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# After Marriage Equality: Dual Fatherhood for Married Male Same-Sex Couples

Jessica Feinberg\*

*In most states, married male same-sex couples who conceive children via gestational surrogacy using sperm from one member of the couple and donor ova must pursue adoption in order to establish legal parentage for the member of the couple who is not genetically related to the child. This is because only a minority of jurisdictions have surrogacy laws that recognize the non-biological intended parent as a legal parent in this situation, and across the United States cisgender male same-sex couples are excluded from the longstanding non-adoptive marriage-based avenues of establishing parentage currently available to both different-sex couples and female same-sex couples. Marriage-based avenues of establishing parentage, such as the marital presumption of parentage and spousal consent to assisted reproduction laws, represent the most common way to establish legal parentage in an individual other than the person who gave birth to the child. The exclusion of male same-sex couples from marriage-based avenues of establishing parentage is harmful, unwarranted, and unnecessary. Parenting abilities do not depend on sexual orientation or gender. Children raised by male same-sex couples fare just as well as children raised by different-sex couples and female same-sex couples, and men who function as primary caretakers to their children are as capable and effective as women who function in that role. Excluding male same-sex couples from marriage-based avenues of establishing parentage reinforces gender-based*

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*stereotypes around caretaking that harm and confine women and men both in the workplace and in the domestic sphere. Moreover, the conclusive presumption of parentage based upon the act of giving birth, which presents a major barrier to the extension of marriage-based avenues of establishing parentage to male same-sex couples, is an outdated concept that fails to reflect the realities of modern medical technology and the diverse circumstances under which children are conceived today. This Article advances a comprehensive proposal for extending marriage-based avenues of establishing parentage to male same-sex couples. If implemented, the proposal will provide a more equitable and effective legal framework for parentage establishment.*

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#### INTRODUCTION

As LGBTQ+ individuals and families have gained greater societal acceptance and broader legal rights and protections in recent years,<sup>1</sup> it has become increasingly common for same-sex couples to welcome children into their families.<sup>2</sup> When this occurs, the establishment of legal parentage for each member of the couple is critically important — there are myriad rights, protections, and obligations that stem from a legally recognized parent-child relationship. For example, if one member of the couple is unable to establish legal parentage, they will lack important parental rights relating to, *inter alia*, custody, visitation, and medical decision-making. In addition, the child will be deprived of important rights relating to, *inter alia*, support, inheritance, healthcare, and social security that would stem from a legally recognized parent-child relationship.<sup>3</sup> Historically, when a same-sex couple was raising a child who was genetically connected to one member of the couple, establishing parentage for the other member of the couple was difficult and, where possible, required adoption procedures.<sup>4</sup> Since non-adoptive avenues of establishing parentage generally stem from either actual or perceived genetic connections to the child or marriage to the individual who gave birth to the child, for most of the nation’s history same-sex

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<sup>1</sup> See, e.g., *Obergefell v. Hodges*, 576 U.S. 644, 680 (2015) (holding that states may not “bar same-sex couples from marriage on the same terms as accorded to couples of the opposite sex”).

<sup>2</sup> Meredith Larson, Note, *Don’t Know Much About Biology: Courts and the Rights of Non-Biological Parents in Same-Sex Partnerships*, 11 *GEO. J. GENDER & L.* 869, 872 (2010) (“In what some have termed a ‘gayby boom,’ LGBT couples and individuals are taking advantage of [assisted reproduction] options to have children at an increasing rate.”).

<sup>3</sup> Jessica Feinberg, *A Logical Step Forward: Extending Voluntary Acknowledgments of Parentage to Female Same-Sex Couples*, 30 *YALE J.L. & FEMINISM* 99, 113 (2018) [hereinafter *A Logical Step Forward*].

<sup>4</sup> Jessica Feinberg, *Whither the Functional Parent?: Revisiting Equitable Parenthood Doctrines in Light of Same-Sex Parents’ Increased Access to Obtaining Formal Legal Parent Status*, 83 *BROOK. L. REV.* 55, 55-56 (2017) [hereinafter *Whither the Functional Parent?*].

couples were excluded from non-adoptive avenues of establishing parentage for the member of the couple who did not share a genetic connection with the child.<sup>5</sup>

With the nationwide legalization of same-sex marriage,<sup>6</sup> however, certain categories of same-sex couples — those in which one member of the couple is able to gestate a child (including cisgender female same-sex couples as well as other same-sex couples in which one or both members of the couple, regardless of sex or gender identity, is willing and able to carry a child) — have gained increasing access to non-adoptive marriage-based avenues of establishing parentage.<sup>7</sup> Marriage-based avenues of establishing parentage provide a conclusive or rebuttable presumption of legal parentage to the spouse of the individual who gave birth to the child.<sup>8</sup> The common marriage-based avenues of establishing parentage include the marital presumption of parentage and spousal consent to assisted reproduction laws.<sup>9</sup> Historically, the marital presumption of parentage provided a rebuttable presumption of parentage to the husband of a woman who conceived or gave birth to a child during the marriage.<sup>10</sup> Spousal consent to assisted reproduction laws generally have provided a conclusive presumption of parentage to a husband who consents to his wife's use of assisted reproduction with the intent to be the resulting child's parent.<sup>11</sup> The extension of these marriage-based methods of establishing parentage to female same-sex couples has been relatively straightforward. For female same-sex couples who wish to have a child who shares a biological or genetic connection with at least one member of the couple, it is common for one of the spouses to gestate and give birth to the couple's child.<sup>12</sup> As a result, states have been able to extend

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<sup>5</sup> *Id.*

<sup>6</sup> *Obergefell*, 576 U.S. at 681.

<sup>7</sup> *See infra* Part I.

<sup>8</sup> *See infra* Part I.A.

<sup>9</sup> Feinberg, *A Logical Step Forward*, *supra* note 3, at 105-06.

<sup>10</sup> Theresa Glennon, *Somebody's Child: Evaluating the Erosion of the Marital Presumption of Paternity*, 102 W. VA. L. REV. 547, 562-63 (2000).

<sup>11</sup> COURTNEY G. JOSLIN, SHANNON P. MINTER & CATHERINE SAKIMURA, *LESBIAN, GAY, BISEXUAL & TRANSGENDER FAMILY LAW* § 3:3 (2019).

<sup>12</sup> Female same-sex couples also may choose to have a child through reciprocal *in vitro* fertilization, in which one member of the couple gestates the child and the other member of the couple provides the ova used to conceive the child. When this occurs, each member of the couple shares a biological or genetic connection to the child. *See* Lauren B. Paulk, *Embryonic Personhood: Implications for Assisted Reproductive Technology in International Human Rights Law*, 22 AM. U. J. GENDER SOC. POL'Y & L. 781, 788 (2014).

laws providing marriage-based avenues of establishing parentage to female same-sex couples simply by adopting gender neutral language to refer to the person who is deemed a parent on the basis of their marriage to the individual who gave birth.<sup>13</sup>

Cisgender male same-sex couples and other same-sex couples in which neither party is able to gestate a child, however, continue to be excluded from marriage-based avenues of establishing parentage. Cisgender male same-sex couples who wish to have a child who is genetically related to one member of the couple require the help of a surrogate to gestate and give birth to the child.<sup>14</sup> In the vast majority of cases, the couple will utilize gestational surrogacy in which the surrogate gives birth to a child who was conceived using ova from a third-party donor and sperm from one member of the couple.<sup>15</sup> Because marriage-based avenues of establishing parentage provide parentage on the basis of an individual's marriage to the person who gave birth, as opposed to an individual's marriage to the child's biological parent, male same-sex couples who conceive children via surrogacy are unable to utilize marriage-based avenues to establish parentage.<sup>16</sup> Furthermore, only a minority of states have adopted surrogacy laws that recognize both members of a male same-sex couple as legal parents when the child is conceived via gestational surrogacy using sperm from one member of the couple and ova from a donor.<sup>17</sup> As a result, in most states, while the member of a married male same-sex couple whose sperm was used to conceive the child (the biological intended parent) often may obtain parentage through existing paternity establishment procedures, his

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<sup>13</sup> See *infra* Part I.A.

<sup>14</sup> Male same-sex couples in which at least one of the members is transgender may not require the help of a third party to gestate and give birth to the child. A transgender man may be able to gestate and give birth to the child himself. See, e.g., Nancy Coleman, *Transgender Man Gives Birth to a Boy*, CNN (Aug. 1, 2017), <https://www.cnn.com/2017/07/31/health/trans-man-pregnancy-dad-trnd/index.html> [<https://perma.cc/NA2M-JVT3>] (reporting the story of a transgender man who gave birth to the child he shares with his cisgender male partner).

<sup>15</sup> The vast majority of surrogacy arrangements today, approximately, ninety-five percent, involve gestational surrogacy. Diane S. Hinson & Maureen McBrien, *Surrogacy Across America*, 34 FAM. ADVOC. 32, 33 (2011), <https://creativefamilyconnections.com/wp-content/uploads/2017/05/SurrogacyAcrossAmerica.pdf?x33078> [<https://perma.cc/43M5-PNSE>]. Accordingly, this Article focuses on establishing parentage in the context of gestational surrogacy arrangements.

<sup>16</sup> See *infra* Part I.C.

<sup>17</sup> See *infra* Part II.A.

spouse (the non-biological intended parent) must pursue adoption in order to establish legal parentage.<sup>18</sup>

Excluding male same-sex couples from marriage-based avenues to establishing parentage and requiring them to pursue adoption in order to establish both members as the child's legal parents is problematic for a number of reasons. Adoption is often an expensive, lengthy, and invasive process.<sup>19</sup> Importantly, until the adoption is completed, which may take months or longer, the non-biological intended parent is not a legal parent.<sup>20</sup> This leaves both the child and the non-biological intended parent without essential rights and protections and in a state of uncertainty.<sup>21</sup> The exclusion of male same-sex couples from marriage-based parentage establishment avenues also sends the harmful message that families headed by male same-sex couples are inferior and less deserving of legal recognition than families headed by different-sex couples or female same-sex couples.<sup>22</sup>

The continuing exclusion of male same-sex couples from marriage-based avenues of establishing parentage likely stems both from the conclusive presumption of legal parentage that often attaches to an individual based upon the act of giving birth and the pervasive gender-based stereotypes and beliefs about caretaking and parenting that continue to linger today.<sup>23</sup> The application of a conclusive presumption of legal parentage to the individual who gave birth creates a significant barrier to extending marriage-based avenues of establishing parentage to male same-sex couples. If conclusive legal parentage attaches to the individual who gave birth, extending marriage-based parentage presumptions to the same-sex spouse of the child's biological father would result in the establishment of legal parentage in at least three people simultaneously: the individual who gave birth, the biological father, and the biological father's spouse. This presents a significant problem, since the vast majority of jurisdictions only recognize a maximum of two legal parents.<sup>24</sup> In addition, providing individuals who give birth with a status — conclusive legal parentage — that generally

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<sup>18</sup> Douglas NeJaime, *The Nature of Parenthood*, 126 *YALE L.J.* 2260, 2308 (2017) (“In most states, nonbiological fathers in same-sex couples cannot establish parentage without adoption, even when they are married.”).

<sup>19</sup> Feinberg, *A Logical Step Forward*, *supra* note 3, at 110-11.

<sup>20</sup> *See* NeJaime, *supra* note 18, at 2317-18.

<sup>21</sup> *Id.* at 2318.

<sup>22</sup> *See id.* at 2322-23.

<sup>23</sup> *See infra* Part III.

<sup>24</sup> Feinberg, *A Logical Step Forward*, *supra* note 3, at 134 (“[T]he law in the vast majority of states recognizes a maximum of two legal parents for each child.”).

can be voluntarily terminated only in specified, narrow circumstances involving adoption proceedings, confines parentage establishment for male same-sex couples who conceive via surrogacy to the realm of adoption.<sup>25</sup> Another significant barrier to extending marriage-based avenues of establishing parentage to male same-sex couples involves the longstanding societal beliefs that women should be primarily responsible for the domestic sphere and that women are more capable than men at caretaking and parenting.<sup>26</sup> Throughout the years, the law has reflected and served to reinforce these gendered beliefs.<sup>27</sup>

These barriers, however, should not preclude the extension of marriage-based avenues of establishing parentage to male same-sex couples. The conclusive presumption of parentage based upon the act of giving birth is an outdated concept that fails to reflect the realities of modern medical technology and the diverse circumstances under which children are conceived today.<sup>28</sup> Reform to make the legal parentage that attaches to an individual based upon the act of giving birth rebuttable in appropriate circumstances is long overdue. Moreover, the gendered stereotypes and expectations regarding parenting abilities and responsibilities are not only inaccurate<sup>29</sup> but also extremely harmful to both women and men.<sup>30</sup> Laws that challenge and dismantle the gendered stereotypes that continue to linger about the familial roles of women and men, such as those that facilitate parentage establishment for male same-sex couples, will promote greater equality both in the workplace and in the home.<sup>31</sup>

This Article proposes that states adopt standards providing for the rebuttal and disestablishment of the presumed legal parentage of the individual who gave birth when the individual is not genetically related to the child and undertook conception in conjunction with the intended parents with the mutual intent and understanding that the intended parents would be the child's sole legal parents. This Article further proposes that states amend their marriage-based avenues of establishing parentage such that these avenues extend to the spouse of the child's biological, legally recognized father upon the rebuttal and disestablishment of the presumed legal parentage of the individual who gave birth. Extending marriage-based avenues of parentage

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<sup>25</sup> See *infra* notes 149–53 and accompanying text.

<sup>26</sup> See *infra* Part III.B.

<sup>27</sup> See *infra* Part III.B.

<sup>28</sup> See *infra* notes 129–32 and accompanying text.

<sup>29</sup> See *infra* notes 223–27 and accompanying text.

<sup>30</sup> See *infra* Part IV.B.

<sup>31</sup> See *infra* Part IV.B.

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establishment to male same-sex couples is an essential component of attaining equality for male same-sex couples in the parentage realm. While advancing surrogacy laws that recognize intended parents as legal parents regardless of gender or sexual orientation is also an extremely important goal, many states still have not passed laws addressing surrogacy and some states prohibit the practice.<sup>32</sup> A substantial number of states may find it easier or more palatable to facilitate parentage establishment for male same-sex couples by extending the longstanding avenues of establishing parentage that already exist, such as marriage-based avenues, as opposed to creating new avenues of parentage establishment, such as surrogacy-based avenues.<sup>33</sup> It is important to note that while this Article explores the issue through the lens of the historical and current legal and societal treatment of cisgender men and cisgender male same-sex couples, the problematic, exclusionary effects of the parentage laws discussed extend to any couple who chooses to pursue gestational surrogacy utilizing sperm from one member of the couple and donor ova, regardless of the gender makeup of the couple.

This Article proceeds in the following manner. Part I provides an overview of the non-adoptive marriage-based avenues of establishing parentage that are available to different-sex couples and female same-sex couples, but do not extend to male same-sex couples. Part II discusses the current state of the law governing parentage establishment for married male same-sex couples when a child is conceived via gestational surrogacy using sperm from one member of the couple and ova from a donor. Part III analyzes the barriers to extending marriage-based avenues of establishing parentage to male same-sex couples, focusing on the presumption of legal parentage that attaches to an individual based upon the act of giving birth and the lingering gender-based stereotypes and assumptions that exist around parenting. Part IV explores the myriad reasons that support extending marriage-based parentage establishment avenues to male same-sex couples. Finally, Part V sets forth a comprehensive proposal for extending marriage-based avenues of establishing parentage to male same-sex couples who

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<sup>32</sup> See ALEX FINKELSTEIN, SARAH MAC DOUGALL, ANGELA KINTOMINAS & ANYA OLSEN, COLUMBIA LAW SCH. SEXUALITY & GENDER LAW CLINIC, SURROGACY LAW AND POLICY IN THE U.S.: A NATIONAL CONVERSATION INFORMED BY GLOBAL LAWMAKING 8 (2016), [https://web.law.columbia.edu/sites/default/files/microsites/gender-sexuality/files/columbia\\_sexuality\\_and\\_gender\\_law\\_clinic\\_-\\_surrogacy\\_law\\_and\\_policy\\_report\\_-\\_june\\_2016.pdf](https://web.law.columbia.edu/sites/default/files/microsites/gender-sexuality/files/columbia_sexuality_and_gender_law_clinic_-_surrogacy_law_and_policy_report_-_june_2016.pdf) [<https://perma.cc/7KSA-UPTF>].

<sup>33</sup> See NeJaime, *supra* note 18, at 2342.

conceive children via gestational surrogacy using sperm from one member of the couple and donor ova.

I. CURRENT NON-ADOPTIVE MARRIAGE-BASED AVENUES OF ESTABLISHING PARENTAGE

When one member of a married different-sex couple conceives or gives birth to a child during the marriage, the legal parentage of their spouse generally is established through a non-adoptive marriage-based avenue. Due to the fact that same-sex couples could not legally marry for most of the nation's history, the marriage-based avenues used to establish parentage for the spouse of the individual who gave birth were, for a long time, simply unavailable to same-sex couples. In 2004, however, Massachusetts became the first state to legalize same-sex marriage.<sup>34</sup> Between 2004 and 2015, the legalization of same-sex marriage expanded rapidly throughout the United States, culminating with the Supreme Court's decision in *Obergefell v. Hodges*, which struck down the remaining state bans on same-sex marriage.<sup>35</sup> *Obergefell* set forth the important proposition that states may not "bar same-sex couples from marriage on the same terms as accorded to couples of the opposite sex."<sup>36</sup> As a result, same-sex spouses of individuals who give birth now have significantly greater access to the non-adoptive marriage-based avenues of establishing parentage enjoyed by their different-sex counterparts.

A. *Establishing the Spouse's Legal Parentage Through the Marital Presumption of Parentage*

The marital presumption of parentage, under which a husband was presumed to be the legal father of any child born to or conceived by his wife during the marriage, arose from English common law.<sup>37</sup> In the United States, the marital presumption has served as a core component of the law governing parentage since the nation's inception.<sup>38</sup> Early justifications for the marital presumption included that it protected children from being deemed illegitimate, a status which deprived

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<sup>34</sup> *Looking Back at the Legalization of Gay Marriage in Mass.*, BOS. GLOBE (June 26, 2015, 12:26 PM), <https://www.bostonglobe.com/metro/2015/06/26/looking-back-legalization-gay-marriage-mass/uhCeyrSeJtWty9tSUde1PI/story.html> [<https://perma.cc/3H29-MB9G>].

<sup>35</sup> *Obergefell v. Hodges*, 576 U.S. 644, 681 (2015).

<sup>36</sup> *Id.* at 680.

<sup>37</sup> Glennon, *supra* note 10, at 562.

<sup>38</sup> Jessica Feinberg, *Restructuring Rebuttal of the Marital Presumption for the Modern Era*, 104 MINN. L. REV. 243, 243 (2019) [hereinafter *Restructuring Rebuttal*].

children of significant legal rights and protections and carried a profound stigma;<sup>39</sup> avoided “evidentiary impasses”<sup>40</sup> and provided parentage to the man viewed as most likely to be the child’s biological father during a time when scientific advancements did not yet allow for the definitive determination of biological paternity;<sup>41</sup> promoted parenthood within marriage;<sup>42</sup> protected the harmony and integrity of the marital family unit;<sup>43</sup> and reduced government spending by ensuring that more children had two legal parents obligated to support them from the time of birth.<sup>44</sup> Although a number of the early justifications for applying the marital presumption no longer carry the same weight (the Supreme Court has struck down laws providing for the unequal treatment of non-marital children in a number of important areas<sup>45</sup> and technology now allows for the efficient determination of biological parentage<sup>46</sup>), there are a number of remaining justifications for the continued application of the marital presumption.

Common justifications set forth for the continued use of the marital presumption relate to promoting children’s best interests and protecting

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<sup>39</sup> *Michael H. v. Gerald D.*, 491 U.S. 110, 125 (1989) (“The primary policy rationale underlying the common law’s severe restrictions on rebuttal of the presumption appears to have been an aversion to declaring children illegitimate, thereby depriving them of rights of inheritance and succession, and likely making them wards of the state.” (citations omitted)).

<sup>40</sup> Debi McRae, *Evaluating the Effectiveness of the Best Interests Marital Presumption of Paternity: It Is Actually in the Best Interests of Children to Divorce the Current Application of the Best Interests Marital Presumption of Paternity*, 5 WHITTIER J. CHILD & FAM. ADVOC. 345, 349-50 (2006).

