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MODIFIED BEST INTEREST STANDARD: HOW STATES AGAINST SAME-SEX UNIONS SHOULD ADJUDICATE CHILD CUSTODY AND VISITATION DISPUTES BETWEEN SAME-SEX COUPLES

Leah C. Battaglioli*

Elizabeth and Kate, residents of New York, began a relationship in 1999.¹ In 2001, the couple was joined in a civil union in Vermont. Shortly thereafter, the couple decided to adopt a little girl from China. However, because China does not allow same-sex couples to adopt,² only Elizabeth officially adopted the child, whom they called June. Both Elizabeth and Kate were involved in the daily care and upbringing of June. Elizabeth and Kate discussed Kate’s option to adopt June in a second-parent adoption.³ However, their relationship soured in 2003 and Elizabeth took June and moved to Florida.⁴ Elizabeth permitted Kate to see June frequently until it proved inconvenient. Elizabeth eventually filed a motion in the Florida court system to determine parentage of June and prevent Kate from seeking custody or visitation rights. How will the Florida court decide the case?⁵

The number of same-sex parents in the United States is increasing.⁶ An estimated six to ten million individuals in same-sex relationships are

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¹ This paragraph contains a fictional fact pattern to illustrate how same-sex couples are sometimes faced with child custody or visitation disputes. The author used New York residents because New York has yet to adopt a statute specifically refusing to recognize same-sex unions and has allowed same-sex couples to adopt children. See In re Jacob, 660 N.E.2d 397, 398 (N.Y. 1995). But see infra note 94.


³ See Jacob, 660 N.E.2d at 398 (allowing second-parent adoption in New York).

⁴ Florida outlaws same-sex unions, FLA. STAT. ANN. § 741.212 (West 2005), and adoption by same-sex couples, FLA. STAT. ANN. § 63.042 (West Supp. 2004).

parents of between six and fourteen million children. An estimated 1.2 to three million of these individuals live together as couples. Over 7000 same-sex couples were joined in civil unions in Vermont and many thousands more were married in Massachusetts. In addition, these couples can enter into recognized unions in Hawaii, California, or New Jersey. With the large number of same-sex couples becoming parents, the hypothetical child custody and visitation dispute previously described is becoming more common. However, at the same time that some states are beginning to recognize same-sex unions, the vast majority of states are passing laws against them, as allowed by Congress’ passage of the Defense of Marriage Act (DOMA). As a result, states are inconsistent in their treatment of child custody and visitation disputes between same-sex couples. Specifically, the law is unsettled on how states that do not recognize same-sex unions will adjudicate child custody and visitation disputes arising after a couple has dissolved a same-sex union formed in another state.

This Comment argues that states refusing to recognize same-sex unions should use a modified best interest standard with a mandatory psychological parent determination to adjudicate child custody and visitation disputes between same-sex couples whose union has dissolved. To demonstrate the inadequacy of current standards, this Comment analyzes Miller-Jenkins v. Miller-Jenkins, a case involving a child custody and visitation dispute between a same-sex couple whose civil union recently dissolved. This Comment provides an overview of the importance of parental status in seeking child custody or visitation. Next,

6. Id. at 365; see also Nancy D. Polikoff, This Child Does Have Two Mothers: Redefining Parenthood To Meet the Needs of Children in Lesbian-Mother and Other Nontraditional Families, 78 GEO. L.J. 459, 461 n.2 (1990).
9. CAL. FAM. CODE § 297(a) (West 2004); HAW. REV. STAT. ANN. § 572C-4 (Michie 1999); N.J. STAT. ANN. § 26:8A-6(a) (West Supp. 2005).
10. See Osborne, supra note 5, at 365-66.
11. 28 U.S.C. § 1738C (2000); see infra Part I.D.
12. See infra Part II.B.
14. See S. Mitra Kalita, Vt. Same-Sex Unions Null in Va., Judge Rules, WASH. POST, Aug. 25, 2004, at B1. The case is currently proceeding simultaneously in the Rutland County Family Court in Vermont and the Frederick County Circuit Court in Virginia. Id. This case is the first case in the Virginia court system to test Virginia's new Marriage Affirmation Act, VA. CODE ANN. § 20-45.3 (Michie 2004); Kalita, supra, which refuses to recognize same-sex unions from other states, § 20-45.3.
this Comment discusses how same-sex couples can have children and the corresponding parental rights. This Comment also describes the available same-sex union alternatives and addresses the public policies of states against such unions. This Comment then analyzes the "best interest of the child" standard and, lastly, discusses the standards courts and states can or have used to address child custody and visitation disputes between former same-sex couples, and a synopsis of their advantages and disadvantages.

I. SAME-SEX COUPLE PARENTING: RIGHTS, TYPES AND LIMITS

A. Rights Afforded to Parents

The United States Supreme Court has consistently held that parents have a fundamental liberty interest "in the care, custody, and control of their children" that is protected by the Due Process Clause of the Fourteenth Amendment.\(^\text{15}\) Traditionally, so long as a biological parent is "fit" and thus capable of caring for a child, states do not interfere in parental decision-making.\(^\text{16}\) Marriage of the child's biological mother and father is not required for both parents to assert and maintain their presumptive right to raise their child without state interference.\(^\text{17}\)

Although the Court holds that parents have a fundamental liberty interest to raise children as they see fit, the right is not absolute.\(^\text{18}\) The

\(^{15}\) Troxel v. Granville, 530 U.S. 57, 65 (2000) (plurality opinion); see also Santosky v. Kramer, 455 U.S. 745, 753 (1982) (discussing that parents have a constitutionally protected right "in the care, custody, and management of their child"); Quilloin v. Walcott, 434 U.S. 246, 255 (1978) ("[T]he relationship between parent and child is constitutionally protected."); Wisconsin v. Yoder, 406 U.S. 205, 232 (1972) ("[T]he primary role of the parents in the upbringing of their children is now established beyond debate as an enduring American tradition."); Prince v. Massachusetts, 321 U.S. 158, 166 (1944) ("It is cardinal with us that the custody, care and nurture of the child reside first in the parents, whose primary function and freedom include preparation for obligations the state can neither supply nor hinder."). This interest is so rooted in our judicial system that it has been classified as "perhaps the oldest of the fundamental liberty interests recognized by [the Supreme] Court." Troxel, 530 U.S. at 65 (plurality opinion). The rationale underlying this parental control is that "historically it has been recognized that natural bonds of affection lead parents to act in the best interests of their children." Parham v. J.R., 442 U.S. 584, 602 (1979).

\(^{16}\) See, e.g., Troxel, 530 U.S. at 68-69 (plurality opinion); Reno v. Flores, 507 U.S. 292, 304 (1993).

\(^{17}\) See, e.g., Stanley v. Illinois, 405 U.S. 645, 646-47, 649 (1972) (holding that although the father had never married the mother of his children, they had lived together as a family and it was a violation of the father's due process rights to take the children away from him upon the mother's death without a showing that he was an unfit parent).

\(^{18}\) See, e.g., Troxel, 530 U.S. at 87-88 (Stevens, J., dissenting); cf., Smith v. Org. of Foster Families for Equal. & Reform, 431 U.S. 816, 844 (1977) ("[A] deeply loving and
Court has previously stated that "a parent's liberty interests 'do not spring full-blown from the biological connection between parent and child[,] [t]hey require relationships more enduring.'" Multiple Supreme Court cases have applied this rationale in adjudicating child custody and visitation disputes.

In addition, at least two members of the Supreme Court have suggested that a child who has established a psychological bond with a third party has a liberty interest in preserving that relationship over an objection of the biological parents. In *Troxel v. Granville*, Justice interdependent relationship between an adult and a child in his or her care may exist even in the absence of blood relationship.

19. *Troxel*, 530 U.S. at 87 (Stevens, J., dissenting) (quoting *Lehr v. Robertson*, 463 U.S. 248, 260 (1983) (quoting *Caban v. Mohammed*, 441 U.S. 380, 397 (1979))). Although the view that biology alone is not enough to warrant constitutional protection of the parent-child relationship was expressed in a dissenting opinion, a majority of the Court endorsed the view in *Lehr v. Robertson*. 463 U.S. at 259-61. In *Lehr*, the Court elaborated on what an "enduring relationship" warranting constitutional protection would entail. *Id.* at 261-62. Specifically, the Court stated that biology allows the "opportunity" to establish a relationship with the child, but the parent must invest effort into the child's future by taking on parental responsibilities, such as helping raise the child, in order for the relationship to reach a level warranting constitutional protection. *See id.* In addition, some state courts have also explicitly endorsed this view. *See, e.g.*, *State v. Wooden*, 57 P.3d 583, 588-89 (Or. Ct. App. 2002); *Randy A.J. v. Norma I.J.*, 677 N.W.2d 630, 636 (Wis. 2004). Justice Stevens has stated that the Court views a parent's rights as "limited by the existence of an actual, developed relationship with a child . . . tied to the presence or absence of some embodiment of family." *Troxel*, 530 U.S. at 88 (Stevens, J., dissenting); *see also Smith*, 431 U.S. at 844 (expressing that "the importance of the familial relationship, to the individuals involved and to the society, stems from the emotional attachments that derive from the intimacy of daily association, and from the role it plays in 'promot[ing] a way of life' through the instruction of children" (alteration in original) (quoting *Yoder*, 406 U.S. at 231-33)).

20. *See, e.g.*, *Quilloin*, 434 U.S. at 256. In *Quilloin*, the Court held that because the natural father had never attempted to legitimize the child and had never taken on any significant responsibility for the child, it was in the child's best interest to be adopted by the mother's new husband. *Id.; see also Lehr*, 463 U.S. at 261. The court in *Lehr* specifically stated:

When an unwed father demonstrates a full commitment to the responsibilities of parenthood by "com[ing] forward to participate in the rearing of his child," his interest in personal contact with his child acquires substantial protection under the Due Process Clause. At that point it may be said that he "act[s] as a father toward his children." But the mere existence of a biological link does not merit equivalent constitutional protection. *Id.* (alterations in original) (citations omitted) (quoting *Caban*, 441 U.S. at 389 n.7, 392).

