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Micah Has One Mommy and One Legal Stranger: Adjudicating Maternity for Nonbiological Lesbian Coparents

MELANIE B. JACOBS†

The tanker truck barreled through a blind intersection on a country road near Oklahoma City and smashed broadside into Nancy Springer's blue Subaru.

Nancy survived for only a few minutes. Her thirteen year-old son, Micah . . . [was] airlifted to a nearby hospital.

Micah had no father, but he told the hospital authorities repeatedly that he did have another mother—Nancy's former partner, who lived in Berkeley [California].

No one listened. No one dialed the phone numbers in California he kept giving them. Before Micah was taken to surgery for a badly broken left arm, he was already a ward of the court and on his way to becoming a foster child.

Micki Graham heard about the accident late that night when a Berkeley cop knocked on her door with the number of a children's hospital chaplain in Oklahoma.

...

"Mom," Micah said as Micki swept into his hospital room [the next] afternoon. "You got here."

But a judge had ruled six years earlier that, in the eyes of the law, Micki Graham wasn't mom. Now, in an Oklahoma hospital, that ruling meant that as soon as Micah was well enough, some couple would be taking him.¹

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1. Elaine Herscher, *Family Circle*, S.F. CHRON., Aug. 29, 1999, at 1Z1 (recounting the facts underlying the case of *Nancy S. v. Michele G.*, 279 Cal. Rptr. 212 (Ct. App. 1991)). For further discussion of *Nancy S.*, see *infra* Part III.B.1.

INTRODUCTION

Micah represents one of approximately ten million children being raised by same-sex parents in the United States.² While our country is undergoing a “gayby boom”³ and a growing number of children will be raised in “two mommy” households, our laws have not caught up with societal reality. Many lesbian couples are having children; but courts consider a child born to both a biological lesbian mother and a nonbiological lesbian mother (“lesbian coparent”⁴) to have one legal parent⁵ and one legal stranger.⁶ Even though these lesbian couples jointly make the decision to have children, the party who is artificially inseminated is a legal parent because of her biological tie, while the other party has no legal parental role because of her lack of biological connection to the child.⁷

This article addresses the status of a lesbian coparent who has made a decision with her partner to form a family, who often has participated in the artificial insemination process, and who has functioned in all ways as a parent, but

2. According to recent estimates by the American Bar Association, as many as ten million children within the United States currently live in families with same-sex parents. Valerie Kellogg, *How the Children of the Gay Baby Boom Are Faring*, NEWSDAY, July 10, 2001, at B10.

3. See *id.*; see also Ilene Chaykin, *Are Two Moms Better Than One?*, LOS ANGELES MAG., July 1, 2000 at 105 (discussing the unprecedented number of lesbian and gay parents).

4. I use the term “lesbian coparent” to refer to a nonbiological or nonadoptive mother who is the committed, lesbian partner of a child’s biological parent, who has fully participated in the decision to create a family, and who has functioned as a parent to the child.

5. The term “parent” has traditionally been defined through biology or adoption. Julie Shapiro, *De Facto Parents and the Unfulfilled Promise of the New ALI Principles*, 35 WILLAMETTE L. REV. 769, 771 (1999).

6. See *id.* at 770-72. Shapiro notes that within the dualistic realm of parent and non-parent, a non-parent is often treated by courts as a legal stranger. *Id.* at 770.

7. See 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, 508 (1990) (“A legally unrecognized lesbian mother is currently forced into the legal status of nonparent, or third party, in custody or visitation disputes.”). Thus, lesbian coparents, who have formed a family with the encouragement and agreement of their partner, are viewed as third parties—such as grandparents, aunts and uncles, stepparents, or foster parents—and not as a second parent, as in paternity or divorce cases. See also Karen Markey, Note, *An Overview of the Legal Challenges Faced by Gay and Lesbian Parents: How Courts Treat the Growing Number of Gay Families*, 14 N.Y.L. SCH. J. HUM. RTS. 721, 723 (1998).

lacks legal recognition of her parenthood under existing laws.⁸ Most courts currently employ third party visitation doctrine⁹ rather than a parental analytical framework when deciding custodial and visitation disputes involving a lesbian coparent. But this doctrine disadvantages lesbian coparents and is inadequate to meet their needs. I propose that courts use instead a statutory parental analytic framework—specifically, the Uniform Parentage Act (“UPA” or the “Act”)¹⁰—to adjudicate maternity for lesbian coparents, thereby conferring all of the rights and privileges of legal parenthood. Only by doing so will courts be able to fully protect the relationship between a child and her lesbian coparent.

Recently, several courts have used equitable doctrines to maintain contact between lesbian coparents and their children, but those doctrines are inferior to the use of the Uniform Parentage Act. Part I of this article discusses in greater detail the existing dilemmas faced by many lesbian coparents, as well as provides background on the UPA and the potential for use of the UPA’s maternity adjudication

8. I have chosen to focus my analysis on this narrow class because much of the existing case law and literature concerns these women. There are many other same-sex parent paradigms that are beyond the scope of this piece. For example, this article does not examine the issues involving lesbian couples in which one woman is the gestational mother and her partner is the genetic mother. See, e.g., Ryah Lilith, Note, *The G.I.F.T. of Two Biological and Legal Mothers*, 9 AM. U. J. GENDER SOC. POL’Y & L. 207 (2001). Furthermore, I have chosen to focus on lesbian coparents rather than gay coparents because of the different legal issues involved; for example, an unknown sperm donor has no parental rights, whereas the parental status of a surrogate mother may be less clear. While the Uniform Parentage Act may arguably be used to adjudicate parentage within a multi-parental framework, see, e.g., Theresa Glennon, *Somebody’s Child: Evaluating the Erosion of the Marital Presumption of Paternity*, 102 W. VA. L. REV. 1, 57 (discussing Louisiana’s recognition of three legal parents through acknowledgment of dual paternity, as well as decisions in two other states which appear similarly to open the door to recognition of dual paternity), this article uses a two-parent model to explore UPA application to a same-sex coparent.

9. Third party visitation doctrine is predicated on the notion that a child has one mother and one father and that any other person occupies the less privileged legal position of third party.

10. See UNIF. PARENTAGE ACT §§ 3, 21 (1973); UNIF. PARENTAGE ACT §§ 106, 201, 602 (2000). The UPA was originally promulgated in 1973 (“UPA 1973”), and substantially revised in 2000 (“UPA 2000”). Only Texas, however, has adopted UPA 2000. See 2001 Tex. Gen. Laws 821. The provisions of UPA 1973 are analyzed within this article’s text; where appropriate, a brief analysis of UPA 2000 is provided in accompanying footnotes.

provision to address the problems. Through a series of case studies, Part II reviews the current jurisprudential trend of using third party equitable doctrines such as *de facto* and psychological parent as a basis of affording a lesbian coparent access to her child upon termination of a relationship with her child's biological mother. Part II further analyzes the deficiencies inherent in those equitable doctrines for establishing maternity and for clarifying standing. Part III examines both the statutory language of the UPA and cases involving the UPA to illustrate that the UPA can and should be used to adjudicate lesbian coparent maternity, thereby conferring upon lesbian coparents full parental rights. This article concludes that the UPA provides the most consistent method for resolving disputes between lesbian coparents and their former same-sex partners and the most expedient and reliable method for legalizing a full parental relationship for lesbian coparents with their children.

I. BACKGROUND

Parenthood is most often legally determined by biology or adoption.¹¹ Furthermore, a child born to married parents is considered to have two legal parents.¹² Since same-sex couples cannot marry, two lesbians in a committed relationship, unlike their heterosexual counterparts, are not both considered the legal parents of a child born to their union.¹³ Although a growing number of states permit a

11. Shapiro, *supra* note 5, at 771.

12. See UNIF. PARENTAGE ACT § 4(a)(1) (1973); UNIF. PARENTAGE ACT § 204 (2000).

13. No states currently permit same-sex partners to marry and thirty-five states expressly forbid it. See National Gay and Lesbian Task Force, Map of Specific Anti-Same-Sex Marriage Laws in the U.S.—June 2001 (2001), available at <http://www.ngltf.org/downloads/marriagemap0601.gif> (last accessed Dec. 8, 2001); see, e.g., FLA. STAT. ANN. § 741.212(1) (West, Supp. 2001) (“Marriages between persons of the same sex entered into in any jurisdiction . . . or relationships between persons of the same sex which are treated as marriages in any jurisdiction . . . are not recognized for any purpose in this state.”); MICH. COMP. LAWS Ann. § 551.1 (West Supp. 2001) (“Marriage is inherently a unique relationship between a man and a woman. . . . A marriage contracted between individuals of the same sex is invalid in this state.”); 23 PA. CONS. STAT. ANN. § 1102 (West 2001) (defining marriage as “[a] civil contract by which one man and one woman take each other for husband and wife”). However, Vermont’s new civil union law operates in the same way as its marriage law and legalizes the parental relationship between a lesbian coparent and her child:

lesbian coparent to adopt the biological child of her partner (same-sex second parent adoption), thus legalizing the parental status of the lesbian coparent, many states still do not, thus limiting the ability of a lesbian coparent to be considered the child's legal parent.¹⁴ In states that do not recognize second parent adoptions by a same-sex partner, a lesbian coparent generally has no mechanism by which she can establish her legal parenthood.¹⁵ Moreover, even in states that do offer same-sex second parent adoption, not all eligible parties avail themselves of the opportunity,¹⁶ and a lesbian coparent may have no legal rights to continue her relationship with her child when the relationship terminates. Thus, children like Micah are routinely separated from a lesbian coparent who has nurtured and loved them because she is not a legal parent and has little legal recourse to protect her parental relationship. As Micah's

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.

Vt. STAT. ANN. tit. 15, § 1204(f) (Supp. 2000).

14. Compare *In re Adoption of B.L.V.B.*, 628 A.2d 1271 (Vt. 1993) (holding that lesbian could adopt her life-partner's biological children), and *In re Adoption of Tammy*, 619 N.E.2d 315 (Mass. 1993) (same), with *Angel Lace M. v. Terry M.*, 516 N.W.2d 678 (Wis. 1994) (denying lesbian's petition to adopt her life-partner's child). One author further notes:

More than 20 states have formally recognized second-parent adoption and others have allowed such adoptions in individual cases, without ruling on the practice generally. Wisconsin, Ohio and Colorado have rejected second-parent adoptions. Furthermore, Florida, Mississippi and Utah do not allow same-sex couples to adopt children [and Arkansas law prohibits gays from becoming foster parents.

John Leland, *State Laws Vary, But a Broad Trend Is Clear*, N.Y. TIMES, Dec. 21, 2000, at F4.

15. Although several states recognize a form of de facto or psychological parent to enable lesbian coparents to maintain contact with their children, these doctrines have been employed as a visitation tool and have not resulted in an adjudication of maternity. See, e.g., *V.C. v. M.J.B.*, 748 A.2d 539 (N.J. 2000) (finding that lesbian coparent was a psychological parent to twins and was properly awarded visitation with the children).

16. For instance, in several of the cases discussed herein, the parties had discussed second-parent adoption but had not finalized the process—perhaps because, like many couples, they did not foresee the imminent termination of their relationship. See, e.g., *V.C. v. M.J.B.*, 748 A.2d at 544; *E.N.O. v. L.M.M.*, 711 N.E.2d 886, 889 (Mass. 1999). Furthermore, many lesbian couples may be concerned about perceived homophobia or may be unfamiliar with the legal system and thus do not avail themselves of this option.

story illustrates, the consequences for a child who is separated from his lesbian coparent can be absolutely devastating.

The failure to treat a lesbian coparent as a legal parent denies her the full spectrum of parental rights that she has voluntarily assumed, and simultaneously disadvantages her child. Legal parenthood confers many rights and responsibilities on a parent, and affords a child many benefits.¹⁷ Statutes in every state provide for the custody, support, and maintenance of children born to heterosexual parents, whether married or unmarried.¹⁸ Moreover, an adjudication of legal parentage under the UPA entitles a child to receive child support,¹⁹ qualify as a dependent on her parent's health insurance,²⁰ collect Social Security benefits from her parent,²¹ sustain an action for wrongful death,²² recover under a state worker's compensation law,²³ and in many states, to inherit from her parent.²⁴ Persons

17. See *Michael H. v. Gerald D.*, 491 U.S. 110, 118-19 (1989).

18. See, e.g., UNIF. MARRIAGE & DIVORCE ACT § 309 (amended 1973), 9A U.L.A. 573 (1998); *id.* §§ 402, 407, 9A U.L.A. 298, 398; UNIF. PARENTAGE ACT §§ 15-18 (1973), 9B U.L.A. 465-66, 486-87 (2001).

19. *Gomez v. Perez*, 409 U.S. 535 (1973) (holding that children born out of wedlock are constitutionally entitled to the same right to support as afforded to children of married parents).

20. See, e.g., *City & County of San Francisco v. Funches*, 89 Cal. Rptr. 2d 49 (Ct. App. 1999) (affirming trial court's decree in paternity suit mandating a monthly award of child support and health insurance coverage for his child); *Martinez v. Agostini*, 579 So.2d 280 (Fla. Dist. Ct. App. 1991) (same); *Pensa v. Sklinor*, 547 So.2d 284 (Fla. Dist. Ct. App. 1989) (same); *In re C.D.D.*, No. 04-98-01023-CV, 2000 Tex. App. LEXIS 2522 (Ct. App. Apr. 19, 2000) (affirming trial court's judgment declaring paternity and ordering father to pay support and health insurance for his child); *In re Perez*, No. 04-95-00724-CV, 1997 Tex. App. LEXIS 736 (Ct. App. Feb. 12, 1997) (same); *De La Gorza v. Salazar*, 851 S.W.2d 380 (Tex. App. 1993) (same).

