same sex violates the equal protection principles contained in the Massachusetts Constitution.” The benefits conferred on married partners and denied to same-sex partners include inheritance rights, contract rights, rights to children born during the relationship and many other benefits too numerous to list. The Massachusetts High Court found it unconstitutional to have a marriage law that does not provide the same benefits to same-sex partners as are provided to heterosexual couples.

Two other state supreme court decisions found that the failure to treat same-sex couples the same as heterosexual couples violates state constitutional provisions and that an adequate remedy to this disparity rests in according these couples the same rights and responsibilities of marriage without the status of marriage. In *Baker v. State*, the Vermont Supreme Court held that under the state constitution’s common benefits clause, plaintiffs seeking same-sex marriage are entitled to benefits and obligations like those accompanying marriage, but the relationship can be classified as a civil union instead of marriage. So long as same-sex partners have the same rights and responsibilities as married couples, there is no violation of the constitutional rights of same-sex couples. In the most recent case, *Winslow v. Harris*, the New Jersey Supreme Court struck down the state marriage law as violating state constitutional rights of same-sex partners, but left it to the state legislature to address the problem.

In support of the status quo in both cases, the states argued that expanding marriage beyond heterosexual couples

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11. *Id.* at 969-70.
puts children at risk of being raised in less than optimal circumstances. Yet, while the states argued that marriage was the sacred institution for procreation, the states had to concede that the concept of family has evolved to include same-sex partners as parents. For instance, adoption laws permit second-parent adoption by a same-sex partner. Other laws and programs in these same states sanction parenting by homosexual partners. Same-sex partners can either become foster parents or give birth to their own children through artificial insemination.

Many of the plaintiffs who challenged the marriage laws in the three cases are parents. To them, the notion of family includes same-sex parents raising children whether or not the state recognizes same-sex marriage. Denying the parents the right to marry deprives the children of the legal benefits bestowed upon legally-recognized marriages and families. As the courts in the cases noted, there are many benefits that come under the umbrella of marriage law that inure to the benefit of the children. The court in Goodridge states that "it cannot be rational under our laws, and indeed it is not permitted, to penalize children by depriving them of State benefits because the State disapproves of their parents' sexual orientation."14 The court in Winslow v. Harris states:

Disparate treatment of committed same-sex couple, moreover, directly disadvantages their children. We fail to see any legitimate governmental purpose in disallowing the child of a deceased same-sex parent survivor benefits under the Worker's Compensations Act or Criminal Injuries Compensation Act when children of married parents would be entitled to such benefits. Nor do we see the governmental purpose in not affording the child of a same-sex parent, who is a volunteer firefighter or first-aid responder, tuition assistance when the children of married parents receive such assistance. There is something distinctly unfair about the state recognizing the right of same-sex couples to raise natural and adopted children and placing foster children with those couples, and yet denying those children the financial and social benefits and privileges available to children in heterosexual

14. Id.
households.\textsuperscript{15}

Thus, the courts in these cases either find the legal concept of marriage must be expanded to include same-sex marriage or the legislature must be directed to protect same-sex partnerships in a manner tantamount to marriage. In finding as they did, the courts were concerned with the lack of legal protection afforded to same-sex couples, particularly in light of the protection extended to heterosexual couples. In part, the concern is related to the children of same-sex couples.

\textbf{B. State Court Decisions Denying Legal Protection to Same-Sex Relationships}

The Washington Supreme Court recently upheld state provisions that prohibit same-sex marriages.\textsuperscript{16} In \textit{King County v. Andersen}, the court applied a rational basis test because the plaintiffs had not adequately established gay and lesbian persons as a suspect class. In deciding that the state could lawfully restrict marriage to heterosexual couples, the court stated, "[W]e conclude that limiting marriage to opposite sex couples furthers the State’s interests in procreation and encouraging families with a mother and father and children biologically related to both."\textsuperscript{17} In reaching this conclusion, the court states that the highly deferential rational basis inquiry sustains the restriction on marriage given the state’s goal of “encouraging procreation between opposite-sex individuals within the framework of marriage.”\textsuperscript{18} The court accepted this as a legitimate government interest furthered by limiting marriage to opposite-sex couples.\textsuperscript{19}

Despite the holding that marriage may lawfully be restricted to heterosexual couples, the court does “not dispute that same-sex couples raise children” and that “same-sex couples enter significant, committed relationships that include children, whether adopted, conceived through assisted reproduction, or brought within the family of the same-sex couple after the end of a heterosexual

\textsuperscript{15} \textit{Id.} at 218.
\textsuperscript{16} See Andersen v. King County, 138 P.3d 963 (Wash. 2006).
\textsuperscript{17} \textit{Id.} at 985.
\textsuperscript{18} \textit{Id.} at 983.
\textsuperscript{19} \textit{Id.}
The New York Court of Appeals considered the same issue and found that the rights of same-sex couples were not violated by a law that restricts marriage to heterosexual couples. In Hernandez v. Robles, the court held that the legislative restriction of marriage to heterosexual couples was rational, and that rational basis scrutiny was applicable in reviewing the state’s marriage law since a fundamental right was not at stake. The court concluded that, although the right to marry was unquestionably a fundamental right, the right to marry someone of the same sex was not. Thus, even though same-sex couples raise children and have families, it is nevertheless not a violation of same-sex partner’s state or federal constitutional rights to define marriage as a relationship between heterosexual couples. Therefore, the court concluded, heightened scrutiny of the law that limits marriage to heterosexual couples is not required. Nor is heightened scrutiny required because the law discriminates on the basis of sex and on the basis of sexual preference. The court says it is up to the legislature to amend the law if it believes that same-sex couples should be able to marry.

C. State Legislation Conferring Rights on Same-Sex Couples

Most states do not recognize the rights of same-sex partners as analogous to marriage, but a handful of states have enacted laws providing some protection to same-sex partners. For instance, Vermont’s Legislature enacted a law that recognizes “civil unions” as identical to marriage but is not described as marriage. Connecticut followed suit; California and New Jersey have also enacted laws that create a legal status for same-sex partners that are virtually identical to marriage, but is not labeled as such.

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20. Id. at 985.
21. Hernandez v. Robles, 855 N.E.2d 1 (N.Y. 2006); see also Li v. State, 110 P.3d 91 (Or. 2005) (holding that a restriction on marriage to opposite sex couples is constitutional).
23. Id. at 9 (“Our conclusion that there is a rational basis for limiting marriage to opposite sex couples leads us to hold that that limitation is valid under the New York Due Process and Equal Protection clauses, and that any expansion of the traditional definition of marriage should come from the Legislature.”).
24. See CAL. FAM. CODE § 297.5(a) (West 2004) (“Registered domestic partners shall have the same rights, protections, and benefits, and shall be
In many states that deny same-sex partners the right to marry or to an equivalent status, the legislatures have enacted laws giving same-sex couples some benefits including rights regarding health care directives, adoption rights, rights to care for foster children, and other rights with respect to one another. The list of rights and responsibilities that subject to the same responsibilities, obligations, and duties under law, whether they derive from statutes, administrative regulations, court rules, government policies, common law, or any other provisions or sources of law, as are granted to and imposed on spouses.

25 For instance, in Washington where the court denied same-sex couples the right to marry, the court and the Legislature have provided limited protection to same-sex couples. See WASH. REV. CODE § 26.33.140(2) (2005) (providing that any person may be an adoptive parent); Vasquez v Hawthorne, 33 P.3d 735 (Wash. 2001) (ruling on a claim to the estate of decedent brought by
same-sex partners have acquired incrementally by statutory and policy changes is legion; the list is too lengthy to mention them all. In most states, same-sex partners have some of the rights and some of the responsibilities of a spouse. Thus, apart from the controversy regarding the meaning of marriage and whether or not it is constitutionally acceptable to leave same-sex couples out of the marriage law, many laws and policies have changed to recognize the fact that many households now consist of same-sex couples and their families.