21. *Troxel*, 530 U.S. at 88 (Stevens, J., dissenting); *id.* at 98 (Kennedy, J., dissenting). Although a majority of the Court has not decided that children have a liberty interest in preserving a relationship with a third person with whom the child has formed a psychological bond, commentators have argued that the *Troxel* decision has not foreclosed this option. *See, e.g.*, Solangel Maldonado, *When Father (or Mother) Doesn't Know Best: Quasi-Parents and Parental Deference After Troxel v. Granville*, 88 IOWA L. REV. 865, 882 (2003); Brooke N. Silverthorn, *Note, When Parental Rights and Children's Best Interests*
B. Ways in Which Same-Sex Couples Can Have Children

1. Artificial Insemination

The majority of lesbian couples seeking to conceive utilize artificial insemination to have children. During this process, sperm from either a known or unknown donor is injected into the uterus of the woman and if the injected sperm fertilizes one of the eggs, the woman carries the child to term. As a result, the biological mother is automatically given parental status through her biological connection with the child, whereas


23. Id. at 88 (Stevens, J., dissenting). Specifically, Justice Stevens stated:
While this Court has not yet had occasion to elucidate the nature of a child’s liberty interests in preserving established familial or family-like bonds, it seems to me extremely likely that, to the extent parents and families have fundamental liberty interests in preserving such intimate relationships, so, too, do children have these interests, and so, too, must their interests be balanced in the equation. Id. (Stevens, J., dissenting) (citation omitted).
24. Id. at 98 (Kennedy, J., dissenting). Justice Kennedy specifically states that “a fit parent's right vis-à-vis a complete stranger is one thing; her right vis-à-vis another parent or a de facto parent may be another.” Id. at 100-01 (Kennedy, J., dissenting).
25. See, e.g., In re Robin N., 9 Cal. Rptr. 2d 512, 516 (Ct. App. 1992) (allowing third party, whose relationship with the child rose to the level of a de facto parent, visitation rights to the child); Francis v. Francis, 654 N.E.2d 4, 7 (Ind. Ct. App. 1995) (granting ex-husband visitation with ex-wife’s children fathered by another man during an extra-marital affair because ex-husband had treated the children as his own, and it was in the best interest of the children to maintain a relationship with the man they had always considered to be their father); Randy A.J. v. Norma I.J., 677 N.W.2d 630, 637-38, 642 (Wis. 2004) (holding that former husband who raised and supported child was the child’s father and denied the putative father from asserting any rights to the child because he had taken no steps to develop a relationship with the child).
26. See Emily Doskow, The Second Parent Trap: Parenting for Same-Sex Couples in a Brave New World, 20 J. JUV. L. 1, 2 (1999) (arguing that artificial insemination is the easiest and least expensive way to become pregnant).
27. Id.
her partner's parental status must arise through other means, such as 
adoption or by statute.  

2. Surrogacy

Other same-sex couples seeking to have children, particularly gay 
males, often choose surrogacy. Such a couple would use sperm from 
one member of the couple to either fertilize an anonymously donated egg 
and implant that egg into another woman who gestates the child, or 
fertilize the egg of the surrogate who will also gestate the child. The 
sperm donor would automatically receive parental status as the biological 
father, whereas his partner would have to gain parental recognition by 
other means.

3. Adoption

Both male and female same-sex couples utilize national or 
international adoption. States vary widely in their views on whether gay 
and lesbian individuals or couples should be allowed to adopt. Three 
states, Florida, Mississippi, and Utah, currently ban all forms of same-sex

[hereinafter Christensen, Simulacrum of Marriage]. If an unknown donor is used, the 
donor typically does not seek any parental rights and thus usually waives them through a 
signed agreement or by statute. Janet Leach Richards, Redefining Parenthood: Parental 
Rights Versus Child Rights, 40 WAYNE L. REV. 1227, 1259 (1994). If a known donor is 
used, such a waiver must also be given or the known donor may later be able to assert 
parental rights through his status as the biological father. Laurie A. Rompala, Note, 
Abandoned Equity and the Best Interests of the Child: Why Illinois Courts Must Recognize 
However, in some cases, the agreements signed by known donors are deemed irrelevant, 
especially when the biological mother has allowed the known donor to have some contact 
with the child. Craig W. Christensen, Legal Ordering of Family Values: The Case of Gay 
and Lesbian Families, 18 CARDOZO L. REV. 1299, 1356 (1997) [hereinafter Christensen, 
Legal Ordering of Family Values].

29. See Doskow, supra note 26, at 3.


31. Id. at 1763. This scheme is risky; even if all intended parties signed a surrogacy 
agreement in which the woman carrying the child to term agrees to relinquish any parental 
rights to the child, the woman can still assert a claim to being the biological mother to the 
child in spite of the agreement. Rompala, supra note 28, at 1940.

32. Doskow, supra note 26, at 3-4. Generally, when people want to adopt, a petition 
must be filed with the state court, which evaluates whether or not the individual or couple 
is fit to adopt. Molly Cooper, Note, What Makes a Family? Addressing the Issue of Gay 
and Lesbian Adoption, 42 FAM. CT. REV. 178, 180 (2004). Most courts will apply the best 
interest of the child standard. Id.; see also Christensen, Simulacrum of Marriage, supra 
note 28, at 1764.

33. Karla J. Starr, Note, Adoption By Homosexuals: A Look At Differing State Court 
adoption.34 Other states recognize, or at least do not prohibit, same-sex adoption either through legislation or case law.35 Some of these same states also allow second-parent adoption, which occurs when the non-adoptive, non-biological partner adopts his or her partner’s child.36

C. Sanctioned Same-Sex Unions and Corresponding “Parental” Rights

Many same-sex couples desire to solidify their commitment to each other by entering into a recognized same-sex union.37 Currently, same-sex couples have the option of entering into a civil union in Vermont, a reciprocal beneficiary relationship in Hawaii, a domestic partnership in California and New Jersey, or marriage in Massachusetts.38 The parental rights associated with these unions are either defined in the statutes creating the same-sex unions or in preexisting statutes.39

1. Civil Union: Vermont

In Baker v. State,40 the Supreme Court of Vermont responded to a challenge of the state’s marriage laws brought by three same-sex couples that were denied marriage licenses.41 The court held that “the State is constitutionally required to extend to same-sex couples the common benefits and protections that flow from marriage under Vermont law.”42 However, the court left it up to the legislature to decide what form this extension of protection would take.43

On July 1, 2000, Vermont became the first state to recognize the legal status of a “civil union” reserved exclusively for same-sex couples.44

34. FLA. STAT. ANN. § 63.042(3) (West 1997); MISS. CODE ANN. § 93-17-3(2) (Supp. 2004); UTAH CODE ANN. § 78-30-1(3)(b) (2002).
36. See, e.g., Hart, 806 A.2d at 1185-86; Tammy, 619 N.E.2d at 315-16; In re Adoption of Two Children by H.N.R., 666 A.2d 535, 536 (N.J. Super. Ct. App. Div. 1995); Jacob, 660 N.E.2d at 398; see also Cooper, supra note 32, at 182.
38. See infra Part I.C.1-4.
41. Id. at 867.
42. Id.
43. Id.
44. VT. STAT. ANN. tit. 15, § 1202-02 (2002); Pamela Ferdinand, Same-Sex Couples Take Vows As Law Takes Effect: Across Vermont, Dozens Celebrate Civil Unions, WASH.
Under the Civil Union Act, same-sex couples are afforded all of the legal protections and benefits that flow from the status of marriage.\textsuperscript{45} The Civil Union Act also deals with child custody by incorporating the Presumption of Parentage statute into the Act.\textsuperscript{46} The statute, as incorporated, states:

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.\textsuperscript{47}

The language of the statute implies that if a same-sex couple enters into a civil union and one partner either adopts a child, has a child through artificial insemination, or donates sperm to a surrogate, there is a rebuttable presumption that the non-biological, non-adoptive partner is a "parent" worthy of visitation or custodial rights if the union dissolves.\textsuperscript{48} This interpretation is being tested in the Miller-Jenkins case.\textsuperscript{49} In Miller-Jenkins, the Vermont court held that under Vermont law, both parties to a civil union have a parental interest in a child conceived through artificial insemination that they intended to raise together.\textsuperscript{50} However, this decision may or may not stand depending on whether Vermont or Virginia ultimately retains jurisdiction.

\textsuperscript{45} tit. 15, § 1204. Specifically, the Civil Union Act extends to same-sex couples "the same benefits, protections and responsibilities under law, whether they derive from statute, administrative or court rule, policy, common law or any other source of civil law, as are granted to spouses in marriage." \textit{Id.} § 1204(a).


\textsuperscript{47} VT. STAT. ANN. tit. 15, § 1204(f) (2002).

\textsuperscript{48} See \textit{id.}; see also Jourdan, supra note 46, at 34.

\textsuperscript{49} See Miller-Jenkins v. Miller-Jenkins, No. 454-11-03 (Vt. Rutland County Fam. Ct. Nov. 17, 2004) (order recognizing parental interest in both parties). Prior to Miller-Jenkins, this interpretation had yet to be tested in the Vermont courts. Jourdan, supra note 46, at 34. This provision would clearly control if the couple remained in Vermont. See VT. STAT. ANN. tit. 15, § 1204(f) (2002). However, many individuals who enter civil unions come from other states and do not remain in Vermont. See infra note 94 and accompanying text. In light of the fact that the majority of these other states have refused to recognize any type of same-sex union or the rights flowing from them, this provision would probably not control in those situations. See infra note 94 and accompanying text.

\textsuperscript{50} Miller-Jenkins, No. 454-11-03, at 11, 13 (Vt. Rutland County Fam. Ct. Nov. 17, 2004) (order recognizing parental interest in both parties).
2. Reciprocal Beneficiary: Hawaii

Hawaii has developed the legal status of "reciprocal beneficiary," available to any two people who have consented and signed a declaration to that effect.51 The reciprocal beneficiary status affords couples many of the same benefits as marriage, but not all.52 Although the status is not limited to same-sex couples, it was created in response to a challenge to the state's marriage laws by same-sex couples.53 In *Baehr v. Lewin*,54 the Supreme Court of Hawaii held that excluding marriage licenses to same-sex couples violated the state constitution's equal protection clause.55 In response to the court's decision, the Hawaii legislature passed a state constitutional amendment allowing the legislature to limit marriage to heterosexual couples.56 However, the state legislature concurrently established the status of reciprocal beneficiaries.57

Regarding child custody and visitation rights, Hawaii made no special provisions in the reciprocal beneficiary statute and, therefore, preexisting

51. HAW. REV. STAT. ANN. § 572C-4 (Michie 1999).
52. See, e.g., HAW. REV. STAT. ANN. § 247-3 (Michie Supp. 2004) (granting tax exemptions); HAW. REV. STAT. ANN. § 323-2 (Michie 2004) (granting privilege of hospital visitation and extension of authority to make health care related decisions); id. § 431:10-234 (granting right to receive benefit of partner's life insurance policy); HAW. REV. STAT. ANN. § 509-2 (Michie 2000) (granting right to create tenancies in common, tenancies by the entirety, or joint tenancies).
54. 852 P.2d 44 (Haw. 1993).
55. Id. at 67. The equal protection clause in Hawaii's state constitution is more expansive than the Equal Protection Clause in the United States Constitution. Compare HAW. CONST. art. I, § 5 ("No person shall . . . be denied the equal protection of the laws, nor be denied the enjoyment of the person's civil rights or be discriminated against in the exercise thereof because of race, religion, sex, or ancestry." (emphasis added)), with U.S. CONST. amend. XIV, § 1 (stating that a state cannot "deny to any person within its jurisdiction the equal protection of the laws"). Based on the plain language of the text of Hawaii's equal protection clause, it is more expansive than the United States Constitution by specifically prohibiting "state-sanctioned discrimination against any person in the exercise of his or her civil rights on the basis of sex." *Baehr*, 852 P.2d at 60. As such, because the Hawaii statute at issue in *Baehr* denied same-sex couples the rights and benefits flowing from the marital status solely because the couples were of the same-sex, the statute on its face, and as applied, created a sex-based classification. Id. at 64. The court subsequently determined that a sex-based classification is a "suspect classification" under an equal protection analysis requiring the state to pass the strict scrutiny test. Id. at 67. However, the court refused to hold that same-sex couples had a fundamental right to marry. Id. at 57.
56. HAW. CONST. art. I, § 23.
57. HAW. REV. STAT. ANN. §§ 572C-1 to 572C-7 (Michie 1999); see also HARRY D. KRAUSE ET AL., FAMILY LAW 59 (5th ed. 2003).
statutes apply. The preexisting child custody and visitation statutes give preference to either one or both biological parents depending on the best interest of the child. However, these statutes also give courts discretion to award third parties, which could include a non-adoptive, non-biological same-sex partner, custody rights or "reasonable visitation" rights provided that the best interest of the child is served.