21. See, e.g., *Zahradnik v. Sullivan*, 966 F.2d 355 (8th Cir. 1992) (finding petitioner had established paternity for purposes of inheriting Social Security benefits under 42 U.S.C. § 416 (h)(2)(A)); *Barton v. Sullivan*, 774 F. Supp. 1151 (S.D. Ind. 1991) (same); *Donaldson v. Sec'y of Health & Human Servs.*, 567 F. Supp. 166 (W.D.N.Y. 1983) (same); *Burrus v. Heckler*, 1985 U.S. Dist. LEXIS 16136 (E.D. Pa. Sept. 10, 1985) (finding child born out of wedlock eligible for Social Security benefits where no evidence negated presumption of paternity).

22. *Levy v. Louisiana*, 391 U.S. 68 (1968) (ruling that Louisiana's Wrongful Death Act violated the Equal Protection Clause by denying recovery to a nonmarital child for the death of the mother).

23. See *Weber v. Aetna Casualty & Surety Co.*, 406 U.S. 164 (1972).

24. See, e.g., *Brady v. Smith*, No. E2000-01880-COA-R3-CV, 2001 Tenn. App. LEXIS 230 (Ct. App. Apr. 6, 2001) (finding children born out of wedlock sufficiently established deceased father's paternity by DNA evidence and were

who are not deemed legal parents often cannot provide these important benefits for a child with whom they have a parent-like relationship.²⁵ Lesbian coparents who are denied recognition of their parental status thus not only lose out on custodial benefits, their children are denied much of the financial security that other children with two parents receive as a matter of course.²⁶

Legal parenthood also has many intangible benefits. Without an adjudication of parentage, lesbian coparents have no legal authority to make important medical or educational decisions for their children,²⁷ or to influence religious or moral decisions.²⁸ From a child's perspective, the absence of lesbian coparent maternity adjudication may deny her the love, nurture, and guidance of a person with whom she has developed a parental bond. Through custody and visitation statutes,²⁹ legal parent status ensures for both parent and child the possibility of an ongoing emotional relationship. Unfortunately, lesbian coparents who seek to preserve their parental relationship with the child that they have helped raise, after the termination of their romantic relationship with the child's mother or after the biological lesbian mother dies, are often precluded from doing so because the law fails to recognize their parental status.³⁰

entitled to inheritance); *Malone v. Thomas*, 24 S.W.3d 412 (Tex. App. 2000) (affirming trial court's determination that child established deceased father's paternity and was entitled to inheritance).

25. See *Michael H. v. Gerald D.*, 491 U.S. 110, 118-19 (1989) (declining to declare biological father as child's legal parent and denying father any parental rights with respect to the rearing of his biological child).

26. See *id.*

27. See *id.*; see also *N.A.H. v. S.L.S.*, 9 P.3d 354, 359 (Colo. 2000) ("The determination of parenthood includes the right to parenting time; the right to direct the child's activities; the right to make decisions regarding the control, education, and health of the child; and the right to the child's services and earnings.").

28. See, e.g., *Michael H.*, 491 U.S. at 118-19; *N.A.H.*, 9 P.3d at 359 ("Legal [parenthood] imposes significant obligations . . . including . . . the obligation to teach moral standards, religious beliefs, and good citizenship.").

29. Both paternity and divorce statutes contain custody and visitation provisions to ensure that, in the absence of egregious behavior on the part of one parent, both parents can continue to actively participate in the parenting process. See UNIF. PARENTAGE ACT § 15 (1973), 9B U.L.A. 465-66 (2001); UNIF. MARRIAGE & DIVORCE ACT § 407 (amended 1973), 9A U.L.A. 398 (1998).

30. See, e.g., *Kazmierczak v. Query*, 736 So.2d 106 (Fla. 1999) (holding that lesbian coparent had no standing to proceed with visitation claim because psychological parent is not entitled to status equivalent to biological parent and

For lesbian coparents, attempts to gain legal recognition as parents are often unsuccessful.³¹ Federal and state law give significant deference to legal parents, thereby enabling a lesbian biological mother to bar her former partner and lesbian coparent from any involvement with the child.³² Many courts will not even entertain a lesbian coparent's petition for custody or visitation because a woman lacking a biological connection to her child is often deemed to lack standing to initiate court proceedings.³³ As Professor Rubenstein observed, "this is true notwithstanding the fact that biology may mean less in a family in which the child is the product of some form of alternative insemination and in which the genetic connection may not correlate, even loosely, with the provision of day-to-day care for the growing child."³⁴

The problem of standing illustrates that the lesbian coparent cases exist against a backdrop of longstanding parental autonomy. Parents have long enjoyed considerable autonomy concerning how they raise their children³⁵ and the Supreme Court has consistently held that parental rights should not be lightly intruded upon by third parties.³⁶

thus cannot overcome constitutional right to privacy hurdle); *Alison D. v. Virginia M.*, 572 N.E.2d 27 (N.Y. 1991) (holding that lesbian coparent was not a legal parent under state statute and that third party equitable doctrine could not apply to lesbian coparent such that she would be enabled to interfere with biological mother's constitutional right to custody and control of her child).

31. See, e.g., *Nancy S. v. Michelle G.*, 279 Cal. Rptr. 212 (Ct. App. 1991); *Alison D.*, 572 N.E.2d 27.

32. See *Nancy S.*, 279 Cal. Rptr at 216-17; *Alison D.*, 572 N.E.2d at 29. It has not escaped notice that it is reprehensible that lesbian biological parents use anti-gay sentiment and law to prevent their ex-partners from continued contact with their children. See Polikoff, *supra* note 7, at 542.

33. William B. Rubenstein, *Divided We Propagate: An Introduction to Protecting Families: Standards for Child-Custody in Same-Sex Relationships*, 10 UCLA WOMEN'S L.J. 143, 146 (1999).

34. *Id.*

35. See, e.g., Elizabeth Weiss, *Nonparent Visitation Rights v. Family Autonomy: An Abridgement of Parents' Constitutional Rights?*, 10 SETON HALL CONST. L.J. 1085 (2000).

36. See, e.g., *Troxel v. Granville*, 530 U.S. 57, 66 (2000) (finding unconstitutionally broad a Washington state statute which permitted any person to petition the court for visitation rights at any time and further allowed the court to order visitation rights for any such person when visitation served the best interests of the child, but did not adequately require that petitioners demonstrate a substantial relationship with the child nor that courts consider the parents' reason(s) for limiting visitation); *Wisconsin v. Yoder*, 406 U.S. 205, 232 (1972) ("The history and culture of Western civilization reflect a strong

Third party visitation doctrine is predicated on the notion that a child has one mother and one father and that any other person occupies the less privileged legal position of third party. Thus, third parties—including, among others, grandparents, stepparents, foster parents, and other relatives—are restricted in their ability to interact with a child against the legal parent's wishes, because to permit third parties unrestricted access to a child would violate the parent's constitutional rights of parental autonomy and privacy.³⁷

In their attempts to seek legal recognition of their parenthood and to maintain contact with their children, lesbian coparents have been treated as third parties.³⁸ Like other third parties, when a lesbian coparent seeks ongoing custody and visitation with the biological child of her same-sex partner, she is often unsuccessful in overcoming the constitutional principles of parental autonomy and privacy.³⁹ Traditionally, a third party could only assert a claim for custody of a nonbiological child if she could establish that the biological parent was unfit.⁴⁰ In lesbian

tradition of parental concern for the nurture and upbringing of their children. This primary role of the parents in the upbringing of their children is now established beyond debate as an enduring American tradition."); *Meyer v. Nebraska*, 262 U.S. 390, 399 (1923) (holding that the liberty interest guaranteed by the Fourteenth Amendment includes the right to "establish a home and bring up children" without state interference).

37. See Ruthann Robson, *Third Parties and the Third Sex: Child Custody and Lesbian Legal Theory*, 26 CONN. L. REV. 1377, 1385 (1994).

38. Courts have increasingly used third party visitation doctrines such as psychological and de facto parent to preserve visitation between a lesbian coparent and her child, but not as a way to adjudicate the lesbian coparent's maternity. See, e.g., *V.C. v. M.J.B.*, 748 A.2d 539 (N.J. 2000) (finding that lesbian coparent was a psychological parent to twins and was properly awarded visitation with the children); *E.N.O. v. L.M.M.*, 711 N.E.2d 886 (Mass. 1999) (holding that lesbian coparent was a de facto parent and probate court properly entered order permitting visitation between lesbian coparent and child).

39. See, e.g., *In re Thompson*, 11 S.W.3d 913, 923 (Tenn. 2000). In upholding a biological mother's right to maintain full custody and control of her children in accordance with constitutional principles, the court stated:

While Tennessee's legislature has generally conferred upon parents the right of custody and control of their children, it has not conferred upon [a lesbian coparent] any right of visitation. Absent any statutory authority establishing such a third-party's right to visitation, parents retain the right to determine with whom their children associate.

Id. (citation omitted).

40. An allegation of parental unfitness may overcome the general presumption that a parent has a fundamental right to the care and custody of her child. See, e.g., *V.C.*, 748 A.2d at 548-49 ("[I]f there is a showing of

coparent cases, however, the biological parent is ordinarily not unfit, thereby rendering the lesbian coparent petitioner's claim for custody meritless.⁴¹

Unfortunately, by categorizing lesbian coparents as mere third party petitioners or "legal strangers," courts overlook the actual parental relationship that has been established. Lesbian coparents are anything but third parties—they are involved, nurturing, loving, and supportive parents. Lesbian coparents are different from traditional third parties because they intend and plan, with their partner's agreement and encouragement, to be a parent. Lesbian coparents thus actively participate in the decision to create a family and, indeed, function as parents. But, because under existing law and court practice lesbian coparents are not protected by state divorce or parentage statutes, they are denied legal recognition of their actual parental role.⁴²

Through categorization alone, many courts have deemed lesbian coparents something "other than" or "less than" parents and approach the issue of lesbian coparenting from a third-party perspective rather than a second-parent perspective.⁴³ In typical paternity disputes,⁴⁴ courts do not treat the putative father⁴⁵ as a mere third party—rather, they treat the putative father as the child's *other* parent,

unfitness, abandonment or gross misconduct, a parent's right to custody of her child may be usurped."); see also *Troxel*, 530 U.S. at 68-69 ("[S]o long as a parent adequately cares for his or her children (*i.e.*, is fit), there will normally be no reason for the State to inject itself into the private realm of the family to further question the ability of that parent to make the best decisions concerning the rearing of that parent's children.").

41. See, e.g., *Cotton v. Wise*, 977 S.W.2d 263, 265 (Mo. 1998) (requiring unfitness, abandonment, or extraordinary circumstances before terminating parental rights).

42. Tsippi Wray, *Lesbian Relationships and Parenthood: Models for Legal Recognition of Nontraditional Families*, 21 *HAMLIN L. REV.* 127, 131-32 (1997).

43. See generally Robson, *supra* note 37.

44. By typical paternity dispute, I refer to the situation in which only two parents, one mother and one father, are parties to the action. This is in contrast to a situation in which three potential parents, one mother and two fathers, are involved. For a discussion of this "atypical" paternity dispute, see *infra* Part III.A.

45. "Putative father" is defined as "the alleged or reputed father of a child born out of wedlock." *BLACK'S LAW DICTIONARY* 1237 (6th ed. 1990). As discussed below, a putative father may have no biological connection whatsoever to the child for whom he may be adjudicated the legal parent. See *infra* Part III.A.

within a parental analytic framework.⁴⁶ For example, in adjudicating paternity disputes, courts do not resolve by piecemeal decision-making a part of the parental dispute—such as visitation—but resolve the entire bundle of parental rights, including custody, visitation, child support, health insurance, and parentage adjudication. The paradigm of traditional third party doctrine disadvantages a lesbian coparent: it categorizes her as a “legal stranger” and thereby distances her from the parental framework.

Rather than applying third party visitation doctrine as a piecemeal remedy for lesbian coparents, courts should instead use a parental analytic framework—specifically, the Uniform Parentage Act—to adjudicate maternity for lesbian coparents. Just as nonbiological fathers can, and do, obtain parentage adjudications under the UPA,⁴⁷ lesbian coparents should also be able to obtain legal declarations of parentage. The text of the Act lends itself to such an application, as the UPA includes a provision for a declaration of maternity.⁴⁸

Using the UPA would enable courts to legalize the relationship between children and their lesbian coparents by properly placing lesbian coparents within the parental framework and thus allowing them (and their children) to realize all of the benefits discussed above. In fact, the UPA’s

46. UNIF. PARENTAGE ACT § 6 (1973), 9B U.L.A. 302 (2001). A putative father has a clear basis for standing upon which to bring his claim; courts require him to prove his parenthood, but do not require him to master the standing or jurisdictional gymnastics that lesbian coparents, as third party legal strangers, are required to perform. *Id.*

47. See discussion *infra* Part III.A.

48. UNIF. PARENTAGE ACT § 21 (1973), 9B U.L.A. 334 (2001); see *infra* notes 165-67 and accompanying text. Fourteen states have adopted the UPA 1973 provision that would allow for adjudication of maternity. See ALA. CODE §§ 26-17-4, 26-17-18 (1992); CAL. FAM. CODE § 7610 (West 1999); COLO. REV. STAT. ANN. § 19-4-104 (West 1999); HAW. REV. STAT. §§ 584-1 to 584-21 (1993); 750 ILL. COMP. STAT. 45/4, 45/19 (West 1999); MO. ANN. STAT. §§ 210.819, 210.848 (West 1996); MONT. CODE ANN. §§ 40-6-104, 40-6-121 (2001); NEV. REV. STAT. ANN. §§ 126.041, 126.071 (Michie 1998 & Supp. 2001); N.M. STAT. ANN. § 40-11-4, 40-11-21 (Michie 1999); N.D. CENT. CODE § 14-17-03, 14-17-20 (1997); OHIO REV. CODE ANN. §§ 3111.02, 3111.17 (Anderson 2000); R.I. GEN. LAWS § 15-8-26 (2000); WASH. REV. CODE ANN. §§ 26.26.030, 26.26.170 (West 1997); WYO. STAT. ANN. §§ 14-2-101, 14-2-118 (Michie 2001). Additionally, three non-UPA states have similar provisions that would allow for adjudication of maternity. See ARIZ. REV. STAT. ANN. § 25-803 (West 2000); MASS. GEN. LAWS ANN. ch. 209C, § 21 (West 1998); N.J. STAT. ANN. § 9:17-45 (West 1993). UPA 2000 similarly contains a provision permitting maternity adjudication. UNIF. PARENTAGE ACT § 106 (2000).

maternity provision has been used by at least one state's supreme court as the procedural basis upon which to hear a lesbian coparent dispute,⁴⁹ and lower courts in several states have used the UPA's maternity provision to adjudicate maternity for a lesbian coparent.⁵⁰ While only eighteen states have adopted the UPA's maternity provision, all states should consider adopting the provision: Maternity adjudication under the UPA offers the most consistent method of legitimizing the lesbian coparent/child relationship and best protects a lesbian coparent and her child.⁵¹

Moreover, when the UPA was promulgated more than thirty years ago, the drafters sought to protect equally the rights of children born to unmarried heterosexual parents and those of children born to married heterosexual parents.⁵² The legislation was prompted by concerns for the unjust financial and emotional ramifications associated with having only one legal parent.⁵³ Yet the concerns today for children born to unmarried lesbian parents are the same as those for children born of unmarried heterosexual parents thirty years ago: children need the financial and emotional security that comes with having two parents. And parents need the security that comes with having the enforceable legal rights of parenthood.