<sup>41</sup> Melanie B. Jacobs, *Parental Parity: Intentional Parenthood’s Promise*, 64 BUFF. L. REV. 465, 478 (2016) (“And, in the majority of instances, a mother’s husband is, indeed, the child’s biological father.”); Marjorie Maguire Shultz, *Reproductive Technology and Intent-Based Parenthood: An Opportunity for Gender Neutrality*, 1990 WIS. L. REV. 297, 317 (“[O]ne presumptive purpose [of the marital presumption] has been the codification of empirical inference — the best available method of determining factual biological paternity. Who is the biological father? The most likely candidate is the man having sexual intercourse with the mother. Who is most likely having sexual intercourse with the mother? Her husband.”).

<sup>42</sup> See Glennon, *supra* note 10, at 590-91.

<sup>43</sup> *Michael H.*, 491 U.S. at 125.

<sup>44</sup> See Susan Frelich Appleton, *Presuming Women: Revisiting the Presumption of Legitimacy in the Same-Sex Couples Era*, 86 B.U. L. REV. 227, 246-47 (2006).

<sup>45</sup> See, e.g., *Trimble v. Gordon*, 430 U.S. 762 (1977) (inheritance); *Gomez v. Perez*, 409 U.S. 535 (1973) (child support); *Weber v. Aetna Casualty & Surety Co.*, 406 U.S. 164 (1972) (workers’ compensation benefits); *Levy v. Louisiana*, 391 U.S. 68 (1968) (wrongful death claims).

<sup>46</sup> *Paternity Blood Tests and DNA*, FINDLAW, <https://family.findlaw.com/paternity/paternity-tests-blood-tests-and-dna.html> (last updated Oct. 2, 2018) [<https://perma.cc/H2VE-QLJC>].

marriages and marital family units. The marital presumption is a simple, efficient method of providing a child born to a married individual with a second legal parent from the time of birth.<sup>47</sup> Providing children with two legal parents — each of whom has a duty to care for and support the child — from the earliest possible point, promotes both children’s best interests<sup>48</sup> and societal interests.<sup>49</sup> Furthermore, the popular belief that children benefit from being raised within a marital family has persisted.<sup>50</sup> In addition, the presumption protects the harmony and integrity of marriages, and stable marital families are considered “a critical social good.”<sup>51</sup> Importantly, in the vast majority of instances involving a child born to a married individual, the marital presumption is never challenged.<sup>52</sup> Thus, the marital presumption generally serves to protect both “the integrity of the marriage” and the relationship that has

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<sup>47</sup> Mikaela Shotwell, Note, *Won’t Somebody Please Think of the Children?!: Why Iowa Must Extend the Marital Presumption to Children Born to Married, Same-Sex Couples*, 15 J. GENDER RACE & JUST. 141, 144 (2012) (“Because this legal status carries with it a number of rights and duties, the marital presumption, in effect, ‘gives the child a legal father who must provide care and support for the child.’” (quoting Kathy T. Graham, *Same-Sex Couples: Their Rights as Parents, and Their Children’s Rights as Children*, 48 SANTA CLARA L. REV. 999, 1008 (2008))); see Jacobs, *supra* note 41, at 470 (stating that the presumption has “ease of application”).

<sup>48</sup> William M. Lopez, Note, *Artificial Insemination and the Presumption of Parenthood: Traditional Foundations and Modern Applications for Lesbian Mothers*, 86 CHI.-KENT L. REV. 897, 903 (2011) (“[C]hildren benefit from the simple fact of having a legally recognized relationship with both parents . . . .”); Jennifer B. Mertus, Note, *In re Adoption of R.B.F.: A Step Toward the Recognition and Acceptance of Non-Traditional Families*, 3 WHITTIER J. CHILD & FAM. ADVOC. 171, 185 (2003) (“Having two legal parents, regardless of their sexuality, provides many economic, legal, and psychological benefits to a child.”).

<sup>49</sup> Appleton, *supra* note 44, at 246 (“A less altruistic version of the child-welfare rationale for the presumption of legitimacy shifts the focus to the public or society in general. On a purely practical level, the law’s preference for the marital family long has helped protect the public purse and the public interest in clear rules of descent.”); see also Mark Strasser, *Presuming Parentage*, 25 TEX. J. WOMEN GENDER & L. 57, 60 (2015).

<sup>50</sup> *Obergefell v. Hodges*, 576 U.S. 644, 646 (2015) (discussing “the significant material costs of being raised by unmarried parents,” including being “relegated to a more difficult and uncertain family life”); *Goodridge v. Dep’t of Pub. Health*, 440 Mass. 309, 383 (2003) (Cordy, J., dissenting) (describing marriage as “the foremost setting for the education and socialization of children”); Appleton, *supra* note 44, at 243 (“According to one popular understanding today, the presumption of legitimacy has served and should continue to serve a child-welfare objective.”); Glennon, *supra* note 42, at 590-91 (“Courts often justify privileging the marital relationship on the ground that parenthood within marriage best protects children.”).

<sup>51</sup> Vivian Hamilton, *Principles of U.S. Family Law*, 75 FORDHAM L. REV. 31, 39 n.25 (2006).

<sup>52</sup> Leslie Joan Harris, *Obergefell’s Ambiguous Impact on Legal Parentage*, 92 CHI.-KENT L. REV. 55, 67 (2017).

formed between the spouse of the individual who gave birth and the child.<sup>53</sup> Today, every state continues to apply the marital presumption in some form,<sup>54</sup> and it remains the most common way of establishing an individual other than the person who gave birth as a child's legal parent.<sup>55</sup>

With regard to the application of the marital presumption of parentage to same-sex spouses of individuals who give birth, while *Obergefell* did not explicitly discuss the extension of the marital presumption to same-sex couples, it held that states must provide marriage to same-sex couples on the "same terms" accorded to different-sex couples.<sup>56</sup> As a result, states' marital presumptions of parentage should apply equally to same- and different-sex spouses of individuals who give birth.<sup>57</sup> The Supreme Court's 2017 decision in *Pavan v. Smith* provides strong additional support for the argument that *Obergefell* requires the extension of the marital presumption of parentage to same-sex spouses of individuals who give birth.<sup>58</sup> In *Pavan*, the Court, applying *Obergefell*, held that because Arkansas law generally requires the name of the different-sex spouse of an individual who gave birth to appear on a child's birth certificate, the state could not refuse to list the name of the same-sex spouse of an individual who gave birth on the child's birth certificate.<sup>59</sup>

Most courts that have addressed the issue of whether a state's marital presumption of parentage extends to the same-sex spouse of an individual who gives birth have answered the question in the affirmative.<sup>60</sup> Moreover, several jurisdictions have amended their

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<sup>53</sup> *Id.*

<sup>54</sup> Leslie Joan Harris, *The Basis for Legal Parentage and the Clash Between Custody and Child Support*, 42 IND. L. REV. 611, 622-23 (2009).

<sup>55</sup> Katharine K. Baker, *Legitimate Families and Equal Protection*, 56 B.C. L. REV. 1647, 1659 (2015).

<sup>56</sup> *Obergefell v. Hodges*, 576 U.S. 644, 646 (2015). With its extension to female same-sex couples, it makes more sense to refer to the presumption as the "marital presumption of parentage" as opposed to the "marital presumption of paternity."

<sup>57</sup> JOSLIN ET AL., *supra* note 11, § 5:22 ("After *Obergefell v. Hodges*, all marriage-based parentage rules — including the marital presumption — should be applied equally to same-sex spouses . . .").

<sup>58</sup> *Pavan v. Smith*, 137 S. Ct. 2075, 2077 (2017).

<sup>59</sup> *Id.* However, *Pavan* concerned only birth certificates, not the presumption of parentage itself, and generally "a birth certificate is merely prima facie evidence of the information stated within." JOSLIN ET AL., *supra* note 11, § 5:25.

<sup>60</sup> See, e.g., *McLaughlin v. Jones ex rel. Pima*, 401 P.3d 492, 496-98 (Ariz. 2017) (holding that the marital presumption extends to the same-sex spouse of an individual who gives birth); *Barse v. Pasternak*, 2015 WL 600973, at \*10 (Conn. Super. Ct. 2015) (same); *Gartner v. Iowa Dep't of Pub. Health*, 830 N.W.2d 335, 340-41 (Iowa 2013)

marital presumption statutes to clarify that the presumption applies to the spouse of an individual who gives birth regardless of the spouse's sex.<sup>61</sup> In addition, a number of states' parentage laws indicate that, insofar as is practicable, provisions addressing the determination of paternity should apply to determinations of maternity.<sup>62</sup> It seems

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(same); *Della Corte v. Ramirez*, 961 N.E.2d 601, 603 (Mass. App. Ct. 2012) (same); *Christopher YY v. Jessica ZZ*, 159 A.D.3d 18, 26 (N.Y. App. Div. 2018) (same); *In re Joseph O. v. Danielle B.*, 158 A.D.3d 767, 769-70 (N.Y. App. Div. 2018) (same); see also *Kerry Abrams & R. Kent Piacenti, Immigration's Family Values*, 100 VA. L. REV. 629, 709 (2014) ("Most states that recognize same-sex marriages, for example, also extend the marital presumption of paternity to gay and lesbian couples . . ."); cf. *Chaisson v. State*, 239 So. 3d 1074, 1081 (La. Ct. App. 2018) ("The Registrar maintains the presumption of parentage for the non-child bearing spouse provided for [under Louisiana law] is not biologically based but is based on the marriage contract in existence at the time of [the child's] birth. Thus, the Registrar is legally required to provide equal protection to same sex couples seeking to amend a birth certificate, under *Obergefell* . . ."); *Miller-Jenkins v. Miller-Jenkins*, 912 A.2d 951, 968-70 (Vt. 2004) (ruling that because civil unions granted same-sex couples all of the rights and obligations of marriage, the marital presumption of parentage applied to same-sex couples who had entered into civil unions). However, not all courts have reached the same conclusion. See, e.g., *Paczkowski v. Paczkowski*, 128 A.D.3d 968, 969 (N.Y. App. Div. 2015) (holding that the statutory marital presumptions of paternity did not apply to the wife of woman who conceived a child during the marriage, "since the presumption of legitimacy [the statutes] create is one of a biological relationship, not of legal status . . . and, as the non-gestational spouse in a same-sex marriage, there is no possibility that [the wife] is the child's biological parent") (citations omitted); *Q.M. v. B.C.*, 995 N.Y.S.2d 470, 474 (N.Y. Fam. Ct. 2014) (declining to apply the marital presumption of paternity to a same-sex couple and explaining that the state's "Marriage Equality Act does not require the court to ignore the obvious biological differences between husbands and wives"); *In re A.E.*, 2017 WL 1535101, at \*8 (Tex. App. 2017) (declining to apply the marital presumption to a same-sex couple and stating that "*Obergefell* did not hold that every state law related to the marital relationship or the parent-child relationship must be 'gender neutral'").

<sup>61</sup> NeJaime, *supra* note 18, at 2339.

<sup>62</sup> See, e.g., COLO. REV. STAT. ANN. § 19-4-122 (2020) ("Any 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 article applicable to the father and child relationship apply."); TEX. FAM. CODE ANN. § 160.106 (2020) ("The provisions of this chapter relating to the determination of paternity apply to a determination of maternity."); see also *JOSLIN ET AL.*, *supra* note 11, § 4:19 ("Courts in a growing number of states — including Arizona, California, Colorado, Delaware, Hawaii, Kansas, Maryland, Massachusetts, Minnesota, Nevada, New Hampshire, New Mexico, and Virginia — have held that [paternity] provisions must be applied in a gender-neutral manner."); NeJaime, *supra* note 18, at 2294 ("In many states, such application has been aided by explicit gender-neutrality directives modeled on the UPA. The original UPA provides that in actions 'to determine the existence or nonexistence of a mother and child relationship[,] [i]nsofar as practicable, the provisions . . . applicable to the father and child relationship apply.' The revised UPA includes a similar directive, stating that the provisions 'relating to determination of paternity apply to determinations of maternity.'").

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probable that in the coming years, as more parentage disputes arise involving children born to same-sex spouses, more states will explicitly extend the marital presumption of parentage to encompass same-sex spouses of individuals who give birth. Furthermore, assuming that *Obergefell* and *Pavan* are not overturned, it is likely that all states that wish to maintain the marital presumption will need to extend it to same-sex spouses of individuals who give birth.<sup>63</sup>

It is important to note that while the extension of existing state marital presumption of parentage standards to same-sex spouses is an important step that will be effective in providing parentage to same-sex spouses in situations in which the presumption is never challenged, the grounds for rebuttal, which have always centered on proving a lack of genetic connection between the spouse of the individual who gave birth and the child, will need to be restructured in order for the presumption to fully and meaningfully encompass same-sex couples.<sup>64</sup> Since in most cases involving same-sex couples the spouse of the individual who gave birth will not be genetically connected to the child, to create a marital presumption that fairly, logically, and effectively encompasses same-sex couples, states must engage in the important undertaking of restructuring their current standards so that a spouse's lack of genetic connection to the child, by itself, is no longer the basis for rebuttal (at least in cases of nonsexual conception).<sup>65</sup> There are a number of other ways to structure rebuttal of the marital presumption, such as requiring, in addition to proof of a lack of genetic connection between the spouse and child, proof of a lack of mutual intent between the parties for the spouse to be the child's legal parent or proof of a lack of parental function on the part of the spouse.<sup>66</sup> Overall, while there is still work to be done with regard to the grounds for rebuttal, the extension of the marital presumption of parentage to same-sex spouses of individuals who give birth is a critically important development that will provide significantly more same-sex couples with a simple and inexpensive method of establishing parentage.

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<sup>63</sup> Feinberg, *Restructuring Rebuttal*, *supra* note 38, at 257.

<sup>64</sup> See generally *id.* (arguing that restructuring the marital presumption of parentage so that a spouse's lack of genetic connection to the child is no longer the basis for rebuttal is essential to establishing a marital presumption that effectively encompasses same-sex couples).

<sup>65</sup> *Id.* at 246.

<sup>66</sup> *Id.* at 271.

B. *Establishing the Spouse's Legal Parentage Through Consent to Assisted Reproduction Laws*

Another common marriage-based avenue to establishing parentage stems from state laws that provide parentage to an individual based upon that individual having provided their consent to their spouse's use of assisted reproduction to conceive a child. Under existing statutory or common law rules throughout the United States, a husband who consents to his wife's use of assisted reproduction with the intent to be the resulting child's parent is deemed a legal parent regardless of whether the child is conceived using the husband's sperm or donor sperm.<sup>67</sup> In some jurisdictions, the laws providing parentage based upon a husband's consent to his wife's use of assisted reproduction require that the husband's consent be in writing, that the procedure be performed by or under the supervision of a physician, or both.<sup>68</sup> In at least one state, the spousal consent to assisted reproduction law's application is restricted to situations involving only certain types of assisted reproduction procedures.<sup>69</sup>

Under *Obergefell* and *Pavan*, spousal consent to assisted reproduction laws should extend to a same-sex spouse who, with the intent to be the resulting child's parent, consents to their spouse's use of assisted reproduction to conceive a child.<sup>70</sup> Most courts that have addressed the issue have ruled that assisted reproduction statutes that on their face provide parentage only to husbands who consent to their wives' use of assisted reproduction to conceive a child also apply to wives who consent to their wives' use of assisted reproduction to conceive a child.<sup>71</sup>

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<sup>67</sup> JOSLIN ET AL., *supra* note 11, § 3:3.

<sup>68</sup> *Id.*

<sup>69</sup> See *Patton v. Vanterpool*, 302 Ga. 253, 256 (2017) (holding that the state's assisted reproduction statute, which "creates an irrebuttable presumption of legitimacy with respect to all children born within wedlock or within the usual period of gestation thereafter who were conceived by means of *artificial insemination*" when both spouses consented to the procedure in writing, did not apply in situations in which the child had been conceived via *in vitro fertilization* (citations omitted) (emphasis added)).

<sup>70</sup> JOSLIN ET AL., *supra* note 11, § 3:3 ("After the decision in *Obergefell v. Hodges* requiring that states permit and recognize marriages between same-sex spouses on the 'same terms and conditions' as for different-sex spouses, these rules . . . must be applied equally to same-sex couples who have children through assisted reproduction during their marriage.").

<sup>71</sup> *Id.* § 3:4 ("A number of courts have held that gendered assisted reproduction provisions must be applied equally to a female intended parent . . . There are a small number of courts, however, that have resisted these trends and directions."); NeJaime, *supra* note 18, at 2294 ("[C]ourts that have considered the issue in other states have, almost without exception, applied these statutes to married same-sex couples.").

In addition, a growing number of states are adopting spousal consent to assisted reproduction statutes that contain gender-neutral terms in reference to the class of individuals who may use this avenue to establish their legal parentage.<sup>72</sup> Furthermore, as noted above, a number of states' parentage laws indicate that provisions that apply to paternity determinations should be interpreted, insofar as is practicable, to apply to maternity determinations.<sup>73</sup> Importantly, especially for same-sex couples, while in most states the marital presumption of parentage provides the spouse of the individual who gives birth with only a rebuttable presumption of parentage, the parentage for the spouse established by consent to assisted reproduction laws generally is conclusive and irrefutable.<sup>74</sup> However, even for married couples who conceive through assisted reproduction, the existence of both types of marriage-based avenues to establishing parentage (the marital presumption of parentage and spousal consent to assisted reproduction laws) is essential, as the marital presumption serves as an important safety net in situations where the formal requirements of spousal consent to assisted reproduction laws have not been satisfied.<sup>75</sup>

*C. The Limited Reach of Existing Non-Adoptive Marriage-Based Avenues of Establishing Parentage*

The extension to same-sex couples of non-adoptive marriage-based avenues to establishing parentage represents a critical step in the right direction towards providing equitable treatment for same-sex parents and their children. Unfortunately, however, thus far the extension of non-adoptive marriage-based avenues to establishing parentage generally has reached only one subset of married same-sex couples: those in which one member of the marital unit has carried and given birth to the child in question.<sup>76</sup> This is because the existing “[p]resumptions of parentage for the second parent, even when they

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<sup>72</sup> See JOSLIN ET AL., *supra* note 11, § 3:4; NeJaime, *supra* note 18, at 2294 n.163.

<sup>73</sup> See *supra* note 62 and accompanying text.

<sup>74</sup> JOSLIN ET AL., *supra* note 11, § 3:4 (“[I]f an assisted reproduction statute applies, it often is the most direct and strongest claim since it typically provides for a conclusive, nonrebuttable basis for establishing parentage.”).

<sup>75</sup> See *Wendy G–M. v. Erin G–M.*, 985 N.Y.S.2d 845, 853-55 (Sup. Ct. 2014) (holding that although the parties had not complied with the formal requirements of the spousal consent to assisted reproduction statute, the marital presumption provided a separate means for establishing the spouse’s parentage).

<sup>76</sup> NeJaime, *supra* note 18, at 2312. *But see In re Maria-Irene D.*, 153 A.D.3d 1203, 1205 (N.Y. App. Div. 2017) (applying the marital presumption of parentage to the biological father’s same-sex spouse).

apply to both women and men, relate to that person's marriage to 'the woman giving birth.'<sup>77</sup> For married cisgender male same-sex couples, however, neither member of the couple is able to give birth to the child; instead, the couple must utilize a surrogate in order to have a child who is genetically related to one member of the couple.<sup>78</sup> Thus, because the existing non-adoptive marriage-based avenues to establishing parentage stem from marriage to the individual who gave birth to the child, as opposed to marriage to the child's biological parent, married male same-sex couples are excluded from these simple, efficient avenues of establishing parentage.<sup>79</sup> Instead, married male same-sex couples who utilize surrogacy to conceive a child who is genetically related to one member of the couple must pursue other avenues to establish both members of the couple as the child's legal parents.

## II. CURRENT METHODS OF ESTABLISHING PARENTAGE FOR MARRIED MALE SAME-SEX COUPLES WHO UTILIZE GESTATIONAL SURROGACY

When a married cisgender male same-sex couple utilizes surrogacy, only one member of the couple, at most, will share a genetic connection to the child. Consequently, there necessarily will be one member of the couple who is a non-biological intended parent and thus cannot establish his parentage through the existing avenues that allow men to establish parentage on the basis of actual or perceived biological connections to a child.<sup>80</sup> The non-biological intended parent also generally cannot establish his parentage through existing non-adoptive marriage-based avenues.<sup>81</sup> As detailed above, the current marriage-based methods of establishing parentage stem from an individual's marriage to the person who gave birth to the child as opposed to an individual's marriage to the child's biological parent.<sup>82</sup> As a result, while

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<sup>77</sup> NeJaime, *supra* note 18, at 2312.