3. Domestic Partnership: California and New Jersey

California has created the status of "domestic partnership" for any two adults who choose to live in an "intimate and committed" relationship. Previously, domestic partners received many of the same rights as married couples, but not all. However, as of January 1, 2005, the rights of domestic partners were extended to include all of the benefits afforded married couples.

58. See HAW. REV. STAT. ANN. § 571-46 (Michie Supp. 2004). The statute states that it applies to "actions for divorce, separation, annulment, separate maintenance, or any other proceeding where there is at issue a dispute as to the custody of a minor child." Id. The language "any other proceeding" could easily cover dissolution of reciprocal beneficiary relationships. See id.

59. See id. § 571-46(1). The statute does not explicitly define "parent," but the subsequent provision in the statute implies that "parent" refers to the biological mother and father of the child. Id. § 571-46(2) (stating that custody can be awarded to "persons other than the father or mother").

60. See id. §§ 571-46(2), (7). As it pertains to child custody, the statute specifically states that "[c]ustody may be awarded to persons other than the father or mother whenever the award serves the best interest of the child." Id. § 571-46(2). As it pertains to visitation rights, the statute specifically states that "[r]easonable visitation rights shall be awarded to parents, grandparents, siblings, and any person interested in the welfare of the child in the discretion of the court, unless it is shown that rights of visitation are detrimental to the best interests of the child." Id. § 571-46(7) (emphasis added). Since the focus of the statute is on the best interest of the child and there is no specific exclusion of a non-adoptive, non-biological same-sex partner as an individual who can seek child custody and visitation rights, the non-adoptive, non-biological partner should be able to seek rights to a child of the reciprocal beneficiary union. See id. §§ 571-46(2), (7). Currently, no Hawaii court decision has tested whether the statute permits courts to award child custody or visitation to a same-sex partner if it is in the child's best interest.

61. CAL. FAM. CODE § 297(a) (West 2004).


63. CAL. FAM. CODE § 297.5(a) (West 2004). Specifically, the statute states that Registered domestic partners shall have the same rights, protections, and benefits, and shall be 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 upon spouses.
Like the Vermont Civil Union Act, California's amended domestic partnership law includes a provision relating to child custody, which specifically states that "[t]he rights and obligations of registered domestic partners with respect to a child of either of them shall be the same as those of spouses." The amended law also includes a provision requiring California to recognize as a domestic partnership any out-of-state, same-sex union that is equivalent to a domestic partnership in California.

In early 2004, New Jersey also created the status of "domestic partnership." Like California's law, the status is not reserved exclusively for same-sex couples, but unlike California's law, it is not nearly as expansive, granting only those rights which are specified in the Act. Regarding child custody and visitation, the domestic partnership

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Id. The language of this provision is virtually identical to the wording in the Vermont Civil Union Act, implying that these two systems are legal equivalents. See VT. STAT. ANN. tit. 15, § 1204 (2002).

64. CAL. FAM. CODE § 297.5(d) (West 2004). The language is not as clear as the equivalent provision in Vermont's Presumption of Parentage statute (as incorporated by the Civil Union Act), but the inference is that a non-adoptive, non-biological partner would be classified as a "parent" with rights to visitation or custody should the union dissolve. Compare id. § 297.5(a), with VT. STAT. ANN. tit. 15, § 1204(f) (2002).

65. CAL. FAM. CODE § 299.2 (West 2004). The provision specifically states:

A legal union of two persons of the same sex, other than a marriage, that was validly formed in another jurisdiction, and that is substantially equivalent to a domestic partnership as defined in this part, shall be recognized as a valid domestic partnership in this state regardless of whether it bears the name domestic partnership.

Id. Therefore, because California's domestic partnership law will have virtually identical provisions to Vermont's Civil Union Act and because Hawaii's reciprocal beneficiary status grants fewer rights than California's domestic partnership status, the implication is that California would recognize Vermont civil unions and Hawaii reciprocal beneficiary relationships. See id. §§ 297.5(a), 297.5(d), 299.2; HAW. REV. STAT. ANN. § 572C-4 (Michie 1999); VT. STAT. ANN. tit. 15, §§ 1204(a), 1204(f) (2002).


67. Compare id., with CAL. FAM. CODE § 297.5(a) (West 2004). New Jersey domestic partners are provided with hospital visitation rights, an inheritance tax exemption, state income tax benefits, and state employee benefits. Mark E. Wojcik, The Wedding Bells Heard Around the World: Years From Now, Will We Wonder Why We Worried About Same-Sex Marriage?, 24 N. ILL. U. L. REV. 589, 677 (2004). The New Jersey law, like California's, also contains a provision regarding whether same-sex unions from other states will be recognized in New Jersey. N.J. STAT. ANN. § 26:8A-6(c) (West Supp. 2004); see also CAL. FAM. CODE § 297.5(a) (West 2004). The provision states that "[a] domestic partnership, civil union or reciprocal beneficiary relationship entered into outside of this State, which is valid under the laws of the jurisdiction under which the partnership was created, shall be valid in this State." N.J. STAT. ANN. § 26:8A-6(c) (West Supp. 2004). By the express wording in the statute, New Jersey would recognize a California domestic partnership, a Vermont civil union, and a Hawaii reciprocal beneficiary relationship, but not a Massachusetts marriage. Id.
law provides no specific provisions. However, New Jersey's general child custody and visitation statutes allow any interested person to seek custody or visitation when the child's custodial parent is deemed unfit.

4. Marriage: Massachusetts

The landmark case of Goodridge v. Department of Public Health paved the way to make the State of Massachusetts the first and only state to allow same-sex marriage. In Goodridge, seven same-sex couples who were denied marriage licenses challenged the state's marriage laws. A plurality of the Massachusetts Supreme Judicial Court applied the "rational basis" standard and held that denying same-sex couples the "protections, benefits, and obligations" of marriage violated the state constitution.

In an attempt to comply with the ruling, the state senate drafted a bill that would have created "civil unions," like Vermont, but prohibited same-sex marriage. The state senate requested an advisory opinion

68. See N.J. STAT. ANN. § 26:8A-6(c) (West Supp. 2004).
70. 798 N.E.2d 941 (Mass. 2003).
71. See id. at 948 (plurality opinion); Yvonne Abraham & Rick Klein, Free to Marry: Historic Date Arrives for Same-Sex Couples in Massachusetts, BOSTON GLOBE, May 17, 2004, at A1. Although same-sex couples are allowed to marry, prior Massachusetts law restricts the issuance of marriage licenses to state residents. MASS. GEN. LAWS ANN. ch. 207, § 11 (West 1998). Specifically, the statute states that "[n]o marriage shall be contracted in this commonwealth by a party residing and intending to continue to reside in another jurisdiction if such marriage would be void if contracted in such other jurisdiction, and every marriage contracted in this commonwealth in violation hereof shall be null and void." Id.
72. Goodridge, 798 N.E.2d at 949-50 (plurality opinion). The same-sex couples alleged that the marriage statutes should be interpreted to permit same-sex marriage and that preventing same-sex couples from obtaining marriage licenses violated the state constitution. Id. at 950 (plurality opinion). The specific state constitutional provisions that the plaintiffs alleged were violated were the liberty, freedom, equality, and due process provisions. Id. at 950-51 (plurality opinion).
73. Id. at 968 (plurality opinion). Specifically, the plurality held:

The marriage ban works a deep and scarring hardship on a very real segment of the community for no rational reason. The absence of any reasonable relationship between, on the one hand, an absolute disqualification of same-sex couples that wish to enter into civil marriage and, on the other, protection of public health, safety, or general welfare, suggests that the marriage restriction is rooted in persistent prejudices against persons who are (or who are believed to be) homosexual.

Id. (plurality opinion). Justice Greaney concurred with the result, the remedy, and much of the reasoning of the plurality, but would have instead applied a "traditional equal protection analysis." Id. at 970 (Greaney, J., concurring).
from the Supreme Judicial Court on whether this proposed legislation would violate the state constitution.\(^7\) A majority of the court held that the civil union scheme would violate the state constitution because the legislation would "relegate same-sex couples to a different status."\(^6\) As of May 17, 2004, Massachusetts has been issuing marriage licenses to same-sex couples.\(^7\) However, whether marriage licenses will continue to be issued is questionable because of a proposed state constitutional amendment limiting marriage to heterosexual couples.\(^8\)

The decision in *Goodridge* also had an effect on child custody and visitation rights.\(^9\) Prior to *Goodridge*, when same-sex couples ended their union, they were "in the highly unpredictable terrain of equity jurisdiction."\(^9\) However, in light of the *Goodridge* decision to allow same-sex couples to marry, the benefits conferred by marriage impliedly include access to current Massachusetts divorce law.\(^8\) Under Massachusetts divorce law, "the rights of [both] parents [to the child] in the absence of misconduct, [should] be held to be equal."\(^8\) The court must look to the best interest of the child to determine whether shared or sole custody should be awarded.\(^8\) However, if sole custody is awarded,

\(^7\) Opinions of the Justices to the Senate, 802 N.E.2d 565, 566 (Mass. 2004).

\(^6\) Id. at 569.

\(^7\) Abraham & Klein, supra note 71.

\(^8\) The court allowed the Massachusetts legislature 180 days from its November 17, 2003 opinion in *Goodridge* to develop appropriate legislation. *Goodridge*, 798 N.E.2d at 970 (plurality opinion). The legislature convened a constitutional convention on February 11 and 12 of 2004, in an attempt to add an amendment to the constitution defining a marriage as a union between one man and one woman. Baker, supra note 62, at 587. Although the legislature could not agree on any one proposal, a plurality of legislators voted for a compromise amendment, which limited marriage to heterosexual couples and created civil unions for same-sex couples. Id. The proposed amendment must be approved by the legislature again in 2005 and subsequently supported by a majority of the people of Massachusetts in November 2006 before the amendment can become part of the state constitution. Id.

\(^9\) See *Goodridge*, 798 N.E.2d at 963-64 (plurality opinion). Children benefit from the protections that are only available to married parents. See id. at 956 (plurality opinion). Marriage provides children with "social [benefits] such as the enhanced approval that still attends the status of being a marital child [and] material [benefits] such as the greater ease of access to family-based State and Federal benefits." Id. at 957 (plurality opinion).

\(^9\) Id. at 963 (plurality opinion).

\(^8\) See id. at 963-64 (plurality opinion). The court appeared to classify access to divorce law as a marital benefit because "divorce [law] provide[s] clear and reasonably predictable guidelines for . . . child custody . . . on dissolution of marriage" that is denied to same-sex couples. See id. at 963 (plurality opinion).

\(^8\) MASS. GEN. LAWS. ANN. ch. 208, § 31 (West Supp. 2005).

\(^3\) Id.
the non-custodial parent will still receive visitation rights so long as the best interest of the child is served.\textsuperscript{84}

With the high rate of mobility in our society, same-sex couples that have entered into a recognized union will likely move to other states that have no such unions and seek recognition of their relationship within the new state.\textsuperscript{85} The majority of states have refused to recognize out-of-state, same-sex unions.\textsuperscript{86} The following section details how these states have explicated their refusal to recognize out-of-state, same-sex unions.