Using the UPA to adjudicate maternity would resolve much of the murkiness that now exists in lesbian coparent disputes. Courts would be able to use the UPA to confer all of the rights and responsibilities of parenthood upon lesbian coparents—as is typical in paternity cases—both after the dissolution of a lesbian relationship and *prior* to such

49. See *Rubano v. DiCenzo*, 759 A.2d 959 (R.I. 2000).

50. See Shannon Minter & Kate Kendell, *Beyond Second-Parent Adoption: The Uniform Parentage Act and the "Intended Parents"—A Model Brief*, 2 GEO. J. GENDER & L. 29, 32-33 (2000). The authors note that California and Colorado trial courts and a Massachusetts probate court have all granted parentage decrees to lesbian coparents under the UPA. *Id.* at 33 nn.27-28 (citing *In re Twin A & Twin B*, No. 99 JV (Colo. Dist. Ct. 1999) and *M.K. & C.P. v. Med. Ctr., Inc.*, No. 00W 1343 (Mass. Prob. & Fam. Ct. 2000)).

51. Using the UPA to adjudicate maternity is suggested as a preferred alternative to same-sex second parent adoption, which accomplishes the same goal, because UPA maternity adjudication is faster and less expensive than an adoption and begins from the premise that the nonbiological mother is, in fact, the child's parent. See *infra* notes 57-58 and accompanying text.

52. UNIF. PARENTAGE ACT, Prefatory Note (1973), 9B U.L.A. 289 (2001).

53. *Id.* at 288.

dissolution.⁵⁴ Additionally, the UPA provides a clear, consistent basis of standing to lesbian coparents for parent custody and visitation disputes. Third party equitable doctrines such as *de facto* parenthood and psychological parenthood can be employed within the parental framework of the UPA to adjudicate maternity.⁵⁵

Moreover, using the UPA, courts would be able to appropriately apply a parental analytic framework in lesbian coparent disputes, akin to that employed in heterosexual paternity disputes and heterosexual divorces.⁵⁶ Adjudication under the UPA is advantageous for lesbian coparents because establishing maternity under the UPA can be done more quickly and cheaply than with second-parent adoption.⁵⁷ Furthermore, a complaint under the UPA need not initiate an adversarial proceeding; for instance, parties can file a written voluntary acknowledgment of parentage with the court, in lieu of filing a complaint, which would have the same force and effect as an adjudication of maternity.⁵⁸ Filing of a maternity petition, before or after the child's birth, can immediately legalize the relationship between the child and her lesbian coparent and provide absolute protection of the relationship in the event of the

54. While paternity statutes may be implemented in adversarial situations, the UPA clearly anticipates voluntary paternity adjudications in some cases. UNIF. PARENTAGE ACT §§ 4, 6 (1973), 9B U.L.A. 298-99, 302-03 (2001).

55. See discussion *infra* Part III.A. Paternity adjudication does not merely legitimize the child, it legitimizes the father of the child, by recognizing his legal entitlement to a parental relationship. See *Michael H. v. Gerald D.* 491 U.S. 110, 118-19 (1989). Similarly, maternity adjudication would provide necessary legal recognition and protection for millions of lesbian families.

56. See UNIF. PARENTAGE ACT § 15 (1973), 9B U.L.A. 324-25 (2001); UNIF. MARRIAGE & DIVORCE ACT § 407 (amended 1973), 9A U.L.A. 398 (1998).

57. Emily Doskow, *The Second-Parent Trap: Parenting for Same-Sex Couples in a Brave New World*, 20 J. JUV. L. 1, 21 (1999).

An adoption [in California] takes six to eight months to complete, and cannot be commenced until after the child's birth. The DSS [Department of Social Services] charges a fee of \$1,250 for its investigation. In contrast, the UPA petition can be filed prior to the child's birth if desired, and because there is no DSS investigation, there is no \$1,250 fee.

Id. at 21 n.118 (citation omitted).

58. See, e.g., MASS. GEN. LAWS ANN. ch. 209C, § 11(a) (West 1998). In addition to the acknowledgment of parentage, the parties can also file a parenting agreement, which reflects their intentions concerning support, custody, visitation, and the like. *Id.* For purposes of establishing maternity, a coparenting agreement further exemplifies to the court the parties' joint intention to create a "two mommies" family.

dissolution of the lesbian relationship or the biological mother's death. Thus, the UPA offers the most reliable method for legalizing a full parental relationship for lesbian coparents with their children.

II. HOW COURTS APPLY THIRD PARTY EQUITABLE DOCTRINE TO LESBIAN COPARENT DISPUTES: THREE CASE STUDIES

When lesbian couples who have children dissolve their romantic relationships, they do not have the luxury of turning to a marital dissolution statute for guidance concerning the continued care, maintenance, and education of their children.⁵⁹ Lesbian coparents, without any biological tie to a child with whom they have developed a parental relationship, are often without legal recourse to preserve their parenthood.⁶⁰ In the last decade, however, several state courts have permitted lesbian coparents ongoing visitation with their nonbiological children.⁶¹ Balancing the importance of a biological parent's constitutional rights in raising her child against the "right" of a lesbian coparent to maintain an ongoing parental relationship with a child, several courts have sought to define parameters under which a parent-like relationship can be established without infringing on the biological parent's rights.⁶²

These cases have relied upon general third party equitable principles to provide standing for the petitioning lesbian coparent.⁶³ Unfortunately, although these courts

59. See UNIF. MARRIAGE & DIVORCE ACT § 309 (amended 1973), 9A U.L.A. 573 (1998) (setting forth guidelines for calculating child support in a proceeding for dissolution of marriage).

60. See *supra* notes 32-33 and accompanying text.

61. See, e.g., *Holtzman v. Knott*, 533 N.W.2d 419, 421 (Wis. 1995); *E.N.O. v. L.M.M.*, 711 N.E.2d 886, 890 (Mass. 1999); *V.C. v. M.J.B.*, 748 A.2d 539, 548 (N.J. 2000).

62. *Holtzman*, 533 N.W.2d at 436 (invocation of general equitable principles to preserve the rights of a lesbian coparent must be exercised in a manner that protects a biological parent's autonomy and constitutional rights); *E.N.O.*, 711 N.E.2d at 893 (finding that the rights of parents to the care and custody of their children is not absolute and that the biological mother's interest in protecting her custody of her child must be balanced against the child's interest in maintaining the relationship with her de facto parent); *V.C.*, 748 A.2d at 548-9 (finding that the rights of parents to the care and custody of their children is not absolute, thereby opening the door to the psychological parent doctrine).

63. *Holtzman*, 533 N.W.2d at 421 (finding that existing visitation statutes did not preempt the "courts' long recognized equitable power to protect the best interest of a child by ordering visitation under circumstances not included in

recognized the importance to the children of an ongoing parent-child relationship, the courts' decisions still did not sufficiently resolve the conflicts, because no adjudication of legal parentage was conferred upon the petitioner lesbian coparents. Without recognizing legal parenthood, courts only "fix" a part of the problem (visitation) and ignore the many other emotional and financial benefits of legal parenthood that children of lesbian coparents are denied. While courts recognizing the rights of lesbian coparents have made tremendous strides in preserving the interests of the nontraditional family, these courts have not done enough to fully protect the interests of the children and their nonbiological parents. Equitable principles alone are not sufficient to adequately address the lesbian coparent dilemma.

The highest courts in three states that, in seminal lesbian coparent dispute cases, have permitted ongoing access by a lesbian coparent to her nonbiological child, have employed various third party equitable doctrines in rendering their decisions. Whether the court deemed the lesbian coparent to be in a parent-like relationship, a psychological parent, or a *de facto* parent, these quasi-parental designations allowed the petitioners to participate in a best interests custody/visitation analysis. Notwithstanding the positive effect of applying these quasi-parental doctrines to the petitioners, the result of these decisions is that the lesbian coparent clearly occupies a much inferior status to that of the biological parent, because quasi-parental doctrines do not confer a status comparable to legal parenthood.⁶⁴ Despite facts in all three cases that clearly suggest a two parent family (comprised of "two mommies")—which would otherwise dictate that the courts should analyze the cases using a parental analytic framework, as in paternity or divorce—the courts relied on

the statute"); *E.N.O.*, 711 N.E.2d at 890 ("The court's duty as *parens patriae* necessitates that its equitable powers extend to protecting the best interests of children in actions before the court, even if the Legislature has not determined what the best interests require in a particular situation."); *V.C.*, 748 A.2d at 548 (invoking the court's equitable power to broadly interpret New Jersey's definition of "parent" to include a person who is not related to the child by blood or adoption but has stood in a parental role with the child, thereby permitting a best interests analysis).

64. See *infra* notes 110-11 and accompanying text.

an expansion of third party doctrine to preserve the lesbian coparent's relationship with her child(ren).

A. *Parent-like Relationship*

In *Holtzman v. Knott*, the Wisconsin Supreme Court held that a lesbian coparent should be permitted to maintain an ongoing relationship with the biological child of her same-sex partner if certain criteria are met.⁶⁵ Holtzman and Knott were in a long-term committed relationship when they decided to have a child.⁶⁶ The couple agreed that Knott would conceive by artificial insemination, and their child was born on December 15, 1988.⁶⁷ Within their circle of family and friends, both women were clearly considered the baby's parents: the baby's name was fashioned using first and middle names from each of their families and the surname was a combination of both of their last names; both women were named the child's parents at their child's dedication ceremony at their church; and Holtzman's parents were recognized by the couple as the baby's grandparents and her sister as the baby's godmother.⁶⁸ For the next five years, the couple shared child-care responsibilities, while Holtzman provided primary financial support for the family.⁶⁹ The relationship soured in 1993, with Knott ultimately bringing an action to prevent Holtzman from having any contact with her or with their child.⁷⁰ Holtzman then filed a petition for custody and a petition for visitation.⁷¹ The circuit court denied Holtzman's petitions, finding that Wisconsin law did not recognize "the alternate type of relationship which existed in this case" and further, that there was no basis for relief.⁷²

65. 533 N.W.2d at 421 (articulating a four-prong test to demonstrate the existence of a parent-child relationship as a means of establishing standing and triggering a best interests analysis for ongoing visitation); see *infra* text accompanying note 78. *Holtzman* is often cited as *In re Custody of H.S.H.-K.*

66. *Id.*

67. *Id.*

68. *Id.* at 422.

69. *Id.*

70. *Id.*

71. *Id.*

72. *Id.* at 423. However, the court also stated:

There are an increasing number of children in this society for whom the mother is the only known biological parent. Frequently that mother forms a lengthy relationship living with another person, be they man

On appeal, the Wisconsin Supreme Court upheld the lower court's determination that Holtzman did not have a viable custody claim,⁷³ but ruled that she could proceed with her claim for visitation. Holtzman asserted that Wisconsin's visitation statute provided jurisdiction for her visitation claim.⁷⁴ The Wisconsin Supreme Court disagreed and determined that the statute only applied to those visitation claims by third parties arising in connection with a divorce.⁷⁵ However, the court concluded that the legislature did not intend the statute to "occupy the field of visitation," nor "intend [its] visitation statute to supplant or preempt the courts' long-standing equitable power to protect the best interest of a child by ordering visitation in circumstances not included in the statute."⁷⁶ Rather, the court concluded

or woman, who assumes a parental role in the child's life for many years. Why should such children be denied the love, guidance and nurturing of the parental bond which developed simply because adults cannot maintain their relationship? Lack of love and guidance in the lives of children is a major problem in our society. Does it make sense for the law to worsen this sad fact by denying a child contact with one they have come to accept as their parent, especially when it clearly appears to be in the best interest of the child?

Id.

73. Holtzman's custody claim failed for the reasons discussed above; because of the constitutional principles of parental autonomy and privacy, a third party is unable to prevail on a claim for custody in the absence of parental unfitness. *Id.* at 436; *see also supra* text accompanying notes 36-41. The Wisconsin Supreme Court held that "[a] person who is not a biological or adoptive parent may not bring an action to obtain custody of a minor unless the biological or adoptive parent is 'unfit or unable to care for the child' or there are compelling reasons for awarding custody to a nonparent." *Holtzman*, 533 N.W.2d at 423 (citations omitted).

74. *Holtzman*, 533 N.W.2d at 424. Wisconsin's visitation statute provides:

[U]pon petition by a grandparent, great grandparent, stepparent or person who has maintained a relationship similar to a parent-child relationship with the child, the court may grant reasonable visitation rights to that person if the parents have notice of the hearing and if the court determines that visitation is in the best interests of the child.

WIS. STAT. ANN. § 767.245(1) (West 2001) (emphasis added).

75. The court engaged in an extensive review of the statute's legislative history and concluded that "the legislature appears to have intended that visitation petitions brought under sec. 767.245 be considered within the context of a dissolving marriage." *Holtzman*, 533 N.W.2d at 426.