D. State and Federal Legislation that Prohibits Recognition of Same-Sex Couples

In 1996, Congress enacted the Defense of Marriage Act (DOMA). This Act defines marriage as a legal union between a male and a female. DOMA gives the states the authority to decline to recognize same-sex relationships as marriage when they otherwise would be required to do so pursuant to the Full Faith and Credit Clause of the U.S. Constitution.

Approximately forty-five states have enacted laws that restrict marriage to heterosexual couples. Even in states

decedent's alleged gay life-partner); In re Dependency of G.C.B., 870 P.2d 1037 (Wash. Ct. App. 1994) (noting placement of a child in foster care with a same-sex couple). Other states that do not extend full protection to same-sex couples provide limited protection both as partners and as parents. See also HAW. REV. STAT. § 572C-1 et seq. (2006) (laying out the Reciprocal Beneficiaries Law); Matter of Jacob, 660 N.E.2d 397 (N.Y. 1995).

26. Another example of this change has occurred in the private sector where employers have recognized the need to provide for same-sex partners for gay and lesbian employees. See Howard Paster, The Federal Marriage Amendment Is Bad for Business, WALL ST. J., Oct. 5, 2004, at B2 (“American businesses have been changing their workplace policies, adding domestic partner benefits and rethinking their corporate cultures since the early 1980s.”). The author says that forty percent of the Fortune 500 companies, including Shell Oil, BP, the Big Three auto-makers, Lockheed Martin, General Electric, and Coca Cola provide benefits for same-sex partners that are equivalent to those for heterosexual partners. Id.

27. See 1 U.S.C. § 7 (2005) (“In determining the meaning of any Act of Congress, . . . the word ‘marriage’ means only a legal union between one man and one woman as husband and wife, and the word “spouse” refers only to a person of the opposite sex who is a husband or a wife.”); 28 U.S.C. § 1738C (2008) (“No State . . . shall be required to give effect to any public act, record, or judicial proceeding of any other State . . . respecting a relationship between persons of the same sex that is treated as a marriage under the laws of such other State . . . or a right or claim arising from such relationship.”).

that have enacted civil union or domestic partnership law, the Legislature or the people may have defined marriage as a heterosexual relationship.

III. ESTABLISHING THE PARENT/CHILD RELATIONSHIP

The meaning of parent is defined as the “lawful father or mother of someone.” As one author says, “the term encompasses so much more today than just the biological aspect of who was responsible for the child’s conception and birth.” As the author says, the term parent connotes a “relationship of mutual love and affection between the parents and the child and that the parents are the individuals who are responsible for child support and maintenance, instruction, discipline, and guidance of the child.”

The following section discusses how the parent-child relationship is established.

A. Biological Parent Recognized as Legal Parent

In most cases, a biological parent is also regarded as the legal parent of a child. For mothers, this is always true unless she gives the child up for adoption or her parental rights are terminated. For fathers, although it may be a more complicated evidentiary issue, the biological dad is the legal father of his children. Biological parents are regarded as legally responsible for their children.

Usually, fatherhood is established by virtue of marital status at the time the child is conceived or is born. If the child’s mother gives birth to the child while she cohabits with her husband, he is presumed to be the father of her child. The marital presumption provides protection to the child, the mother, and the father, because marriage provides a legal father to the child. Even if the mother’s husband is not the

30. Id.
31. Id.
32. UNIF. PARENTAGE ACT § 204 (2002) (“A man is presumed to be the father of a child if: 1) he and the mother of the child were married to each other
natural father of her child, the marriage presumption gives
the child a legal father who must provide care and support for
the child. Although this presumption may be rebutted, if it is
not, the child’s legal father owes the child the obligations of
parenthood. In some cases, undoubtedly, the legal father is
not the biological father, but that does not prevent the
presumption from creating a father-child bond.33

If the child’s mother gives birth to a child outside of
marriage, fatherhood is established through a filiation
proceeding or by a voluntary acknowledgment of the child by
the father. Once paternity is established, the father is
responsible for the support of the child as well as entitled to
visitation and even perhaps to custody.34

For the most part, the legal framework follows the
contours of the natural relationships between mother and
child, father and child, or mother’s husband and child. Most
parent-child relationships are established by the marital
presumption or through a paternity process.

B. Establishing Parent-Child Relationship for Non-Natural
Parents

More and more children are being raised in families
where there are not two natural parents living together.
More and more children today are being raised in single-
parent homes, or with a parent and a step-parent.35 New
parenting relationships may be created with other caring
adults as a result of the changes in the family.
1. By Adoption

A parent-child relationship may also be established through adoption. If the child's natural parents relinquish their rights to a child, the child can be adopted by other parents. Once the adoption is final, the child is regarded as the natural child of his adoptive parents. The adoptive parents are considered the child's legal parents. The natural parents lose all legal standing as parents and the adoptive parents replace them. Legally, it is as if the child was born to his adoptive parents.

2. Creating a Parent-Child Bond from the Stepparent Relationship

Laws in some jurisdictions provide that stepparents are obligated to provide support for the children of their spouses while the marriage lasts and while the children reside in the stepparents' home. If the children reside with the stepparent, a stepparent may stand in loco parentis to his or her spouse's children during their marriage, but this relationship terminates on divorce. Once the stepparent is divorced from the natural parent, the obligation to provide support and the in loco parentis relationship terminates.

Adoption is also a possibility. If the stepparent adopts the child through a stepparent adoption process, the bond is

36. See OR. REV. STAT. § 109.050 (2007) ("An adopted child bears the same relation to adoptive parents and their kindred in every respect pertaining to the relation of parent and child as the adopted child would if the adopted child were the natural child of such parents.")

37. Although a majority of states adhere to the common law rule that holds that stepparents have no duty to support their stepchildren, about twenty states do require some support in some circumstances. See MO. REV. STAT. § 568.040 (1999); MONT. CODE ANN. § 40-6-217 (2007); N.D. CENT. CODE § 14-09-09 (2004); N.H. REV. STAT. ANN. § 546-A-1 (2006); N.Y. DOM. REL. LAW Art. 3-A § 31 (McKinney 1999); OKLA.STAT. ANN. tit. 10, § 15 (West 2007); OR. REV. STAT. § 109.053 (2007); S.D. CODIFIED LAWS § 25-7-8 (2004); UTAH CODE ANN. § 78-45-4.1 (2002).

38. 67A C.J.S. Parent and Child § 352 (2007) ("In order for a person to be regarded as a stepparent, he or she must be married to the natural parent of the child. A stepparent does not, merely by reason of the relation, stand in loco parentis to the stepchild. Accordingly, at common law, the relationship between a stepparent and stepchild does not of itself confer any rights or impose any duties upon either party. A stepparent who lives with his or her spouse and the spouse's natural children may assume the relationship of in loco parentis, and the rights and responsibilities that arise where a spouse elects to stand in loco parentis to the other spouse's child or children. The status of loco parentis for a stepparent terminates upon divorce.")
the same as if the stepparent was the natural parent. Many states created the stepparent adoption process as an exception to the ordinary adoption where the child's legal connection to both parents is severed when the child is adopted. In a stepparent adoption, the child keeps his or her relationship with one parent and is legally adopted by that parent's spouse.

3. *In Loco Parentis Doctrine*

A parent child relationship may be established by someone other than a natural parent through the in loco parentis doctrine. The in loco parentis doctrine refers to a situation where a person puts himself in the position of a lawful parent by assuming the obligations of a parent without going through a formal adoption process. Although the tradition in the common law is that natural parents have a superior right to their children, a natural parent could lose custody of a child if it is shown that the natural parent is unfit or it would be detrimental to the child's interests to give custody to the natural parent.