\textbf{D. Public Policy Against Same-Sex Unions}

Under the Full Faith and Credit Clause of the Constitution, states must recognize the “public Acts, Records, and judicial Proceedings” of all other states.\textsuperscript{87} Regardless of the category to which marriages belong, states traditionally recognize out-of-state marriages.\textsuperscript{88} However, states are not strictly bound to the Full Faith and Credit Clause.\textsuperscript{89} The United States Supreme Court has held that a state can refuse to recognize another state’s actions if doing so would violate a strong public policy of the state.\textsuperscript{90} This public policy exception is embodied in the \textit{Restatement (Second) of Conflict of Laws}.\textsuperscript{91} The public policy exception allows states

\textsuperscript{84.} Id.

\textsuperscript{85.} Wojcik, supra note 67, at 679.

\textsuperscript{86.} See infra note 94 and accompanying text.

\textsuperscript{87.} U.S. CONST. art. IV, § 1.

\textsuperscript{88.} Baker, supra note 62, at 609-10; Barbara J. Cox, Adoptions by Lesbian and Gay Parents Must Be Recognized by Sister States Under the Full Faith and Credit Clause Despite Anti-Marriage Statutes that Discriminate Against Same-Sex Couples, 31 CAP. U. L. REV. 751, 757 (2003).

\textsuperscript{89.} Baker, supra note 62, at 611.

\textsuperscript{90.} Baker v. Gen. Motors Corp., 522 U.S. 222, 232-33 (1998). Specifically, in Baker, the United States Supreme Court stated:

\begin{quote}
The Full Faith and Credit Clause does not compel “a state to substitute the statutes of other states for its own statutes dealing with a subject matter concerning which it is competent to legislate” . . . .

A court may be guided by the forum State’s “public policy” in determining the law applicable to a controversy.
\end{quote}


\textsuperscript{91.} See RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 283 (1971). The Restatement (Second) of Conflict of Laws states:

\begin{enumerate}
\item (1) The validity of a marriage will be determined by the local law of the state which, with respect to the particular issue, has the most significant relationship to the spouses and the marriage under the principles stated in § 6.
\item (2) A marriage which satisfies the requirements of the state where the marriage was contracted will everywhere be recognized as valid \textit{unless it violates the strong public policy of another state which had the most significant relationship to the spouses and the marriage at the time of the marriage.} \end{enumerate}
to refuse to recognize same-sex unions solely because of a strong public policy against them, provided that the forum state has the most significant relationship to the parties.\footnote{92}

Reinforcing this public policy exception, Congress passed DOMA in 1996, permitting states to refuse to recognize same-sex unions.\footnote{93} Forty-four states have created their own "mini-DOMAs," or a functionally equivalent statute, which explicitly set forth the state's public policy against same-sex unions and their refusal to recognize them.\footnote{94} The

\emph{Id.} (emphasis added). The majority of states use the approach of the \textit{Restatement (Second)}, but it is not mandated. Anthony Dominic D'Amato, Note, \textit{Conflict of Laws Rules and the Interstate Recognition of Same-Sex Marriages}, 1995 U. ILL. L. REV. 911, 921.


93. 28 U.S.C. § 1738C (2000). The statute specifically states:

No State, territory, or possession of the United States, or Indian tribe, shall be required to give effect to any public act, record, or judicial proceeding of any other State, territory, possession, or tribe respecting a relationship between persons of the same sex that is treated as a marriage under the laws of such other State, territory, possession, or tribe, or a right or claim arising from such relationship.

\emph{Id.}

United States Supreme Court has yet to be presented with the opportunity to rule on the constitutionality of DOMA.\textsuperscript{95} However, Arizona and Washington have addressed the constitutionality of their states' mini-DOMAs with differing results.\textsuperscript{96}

\textsuperscript{95} Scholars have varying opinions on how they think the United States Supreme Court would rule on the constitutionality of the federal or state DOMAs. See, e.g., Larry Kramer, \textit{Same-Sex Marriage, Conflict of Laws, and the Unconstitutional Public Policy Exception}, 106 \textit{Yale L.J.} 1965, 1966-68 (1997); Anita Y. Woudenberg, Note, \textit{Giving DOMA Some Credit: The Validity of Applying Defense of Marriage Acts to Civil Unions Under the Full Faith and Credit Clause}, 38 \textit{Val. U. L. Rev.} 1509, 1567-68 (2004); see also Cox, \textit{supra} note 88, at 761-62.

\textsuperscript{96} Standhardt v. Superior Court, 77 P.3d 451, 465 (Ariz. Ct. App. 2003); Castle v. State, No. 04-2-00614-4, 2004 WL 1985215, at *12-13 (Wash. Super. Ct. Sept. 7, 2004). Specifically, the Arizona court concluded that Arizona's mini-DOMA was constitutional, \textit{Standhardt}, 77 P.3d at 465, whereas the Washington court concluded that Washington's mini-DOMA was unconstitutional, \textit{Castle}, 2004 WL 1985215, at *16-17. Both state courts looked at the effect that the denial of same-sex marriage would have on the children of homosexual couples. \textit{Standhardt}, 77 P.3d at 462-63; \textit{Castle}, 2004 WL 1985215, at *14-16. The Arizona court recognized that children raised in same-sex unions "could benefit from the stability offered by same-sex marriage." \textit{Standhardt}, 77 P.3d at 463. However, the Arizona court felt that the state's interest in procreation in a heterosexual household outweighed any benefits that children of same-sex couples would receive from recognizing same-sex marriage and that any desire for change should be addressed to the legislature. \textit{Id.} The Washington court was much more concerned with the protection of children in same-sex households. \textit{Castle}, 2004 WL 1985215, at *15. The court stated that a family is more than just

\begin{quote}
a man mating with a woman to have a child [and that]\ldots
\end{quote}
In child custody and visitation disputes between same-sex couples, the mini-DOMAs (if constitutional) and their underlying public policy will be considered by courts in determining whether a non-adoptive, non-biological partner will be granted custody or visitation rights.\textsuperscript{97} However, in addition to a state's interest in determining its own policy regarding child custody and visitation disputes between same-sex couples, the best interest of the child, being the almost universal standard applied in custody and visitation disputes, should be considered.\textsuperscript{98}

II. JUDICIAL RESPONSE TO CHILD CUSTODY AND VISITATION DISPUTES BETWEEN SAME-SEX COUPLES: APPROACHES AND THEIR APPLICATIONS

A. Best Interest of the Child Standard and the Psychological Parent Doctrine

In resolving custody and visitation disputes, virtually all courts utilize the "best interest of the child" standard.\textsuperscript{99} Unfortunately, the standard is

\[\text{Id. at *15-16 (footnote omitted). These two opinions illustrate possible outcomes in the determination of the constitutionality of the mini-DOMAS and how the legal recognition or non-recognition of same-sex unions could affect the children of those unions.}\]

\textsuperscript{97} See, e.g., Miller-Jenkins v. Miller-Jenkins, No. CH04-280 (Va. Cir. Ct. Sept. 9, 2004) (order and certification for interlocutory appeal) (holding that the non-biological, non-adoptive partner cannot claim any parental rights to her partner's child because her rights are based on a dissolved Vermont civil union and civil unions are not recognized under Virginia's Marriage Affirmation Act).


\textsuperscript{99} See, e.g., Kyle C. Velte, Towards Constitutional Recognition of the Lesbian-Parented Family, 26 N.Y.U. REV. L. & SOC. CHANGE 245, 299 (2000-2001) (agreeing that only West Virginia does not use the best interest of the child standard in custody cases and that only three states do not use the best interest of the child standard in visitation disputes); Bell, supra note 98, at 252 (finding that all states, except West Virginia, utilize the best interest of the child standard in custody disputes and that forty-seven states utilize the best interest of the child standard in visitation disputes); see also Christensen, Legal Ordering of Family Values, supra note 28, at 1348 ("Since the mid-nineteenth century, the 'best interests of the child' has been the predominant standard by which judicial public ordering is employed to resolve custody and visitation disputes.").
amorphous, lacking any uniformity in definition or application. Although the standard is not concrete, courts typically look at a variety of factors including the following: moral unfitness of the parent; biological and psychological relationship of the child to the parent; wishes of the child; health, welfare, and social behavior of the child; evidence of abuse; and parenting ability.

Intimately connected with the best interest standard is the psychological parent doctrine. A psychological parent has a

100. See, e.g., Gill, supra note 98, at 364; Starr, supra note 33, at 1502.
102. See, e.g., Philip F. Schuster II, Constitutional and Family Law Implications of the Sleeper and Troxel Cases: A Denouement for Oregon’s Psychological Parent Statute?, 36 WILLAMETTE L. REV. 549, 574 (2000) (indicating that the best interests of the child standard and the psychological parent standard have fused). Joseph Goldstein, Anna Freud, and Albert Solnit originally developed the psychological parent doctrine. See, e.g., KRAUSE ET AL., supra note 57, at 719; Bell, supra note 98, at 260-61. Goldstein, Freud and Solnit explained the doctrine as follows:

   [W]hen a child is in the direct and continuous care of an adult for a significant period of time, the child will form a closer and more significant relationship with this adult than with the biological parents. Separation from these non-biological, so called “psychological parents,” is “no less painful and no less damaging to a child than separation from natural or adoptive caregiving parents.”

Stephanie Moes, Note, Being Seen and Heard: Webster v. Ryan’s Constitutional Protection for Children’s Right To Maintain Contact with Foster Parents, 71 U. CIN. L. REV. 331, 339 (2002) (quoting JOSEPH GOLDSTEIN ET AL., THE BEST INTERESTS OF THE CHILD 105 (1996)). Goldstein, Freud, and Solnit intended the doctrine to be applicable only in custody disputes, and not visitation disputes where they believe the custodial parent should have the sole right to determine who can visit with the child. KRAUSE ET AL., supra note 57, at 707, 719 (citing GOLDSTEIN ET AL., supra, at 24). However, courts that currently apply the psychological parent doctrine do so in both custody and visitation disputes. E.g., In re E.L.M.C., 100 P.3d 546, 561 (Colo. Ct. App. 2004) (upholding grant of joint custody of child to former lesbian couple on the ground that the non-adoptive partner was a psychological parent to the child), cert. denied, No. 04SC528, 2004 Colo. LEXIS 851 (Colo. Oct. 25, 2004); V.C. v. M.J.B., 725 A.2d 13, 32 (N.J. Super. Ct. App. Div. 1999) (upholding grant of visitation to the non-adoptive, non-biological partner on the ground that she was a psychological parent to the children), aff’d, 748 A.2d 539 (N.J. 2000). Courts and commentators alike have equated the psychological parent doctrine with such equitable doctrines as “de facto” parent, “in loco parentis,” “equitable” parent, and “functional parent,” at times using the terms interchangeably or creating a new name altogether to refer to the core ideas these doctrines share. See, e.g., In re Parentage of L.B., 89 P.3d 271, 282-84 (Wash. Ct. App. 2004) (discussing cases from other jurisdictions which applied the psychological parent doctrine, the de facto parent doctrine, or in loco parentis to grant a non-biological, non-adoptive same-sex partner standing as evidence for allowing standing based on a claim of being a de facto or psychological parent in its own jurisdiction), reh’g granted, 101 P.3d 107 (Wash. 2004); Bell, supra note 98, at 260 (choosing the term “psychosocial” parent to refer to parent-child relationships based on a “psychological bond” and “physical and emotional nurturing” instead of the “de facto,”
relationship with a child "with deep emotional bonds such that the child recognizes the person, independent of the legal form of the relationship, as a parent from whom they receive daily guidance and nurturance."