76. *Id.* at 425. Reviewing Wisconsin's visitation statutes, the court noted:

[T]he legislature has clearly and repeatedly expressed the policy that courts are to act in the best interest of children. It is reasonable to infer that the legislature did not intend the visitation statutes to bar the courts from exercising their equitable power to order visitation in

that a trial court has equitable power to hear a petition for visitation when it determines that the petitioner has a parent-like relationship with the child and that a significant triggering event justifies state intervention in the child's relationship with her biological or adoptive parent.⁷⁷

The court articulated a four-prong test that a petitioner must satisfy to prove a parent-child relationship:

(1) that the biological or adoptive parent consented to, and fostered, the petitioner's formation and establishment of a parent-like relationship with the child; (2) that the petitioner and the child lived together in the same household; (3) that the petitioner assumed obligations of parenthood by taking significant responsibility for the child's care, education, and development, including contributing towards the child's support, without expectation of financial compensation [though such contribution need not be monetary]; and (4) that the petitioner has been in a parental role for a length of time sufficient to have established with the child a bonded, dependent relationship parental in nature.⁷⁸

The court determined that such a test balances the biological or adoptive parent's autonomy and constitutional rights while preserving the child's relationship with an adult who has functioned as a parent.⁷⁹ The four-pronged parent-like relationship test is useful to permit continued visitation, but the test does not establish "legal parenthood." Rather, the test establishes a quasi-parenthood that is considered only with respect to visitation issues and does not establish parental parity between the lesbian coparent and her former partner.⁸⁰

circumstances not included within the statutes but in conformity with the policy directions set forth in the statutes.

Id. at 431.

77. *Id.* at 435.

78. *Id.* at 435-36 (footnote omitted).

79. *Id.* at 436.

80. The focus and purpose of the court's discussion of the four-part "parent-like relationship test" was to determine on what basis Holtzman could assert a claim for visitation, not custody. *Id.* at 437 ("A circuit court may determine whether visitation with Holtzman is in the child's best interest if Holtzman first proves under the four part test that she has a parent-like relationship with the child . . .").

B. *Psychological Parent*

Although under the guise of a different name, the psychological parent doctrine is nearly identical to the parent-like relationship doctrine.⁸¹ In *V.C. v. M.J.B.*, the New Jersey Supreme Court held that a nonbiological lesbian coparent had functioned as a psychological parent to her former partner's biological children and awarded her visitation rights.⁸² V.C. and M.J.B. began dating on July 4, 1993 and five days later M.J.B. visited a fertility specialist to begin artificial insemination procedures.⁸³ Early in their relationship, the women discussed having children, and as M.J.B. continued the artificial insemination process, V.C. attended at least two sessions.⁸⁴ The relationship progressed: V.C. moved in with M.J.B. in December 1993 and, in February 1994, when M.J.B. learned that she was pregnant, she called V.C. at work "to tell her the good news."⁸⁵ Eventually the couple learned that M.J.B. was carrying twins and the two women prepared for the birth of the twins by attending pre-natal and Lamaze classes.⁸⁶

The facts suggested that the women jointly planned to parent: both attended pre-natal and Lamaze classes; they jointly decided on the children's names; they decided that V.C. would be called "Meema" and M.J.B. would be called "Mommy"; V.C. was present in the delivery room for the birth of the twins; the couple opened joint bank accounts for household expenses; they prepared wills and powers of attorney, naming each other as beneficiary on their respective life insurance policies, and opened savings accounts for the children with M.J.B. as custodian of one account and V.C. as custodian of the other; and, most significantly, the couple held themselves out both privately and publicly as a family.⁸⁷ In February 1995, the couple purchased a home together, and in July 1995 they had a commitment ceremony, thereafter considering themselves "married."⁸⁸

81. See *V.C. v. M.J.B.*, 748 A.2d 539 (N.J. 2000).

82. *Id.* at 555.

83. *Id.* at 542.

84. *Id.*

85. *Id.*

86. *Id.*

87. *Id.* at 542-43.

88. *Id.* at 543.

In June 1996, the couple consulted with an attorney concerning V.C.'s adopting the twins, but the adoption was never finalized.⁸⁹ In August 1996, M.J.B. ended the relationship and the women then took turns living in the house with the children until November 1996.⁹⁰ In December 1996, V.C. moved out but continued contributing to household expenses and she visited with the children approximately every other weekend.⁹¹ By the summer of 1997, however, the couple's relationship had truly deteriorated and M.J.B. no longer permitted V.C. to visit with the children or accepted V.C.'s financial contributions.⁹² V.C. subsequently filed a petition for joint legal custody of the twins.⁹³ The trial court determined that V.C. did not have standing to petition for joint legal custody because she did not allege that M.J.B. was an unfit parent; V.C. appealed.⁹⁴

On appeal, M.J.B. asserted that V.C. had no standing to bring her claims because she did not allege that M.J.B. was an unfit parent and, further, that V.C.'s petition was an intrusion on her basic liberty interest and parental autonomy in raising her children.⁹⁵ V.C. contended that she qualified as a parent under New Jersey statutory law and that she was a psychological parent, justifying the invocation of the state's *parens patriae* power.⁹⁶

V.C. sought ongoing contact with her children under a state statute which allows the court to enter visitation and custody orders upon the separation of a child's parents.⁹⁷ The New Jersey Supreme Court concluded that the definition of "parent" within the family law statutory scheme encompasses more than a biological or adoptive parent.⁹⁸ The court noted that the visitation statute

89. *Id.* at 544.

90. *Id.*

91. *Id.*

92. *Id.*

93. *Id.*

94. *Id.* at 545.

95. *Id.* at 546.

96. *Id.*

97. *Id.* at 547. The statute provides that "[w]hen the parents of a minor child live separately, or are about to do so, the Superior Court, in an action brought by either parent, shall have the same power to make judgments or orders concerning care, custody, education and maintenance as concerning a minor child whose parents are divorced." N.J. STAT. ANN. § 9:2-3 (West 1993).

98. 748 A.2d at 547.

provides that “the word ‘parent,’ *when not otherwise described by the context*, means a natural parent or parent by previous adoption.”⁹⁹ Thus, the court determined, the legislature must have envisioned circumstances in which a relationship between a child and a person not specifically denominated by the statute as a parent would, in fact, qualify as “parental.”¹⁰⁰ The court concluded that it could exercise jurisdiction over V.C.’s complaint since a broad reading of the statute includes parents other than biological or adoptive parents.¹⁰¹

The court did not end its inquiry there, however. Instead, it turned its analysis to whether V.C. had standing apart from the statute to bring her complaint since she did not allege that M.J.B. was an unfit parent.¹⁰² The court reverted to a traditional inquiry and application of third party visitation doctrine determining whether a non-parent can seek visitation with a child in the absence of the legal parent’s unfitness. In determining that third party visitation doctrine could be applied in this case, the court effectively distanced itself from the parental analytic framework it had considered.

Holding that under general equitable third party visitation doctrine V.C. could maintain her visitation request, the court concluded that, while an allegation of unfitness or abandonment is generally the prerequisite for a third party to seek custody and visitation of another person’s child, there is an “exceptional circumstances” category that provides an alternative basis for proceeding with a custody and/or visitation complaint.¹⁰³ Subsumed

99. *Id.* (emphasis added).

100. *Id.* at 548. The court did not engage in a long elaboration of its statutory interpretation, but noted that:

Although the Legislature may not have considered the precise case before us, it is hard to imagine what it could have had in mind in adding the “context” language other than a situation such as this, in which a person not related to a child by blood or adoption has stood in a parental role vis-a-vis the child.

Id.

101. *Id.* The court did not elaborate and discuss whether V.C. had exercised a “parental” relationship with the twins; the court engaged in that analysis as part of its discussion of standing and psychological parenthood. *Id.* at 548-50.

102. *Id.* at 548.

103. *Id.* at 549. “[Exceptional circumstances] has been recognized as an alternative basis for a third party to seek custody and visitation of another person’s child. The ‘exceptional circumstances’ category contemplates the intervention of the Court in the exercise of its *parens patriae* power to protect a

within the exceptional circumstances category, the court noted, are the psychological parent cases in which a third party has assumed the role of a legal parent "who has been unable or unwilling to undertake the obligation of parenthood."¹⁰⁴ At the heart of the doctrine is "a recognition that children have a strong interest in maintaining the ties that connect them to adults who love and provide for them."¹⁰⁵ Even though V.C. did not step into M.J.B.'s role as a parent, but instead worked alongside her in establishing a family, the court held that V.C. had standing to maintain her action under the exceptional circumstances/psychological parent doctrine.¹⁰⁶ To determine whether a petitioner has established herself as a psychological parent, the court adopted the four-prong test outlined in *Holtzman v. Knott*.¹⁰⁷ Under the psychological parent test, the court concluded that V.C. should have continued visitation with the children on a regular basis. However, due to the long pendency of the case, the court concluded it would be unnecessarily disruptive to then inject V.C. into the "decisional realm" and denied her an award of joint legal custody.¹⁰⁸

Using psychological parenthood, the court accomplished the important goal of assuring ongoing parental contact between V.C. and her children, but did not recognize her as a parent in any other way. Third party visitation doctrine effectively distanced V.C. from the parental analytic framework, despite the court's earlier determination that V.C. qualified as a parent under New Jersey's visitation statute.¹⁰⁹ Furthermore, third party visitation doctrine, by its very nature, does not provide the lesbian coparent with

child." *Id.* (citations omitted). The court determined that the exceptional circumstances category includes psychological parents. *Id.*

104. *Id.*

105. *Id.* at 550.

106. *Id.*

107. *Id.* at 551. ("The most thoughtful and inclusive definition of de facto parenthood is the test enunciated in [*Holtzman v. Knott*] and adopted . . . here. It addresses the main fears and concerns both legislatures and courts have advanced when addressing the notion of psychological parenthood.").

108. *Id.* at 555.

109. See *supra* text accompanying notes 98-100. Even if the court had found that V.C. was a "parent" under the New Jersey visitation statute, the court did not entertain the possibility of a parentage adjudication, nor would such adjudication be possible pursuant to a visitation statute alone.

rights equivalent to those of a legal parent.¹¹⁰ Although psychological parenthood allowed V.C. continued access to her children, the result in the case shows that her rights are clearly inferior to those of her former partner. As the court stated:

The legal parent's status is a significant weight in the best interests balance because eventually, in the search for self-knowledge, the child's interest in his or her roots will emerge. Thus, under ordinary circumstances when the evidence concerning the child's best interests (as between a legal parent and psychological parent) is in equipoise, custody will be awarded to the legal parent.¹¹¹

C. *De Facto Parent*

Using a slightly different test, the Massachusetts Supreme Judicial Court, in *E.N.O. v. L.M.M.*, invoked general equitable principles to award a lesbian coparent petitioner visitation with the biological child of her same-sex partner.¹¹² In 1991, the two women—who at the time lived in Maryland—shared a committed, monogamous relationship, and decided to have a baby by artificial insemination.¹¹³ The couple attended parenting workshops and sessions on artificial insemination; E.N.O. was present at the actual insemination sessions, and both women participated in all medical decisions.¹¹⁴ In 1994, the insemination process was successful and L.M.M. became pregnant. E.N.O., present at the birth and acting as birth coach, cut the umbilical cord, and was treated by hospital staff “as a mother.”¹¹⁵ The couple sent out birth

110. As Professor Ruthann Robson notes in a her criticism of *V.C. v. M.J.B.*, the court creates an inequality relating to proof of parenthood, which also persists in the way the standard is implemented. Moreover, the legal parent enjoys preferential treatment by virtue of her biological connection to the child. Thus, the “parity” of which the court writes is illusory because the rights of the lesbian coparent are subordinate to those of the legal parent. Ruthann Robson, *Making Mothers: Lesbian Legal Theory & The Judicial Construction of Lesbian Mothers*, 22 *WOMEN'S RTS. L. REP.* 15, 33-34 (2000).

111. 748 A.2d at 554.

112. 711 N.E.2d 886, 890 (Mass. 1999).

113. *Id.* at 888.

114. *Id.*

115. *Id.* at 889.

announcements naming them both as the child's parents.¹¹⁶ Before the child was born and again after the child's birth, the parties executed a coparenting agreement in which they expressly stated that they intended to coparent the child and that E.N.O. would retain her parental status, even if the couple were to separate.¹¹⁷ Following the child's birth, E.N.O. assumed most of the financial responsibility for the family and, for a period of seven months, she assumed primary care for the child when L.L.M. was experiencing medical problems.¹¹⁸

In September 1997, the couple moved to Massachusetts; and in the spring of 1998, E.N.O. consulted an attorney regarding a second-parent adoption.¹¹⁹ Shortly thereafter, the parties' relationship began to deteriorate.¹²⁰ In June 1998, E.N.O. filed a complaint seeking specific performance of the parties' agreement to allow her to adopt the child, and for joint custody and visitation, as well as a settlement of the parties' financial affairs.¹²¹ A probate court judge ordered temporary visitation, applying the "best interests of the child" standard and noting that, pursuant to Massachusetts's paternity statute, " 'children born to parents who are not married to each other should be treated in the same manner as all other children.' "¹²²

The Massachusetts Supreme Judicial Court disagreed that statutes governing paternity were applicable to this case.¹²³ However, the court determined that the probate

116. *Id.*

117. *Id.* Massachusetts might enforce such a coparenting agreement if its terms reflect the best interests of the child. The *E.N.O.* court noted that a cohabiting couple can contract concerning the rights of their children as long as the court determines that the terms reflect the child's best interests. *Id.* at 892 (citing *Wilcox v. Trautz*, 693 N.E.2d 141, 148 n.7 (Mass. 1998)); see also *A.C. v. C.B.*, 829 P.2d 660, 664 (N.M. 1992) (an agreement between a biological mother and lesbian coparent concerning coparenting issues upon the dissolution of the relationship was deemed enforceable by the New Mexico appeals court, so long as the terms represented the best interests of the child).

118. *E.N.O.*, 711 N.E.2d at 889.