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39. Lavely, supra note 28, at 264 ("As divorce and remarriage become increasing commonplace during the twentieth century, states began to carve out stepparent adoptions in their adoption statutes.") (footnote omitted).


parent may consent to the placement of his or her child with someone else for some period of time.

In these rare cases where a natural parent either consents to or is forced to give another person custody rights to his or her child, the natural parent continues to have legal rights to the child unless parental rights are terminated. In these situations, the natural parent shares his or her rights with others who have provided care for the child. But the natural parent is presumed to have the superior right to care for and have custody of the child. If the natural parent no longer is willing to share the child with the adult who has assumed the role of parent, the natural parent is entitled to make that choice.

4. By New Reproductive Technology

New reproductive technologies make it possible for women to conceive children through artificial insemination without a male partner. The advent of the new reproductive technology forces us to reckon with the rights of parental partners who are not natural parents of their partners' children.

The original artificial insemination by donor (AID) cases deal with a married woman whose husband is infertile, but nevertheless desires a child. She becomes pregnant via artificial insemination and gives birth; her husband is regarded as the natural and legal father of the child. This is true despite the fact that the child's genetic identity is unrelated to her husband. This reflects a policy that the


42. Many states have established that when a married woman receives
AID procedure is designed to create a family unit and that the best interests of the child are fulfilled by giving the child a relationship with two parents. Today, of course, AID is used by unmarried women who desire to have children either without a partner or perhaps with a same-sex partner.

Another possibility is that a child may be created through in vitro fertilization. The 2002 Uniform Parentage Act includes a provision that limits the ability of a husband to challenge his status as the father of a child born through this procedure. Again, the law is designed to recognize the mother's husband as the father of the child if the mother is married at the time of the procedure and the birth of the child. If there is no husband or partner, then there is no other parent in the eyes of the law because a donor is not considered a legal parent of a child born through assisted reproduction.

Another kind of assisted reproduction is through a surrogate who agrees to implantation of an embryo which consists of an egg and sperm or may consist of sperm that unites with an egg from the surrogate. Complicated questions arise about the relationships created in these situations. The 2002 Uniform Parentage Act provides some guidance by upholding the parties' intentions when they contract a gestational agreement that provides for the child's birth and their rights as the child's parents.

artificial insemination in order to conceive and produce a child, her husband is legally regarded as the natural and lawful father of the child even though the biological father is someone else. See People v. Sorensen, 437 P.2d 495 (Cal. 1968); Anonymous v. Anonymous, 246 N.Y.S.2d 406 (N.Y. 1963); see also OR. REV. STAT. § 109.243 (2005) (“The relationship, rights and obligation between a child born as a result of artificial insemination and the mother's husband shall be the same to all legal intents and purposes as if the child had been naturally and legitimately conceived by the mother and the mother's husband if the husband consented to the performance of artificial insemination.”).


34. See UNIF. PARENTAGE ACT § 702 (2002) (noting that a donor is not a parent of a child conceived by means of assisted reproduction); UNIF. PARENTAGE ACT § 705(a) (2002) (“Except as otherwise provided in subsection (b), the husband of a wife who gives birth to a child by means of assisted reproduction may not challenge his paternity of the child unless: (1) within two years after learning of the birth of the child he commences a proceeding to adjudicate his paternity; and (2) the court finds that he did not consent to the assisted reproduction, before or after the birth of the child.”).

35. See CAL. FAM. CODE §§ 7610, 7613, 7570 (West 2004); In re Marriage of Buzzanca, 72 Cal. Rptr. 2d 280 (Cal. Ct. App. 1998).

36. See UNIF. PARENTAGE ACT § 803(a) (2002).
The laws that define the parent-child relationship for children conceived and born with reproductive technology include provisions that cut off the legal rights of the natural parents. The purpose of these laws is to give effect to the intention of the parties to create a parent-child relationship where it otherwise would not exist.

Most parent-child relationships are created by virtue of the natural relationship that exists between the child and the parents. Most of the time, a child is born into a family unit that consists of married parents or unmarried parents who cohabit. Even when that is not the case, paternity law creates a mechanism for creating the legal bond between a natural father and his child.

The parent bond may also be created in situations where another person becomes the child’s parent or assumes the role of parent when the natural parent is unwilling or unable to do so. We have seen several examples of laws that accomplish this, particularly examples involving reproductive technology. In AID, the genetic father may be unwilling to do any more than provide the sperm to enable a woman to have a child. He is not interested in assuming the responsibilities of fatherhood.

The term “parent” means more than the biological link between a child and his natural parent. It is important to keep this in mind as we examine parenthood in the context of same-sex families.

III. RECOGNITION OF PARENTAL RIGHTS IN GAY RELATIONSHIPS

Same-sex couples are “changing the portrait of the American family and the landscape of family law.” A recent
article discusses the complexity of same-sex families. The article describes the many different ways that a child may come into a same-sex family unit. The authors describe the different ways:

In many cases (no one knows how many), children living with gay and lesbian couples are the biological offspring of one member of the couple, whether by an earlier marriage or relationship, by arrangement with a known or anonymous sperm donor (in the case of lesbian couples), or by arrangement with a surrogate birth mother (in the case of male couples).48

Yet, we seem not to have figured out a way to recognize the relationships created in these families with their children. To the extent we have been unable to connect these children with both of their parents, we put these children at risk of not having as secure a childhood as they otherwise might.

The following is a summary of current law that defines the parent-child relationship between children and their gay or lesbian parents.

A. Recognizing Gay and Lesbian Natural Parents’ Rights

A gay or lesbian parent’s status as a natural parent to his or her child is no different than that of a heterosexual parent. In some cases, a gay or lesbian parent may be in a heterosexual relationship when the parent has a child. Later, perhaps that parent either divorces the other parent or establishes a new relationship with a same-sex partner.

Although a parent’s status does not change if the parent becomes involved in a gay or lesbian relationship, it is possible that the relationship could affect the custody or visitation rights of the natural parent. The trend in case law is to consider the homosexual conduct of a natural parent only if that conduct has an adverse effect on the child. Courts apply the same standard to heterosexual conduct of a parent. A minority of courts consider a parent’s homosexuality a

unwieldy course: Many couples create families through surrogacy or donor insemination (or both) but still find themselves unable to secure parental rights for both partners due to the fact that joint adoption very often statutorily requires marriage. In one great sweep, then, the legal system denies homosexuals the opportunity to make formal commitments to one another and denies them parental status due to their not making such a commitment.” (footnote omitted)).

48. See Meezan & Rauch, supra note 4, at 99.
sufficient reason for restricting the visitation and custody rights of the parent without a showing of any adverse effect on the child. 49