Courts employ different methods to classify individuals as psychological parents; however, many courts use the following four-part test developed in Wisconsin: (1) the legal parent consented to and fostered the nonparent's relationship with the child; (2) the nonparent and the child lived in the same household; (3) the nonparent assumed significant responsibilities in the care and upbringing of the child; and (4) the nonparent has established a parental role which created a dependent relationship with the child. This test places strict limits on who can claim to be a psychological parent and therefore protects parents from frivolous claims.

'equitable,' 'functional,' or 'psychological' parenting doctrine[s], which the author views as "slightly misleading"; Osborne, supra note 5, at 378 (equating the psychological parent doctrine with the de facto parent doctrine). For purposes of this Comment, reference to the psychological parent doctrine will encompass all similar doctrines.

103. E.L.M.C., 100 P.3d at 559. With the composition of the traditional family changing to include individuals other than a child's biological parents, courts and commentators advocate greater use of the psychological parent doctrine to allow third parties to seek child custody or visitation. See KRAUSE ET AL., supra note 57, at 718-19; Bell, supra note 98, at 262. The highest courts of New Jersey, Alaska, Colorado, Kentucky, Massachusetts, Utah, and Wisconsin have granted third parties standing to seek visitation or custody of a child based on the psychological parent doctrine. Bell, supra note 98, at 274. In addition, states such as Idaho, Minnesota, Montana, New Hampshire, and Oregon have adopted psychological parent statutes. Schuster, supra note 102, at 610. The psychological parent doctrine, in theory, takes into account the interests of the parent, the third party, and the child through its mandated evaluation of the psychological bond the child shares with both the parent and the third party. See Osborne, supra note 5, at 385; Vanessa L. Warzynski, Comment, Termination of Parental Rights: The "Psychological Parent" Standard, 39 VILL. L. REV. 737, 771 (1994). However, because the psychological parent doctrine "is a fluid concept based on complex human interaction that changes and evolves over time, [it is subject to inconsistent definitions and] unpredictable variables." Schuster, supra note 102, at 630.

104. See, e.g., C.E.W. v. D.E.W., 845 A.2d 1146, 1152 (Me. 2004) (refusing to define de facto parent, but stating the status should "be limited to those adults who have fully and completely undertaken a permanent, unequivocal, committed, and responsible parental role in the child's life"); J.A.L. v. E.P.H., 682 A.2d 1314, 1319-20 (Pa. Super. Ct. 1996) (defining an in loco parentis relationship as one "where the child has established strong psychological bonds with a person who, although not a biological parent, has lived with the child and provided care, nurture, and affection, assuming in the child's eye a stature like that of a parent").


106. Rubano v. DiCenzo, 759 A.2d 959, 974 (R.I. 2000) (arguing that the four-part test will prevent individuals such as babysitters and nannies from claiming parental rights because relationships based solely on payment for services do not rise to the level of a psychological parent).
B. The Initial Hurdle – Standing in Non-Adoptive, Non-Biological Partner Child Custody and Visitation Cases

In all custody and visitation disputes, the courts should utilize a "bifurcated analysis." The court should first determine whether the individual seeking custody or visitation has standing and only after standing has been determined, should the best interests of the child be considered. However, the judicial decisions in the area of child custody and visitation are "overwhelmingly confused" as many court opinions fail to address standing. An additional problem leading to inconsistency among judicial decisions is that courts often do not apply the same standard in determining whether or not a third party has standing.

1. Rationales for Granting Standing to the Non-Adoptive, Non-Biological Partner

a. The Psychological Parent Doctrine

The majority of courts that have granted standing to the non-adoptive, non-biological same-sex partner seeking custody or visitation rights, including those cases which reached the merits, did so through the psychological parent doctrine. In In re E.L.M.C., a Colorado court upheld a joint parental responsibilities order between a same-sex couple, noting "that emotional harm to a young child is intrinsic in the termination or significant curtailment of the child's relationship with a psychological parent under any definition of that term." Many other courts also utilize the psychological parent doctrine.

107. The case law almost exclusively deals with lesbians rather than gay men in custody disputes. See infra Part II.B. However, the analysis is applicable to all same-sex couples.
108. Osborne, supra note 5, at 376.
109. Id.
110. See Polikoff, supra note 6, at 508. In disputes between same-sex couples, some courts have ruled on custody or visitation without discussing the standing of the non-biological, non-adoptive partner while other courts devote the majority of their opinion to standing. See id. at 508-09.
111. See Warzynski, supra note 103, at 752.
114. Id. at 561.
115. See, e.g., E.N.O., 711 N.E.2d at 891; V.C., 725 A.2d at 23. In E.N.O., the Massachusetts court held that recognition of a de facto parent was in accord with the
b. The Intended Parent Doctrine

California has used the intended-parent doctrine to extend parental rights to the non-adoptive, non-biological same-sex partner.\textsuperscript{116} This doctrine traditionally has been used in cases involving artificial reproduction and surrogacy in order to determine parentage.\textsuperscript{117} The doctrine focuses on the intent of the parties when a child is conceived through analysis of such factors as: “the relationship between the parties, the parties’ statements on parentage, their plans for raising the child, and their subsequent conduct in carrying out those plans.”\textsuperscript{118} In one case, a California appellate court held that because the child would not have been conceived but for the actions of both parties, the non-adoptive, non-biological partner had standing to seek custody or visitation.\textsuperscript{119}

2. Rationales for Denying Standing to the Non-Adoptive, Non-Biological Partner

a. Strict Statutory Construction

Various courts have denied the non-adoptive, non-biological partner child custody or visitation rights by focusing exclusively on statutory language, particularly on the definition of “parent” and the list of those changing perception of the family and that “the best interests calculus must include an examination of the child’s relationship with both his legal and de facto parent.” \textit{E.N.O.}, 711 N.E.2d at 891. In \textit{V.C.}, the New Jersey court relied on the assessment of experts that the children had formed a psychological attachment to the non-biological partner in making their decision that visitation with the non-biological partner should continue. \textit{V.C.}, 725 A.2d at 23; see also \textit{T.B. v. L.R.M.}, 786 A.2d 913, 914-15 (Pa. 2001) (holding that same-sex partner who was named guardian to the child in the biological mother’s will and shared in the daily responsibilities of child rearing had established the requisite psychological bond with the child so that it was in the child’s best interest to grant her standing in loco parentis to litigate the issue of whether the relationship should continue); \textit{In re Parentage of L.B.}, 89 P.3d 271, 285-86 (Wash. Ct. App. 2004) (holding that partner of child’s biological mother, with whom she had been in a twelve year relationship and who was the primary care-taker when the child was young, met the requirements of the 4-part psychological parent test permitting her standing to determine whether the relationship should continue), \textit{reh'g granted}, 101 P.3d 107 (Wash. 2004).


\textsuperscript{118} \textit{Kristine Renee H.}, 16 Cal. Rptr. 3d at 145.

\textsuperscript{119} \textit{Id.} at 145-46; see also \textit{In re Parentage of A.B.}, 818 N.E.2d 126, 132 (Ind. Ct. App. 2004) (holding that both partners of a former same-sex couple were the legal parents of a child conceived through artificial insemination where the biological mother intended to conceive and raise a child with her former partner and “actively fostered a parent-child relationship”).
individuals able to assert standing. For example, in In re Thompson, the court focused on the definition of "parent" under Tennessee law, which is defined as "any biological, legal, adoptive parent(s) or, . . . stepparents." The court then held that the "law does not provide for any award of custody or visitation to a nonparent except as may be otherwise provided by our legislature." Other jurisdictions are in accord.

b. Presumption in Favor of the Biological or Adoptive Parent

Some courts presumptively favor the biological or adoptive parent's decision to terminate entirely the former same-sex partner's visitation rights by denying the former partner standing, unless the biological or adoptive parent is unfit. However, even if this showing of unfitness is made, the judge has wide discretion to refuse to grant custodial or visitation rights to the partner.

121. 11 S.W.3d 913 (Tenn. Ct. App. 1999).
123. Thompson, 11 S.W.3d at 919 (emphasis omitted).
124. See, e.g., C.B.L., 723 N.E.2d at 320. In In re C.B.L., an Illinois court denied standing to assert parental rights to a same-sex partner's child because "same-sex partner" was not listed in the categories of persons who could have standing under the Illinois Marriage and Dissolution of Marriage Act. Id. at 320. For another example, see Music v. Rachford, 654 So. 2d 1234, 1235 (Fla. Dist. Ct. App. 1995) (per curium), where a Florida court denied standing as a de facto parent to the non-adoptive, non-biological partner who assisted in the raising of the child for three years because visitation rights are statutory.
125. See, e.g., Kazmierazak v. Query, 736 So. 2d 106, 107, 109-10 (Fla. Dist. Ct. App. 1999) (holding that the status of in loco parentis is determined solely by marriage and is not applicable to a same-sex couple and that Florida law requires a showing that the parent is unfit which was not alleged); In re Jones, No. 2000 CA 56, 2002 WL 940195, at *7 (Ohio Ct. App. May 10, 2002) (holding that former same-sex partner is not a parent within the meaning of the statute and cannot receive rights to a child she helped raise unless she proves the biological parent is unfit).
126. See, e.g., S.F. v. M.D., 751 A.2d 9, 14, 18-19 (Md. Ct. Spec. App. 2000) (holding that although an expert testified to the fact that the non-biological, non-adoptive parent was a de facto parent to the child and should maintain visitation, the court acted within its discretion to refuse to grant such visitation). In applying the presumption in favor of the biological or adoptive parent, a court will not inquire into the psychological bond that the child shared with the non-adoptive, non-biological partner to determine whether it is in the child's best interest to grant standing to the partner to determine if custody or visitation should be awarded. See, e.g., Kazmierazak, 736 So. 2d at 110.
C. Illustration of the Complexities in Child Custody and Visitation Disputes Between Same-Sex Couples: Miller-Jenkins\textsuperscript{127}

Lisa Miller and Janet Jenkins met and began a relationship in Virginia.\textsuperscript{128} On December 19, 2000, they traveled to Vermont and entered into a civil union.\textsuperscript{129} The parties later decided to have a child together, and Lisa was artificially inseminated with anonymous donor sperm that Janet helped select.\textsuperscript{130} Lisa became pregnant and on April 16, 2002, she gave birth to a daughter named Isabella.\textsuperscript{131}

Lisa and Janet moved to Vermont with Isabella in July of 2002 in order to take advantage of the state’s favorable laws regarding same-sex couples.\textsuperscript{132} In the fall of 2003, the parties decided to separate and on November 24, 2003, Lisa filed a petition to dissolve the civil union in the

\textsuperscript{127} Miller-Jenkins v. Miller-Jenkins, No. 454-11-03 Rddm (Vt. Rutland County Fam. Ct. filed Nov. 24, 2003); No. CH04-280 (Va. Cir. Ct. filed July 1, 2004). The summation of the facts and case disposition is based on court documents from the Rutland Family Court in Vermont (Vermont court) and the Frederick County Circuit Court in Virginia (Virginia court) as of March 18, 2005, provided by Joseph Price, Esq., counsel for the Defendant, Janet Miller-Jenkins, unless otherwise noted.