119. *Id.* Second-parent adoption was not available in Maryland.

120. *Id.*

121. See *id.*

122. *Id.* (quoting the trial court). The court cited to a Massachusetts child support statute which provides that "[c]hildren born to parents who are not married to each other shall be entitled to the same rights and protections of the law as all other children." MASS. GEN. LAWS ANN. ch. 209C, § 1 (West 1998).

123. 711 N.E.2d at 890 n.3. Interestingly, Massachusetts's parentage statute specifically includes a maternity provision modeled after that included

court's equitable powers extend to protecting the best interests of children, even if the legislature has not articulated what "best interests" require in a particular situation.¹²⁴ Finding that the best interest standard is amorphous, the court stated that "the 'best interests calculus' must include an examination of the child's relationship with both [her] legal and de facto parent."¹²⁵ Reviewing the facts in the case before it, the court concluded that E.N.O. met the definition of a de facto parent and was properly awarded visitation.¹²⁶ The court defined a de facto parent as a person who:

has no biological relation to the child, but has participated in the child's life as a member of the child's family. The de facto parent resides with the child and, with the consent and encouragement of the legal parent, performs a share of care taking functions at least as great as the legal parent. The de facto parent shapes the child's daily routine, addresses his developmental needs, disciplines the child, provides for his education and medical care, and serves as a moral guide.¹²⁷

in the 1973 Uniform Parentage Act. The statute provides, in part, that "[a]ny interested party may bring an action to determine the existence of a mother and child relationship." MASS. GEN. LAWS ANN. ch. 209C, § 21. Furthermore, as the trial judge determined, the purpose of the Massachusetts parentage statute is to ensure that children born out of wedlock are treated in the same manner as children born to married parents. *E.N.O.*, 711 N.E.2d at 889; see *supra* note 122 and accompanying text. The *E.N.O.* court relegated its dismissal of the applicability of the paternity statute to a footnote, although it certainly would make sense under the Massachusetts parentage statute to allow E.N.O. standing to pursue her claim under that provision. The de facto parent analysis should be the second step in determining the visitation and parental rights of the lesbian coparent, after first exercising jurisdiction over the dispute under the parentage statute. See discussion *infra* Part III.

124. *E.N.O.*, 711 N.E.2d at 890. The court cited a Massachusetts statute that provides: "The probate and family court department shall have original and concurrent jurisdiction with the supreme judicial court and the superior court department of all cases and matters of equity cognizable under the general principles of equity jurisprudence and, with reference thereto, shall be courts of general equity jurisdiction . . ." MASS. GEN. LAWS ANN. ch. 215, § 6 (West 1989).

125. *E.N.O.*, 711 N.E.2d at 891.

126. *Id.* at 892. The court emphasized that the biological parent endorsed and consented to the lesbian coparent's full parental role in raising their child, as evidenced both through the parties' actions and their written coparenting agreement. *Id.*

127. *Id.* at 891 (citing *Youmans v. Ramos*, 711 N.E.2d 165 (Mass. 1999) and ALI PRINCIPLES OF THE LAW OF FAMILY DISSOLUTION §§ 2.03(1)(b), (6) (Tent.

The Massachusetts Supreme Judicial Court concluded that E.N.O.'s visitation request, based upon her status as a de facto parent, did not inappropriately infringe on the rights of L.M.M. because the child's interest in maintaining a relationship with E.N.O. outweighed L.M.M.'s custodial interest.¹²⁸

As this was an appeal from a temporary order concerning visitation, the court did not address other "parental" concerns, such as child support, health insurance, life insurance, and most importantly, an adjudication of parentage. However, since the court specifically concluded that Massachusetts's parentage statute did not apply, the court foreclosed the possibility of a maternity adjudication and with it, foreclosed the child's ability to benefit from two legal parents. Furthermore, while the court emphasized that E.N.O.'s visitation claim did not infringe on L.M.M.'s custodial interest, the court might have viewed a custodial award to E.N.O. differently if it had followed the reasoning of *V.C. v. M.J.B.* and determined that a de facto parent's rights are subordinate to those of a biological parent.¹²⁹

D. *Why Equitable Doctrines Are Only a Partial Solution*

By approaching the lesbian coparent cases from a parent-like, psychological parent, de facto parent, or similar perspective, courts have made considerable progress, and have improved the chances for a lesbian coparent to maintain a relationship with her child(ren). But they have fallen short of the mark. The equitable remedies discussed above only encompass the issues of custody and visitation.¹³⁰ None of these equitable doctrines has been used to adjudicate the lesbian coparent's maternity or to establish

Draft No. 3 Part I 1998)). While the ALI Principles provide guidance for courts engaged in a best interests analysis of custody and visitation, the category of de facto parent, in itself, does not provide jurisdiction of a lesbian coparent dispute nor does it permit a maternity adjudication. The biological parent remains in a superior position, even if she did not have the primary caretaking responsibilities.

128. 711 N.E. 2d at 893.

129. See *supra* notes 110-11 and accompanying text.

130. As discussed above, these equitable remedies do not equalize the biological parent and lesbian coparent. See *supra* note 127 and accompanying text.

legal parity between the lesbian coparent and her former partner.

For example, in *Holtzman v. Knott*, despite facts indicating that Holtzman functioned as every bit the child's mother as her former partner, she was stripped of her functional parental status and relegated to third party status by the Wisconsin Supreme Court. The parent-like relationship test did not establish legal parity between Holtzman and Knott; it merely allowed Holtzman access to a child whom she helped to raise. Similarly, the New Jersey Supreme Court in *V.C. v. M.J.B.* limited the utility of the psychological parent doctrine. Unlike a situation in which both caretakers have legal parental recognition and may be awarded joint or shared custody, under the psychological parent doctrine lesbian coparents are merely earning the right to visit with the children that they have helped to raise, but are not likely to be awarded the right to continue raising those children. And, similarly, children who were raised for several years by two parents are being denied the right to continue having their lesbian coparent function in that capacity.

These equitable doctrine decisions are Pyrrhic victories for lesbian coparents; under the parent-like relationship, psychological parent, and de facto parent doctrines, lesbian coparents still occupy an inferior legal status as compared to their former partners.¹³¹ Third party visitation doctrine would be better exercised, and provide better security for children and their lesbian coparents, if it were used within the context of the UPA to establish legal parenthood and not merely a "parent-like status." In order to confer upon lesbian coparents a full range of legal rights, courts must look beyond third party visitation doctrine and move to a parental analytic framework.¹³² By so doing, courts will equalize the rights of the biological and nonbiological lesbian mothers. Furthermore, courts will thereby protect the children as well, ensuring that children of lesbian parents benefit from two legal parents.

Third party visitation doctrine also inadequately resolves the issue of standing, the legal basis upon which a lesbian coparent may bring her custody and visitation

131. See Robson, *supra* note 37, at 1402; see also *supra* note 110 and accompanying text.

132. Robson, *supra* note 37, at 1398.

claim. Because courts have not often recognized a statutory basis upon which lesbian coparents can maintain their claims, they have relied on the equitable principles discussed above both as a mechanism for determining whether the petitioner has standing to bring her claim and to decide the merits of the claim. By conflating the issues of standing and merits, courts do little to clarify the legal process for future petitioners. As noted concerning *E.N.O. v. L.L.M.*, "by defining the de facto parent standard as an aspect of the substantive best interests analysis, rather than as a procedural standing requirement, the *E.N.O.* court neither explicitly extended nor limited the possible extension of parental standing rights to lesbian coparents."¹³³ The court did not differentiate its standing analysis from its analysis of the merits, leaving unclear the specific circumstances under which a lesbian coparent may petition for custody and visitation with her child. The Massachusetts Supreme Judicial Court left to the state's probate courts the task of determining whether a petitioner is a de facto parent before determining whether the petitioner has the right to bring a visitation or custody claim.

Similarly, the *Holtzman* court subsumed its four-pronged parent-like relationship test within a best interest analysis, and never specifically identified upon what legal basis a lesbian coparent has standing to file an action for ongoing visitation or custody with her child.¹³⁴ In framing the issue before the court as "whether the circuit court *should* exercise its equitable powers to consider Holtzman's claim that visitation is in the child's best interest,"¹³⁵ the *Holtzman* court proceeded with a best interests/merits analysis on the presumption that Holtzman had standing to pursue her claim under equity principles; but the court did not clearly articulate a standing rule applicable to future petitioners. Rather, the court applied a circular analysis by fusing the best interests analysis and the procedural standing requirement: before the court will hear the petition, the petitioner must establish the parent-like

133. *Family Law—Massachusetts Supreme Judicial Court Upholds Probate Court's Exercise of Equity Power in Granting Visitation Between a Child and a Lesbian De Facto Parent*, 113 HARV. L. REV. 1551, 1555 (2000).

134. *Holtzman v. Knott*, 533 N.W.2d 419, 435-36 (Wis. 1995).

135. *Id.* at 434 (emphasis added).

relationship—the same test that affects her rights to visitation with her child.

Unlike the *E.N.O.* and *Holtzman* courts, the *V.C.* court noted that it had jurisdiction to hear *V.C.*'s complaint under a New Jersey visitation statute, but did not base jurisdiction on the statute alone, since *V.C.* had made no allegation of *M.J.B.*'s unfitness. Instead, the court also used the equitable psychological parenthood doctrine to establish *V.C.*'s standing to maintain her custody and visitation claim. Thus, the New Jersey Supreme Court, too, has inextricably linked the standing and best interests of the child analyses, as the psychological parent test is used both as a basis for exercising jurisdiction of the complaint and for determining whether the petitioner is entitled to ongoing visitation by virtue of how "parental" her role was during the course of the couple's relationship.

The decisions in *Holtzman*, *V.C.*, and *E.N.O.* imply that if the petitioner can overcome the substantive hurdles of a best interests analysis, she will also satisfy the standing requirement. These courts, however, in thus combining the standing and best interests analyses, leave ambiguous their position on standing because they have neither clearly articulated a standard nor provided sufficient guidance for future litigants. Additionally, these courts leave ambiguous what likelihood, if any, a lesbian coparent has to maintain a relationship with her child. A uniform and consistent approach by courts to lesbian coparent disputes, such as using the UPA, would clarify standing issues and assist lesbian coparents in maintaining a parental relationship with their children.

III. APPLYING THE UNIFORM PARENTAGE ACT TO LESBIAN COPARENTS

The parental analytic framework regularly applies in divorce and paternity cases. While predicated on a one mother/one father model, the parental framework can and should be applied to nontraditional families, regardless of the sex of the parents. Just as second-parent adoption has been used to establish two legal parents of the same sex, so, too, can the UPA be applied. The purpose of the UPA is to provide substantive legal equality for all children by

protecting the rights of children born out of wedlock.¹³⁶ The 1973 Act codified the decisions of the U.S. Supreme Court and lower courts throughout the country at the time—a recognition that the Equal Protection Clause of the Constitution mandates equal treatment for children born in or out of wedlock.¹³⁷ Why then, shouldn't an Act designed to protect children born of unmarried heterosexual parents be applied to children of lesbian couples, specifically to adjudicate the maternity of nonbiological, nonadoptive lesbian parents?

A. *Who Is a Parent Under the Uniform Parentage Act?*

The Uniform Parentage Act has always contemplated that "parent" can mean more than a biological or adoptive parent. Section 1 of the UPA defines the "parent and child relationship" as the "legal relationship existing between a child and his natural or adoptive parents."¹³⁸ The statute's use of "natural," rather than "biological," is significant. Section 3 of the Act makes this distinction clear:

[T]he parent and child relationship between a child and (1) the natural mother may be established by proof of her having given birth to the child, *or under this Act*; (2) the natural father may be established *under this Act*; (3) an adoptive parent may be established by proof of adoption.¹³⁹

By distinguishing relationships founded on biology, adoption, or "under this Act," the Act broadens the scope of whose parental status can reasonably be adjudicated. Specifically, the UPA's language indicates that a nonbiological or nonadoptive parent can indeed be considered a "natural" parent under the statute.¹⁴⁰

136. UNIF. PARENTAGE ACT, Prefatory Note (1973), 9B U.L.A. 289 (2001).

137. *Id.* at 378-79.

138. UNIF. PARENTAGE ACT § 1 (1973), 9B U.L.A. 387 (2001).

139. *Id.* § 3, 9B U.L.A. at 391-92 (emphasis added).

140. UPA 2000 continues to recognize that a legal parent may not be a biological or adoptive parent. Section 102(14) defines "parent" as "an individual who has established a parent-child relationship under Section 201." The omission of "biological" or "adoptive" parent within the definition of "parent" remains significant: "The mother-child relationship is established between a woman and a child by: (1) the woman's having given birth to the child . . . ; (2) *an adjudication of the woman's maternity*; [or] (3) adoption of the child by the woman." UNIF. PARENTAGE ACT § 201(a) (2000) (emphasis added).

For example, the Act long recognized that a certain category of nonbiological and nonadoptive parents should nonetheless be adjudicated as legal parents under the Act: presumptive fathers. Under section 4 of UPA 1973, a man may be presumed to be a child's father in a number of circumstances.¹⁴¹ Two of these presumptions are illustrative

By continuing to identify three possible bases of establishing parenthood—biology, adoption, and adjudication—the Act broadens the scope of whose parental status can reasonably be established, and further indicates that a lesbian coparent who can prove her de facto or psychological parent status can indeed be established a legal parent under the statute.

141. The text of section 4 of UPA 1973 reads:

(a) A man is presumed to be the natural father of a child if:

(1) he and the child's natural mother are or have been married to each other and the child is born during the marriage, or within 300 days after the marriage is terminated by death, annulment, declaration of invalidity, or divorce, or after a decree of separation is entered by a court;

(2) before the child's birth, he and the child's natural mother have attempted to marry each other by a marriage solemnized in apparent compliance with law, although the attempted marriage is or could be declared invalid, and,

(i) if the attempted marriage could be declared invalid only by a court, the child is born during the attempted marriage, or within 300 days after its termination by death, annulment, declaration of invalidity, or divorce; or

(ii) if the attempted marriage is invalid without a court order, the child is born within 300 days after the termination of cohabitation;

(3) after the child's birth, he and the child's natural mother have married, or attempted to marry, each other by a marriage solemnized in apparent compliance with law, although the attempted marriage is or could be declared invalid, and

(i) he has acknowledged his paternity in writing filed with the [appropriate court or Vital Statistics Bureau].