B. Recognition of Gay or Lesbian Partner’s Parental Rights

1. Rights of a Natural Parent Partner Versus a Non-Natural Parent Partner

In many gay and lesbian families, one of the partners

49. There have been a number of cases and statutes that are relevant to this issue. For example, a number of the states have statutes and/or case law that restricts the courts’ ability to consider “marital status, income, social environment or life style of either party” only if the factor is causing or may cause emotional or physical damage to the child. See OR. REV. STAT. § 107.137(3) (2007); see also S.N.E. v. R.L.B, 699 P.2d 875 (Alaska 1985) (finding that a person’s sexual orientation and status as a partner in a same-sex relationship are insufficient bases upon which to deny custody to a parent); Downery v. Muffley, 767 N.E.2d 1014 (Ind. Ct. App. 2002) (noting that the sexual preferences of parents relevant only if the evidence can connect that with harm to the children); Bezo v. Patenaude, 410 N.E.2d 1207 (Mass. 1980) (finding that the mother’s sexual orientation is not an automatic disqualifier from her receiving custody); Hassenstab v. Hassenstab, 570 N.W.2d 368 (Neb. Ct. App. 1997) (finding no harmful effect on the daughter from exposure to mom’s homosexual relationship); M.P. v. S.P., 404 A.2d 1256 (N.J. Super. Ct. Div. 1979) (holding that it is in the child’s best interests to remain with the defendant even though she is homosexual); Paul C. v. Tracy C., 209 A.D.2d 955 (N.Y. App. Div. 1994) (noting that the mother’s sexual preference of woman not determinative in a custody dispute); In re Parsons, 914 S.W.2d 889 (Tenn. Ct. App. 1995) (holding that the key consideration is whether or not a parent’s sexual orientation adversely affects the children); In re Wicklund, 932 P.2d 652 (Wash. Ct. App. 1996) (noting that the father’s homosexuality does not disqualify him from caring for his children unless it would endanger his children). Some cases have held that the gay or lesbian life style and exposure of the child to it constitutes an adequate basis for restricting that parent’s contact with the child. See Ex Parte H. H., 830 So. 2d 21 (Ala. 2002) (recognizing that homosexuality has a detrimental effect on children); Morris v. Morris, 783 So. 2d 681 (Miss. 2001) (finding that sexual orientation can be considered in making a custody determination so long as it is considered along with other factors); Jenkins v. Jenkins, 2001 Tex. App. Lexis 3116 (Tex. Ct. App. 2003) (holding that a gay parent’s visitation could be restricted given his “paramour’s” presence at his home); Tucker v. Tucker, 910 P.2d 1209 (Utah 1996) (reversing a custody determination to lesbian mom in part because father would “serve as a better moral example” because of mom’s cohabitation with lesbian partner).
brings children into the relationship from a previous heterosexual relationship that ended. So, the children may have two natural parents, one of whom is the custodial parent who now lives with a gay or lesbian partner. The analogous heterosexual relationship is that of stepparent to child in the context of the remarriage of a parent.

As is true with respect to a natural parent and a stepparent, the law favors the natural parents over the partner. Not surprisingly, a natural parent who has custody would lose custodial rights only if proven to be unfit or it is proven that it will be detrimental to the child's interests to give custody to the natural parent. And even then the noncustodial parent would likely have rights superior to the rights of the gay or lesbian partner.

The basis for this right resides, in part, in the U.S. Constitution. It gives parents a priority over third persons who might seek custody of the natural parents' children. As the court said in Troxel v. Granville, the right to raise one's children is a fundamental liberty interest protected by the Constitution. The natural parent's rights are superior to the rights of others who may have performed parenting functions, but at the behest and with the consent of the natural parent. If there is a conflict between the natural parent and the other party, the natural parent will prevail.

Assume that mother A and father B were married when

50. See supra text and cases accompanying note 41.

51. See Davis v. Collinsworth, 771 S.W.2d 329, 330 (1989) ("The United States Supreme Court has recognized that parents have fundamental, basic and constitutionally protected rights to raise their own children and that any attack by third persons (and we would include grandparents in that category) seeking to abrogate that right must show unfitness by 'clear and convincing evidence'."). In Sheppard v. Sheppard, the court declared a statute that required the court to apply a best interests standard instead of one that gave parents a preference unconstitutional. Sheppard v. Sheppard, 630 P.2d 1121 (Kan. 1981). In so doing, the court said:

The United States Supreme Court recently recognized the fundamental nature of the relationship between parent and child in two cases, both of which involve the rights of natural parents of illegitimate children. What we hold here is simply this: that a parent who is not found to be unfit has a fundamental right, protected by the Due Process Clause of the United States Constitution, to care, custody and control of his or her child, and that the right of such a parent to custody of the child cannot be taken away in favor of a third person, absent a finding of unfitness on the part of the parents.

Id. at 1125-28 (citation omitted).
mother gave birth to her child X. Several years later, mother divorced father and later moved in with lesbian partner C. Assume further that partner C became attached to X and cares for her and treats her like a daughter. Several years later, the relationship breaks up and A and C go their separate ways. C requests a court to create a joint parenting plan with A for the care of X. She asks for liberal visitation with X.

In many states, C’s requests will be denied and she may not have standing to challenge these issues. Even if father B has not spent a great deal of time with X, B retains his rights as a parent to the child unless he had surrendered his child for adoption by C, which he had not done in this case.

One recent case, In re Thompson, held that, under Tennessee law, a same-sex partner lacked standing to be considered a parent and claim visitation rights with the child. The court so held despite facts showing that the lesbian partners had agreed to co-parent the child and in the event of a separation had agreed that the partner would have visitation rights. The two partners lived together in a long-term relationship and planned for the birth of the child while they lived together. In reaching this result, while the court was concerned with the father’s custody and visitation rights, as well as the fact that he had not agreed to the co-parenting arrangement, the court seemed most concerned with the fact that the mother’s lesbian partner lacked standing under the statutes to seek rights as a parent.


53. In re Thompson, 11 S.W.3d at 916. The agreement provided:

Each party acknowledges and agrees that both parties will share in providing (J.C.) with the necessary food, clothing, shelter, medical or any other remedial care that may be needed by the child until the time (J.C.) is 18 years of age. Each party acknowledges and agrees that if Debbie Lynn Coke and Mary Helen Looper are no longer living together in the family home they will both continue to provide for (J.C.) in the manner described below: a. Legal custody of the child would remain in the biological parent, Debbie Lynn Coke/ b. Mary Helen Looper would have reasonable visitation; c. Mary Helen Looper would have no financial obligations to (J.C.).

Id.

54. Id. at 918-19 ("While it may be true that in our society the term ‘parent’ has become used at times to describe more loosely a person who shares mutual love and affection with a child and who supplies care and support to the child, we find it inappropriate to legislate judicially such a broad definition of the term")
Because the lesbian partner did not meet the statutory definition of parent, the court concluded that the partner did not have standing to raise a custody or visitation issue and was therefore barred from making a claim for parenting time. The court’s failure to grant some parental rights to the former lesbian partner parallels a court’s unwillingness to consider the rights of a stepparent at divorce. Neither parent figure has the status of a natural parent and cannot expect to be protected if their relationship to the natural parent ends. In sum, their relationship with the child is connected to their relationship to the child’s natural parent.

2. Recognition of Same-Sex Partner’s Parental Rights by Adoption

In increasing numbers, gay and lesbian couples are having children. In lesbian couples, this arrangement usually means that one partner is the natural parent who was artificially inseminated. The other lesbian partner is not related to the child by blood, but becomes a mother either by virtue of the family relationships established by the couple or adoption.

Some states allow the second parent adoption process to be used by gay and lesbian couples. The adoption enables the non-natural parent to be regarded as a legal parent to the child. If questions arise about support, custody, or visitation, both parents are on the same footing with respect to the rights and responsibilities surrounding the child.55

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55. See In re Jacob, 86 N.Y.2d 651 (N.Y. 1995) (holding that the unmarried partner of a child’s biological parent had standing to adopt the child); In re Adoption of Carolyn B., 6 A.D.3d 67 (N.Y. App. Div. 2004) (clarifying that Slip Op. 01860 allows two unmarried same sex partners to have standing to adopt a child); see also In re Adoption of Baby Z., 699 A.2d 1065 (Conn. Super. Ct. 1996) (holding that the adoption review board must approve inclusion of a lesbian partner as a statutory parent before the partner could be treated like a
In a typical second-parent adoption, one parent has already established a legal parent relationship with the child. The second parent, in this case, the same-sex partner, petitions the court to adopt the child. The petitioner asks the court to grant the adoption without terminating the rights of the first parent. As one author points out, "[i]n many states, an adoption cannot be granted without terminating the existing legal parents' rights. The exception to this is 'stepparent adoption,' in which the first parent and the petitioner are married and the parent consents to the adoption." Although the trend appears to be in favor of allowing second-parent adoptions, there are a handful of states that expressly prohibit second-parent adoptions for same-sex couples. (Another option is for the same-sex couple to adopt together; while some jurisdictions do not allow this, others do.)