\textsuperscript{129} Id. The parties returned to Virginia to continue their relationship. \textit{Id}.


Rutland Family Court in Vermont. Lisa requested legal and physical custody of Isabella; however, she waived her right to challenge Janet’s parentage and Janet’s right to seek visitation.

Later, Lisa changed her mind and attempted to revoke her waiver so as to challenge Janet’s rights to visitation and custody. The Vermont court issued a temporary order of parental rights on June 17, 2004, granting Lisa temporary legal and physical custody of Isabella while also granting Janet visitation rights.

Two weeks later, on July 1, 2004, Lisa sought to establish parentage of Isabella in the Frederick County Circuit Court in Virginia. On July 7, 2004, Janet was granted specific dates of visitation with Isabella in Virginia in June and July, but starting in August, Janet was granted visitation with Isabella at her residence in Vermont for the third full week of each month beginning on a Saturday morning and ending on a Sunday evening. In addition, the court ordered that Janet be permitted telephone contact with Isabella once per day while Isabella remained with Lisa.

133. Summons, Complaint for Civil Union Dissolution Notice of Appearance and Affidavit of Child Custody, Miller-Jenkins, No. 454-11-03 Rddm (Vt. Rutland County Fam. Ct. Nov. 24, 2003). Janet alleges that their union started to fall apart in July of 2003 after Lisa miscarried a second child. Miller-Jenkins, supra note 130. Janet claims that instead of trying to work through the episode together, Lisa decided to end the relationship. Id.

134. Summons, Complaint for Civil Union Dissolution Notice of Appearance and Affidavit of Child Custody, Miller-Jenkins, No. 454-11-03 Rddm (Vt. Rutland County Fam. Ct. Nov. 24, 2003). Lisa was not opposed to Janet having supervised visits with Isabella and in addition, sought child support from Janet. Id.


136. Miller-Jenkins, No. F454-11-03Rddm (Vt. Rutland County Fam. Ct. June 17, 2004) (temporary order granting parental rights and responsibilities). Janet was granted specific dates of visitation with Isabella in Virginia in June and July, but starting in August, Janet was granted visitation with Isabella at her residence in Vermont for the third full week of each month beginning on a Saturday morning and ending on a Sunday evening. Id. at 1-2. In addition, the court ordered that Janet be permitted telephone contact with Isabella once per day while Isabella remained with Lisa. Id. at 3. The hearing date had been delayed multiple times at the request of Lisa for various reasons (including her need for new counsel because she had a disagreement with her previous counsel over her waiver of a challenge to Janet’s parental rights). Motion To Delay Action, Miller-Jenkins, No. 454-11-03Rddm (Vt. Rutland County Fam. Ct. May 17, 2004).

2004, Janet filed an emergency motion for contempt and enforcement against Lisa in the Vermont court for failure to comply with the court's visitation order.\textsuperscript{138} The Vermont court issued an entry order on July 19, reaffirming its jurisdiction and temporary order.\textsuperscript{129}

On July 29, 2004, Janet filed a motion in the Virginia court seeking a dismissal of the complaint and costs.\textsuperscript{140} Lisa then sought to enjoin visitation against Janet on August 12.\textsuperscript{141} Six days later, the Virginia court stayed all visitation but permitted Janet supervised visits pending further court action.\textsuperscript{142} On August 19, 2004, the two judges involved, Judge Cohen of Vermont and Judge Prosser of Virginia, conferred about the case in a conference call.\textsuperscript{143} On September 2, 2004, the Vermont court found Lisa in contempt of the visitation order, but did not impose sanctions.\textsuperscript{144} On September 8, 2004, the Virginia court asserted it had jurisdiction, but certified the matter for appeal.\textsuperscript{145} On October 15, 2004, the Virginia court held that Lisa was the sole legal parent of Isabella and

\textsuperscript{138} Emergency Motion for Contempt and Enforcement, \textit{Miller-Jenkins}, No. F454-11-03Rddm (Vt. Rutland County Fam. Ct. July 8, 2004). Lisa complied with the order for the first required visitation in June, but refused any additional visitation with Isabella. \textit{Id.} In addition, Lisa has not allowed Janet to talk on the phone with Isabella and returned a letter and pictures that Janet attempted to send to Isabella. \textit{Id.} Janet filed a second motion for contempt in August. Defendant's Second Motion for Contempt and Motion for Immediate Hearing, \textit{Miller-Jenkins}, No. F454-11-03Rddm (Vt. Rutland County Fam. Ct. Aug. 3, 2004).


\textsuperscript{141} Motion to Enjoin Visitation, \textit{Miller-Jenkins}, No. CH04-280 (Va. Cir. Ct. Aug. 12, 2004).

\textsuperscript{142} \textit{Miller-Jenkins}, No. CH04-280 (Va. Cir. Ct. Aug. 18, 2004) (order to stay visitation).

\textsuperscript{143} Record of Conference Call Between Judge Prosser and Judge Cohen, \textit{Miller-Jenkins}, No. 04000280 (Va. Cir. Ct. Aug. 19, 2004). Communication between the courts was required by the UNIF. CHILD CUSTODY JUSTIFICATION AND ENFORCEMENT ACT § 206, 9 U.L.A. 680 (1999), which has been adopted in Virginia, 2001 Va. Acts ch. 305 (codified at VA. CODE ANN. § 20-146.9 (Michie 2004)). The substance of the conversation included both judges discussing how the case had proceeded and would continue to proceed in their respective courts. \textit{See} Record of Conference Call Between Judge Prosser and Judge Cohen, \textit{Miller-Jenkins}, No. 04000280 (Va. Cir. Ct. Aug. 19, 2004). Both judges acknowledged that the results reached in each court would be at odds with each other based on the different laws in Virginia and Vermont. \textit{Id.} at 8-9. Both judges elected to continue with the proceedings in both courts with the understanding that they would meet soon to discuss the case. \textit{Id.} at 9-10.


that Janet had no parental rights. Almost a month later on November 17, the Vermont court handed down a conflicting ruling, holding that Janet was a legal parent to Isabella under the Civil Union Act and the case was set for a final hearing on parental rights. On December 21, 2004, the Vermont court refused to grant judgment for Lisa based on the Virginia court's October 15 ruling. At the time of this writing, Janet has appealed the Virginia ruling and both parties are awaiting a date to be set for oral arguments in Virginia and the final hearing on parental rights in Vermont.

This case illustrates the complexities of a child custody and visitation dispute after the dissolution of a same-sex union. The remainder of this Comment will analyze the Miller-Jenkins case in conjunction with the available standards to resolve these disputes in order to highlight their advantages and disadvantages and to develop a standard that is equitable to all parties concerned.

III. FINDING A UNIFORM STANDARD: ADVANTAGES AND DISADVANTAGES OF APPLYING ESTABLISHED APPROACHES TO SAME-SEX COUPLES

A. Need for a Uniform Standard

Courts and commentators do not agree on any one method to resolve child custody and visitation disputes between former same-sex couples. Generally, federal law defers to the states in family law matters, allowing each state to develop its own policies. However, there is a legitimate
concern that maintaining the state-by-state variation will result in forum shopping; either member of the same-sex couple could move with the child to a state favorable to his or her position, meet the jurisdictional requirements, and file a custody or visitation action to the detriment of the other party.\textsuperscript{154} Under the statutes governing initial jurisdiction, the Parental Kidnapping Prevention Act of 1980 (PKPA), enacted by Congress,\textsuperscript{155} and the Uniform Child Custody Jurisdiction and Enforcement Act (UCCJEA), adopted in thirty-one states,\textsuperscript{156} the residency requirement is six consecutive months immediately prior to litigation.\textsuperscript{157} Therefore, if the biological or adoptive parent wanted to prevent his or her same-sex partner from having rights to the child, he or she could move with the child to a state against same-sex unions, remain there for six consecutive months, establish priority jurisdiction in that state, and then file a custody or visitation action.\textsuperscript{158} One of Janet Miller-Jenkins' attorneys, Joseph Price, stated the problem as it pertains to

\begin{itemize}
  \item \text{subject to the Fourteenth Amendment constitutional protection of parental rights.} \textsuperscript{footnote omitted}; \text{see also KRAUSE ET AL., supra note 57, at 19.}
  \item \text{See, e.g., Carolyn Wilkes Kaas, Breaking Up a Family or Putting It Back Together Again: Refining the Preference in Favor of the Parent in Third-Party Custody Cases, 37 WM. & MARY L. REV. 1045, 1128 (1996) (arguing that a uniform standard will prevent forum shopping because the outcome reached would not depend on the jurisdiction in which the child custody or visitation dispute is heard); Velte, supra note 99, at 256 (arguing that "protection of the non-legal parent-child relationship depends solely on jurisdictional location of the lesbian-parented family when it dissolves").}
  \item \text{See KRAUSE ET AL., supra note 57, at 628.}
  \item \text{See 28 U.S.C. §§ 1738A(b)(4), 1738A(c)(2)(A) (2000); UNIF. CHILD CUSTODY JURISDICTION AND ENFORCEMENT ACT § 201(a)(1), 9 U.L.A. 671 (1999). The purpose of the UCCJEA was to clarify interpretation of the PKPA. Celia Guzaldo Gamrath, UCCJEA: A New Approach to Custody Jurisdiction and Interstate Custody and Visitation, 92 ILL. B.J. 204, 206 (2004). Therefore, the provisions of the UCCJEA conform to the PKPA. Id.}
  \item \text{See 28 U.S.C. §§ 1738A(b)(4), 1738A(c)(2)(A); UNIF. CHILD CUSTODY JURISDICTION AND ENFORCEMENT ACT § 201(a)(1), 9 U.L.A. 671 (1999). One of the main objectives of the PKPA was to prevent a parent from kidnapping his or her child and allowing the state to which the child was taken to have jurisdiction over the case. Melissa Crawford, Note, In the Best Interests of the Child? The Misapplication of the UCCJA and the PKPA to Interstate Adoption Custody Disputes, 19 VT. L. REV. 99, 99-100 (1994). Although the moving of the biological or adoptive parent with the child to a jurisdiction against same-sex unions is not kidnapping, it is effectively an end run around the PKPA because it accomplishes the same result the PKPA sought to avoid; the parent with the child gets to choose the state of jurisdiction. See 28 U.S.C. § 1738A; see also Christopher L. Blakesley, Comparativist Ruminations from the Bayou on Child Custody Jurisdiction: The UCCJA, the PKPA, and the Hague Convention on Child Abduction, 58 LA. L. REV. 449, 467 (1998) (defining child abduction as "when one parent breaches another's right to custody by removing the child from his 'home state' or 'habitual residence' and takes him to another jurisdiction, or when the parent retains the child in contravention of another's custodial rights or interests").}
\end{itemize}
Virginia, though applicable in any state that prohibits same-sex unions: “Virginia could become the Las Vegas of gay divorces. You would simply pack up and move to Virginia, and your partner would have no rights . . . .” 159 A uniform standard is needed in the states that prohibit same-sex unions to prevent forum shopping and reduce the uncertainty and inconsistency found in past court decisions. 160

B. Possible Standards and Their Advantages and Disadvantages

1. Biological Parent Presumption

There are several options to achieve a uniform standard in child custody and visitation disputes between former same-sex couples. One option is to award child custody solely to the biological or adoptive parent and deny visitation to the non-biological, non-adoptive partner on the ground that these individuals have no standing to assert parental rights. 161 This logic would fall in line with the rationale that previous courts have used to deny parental rights to the non-biological, non-adoptive partner by presuming that interference with a biological parent is unwarranted unless the parent is unfit. 162 Applying this rationale to the Miller-Jenkins case, Lisa, because she is the biological mother of Isabella, would be awarded sole legal and physical custody of her daughter. 163

This standard, however, would likely fail on constitutional grounds because various members of the United States Supreme Court have indicated that biology alone is not enough; a child’s right to maintain a relationship with a third party should also be taken into consideration. 164 This view is supported by the fact that the Supreme Court has denied custody or visitation to biological parents in cases where no previous


160. See, e.g., Kaas, supra note 154, at 1128 (arguing that “a unitary test, or at least consistently defined standards” should be created because a uniform standard would prevent forum shopping); Velte, supra note 99, at 256 (arguing that the present state laws are inconsistently applied and that courts should seek consistency and predictability in child custody and visitation cases); Warzynski, supra note 103, at 752 (arguing that “[b]ecause [none of the courts of the respective states] apply exactly the same standard, inconsistency and uncertainty in the law linger”).