<sup>78</sup> Jenna Casolo, Campbell Curry-Ledbetter, Meagan Edmonds, Gabrielle Field, Kathleen O'Neill & Marisa Poncia, *Assisted Reproductive Technologies*, 20 *GEO. J. GENDER & L.* 313, 344 (2019) ("Because LGBT men cannot reproduce on their own, they must have the cooperation and support of a woman to act as their surrogate.").

<sup>79</sup> Libby Adler, *Inconceivable: Status, Contract, and the Search for a Legal Basis for Gay & Lesbian Parenthood*, 123 *PENN ST. L. REV.* 1, 17 (2018) ("Indeed, the most recent version of the Uniform Parentage Act . . . maintains automatic parenting rights for a birth mother and then presumes parentage for the birth mother's spouse, but the spouse of a male biological parent acquires no such presumption."); NeJaime, *supra* note 18, at 2314 ("Ordinary parentage rules simply do not permit dual parentage for male same-sex couples absent adoption.").

<sup>80</sup> NeJaime, *supra* note 18, at 2312.

<sup>81</sup> See *supra* Part II.

<sup>82</sup> See *supra* Part II.

a number of non-adoptive avenues of establishing parentage may be available to the biological intended parent, surrogacy law generally represents the only potential non-adoptive avenue through which the non-biological intended parent can establish parentage.

Surrogacy typically involves an agreement between the surrogate and intended parent(s) providing that the surrogate agrees to become pregnant through the use of assisted reproduction and to relinquish parental rights to any resulting child to the intended parent(s).<sup>83</sup> In the context of gestational surrogacy, which is estimated to represent approximately 95% of all surrogacy arrangements today,<sup>84</sup> the surrogate is not genetically connected to the child.<sup>85</sup> Instead, ova and sperm from the intended parent(s) or gamete donor(s) are used to create the embryo that will be implanted in the surrogate.<sup>86</sup> It has become increasingly common for both male same-sex couples and different-sex couples wherein medical issues make it risky or impossible for the wife to carry a child to pursue gestational surrogacy arrangements.<sup>87</sup> According to a report from the Centers for Disease Control and Prevention, between 2005 and 2014, the number of embryo transfers that involved gestational surrogates almost doubled.<sup>88</sup>

In the United States, surrogacy is a complex area of the law and legal regulation of gestational surrogacy varies dramatically by jurisdiction. Slightly under half of states have statutes that explicitly address gestational surrogacy, some states have only case law addressing gestational surrogacy, and still other states have no statutory or case law governing gestational surrogacy.<sup>89</sup> A few states consider surrogacy

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<sup>83</sup> Casolo et al., *supra* note 78, at 330.

<sup>84</sup> Hinson & McBrien, *supra* note 15, at 33.

<sup>85</sup> See CTR. FOR DISEASE CONTROL & PREVENTION, 2014 ASSISTED REPRODUCTIVE TECHNOLOGY: NATIONAL SUMMARY REPORT 52 (2016), <https://www.cdc.gov/art/pdf/2014-report/art-2014-national-summary-report.pdf> [<https://perma.cc/V6VB-X9FL>]. In contrast, “[a] traditional surrogate supplies both the egg, or genetic component, and the gestational role of carrying the pregnancy to term.” Casolo et al., *supra* note 78, at 316.

<sup>86</sup> JOSLIN ET AL., *supra* note 11, § 4:1; ROBERT JOHN KANE & LAWRENCE E. SINGER, THE LAW OF MEDICAL PRACTICE IN ILLINOIS § 35:9 (2019).

<sup>87</sup> See JOSLIN ET AL., *supra* note 11, § 4:1 n.1; Paige Lyons, *Are You My Mother?: Equality for Same-Sex Parents in Texas Following Obergefell*, 51 TEX. TECH L. REV. 241, 250 (2019); Nara Schoenberg, *Gay Men Increasingly Turn to Surrogates to Have Babies*, CHICAGO TRIB. (Nov. 23, 2016, 8:59 AM), <https://www.chicagotribune.com/lifestyles/health/sc-gay-men-having-babies-health-1130-20161123-story.html> [<https://perma.cc/PV5K-YZXB>].

<sup>88</sup> CTR. FOR DISEASE CONTROL & PREVENTION, *supra* note 85, at 52.

<sup>89</sup> FINKELSTEIN ET AL., *supra* note 32, at 8; see JOSLIN ET AL., *supra* note 11, § 4:12; NeJaime, *supra* note 18, at 2376 app. E.

contracts void and unenforceable.<sup>90</sup> In the jurisdictions that have statutes or appellate case law recognizing the enforceability of at least some categories of gestational surrogacy agreements, there are different approaches relating to issues such as, *inter alia*, the procedure for entering into the agreement, who is eligible to serve as a surrogate, whether and to what extent the surrogate can be compensated, and the types of substantive provisions that may be included in the agreement.<sup>91</sup> For example, in many states the parties to the surrogacy contract must be represented by independent legal counsel, and the surrogate, the intended parents, or both, must undergo psychological and medical evaluations.<sup>92</sup> A couple of states require either a home study of the intended parents, judicial preauthorization of the surrogacy agreement (meaning a court must approve the agreement before the surrogate becomes pregnant), or both.<sup>93</sup> A number of states mandate that to be eligible to serve as a surrogate, the individual must have had at least one prior pregnancy that was carried to term.<sup>94</sup> In some states only uncompensated surrogacy is permitted, while other states permit compensated surrogacy.<sup>95</sup>

Importantly, the jurisdictions with statutes or appellate case law governing gestational surrogacy also differ with regard to the categories of intended parents who are eligible to enter into enforceable surrogacy agreements.<sup>96</sup> In states that recognize the enforceability of at least some gestational surrogacy agreements, the approaches to the categories of

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<sup>90</sup> See, e.g., ARIZ. REV. STAT. ANN. § 25-218 (2020) (stating that no person may enter into a surrogacy agreement); IND. CODE § 31-20-1-1 (2020) (stating that it is against public policy to enforce surrogacy agreements); MICH. COMP. LAWS § 722.855 (2020) (stating that surrogacy agreements are void and unenforceable); N.D. CENT. CODE § 14-18-05 (2020) (stating that surrogacy agreements are void). New York recently passed legislation lifting its long-time ban on gestational surrogacy. Elizabeth Chuck, *New York State, Long a Holdout Against Legalizing Surrogacy, Overturns Ban*, NBC NEWS (Apr. 3, 2020), <https://www.nbcnews.com/news/us-news/new-york-state-long-holdout-against-legalizing-surrogacy-overturns-ban-n1176071> [https://perma.cc/DJ3G-Z2FQ]. The new law takes effect on February 15, 2021. *Id.*

<sup>91</sup> See JOSLIN ET AL., *supra* note 11, § 4:2; Casolo et al., *supra* note 78, at 330-37.

<sup>92</sup> JOSLIN ET AL., *supra* note 11, § 4:2; Casolo et al., *supra* note 78, at 335.

<sup>93</sup> LA. STAT. ANN. § 9:2720(B) (2020); VA. CODE ANN. § 20-160 (2020); Casolo et al., *supra* note 78, at 334-335 n.202.

<sup>94</sup> JOSLIN ET AL., *supra* note 11, § 4:2.

<sup>95</sup> *Id.* With regard to the substance of the agreement, a few states expressly limit the ability of surrogacy contracts to restrict the surrogate's right to make medical decisions during the course of the pregnancy, while a few other states expressly permit the inclusion of provisions restricting the surrogate's rights to engage in activities that may harm the fetus. *Id.*

<sup>96</sup> See *id.*; Casolo et al., *supra* note 78, at 330-37.

individuals who may enter into enforceable surrogacy agreements as intended parents range from permissive jurisdictions that place no marriage- or gender-based restrictions on intended parents to restrictive jurisdictions in which eligibility is limited to very narrow categories of intended parents.<sup>97</sup> In terms of the specific types of eligibility restrictions for intended parents, the language of a number of state surrogacy statutes restricts eligibility to married intended parents.<sup>98</sup> In addition, a few jurisdictions restrict eligibility by requiring that gametes from at least one of the intended parents be used to conceive the child.<sup>99</sup> Louisiana and North Dakota go even further, requiring that gametes from both of the intended parents be used to conceive the child — thereby excluding cisgender male same-sex couples from eligibility.<sup>100</sup>

Moreover, male same-sex couples also seemingly are excluded from entering into enforceable surrogacy agreements in the three jurisdictions that require proof that the intended *mother* (who generally would not exist in the context of male same-sex couples) is unable to carry a pregnancy altogether or without serious risk to her health or the health of the fetus.<sup>101</sup> The language of the Arkansas statute governing

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<sup>97</sup> *The United States Surrogacy Law Map*, CREATIVE FAM. CONNECTIONS (2016), <https://www.creativefamilyconnections.com/us-surrogacy-law-map/> (last visited Nov. 11, 2020) [<https://perma.cc/C2ZB-H5D7>] (describing the laws governing surrogacy agreements in every state).

<sup>98</sup> JOSLIN ET AL., *supra* note 11, § 4:2 (identifying the states as Florida, Louisiana, Texas, Utah, and Virginia).

<sup>99</sup> See, e.g., FLA. STAT. ANN. §§ 742.15-16 (2020) (stating that if neither of the intended parents is a genetic parent, the surrogate “assume[s] parental rights and responsibilities for the child.”); 750 ILL. COMP. STAT. § 47/20 (2020) (requiring that at least one of the gametes used to conceive the child come from an intended parent); UTAH CODE ANN. § 78B-15-801 (2020) (noting that a gestational surrogacy agreement is not authorized if neither intended parent provided the gametes used to conceive the child).

<sup>100</sup> LA. STAT. ANN. § 9:2718.1(6) (2020) (providing that “[i]ntended parents” means “a married couple who each exclusively contribute their own gametes to create their embryo . . . .”); N.D. CENT. CODE §§ 14-18-01, -05, -08 (2020) (recognizing intended parents as legal parents only when the person carrying the child meets the definition of a “gestational carrier,” defining the term gestational carrier to require that the embryo implanted in the individual be conceived from the ova and sperm of the intended parents, and identifying the woman carrying the child and her husband (if he was a party to the agreement as the child’s legal parents in all other surrogacy situations)).

<sup>101</sup> FLA. STAT. ANN. § 742.15 (2020); LA. STAT. ANN. § 9:2720.3 (2020); TEX. FAM. CODE ANN. § 160.756 (2020). The constitutionality of such provisions is questionable. In 2019, the Utah Supreme Court held that, pursuant to *Obergefell*, the provision of the surrogacy statute requiring that there be an intended mother who is unable to bear a child altogether or without unreasonable risk to the mother or child unconstitutionally infringed on the rights of married male same-sex couples. *In re Gestational Agreement*, 449 P.3d 69, 80 (Utah 2019).

gestational surrogacy also excludes married male same-sex couples, albeit through a different mechanism, by declaring that when the biological father's sperm is used to conceive the child, the child's other parent is "the woman intended to be the mother if the biological father is married."<sup>102</sup> Due to the various eligibility restrictions within existing state surrogacy laws and the lack of surrogacy laws in many states, surrogacy laws provide a non-adoptive avenue to establishing parentage for male same-sex couples in only a minority of jurisdictions.

A. *Non-Adoptive Legal Recognition of Both the Biological Intended Parent and the Non-Biological Intended Parent*

When a different-sex married couple enters into a valid gestational surrogacy agreement in which a child is conceived using sperm from one member of the couple and ova from a gamete donor, approximately eighteen jurisdictions have statutory or appellate case law governing surrogacy that explicitly recognizes both spouses as the child's legal parents.<sup>103</sup> It is important to note that the statutory language in a few of

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Whether the language of the medically-related requirements of a number of other states' statutes excludes male same-sex couples is unclear. *See, e.g.*, 750 ILL. COMP. STAT. § 47/20 (2020) (requiring the intended parent or parents to prove that "he, she, or they have a medical need for the gestational surrogacy as evidenced by a qualified physician's affidavit attached to the gestational surrogacy"); VA. CODE ANN. § 20-160 (2020) (requiring a finding that "[t]he intended parent is infertile, is unable to bear a child, or is unable to do so without unreasonable risk to the unborn child or to the physical or mental health of the intended parent or the child"); OKLA. STAT. tit. 10, § 557.10 (2020) (requiring that the court find that "[t]he medical evidence provided shows that the intended parent is unable to carry a pregnancy to term and give birth to a child or is unable to carry a pregnancy to term and give birth to a child without unreasonable risk to the intended parent's physical or mental health or to the health of the unborn child").

<sup>102</sup> ARK. CODE ANN. § 9-10-201 (2020).

<sup>103</sup> *See* ARK. CODE ANN. § 9-10-201 (2020); CAL. FAM. CODE §§ 7606, 7960, 7962 (2020); CONN. GEN. STAT. §§ 7-36, -48a (2020); DEL. CODE ANN. tit. 13, §§ 8-805, -806, -807 (2020); D.C. CODE §§ 16-403, -407 (2020); FLA. STAT. § 742.15 (2020); 750 ILL. COMP. STAT. §§ 47/20, /25 (2020); ME. STAT. tit. 19-A, § 1933 (2020); NEV. REV. STAT. § 126.750 (2020); N.H. REV. STAT. ANN. §§ 168-B:1, :7 (2020); N.J. STAT. ANN. §§ 9:17-62, -67 (2020); OKLA. STAT. tit. 10, §§ 557.5, 557.6 (2020); TEX. FAM. CODE ANN. § 160.754 (2020); UTAH CODE ANN. § 78B-15-801 (2020); VT. STAT. ANN. tit. 15C, § 803 (2020); VA. CODE ANN. § 20-158 (2020); WASH. REV. CODE § 26.26A.740 (2020); *In re S.S.*, 128 A.3d 296, 306-07 (Pa. Super. Ct. 2015). In addition, Rhode Island and New York will join this category of states beginning on January 1, 2021 and February 15, 2021, respectively. *See* N.Y. FAM. CT. ACT § 581-406 (2020) (effective Feb. 15, 2021); Associated Press, *Gov Signs Bill Ensuring Parental Rights for Same Sex Couples*, 7NEWSBOSTON (July 21, 2020), <https://whdh.com/news/gov-signs-bill-ensuring-parental-rights-for-same-sex-couples/> [<https://perma.cc/3CPX-J9YZ>]. One of the Ohio intermediate appellate courts (there are twelve, each of which covers a different

these states is written in gendered terms that, if applied as written, would exclude male same-sex couples.<sup>104</sup> As a result, only approximately fifteen of the jurisdictions that provide parentage to both spouses when a child is conceived using sperm from one of the spouses and ova from a donor have laws that do not contain gendered language excluding male same-sex couples.<sup>105</sup> In these fifteen jurisdictions, both members of a married male same-sex couple, the biological intended father and the non-biological intended father, can establish legal parentage pursuant to the state's surrogacy law — neither member of the couple has to pursue adoption procedures to establish parentage.

In a number of the jurisdictions with gestational surrogacy laws that recognize both intended parents as the child's legal parents when a child is conceived using sperm from one member of the couple and ova from a gamete donor, courts can grant pre-birth parentage orders that identify the intended parents as the child's legal parents before the child is born.<sup>106</sup> Pre-birth orders are an important tool for intended parents. Notably, "[o]btaining a judgment prior to the birth of the child removes any uncertainty about the respective rights and obligations of the parties."<sup>107</sup> As the child's legal parents, the intended parents generally will have immediate access to and custody of the child and control over decisions relating to the child's post-birth care, and the hospital will be

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geographical location) held that the gestational surrogacy agreement between an unmarried non-biological intended mother and surrogate for the conception of a child using donor ova and donor sperm was enforceable and established the intended mother's legal parentage. See *S.N. v. M.B.*, 935 N.E.2d 463, 471-72 (Ohio Ct. App. 2010). In cases before Ohio courts that are bound by or otherwise follow this decision, the non-biological intended mother of a child conceived using donor ova and sperm from the intended mother's husband also likely would be deemed a legal parent. In addition, there are reports of trial courts in other jurisdictions providing parentage judgments that recognize both spouses as the child's legal parents in this situation despite the lack of any statutory or appellate authority explicitly providing for such judgments in the jurisdiction. See Peter Nicolas, *Straddling the Columbia: A Constitutional Law Professor's Musings on Circumventing Washington State's Criminal Prohibition on Compensated Surrogacy*, 89 WASH. L. REV. 1235, 1245-49 (2014).

<sup>104</sup> These states include Arkansas, Florida, and Texas. See *supra* notes 101-02 and accompanying text.

<sup>105</sup> See *supra* notes 101-04 and accompanying text.

<sup>106</sup> There are approximately ten states in which "[s]urrogacy is permitted for all parents, pre-birth orders are granted throughout the state, and both parents will be named on the birth certificate." *The United States Surrogacy Law Map*, *supra* note 97. New York will join this category of states beginning on February 15, 2021. See S. Assemb. 7506, 2019-2020 Legis. Sess., N.Y. FAM. CT. § 581-203 (2019).

<sup>107</sup> JOSLIN ET AL., *supra* note 11, § 4:20.

able to discharge the child to the intended parents.<sup>108</sup> Pre-birth orders also often allow the intended parents to be listed as the child's legal parents on the original birth certificate.<sup>109</sup>

In a few of the jurisdictions that recognize both of the intended parents as legal parents when a child is conceived using sperm from one member of the couple and donor ova, the intended parents must wait until the child is born to obtain an order establishing their legal parentage.<sup>110</sup> A post-birth order may be required in addition to or instead of pre-birth judicial approval of the surrogacy agreement.<sup>111</sup> On the other end of the spectrum, a few states' gestational surrogacy statutes establish legal parentage for intended parents who enter into a valid surrogacy agreement without any requirement of judicial involvement.<sup>112</sup> Even in these jurisdictions, however, experts recommend that the intended parents nonetheless obtain a court order reflecting their legal parentage.<sup>113</sup> This is because "a judgment will provide greater assurance that the parties' legal parentage will be recognized by other states and by the federal government," as even courts in jurisdictions that do not recognize surrogacy agreements have held that orders from other states establishing parentage in the surrogacy context must be given full faith and credit.<sup>114</sup>

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<sup>108</sup> Steven H. Snyder & Mary Patricia Byrn, *The Use of Prebirth Parentage Orders in Surrogacy Proceedings*, 39 FAM. L.Q. 633, 634-35 (2005); Nick Stanley, Comment, *Freedom of Family: The Right to Enforceable Family Contracts*, 31 J. AM. ACAD. MATRIM. LAW. 223, 229 (2018).

<sup>109</sup> Snyder & Byrn, *supra* note 108, at 634-35; Stanley, *supra* note 108, at 229.

<sup>110</sup> JOSLIN ET AL., *supra* note 11, §§ 4:8, :20 ("In a small number of states that permit surrogacy by statute, the legal parentage of the intended parents must be 'confirmed' by a court after the birth of the child.").

<sup>111</sup> *Id.* § 4:8; Elizabeth J. Samuels, *An Immodest Proposal for Birth Registration in Donor-Assisted Reproduction in the Interest of Science and Human Rights*, 48 N.M. L. REV. 416, 429 (2018).

<sup>112</sup> See, e.g., 750 ILL. COMP. STAT. ANN. § 47/15 (2020) (stating that when the parties have entered into a valid gestational surrogacy agreement, the intended parents are the parents of the child for purposes of state law immediately upon the birth of the child); ME. REV. STAT. ANN. tit. 19-A, § 1933 (2020) (providing that when the parties have entered into a valid gestational surrogacy agreement, the intended parent(s) are by operation of law the parent(s) of the resulting child immediately upon the birth of the child); UNIF. PARENTAGE ACT § 809 (UNIF. LAW COMM'N 2017) ("[O]n birth of a child conceived by assisted reproduction under a gestational surrogacy agreement, each intended parent is, by operation of law, a parent of the child.").

<sup>113</sup> See JOSLIN ET AL., *supra* note 11, § 4:17.