Some states that permit same-sex couple adoptions through the second-parent adoption process do not give legal recognition to same-sex partnerships through marriage, civil union or partnership law. There is, as one author says, an odd "irony" to the inconsistent positions taken in some jurisdictions.

3. Recognition of Rights Through De Facto or stepparent for adoption).

56. See Palmer, supra note 47, at 10 ("Second-parent adoptions are currently available by statute or appellate court decisions in ten states: California, Connecticut, District of Columbia, Illinois, Indiana, Massachusetts, New York, New Jersey, Pennsylvania, and Vermont. Second-parent adoptions are also available in counties in at least fifteen other states."); see also In re Adoption of M.M.G.C., 785 N.E.2d 267 (Ind. Ct. App. 2003).

57. Palmer, supra note 47, at 10 ("Colorado, Ohio, Nebraska and Wisconsin have held that [second parent] adoptions [by a same-sex partner] are not permitted.").


59. Lavely, supra note 28, at 287 ("Similarly, the results of various adoption cases undermine the optimal setting argument. Given that some courts in adoption cases have redefined the optimal setting as one in which a child has 'two adults dedicated to his welfare, secure in their loving partnership, and determined to raise him to the very best of their considerable abilities,' courts in marriage cases should not insist that only a married man and woman can provide an ideal home for a child. If courts admit the irony inherent in accepting the procreation-marriage and optimal-setting arguments while also granting same-sex adoptions, then they may be willing to reconcile these two sets of cases."). (footnote omitted).
Psychological Parent Doctrine

If the same-sex partners have no adoption option available to them as a couple, they may decide that one of them will give birth to a child, or one of the partners will adopt a child. The partner who is not the natural or adoptive parent may have no legal rights vis-à-vis the other parent/partner when their partnership ends. At that point, the partner who is not the natural or adoptive parent does not have legally-recognized rights to the child. The partner will have to rely on equitable theories seeking protection of the relationship he or she established with the child.

For instance, in several recent cases, a state court has considered the rights of the non-natural parent as a psychological or a de facto parent given the relationship the partner established with the child. In a few cases, the court said that the non-parent has no standing to raise issues of custody or visitation.

Courts are becoming more willing to consider the parental rights of a lesbian partner after the breakup of her relationship. In order to establish standing, the person seeking a right to custody or visitation will need a statute that gives the court the authority to award rights to someone other than a natural parent. Once a non-natural parent establishes standing, the issue of the non-natural parent’s rights relative to the natural parent is considered.

If the jurisdiction has a statute conferring authority upon the court to hear a claim by a non-natural parent, the issue becomes what standard the court will employ to weigh the rights of the natural parent against the rights of the non-natural parent. In assessing the rights of the non-natural parent, the court must be cognizant of the constitutional right of a parent to raise a child as he or she so chooses. On the other hand, if the parent has allowed a relationship to develop between the child and the parent’s gay or lesbian partner, that partner may be considered a psychological

60. See Kazmierazak v. Query, 736 So. 2d 106 (Fla. Dist. Ct. App. 1999); In re C.B.L., 723 N.E. 2d 316 (Ill. App. Ct. 2000); Coons-Andersen v. Andersen 104 S.W.3d 630 (Tex. Ct. App. 2003). In all three of these cases, the court denies a lesbian partner standing to raise issues of visitation and custody of a child born during a lesbian relationship.

parent and it may be harmful to deprive the child of the ongoing relationship with that person. The focus is not on the rights of the non-natural parent per se, but rather on the interests of the child's life in ensuring that an important relationship is able to continue even though the child's parent has ended his or her partnership with that person.62 The doctrine of psychological parent or de facto parent is applied to protect the interests of a child who needs the continued relationship with the non-parent.

Another case focused on the reliance that a partner had on a former partner's willingness to undertake the obligations of parenthood with the natural parent. Because the partner had agreed to become a parent although she was not a natural parent, the court held that the doctrine of persons in loco parentis could bind the former partner to the obligations of parenthood after the parties separated.63 The court said that the doctrine applied to situations where a person assumed the status of a parent, and in that capacity discharged the duties of a parent.64

Several recent California cases deal with the rights of a lesbian partner who is not the biological mother of a child, but nevertheless cohabited with the child's natural parent and held herself out as the child's parent. In each of these cases, the California Supreme Court confirms the rights of a lesbian mother to have the legal rights of a natural mother. Each case raises different legal issues, but all reach the same conclusion about the existence of co-equal parenting rights of a same-sex partner with the birth partner.

The first case is Elisa B. v. Superior Court of El Dorado

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62. Id. at 559 (“Some courts have set forth a more specific four-factor test to determine whether a nonparent is a psychological parent: (1) the legal parent consented to and fostered the nonparent's formation and establishment of a parent-like relationship between the nonparent and the child; (2) the nonparent and the child lived together in the same household; (3) the nonparent assumed obligations of parenthood by taking significant responsibility for the child's care, education and development, including contributing towards the child's support, without expectation of financial compensations, and (4) the nonparent has established a parental role sufficient to create with the child a bonded, dependent relationship parental in nature.”).

63. L.S.K. v. H.A.N., 813 A.2d 872 (Pa. Super. Ct. 2002) (holding that the persons in loco parentis doctrine bound the non-natural parent to pay child support for five children born to her former partner during the time that the parties lived together as a family).

64. Id.
In this case two mothers agreed to raise their children together in a partnership. The two partners, Elisa and Emily, began living together six months after they met in 1993. They both wanted children; because Elisa earned substantially more income than Emily, they agreed that Emily would be the stay-at-home mother. Both were artificially inseminated; Elisa gave birth to her child in November of 1997 while Emily gave birth to twins in March of the next year. One of Emily’s twins was born with Down’s Syndrome.

For a period of time, the partners lived together and held themselves out as mothers to all the children. Elisa worked outside the home to support the family while Emily remained in the home caring for the children.

The couple separated in November 1999. At the time of separation, Elisa promised to provide support to Emily and the twins “as much as she could” and she initially paid the mortgage and other expenses. Eventually, Elisa stated she could no longer support the children. An action ensued to collect child support from Elisa for the support of Emily’s children.

Although the couple did not register as a domestic partnership and although Elisa did not adopt the children, the court found that she is a parent under the Uniform Parentage Act and may be held responsible for the support of her former partner’s children. The court considered section 7611 of the Act, which provides several ways in which a man may be considered the father of a child.66

One of the ways that a man can be presumed to be the natural father of a child is if he receives the child into his home and openly holds out the child as his natural child.67 The court construed this statute to apply to mothers who, like Elisa, entered into a lesbian partnership and committed to a


66. Id. (“Section 7611 provides several circumstances in which ‘[a] man is presumed to be the natural father of a child,’ including: if he is the husband of the child’s mother, is not impotent or sterile, and was cohabiting with her (Section 7540); if he signs a voluntary declaration of paternity stating he is the ‘biological father of the child’ (Section 7574, subd. (a)(6)); and if ‘[h]e receives the child into his home and openly holds out the child as his natural child’ (Section 7611 subd. (d)).”).

67. Id.
relationship with children born to their lesbian partner. The court states:

Elisa is a presumed mother of the twins . . . because she received the children into her home and openly held them out as her natural children, and this is not an appropriate action in which to rebut the presumption that Elisa is the twins’ parent with proof that she is not the children’s biological mother because she actively participated in causing the children to be conceived with the understanding that she would raise the children as her own together with the birth mother, she voluntarily accepted the rights and obligations of parenthood after the children were born, and there are no competing claims to her being the children’s second parent.68

In the case of K.M. v. E.G., the California Supreme Court issued another decision further defining the rights of same-sex partners as parents.69 The issue in this case arose when two lesbian partners made arrangements to have one partner, K.M., donate her egg to respondent E.G., the gestational mother of the children. At the time of the procedure the couple lived together, and E.G. gave birth to twin girls during their relationship.