162. See Kazmierazak, 736 So. 2d at 109; Jones, 2002 WL 940195, at *7.

163. See supra Part II.B.2(b).

relationship with the child existed. This view is additionally supported by the fact that state courts have granted custody or visitation rights to some third parties who did form a relationship with the child.

2. Public Policy Exception

A second option for a uniform standard would be for states to utilize the public policy exception embodied in the Restatement (Second) of Conflict of Laws. Forty-four states have mini-DOMAs, or a functionally equivalent statute, outlining that state's refusal to recognize same-sex unions. Presuming such laws are constitutional, courts could refuse to hear these cases or grant sole legal and physical custody to the biological or adoptive parent based on their public policy against same-sex unions. If a court chooses not to hear the case, the parties would have to seek another forum, possibly the forum in which the union was created, thus requiring the application of that state's law. For example, if the same-sex union was formed in California or Vermont, these states have statutes that specifically state that both members of the same-sex


166. See, e.g., In re Robin N., 9 Cal. Rptr. 2d 512, 516 (Ct. App. 1992); Francis v. Francis, 654 N.E.2d 4, 7 (Ind. App. 1995). In addition, commentators state that the parental right to be free of state interference in the care and custody of a child may not be as fundamental as once thought, based on the Court's analysis in Troxel, which involved a balancing test more reminiscent of intermediate scrutiny than strict scrutiny. See, e.g., Emily Buss, Adrift in the Middle: Parental Rights After Troxel v. Granville, 2000 SUP. CT. REV. 279, 302-03 (arguing that "the court has strayed from the fundamental rights approach" because the Court in Troxel implied that harm to the child is not necessary for state involvement, refused to announce a standard, appeared to embrace the best interests of the child standard which would impair the right of the parent to determine who can visit with a child, and refused to find that litigation over custody harmed the parent's effectiveness in raising a child); Bell, supra note 98, at 242-43 (arguing that the Court "applied a middle-tier balancing analysis" which is reminiscent of "intermediate scrutiny, requiring a balancing of parents' rights against the state's authority to intervene for the welfare of children").

167. RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 283 (1971). This option assumes that because these states refuse to recognize relationships based on a same-sex union, they will also refuse to recognize any rights that flowed from that same-sex union, including child custody and visitation rights.

168. Supra note 94.

169. See, e.g., Burns v. Burns, 560 S.E.2d 47, 49 (Ga. Ct. App. 2002) (refusing to dissolve a civil union formed in Vermont). The Georgia court relied on the state's mini-DOMA, only recognizing a union between one man and one woman, and on the Full Faith and Credit Clause to hold that it had "no jurisdiction whatsoever under any circumstances to grant a divorce or separate maintenance with respect to such marriage or otherwise to consider or rule on any of the parties' respective rights." Id. at 49.

couple are joint parents of the child. Because California and Vermont have statutes on point, most likely, the biological or adoptive parent, such as Lisa in the *Miller-Jenkins* case, would retain legal and physical custody of the child, but the non-adoptive, non-biological partner, such as Janet, would receive visitation rights. However, if the second forum was also a state that had a public policy against same-sex unions, that state could refuse to hear the case, forcing the parties to seek yet another forum. This solution is neither practical nor beneficial and demonstrates how the forum can dictate the outcome of a case.

If a state that does not recognize same-sex unions chooses to hear the case, the probable result is that the non-adoptive, non-biological partner, such as Janet in the *Miller-Jenkins* case, would not be recognized as a parent to the child and would receive no custody or visitation rights. This eventuality was later confirmed in the *Miller-Jenkins* case, when the Virginia court held that Lisa was Isabella’s sole parent and that Janet had no parental rights.

### 3. Best Interest

The aforementioned two options do not take into account the other individual who is involved in these proceedings – the child. The third option would be to look solely to the best interest of the child. Many scholars have argued that with the changing dynamics of families to include children forming psychological bonds with third parties, the presumptive deference given to biological parents is no longer warranted and that the child’s right to continue the relationship should be given

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171. *See* CAL. FAM. CODE § 297.5(d) (West 2004); VT. STAT. ANN. tit. 15, § 1204(f) (2000).


173. *See*, e.g., *Burns*, 560 S.E.2d at 49.

174. *See*, e.g., Warzynski, *supra* note 103, at 752 (arguing because states do not apply a uniform standard, “parents involved in custody [or visitation] disputes lack adequate guidance in decision-making”). As Judge Cohen states in the *Miller-Jenkins* case, “the judicial system as a whole simply cannot allow parties to try to take advantage of legal and cultural differences which may make one state favor the position of a particular party over another.” *Miller-Jenkins*, No. 454-11-03 Rddm, at 6 (Vt. Rutland County Fam. Ct. Sept. 2, 2004) (order granting contempt motion).


178. *See supra* Part II.A.
greater weight. Even the United States Supreme Court is beginning to back away from complete deference to the wishes of biological parents; one commentator noted how “it appears that at least six of the [current] justices would weigh children’s interest in protection of intimate relationships in the balance of constitutional rights.”

Justice Stevens has gone so far as to say that a child’s right to maintain “familial or family-like bonds [is] fundamental.”

In determining the best interest of the child in custody and visitation disputes involving same-sex individuals, courts frequently rely on same-sex parenting studies. Much of the research done to date has found few differences between children reared by one or two homosexual parents as opposed to heterosexual parents. However, many commentators criticize these studies as having significant methodological flaws that prevent any generalizations to be drawn. Additionally, some of these


180. Woodhouse, supra note 164, at 113.


183. See, e.g., Judith Stacey & Timothy J. Biblarz, (How) Does the Sexual Orientation of Parents Matter?, 66 AM. SOC. REV. 159, 159 (2001); Tye, supra note 7, at 92. One frequently cited commentator, Charlotte J. Patterson, succinctly summarizes the research by stating:

Overall, the picture emerging from social science research on children with lesbian and gay parents is very positive. Based on the research literature, there is no reason to believe that children of lesbian or gay parents are behind their peers in any aspect of personal or social development. In other words, the biases against lesbian and gay families are unsubstantiated, based solely on prejudice.

Charlotte J. Patterson, Adoption of Minor Children by Lesbian and Gay Adults: A Social Science Perspective, 2 DUKE J. GENDER L. & POL’Y 191, 200-01 (1995); see also Ball & Pea, supra note 37, at 271 (arguing that the research shows that homosexuals “who are in a committed relationship can provide a structured and supportive form of familial care giving”); Kathryn Kendall, Sexual Orientation and Child Custody, TRIAL, Aug. 1999, at 42, 42 (stating that research has found no differences in “gender identity, sexual orientation, self-esteem, and social adjustment” of children reared by homosexual parents as opposed to heterosexual parents).

184. See, e.g., LERNER & NAGAI, supra note 182, at 3, 21, 29-30, 69 (evaluating forty-nine same-sex parenting studies and finding such problems as unclear or inappropriate hypotheses, lack of control for extraneous variables, inadequate or no control groups, researcher bias, sampling deficiencies, and flawed statistical analyses which preclude
same commentators argue that other studies show that children reared by homosexual parents are more likely to develop high-risk behaviors such as sexual promiscuity, gender identity confusion, and anxiety, lending weight to the view that it is in the child's best interest to be raised exclusively by heterosexual parents.\(^{185}\)

The results are arguably inconclusive, but they do not rule out the possibility that it is in the child's best interest to be with a loving family regardless of the parents' sexual orientation.\(^{186}\) However, critics argue that the best interest standard is too amorphous and flexible, allowing judges to let their personal feelings dictate their judgment and leaving parents to guess how their cases will be resolved.\(^{187}\)

Applying the traditional best interest of the child standard to the *Miller-Jenkins* case, Janet should, at the very least, be granted visitation.

generalizations from being made); George Rekers & Mark Kilgus, *Studies of Homosexual Parenting: A Critical Review*, 14 REGENT U. L. REV. 343, 346-53, 361 (2001-2002) (criticizing current same-sex parenting studies for such problems as sampling deficiencies, lack of anonymity of research participants, inaccurate reporting of findings, and design problems); Wardle, *supra* note 152, at 846-51 (discussing the deficiencies in same-sex parenting studies which include small sample size, convenience samples, inadequate control groups, lack of control for extraneous variables, researcher bias, and improper analysis); see Affidavit of Steven Lowell Nock at 39, *Halpern*, 2002 Can. LII 42749 (finding that the only conclusion to be drawn from existing studies is that further research is necessary because of the studies reviewed “[n]ot a single one was conducted according to generally accepted standards of scientific research”).

185. Wardle, *supra* note 152, at 852-57; see also Lynne Marie Kohm, *Moral Realism and the Adoption of Children by Homosexuals*, 38 NEW ENG. L. REV. 643, 665 (2004) ("[I]t is in the best interests of every child to have a mother and a father who are married to each other."). Wardle argues that heterosexual parenting is best “because there are gender-linked differences in child-rearing skills,” Wardle, *supra* note 152, at 857, and “just as a mother’s influence is crucial to the secure, healthy, and full development of a child, ‘a paternal presence in the life of a child is essential to the child emotionally and physically,’” *id.* at 860 (alteration in original) (quoting Kyle D. Pruett, *The Paternal Presence*, 74 FAMILIES SOC’Y 46, 46 (1993)). But see Stacey & Biblarz, *supra* note 183, at 177. Stacey and Biblarz agree that there are differences between children reared by homosexual parents compared to heterosexual parents, but contend that “[t]hey cannot be considered deficits from any legitimate public policy perspective [and that] [t]hey either favor the children with lesbigay parents, are secondary effects of social prejudice, or represent ‘just a difference’ of the sort democratic societies should respect and protect.” *Id.*


187. See, e.g., Barbara Bennett Woodhouse, *Child Custody in the Age of Children’s Rights: The Search for a Just and Workable Standard*, 33 FAM. L.Q. 815, 820-22 (1999); Bell, *supra* note 98, at 254 (“Award or denial of visitation often amounts to little more than a good faith guess, based on a judge’s personal experience and preference, about what... serves the best interests of the child.”).
Janet has lived with Isabella since she was born in April of 2002, Isabella views Janet as a mother, and Janet has played a significant role in her upbringing. The relationship of the alleged parent and child and his or her parenting ability are factors that courts traditionally give significant weight when applying the best interest standard. Provided the court views Janet’s continuation in Isabella’s life as being in Isabella’s best interest, Janet should receive visitation rights.