<sup>114</sup> *Id.*

B. *Non-Adoptive Legal Recognition of Only the Biological Intended Parent*

As discussed above, only a minority of states have laws governing surrogacy that recognize the parentage of both members of a married couple (different- or same-sex) who conceive a child via gestational surrogacy using sperm from the biological intended father and donor ova.<sup>115</sup> In most states that lack such laws, only one of the spouses — the biological intended father — can establish parentage through non-adoptive avenues.<sup>116</sup> Specifically, the biological intended father often is able to establish parentage through existing procedures for establishing paternity that long have been utilized outside of the surrogacy context.<sup>117</sup> This generally will involve either judicial procedures that allow a man to establish paternity based upon proof of a genetic tie to the child or voluntary acknowledgement of paternity procedures that allow a man to establish paternity by jointly executing a document with the birth mother (and, if applicable, her spouse) acknowledging the man's paternity.<sup>118</sup>

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<sup>115</sup> See *supra* Part II.A.

<sup>116</sup> See *infra* note 118 and accompanying text. In some jurisdictions, case law or legislative directive makes clear that the non-biological intended parent will need to pursue adoption in order to obtain legal parentage. NeJaime, *supra* note 18, at 2309 n.239. “In the remaining states without statutory guidance or negative case law, adoption would presumably be required because of the operation of the governing parentage rules.” *Id.*

<sup>117</sup> See *infra* note 118.

<sup>118</sup> See, e.g., IOWA ADMIN. CODE r. § 641-99.15(144) (2020) (stating that “[i]f the surrogate birth mother is unmarried and the intended father is the sperm donor, the unmarried surrogate birth mother and the intended father may complete a Voluntary Paternity Affidavit form after the child's birth . . . .”); *In re Paternity and Maternity of Infant T.*, 991 N.E.2d 596, 599 (Ind. Ct. App. 2013) (holding that although state law did not recognize the surrogacy agreement, the biological father could establish his paternity through existing procedures that allow for the establishment of a man's paternity when there is a joint stipulation that the man is the child's biological father executed by the surrogate, her husband, and the man); *A.G.R. v. D.R.H.*, No. FD-09-001838-07, 2009 N.J. Super. Unpub. LEXIS 3250, at \*12 (Super. Ct. Dec. 23, 2009) (holding that although at the time state law did not recognize the surrogacy agreement (New Jersey has since enacted legislation recognizing gestational surrogacy agreements), the biological father was a legally recognized parent pursuant to the existing state laws governing the establishment of paternity); *Arredondo v. Nodelman*, 622 N.Y.S.2d 181, 181 (N.Y. Sup. Ct. 1994) (explaining that the biological father was able to establish his paternity through a filiation proceeding in which he submitted DNA evidence indicating that he was the child's genetic father); *In re Adoption of J.*, 72 N.Y.S.3d 811, 812 (N.Y. Fam. Ct. 2018) (holding that although surrogacy agreements were void and unenforceable in New York, in order to establish his legal parentage the biological intended father nonetheless “could have asked the surrogate to place his name on [the child's] birth certificate, signed an acknowledgment of paternity,

Adoption, however, is the only avenue through which the other spouse, the non-biological intended parent, can establish parentage in these jurisdictions. This is because even when the biological intended father is able to establish parentage through existing paternity establishment procedures, the law presumes that the individual who gave birth to the child is the child's other legal parent.<sup>119</sup> When donor ova are used to conceive the child, which is what occurs in the typical gestational surrogacy situation involving a male same-sex couple, the presumption of legal parentage attaching to the surrogate based upon the act of giving birth generally is conclusive and irrefutable, regardless of her wishes.<sup>120</sup> In most instances, terminating the surrogate's legal parentage will require an adoption procedure in which the surrogate agrees to the voluntary termination of her parental rights and the non-biological intended parent adopts the child.<sup>121</sup>

Even if the surrogate is not recognized as a legal parent because, for example, the jurisdiction (unlike most) allows for rebuttal of the presumed parentage of an individual who gives birth to a child conceived using donor ova on genetics-based grounds,<sup>122</sup> the non-biological intended parent within a married male same-sex couple still

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registered with the putative father registry, submitted to a deoxyribonucleic acid test, or filed a paternity petition"); cf. NEB. REV. STAT. § 25-21, 200 (2020) ("A surrogate parenthood contract entered into shall be void and unenforceable. The biological father of a child born pursuant to such a contract shall have all the rights and obligations imposed by law with respect to such child."); *J.R. v. Utah*, 261 F. Supp. 2d 1268, 1293 (D. Utah 2002) (stating that although Utah did not enforce surrogacy agreements at the time (the law has since changed), the biological intended parents must not be precluded from establishing parentage through genetics-based avenues); *In re Declaration of Parentage and Termination of Parental Rights of Doe*, 372 P.3d 1106, 1107 (Idaho 2016) (noting that the "Intended Father, Gestational Carrier and Husband, each signed an affidavit stating that Intended Father, and not Husband, is the biological father of child and should be listed on the birth certificate").

<sup>119</sup> See David D. Meyer, *Parenthood in a Time of Transition: Tensions Between Legal, Biological, and Social Conceptions of Parenthood*, 54 AM. J. COMP. L. 125, 127 (2006) (explaining that the law generally bestows parentage to individuals who give birth as "a matter of course").

<sup>120</sup> See *infra* note 137 and accompanying text; see also NeJaime, *supra* note 18, at 2311.

<sup>121</sup> See NeJaime, *supra* note 18, at 2313 ("Yet, for the nonbiological gay father, the surrogate's gestation — increasingly immaterial where the intended mother is the genetic mother — produces legal motherhood and justifies the denial of his parental status. Like nonbiological intended mothers in different-sex couples, nonbiological intended fathers in same-sex couples cannot claim parentage by virtue of a relationship to the biological father. They must, if possible, adopt the child.")

<sup>122</sup> See, e.g., *In re Roberto d.B.*, 923 A.2d 115 (Md. 2007) (holding that the surrogate could disestablish her maternity on the basis of her lack of genetic connection to the child).

is left with adoption as the only avenue to establishing legal parentage. This is because the surrogacy laws in these jurisdictions do not recognize him as a legal parent, the existing paternity establishment avenues utilized by his husband, the child's biological father, are unavailable to him as the non-biological intended parent, and marriage-based parentage establishment avenues stem only from marriage to the individual who gave birth.<sup>123</sup> Notably, in these jurisdictions, the same result occurs for married different-sex couples who conceive children via gestational surrogacy using sperm from the biological intended father and donor ova — the non-biological intended mother cannot establish parentage through surrogacy-, genetics-, or marriage-based avenues, leaving adoption as the only option.

### C. *Adoptive Legal Recognition of Both Intended Parents*

In a few states, both members of a married male same-sex couple may have to pursue adoption in order to establish themselves as the legal parents of a child born through gestational surrogacy using sperm from one member of the couple and donor ova. For example, the law governing surrogacy in North Dakota provides that unless the embryo was conceived using the ova and sperm of the intended parents, “the surrogate is the mother of a resulting child and the surrogate’s husband, if a party to the agreement, is the father of the child.”<sup>124</sup> Similarly, in other states in which the provision of legal parentage based upon the act of giving birth is conclusive and irrefutable, if the surrogate is married and the state’s marital presumption of parentage applies to her spouse, both intended parents may have to pursue adoption to establish

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<sup>123</sup> See NeJaime, *supra* note 18, at 2314 (“Ultimately, male same-sex couples are excluded by a parentage regime that grounds parenthood in biological connection outside marriage and derives nonbiological parenthood inside marriage only from marriage to a biological mother.”); *supra* Part I.C.

<sup>124</sup> N.D. CENT. CODE § 14-18-05 (2020). North Dakota distinguishes between “gestational carriers” and “surrogates.” *Id.* § 14-18-01. North Dakota defines a gestational carrier as “an adult woman who enters into an agreement to have an embryo implanted in her and bear the resulting child for intended parents, where the embryo is conceived by using the egg and sperm of the intended parents.” *Id.* The requirement that the embryo be conceived using the egg and sperm of the intended parents excludes surrogacy agreements involving intended parents who are cisgender male same-sex couples. North Dakota defines a surrogate as “an adult woman who enters into an agreement to bear a child conceived through assisted conception for intended parents.” *Id.* Consequently, the person carrying the child pursuant to an agreement with a male same-sex couple would fall under the definition of surrogate, as opposed to gestational carrier. While a child born to a gestational carrier is the child of the legal parents, a child born to a surrogate is the child of the surrogate and her husband (if he was a party to the agreement). *Id.* §§ 14-18-05, -08.

legal parentage if the parties are unable to rebut the marital presumption.<sup>125</sup> In these situations, the consent of the surrogate and her spouse to the relinquishment of their parental rights and the adoption of the child by the intended parents generally would be required as part of the adoption procedures.<sup>126</sup>

### III. THE BARRIERS TO EXTENDING NON-ADOPTIVE MARRIAGE-BASED PARENTAGE ESTABLISHMENT AVENUES TO MALE SAME-SEX COUPLES

Both male and female same-sex couples have long faced inequitable treatment under the laws governing parentage, which often have served to make the establishment of legal parentage significantly more burdensome (if not impossible) for same-sex couples as compared to their different-sex counterparts. This inequitable treatment likely stems from societal homophobia and heteronormativity, as well as the lingering perception that genetic connections are essential to identifying who is entitled to recognition as a child's legal parents.<sup>127</sup> Although in recent years parentage law has made significant strides in its treatment of female same-sex couples by extending non-adoptive marriage-based parentage establishment avenues to the same-sex spouses of individuals who give birth, male same-sex couples continue to be excluded from these important avenues to establishing parentage. The barriers that are unique to male same-sex couples in gaining access to non-adoptive methods of establishing parentage are tied, in large part, to both the significance that parentage law long has placed on the

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<sup>125</sup> See, e.g., ARIZ. REV. STAT. §§ 25-218(B), (C) (2020) (“A surrogate is the legal mother of a child born as a result of a surrogate parentage contract and is entitled to custody of that child . . . . If the mother of a child born as a result of a surrogate contract is married, her husband is presumed to be the legal father of the child.”); JOSLIN ET AL., *supra* note 11, § 4:20 (“[E]ven in situations in which one of the intended parents is a genetic contributor, there may be circumstances under which that person is not recognized as a legal parent of a child born through surrogacy . . . . [T]his may be the result in states without statutes specifically governing the legal parentage of children born through surrogacy.”); June Carbone & Naomi Cahn, *Marriage and the Marital Presumption Post-Obergefell*, 84 UMKC L. REV. 663, 671 (2016) (“[S]ome states, such as Michigan, may also recognize the birth mother’s husband as a legal parent and make it relatively difficult to rebut the marital presumption.”). Around two-thirds of states allow biological fathers who conceive children with a woman who is married to someone else to bring actions seeking to rebut the marital presumption. Feinberg, *Restructuring Rebuttal*, *supra* note 38, at 252. Courts may deny rebuttal despite proof that the putative father, and not the birth mother’s husband, is the child’s biological father if it is determined that rebuttal would be contrary to the best interests of the child. *Id.* at 252-53.

<sup>126</sup> See JOSLIN ET AL., *supra* note 11, § 4:20.

<sup>127</sup> See Feinberg, *A Logical Step Forward*, *supra* note 3, at 102 n.7.

act of giving birth and the deeply engrained, lingering societal views regarding the roles of women and men in raising children.<sup>128</sup>

A. *The Law's Provision of Legal Parentage Based Upon the Act of Giving Birth*

The law long has provided legal parentage to individuals who give birth “as a matter of course.”<sup>129</sup> For most of the nation’s history, the automatic provision of legal parentage based upon the act of giving birth went largely unchallenged.<sup>130</sup> This is almost certainly due in large part to the fact that, until recent advancements in medical technology leading to the availability of *in vitro* fertilization, the person who gave birth necessarily was the child’s genetic parent.<sup>131</sup> Today, of course, it is no longer true that the person who gives birth to the child necessarily shares a genetic connection with the child. As a result of the advancements in reproductive technology that have allowed for the disentanglement of gestation and genetics, the law has had to “to confront issues in determining maternity for the first time in history.”<sup>132</sup>

At present, the only scenario in which a presumption of legal parentage does not attach to the act of giving birth is when state law recognizes a surrogacy agreement as establishing the intended parents as the child’s sole legal parents prior to or upon the child’s birth. In the absence of an enforceable surrogacy agreement, the law widely continues to presume legal parentage based upon the act of giving

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<sup>128</sup> I agree with Professor Susan Appleton that it is correct to regard “as gender-based an approach that excludes all gay male couples from the easy and beneficial default rule and makes them instead navigate more onerous and intrusive hurdles, even if some traditional and lesbian couples occasionally face such hurdles as well.” Appleton, *supra* note 44, at 268.

<sup>129</sup> Meyer, *supra* note 119, at 127.

<sup>130</sup> See Marsha Garrison, *Law Making for Baby Making: An Interpretive Approach to the Determination of Legal Parentage*, 113 HARV. L. REV. 835, 912 (2000) (“Because pregnancy and birth are relatively public and undisputed, the law has rarely confronted the question of legal motherhood at all.”).

<sup>131</sup> See Lauren Springett, *Why the Intent Test Falls Short: Examining the Ways in Which the Legal System Devalues Gestation to Promote Nuclear Families*, 52 COLUM. J.L. & SOC. PROBS. 391, 396 (2019) (“The law privileged the mother-child relationship on the assumption that birthing a child and having a genetic relationship with that child went hand in hand.”); *The History of Surrogacy*, MODERN FAMILY SURROGACY CTR., [http://www.modernfamilysurrogacy.com/page/surrogacy\\_history](http://www.modernfamilysurrogacy.com/page/surrogacy_history) (last visited Aug. 30, 2019) [<https://perma.cc/ZAJ3-672B>] (explaining that the first gestational surrogacy arrangement occurred in 1985).

<sup>132</sup> J. Herbie DiFonzo & Ruth C. Stern, *The Children of Baby M.*, 39 CAP. U. L. REV. 345, 395 n.397 (2011).

birth.<sup>133</sup> However, judicial decisions in a number of jurisdictions have provided for the rebuttal and disestablishment of the presumed legal parentage that attaches to the individual who gave birth, despite the unenforceability of the surrogacy agreement, when there is a genetic intended mother seeking to establish maternity.<sup>134</sup> The courts in these cases have held that genetics-based avenues similar to those that exist in the paternity establishment context can be utilized to establish the intended mother's maternity and to rebut and disestablish the surrogate's maternity.<sup>135</sup> Specifically, the intended mother's maternity can be established and the surrogate's maternity can be rebutted and disestablished based upon proof that the intended mother's ova were used to conceive the child, i.e., proof that the intended mother is also the genetic mother.<sup>136</sup> However, the ability to rebut and disestablish the maternity of the person who gave birth through genetics-based avenues generally has been restricted to surrogacy arrangements that involve a genetic intended mother.<sup>137</sup>

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<sup>133</sup> NeJaime, *supra* note 18, at 2300.

<sup>134</sup> See, e.g., *J.R. v. Utah*, 261 F. Supp. 2d 1268 (D. Utah 2002) (concluding that the presumption that the individual who gave birth is a legal parent cannot lawfully be given preclusive or conclusive effect in the light of evidence that the intended parents are the child's genetic parents); *Soos v. Superior Court*, 897 P.2d 1356 (Ariz. Ct. App. 1994) (finding a state statute, which declared the individual who gave birth to the child to be the legal mother, unconstitutional on equal protection grounds); *In re Paternity & Maternity of Infant R.*, 922 N.E.2d 59 (Ind. Ct. App. 2010) (holding that "that the paternity statutes provide a procedural template to challenge the putative relationship between the [surrogate and child]"); *Culliton v. Beth Israel Deaconess Med. Ctr.*, 756 N.E.2d 1133 (Mass. 2001) (holding that the intended parents, who were the "sole genetic sources of the twins[,] were the children's lawful parents); *A.H.W. v. G.H.B.*, 772 A.2d 948 (N.J. Super. Ct. 2000) (holding that the original birth certificate of a child born to a surrogate could identify the intended parents whose genetic materials were used to conceive the child as the child's parents); *T.V. v. N.Y. State Dep't of Health*, 929 N.Y.S.2d 139 (N.Y. App. Div. 2011) (holding that the lower court "erred in finding that it did not have the authority to issue an order of maternity to the Genetic Mother . . . ."); *Doe v. N.Y.C. Bd. of Health*, 782 N.Y.S.2d 180 (N.Y. Sup. Ct. 2004) (holding that the intended mother was entitled to a declaration of maternity because she established to a reasonable degree of certainty that she was the genetic mother); *Arredondo v. Nodelman*, 622 N.Y.S.2d 181 (N.Y. Sup. Ct. 1994) (holding that the genetic mother, and not the surrogate, was the legal mother of the child to whom the surrogate gave birth).

<sup>135</sup> See *supra* note 134.

<sup>136</sup> See *supra* note 134.

<sup>137</sup> See, e.g., *In re Paternity & Maternity of Infant T.*, 991 N.E.2d 596 (Ind. Ct. App. 2013) (holding that the gestational surrogate could not disestablish maternity because biological maternity had not been established in another woman); *In re Parentage of a Child by T.J.S. & A.L.S.*, 54 A.3d 263 (N.J. 2012) (*per curiam*) (holding that the gestational surrogate, and not the non-biological intended mother, was the legal parent

Restricting genetics-based rebuttal of the presumed parentage that attaches based upon the act of giving birth to surrogacy arrangements involving a genetic intended mother means that the legal parentage of the surrogate, who has no genetic connection to the child herself, often hinges on the source of the ova used to create the embryo. A pair of cases from Indiana is illustrative. In *In re Infant R.*, the Court of Appeals of Indiana ruled on the legal parentage of a child born through gestational surrogacy using the genetic materials of both the intended mother and the intended father.<sup>138</sup> Although surrogacy contracts are unenforceable under Indiana law,<sup>139</sup> the court held that, based upon principles of equity, the maternity of the intended mother could be established and the maternity of the surrogate disestablished based upon clear and convincing evidence of the intended mother's genetic connection to the child.<sup>140</sup> The court explained that "the [state's] paternity statutes provide a procedural template to challenge the putative relationship between the infant and [the gestational surrogate]."<sup>141</sup> Three years later, in *In re Paternity & Maternity of Infant T.*, the same court ruled on the legal parentage of a child born through gestational surrogacy using sperm from the intended father and donor ova.<sup>142</sup> The intended father, the surrogate, and the surrogate's husband jointly sought to disestablish the surrogate's maternity,<sup>143</sup> and the intended father's wife planned to subsequently pursue legal parentage through the only avenue available to her, adoption.<sup>144</sup> The court denied the parties' request to disestablish the maternity of the gestational surrogate, holding that the "presumptive relationship [between the

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of a child conceived using donor ova because maternity requires a gestational or genetic connection to the child); *A.G.R. v. D.R.H.*, No. FD-09-001838-07, 2009 N.J. Super. Unpub. LEXIS 3250 (Super. Ct. Dec. 23, 2009) (holding, in a case in which the intended parents were a male same-sex couple, that the gestational surrogate's maternity could not be disestablished and noting that it was not a situation in which a court had to "break a tie" between a gestational mother and a genetic mother); *see also* NeJaime, *supra* note 18, at 2326 ("Yet in most states, the surrogate's nonrecognition occurs only when the intended mother is the genetic mother."); *supra* note 134 (discussing cases in which the surrogate's maternity was disestablished). *But see In re Roberto d.B.*, 923 A.2d 115, 130-31 (Md. 2007) (holding that the surrogate's maternity could be disestablished through a genetics-based avenue despite the lack of a genetic intended mother).

<sup>138</sup> *In re Paternity & Maternity of Infant R.*, 922 N.E.2d at 60.

<sup>139</sup> IND. CODE ANN. § 31-20-1-1 (2020).

<sup>140</sup> *In re Paternity & Maternity of Infant R.*, 922 N.E.2d at 61-62.

<sup>141</sup> *Id.* at 62.

<sup>142</sup> *In re Paternity & Maternity of Infant T.*, 991 N.E.2d at 597.

<sup>143</sup> *Id.*

<sup>144</sup> *See id.* at 598 n.2.