(ii) with his consent, he is named as the child's father on the child's birth certificate, or

(iii) he is obligated to support the child under a written voluntary promise or by court order;

(4) while the child is under the age of majority, he receives the child into his home and openly holds out the child as his natural child; or

(5) he acknowledges his paternity of the child in a writing filed with the [appropriate court or Vital Statistics Bureau], which shall promptly inform the mother of the filing of his acknowledgment, and she does not dispute the acknowledgment within a reasonable time after being informed thereof, in a writing filed with the [appropriate court or Vital Statistics Bureau]. If another man is presumed under this section to be the child's father, acknowledgment may be effected only with the written consent of the presumed father or after the presumption has been rebutted.

(b) A presumption under this section may be rebutted in an appropri-

of the adjudication of nonbiological fathers as “legal” fathers: those founded on marriage and holding oneself out as a father. These paternity presumptions have been extensively litigated and courts have consistently demonstrated their desire to preserve intact father and child relationships.¹⁴² One of the strongest legal presumptions is that a child born to a married woman is legitimate: the woman’s husband is presumed the legal father.¹⁴³ The marital presumption—that the husband was the child’s father in the absence of proof of impotence, sterility, or non-access to the wife—was a fundamental principle of English common law and protected the legitimacy of children, which entitled them to financial support, afforded them inheritance rights, and preserved the stability of the

ate action only by clear and convincing evidence. If two or more presumptions arise which conflict with each other, the presumption which on the facts is founded on the weightier considerations of policy and logic controls. The presumption is rebutted by a court decree establishing paternity of the child by another man.

UNIF. PARENTAGE ACT § 4 (1973), 9B U.L.A. 393-94 (2001).

142. The Act (UPA 2000) no longer includes a presumption of “natural” fatherhood arising from receiving a child into one’s home and holding the child out as one’s natural child, codified in UPA 1973 at section 4(a)(4). The drafters of UPA 2000 have determined that in this age of improved genetic marker testing, biological determiners are preferential to merely holding oneself out as a father as a more efficient means of adjudicating paternity. However, as discussed below, it is questionable whether courts will so easily move to a biological preference, because for several decades, courts have established a body of case law that relies on this presumption to preserve an existing, functional parent child relationship. See *infra* notes 151-58 and accompanying text.

Furthermore, while the drafters of UPA 2000 place greater reliance on biology and less reliance on “holding oneself out” as a parent, this is in direct contrast to the position of the American Law Institute, which has promulgated Principles governing the allocation of custodial and decision-making responsibility for children, and which defines “parent” as a legal parent, parent by estoppel, or a de facto parent. ALI PRINCIPLES OF THE LAW OF FAMILY DISSOLUTION § 2.03(1) (Tent. Draft No. 4 2000). A parent by estoppel is defined, in part, as someone who holds herself out and accepts full and permanent responsibilities as a parent. *Id.* § 2.03(1)(b). A de facto parent is defined, in part, as someone who regularly performed a share of caretaking functions at least as great as that of the parent with whom the child primarily lived. *Id.* § 2.03(1)(c). This emphasis on functional parenthood within the ALI Principles further serves to reinforce the necessity of looking beyond biology in parentage disputes.

143. HOMER H. CLARK, JR., THE LAW OF DOMESTIC RELATIONS IN THE UNITED STATES § 4.4 (2d ed. West 1988). For a thorough discussion of the evolution of the marital presumption in paternity see generally Glennon, *supra* note 8.

family.¹⁴⁴ The preservation of family integrity through the marital presumption was upheld in the Supreme Court's well-publicized decision of *Michael H. v. Gerald D.*¹⁴⁵

In *Michael H.*, a biological father sought to establish his paternity over the objections of the biological mother and her husband, to whom she was married at the time of conception.¹⁴⁶ In upholding California's conclusive marital presumption of paternity, the Court held that allowing Michael H.'s claim would undermine family integrity, in contrast to a situation where a husband or wife may raise the issue of illegitimacy.¹⁴⁷ The Court noted that Michael H. did not merely seek to have himself declared the child's father, but to "obtain parental prerogatives."¹⁴⁸ However, the Court concluded that where the child "is born into an extant marital family, the natural father's unique opportunity [to develop a relationship with his child] conflicts with the similarly unique opportunity of the husband of the marriage; and it is not unconstitutional for the State to give categorical preference to the latter."¹⁴⁹

The critical underpinning of the marital presumption is the importance of preserving an intact family unit and existing parent-child relationships. The doctrine of equitable estoppel similarly fosters family stability and integrity. Estoppel is sometimes used in conjunction with the marital presumption, to prevent a married man from illegitimizing the child he held out as his own.¹⁵⁰ Estoppel may also be used by courts to prevent a man from attempting

144. Diane S. Kaplan, *Why Truth Is Not a Defense in Paternity Actions*, 10 TEX. J. WOMEN & L. 69, 70 (2000).

145. 491 U.S. 110, 124 (1988).

146. *Id.* at 113-16.

147. *Id.* at 129 & n.7. In most jurisdictions today, the marital presumption is largely rebuttable, placing the burden of proving the husband's non-paternity on the moving party, often the wife or the biological, putative father. See CLARK, *supra* note 143, at 191 & n.33.

148. 491 U.S. at 126.

149. *Id.* at 129.

150. *E.g.*, *Godin v. Godin*, 725 A.2d 904, 910 (Vt. 1998) (holding that former husband could not seek to disestablish paternity six years after divorce proceedings, despite his recent ascertainment of facts which led him to believe he was not child's biological father, because "[w]here the presumptive father has held himself out as the child's parent, and engaged in an ongoing parent-child relationship for a period of years, he may not disavow that relationship and destroy a child's long-held assumptions, solely for his own self-interest").

to disestablish his paternity based on a lack of biological connection to a child that he held out as his own.¹⁵¹

Despite advances in genetic testing, the notion of functional parenthood is still an important factor in paternity adjudications, as demonstrated in a recent Ohio decision. In *Crago v. Kinzie*,¹⁵² a man who had functioned and held himself out as the father of two children for almost a decade sought to disestablish his paternity after the children's mother sought child support.¹⁵³ The record demonstrated that he and the mother had lived together as "man and wife," although they were not married; that he listed himself as the children's father on their respective birth certificates; and that the children bore his surname.¹⁵⁴ The court phrased the determinative issue as follows: "Did the putative father take some action or refrain from taking some action that he reasonably should have taken, which gave rise to a conclusion, reasonably relied upon by the children, the mother, or the public, which now precludes him from attempting to establish the contrary of that conclusion?"¹⁵⁵

The court concluded "yes": by holding himself out and functioning as the children's father for nearly ten years, he was prevented by the doctrine of estoppel from seeking genetic marker testing which might disprove his paternity.¹⁵⁶ The court stressed the importance of "finality" over "perfection"¹⁵⁷ and noted the importance of the children's reliance on his paternity for their financial and emotional well-being, which militated against his interest in disproving his paternity.¹⁵⁸

151. *E.g.*, *In re Paternity of Cheryl*, 746 N.E.2d 488, 495-96 (Mass. 2001) (holding that nonbiological father was barred from asserting non-paternity of child he held out as his own and financially supported for more than five years before challenging his paternity on grounds that genetic tests revealed he was not child's biological father). The court stated that "[w]here a father and child have a substantial parent-child relationship . . . and the father has provided the child with consistent emotional and financial support, an attempt to undo a determination of paternity is 'potentially devastating to a child who ha[s] considered the man to be the father.'" *Id.* at 495.

152. 733 N.E.2d 1214, 1219 (Ohio Ct. Com. Pl. 2000).

153. *Id.* at 1223.

154. *Id.*

155. *Id.*

156. *Id.* at 1228.

157. *Id.* at 1226.

158. *Id.* at 1233. The court noted that equity may preclude consideration of genetic testing:

The *Michael H.* and *Crago* courts determined that undoing an existing parent-child relationship is potentially devastating to a child who has lived with the knowledge and reliance that a certain man is her father. Similarly, excising a loving mother from a child's life because of her lack of biological (hence, legal) connection to the child carries the same potentially disastrous consequences, as most poignantly expressed in Micah's story. The marital presumption and estoppel have been successfully used to maintain the father-child relationship in the absence of a biological tie because courts know that children rely on established parent-child relationships. Undoing that relationship does more than remove a source of child support from the child's life; it causes a lack of security and stability in the child's life.

The principles on which these presumptions are founded include stability for the child, maintaining an existing parent and child relationship, and ensuring that the child will continue to reap the benefits, particularly the financial benefits, of having two legal parents. Applying these principles to preserve familial relationships demonstrates that functioning as parent—socially, emotionally, financially—is more important than biological or adoptive connection to the child. And applying these principles has rendered a nonbiological or nonadoptive (heterosexual) parent a legal parent under the UPA. These principles are equally applicable to lesbian coparents. Thus, the issue of UPA application to lesbian coparents becomes not one of legal theory but social practice. Courts certainly recognize the importance of preserving the integrity of an existing father and child relationship. Courts have not been so willing to preserve the integrity of a relationship between a lesbian coparent and her child.¹⁵⁹

With the advent and widespread availability of genetic testing, it is tempting for putative fathers to assume that their exclusion as the biological father of a child through such testing will necessarily extinguish their duty of parental support. Putative fathers who make this erroneous assumption may learn that the . . . rules of equity render their disestablishment efforts for naught.

Id. at 1230.

159. *E.g.*, *Alison D. v. Virginia M.*, 572 N.E.2d 27, 29 (N.Y. 1991) (refusing to apply equitable estoppel to find lesbian coparent a "parent" under statute and declining to award her visitation with child); *Nancy S. v. Michele G.*, 279 Cal. Rptr. 212 (Ct. App. 1991) (holding that equitable estoppel could not be used to establish lesbian coparent's legal parentage).

The one mother/one father model pervades family law doctrine and continues to serve as the biggest hurdle in adjudicating maternity for lesbian coparents. For example, in discussing the difficulties of obtaining legal recognition for lesbian coparents, Professor Polikoff observed that *Michael H.* reinforces the state's interest "in assuring that every child has neither more nor less than one mother and one father."¹⁶⁰ Similarly, in analyzing the application of third party doctrine to lesbian coparents, Professor Ruthann Robson observed that "[t]he lesbian nonlegal mother . . . challenges the heterosexual matrix of third party custody by being the 'other' mother in an ideology that acknowledges only one mother, the third party in an ideology that admits of only two parents, one of each gender."¹⁶¹

But in keeping stride with social trends, our laws—and application of our laws—must adapt to fit scenarios that were not previously contemplated.¹⁶² As Professor Polikoff wrote more than a decade ago:

When parents create a nontraditional family, that family becomes the reality of the child's life. The child may experience some stigma, but courts should delegitimize, not condone, disparaging community attitudes. The courts should protect children's interests within the context of nontraditional families, rather than attempt to eradicate such families by adhering to a fictitious, homogeneous family model.¹⁶³

Approximately ten million children are being raised by same-sex parents.¹⁶⁴ These children should be protected by our courts, not punished. The concerns that prompted the implementation of the UPA and its parental presumptions—the need to provide financial and emotional protection for a child born to unmarried heterosexual parents—are equally applicable to children born to unmarried lesbian parents, and the same legal analysis should apply.

160. Polikoff, *supra* note 7, at 479.

161. Robson, *supra* note 37, at 1391-92.

162. Courts have been able to relax the rigidity of the one mother/one father model in permitting same-sex second parent adoptions; the same movement away from the traditional model should apply to UPA maternity adjudication for lesbian coparents.

163. Polikoff, *supra* note 7, at 482.

164. See Kellogg, *supra* note 2, at B10.

Lesbian coparents should be able to obtain parentage adjudications under the UPA just as nonbiological fathers can and do. The text of the Act seems to lend itself to such an application. The UPA includes a provision for a declaration of maternity, which provides a statutory basis upon which lesbian coparents can pursue their custody and visitation claims: section 21 of the Act provides that “[a]ny interested party may bring an action to determine the existence or nonexistence of a mother and child relationship. Insofar as practicable, the provisions of this Act applicable to the father and child relationship apply.”¹⁶⁵ Read in conjunction with section 3, which permits the establishment of a mother and child relationship “under this Act” and not just on biology or adoption,¹⁶⁶ section 21 can be used to adjudicate a lesbian coparent’s maternity.¹⁶⁷

Using the equitable doctrines of *de facto* or psychological parenthood or equitable estoppel can assist the court in making determinations of whether the petitioner has truly acted as a parent, deserving of parentage adjudication. However, by applying these equitable doctrines within the broader statutory framework, courts will do more than make piecemeal resolutions of visitation disputes: courts will preserve the integrity of relationships between lesbian coparents and their children, just as they have for heterosexual fathers.

B. *The Lesbian Coparent Cases*

The issue of whether the Act *should* apply to lesbian coparents has been litigated for more than a decade. While early cases held that the Act should not be applied to nonbiological or nonadoptive mothers, recent cases have properly begun to apply the Act to lesbian coparents and other “nontraditional” parents. These recent cases illustrate a better judicial understanding of our societal move from a

165. UNIF. PARENTAGE ACT § 21 (1973), 9B U.L.A. 334 (2001).

166. *Id.* § 3, 9B U.L.A. at 391-92.

167. Similarly, section 106 of UPA 2000 states that “[p]rovisions of this [Act] relating to determination of paternity apply to determinations of maternity.” UNIF. PARENTAGE ACT § 106 (2000). Read in conjunction with section 201, which permits the establishment of a mother and child relationship by an adjudication of the woman’s maternity and not just by birth or adoption, and section 602, which authorizes standing for a woman whose maternity is to be adjudicated, UPA 2000 can be used to establish a lesbian coparent’s maternity. *Id.* §§ 201, 602.

one mother/one father model of family to other models, including same-sex parent families.