When K.M agreed to donate her egg, E.G. accepted on the condition that K.M. sign a consent form for ovum donors that provided the donor would “waive any right and relinquish any claim to the donated eggs or any pregnancy or offspring that might result from them.”70 Despite K.M.’s signature on the form, she stated that she “thought she was going to be a parent.”71

E.G. gave birth to twins in 1995; the couple’s relationship ended in March 2001. K.M. then sued. The California Supreme Court found that although K.M. had signed the

68. Id. at 670.
70. Id. at 676 (“[T]he form states on the third page . . . . I agree that the recipient may regard the donated eggs and any offspring resulting therefrom as her own children . . . . on page 4 of the form, above K.M.’s signature and the signature of a witness, the agreement also states: ‘I specifically disclaim and waive any right in or any child that may be conceived as a result of the use of any ovum or egg of mine, and I agree not to attempt to discover the identity of the recipient thereof.’ E.G. signed another part of the form that stated: ‘I acknowledge that the child or children produced by the IVF procedure is and shall be my own legitimate child or children and the heir or heirs of my body with all rights and privileges accompanying such status.’”).
71. Id.
agreement giving up her right as a parent, that agreement did not bar her from being regarded as a parent to her partner’s twins. The court stated:

A woman who supplies ova to be used to impregnate her lesbian partner, with the understanding that the resulting child will be raised in their joint home, cannot waive her responsibility to support that child. Nor can such a purported waiver effectively cause that woman to relinquish her parental rights.7

In reaching this decision, the court considered the impact of a statute that deals with men who provide semen for artificial insemination and found that it did not apply in this situation.72 In the decision, the court affirmed the point that two women may be regarded as parents of the same children.

In the final companion case, the Supreme Court dealt with another situation involving the claims of a lesbian parent. In this case, the lesbian parents sought and obtained a stipulated judgment recognizing both parents as “the only legally recognized parents of said child,” and Lisa as “the legal second mother/parent of the unborn child.”73

The stipulated judgment declared that Kristine and Lisa “are the only legally recognized parents of (the unborn child) and take full and complete legal, custodial and financial responsibility of said child.”74

When the child was almost two years old, the parties ended their relationship and Lisa filed a motion to set aside the stipulated judgment that declared her to be the child’s mother. The court found her estopped from challenging the validity of the judgment entered before her child was born.75

72. Id. at 682.
73. Id. at 678 (“[W]e agree that K.M. is a parent of the twins because she supplied the ova that produced the children, and Family Code section 7613, subdivision (b) (hereafter section 7613(b)), which provides that a man is not a father if he provides semen to a physician to inseminate a woman who is not his wife, does not apply because K.M. supplied her ova to impregnate her lesbian partner in order to produce children who would be raised in their joint home.”).
74. Kristine H. v. Lisa R., 117 P.3d 690, 692 (Cal. 2005) (“[A] judgment was filed in superior court declaring that Kristine is the ‘biological, genetic and legal mother/parent,’ of the unborn child and shall have joint custody with her ‘partner’ Lisa, that Lisa ‘is the second mother/parent’ of the unborn child and shall have joint custody with Kristine, and ordering that the child’s birth certificate list Kristine as ‘mother’ and that Lisa ‘be listed in the space provided for ‘father.’”).
75. Id.
76. Id. at 695 (“Kristine invoked the jurisdiction of the superior court to
In finding the defendant estopped from denying the terms of the stipulated judgment, the court found that the parent had availed herself of the Family Code section that enables a person to be declared a parent before the child is born, and by taking advantage of that procedure, Lisa could not seek to declare that proceeding invalid.

In its willingness to affirm the stipulated judgment declaring Lisa as the second parent to the child, the court stated that since she took advantage of the code section recognizing fathers before their children are born, there is no reason not to treat Lisa the same as a father in that situation. Therefore, the stipulated judgment stood.

What sets these cases apart from other cases dealing with parental rights of same-sex partners is this: The court declared that a lesbian partner has the same rights and responsibilities as a natural parent using statutes traditionally reserved for natural fathers. In others words, these cases recognize that a child can legally have two natural mothers, one the biological mother and the other acknowledged as the natural mother. Accordingly, the lesbian partner does not acquire these rights through adoption; an adoption is unnecessary so long as the parent follows the requirements of the law that traditionally were used to establish the father-child relationship.

4. Establishing Parenthood by Partnership Laws

The California cases are not based on the relationship established by the domestic partnership law. Given that several states including California have enacted partnership laws making it possible for same-sex couples to register and create a relationship similar to marriage, the creation of the relationship may also trigger parental rights to a child born during the relationship. The same could also be true in Massachusetts where same-sex marriages are allowed.

A recent Vermont case, Miller-Jenkins v. Miller-Jenkins, considered the rights of a partner seeking visitation rights based on her claimed status as a parent, which arose from her determine the parentage of the unborn child under the Uniform Parentage Act. The court thus had subject matter jurisdiction. Family Code section 7630, subdivision (b), provides that "Any interested party may bring an action at any time for the purpose of determining the existence or nonexistence of the father and child relationship presumed under subdivision (d) or (f) of Section 7611."
status as a civil union partner. Two lesbian partners, Lisa and Janet, entered into a civil union in Vermont. The couple returned to Virginia where they were domiciled, Lisa was artificially inseminated, became pregnant, and had a child. During this time, Janet participated in the decision-making process, the birth, and the child care responsibilities. The couple eventually split up and filed for dissolution in Vermont.

The issues in the dissolution proceeding pertained primarily to custody and visitation rights. Lisa, the natural mother, contested Janet’s rights as a natural parent entitled to visitation. Vermont statutory law includes a rebuttable presumption that a child born during a marriage is the natural child of both the husband and wife. The statutes also state that the rights of parties to a civil union shall be the same as the rights of a married couple with respect to a child born during the civil union.

The court ruled that although the Legislature’s purpose in enacting the civil union law was to give “legal equality” to a civil union partner vis-à-vis a marriage partner, parenthood is established without relying on the marital presumption that a husband or wife is a natural parent. The court concluded Janet was a parent without relying on the presumption of a natural parent triggered by marriage or civil union. Although the court did not rely on that statute,

78. See VT. STAT. ANN. tit. 15, § 308(4) (2002) (“A person alleged to be a parent shall be rebuttably presumed to be the natural parent of a child if . . . (4) the child is born while the husband and wife are legally married to each other.”); VT. STAT. ANN. tit. 15, § 1204(f) (2002) (“The rights of parties to a civil union, with respect to a child of whom either becomes the natural parent during the term of the civil union, shall be the same as those of a married couple, with respect to a child of whom either spouse becomes the natural parent during the marriage.”).
79. Miller-Jenkins, 912 A.2d at 968 (“The Legislature’s intent in enacting the civil union laws was to create legal equality between relationships based on civil unions and those based on marriage.”).
80. By doing this the court avoids having to resolve the issue raised by Lisa concerning the meaning of natural parent as used in the statute. The court says:

Lisa focuses almost exclusively on the word “natural,” finding in its use the legislative intent that only biological parents can be parents for purposes of the parentage statute. We find this to be an overly broad reading of the language. The parentage act does not include a definition of “parent. It does not state
it nevertheless recognized that the presumption of legitimacy of children born during a marriage is "extremely persuasive evidence of joint parentage." The court acknowledged the powerful presumption of parentage that applies to Lisa and Janet once they entered a civil union and had a child. It was their intent that Janet be IMJ's parent. Janet participated in parenting responsibilities, and both of the partners regarded her as a parent to IMJ. And most importantly, the court stated that if Janet did not qualify as a parent, it leaves IMJ in the position of having only one parent. 81

Other states have also recently enacted laws that make it likely their courts will reach a similar result in a similar case. For instance, Oregon recently passed the Oregon Family Fairness Act providing that gay and lesbian relationships are to be treated identical to marriage. The Oregon law is similar to the law of Vermont in granting same-sex partners rights and responsibilities equivalent to marriage. 82

Oregon's family law includes provisions about establishing paternity. According to these provisions, a man married to a woman who gives birth to a child during their marriage is rebuttably presumed to be the father of the child. 83 Applying this language to protect the interests of a lesbian or gay partner means that the partner is presumed to

that only a natural parent is a parent for purposes of the statute. In fact, the statute is primarily procedural, leaving it to the courts to define who is a parent for purposes of a parentage adjudication. Given its origin and history, it is far more likely that the legislative purpose was to allow for summary child support adjudication in cases where biological parenthood is almost indisputable.