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surrogate and child] will stand unless another woman establishes that she is, in fact, the biological mother of the child.”<sup>145</sup>

These decisions reflect the modern trend in maternity determinations involving gestational surrogacy agreements that the jurisdiction does not recognize as enforceable. Namely, a conclusive presumption of legal parentage attaches to the surrogate when donor ova are used to conceive the child, but when ova from the intended mother are used, the presumption of legal parentage that attaches to the surrogate can be rebutted and disestablished on genetics-based grounds.<sup>146</sup> The result is that a surrogate is not a legal parent when ova from the intended mother are used in conception, but is a legal parent when donor ova are used in conception. When male same-sex couples seek to become parents via gestational surrogacy, generally donor ova are used in conception and no genetic intended mother exists. This means that in the typical situation involving a male same-sex couple who has entered into a surrogacy agreement that the relevant jurisdiction does not recognize as enforceable, the presumption of legal parentage that attaches to the surrogate is conclusive — it cannot be rebutted and disestablished through genetics-based avenues.

The conclusive presumption of legal parentage that attaches to the individual who gave birth when there is no genetic intended mother poses a significant barrier to extending marriage-based avenues of establishing parentage to male same-sex couples who conceive children via surrogacy. First, since the person who gives birth automatically attains the conclusive status of the child’s legal parent and most United States jurisdictions recognize a maximum of two legal parents, it follows that marriage-based presumptions of parentage logically would stem only from the person who gave birth.<sup>147</sup> If marriage-based presumptions of parentage stemmed from anyone other than the person who gave birth, such as the child’s biological father, then the state would be opening the door for the simultaneous establishment of legal parentage in more than two individuals. In situations in which the biological father was married to someone other than the person who gave birth, application of a marriage-based parentage presumption to the biological father’s spouse would result in the concurrent establishment of legal parentage in, at a minimum, the individual who gave birth, the

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<sup>145</sup> *Id.* at 601.

<sup>146</sup> See NeJaime, *supra* note 18, at 2311.

<sup>147</sup> Feinberg, *A Logical Step Forward*, *supra* note 3, at 134 (“[T]he law in the vast majority of states recognizes a maximum of two legal parents for each child.”).

biological father, and the biological father's spouse.<sup>148</sup> Consequently, the conclusive presumption of legal parentage that attaches to individuals who give birth in the absence of a genetic intended mother and the limit of two legal parents in most states result in a situation where marriage-based parentage presumptions can flow only from the person who gave birth.

In addition, as long as the presumption of legal parentage based upon the act of giving birth is conclusive in the absence of a genetic intended mother, generally rendering the surrogate a legal parent in surrogacy arrangements involving male same-sex couples, adoption proceedings will remain a necessary step for establishing the legal parentage of the non-biological intended parent. Since most jurisdictions recognize a maximum of two legal parents, before the non-biological intended parent can establish legal parentage, the surrogate's parental rights will need to be terminated.<sup>149</sup> Termination of a legal parent's rights requires a judicial proceeding.<sup>150</sup> Unless the surrogate is deemed an unfit parent, she will need to agree to the voluntary termination of her parental rights,<sup>151</sup> and there are very limited circumstances under which a legal parent can voluntarily terminate their parental rights.<sup>152</sup> Generally, this may only occur in the context of an adoption proceeding wherein someone else is seeking to assume the parental status occupied by the parent whose rights are being terminated.<sup>153</sup> As a result, the conclusive presumption of legal parentage based upon the act of giving birth not only makes the extension of marriage-based avenues of establishing parentage to male same-sex couples untenable in jurisdictions that recognize a maximum of two legal parents, but it also confines

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<sup>148</sup> If the individual who gave birth was married, a presumption of legal parentage could also attach to their spouse.

<sup>149</sup> See *supra* note 147 and accompanying text.

<sup>150</sup> See 2 ANN M. HARALAMBIE, HANDLING CHILD CUSTODY, ABUSE AND ADOPTION CASES § 13:21 (2020) ("An action for termination of parental rights or an adoption must still be filed in order for the parent's rights to be terminated.").

<sup>151</sup> See Feinberg, *A Logical Step Forward*, *supra* note 3, at 119-21.

<sup>152</sup> See *id.* at 120-21.

<sup>153</sup> M. ELAINE BUCCIERI, JAMES BUCHWALTER, CECILY FUHR, STEPHEN LEASE, KARL OAKES, & ERIC C. SURETTE, 43 C.J.S. INFANTS § 24 (2020) ("There is authority that a parent may not voluntarily surrender his or her parental rights to a child in a context other than the adoption of the child."); Krista Sirola, *Are You My Mother? Defending the Rights of Intended Parents in Gestational Surrogacy Arrangements in Pennsylvania*, 14 AM. U. J. GENDER SOC. POL'Y & LAW 131, 139-40 (2006) ("Neither mothers nor fathers can relinquish their parental rights voluntarily unless another intends to assume those rights by adoption.").

parentage establishment for male same-sex couples to the adoption realm.

*B. Gender-Based Stereotypes, Beliefs, and Assumptions in the Parentage Context*

The failure to extend marriage-based avenues of parentage establishment to male same-sex couples also likely stems from societal beliefs about the differing roles of women and men;<sup>154</sup> these beliefs have both influenced, and been influenced by, the law. For most of the nation's history, the law has perpetuated and reinforced the belief that men and women should have different familial roles, with women responsible for the care of the home and children, and men responsible for providing the household's "[financial] support and its links to external society."<sup>155</sup> For example, early laws, *inter alia*, required married men to support their wives financially and married women to care for the children and home,<sup>156</sup> denied married women the right to hold property or control any wages that they earned,<sup>157</sup> capped the number of hours women could work,<sup>158</sup> and provided no protection against sex-based discrimination in the workplace.<sup>159</sup> Until the 1970s, when the Supreme Court began to interpret the Equal Protection Clause to require heightened scrutiny for laws that made classifications on the basis of sex, "sex-based classifications in family and employment law

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<sup>154</sup> See David Fontana & Naomi Schoenbaum, *Unsexing Pregnancy*, 119 COLUM. L. REV. 309, 350 (2019) (discussing the view that "gay-male couples are inadequate parents, not only because of their sexual orientation, but also because their family is missing an appropriate caregiver — a woman"); NeJaime, *supra* note 18, at 2330 ("Gay men engaging in surrogacy challenge the centrality of the mother-child relationship in ways that different-sex couples engaging in surrogacy do not.") (citing GERALD P. MALLON, *GAY MEN CHOOSING PARENTHOOD* 99 (2004)).

<sup>155</sup> DOUGLAS E. ABRAMS, NAOMI R. CAHN, CATHERINE J. ROSS, DAVID D. MEYER & LINDA C. MCCLAIN, *CONTEMPORARY FAMILY LAW* 169 (4th ed. 2015); see also Fontana & Schoenbaum, *supra* note 154, at 316 (citing Ruth Bader Ginsburg, *Remarks on Women Becoming Part of Constitution*, 6 L. & INEQ. 17, 19 (1988)).

<sup>156</sup> Laura A. Rosenbury, *Friends with Benefits?*, 106 MICH. L. REV. 189, 213 (2007).

<sup>157</sup> A. Mechele Dickerson, *Family Values and the Bankruptcy Code: A Proposal to Eliminate Bankruptcy Benefits Awarded on the Basis of Marital Status*, 67 FORDHAM L. REV. 69, 76-77 (1998); see also Ruth Bader Ginsburg, *Constitutional Adjudication in the United States as a Means of Advancing the Equal Stature of Men and Women Under the Law*, 26 HOFSTRA L. REV. 263, 269 (1997).

<sup>158</sup> Ginsburg, *supra* note 157, at 269 (citing *Muller v. Oregon*, 208 U.S. 412 (1908)).

<sup>159</sup> Title VII of the Civil Rights Act of 1964 was the first federal law to prohibit employment discrimination on the basis of sex. ABRAMS ET AL., *supra* note 155, at 169.

aligned with gender norms to enforce an ideology of separate spheres for men and women.”<sup>160</sup>

With regard to laws governing parental rights specifically, historically these laws have reflected gendered beliefs and assumptions about the parental and caretaking capabilities of women and men. For example, in the context of custody disputes between mothers and fathers, by the late nineteenth century, many states began to employ the tender years doctrine, which required that mothers receive custody of children under a certain age.<sup>161</sup> This doctrine stemmed from the belief that only mothers could properly nurture young children.<sup>162</sup> It was not until the 1970s that courts started to strike down state custody laws employing the tender years doctrine based upon “emerging constitutional law concerning gender equality.”<sup>163</sup> Moreover, it was not until 1972 that the Supreme Court, in *Stanley v. Illinois*, struck down as unconstitutional state laws that set forth a conclusive presumption that all unmarried biological fathers were “unsuitable and neglectful parents” who were unfit to care for their children, and left children of unmarried fathers wards of the state when their mother, due to death or other circumstances, was unable to care for them.<sup>164</sup>

Although parentage law began moving towards greater gender equality in the 1970s and 1980s, the law continued to reflect gendered beliefs about the parental roles and caretaking capabilities of women and men by providing biological fathers who were not married to the child’s mother with fewer rights and protections than any other category of biological parents. Following *Stanley*, a series of cases decided by the Supreme Court established the “biology plus” standard for determining whether a biological father who is not married to the child’s mother shares a constitutionally protected relationship with the child.<sup>165</sup> Under

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<sup>160</sup> Deborah A. Widiss, *Changing the Marriage Equation*, 89 WASH. U. L. REV. 721, 721 (2012).

<sup>161</sup> ABRAMS ET AL., *supra* note 155, at 803.

<sup>162</sup> *See id.*

<sup>163</sup> *Id.* Today, while custody laws do not explicitly set forth gender-based preferences, and many states have statutory provisions stating that the court may not give preference to one parent over the other on the basis of gender, many people argue that gender stereotypes continue to pervade custody decisions. *See* Jessica Feinberg, *Consideration of Genetic Connections in Child Custody Disputes Between Same-Sex Parents: Fair or Foul?*, 81 MO. L. REV. 331, 357 (2016).

<sup>164</sup> *See Stanley v. Illinois*, 405 U.S. 645, 654, 656-57 (1972).

<sup>165</sup> *See, e.g., Lehr v. Robertson*, 463 U.S. 248, 261-62 (1983) (finding a biological connection plus acceptance of parental responsibility to be sufficient for constitutional protection); *Caban v. Mohammed*, 441 U.S. 380, 393 (1979) (holding a substantial parent-child relationship should lead to ease in identifying the father even if the child

this standard, the biological father establishes a constitutionally protected parent-child relationship only if he “grasps the opportunity” to develop a relationship with his child and “demonstrates a full commitment to the responsibilities of parenthood by com[ing] forward to participate in the rearing of his child.”<sup>166</sup> While the biology plus standard provided significantly greater protections for biological fathers who are not married to the child’s mother than they had previously enjoyed, it is notable that no other categories of biological parents need to make this type of showing in order to receive constitutional protection for the parent-child relationship. With regard to biological mothers, whether married or unmarried, “all of the [Supreme Court’s] fatherhood cases assumed that the birth of a child establishes the mother’s rights.”<sup>167</sup> In terms of biological fathers who are married to the child’s mother, the Supreme Court has suggested that they enjoy greater constitutional protections than unmarried fathers.<sup>168</sup> The Court has indicated that if the biology plus standard applies to married biological fathers,<sup>169</sup> they may be presumed to have satisfied the standard by virtue of having shared an intact marital relationship and familial home with the mother and child for a period of time.<sup>170</sup>

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is born out of wedlock); *Quilloin v. Walcott*, 434 U.S. 246, 256 (1978) (failing to recognize a constitutionally protected parent-child relationship due to the father’s failure to take significant responsibility of the child).

<sup>166</sup> *Lehr*, 463 U.S. at 261-62 (quoting *Caban*, 441 U.S. at 392) (internal quotations omitted).

<sup>167</sup> Jennifer S. Hendricks, *Essentially a Mother*, 13 WM. & MARY J. WOMEN & L. 429, 441 (2007); see also Albertina Antognini, *From Citizenship to Custody: Unwed Fathers Abroad and at Home*, 36 HARV. J. L. & GENDER 405, 436 (2013) (stating that in *Lehr*, “the only relevant criterion for the mother was, by default, the fact that she gave birth to her child; just the father had to supplement the fact of biology with the establishment of a perceptible relationship”).

<sup>168</sup> *Lehr*, 463 U.S. at 260 n.16 (stating that although “[i]n some circumstances the actual relationship between father and child may suffice to create in the unwed father parental interests comparable to those of the married father . . . the absence of a legal tie with the mother may . . . appropriately place a limit on whatever substantive constitutional claims might otherwise exist by virtue of the father’s actual relationship with the children” (quoting *Caban*, 441 U.S. at 397) (Stewart, J., dissenting)).

<sup>169</sup> Jennifer S. Hendricks, *Fathers and Feminism: The Case Against Genetic Entitlement*, 91 TUL. L. REV. 473, 505 n.126 (2017) (“The Supreme Court, however, has suggested that the biology-plus-relationship may apply to all fathers.”) (emphasis added).

<sup>170</sup> See *Quilloin*, 434 U.S. at 256 (referring to a “married father who is separated or divorced from the mother and is no longer living with his child” and stating that “even a father whose marriage has broken apart will have borne full responsibility for the rearing of his children during the period of the marriage”); see also Nancy E. Dowd, *Fathers and the Supreme Court: Founding Fathers and Nurturing Fathers*, 54 EMORY L.J. 1271, 1307 (2005) (“The strong protection of marital fathers seems presumed within

Notably, after the *Stanley* line of cases, a subsequent Supreme Court decision established that for biological fathers who are not married to the child's mother, even satisfaction of the biology plus standard does not guarantee constitutional protection for the parent-child relationship when there is a competing claim of parentage from a man who is married to the child's mother.<sup>171</sup> In *Michael H. v. Gerald D.*, the Supreme Court addressed a biological father's claim that it was unconstitutional for California to categorically deny biological fathers standing to challenge the marital presumption.<sup>172</sup> The plurality opinion, in determining that the biological father's constitutional rights had not been violated, set forth the proposition that the constitutional protections afforded to unmarried biological fathers who satisfy the biology plus standard do not extend to a man who fathers a child with a woman who is married to another man.<sup>173</sup> Consequently, although the biological father had formed a relationship with the child that satisfied the biology plus standard, it was constitutional to establish the husband of the child's mother as the legal father on the basis of his marriage to the child's mother.<sup>174</sup>

The different avenues available today for establishing paternity depending on the man's relationship to the child's mother further illuminate parentage law's continued adherence to gender-based stereotypes and assumptions.<sup>175</sup> As discussed above, in terms of married men, every state employs a presumption that the husband of the woman who gave birth is the child's legal parent.<sup>176</sup> For a man who wishes to establish his legal parentage but is not married to the child's birth mother, the most efficient, simple, and inexpensive method of doing so is through a voluntary acknowledgement of paternity ("VAP") executed jointly with the child's mother (often at the hospital immediately following the child's birth).<sup>177</sup> Federal law mandates that VAPs be offered by all birthing hospitals and birth records offices,<sup>178</sup> and after

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decisions protecting family privacy that especially accord a high value to marriage, as well as decisions upholding parental rights against state intrusion.").

<sup>171</sup> See *infra* notes 173–74 and accompanying text.

<sup>172</sup> *Michael H. v. Gerald D.*, 491 U.S. 110, 121 (1989).

<sup>173</sup> *Id.* at 123–24.

<sup>174</sup> *Id.* at 129–30.

<sup>175</sup> See Appleton, *supra* note 44, at 282–83 ("Still, fatherhood remains, in significant part, a 'secondary' or derivative relationship that requires an initial determination of the child's first or 'primary' parent, the mother.").

<sup>176</sup> See *supra* note 54 and accompanying text.

<sup>177</sup> See Feinberg, *A Logical Step Forward*, *supra* note 3, at 106 n.27.

<sup>178</sup> 45 C.F.R. § 303.5(g)(1) (2020).

sixty days the VAP must be considered “a legal finding of paternity.”<sup>179</sup> Importantly, men cannot establish parentage through VAPs without the birth mother’s express, written consent.<sup>180</sup> It is also noteworthy that neither marital presumption standards nor VAP procedures require the man to prove that he is genetically connected to the child in order to establish his legal parentage.<sup>181</sup>

If a biological father is not married to the child’s birth mother and the birth mother is unwilling to execute a VAP, he must pursue legal proceedings to establish parentage based upon his biological connection to the child.<sup>182</sup> Moreover, if the mother is married to someone else and does not wish for the biological father to establish parentage, the biological father must bring a legal action to challenge the marital presumption of parentage that applies to the mother’s husband.<sup>183</sup> Although a majority of states now grant biological fathers standing to challenge the marital presumption, proof of a genetic connection to the child does not guarantee that the biological father will be able to establish legal paternity.<sup>184</sup> Courts may deny rebuttal of the marital presumption when it is deemed contrary to equitable principles or the best interests of the child, and many states place time restrictions on actions to challenge the marital presumption.<sup>185</sup>

Basically, the law continues to make it significantly easier for men, regardless of their biological connection to the child, to establish legal parentage when they are, or are perceived to be, undertaking parentage with the involvement of the child’s birth mother.<sup>186</sup> If a man is married to the child’s birth mother, which is likely perceived as the strongest guarantee that the birth mother will be significantly involved in any

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<sup>179</sup> 42 U.S.C. § 666(a)(5)(D)(ii) (2018).

<sup>180</sup> See Hendricks, *supra* note 169, at 517.

<sup>181</sup> See Feinberg, *A Logical Step Forward*, *supra* note 3, at 127; *supra* Part I.A.

<sup>182</sup> Feinberg, *Whither the Functional Parent?*, *supra* note 4, at 85.

<sup>183</sup> In some states, the biological father’s paternity can be established through the VAP even if the birth mother is married to someone else. This usually involves the birth mother, her husband, and the biological father together executing the VAP. Feinberg, *A Logical Step Forward*, *supra* note 3, at 128-29 n.158. This, of course, requires the birth mother’s consent. *See id.*

<sup>184</sup> Feinberg, *Restructuring Rebuttal*, *supra* note 38, at 252-54.

<sup>185</sup> *Id.*

<sup>186</sup> See Appleton, *supra* note 44, at 282 (“[F]atherhood has long been constructed as a status stemming from a man’s legally recognized relationship to a child’s mother. Although the required legal relationship to the mother often coincides with a genetic relationship to the child, traditionally the genetic relationship was neither necessary nor sufficient to trigger legal paternity.”); *see also* Hendricks, *supra* note 169, at 517 (“The VAP process thus substitutes for marriage by allowing for the creation of a coparenting relationship by mutual consent.”).

caretaking the man undertakes, he does not have to take any steps at all to establish parentage.<sup>187</sup> If a man is not married to the birth mother but she consents to his establishment of parentage, which is likely perceived as the next best indication that the birth mother will be involved in the caretaking undertaken by the man, the man merely has to execute a document to establish parentage.<sup>188</sup> However, if the man does not share a marital or cooperative relationship with the birth mother, which is likely perceived as a strong indication that the caretaking he undertakes will not occur in the presence of the birth mother, he must pursue legal proceedings to establish his parentage and prove that he is the child's biological father.<sup>189</sup> Even if a man is able to prove a biological tie to the child, that may not be enough to establish his parentage. As the Supreme Court's decision in *Michael H.* demonstrated, parentage claims stemming from a man's marriage to the child's birth mother may outweigh parentage claims stemming from a man's biological and social connections to the child.<sup>190</sup>

The differing standards for parentage establishment for men who are perceived to be part of a parenting unit with the child's biological mother, as opposed to those who are not, likely stem, at least in part, from the lingering discomfort about the ability (or lack thereof) of men to care for children without the presence of the biological mother. While the desire to provide children with a "unitary family" certainly is part of the reason for encouraging the establishment of parentage in men who are married to or in a relationship with the child's biological mother,<sup>191</sup> the preference for raising children within unitary families cannot be the only reason that the law is structured in this manner. This becomes clear when one considers that the promotion of the unitary family through the laws governing parentage establishment only works in one direction. Specifically, if the biological mother is part of a unitary family, the law promotes the establishment of parentage in her spouse or partner.<sup>192</sup> Conversely, if the biological father is part of a unitary family, the law does not promote the establishment of parentage in his spouse or partner — even if the biological father is the only biological

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<sup>187</sup> See *supra* note 37 and accompanying text.

<sup>188</sup> See *supra* notes 177–80 and accompanying text.

<sup>189</sup> See *supra* note 182 and accompanying text.

<sup>190</sup> See Dowd, *supra* note 170, at 1305-06 ("Marital fatherhood, even when nonbiological, is clearly preferred by the Court . . .").

<sup>191</sup> *Michael H. v. Gerald D.*, 491 U.S. 110, 123 n.3 (1989).