1. *The "Traditional" Paradigm.* One of the first cases to address whether the UPA can be used to adjudicate the maternity of a lesbian coparent was *Curiale v. Reagan*.¹⁶⁸ In *Curiale*, a lesbian couple who had been residing together in a committed relationship, decided to have a baby through artificial insemination and to both raise the child.¹⁶⁹ While the defendant Reagan gave birth to the child, Curiale provided the sole financial support for the family.¹⁷⁰ The couple's relationship ended three years after their child's birth, at which time the couple executed a written agreement which provided, *inter alia*, for the sharing of physical custody of the child.¹⁷¹ Six months later, Reagan informed Curiale that she was no longer willing to share custody of the child and further, that Curiale could no longer visit with the child.¹⁷² Curiale subsequently filed a complaint to "establish de facto parent status/maternity and for custody and visitation."¹⁷³ The trial court held that it was without jurisdiction to hear Curiale's claim and that there was no statutory basis for her claim of parental status.¹⁷⁴

On appeal, Curiale asserted that one foundation for her claim was California Civil Code section 7015, part of California's version of the 1973 Uniform Parentage Act.¹⁷⁵ The California Court of Appeals for the Third District held that, while section 7015 confers standing upon any interested person to bring an action to determine the existence of a parent-child relationship, "it has no application where, as here, it is undisputed that the defendant is

168. 272 Cal. Rptr. 520 (Ct. App. 1990).

169. *Id.* at 521.

170. *Id.*

171. *Id.*

172. *Id.*

173. *Id.*

174. *Id.* at 522.

175. *Id.* Section 7015 of the California Family Code provided that "[a]ny interested person may bring an action to determine the existence or nonexistence of a mother and child relationship. Insofar as practicable, the provisions of this part applicable to the father and child relationship apply." CAL. FAM. CODE § 7015, *repealed by* CAL. FAM. CODE § 7650 (West 2001). Section 7650 continues former § 7015 without change.

the natural mother of the child."¹⁷⁶ The court engaged in no further discussion of the UPA, but implied by its ruling that the maternity provision could apply only to a child's biological mother.¹⁷⁷ The *Curiale* decision did not adequately address the reality of the family unit before it, nor did it act in the child's best interest in denying the lesbian coparent legal recourse to maintain an existing parent-child relationship.

Less than a year later, the California Court of Appeals for the First District was presented with the issue of whether the UPA conferred standing upon a lesbian coparent seeking custody of her nonbiological children.¹⁷⁸ The parties in *Nancy S. v. Michele G.* began living together in 1969 and had a commitment ceremony several months later.¹⁷⁹ The parties decided to have children and in June 1980, the respondent, Nancy S., gave birth to the parties' first child, a daughter.¹⁸⁰ Four years later, Nancy S. gave birth to the parties' second child, a son.¹⁸¹ Both children were given Michele G.'s family name and she was listed as the "father" on both children's birth certificates.¹⁸²

A year after the birth of their son, the parties separated and they agreed that their daughter would live with Michele G. and that their son would live with Nancy S.¹⁸³ They arranged visitation so that each party would have primary care of one child for five days during the week, but the children would be together, at either parent's home, four days a week.¹⁸⁴ After three years, Nancy S. wanted to change the agreement so that each parent would have custody of both children 50% of the time, but Michele G. opposed any change.¹⁸⁵ Nancy S. then commenced a proceeding under the UPA, seeking a declaration that she

176. *Curiale*, 272 Cal. Rptr. at 522.

177. The California Supreme Court now recognizes that the term "mother" under the UPA encompasses more than a biological mother and has opened the door for lesbian coparent maternity adjudication. See discussion *infra* Part III.B.2.

178. *Nancy S. v. Michele G.*, 279 Cal. Rptr. 212 (Ct. App. 1991).

179. *Id.* at 214.

180. *Id.*

181. *Id.*

182. *Id.*

183. *Id.*

184. *Id.* By alternating with which parent the children reside, this seemingly mathematical feat can indeed be accomplished.

185. *Id.*

was entitled to sole legal and physical custody of the children, that Michele G. was *not* a parent of either child, and that Michele G. could visit the children only with her consent.¹⁸⁶

Michele G. conceded that she was not a biological or adoptive “natural” parent under the UPA, but asserted that the Act did not provide an exclusive definition of parenthood and advanced several equitable theories pursuant to which the court might consider her a parent: *de facto* parenthood, *in loco parentis*, parenthood by equitable estoppel, and functional parenthood.¹⁸⁷ Professor Robson noted that “[a]ll of these theories supported the proposition that Michelle [sic] G. should be deemed a parent, thereby forestalling the operation of third party doctrine.”¹⁸⁸ However, the *Nancy S.* court, concerned that application of the doctrines would give Michele a parental status that did not exist under California’s statutory law, refused to apply equitable doctrines to protect Michele G.¹⁸⁹ And, unlike the courts discussed in Part II that were willing to apply equitable doctrine to resolve at least the issue of visitation, the *Nancy S.* court refused to apply *any* third party doctrine, thereby denying Michele G. any legal right to continue a parental relationship with her children. The court’s unwillingness to apply any one of four equitable doctrines to Michele demonstrates its reluctance to move beyond the one mother/one father paradigm and to view family in terms of two same-sex parents.

Refusing to recognize Michele’s parental status, the court reinforced Michele’s third party “legal stranger” status in its application of each parental theory. The court held that *de facto* parenthood and *in loco parentis* status do not overcome the hurdles of parental autonomy, noting that the doctrine of *de facto* parenthood is most often used if the natural parent is unfit¹⁹⁰ and that the concept of *in loco*

186. *Id.* Gay and Lesbian Advocates and Defenders (GLAD) has drafted standards helpful for resolving custodial disputes between former same-sex partners. GAY & LESBIAN ADVOCATES & DEFENDERS, PROTECTING FAMILIES: STANDARDS FOR CHILD CUSTODY IN SAME-SEX RELATIONSHIPS (1999), available at <http://www.glad.org/Publications/CivilRightProject/protectingfamilies.pdf>.

187. *Nancy S.*, 279 Cal. Rptr. at 215-16.

188. Robson, *supra* note 37, at 1396.

189. *Nancy S.*, 279 Cal. Rptr. at 216-19.

190. *Id.* at 216. *But see* V.C. v. M.J.B., 748 A.2d 539, 549 (N.J. 2000) (recognizing that someone who has acted as a psychological parent may assert a

parentis has generally been used to impose certain rights and obligations of legal parents on those in a parent-like relationship with children, but had never been extended to custodial disputes.¹⁹¹ The court further noted that the doctrine of equitable estoppel has generally been used to preclude a man from denying paternity for the purpose of avoiding his support obligations.¹⁹² Although equitable estoppel has also been used to *preserve* a parental relationship in the absence of a biological tie, the court refused to analogize the situation of the lesbian coparent with a nonbiological putative father.¹⁹³ Finally, in refusing also to recognize the notion of functional parenthood, the court agreed that the absence of any legal formalization of Michele's relationship with the children was "tragic," but it refused to find that the Act permits an expansive definition of parent—mainly out of concern that such an expansion could "expose other natural parents to litigation brought by child-care providers of long standing, relatives, successive sets of stepparents or other close friends of the family."¹⁹⁴

The court not only precluded the adjudication of a mother and child relationship by finding that the four equitable theories were inapplicable, it precluded Michele G. from maintaining *any* parental relationship with her children. Clearly, the court was concerned about the impact its decision would have on the children involved, but it refused to depart from a formalistic approach to statutory construction.¹⁹⁵ Notably, as in *Curiale*, the *Nancy S.* court

custody and visitation claim even if she does not allege the biological parent's unfitness).

191. *Nancy S.*, 279 Cal. Rptr. at 217 ("The concept of 'in loco parentis,' however, has never been applied in a custody dispute to give a nonparent the same rights as a parent, and we are unpersuaded that the concept should be so extended.").

192. *Id.* at 217.

193. *See id.* at 217-18 (distinguishing equitable estoppel from an "equitable parent" theory). The reluctance to apply doctrines such as estoppel to lesbian coparents exemplifies the courts unwillingness to consider that a child may have two parents of the same gender. *See supra* text accompanying notes 160-63.

194. *Nancy S.*, 279 Cal. Rptr. at 219.

195. *See id.* ("By deferring to the Legislature in matters involving complex social and policy ramifications far beyond the facts of the particular case, we are not telling the parties that the issues they raise are unworthy of legal recognition. To the contrary, we intend only to illustrate the limitations of the courts in fashioning a comprehensive solution to such a complex and socially significant issue.").

appeared wary of adjudicating the maternity of a nonbiological mother. By finding no legal parental relationship between Micah and Michele, the court denied Micah his mother and forfeited his right to parental protection. As noted in the preface to this article, Micah knew that he continued to have a second mother and begged for her protection after his accident. By denying Michele and Micah any legalization of their relationship, the *Nancy S.* court's decision made Micah an orphan—more of a tragedy than it ever could have foreseen in its opinion.¹⁹⁶

2. *New Decision-Making for New Times.* The California Supreme Court opened the door to nonbiological maternity adjudication in its 1993 decision, *Johnson v. Calvert*.¹⁹⁷ In *Johnson*, the court was confronted with determining who is a “mother” under California’s version of the UPA, as between the egg donor/genetic mother or the birth mother. The court concluded that both women had a legitimate factual basis upon which to assert their maternity¹⁹⁸ and that both women “adduced evidence of a mother and child relationship as contemplated by the Act.”¹⁹⁹ Based on the court’s determination that both women could assert maternity under the Act, the court reviewed the parties’ intent to determine who should be adjudicated the legal mother.

Because the genetic mother had, with her husband, contracted for the birth mother to act as surrogate, the court determined that the intent of the genetic mother to actually parent the child was more compelling than the

196. Ultimately, Michele was able to convince social services workers in Oklahoma to permit her to bring Micah home and she became his legal guardian. See Herscher, *supra* note 1.

197. 851 P.2d 776 (Cal. Ct. App. 1993); see also *Buzzanca v. Buzzanca*, 72 Cal. Rptr. 2d 280, 291 (Ct. App. 1998) (holding that a couple who had arranged for the birth of a child through donor insemination and a surrogate mother were in fact the child’s legal parents, despite the absence of any biological connection to the child, because the child would not have been born “but for the efforts of the intended parents”) (quoting *Johnson*, 851 P.2d at 782).

198. The court found that the undisputed evidence demonstrated that one woman gave birth to the child and one woman is genetically related to the child, thus rendering both women “mother” under the Act. *Johnson*, 851 P.2d at 781.

199. *Id.* Concluding that both women had valid claims for maternity under the Act, the court relied on California Civil Code section 7003, which provides in relevant part, that between a child and the natural mother a parent and child relationship “may be established by proof of her having given birth to the child, or under [the Act].” *Id.* at 780 (citing CAL. CIV. CODE § 7003(1) (2001)) (emphasis added).

surrogate's gestation of the child.²⁰⁰ The court specifically noted that it declined to find that the child had two mothers, because that would vest parental rights in a third party and disrupt a "stable, intact, and nurturing home."²⁰¹ As one author, however, has written:

[T]he court left open the possibility that—faced with compelling reasons—recognition of two mothers could be appropriate in some future situation. In addition, it elevated intent of the parties over literal interpretation of the statute, holding that 'intentions that are voluntarily chosen, deliberate, express and bargained for ought presumptively to determine legal parenthood.'²⁰²

Attorneys Minter and Kendell of the National Center for Lesbian Rights similarly agree that the parties' intentions to coparent a child were of paramount importance in the *Johnson* case and that intention to coparent provides a solid foundation upon which lesbian coparents can seek adjudication under the UPA.²⁰³ In fact, several California courts agree with this broader reading of the UPA: a number of county courts have granted UPA petitions to nonbiological lesbian coparents, thereby adjudicating their legal motherhood.²⁰⁴

3. *A State Supreme Court Recognizes the Applicability of the Uniform Parentage Act to a Lesbian Coparent.* In its September 2000 decision in *Rubano v. DiCenzo*, the Rhode Island Supreme Court became the first state court of last resort to approve the use of the UPA as a means of exercising jurisdiction over a lesbian coparent dispute and adjudicating maternity for a lesbian coparent.²⁰⁵ Although at the trial court level the lesbian coparent petitioner waived her claim seeking adjudication of a mother and child

200. *Id.* at 781-82.

201. *Id.* at 781 n.8.

202. Doskow, *supra* note 57, at 18 (quoting *Johnson*, 851 P.2d at 783).

203. See Minter & Kendell, *supra* note 50, at 41-42. The authors have prepared a model brief which contains a good analysis of how courts, particularly those in California, can use *Johnson* to adjudicate maternity for lesbian coparents. *Id.* at 38-47. In their model brief, the authors argue that under the holding in *Johnson*, a lesbian coparent is a lawful parent because she consented to the biological mother's artificial insemination in order "to bring about the birth of a child that she intended to raise as her own." *Id.* at 38.

204. *Id.* at 32.

205. 759 A.2d 959 (R.I. 2000).

relationship, the *Rubano* court noted in its decision that the petitioner could have so requested, thus opening the door to lesbian coparent adjudication and a more definite resolution of lesbian coparent disputes.²⁰⁶ *Rubano* marks a significant step forward in lesbian coparent jurisprudence, by recognizing that a nonbiological or nonadoptive mother can be adjudicated a legal parent nonetheless.