Id. at 969 (footnote omitted).

81. Id. at 970 ("The sperm donor was anonymous and is making no claim to be IMJ's parent. If Janet had been Lisa's husband, these factors would make Janet the parent of the child born from the artificial insemination. Because of the equality of treatment of partners in civil unions, the same result applies to Lisa.") (citation omitted).

82. H.B. 2007(9)(3), 74th Leg., Reg. Sess. (Or. 2007) ("Any privilege, immunity, right, benefit or responsibility granted or imposed by statute, administrative or court rule, policy, common law or any other law to or on a spouse with respect to a child of either of the spouses is granted or imposed on equivalent terms, substantive and procedural, to or on a partner with respect to a child of either of the partners.").

83. OR. REV. STAT. § 109.070(1)(a) (2007) ("The paternity of a person may be established as follows: A man is rebuttably presumed to be the father of a child born to a woman if he and the woman were married to each other at the time of the child's birth, without a judgment of separation, regardless of whether the marriage is void.").
be the "father" of the child. Since the term father is not gender appropriate in lesbian relationships, it makes sense to substitute parent for father.

In many cases where a lesbian couple decides to have children, one partner will undergo artificial insemination in order to conceive and have a child. Oregon Revised Statutes section 109.243 states that the husband of a woman who underwent AID in order to have a child is considered the father of that child. The new law provides the same kind of protection to a lesbian partner when her partner has a child through artificial insemination. Again, the language of the statute is not gender appropriate, but the meaning of the Family Fairness Act makes it clear that the purpose of the new law is to bestow parental rights on the lesbian partner in this situation.

Taking the scenario one step further, after the birth of the child to the lesbian partner, her partner's name may be placed on the birth certificate as the child's other parent. The law provides for this in the case of a married woman who gives birth to a child as a result of artificial insemination; so, the law would protect the lesbian partner and the child in the same way as it protects the father and the child in the case of a married woman.

V. PROPOSALS FOR PROTECTION OF THE PARENT/CHILD RELATIONSHIP

The concept of family and most importantly, the concept of parent, have undergone transformation. Family means something much different than the nuclear family headed by a married couple that once was where most children were raised. Today, with divorce, out-of-marriage births, and same-sex relationships, the concept of family includes different arrangements for child-rearing.

As a result, our concept of parent has also changed. A legal parent may not be the biological parent of a child.

84. Id. § 109.243 ("The relationship, rights and obligations between a child born as a result of artificial insemination and the mother's husband shall be the same to all legal intents and purposes as if the child had been naturally and legitimately conceived by the mother and the mother's husband if the husband consented to the performance of artificial insemination.").

85. Id. § 432.206(6) ("In the case of a child born to a married woman as a result of artificial insemination with the consent of her husband, the husband's name shall be entered on the certificate.").
Instead, the parent may be the stepparent who has provided nurture and sustenance for a child who has a different biological parent. And as discussed above, the parent may be the same-sex partner of the natural parent who has raised the child and wants to continue to have a relationship with the child even after the relationship ends.

Unfortunately, some of these parents-child relationships do not enjoy adequate legal protection. Although the emotional connection and dependency of a parent-child relationship exists, the legal system provides uncertain protection for that relationship. It is most uncertain in the case of gay and lesbian parent partners who choose to coparent with a natural or adoptive parent. The uncertainty of the legal relationship poses a risk to the parents, to the children, and to society.

First, with respect to the partner/parent, he or she has no assurance of a long-term, stable relationship with their child. It may be that once the relationship ends, protracted litigation will be necessary to secure a continuing relationship with their child. In the end, that may not be enough to protect the parents’ rights. Second, the child’s interest in having the relationship with his or her social parent protected is also vulnerable.

Finally, it is damaging to our society if our laws do not adequately protect the interests of our most vulnerable, our children.

Most likely, states are not going to change their stance with respect to recognition of same-sex marriage or even with 86.

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86. See Latham, supra note 47, at 238 (clarifying that bonding and attachment theory hold that stability and continuity in a child’s relationship with parents is critical to the child’s development. If a parent does not have a way to make sure that the law protects that relationship, the child’s health could be seriously damaged).

87. Meezan & Rauch, supra note 4, at 97 (“A second important question is how same-sex marriage might affect children who are already being raised by same-sex couples. Meezan and Rauch observe that marriage confers on children three types of benefits that seem likely to carry over to children in same-sex families. First, marriage may increase children’s material well-being through such benefits as family leave from work and spousal health insurance eligibility. It may also help ensure financial continuity, should a spouse die or be disabled. Second, same-sex marriage may benefit children by increasing the durability and stability of their parents’ relationship. Finally, marriage may bring increased social acceptance of and support for same-sex families although those benefits might not materialize in communities that meet same-sex marriage with rejection or hostility.”).
respect to the creation of civil union laws in the near future. However, regardless of how one comes out on the same-sex marriage/partnership debate, the parent-child relationships created in same-sex families continues to raise legal issues for these parents and their children.

Parents who enter into same-sex relationships know the risks. They know that their rights and responsibilities as partners and as parents will not be given the legal legitimacy that partners and parents in a marriage have. Although a state might recognize the parent-child relationship as the courts in California did, other state courts most likely will not. Even if a court did recognize this relationship, obtaining legal recognition would be a very costly and lengthy process.

The partners know this going into the relationship, but the children do not. Despite the children’s bond to a parent; the failure of the law to recognize the bond will have an impact regardless of whether the family is together or separated. While the family is together, the state’s unwillingness to treat the relationship as legal burdens the children both economically and psychologically.88 Once the family unit breaks up, the children may experience a loss of a parent, including the psychological and financial losses. And there will be no recourse for the children.

The current unwillingness of state legislatures to recognize same-sex partnerships as family units has an unintended consequence of creating a class of children who are destined to be treated differently than children who have two parents who are legally responsible for them. Children raised in same-sex families do not have the same right to expect that both partners will be legally responsible for them. For instance, if a partner should die or leave, there is no legal protection for the child to inherit or be protected financially after the parent is gone.

A. Children’s Constitutional Right to Protection of Parent/Child Relationship

In *Plyler v. Doe*,89 the U.S. Supreme Court faced the constitutionality of a Texas statute that authorized school districts to deny children access to public education if they

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88. *Id.*
were not citizens or legally admitted aliens to the United States. A class action, on behalf of children who could not establish their status as citizens or legal aliens and were denied admission to public schools, was brought against the Tyler, Texas School District.