<sup>192</sup> See *supra* notes 176–80 and accompanying text.

parent who would provide the child with a unitary family.<sup>193</sup> The differing standards for paternity establishment based upon a man's relationship to the child's biological mother reflect the gendered belief that men cannot or will not provide adequate caregiving without the presence and involvement of the biological mother. Overall, while many of the laws that explicitly employed sex-based stereotypes have been struck down over the years, parentage law continues to reflect gender-related assumptions in more subtle ways.<sup>194</sup>

It is perhaps then unsurprising that the belief that it is essential for children to have a mother present and serving as the primary caretaker, a belief which the law long promoted and reinforced, remains prevalent in modern society.<sup>195</sup> Polls conducted in recent years by the Pew Research Center highlight that large segments of society maintain gendered beliefs about parenting. For example, while 51% of respondents in a recent poll stated that they believed children were better off when their mother was a stay-at-home mother who did not work outside the home, only 8% of respondents held the same belief about fathers.<sup>196</sup> When the question focused on parents of young children, 80% of respondents stated that the ideal situation for mothers with young children was that they either work part-time or not at all, while only 24% of respondents felt the same way about fathers with young children.<sup>197</sup> This recent research regarding societal views of parenting roles indicates that the presence of a mother in a primary caretaking role is still viewed by a large segment of society as essential to children's development, and that this belief does not extend to fathers.

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<sup>193</sup> Parentage establishment through marriage-based presumptions of parentage and VAPs stems from an individual's relationship to the person who gave birth as opposed to an individual's relationship to the child's biological father. *See supra* notes 37, 67, 177–80 and accompanying text.

<sup>194</sup> *See, e.g.*, Dowd, *supra* note 170, at 1280–90 (discussing immigration law decisions that reflect gender-based assumptions around parentage).

<sup>195</sup> *See id.* at 1271 (“[S]tereotypes of fathers run deep despite changing constitutional norms.”); Widiss, *supra* note 160, at 739 (“The reforms of the 1970s eliminated the role that sex-based classifications played in enforcing the traditional gendered divide. It was expected that these changes would in turn transform the gendered ideology that underlay them. This has proven an elusive goal.”).

<sup>196</sup> WENDY WANG, KIM PARKER & PAUL TAYLOR, PEW RESEARCH CTR., BREADWINNER MOMS 2-3 (2013), [http://www.pewsocialtrends.org/wp-content/uploads/sites/3/2013/05/Breadwinner\\_moms\\_final.pdf](http://www.pewsocialtrends.org/wp-content/uploads/sites/3/2013/05/Breadwinner_moms_final.pdf) [<http://perma.cc/Q3ZW-W6EL>].

<sup>197</sup> KIM PARKER & WENDY WANG, PEW RESEARCH CTR., MODERN PARENTHOOD app. 4 at 58 (2013), [http://www.pewresearch.org/wp-content/uploads/sites/3/2013/03/modern\\_parenthood\\_topline\\_03-2013.pdf](http://www.pewresearch.org/wp-content/uploads/sites/3/2013/03/modern_parenthood_topline_03-2013.pdf) [<http://perma.cc/23CJ-66VW>].

The gendered societal beliefs that persist in the parentage context stem from a number of common assumptions, stereotypes, and generalizations about the differing parental and caretaking dispositions, capabilities, and practices of women and men.<sup>198</sup> As an initial matter, there is the persistent assumption that fathers cannot or will not be as caring or nurturing as mothers.<sup>199</sup> Similarly, another lingering assumption is that men cannot or will not form as strong of bonds with their children as women.<sup>200</sup> Other persistent stereotypes are that women are more responsible parents than men and are more capable than men at performing the tasks involved in day-to-day caregiving.<sup>201</sup> Indeed, in several studies, stay-at-home fathers were viewed as less competent caregivers than stay-at-home mothers.<sup>202</sup> In addition to the stereotypes and assumptions about men in general, there are also stereotypes more specific to gay men that cast a negative light on their caretaking abilities, including that they are “anti-family”<sup>203</sup> and have commitment issues.<sup>204</sup>

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<sup>198</sup> See Dowd, *supra* note 170, at 1272 (describing “a deep negative societal bias about men’s caregiving”).

<sup>199</sup> See ABBIE E. GOLDBERG, *GAY DADS: TRANSITIONS TO ADOPTIVE FATHERHOOD* 12 (2012) (citation omitted) (“Women as mothers are presumed to be nurturing, caring, and self-sacrificing, whereas men as fathers are presumed to be more practical, less emotional, and strongly committed to paid employment.”); Dowd, *supra* note 170, at 1284 (“This idea is grounded in a stereotype that men, or most men, will not nurture children.”).

<sup>200</sup> *Stanley v. Illinois*, 405 U.S. 645, 665 (1972) (Burger, C.J., dissenting) (“I believe that a State is fully justified in concluding, on the basis of common human experience, that the biological role of the mother in carrying and nursing an infant creates stronger bonds between her and the child than the bonds resulting from the male’s often casual encounter.”); see also Abigail Millings, Angela Rowe & Judi Walsh, *Do Mothers Really Have Stronger Bonds with Their Children than Fathers Do?*, *CONVERSATION* (Apr. 20, 2016, 5:40 AM EDT), <http://theconversation.com/do-mothers-really-have-stronger-bonds-with-their-children-than-fathers-do-57590> [<http://perma.cc/5MAM-W9AG>].

<sup>201</sup> See *Stanley*, 405 U.S. at 666 (Burger, C.J., dissenting) (“Centuries of human experience buttress this view of the realities of human conditions and suggest that unwed mothers of illegitimate children are generally more dependable protectors of their children than are unwed fathers.”); *id.* at 654 (majority opinion) (“It may be, as the State insists, that most unmarried fathers are unsuitable and neglectful parents.”); Dowd, *supra* note 170, at 1275 (describing “outdated stereotypes about men as incapable, incompetent caregivers”).

<sup>202</sup> Ruth Gaunt, *Breadwinning Moms, Caregiving Dads: Double Standard in Social Judgments of Gender Norm Violators*, 34 *J. FAM. ISSUES* 3, 6, 9-10 (2013).

<sup>203</sup> Dana Berkowitz, *A Sociohistorical Analysis of Gay Men’s Procreative Consciousness*, in *GAY AND LESBIAN PARENTING: NEW DIRECTIONS* 157, 159 (Fiona Tasker & Jerry J. Bigner eds., 2007).

<sup>204</sup> See E. Gary Spitko, *From Queer to Paternity: How Primary Gay Fathers Are Changing Fatherhood and Gay Identity*, 24 *ST. LOUIS U. PUB. L. REV.* 195, 207 (2005).

Laws that exclude male same-sex couples from establishing both members as legal parents through non-adoptive avenues directly reflect the persistent gendered beliefs, assumptions, and stereotypes that continue to exist around parenting and caretaking.<sup>205</sup> For example, laws that provide parentage based upon the act of giving birth and set forth marriage-based presumptions stemming only from the person who gives birth reflect the view that identifying the biological mother as the child's first legal parent is the critical initial step that parentage law must undertake.<sup>206</sup> While marriage-based presumptions of parentage have been extended to encompass both male and female spouses of women who give birth, i.e., situations in which it is guaranteed that at least one of the child's two legal parents will be a woman who is biologically connected to the child — they have not been extended to the spouses of biological fathers.<sup>207</sup> In addition, laws that maintain parentage in the woman who gives birth *unless* there is a genetic intended mother or, in some jurisdictions, simply an intended mother for whom pregnancy carries substantial risks, reflect the view that providing children with at least one legal parent who is a woman is essential. These laws demonstrate that while it is not always essential to provide parentage to the woman who gives birth, it is essential to establish legal parentage in at least one individual who can be identified as a “mother,” a term which is construed narrowly in some of these jurisdictions as a woman who is biologically or genetically connected to the child, and more broadly in others as a woman who intends to raise the child but for whom pregnancy carries substantial risks.<sup>208</sup> In sum, the law governing parentage establishment for male same-sex couples, which reflects problematic gender-based stereotypes, beliefs, and assumptions, is in critical need of reform.

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<sup>205</sup> See Appleton, *supra* note 44, at 292 (“Aside from the practical difficulties, the different treatment marginalizes male couples and sends a signal that nurturing and parenting do not come ‘naturally’ to gay men.”).

<sup>206</sup> Adler, *supra* note 79, at 18 (“Pavan grounds the second parent’s rights in marriage to the birth mother, whose rights go entirely unquestioned; birth mother rights serve as a premise rather than a conclusion. A married gay male couple cannot possibly be treated the same as a married heterosexual or lesbian couple unless and until the law dispenses with that remarkably durable — if barely visible — starting place.”); Appleton, *supra* note 44, at 282 (“[F]atherhood remains, in significant part, a ‘secondary’ or derivative relationship that requires an initial determination of the child’s first or ‘primary’ parent, the mother.”); NeJaime, *supra* note 18, at 2329 (“[T]he mother remains the parental figure who establishes the family, while the father is a secondary, optional parent, potentially supplementing but certainly not replacing the mother.”).

<sup>207</sup> See *supra* Part II.

<sup>208</sup> See *supra* Part II.

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IV. WHY THE LAW SHOULD EXTEND NON-ADOPTIVE MARRIAGE-BASED AVENUES OF ESTABLISHING PARENTAGE TO MALE SAME-SEX COUPLES

A. *Remedying the Unwarranted, Unnecessary Harm to Male Same-Sex Couples and their Children Resulting from Current Parentage Law*

Excluding male same-sex couples who conceive children via surrogacy from non-adoptive marriage-based avenues to establishing parentage and requiring them to undertake adoption in order to establish parentage for the non-biological intended parent results in unwarranted, unnecessary harm to male same-sex couples and their children.<sup>209</sup> Generally, in a stepparent adoption, which married male same-sex couples nationwide may now utilize pursuant to *Obergefell*, the spouse of the child's legal parent can adopt the child and the legal parent can maintain his or her parentage provided that if the child already has a second legal parent, they have consented to the termination of their parental rights.<sup>210</sup> However, because in most jurisdictions the law conclusively presumes that the surrogate is a legal parent if no genetic intended mother exists, stepparent adoption represents a viable avenue for male same-sex couples to establish the non-biological intended parent's legal parentage only when the surrogate is willing to surrender her parental rights.<sup>211</sup> Despite the prior execution of a surrogacy contract in which the surrogate agreed to relinquish her parental rights, unless there is a judicial determination that the surrogate is an unfit parent whose rights are subject to involuntarily termination, the stepparent adoption cannot occur without the surrogate's consent.<sup>212</sup> While in the vast majority of cases the surrogate is willing to surrender her parental rights in accordance with the surrogacy contract,<sup>213</sup> in the rare instances when the surrogate

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<sup>209</sup> See NeJaime, *supra* note 18, at 2308, 2313 (describing this approach as “consistent with the approach of most other states” and further stating that “[i]n most states, nonbiological fathers in same-sex couples cannot establish parentage without adoption, even when they are married”).

<sup>210</sup> Feinberg, *A Logical Step Forward*, *supra* note 3, at 110.

<sup>211</sup> See NeJaime, *supra* note 18, at 2320 (“While adoption will ultimately yield legal parentage for some, it may be impossible for others, meaning that legal recognition remains out of reach. Terminating the rights of the individual presumed by law to be the parent may not be feasible.”).

<sup>212</sup> See *supra* notes 149–53 and accompanying text.

<sup>213</sup> See Snyder & Byrn, *supra* note 108, at 643 n.27 (citing Deborah Morgenstern Katz, *Womb for Rent*, PARENTING MAG., Dec./Jan. 2002, at 86); see also Joanna L. Grossman, *Time to Revisit Baby M.? A New Jersey Court Refuses to Enforce a Surrogacy Agreement, Part Two*, FINDLAW (Jan. 20, 2010), <http://supreme.findlaw.com/legal->

changes her mind, the stepparent adoption requirement effectively prevents married male same-sex couples from establishing both members of the couple as the child's legal parents.

Even when the surrogate is willing to relinquish her parental rights, the stepparent adoption process can be expensive, lengthy, and burdensome.<sup>214</sup> Specifically, “many individuals require the assistance of an attorney to navigate the process, and the procedure often requires submitting various documents, paying court fees, appearing in court, submitting to a background check, and undergoing some form of post-placement supervision.”<sup>215</sup> Some courts also require financial accountings and invasive home studies.<sup>216</sup> Stepparent adoptions can cost several thousand dollars and may take months to complete.<sup>217</sup> Couples who lack the resources or knowledge necessary to complete the stepparent adoption process will be excluded from establishing legal parentage for the non-biological intended parent.

Importantly, until the adoption is completed, the non-biological intended parent is not a legal parent and thus lacks the myriad rights and obligations that accompany legal parentage, including, for example, medical decision-making and custodial rights as well as support obligations.<sup>218</sup> This leaves both the child and the non-biological intended parent without essential rights and protections and in a state of limbo.<sup>219</sup> If the couple's relationship ends before the adoption is completed, the non-biological intended parent, a legal stranger to the child at that point, will be left completely “at the mercy of [their] former partner.”<sup>220</sup> Requiring married male same-sex couples to pursue adoption in order for the non-biological intended parent to establish legal parentage also sends a harmful, problematic message to the non-

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commentary/time-to-revisit-baby-m-a-new-jersey-court-refuses-to-enforce-a-surrogacy-agreement-part-two.html [http://perma.cc/L3P7-HVJ3].

<sup>214</sup> See Feinberg, *A Logical Step Forward*, *supra* note 3, at 110-11.

<sup>215</sup> *Id.*

<sup>216</sup> See, e.g., *Henderson v. Adams*, 209 F. Supp. 3d 1059, 1065 (S.D. Ind. 2016) (“[Plaintiff] is seeking a stepparent adoption. She is required to undergo fingerprinting and a criminal background check in addition to submitting her driving record, her financial profile, and the veterinary records for any pet living in the home. A home study is being conducted, which examines the relationship history of [plaintiff and her wife], requires them to write an autobiography and to discuss their parenting philosophy, and requires them to open their home for inspection. The cost for their stepparent adoption is approximately \$4,200.00 . . .”).

<sup>217</sup> NeJaime, *supra* note 18, at 2317.

<sup>218</sup> See *id.* at 2317-18.

<sup>219</sup> See *id.* at 2318.

<sup>220</sup> *Id.* at 2320.

biological intended parent and society at large. The message is that the non-biological parent is not a “real” parent but instead is a “parental substitute[] who must formally replace the biological parent[] [(here the surrogate)] through adoption.”<sup>221</sup> This message is likely to further stigmatize families headed by male same-sex couples and lead to feelings of insecurity and inferiority for the non-biological intended parent.

The harm to male same-sex couples and their families resulting from the denial of marriage-based avenues to establishing parentage is unwarranted — there is a wide body of social science research indicating that the skills and abilities required to successfully raise children exist in both men and women and in both different- and same-sex couples. Specifically, studies have demonstrated that men who serve as primary caretakers to their children are as capable as women who serve in that role and that children raised by male same-sex couples function as well as children raised by different-sex couples and female same-sex couples across an array of measures.<sup>222</sup> In terms of the findings of studies involving men who are primary caretakers for their children, “[t]he most critical fact that emerges about how men parent is that when men do nurture children as a primary parent, men parent essentially like mothers. Men parent as well as women do, and their way of parenting is not unique.”<sup>223</sup> As Professor Nancy Dowd has explained, the research indicates that “[g]ood parenting is neither sex-specific nor sex-related.”<sup>224</sup>

With regard to studies of children raised by gay and lesbian parents, as the American Sociological Association has explained,

The clear and consistent social science consensus is that children raised by same-sex parents fare just as well as children raised by different-sex parents. Decades of methodologically sound social science research, including multiple nationally representative studies and expert evidence introduced in courts around the country, confirm that positive child wellbeing is the product of stability in the relationship between the two parents, stability in the relationship between the parents and the child, and sufficient parental socioeconomic resources. The wellbeing

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<sup>221</sup> *Id.* at 2319.

<sup>222</sup> See *infra* notes 223–27 and accompanying text.

<sup>223</sup> Dowd, *supra* note 170, at 1317; see also NANCY E. DOWD, REDEFINING FATHERHOOD 46, 83 (2000).

<sup>224</sup> Dowd, *supra* note 170, at 1318.

of children does not depend on the sex or sexual orientation of their parents.<sup>225</sup>

Specifically, research indicates that children of same-sex parents scored as well as or better than children of different-sex parents on measures such as mental health, cognitive development, psychological adjustment, academic success, quality of the parent-child relationship, and overall well-being.<sup>226</sup> As a result, leading social science and medical organizations, such as the American Academy of Pediatrics, the American Medical Association, the American Psychological Association, and the American Sociological Association, have issued statements expressing support for the legal recognition of same-sex parents.<sup>227</sup>

Moreover, the substantial burden that married male same-sex couples and surrogates bear as a result of a legal framework that requires an adoption procedure in order for the surrogate's rights to be terminated and the non-biological intended parent's rights to be established is an unnecessary, counterproductive one. Disputes over parentage in the surrogacy context are rare — “[i]t is anecdotally reported that, of the estimated 14,000 to 16,000 surrogacies completed through 2002, only 88 resulted in disputes over parentage.”<sup>228</sup> When the law requires an adoption procedure in order for the surrogate's parentage to be terminated and the non-biological intended parent's parentage to be established, it forces legal parentage on the surrogate against her wishes and denies parental rights to the child's non-biological intended parent

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<sup>225</sup> Brief for American Sociological Association as Amicus Curiae Supporting Petitioners at 2, *Obergefell v. Hodges*, 576 U.S. 644 (2015) (Nos. 14-556, 14-562, 14-571, 14-574).

<sup>226</sup> See Alicia Crowl, Soyeon Ahn & Jean Baker, *A Meta-Analysis of Developmental Outcomes for Children of Same-Sex and Heterosexual Parents*, 4 J. GLBT FAM. STUD. 385, 398 (2008); Suzanne A. Kim & Edward Stein, *Gender in the Context of Same-Sex Divorce and Relationship Dissolution*, 56 FAM. CT. REV. 384, 390 n.25 (2018).

<sup>227</sup> See EVAN B. DONALDSON ADOPTION INST., EXPANDING RESOURCES FOR WAITING CHILDREN II: ELIMINATING LEGAL AND PRACTICE BARRIERS TO GAY AND LESBIAN ADOPTION FROM FOSTER CARE app. B at 42-44 (2008), <http://web.archive.org/web/20190807143323/http://www.f2f.ca.gov/res/pdf/ExpandingResources.pdf> [<http://perma.cc/B7EW-JRLU>]; see, e.g., Brief for American Sociological Association as Amicus Curiae Supporting Petitioners, *supra* note 225 (arguing that legalizing same-sex marriage will promote the wellbeing of the children of same-sex couples).

<sup>228</sup> Snyder & Byrn, *supra* note 108, at 643 n.27 (citing Deborah Morgenstern Katz, *Womb for Rent*, PARENTING MAG., Dec./Jan. 2002, at 86). Notably, “of those 88 cases, only 23 were reported to be surrogates who wanted to keep the child (often simply to leverage better contract terms), while the remaining 65 were intended parents who were unable or did not want to complete the agreement (because of divorce, death of one of the intended parents, nature or condition of the child, etc.).” *Id.*

until the costly, intrusive adoption process is completed. It is also deeply problematic that in many jurisdictions, despite the fact that the surrogate's relationship to the child is exactly the same in either scenario, the surrogate avoids legal parentage if the intended mother's ova were used in conception but is conclusively deemed the child's legal parent if the intended parents utilized donor ova.<sup>229</sup> Extending marriage-based avenues of establishing parentage to male same-sex couples who conceive children via surrogacy would better and more efficiently effectuate the intent of all of the parties involved in the surrogacy agreement in the overwhelming majority of cases.<sup>230</sup>

In addition, it is already well entrenched under current law that an individual who does not share a genetic connection to a child may establish legal parentage on the basis of their marriage to the child's biological parent. Across the country, marital presumption laws establish parentage for the different- or same-sex spouse of an individual who conceives or gives birth to a child during the marriage.<sup>231</sup> Similarly, spousal consent to assisted reproduction laws across the country provide parentage to married individuals who, with the intent to be the resulting child's parent, consent to their same- or different-sex spouse's use of assisted reproduction to conceive a child.<sup>232</sup> Extending marriage-based parentage establishment avenues to male same-sex couples who conceive via surrogacy would be a logical expansion of these existing laws. Furthermore, while extending marriage-based avenues of establishing parentage to male same-sex couples would require legal recognition that giving birth does not necessarily conclusively establish an individual's parentage, this also is not a new concept. In allowing genetic intended mothers in the surrogacy context to establish their parentage and to rebut and disestablish the surrogate's parentage through non-adoptive avenues, the law in many states already recognizes that giving birth does not always conclusively establish legal parentage.<sup>233</sup>

Finally, denying male same-sex couples access to non-adoptive marriage-based avenues to establishing parentage runs afoul of the modern justifications for maintaining marriage-based parentage presumptions. As discussed above, there are a number of justifications for marriage-based parentage presumptions that remain relevant today. These justifications include protecting the integrity of marriages,

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<sup>229</sup> See *supra* notes 134–46 and accompanying text.