4. Intended Parent Doctrine

Application of the intended parent doctrine, frequently used in surrogacy and artificial insemination cases, would be applicable to same-sex couples like Lisa and Janet. Under this standard, courts award custody and visitation rights to the individual(s) who intended to bring the child into existence. In the Miller-Jenkins case, the couple mutually decided to have a child, agreed that Lisa would carry the child, picked out the sperm donor together, and together, reared the child until separation. Therefore, under this doctrine, Lisa would likely be granted legal and physical custody of Isabella because of her status as the biological mother, but Janet would receive visitation rights because, if it were not for Janet’s involvement and intention to raise Isabella, Isabella may never have been conceived. However, the doctrine is not applicable to disputes involving an adopted child because of preexisting adoption laws and because the intent of the couple is not dispositive in those situations.

188. See supra note 101 and accompanying text.
189. Miller-Jenkins v. Miller-Jenkins, No. 454-11-03 Rddm (Vt. Rutland County Fam. Ct. Sept. 2, 2004) (order granting contempt motion); Kalita, supra note 14. Isabella refers to Lisa as “Mommy” and Janet as “Mama.” Kalita, supra note 14; see also Miller-Jenkins, supra note 130. Janet claims that she paid for three rounds of artificial insemination before Isabella was conceived and was the primary caregiver to Isabella in the early months after her birth. Miller-Jenkins, supra note 130. Janet has also contributed financially to Isabella’s care. See id.
190. See supra text accompanying note 101.
191. See supra note 189-90 and accompanying text.
192. See supra text accompanying note 117-18.
194. See Miller-Jenkins v. Miller-Jenkins, No. 454-11-03 Rddm (Vt. Rutland County Fam. Ct. September 2, 2004) (order granting contempt motion); see also Bergman, supra note 130; Miller-Jenkins, supra note 130.
195. See Kristine Renee H., 16 Cal. Rptr. 3d at 144-46.
196. See id. at 145-46. In adoption cases, the child at issue is already born so the rationale that the child would not have come into existence but for the actions of the couple is not dispositive. Cf. id. In addition, states have adoption laws and policies, which would presumptively govern. See Christensen, Simulacrum of Marriage, supra note 28, at 1763-64.
5. Statutory Construction

States could also rely solely on statutory construction and grant standing to a non-adoptive, non-biological partner only if his or her relationship to the child fits within a statute authorizing him or her to seek custody or visitation. However, most state statutes are very narrowly drawn and do not contemplate a same-sex partner seeking custody or visitation, automatically precluding a same-sex partner from seeking any rights to the child. Applying this option to the Miller-Jenkins case, Janet, as the non-biological, non-adoptive partner, would be excluded from asserting any rights to custody of or visitation with Isabella.

IV. MODIFIED BEST INTEREST STANDARD

As the above analysis illustrates, the problem with the current standards is that none effectively account for the interests of all the parties. Of these standards, the best interest of the child standard is the most appropriate because it is the only one to truly consider the child. However, the biological or adoptive parents’ rights must also be protected, and, for this reason, the partner seeking custody or visitation should be required to show that he or she is a psychological parent whose relationship warrants protection. Mandating application of the psychological parent doctrine would protect the biological or adoptive parent from frivolous litigation by an individual who has no significant connection with the child while at the same time keeping the best interest of the child paramount.

The four-part test developed in Wisconsin is the most appropriate method to apply the psychological parent doctrine. Special attention

197. See supra notes 122-24 and accompanying text.
199. See supra Part II.B.2(a).
200. This Comment restricts the argument for use of the modified best interest of the child standard to custody and visitation disputes between same-sex couples. Use of the standard in all other third-party child custody and visitation disputes is beyond the scope of this Comment.
201. See supra Part III.B.
202. See supra Part III.B.3.
203. See Troxel v. Granville, 530 U.S. 57, 65-66, 72-73 (2000) (plurality opinion); In re Custody of H.S.H.-K., 533 N.W.2d 419, 421 (Wis. 1995); see also supra notes 102-06 and accompanying text.
205. See E.L.M.C., 100 P.3d at 560; H.S.H.-K., 533 N.W.2d at 421; supra note 106 and accompanying text. The Rhode Island Supreme Court claims that the four-part test will
should be given to the first factor, the intent of the biological parent in permitting and fostering a relationship with the child.\textsuperscript{206} When a child is brought into a family, there is a significant amount of planning, time, effort, emotion, and money expended.\textsuperscript{207} Because the non-biological, non-adoptive partner expects significant involvement in rearing the child and has relied on that expectation, the intent of the biological or adoptive parent in permitting and fostering this arrangement deserves significant weight.\textsuperscript{208} In particular, a court should draw from California’s intended parent doctrine factors and focus on the biological or adoptive parent’s intent prior to the child’s birth and during the rearing of the child.\textsuperscript{209} Paying special attention to the conduct of the biological or adoptive parent prior to separation will prevent the parent from denying a claim of custody or visitation by his or her same-sex partner based solely on the fact that he or she regrets letting the partner into the child’s life.\textsuperscript{210} Denying custody or visitation to the same-sex partner because of such a claim would violate the child’s best interest because those “interests are not likely to run contrary to those of adults who choose to bring [a child] into being” and take active roles in rearing the child.\textsuperscript{211}

Although the best interest of the child standard is amorphous, the four-part test provides judges with specific criteria upon which to base a judgment and lessens the probability that his or her feelings will dictate

\textsuperscript{206} See Kristine Renee H. v. Lisa Ann. R., 16 Cal. Rptr. 3d 123, 145-46 (Cal. 2004), depublished and review granted, 97 P.3d 72 (Cal. 2004); V.C., 748 A.2d at 552; H.S.-K., 533 N.W.2d at 437.

\textsuperscript{207} Marjorie Maguire Shultz, Reproductive Technology and Intent-Based Parenthood: An Opportunity for Gender Neutrality, 1990 Wis. L. Rev. 297, 324.

\textsuperscript{208} See id.

\textsuperscript{209} Kristine Renee H., 16 Cal. Rptr. at 145; see supra Part II.B.1(b).

\textsuperscript{210} See E.L.M.C., 100 P.3d at 560; see also, Rubano, 759 A.2d at 976.

A Colorado court states:

The first factor contains an estoppel-like element and recognizes that, where a legal parent has fostered a parent-like relationship between her child and a nonparent, “the right of the legal parent [does] not extend to erasing a relationship between her partner and her child which she voluntarily created and actively fostered simply because after the party’s . . . separation she regretted having done so.”


\textsuperscript{211} Shultz, supra note 207, at 397.
the outcome. The four-part test also allows judges leeway to decide these disputes. These cases must be evaluated on an individual basis because their outcomes will have a substantial impact on the child's future; therefore, judges need flexibility to determine the best interest of the child. Other commentators have advocated similar standards, but this proposal is different because of its inclusion of the psychological parent doctrine as a mandatory element of the best interest standard, promotion of Wisconsin's four-part test, and special emphasis on the intent factor.

Applying the four-part test to the *Miller-Jenkins* case, Janet is a psychological parent to Isabella and should be allowed to continue a parent-child relationship with her. First, Lisa, the biological and legal parent, consented to and fostered Janet's relationship with Isabella. Lisa did not prevent Janet from forming a relationship with Isabella and, at first, permitted visitation even after she and Janet separated. Second, Janet and Isabella lived in the same household. Neither party denies that Janet, Lisa, and Isabella lived as a family. Third, Janet, the nonparent, assumed significant responsibilities in the care and upbringing of Isabella. Janet contributed to the expenses and took an active role

212. See Bell, supra note 98, at 254; supra notes 105-06 and accompanying text.
213. See Susan Tomaine, Comment, Troxel v. Granville: Protecting Fundamental Parental Rights While Recognizing Changes in the American Family, 50 CATH. U. L. REV. 731, 780 (2001) (arguing that "an open standing provision grants courts flexibility to provide a remedy to a nonparent [third party]").
214. See id.
215. See, e.g., Katharine T. Bartlett, Rethinking Parenthood As an Exclusive Status: The Need for Legal Alternatives When the Premise of the Nuclear Family Has Failed, 70 VA. L. REV. 879, 946-48 (1984) (advocating the psychological parent doctrine and focusing on the factors of physical custody of the child, mutuality, and consent, but not focusing on requiring an assumption of significant responsibilities to the child); Bell, supra note 98, at 275-76 (recommending psychosocial parent visitation statutes contain a clear and convincing evidence standard and focusing on the factors of living with the child, financial support, and a parent-child bond, but not on the intent of the biological or adoptive parent in fostering the relationship); Osborne, supra note 5, at 385, 392 (arguing for use of the psychological parent doctrine in relation to standing only); Silverthorn, supra note 21, at 924-25 (advocating the psychological parent doctrine only as it relates to standing and not as being encompassed in the best interest of the child standard).
216. See *In re H.S.H.-K.*, 533 N.W.2d 419, 421 (Wis. 1995).
217. See id.
219. See *H.S.H.-K.*, 533 N.W.2d at 421.
221. See *H.S.H.-K.*, 533 N.W.2d at 421.
in caring for Isabella. Fourth, Janet, the nonparent, established a dependent relationship with Isabella. Isabella bonded with Janet, having lived with her since she was born, and knew her as "Mama." Application of all four factors demonstrates that Janet is a psychological parent to Isabella and it would be in Isabella's best interest to maintain the relationship through at least visitation.

The proposed modified best interest standard does not change current law, only its application. Family law has evolved in the past to reflect changing family dynamics. For example, as women became more involved in the workforce and men more involved in childcare, upon divorce, joint custody was more often seen as in the child's best interest. Today, an increasing number of same-sex couples are having families together; the application of the best interest standard ought to reflect this change. Making application of the psychological parent doctrine a mandatory element will achieve this goal and continue the emerging trend of the Supreme Court and many states of being more open to allowing third parties to seek child custody and visitation.

V. CONCLUSION

Many same-sex couples are entering into unions and having children together. However, while a few states sanction same-sex unions, the majority of states have passed laws prohibiting them. A problem arises when the union dissolves and custody or visitation is sought in a state that does not recognize same-sex unions. Courts and commentators have not reached a consensus on the appropriate method to adjudicate these cases. A uniform standard is needed to prevent forum shopping and reduce the inconsistency found in past decisions. The standard that

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222. See Miller-Jenkins, supra note 130. Janet has paid child support and has provided Lisa with other necessities to aid her in caring for Isabella. Id.
223. See H.S.H.-K., 533 N.W.2d at 421.
225. See H.S.H.-K., 533 N.W.2d at 421; supra notes 217-24 and accompanying text.
226. See supra Part II.A. The best interest standard is still being used and being a psychological parent is a common factor in a best interest analysis. See supra note 96 and accompanying text. The only difference is that by making the psychological parent doctrine mandatory, the application of the best interest standard therefore changes. See supra notes 188-211 and accompanying text.
227. See KRAUSE ET AL., supra note 57, at 8.
229. See supra notes 5-6 and accompanying text.
should be applied is a modified best interest of the child standard with a mandatory psychological parent determination. This standard protects all parties while giving special attention to the child, who has the most to lose.