The Court recognized that the parents, who may be illegal aliens, of these children cannot be considered members of a suspect class. The parents voluntarily chose to come to the United States without following immigration laws. They put themselves in a situation where they broke the law and must pay the consequences.90

On the other hand, the Court recognizes that the children were involuntarily put into the situation they find themselves in. They did not ask to be illegally present in the United States without an ability to attend public school.91 The Court says:

The children who are plaintiff in these cases are special members of the underclass. Persuasive arguments support the view that a State may withhold its beneficence from those whose very presence within the United States is the product of their own unlawful conduct. These arguments do not apply with the same force to classifications imposing disabilities on the minor children of such illegal entrants. At the least, those who elect to enter our territory by stealth and in violation of our law should be prepared to bear the consequences, including, but not limited to, deportation. But the children of those illegal entrants are not comparably situated. Their “parents have the ability to conform their conduct to societal norms,” and presumably the ability to remove themselves from the State's jurisdiction; but the children who are plaintiffs in these cases “can affect neither their parents' conduct nor their own status.” Even if the State found it expedient to control the conduct of adults by acting against their children, legislation directing the onus of a parent's misconduct against his children does not comport with fundamental conceptions of justice. “Visiting . . .condemnation on the head of an infant is illogical and unjust. Moreover, imposing disabilities on the . . . child is contrary to the basic concept of our system that legal burdens should bear some

90. Id. at 219.
91. Id. at 220.
relationship to individual responsibility or wrongdoing. Obviously, no child is responsible for his birth and penalizing the . . . child is an ineffectual as well as unjust-way of deterring the parent.\textsuperscript{92}

The same kind of situation exists for children born in same-sex families. The partners have decided to create a family unit not recognized or protected by state law in most states. The consequence of this decision is that a child born into this family may not be legally entitled to two parents.

The debate on the legitimacy of same-sex partnerships has concentrated largely on the partners' relationship with one another and the fairness of treating the relationship like a marriage. But when considering the right of a child to have the parent/child relationship recognized between the two partners who intend to be his or her parent, the debate should focus on the children, rather than the partners. It is the child who is being treated differently from a child born into a family where the parents are married.

By enacting laws that prohibit legal recognition of same-sex relationships, the states disadvantage these children. The children face the prospect of not having or losing the relationship with one of their parents. A child born to a heterosexual couple does not face this problem. Children born of heterosexual couples are presumed to be the legal child of their mothers' husband if the couple is married, and there are filiation processes available if they are not married.

Although in some states adoption is a process that may afford a child born to a same-sex couple legal protection, many states do not permit adoption by a same-sex partner. Although a court might, as the California Supreme Court did, bestow parental rights to a same-sex partner,\textsuperscript{93} that is by no means a certain outcome. No doubt the climate in California was receptive to this outcome given the passage of the Domestic Partnership Law in California.\textsuperscript{94}

The Supreme Court has struck down state laws in other cases that discriminated against a class of children in an impermissible manner.\textsuperscript{95} It is possible that the same could

\textsuperscript{92} Id. at 219-20 (citations omitted).
\textsuperscript{93} See supra notes 65-74.
\textsuperscript{94} See supra note 24 and accompanying statutory provisions.
\textsuperscript{95} See Trimble v. Gordon, 430 U.S. 762 (1977) (striking down an Illinois statute that allowed children born out of marriage to inherit from their mothers but not their fathers).
happen with the laws that currently make it impossible for a child to be legally connected with both parents when the parents form a same-sex partnership and form a family. Laws in states that restrict the meaning of family have an adverse impact on children born in those families and treat them differently than children born to married parents. And in some cases, it is impossible for the children to have more than one parent.

Whether or not the laws discriminate against the children in this class in an impermissible manner is important to consider. It makes sense to devise a way to protect the children regardless of whether or not the state recognizes the same-sex relationship as marriage or legal partnership.

B. Protecting the Children in Same-Sex Families

The debate about recognition of same-sex partnerships as equivalent to marriage has centered on the rights of the partners, rather than the rights of the children. Although a good deal of the debate has centered on marriage as being the place where procreation occurs and where we want to encourage the rearing of children, much less is said about the parent-child relationship in that context.

Where the state recognizes the relationship, the parent-child relationship is assured by the laws that protect partners in the same way that married spouses are protected. But where the law does not afford that protection, it is doubtful that protection is available.

To protect the parent-child relationship, states should consider legitimizing the relationship by enacting a law creating a presumption that the partner of a parent who gives birth to or adopts a child is legally presumed to be the parent of the child. For instance, the proposed statute could provide as follows:

A person who is living in a committed same-sex relationship when his or her partner gives birth to or adopts a child shall be presumed to be a legal parent of the child.

The statute takes care of establishing the connection between the child and both parents and is silent on the issue of legal recognition of the relationship between the two parents. States that do not want to recognize the same-sex
partnership are given consideration, but this statute still affords protection to the child who was intended to be the child of both parents.

A statute such as this one is analogous to the presumed father statutes that presuppose the husband of a married woman who gives birth to a child is the legal father of the child born during the marriage.\textsuperscript{96} Statutes like these provide protection to the child and to the parent as well. It makes sense to consider adopting a statute like this to protect the parent and the child in a same-sex relationship.

There are several reasons why a state may be willing to adopt a statute like the one proposed. First, the children who are not protected face the prospect of being in a situation where they have but one legal parent. The children risk losing the relationship they establish with one of their parents should the partnership ever breakup. This means both emotional and economic loss to the children. It also means that the parent faces significant losses that cannot be protected.

Society is also at risk. Children will not have the support of both their parents which constitutes a social loss. Our society will sanction an underclass of children who do not have the love and support of two parents, which ultimately puts these children and society at greater risk.

To the extent the debate is focused on the children and their needs, the debate moves away from the morality of same-sex relationships. Of course, it is true that a same-sex relationship is at the center of this issue, but if we focus the debate on the children, our concerns are different. How best can we provide for the children regardless of whether or not we approve of their family relationship? Additionally, even if a state does not permit same-sex marriage or partnership, most states take no legal position on whether or not same-sex couples can have and raise children. In taking no position, the states are accepting what is fact: many children are raised in same-sex families.

\textsuperscript{96} E.g., VT. STAT. ANN. tit. 15, § 308(4) (2002) ("A person alleged to be a parent shall be rebuttably presumed to be the natural parent of a child . . . (4) the child is born while the husband and wife are legally married to each other.").
VI. CONCLUSION

The debate about recognition of same-sex partnerships has missed the mark when it comes to the children who are born and raised in same-sex families in large numbers. To the extent that the debate has focused on the morality of the same-sex relationship, it has ignored the reality of the children.

Establishing the link between a child and two parents can be critical to the child's welfare. For children born to a married mother, the marriage links her husband to her child as the presumed father of the child. The paternity process provides a vehicle for linking a father to his child. Adoption and other doctrines also can be used to establish the link between a parent and a child.

A same-sex couple who chooses to have children faces greater challenges in making the legal connection between the child and both parents. Where a state allows second-parent adoption for a same-sex partner, the parent bond is legally created. But this process is not available in all states and wherever it is, it can be a cumbersome process. Otherwise, a partner can rely on the in loco parentis doctrine to secure rights to a child. But this doctrine does not insure a partner's legal connection to a child, and often, the rights of the natural parent will trump the rights of the other partner.

In a state that sanctions same-sex marriage or a partnership equivalent to marriage, the legal connection between a partner and a child will flow from the rights that arise from creating the legal relationship, as it does with heterosexual marriage. Embedded in the law is protection for both the parent and the child.

In states that do not recognize same-sex relationships, there is no protection for the parent who does not give birth to or adopt a child resulting from a relationship between the partners.

This result leaves many children born to same-sex couples in a vulnerable situation. Regardless of what we may believe is appropriate protection for the partners in a same-sex relationship, we need to do more to foster protection for children born in same-sex couple families. Without legal protection, these children are likely to have only one legally recognized parent, which triggers ensuing problems for the children. Ultimately, this paper proposes a way to provide
these children protection without debating the complexities surrounding same-sex marriage.