The parties in *Rubano*, Maureen Rubano and Concetta DiCenzo, entered into a committed relationship in 1988.²⁰⁷ Eventually, they set up a household as domestic partners and in 1991 they decided to have and raise a child together.²⁰⁸ The parties decided that DiCenzo would be artificially inseminated, and in 1992 she gave birth to a son whose last name was listed on both his birth and baptismal certificates as Rubano-DiCenzo.²⁰⁹ Rubano never adopted him, but for four years the couple coparented the child.²¹⁰ In 1996, the couple separated and the parties established an informal visitation schedule for Rubano to see her son. But by 1997, DiCenzo opposed the visits and Rubano filed a petition in family court seeking to establish her de facto parental status and to obtain court-ordered visitation.²¹¹

After Rubano filed the lawsuit, and subsequent to the appointment and recommendations of a guardian *ad litem*, the parties negotiated a consent order which provided that Rubano was to have permanent visitation with her child in exchange for which she agreed to waive any claim she had or may have to recognition as a parent of her son.²¹² Their agreement was subsequently entered as an order of the

206. *Id.* at 967. The court stated:

[T]he plain language of this provision of the ULP [Rhode Island version of the UPA] vests the Family Court with jurisdiction to declare the existence *vel non* of a mother and child relationship in these limited circumstances. . . . Indeed, if the parties had chosen to litigate this issue rather than to settle their dispute and if the facts were contrary to what Rubano had alleged, the ULP expressly allowed for a finding that no mother and child relationship existed between Rubano and the child; but, in any event, there is no question but that § 15-8-26 [of the ULP] gives the Family Court jurisdiction to determine whether such a relationship exists *in cases like this one*.

Id. (emphasis added).

207. *Id.* at 961.

208. *Id.*

209. *Id.*

210. *Id.*

211. *Id.* at 961-62.

212. *Id.* at 962.

family court.²¹³ Soon thereafter, DiCenzo allegedly violated the visitation agreement again and Rubano sought contempt relief under the family court order.²¹⁴ DiCenzo countered that the family court could not enforce the visitation order because the court had lacked jurisdiction to enter the order in the first place.²¹⁵

The Rhode Island Supreme Court disagreed, and held that Rubano had several remedies available to her and that the family court indeed had jurisdiction to hear Rubano's complaint for contempt as well as her initial petition.²¹⁶ First, and most importantly, the court held that the family court had jurisdiction to hear Rubano's original petition to determine the existence of a de facto parental relationship under section 15-8-26 of Rhode Island's Uniform Law on Paternity ("ULP").²¹⁷ Section 15-8-26 provides that "[a]ny interested party may bring an action to determine the existence or nonexistence of a mother and child relationship."²¹⁸ The court found that Rubano qualified as an interested party because she claimed that she had a de facto parental relationship with her son.²¹⁹ Second, in addition to the maternity provision of the ULP, the *Rubano* court concluded that Rubano was entitled to pursue her visitation claim under the state's general paternity statute.²²⁰ The court also concluded that Rubano had a claim against DiCenzo for violating the parties' visitation agreement.

In recognizing Rubano's right to pursue her claim under section 15-8-26, the court made several important legal conclusions. Unlike the California courts in *Curiale* and *Michele G.*, the *Rubano* court acknowledged that a biological connection to a child is not a prerequisite to seeking a maternity adjudication under the maternity

213. *Id.*

214. *Id.* at 962-63.

215. *Id.* at 963.

216. *Id.* at 966.

217. Rhode Island's Uniform Law on Paternity is a hybrid version of the Uniform Act on Paternity and the Uniform Parentage Act. *Rubano*, 759 A.2d at 966.

218. R.I. GEN. LAWS § 15-8-26 (2000) (emphasis added); *Rubano*, 759 A.2d at 966. Section 15-8-26 adopts verbatim the language of the maternity provision contained in section 21 of the 1973 Uniform Parentage Act.

219. 759 A.2d at 966-67 (citing R.I. GEN. LAWS § 8-10-3).

220. *Id.* at 970.

provision of the ULP (or the UPA).²²¹ Relying on its previous decision in *Pettinato v. Pettinato*,²²² the *Rubano* court noted that the family court has the power to determine the existence of a de facto parent-child relationship, despite the absence of a biological connection between the child and putative parent.²²³ The court ruled that "any interested party" under section 15-8-26 may include a person "who, though he or she has no biological connection with a child, nonetheless has functioned as a parent in relation to that child and has been held out to the community as the child's parent by the biological parent."²²⁴

The *Rubano* court engaged in a critical analysis of section 15-8-26, the language of which is identical to the UPA 1973 maternity provision. The court specifically noted that while other provisions of the parentage act include various forms of limiting language,²²⁵ section 15-8-26 contains no such limiting provisions, "thereby allowing a nonbiological parent to establish the existence of a de facto mother-child relationship with the child."²²⁶ The dissent's contention was that the ULP's maternity provision was enacted solely for the rare case where a young child may not know his or her mother and that it does not permit someone who already knows who a child's biological mother is "to intrude upon an already established biological mother and child relationship." In contrast, the majority found no such limiting language within section 15-8-26:²²⁷

[I]f the General Assembly had intended to permit only a biological mother or a child living with a single father or in a foster home to bring an action to determine the existence of a mother and child relationship, we are of the opinion that it would have said so instead of using the broader term "[a]ny interested party." A *biological connection with either the mother or the child is but one*

221. *Id.* at 968.

222. 582 A.2d 909 (R.I. 1990) (awarding custodial rights of minor child to nonbiological father based upon his status as a de facto parent).

223. *Rubano*, 759 A.2d at 967.

224. *Id.* at 969. The court specifically noted that the doctrine of equitable estoppel barred DiCenzo from asserting that *Rubano's* lack of a biological tie to the child was fatal to *Rubano's* claim for legal recognition of her rights as a de facto parent. *Id.* at 968.

225. For example, the court referred to section 15-8-3(a), which delineates specific circumstances under which a man is presumed to be a child's natural father. *Id.*

226. *Id.* at 969.

227. *Id.* at 980 (Bourcier, J. dissenting).

potential source of an interest sufficient to confer standing on a person seeking to obtain a judicial determination concerning the existence of a mother-child relationship. Thus . . . the language of § 15-8-26 does not specifically limit its scope to those interested in determining a biological mother-and-child relationship.²²⁸

Thus, in *Rubano*, the Rhode Island Supreme Court became the first court of last resort to recognize what the broad language of the UPA allows: a lesbian coparent with no biological or adoptive connection to her child may indeed be a legal parent under the statute and proceed with a petition to establish maternity.

However, although the court noted that “any interested party” may petition to establish the existence of a mother and child relationship, it narrowly construed “any interested party,” requiring an alleged parent-like relationship with the child before relief can be granted.²²⁹ While this may appear to implicate the problems noted in the third party equitable doctrine cases, the significant difference between the cases is clear: the basis for standing, namely the UPA. In the equitable doctrine cases, the issues of standing and proof of a parent-like relationship were inextricably intertwined, resulting in an unclear process and result. Under a *Rubano* analysis, however, while the lesbian coparent must establish a parent-like relationship to sustain her maternity claim, it appears she need only disclose in the petition that she has such a relationship; she can prove the merits of her parental relationship as part of her case-in-chief seeking a maternity determination.

Furthermore, the context in which she must establish her de facto parental status differs between *Rubano* and the previous third party equitable doctrine cases. *Rubano* definitely suggests that proof of a de facto parental relationship can result in an adjudication of maternity; the third party equitable doctrine cases merely allowed for ongoing visitation upon proof of a de facto parental relationship. As previously discussed, maternity adjudication greatly impacts other considerations, such as custody

228. *Id.* at 969-70 (emphasis added).

229. *Id.* at 967. In clarifying its narrow interpretation of “any interested party,” the court distinguishes its decision in *Rubano* from the U.S. Supreme Court’s decision in *Troxel v. Granville*, 530 U.S. 57 (2000), which held that a Washington statute that permitted “any person” to petition for visitation at “any time” was unconstitutionally broad.

and visitation, and creates a legal parity between the parties that third party doctrine cannot. Moreover, maternity adjudication provides the greatest security for the child of a lesbian coparent.

Rubano does not stand for the proposition that third party equitable doctrine should be completely overlooked. As discussed above, *Rubano* must prove her de facto parental status in order to be adjudicated as a legal parent under section 15-8-26. Thus, traditional third party equitable doctrines still play an integral role in a maternity adjudication, because they provide a means for evaluating the parental role that a lesbian coparent has played in the life of her child; however, this evaluation occurs within a parental analytic framework. *Rubano* did not begin from the premise that the biological parent is the only parent and that the lesbian coparent is a legal stranger. Instead, the court properly treated both parties as parents within its analysis. In recognizing the maternity claim of the lesbian coparent, the *Rubano* court recognizes the societal trend of "two mommy" households and is not constrained by traditional norms of one mother/one father.

In fact, the *Rubano* court further demonstrated its willingness to look beyond the one mother/one father parentage model by determining that the general paternity statute conferred standing for *Rubano's* visitation claim. That statute grants jurisdiction to the family court over "those matters relating to adults who shall be involved with paternity of children born out of wedlock."²³⁰ The court noted that the statute equally applied to two women:

While the word 'paternity' implies the 'fathering' of a child, we are mindful of the Legislature's instruction that when statutes are construed '[e]very word importing the masculine gender only, may be construed to extend to and to include females as well as males.' Thus, two women may certainly be 'adults who shall be involved with paternity' of a child for purposes of this statute.²³¹

The court found that *Rubano* was most certainly involved with the "paternity" of the child, based on the facts recounted above. Although the court did not indicate that the general provisions of the paternity statute confer standing to adjudicate *maternity* for *Rubano*, the provision

230. *Rubano*, 759 A.2d. at 970.

231. *Id.* at 971 n.13 (citation omitted).

does provide a statutory basis for standing upon which she could proceed with her *visitation* claim. Thus, unlike the *Holtzman*, *V.C.*, and *E.N.O.* courts, which applied third party doctrine to exercise standing *and* to resolve the substantive dispute, *Rubano* found a statutory predicate for *Rubano's* visitation claim and clarified the issue of standing. Thus, the *Rubano* court became the first state court of last resort to fully acknowledge the potentiality for applying the UPA to lesbian coparents, both as an adjudication mechanism and a basis for exercising jurisdiction of lesbian coparent disputes.

CONCLUSION

Other courts should follow the example of *Rubano* and use the UPA to adjudicate maternity for lesbian coparents. Unlike third party equitable doctrines, use of the UPA fully resolves the issue of a lesbian coparent's legal parent status and simultaneously provides clarity concerning her standing to maintain her claim. The UPA provides a consistent, uniform means for enabling a lesbian coparent to achieve full, legal parental status, which protects her and her child. In filing a maternity complaint, petitioners will not run afoul of constitutional presumptions of parental autonomy; they will not need to allege that the biological parent is unfit. Instead, a lesbian coparent can assert that she has a parental relationship with her child and use equitable doctrines as a means of proving her parentage within a parental analytic framework, rather than as a last-ditch effort to illustrate a quasi-parental relationship which may recognize only some aspects of parentage.

In this way, the UPA better establishes parity between the lesbian coparent and biological mother than either a second-parent adoption or a traditional equity complaint, because under a UPA complaint, the petitioner argues that she *is* a parent to her child, not that she has assumed a quasi-parental role in the child's life.²³² Essentially, this type of proceeding puts lesbian coparents on a par with men engaged in paternity proceedings and parents engaged in divorce proceedings: the focus is properly placed on determining how much visitation or contact with the lesbian coparent serves the child's best interests, rather

232. See Doskow, *supra* note 57, at 21.

than whether *any* contact with the lesbian coparent serves the child's best interests or whether such contact violates the biological mother's parental rights.²³³

Maternity adjudication under the UPA also preempts many of the problems noted in the cases discussed above. If lesbian coparents had a legal acknowledgment of their parental status prior to the dissolution of their relationship, it would be simpler to establish the jurisdictional basis for filing a custody and visitation complaint.²³⁴ Courts in Los Angeles, San Luis Obispo, and San Francisco counties in California as well as courts in Colorado and Massachusetts have granted UPA petitions to establish a legal relationship between lesbian coparents and their children, thereby protecting the relationship between a lesbian coparent and her child even if the lesbian coparent and her partner end their romantic relationship.²³⁵

Moreover, under the UPA, lesbian coparents (or biological mothers) need not initiate an adversarial proceeding: for instance, parties can file a written voluntary acknowledgment of parentage with the court in lieu of filing a complaint, which would have the same force and effect as an adjudication of maternity.²³⁶ Filing a maternity petition provides absolute protection of the child-parent relationship between the child and her lesbian coparent, now legal parent. From a practical standpoint, then, adjudication

233. Minter and Kendell note that:

[W]hile lesbian and gay parents who obtain second-parent adoptions are relieved to have some means of protecting their children, many also resent the notion that it is necessary for one of the partners to adopt the child to obtain legal recognition as a parent, despite the fact that both partners have planned the birth of the child and assumed co-equal responsibilities for parenting.

Minter & Kendell, *supra* note 50, at 30.

234. In all of the lesbian coparent cases discussed, a maternity adjudication for the lesbian coparent prior to the dissolution of her relationship with her romantic partner would have enabled her to proceed with her custody and visitation claims without need for a determination of her *right* to proceed; her legal parentage would have automatically given her that right.

235. See Doskow, *supra* note 57, at 21; Minter & Kendell, *supra* note 50, at 33 nn.27-28.

236. See, e.g., MASS. GEN. LAWS ANN. ch. 209C, § 11(a) (West 1998). In addition to the acknowledgment of parentage, the parties can also file a parenting agreement, which reflects their intentions concerning support, custody, visitation, and the like. *Id.* For purposes of establishing maternity, a coparenting agreement further exemplifies to the court the parties' joint intention to create a "two mommies" family.

under the UPA is advantageous for lesbian coparents because they can quickly and cheaply resolve the issue of legal parenthood.²³⁷

Most significantly, children benefit from lesbian coparent maternity adjudication too. By establishing maternity, a lesbian coparent will be able to ensure all of the privileges and protections of parenthood for her child, such as financial benefits—support, inheritance, health insurance—and emotional benefits—a legal ability to get involved in her child's educational, medical, moral, and religious development. Thus, maternity adjudication under the UPA will give children of lesbian parents, like Micah, *two* mommies who can protect and care for them and will ensure that children are not separated from the lesbian coparents who love them.

237. See *supra* notes 57-58 and accompanying text.