<sup>230</sup> See *supra* note 213 and accompanying text.

<sup>231</sup> See discussion *supra* Part II.A.

<sup>232</sup> See discussion *supra* Part II.B.

<sup>233</sup> See *supra* notes 134–36 and accompanying text.

fostering marital harmony and unity, promoting childrearing within marriage, and providing stable homes for children.<sup>234</sup> Each of these justifications supports the application of marriage-based avenues of establishing parentage to all married couples, regardless of the genders of the spouses.

B. *Dismantling Harmful Gender-Based Stereotypes*

Extending non-adoptive marriage-based avenues to establishing parentage to male same-sex couples falls within the scope of the type of legal reform that will help to dismantle harmful and confining gender-based stereotypes and expectations. This certainly is not to say that extending marriage-based parentage to male same-sex couples will, on its own, dismantle the gender-based stereotypes embedded in our laws and society — it will not. However, adopting laws such as this that challenge existing gender stereotypes and expectations around parenting and caretaking is undoubtedly important, and, if done on a large enough scale, will result in meaningful change. Broadly speaking, laws that recognize men as caretakers will help women in a number of ways, both in the workplace and in the domestic sphere. It is well established that women face discrimination in the workplace based upon assumptions about their current or future familial roles and caretaking responsibilities. As Professor Vicki Schultz has explained, “[h]istorically, workplace inequalities between men and women have been based on a biased set of attitudes and assumptions casting women as secondary workers . . . [who] are committed first and foremost to their domestic roles.”<sup>235</sup> Many employers continue to assume that women are, will be, or should be primarily responsible for the care of their home and family members, and that men are, will be, or should be primarily responsible for supporting their families financially.<sup>236</sup> As a result, employers often view women as both less committed to their careers and less competent at their jobs than their male counterparts.<sup>237</sup>

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<sup>234</sup> See *supra* notes 50–53 and accompanying text.

<sup>235</sup> Vicki Schultz, *Taking Sex Discrimination Seriously*, 91 DENV. U. L. REV. 995, 1010–11 (2015).

<sup>236</sup> See Claire Cain Miller, *The Motherhood Penalty vs. the Fatherhood Bonus*, N.Y. TIMES (Sept. 6, 2014), <http://www.nytimes.com/2014/09/07/upshot/a-child-helps-your-career-if-youre-a-man.html> [<http://perma.cc/UT8F-RTFT>].

<sup>237</sup> Schultz, *supra* note 235, at 1011 (discussing the assumption that “women do not have the same level of commitment to paid work as men, nor do they develop the same level of work competence . . . .”); see Dania Y. Pulido, *When Giving Birth Becomes a Liability: The Intersection of Reproductive Oppression and the Motherhood Wage Penalty for Latinas in Texas*, 19 SCHOLAR 111, 136 (2017) (“According to a gender inequality

These assumptions lead to discrimination against women in, *inter alia*, hiring, promotion, pay, and retention.<sup>238</sup>

Today, 42% of women report experiencing gender-based discrimination in the workplace,<sup>239</sup> and women are severely underrepresented in leadership positions across a wide array of fields.<sup>240</sup> A significant gender wage gap persists in the United States, with women who work fulltime earning only approximately 80% as much as men who work fulltime; the wage gap is substantially larger for Black, Latina, and Hispanic women.<sup>241</sup> Across a variety of fields and types of jobs, “women regularly are paid less than men working in the same occupation.”<sup>242</sup> As a 2013 report from the National Equal Pay Task Force explains, “the gender pay gap exists for women working full time as well as part time, and begins when women are first employed, which is often well before they have children.”<sup>243</sup>

For women who are also mothers, the discriminatory treatment stemming from gendered assumptions and beliefs around caretaking is

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study, employers even questioned *childless* women’s career commitment because they perceived such women as prospective mothers.”).

<sup>238</sup> See Keith Cunningham-Parmeter, *(Un)Equal Protection: Why Gender Equality Depends on Discrimination*, 109 NW. U. L. REV. 1, 49 (2014); see also Shirley Lin, “*And Ain’t I a Woman?*”: *Feminism, Immigrant Caregivers, and New Frontiers for Equality*, 39 HARV. J. L. & GENDER 67, 71 (2016).

<sup>239</sup> Kim Parker & Cary Funk, *Gender Discrimination Comes in Many Forms for Today’s Working Women*, PEW RES. CTR. (Dec. 14, 2017), <http://www.pewresearch.org/fact-tank/2017/12/14/gender-discrimination-comes-in-many-forms-for-todays-working-women/> [<http://perma.cc/ECF2-UGBU>].

<sup>240</sup> Judith Warner, Nora Ellmann & Diana Boesch, *The Women’s Leadership Gap*, CTR. AM. PROGRESS (Nov. 20, 2018, 9:04 AM), <http://www.americanprogress.org/issues/women/reports/2018/11/20/461273/womens-leadership-gap-2/> [<https://perma.cc/33VS-926D>].

<sup>241</sup> See Sonam Sheth, Shayanne Gal, Madison Hoff & Marguerite Ward, *7 Charts that Show the Glaring Gap Between Men’s and Women’s Salaries in the US*, BUS. INSIDER (Aug. 26, 2020, 10:51 AM), <http://www.businessinsider.com/gender-wage-pay-gap-charts-2017-3> [<http://perma.cc/58QN-M8QF>]; see also Taylor Stoneman, *International Economic Law, Gender Equality, and Paternity Leave: Can the WTO Be Utilized to Balance the Division of Care Labor Worldwide?*, 32 EMORY INT’L L. REV. 51, 58-59 (2017).

<sup>242</sup> NAT’L EQUAL PAY TASK FORCE, *FIFTY YEARS AFTER THE EQUAL PAY ACT: ASSESSING THE PAST, TAKING STOCK OF THE FUTURE* 28 (2013), [http://obamawhitehouse.archives.gov/sites/default/files/equalpay/equal\\_pay\\_task\\_force\\_progress\\_report\\_june\\_2013\\_new.pdf](http://obamawhitehouse.archives.gov/sites/default/files/equalpay/equal_pay_task_force_progress_report_june_2013_new.pdf) [<http://perma.cc/NWX3-4WQZ>].

<sup>243</sup> *Id.* (citing Anthony T. Lo Sasso, Michael R. Richards, Chiu-Fang Chou, & Susan E. Gerber, *The \$16,819 Pay Gap for Newly Trained Physicians: The Unexplained Trend of Men Earning More Than Women*, 30 HEALTH AFFAIRS 193, 193 (2011)); see also U.S. BUREAU OF LAB. STAT., U.S. DEP’T OF LAB., *MEDIAN WEEKLY EARNINGS OF FULL-TIME WAGE AND SALARY WORKERS BY DETAILED OCCUPATION AND SEX 1-10* (2019), <http://www.bls.gov/cps/cpsaat39.pdf> [<http://perma.cc/8EMH-SVXY>].

even more pronounced. As compared to women without children, mothers receive lower wages, are less likely to be hired and promoted, are perceived as less competent, and are subjected to “harsher performance and punctuality standards.”<sup>244</sup> Fathers, on the other hand, are more likely than childless men to be hired, and men tend to receive higher wages after they have children.<sup>245</sup> While employers tend to assume that men who are fathers will be more committed to their work in order to provide financially for their families, women who are mothers are perceived as less committed to their work and “more distractible when on the job.”<sup>246</sup> In one study, women whose resumes indicated that they were parents (by mentioning membership in a parent-teacher association) were half as likely to receive interview invitations as women whose otherwise identical resumes did not indicate that they were parents.<sup>247</sup> Men whose resumes indicated that they were parents, however, were actually slightly more likely to receive interview invitations than men whose resumes did not indicate that they were parents.<sup>248</sup> In a related study, when participants were placed in the role of an employer and asked how much they would pay job applicants, “[m]others were offered on average \$11,000 less than childless women and \$13,000 less than fathers.”<sup>249</sup> Research also indicates that, after controlling for the usual occupational and human capital factors that affect wages, working women in the United States receive, on average, a 5% wage penalty per child.<sup>250</sup>

Moreover, at home, women are still engaging in a greater share of housework and caretaking. Although men are performing more caretaking and housework than in the past, mothers today spend approximately twice the amount of time caring for their children as fathers, and women spend eight more hours than men completing

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<sup>244</sup> Shelley J. Correll, Stephen Benard & In Paik, *Getting a Job: Is There a Motherhood Penalty?*, 112 AM. J. SOC. 1297, 1316 (2007); see Gaunt, *supra* note 202, at 5-6; Pulido, *supra* note 237, at 135; see also ABRAMS ET AL., *supra* note 155, at 196. The degree of the motherhood penalty varies by race. Research indicates that the motherhood wage penalty for Black and Latina women, for example, may be less. *Id.* (citing Asmara M. Tekle, *The “Non-Maternal Wall” and Women of Color in High Governmental Office*, 35 T. MARSHALL L. REV. 169, 175-78 (2010)).

<sup>245</sup> Miller, *supra* note 236; see Miranda McGowan, *The Parent Trap: Equality, Sex and Partnership in the Modern Law Firm*, 102 MARQ. L. REV. 1195, 1200 (2019).

<sup>246</sup> Miller, *supra* note 236.

<sup>247</sup> See Correll et al., *supra* note 244, at 1329-30.

<sup>248</sup> See *id.* at 1330.

<sup>249</sup> Miller, *supra* note 236.

<sup>250</sup> Correll et al., *supra* note 244, at 1297.

housework each week.<sup>251</sup> Furthermore, even though couples in which both members work fulltime increasingly report sharing equally in childcare and housework, among these couples mothers are still significantly more likely than fathers to be doing a greater share of the work involved in raising children and maintaining the household.<sup>252</sup> In addition, women are significantly more likely than men to interrupt their careers in order to care for a child or family member.<sup>253</sup> In a 2013 Pew Research Poll, a significantly higher percentage of mothers as compared to fathers indicated that they had reduced their hours at work, taken a substantial amount of time off from work, or quit their jobs in order to care for a child or family member.<sup>254</sup>

Legal reform such as that proposed in this Article that recognizes the caretaking disposition and capabilities of men sends a message that directly contradicts gender-based stereotypes and assumptions around caretaking responsibilities that harm and confine women.<sup>255</sup> In allowing male same-sex couples to establish legal parentage through the marriage-based avenues available to different-sex couples and female same-sex couples, the law would be recognizing that caretaking is not a “woman’s role,” but rather a role that can be, and is, fulfilled by both

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<sup>251</sup> PEW RES. CTR, CHAPTER 5: AMERICANS’ TIME AT PAID WORK, HOUSEWORK, CHILD CARE, 1965 TO 2011, at 6 (Paul Taylor ed., 2013), <http://www.pewsocialtrends.org/2013/03/14/chapter-5-americans-time-at-paid-work-housework-child-care-1965-to-2011/> [<http://perma.cc/XXH2-EHAA>] (“Despite the increase in child care time, American mothers still spend about twice as much time with their children as fathers do. In 2011, child care time was 7.3 hours per week for fathers and 13.5 hours per week for mothers.”).

<sup>252</sup> See *Raising Kids and Running a Household: How Working Parents Share the Load*, PEW RES. CTR. (Nov. 4, 2015), <http://www.pewsocialtrends.org/2015/11/04/raising-kids-and-running-a-household-how-working-parents-share-the-load/> [<http://perma.cc/3TZ4-LLHE>].

<sup>253</sup> Kim Parker, *Women More than Men Adjust Their Careers for Family Life*, PEW RES. CTR. (Oct. 1, 2015), <http://www.pewresearch.org/fact-tank/2015/10/01/women-more-than-men-adjust-their-careers-for-family-life/> [<http://perma.cc/4KHL-MCDC>] (“In a 2013 survey, we found that mothers were much more likely than fathers to report experiencing significant career interruptions in order to attend to their families’ needs.”).

<sup>254</sup> See *On Pay Gap, Millennial Women Near Parity – For Now*, PEW RES. CTR. (Dec. 11, 2013), <http://www.pewsocialtrends.org/2013/12/11/on-pay-gap-millennial-women-near-parity-for-now/> [<http://perma.cc/XA33-NY56>].

<sup>255</sup> See Fontana & Schoenbaum, *supra* note 154, at 311 (“Unsexing the law of caregiving has been crucial to dismantling the separate sex-based spheres that pigeonhole women as caregivers and men as breadwinners and that have been so harmful to sex equality.”).

women and men.<sup>256</sup> Legal reform that promotes messages like this, if accomplished on a broad enough scale, will help to dismantle the “stereotype that only women are responsible for family caregiving.”<sup>257</sup> As legal and societal recognition that caretaking is not a gender-specific role increases, employers will be less likely to resort to the harmful gender-based beliefs and assumptions around caretaking that have plagued women in the workplace.<sup>258</sup>

Legal reform that recognizes men as fully capable, nurturing, and responsible caretakers and parents also will help to combat the persistent gender-based expectations of women that exist in the domestic sphere.<sup>259</sup> On a broad scale, as legal and societal recognition that men are fully capable of undertaking the wide range of activities associated with successful childrearing increases, the likelihood that different-sex couples will automatically resort to traditional gender-based caretaking roles and expectations when they have children will continue to decrease.<sup>260</sup> As caretaking becomes less synonymous with motherhood, different-sex couples will increasingly be left to make decisions about domestic responsibilities based upon considerations other than gender. Importantly, dismantling gender-based caretaking expectations within the domestic sphere will promote the dismantling of gender-based caretaking expectations in the workplace and vice versa.<sup>261</sup> Although there is still significant progress to be made, women today are gaining increasing equality in both the workplace and domestic sphere. Laws that serve to facilitate and normalize male caretaking, such as those that advance parentage establishment for male

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<sup>256</sup> See NeJaime, *supra* note 18, at 2330 (“[M]ale same-sex couples disrupt norms of both heterosexuality and gender that have structured family relationships. By forming a family that excludes a mother, these men position fathers as primary parents — assuming the social role traditionally demanded of women as a matter of biology.”).

<sup>257</sup> See Fontana & Schoenbaum, *supra* note 154, at 363 (quoting *Nev. Dep’t of Human Res. v. Hibbs*, 538 U.S. 721, 737 (2003)).

<sup>258</sup> See *id.*

<sup>259</sup> See *supra* notes 195–97, 251–54 and accompanying text.

<sup>260</sup> As laws and societal views regarding gender equality have advanced, different-sex couples have become increasingly more egalitarian with regard to responsibilities for childcare and housework. See *Modern Parenthood: Roles of Moms and Dads Converge as they Balance Work and Family*, PEW RES. CTR. (Mar. 14, 2013), <http://www.pewsocialtrends.org/2013/03/14/modern-parenthood-roles-of-moms-and-dads-converge-as-they-balance-work-and-family/> [<http://perma.cc/7DXN-GCGE>] [hereinafter *Modern Parenthood*].

<sup>261</sup> See Susan Frelich Appleton, *Missing in Action? Searching for Gender Talk in the Same-Sex Marriage Debate*, 16 STAN. L. & POL’Y REV. 97, 112 (2005) (“[W]e can now see home and employment as complementary but interlocking spaces. Changing the rules and norms in one affects the other . . .”).

same-sex couples, will help to ensure that the momentum toward women's equality continues.<sup>262</sup>

Laws that reflect the recognition that children can thrive under the care of men also can help to disrupt the assumptions and stereotypes that harm and confine men. Today, it is increasingly common for men to “want to escape the bonds of the breadwinner stereotype so that they can be more connected and involved fathers and partners who equally share the load at home with their spouses.”<sup>263</sup> Men are taking on significantly more caretaking and housework than in the past,<sup>264</sup> and the percentage of fathers who serve as stay-at-home parents also is on the rise.<sup>265</sup> In a recent Pew Research Poll, fathers were almost as likely as mothers to indicate that they would rather be raising their children than working.<sup>266</sup> Additionally, although “[f]athers have nearly tripled their time with [their] children since 1965,” almost half of the fathers surveyed indicated that they felt the amount of time they were currently able to spend with their children was still not enough.<sup>267</sup>

Despite these significant changes in men's caretaking attitudes and behaviors, men who engage in substantial caretaking continue to face discrimination and stigmatization. Notably, “[m]en who treat caregiving as a primary concern face discrimination and hostility in the workplace.”<sup>268</sup> For example, men who seek to utilize family leave or flexible work policies to engage in caretaking activities report being met with skepticism and retaliation in the workplace.<sup>269</sup> Similarly, men who

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<sup>262</sup> Cf. *Modern Parenthood*, *supra* note 260.

<sup>263</sup> McGowan, *supra* note 245, at 1200 (citing BRAD HARRINGTON, FRED VAN DEUSEN & BETH HUMBERD, *THE NEW DAD: CARING, COMMITTED AND CONFLICTED* 12 chart 5 (2011)).

<sup>264</sup> See *Modern Parenthood*, *supra* note 260.

<sup>265</sup> Gretchen Livingston, *Stay-at-Home Moms and Dads Account for About One-in-Five U.S. Parents*, PEW RES. CTR. (Sept. 24, 2018), <http://www.pewresearch.org/fact-tank/2018/09/24/stay-at-home-moms-and-dads-account-for-about-one-in-five-u-s-parents/> [<http://perma.cc/RA4L-X3Z6>] (“However, the long-term uptick in dads at home is not driven solely by economic factors. The modest increase is apparent even after excluding those who were home due to unemployment. Furthermore, a growing share of stay-at-home fathers say they are home specifically to care for their home or family, suggesting that changing gender roles may be at play.”).

<sup>266</sup> *Modern Parenthood*, *supra* note 260.

<sup>267</sup> *Id.*

<sup>268</sup> Kelli K. García, *The Gender Bind: Men as Inauthentic Caregivers*, 20 DUKE J. GENDER L. & POL'Y 1, 4 (2012).

<sup>269</sup> See Dara E. Purvis, *Trump, Gender Rebels, and Masculinities*, 54 WAKE FOREST L. REV. 423, 432 (2019) (“There are scores of examples of employers who punish male employees for taking on caregiving responsibilities.”); Jocelyn Tillisch, *Title IX and Gender Stereotype Theory: Protecting Students from Parental Status Discrimination*, 42

seek to return to work after leaving the workforce to care for their children also report experiencing discrimination.<sup>270</sup> Moreover, the stigmatization and discrimination experienced by men who engage in primary caretaking is not confined to the workplace. For example, as discussed above, society views stay-at-home fathers as less competent than stay-at-home mothers.<sup>271</sup> Furthermore, while a large segment of the population continues to believe that the ideal situation for children is to have a mother who stays at home part- or full-time, the percentage of people who believe the same about fathers is drastically lower.<sup>272</sup> The view that a man's role is to provide financially for his family lingers, and men who serve as primary caretakers report being met with discomfort, disapproval, and judgment as they move through the world.<sup>273</sup>

It is likely that the adoption of laws and policies that serve to support and normalize families in which primary caretaking responsibilities are undertaken by men will lead to more men taking on caretaking responsibilities.<sup>274</sup> As male caretaking becomes increasingly common, the stereotypes and stigmatization that plague male caretakers will further dissipate, and employers and society at large will be less likely to perceive male caretaking as suspicious or improper. In sum, laws that reflect a recognition that caretaking is not a gender-specific activity, including those that facilitate the establishment of parentage in male same-sex couples, collectively will help in the ongoing efforts to free

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SEATTLE U. L. REV. 1223, 1223 (2019) (“Fathers face different stereotypes, including that they are uncommitted . . . employees when they take family leave, because childcare is still regarded as a feminine role.”); *see also* García, *supra* note 268, at 10 (“Research on attitudes toward male caregivers suggests that men correctly perceive that they will be judged more harshly than women for using family leave policies.”).

<sup>270</sup> Maureen Minehan, *Don't Stigmatize Stay-at-Home Dads*, HR WIRE (Oct. 20, 2003); Eve Tahmincioglu, *Return to Work Not Easy for Stay-at-Home Dads*, NBC NEWS (Aug. 30, 2007, 7:26 AM EST), <http://www.nbcnews.com/id/19977348/ns/business-careers/t/return-work-not-easy-stay-at-home-dads/#.XUMyOehKi70> [https://perma.cc/QBP2-U9MV].

<sup>271</sup> *See supra* note 202 and accompanying text.

<sup>272</sup> *See supra* note 197 and accompanying text.

<sup>273</sup> *See* Jason Beaubien, *Stay-at-Home Dads Still Struggle with Diapers, Drool, Stigma and Isolation*, NPR (June 17, 2018, 5:37 PM EST), <https://www.npr.org/sections/health-shots/2018/06/17/619557786/stay-at-home-dads-still-struggle-with-diapers-drool-stigma-and-isolation> [https://perma.cc/JB66-AHH7]; Caitlin Fitzsimmons, *Stigma and Suspicion: The Extra Burden of Stay-at-Home Dads*, SYDNEY MORNING HERALD (Sept. 2, 2018, 12:00 AM), <https://www.smh.com.au/lifestyle/life-and-relationships/stigma-and-suspicion-the-extra-burden-of-stay-at-home-dads-20180901-p5014p.html> [https://perma.cc/US98-ZEF7]; Jennifer Medina, *Housewives, Try This for Desperation*, N.Y. TIMES (Dec. 22, 2004), <https://www.nytimes.com/2004/12/22/nyregion/housewives-try-this-for-desperation.html> [https://perma.cc/R2EY-N947].

<sup>274</sup> *See supra* notes 199–202 and accompanying text.

both women and men from the confines of traditional gender roles and the significant harms that stem therefrom.

V. PROPOSAL: EXTENDING NON-ADOPTIVE MARRIAGE-BASED AVENUES TO ESTABLISHING PARENTAGE TO MALE SAME-SEX COUPLES

At first glance, it may seem that efforts aimed at providing parentage to married male same-sex couples who conceive children via surrogacy should focus exclusively on advancing surrogacy statutes that recognize intended parents as legal parents regardless of gender or biological connection to the child. While this is undoubtedly an extremely important goal, extending marriage-based avenues of establishing parentage to male same-sex couples is also an essential step for attaining equality for male same-sex couples in the parentage realm. Although the first surrogacy agreement in the United States occurred in 1976,<sup>275</sup> today many states still lack statutes or appellate case law governing surrogacy and only a minority of states have surrogacy laws recognizing both members of a married couple as legal parents in situations in which the child is conceived using donor ova and sperm from one of the intended parents.<sup>276</sup> The hesitancy of states to address surrogacy and the vast disparity in the approaches of the states that do have laws governing surrogacy make it essential to advance other methods of establishing parentage for male same-sex couples while simultaneously seeking to advance inclusive state surrogacy laws.

When it comes to facilitating parentage establishment for same-sex couples, a number of states may find it easier or more palatable to extend to same-sex couples the longstanding avenues of establishing parentage that already exist, as opposed to creating new avenues of parentage establishment, such as surrogacy-based avenues.<sup>277</sup> For example, states have extended longstanding marriage-based avenues of establishing parentage to female same-sex couples simply by adopting gender neutral language to refer to the person who is deemed a parent

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<sup>275</sup> Keith J. Hey, *Assisted Conception and Surrogacy — Unfinished Business*, 26 J. MARSHALL L. REV. 775, 787 (1993).

<sup>276</sup> See *supra* notes 89, 103–05 and accompanying text.

<sup>277</sup> See NeJaime, *supra* note 18, at 2342 (“Ideally, legislators would accept primary responsibility for reforming parentage law . . . [b]ut lawmakers in many states have been slow to respond to shifts in family formation made possible by ART – even when urged to do so by judges. Consequently, courts are routinely asked to apply existing parentage principles to new and unforeseen situations. In many states, courts can rely on existing family law principles to apply the marital presumption in ways that promote equality . . .”).

on the basis of their marriage to the individual who gave birth.<sup>278</sup> In addition, even when same- or different-sex couples utilize surrogacy in a state that does not recognize the surrogacy agreement itself as establishing legal parentage for the intended parents, in many instances genetic intended parents have been able to use well-established genetics-based avenues to obtain legal parentage.<sup>279</sup> It is likely that in a number of the states that lack surrogacy laws providing parentage to male same-sex couples, the strategy of extending longstanding avenues of establishing parentage, such as the existing marriage-based avenues, will provide the quickest path to achieving non-adoptive parentage establishment for male same-sex couples.

Among the states that do not have surrogacy laws providing parentage to the non-biological intended parent when conception occurs using sperm from their spouse and donor ova, the ease of extending marriage-based parentage establishment avenues to male same-sex couples will depend on the state's approach to the disestablishment of legal parentage for surrogates. As discussed above, in most states, when the surrogacy agreement is not recognized as establishing the intended parents as legal parents, non-adoptive disestablishment of a surrogate's legal parentage is allowed only when there is a genetic intended mother seeking to establish maternity — which would not usually exist in the context of male same-sex couples.<sup>280</sup> In a couple of these states, however, the surrogate's legal parentage can be disestablished through non-adoptive avenues even when there is no genetic intended mother seeking to establish maternity.<sup>281</sup> In these states, extending marriage-based parentage establishment avenues to male same-sex couples will be the most straightforward and will require the least amount of reform to existing laws.

Maryland is one of these minority jurisdictions. Despite rendering surrogacy agreements unenforceable, Maryland allows for the disestablishment of the surrogate's legal maternity through genetics-based avenues similar to those applicable to paternity disestablishment when a child is conceived using sperm from an intended parent and donor ova (meaning there is no genetic intended mother).<sup>282</sup> In *In re Roberto d.B.*, an unmarried man and a gestational surrogate entered into a surrogacy agreement through which a child was to be conceived using

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<sup>278</sup> See *supra* notes 60–62, 71–73 and accompanying text.

<sup>279</sup> See *supra* note 118 and accompanying text.

<sup>280</sup> See *supra* notes 134–37 and accompanying text.

<sup>281</sup> See *infra* notes 282–90 and accompanying text.

<sup>282</sup> *In re Roberto d.B.*, 923 A.2d 115, 121 (Md. 2007).

the man's sperm and donor ova.<sup>283</sup> Against the parties' wishes, the surrogate's name was listed on the child's birth certificate along with the biological father's name, and the trial court rejected the parties' petition seeking the issuance of an accurate birth certificate that listed only the name of the biological father.<sup>284</sup> The Maryland Court of Appeals held that pursuant to equal protection principles, women must be able to utilize the genetics-based parentage disestablishment procedures available to men.<sup>285</sup> As a result, the surrogate could disestablish her maternity on the basis of her lack of genetic connection to the child even through there was no genetic intended mother seeking to establish maternity.<sup>286</sup>

Iowa allows for the disestablishment of the surrogate's legal parentage in this context through a different avenue. Although Iowa law does not allow the non-biological intended parent to establish parentage through enforcement of the surrogacy agreement when a child is conceived using sperm from the other intended parent and donor ova, it nonetheless allows for the surrogate's legal parentage to be disestablished through enforcement of the surrogacy agreement in this situation.<sup>287</sup> In *P.M. v. T.B.*, the intended parents, a married couple, sought to enforce the surrogacy agreement after the surrogate and her husband refused to deliver the child, who was conceived using sperm from the intended father and donor ova.<sup>288</sup> The Iowa Supreme Court held that a "gestational surrogacy contract is legally enforceable in favor of the intended, biological father against a surrogate mother and her husband who are not the child's genetic parents."<sup>289</sup> While the court indicated that the non-biological intended parent, the biological father's wife, would need to pursue adoption in order to establish legal parentage, enforcement of the surrogacy agreement served to establish parentage in the biological father and to disestablish parentage in the surrogate even though there was no genetic intended mother seeking to establish maternity.<sup>290</sup>

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<sup>283</sup> *Id.* at 117.

<sup>284</sup> *Id.* at 118-19.

<sup>285</sup> *See id.* at 122-26.

<sup>286</sup> *See id.*

<sup>287</sup> *See P.M. v. T.B.*, 907 N.W.2d 522, 536 (Iowa 2018) ("Adoption laws shall be followed to reestablish the certificate of live birth by establishing the nonbiological parent on the certificate of live birth pursuant to Iowa Code chapter 600.").

<sup>288</sup> *Id.* at 524-25.

<sup>289</sup> *Id.* at 525.

<sup>290</sup> *See id.* at 536 ("When the intended mother is not the egg donor, she may replace the birth mother on a new certificate of live birth through a formal adoption.").

Application of marriage-based avenues of establishing parentage to male same-sex couples will be relatively straightforward in jurisdictions like Maryland and Iowa that, despite not recognizing the surrogacy agreement as establishing parentage in the non-biological intended parent when a child is conceived using sperm from the other intended parent and donor ova, nonetheless allow for the disestablishment of the surrogate's legal parentage through genetics- or surrogacy-based avenues. As an initial matter, in these jurisdictions, it is not necessary to relegate the establishment of parentage for the biological father's spouse (the non-biological intended parent) to the adoption realm. When legal parentage conclusively attaches to an individual based upon the act of giving birth, generally it can only be voluntarily terminated through formal adoption procedures.<sup>291</sup> However, if the legal parentage presumed based upon the act of giving birth is rebuttable through genetics- or surrogacy-based avenues, the surrogate whose legal parentage is rebutted will no longer have parental rights that must be formally terminated.

Moreover, in these jurisdictions, the concern that applying marriage-based parentage presumptions to the spouses of biological fathers will result in the simultaneous establishment of legal parentage in more than two individuals does not pose a major problem. If the surrogate's legal maternity is disestablished, there will be only one legal parent, the biological father, and thus extending marriage-based presumptions to his spouse at that point will not result in the child having more than two legal parents. In fact, if marriage-based parentage presumptions do not apply to the biological father's spouse, the child will have only one legally recognized parent when the surrogate's maternity is disestablished. Overall, extending marriage-based avenues of parentage establishment to male same-sex couples will be a relatively simple and straightforward undertaking in these jurisdictions and will promote important government interests in identifying two legal parents for every child from the earliest possible point.<sup>292</sup>

The decision in *In re Maria-Irene D.*, one of the only reported cases (perhaps the only reported case) to date in which a court applied a marriage-based parentage presumption to the same-sex spouse of the child's biological father,<sup>293</sup> demonstrates the straightforward nature of

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<sup>291</sup> See *supra* note 153 and accompanying text.

<sup>292</sup> See Feinberg, *A Logical Step Forward*, *supra* note 3, at 104.

<sup>293</sup> At least one court has applied the marital presumption to the different-sex spouse of a child's biological father. In *In re S.N.V.*, the Colorado Court of Appeals held that the marital presumption of parentage applied to a woman who was not genetically connected to the child, but was married to the child's biological father at the time of the

applying marriage-based avenues of establishing parentage to male same-sex couples in situations where the surrogate's legal parentage has been disestablished.<sup>294</sup> In *In re Maria-Irene D.*, a married male same-sex couple jointly executed a surrogacy agreement, and the surrogate later gave birth to a child conceived from donor ova and sperm from one member of the couple.<sup>295</sup> The couple commenced a judicial proceeding in Missouri through which they sought and obtained a judicial determination that neither the ova donor nor the surrogate had parental rights.<sup>296</sup> During the proceeding, the court awarded the spouse whose sperm had been used to conceive the child, "as the genetic father, . . . 'sole and exclusive custody' of the child."<sup>297</sup>

After the couple separated, the biological father's new partner adopted the child.<sup>298</sup> The biological father's former spouse sought to vacate the adoption on the grounds that, as a legal parent, he was entitled to notice of the adoption and an opportunity to be heard, neither of which he had received.<sup>299</sup> In upholding the Family Court's decision to vacate the adoption, the New York intermediate appellate court held that the biological father's marriage to his former spouse at the time the child was born gave rise to the presumption under state law that a child born into a marriage is the legitimate child of both spouses, which bestowed parental rights on the former spouse.<sup>300</sup> In this case, because the surrogate's parental rights had been disestablished, the court could apply a marriage-based presumption of parentage to the biological father's spouse without the need for an adoption proceeding to terminate the surrogate's rights and without fear that application of the presumption would result in the biological father, the biological father's spouse, the surrogate, and the surrogate's spouse (if any) all being entitled to legal parentage.

The availability of procedures for rebutting and disestablishing the surrogate's presumed legal parentage creates a clear path to extending

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child's conception and birth. *In re S.N.V.*, 284 P.3d 147, 151 (Colo. App. 2011). For an example of a decision that reached the opposite conclusion, see *Amy G. v. M.W.*, 47 Cal. Rptr. 3d 297, 304-05 (Cal. App. 2006) (holding that while the marital presumption of paternity could be applied in a gender-neutral manner in some contexts, it could not be applied to a biological father's wife when there was a competing claim of maternity from the child's biological mother).

<sup>294</sup> See *In re Maria-Irene D.*, 153 A.D.3d 1203, 1205 (App. Div. 2017).

<sup>295</sup> *Id.* at 1203-04.

<sup>296</sup> See *id.* at 1204.

<sup>297</sup> *Id.*

<sup>298</sup> *Id.*

<sup>299</sup> *Id.*

<sup>300</sup> *Id.* at 1205.

marriage-based parentage presumptions to male same-sex couples. Since most states do not allow for the rebuttal and disestablishment of the gestational surrogate's parentage when there is no genetic intended mother,<sup>301</sup> reform must start with creating avenues for rebutting and disestablishing the presumed legal parentage that attaches based upon the act of giving birth in situations involving donor ova. While eliminating the presumption of parentage that attaches based upon the act of giving birth is another option that would facilitate the application of marriage-based avenues of parentage establishment to male same-sex couples, it is safe to assume that most states will continue to presume an individual's legal parentage based upon the act of giving birth. Although in modern times gestation and genetics no longer necessarily coincide, this longstanding practice not only reflects a recognition of the critically important, substantial caregiving work and nurturing undertaken by individuals who gestate and give birth to children,<sup>302</sup> it also bestows parentage to an individual who, in addition to gestating the child, is the child's genetic and intended parent in the vast majority of instances.<sup>303</sup> Consequently, efforts to extend marriage-based presumptions to male same-sex couples should focus on adopting procedures for rebutting and disestablishing the legal parentage that the law presumes based on the act of giving birth, as opposed to eliminating presumptions of parentage stemming from the act of giving birth.

In determining how to structure the rules governing the rebuttal and disestablishment of the presumed legal maternity that attaches based upon the act of giving birth, it is important to consider the processes that states already have in place for the rebuttal and disestablishment of presumed legal paternity. For example, in the context of the marital presumption of parentage, rebuttal of the husband's presumed paternity requires, at a minimum, proof that the man and the child do not share a genetic tie.<sup>304</sup> If the child is conceived via assisted reproduction, considerations relating to both genetics and intent will factor into rebuttal of the husband's presumed parentage. Specifically, although rebuttal of the husband's presumed parentage will still require proof of a lack of genetic tie between the husband and child, the rebuttal action will fail if the husband consented to his wife's use of assisted reproduction with the intent to be the resulting child's parent in

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<sup>301</sup> See *supra* notes 134–37 and accompanying text.

<sup>302</sup> Appleton, *supra* note 44, at 270 (noting “the unique and indispensable nurturing role played by the woman who provides gestation”).

<sup>303</sup> See Feinberg, *A Logical Step Forward*, *supra* note 3, at 115 n.83.

<sup>304</sup> See Feinberg, *Restructuring Rebuttal*, *supra* note 38, at 243.

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compliance with the state's spousal consent to assisted reproduction law.<sup>305</sup>

Notably, many states have adopted provisions in their parentage codes indicating that, to the extent reasonable, the standards governing paternity determinations should apply to maternity determinations.<sup>306</sup> As the court explained in *In re Roberto d.B.*, equal protection principles support extending to women the paternity disestablishment procedures available to men.<sup>307</sup> Indeed, a number of states have already applied paternity establishment principles in the maternity establishment context by allowing genetic intended mothers to establish their legal maternity and rebut and disestablish the legal maternity of the surrogate through genetics-based avenues akin to those that apply in paternity determinations.<sup>308</sup> It is clear that adopting methods for the rebuttal and disestablishment of maternity will not require states to create a wholly novel set of rules governing parentage determinations; rather, existing laws and procedures can be reformed and restructured to provide avenues for maternity rebuttal and disestablishment.

Genetics-focused avenues present a logical, well-established method for rebutting and disestablishing presumed legal parentage, and such avenues should form a core component of procedures governing the rebuttal and disestablishment of the presumed legal parentage that attaches to an individual based upon the act of giving birth. However, it is important that genetics are not the sole consideration in actions to rebut the presumption of legal parentage that attaches to an individual based upon the act of giving birth. This is because it is not only surrogates who carry and give birth to children with whom they lack a genetic tie. Intended mothers who cannot conceive children using their own ova may utilize donor ova and sperm from a partner or donor to become pregnant.<sup>309</sup> In this situation, a standard that allowed for the rebuttal and disestablishment of the legal parentage of the individual who gave birth solely on the basis of their lack of genetic ties to the child would be problematic. As a result, notions of intent, along with genetics-based considerations, must play a role in standards governing the rebuttal and disestablishment of the legal parentage that attaches to an individual based upon the act of giving birth.

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<sup>305</sup> See *supra* notes 67–69 and accompanying text.

<sup>306</sup> See *supra* note 62 and accompanying text.

<sup>307</sup> See *In re Roberto d.B.*, 923 A.2d 115, 122–26 (Md. 2007).

<sup>308</sup> See *supra* notes 134–35 and accompanying text.

<sup>309</sup> See *Donor Eggs*, AM. PREGNANCY ASS'N (Apr. 24, 2017), <https://americanpregnancy.org/infertility/donor-eggs/> [<https://perma.cc/FRM2-AKUH>].

The standard for rebutting and disestablishing the presumed legal parentage that attaches to an individual based upon the act of giving birth should require proof both that the individual lacks a genetic tie to the child and that the individual and the intended parent(s) undertook conception with the intent and understanding that the child's intended parent(s) would be the child's sole legal parent(s). The most obvious evidence of the requisite intent would be a surrogacy agreement entered into between the individual who gave birth and the intended parent(s). The state would not have to recognize the surrogacy agreement itself as establishing or disestablishing any of the parties' legal parentage. Instead, the surrogacy agreement would serve as persuasive evidence of the intent component of the proposed standard for rebutting and disestablishing the presumed legal parentage of the individual who gave birth. In defining the intent element of the proposed rebuttal standard, states would be free to adopt the type of procedural and substantive requirements for establishing the existence of meaningful, informed consent that already exist within many states' laws governing parentage establishment in the assisted reproduction context.<sup>310</sup>

Establishing grounds for rebuttal and disestablishment of maternity that combine genetics- and intent-based considerations is not a major leap from existing practices. As discussed above, even when the surrogacy agreement is not enforceable, in many states the surrogate's parentage can be rebutted and disestablished when there is a genetic intended mother seeking to establish maternity.<sup>311</sup> When this occurs, the disestablishment of the surrogate's parentage is based upon notions of both genetics and intent — the individual who gave birth lacks a genetic tie to the child *and* the individual whose ova were used to conceive the child intended to be the child's parent, while the individual who gave birth did not. In these cases, despite not recognizing the enforceability of the surrogacy agreement, the court identifies the individual who gave birth as a "surrogate," meaning the court perceives the situation as one in which, at the time of conception, the parties had the mutual intent for the intended parent(s), and not the individual who gave birth, to be the child's legal parent(s).<sup>312</sup> If the individual who gave

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<sup>310</sup> See, e.g., *supra* notes 68, 91–95 and accompanying text (describing various procedural and substantive requirements that states employ in the assisted reproduction context).

<sup>311</sup> See *supra* notes 134–35 and accompanying text.

<sup>312</sup> See, e.g., *Soos v. Superior Court*, 897 P.2d 1356, 1358 (Ariz. Ct. App. 1994) (referring throughout the opinion to the individual who gave birth as "the surrogate"); *Doe v. N.Y.C. Bd. of Health*, 782 N.Y.S.2d 180, 182 (Sup. Ct. 2004) (describing the individual who gave birth as "a gestational surrogate"); *J.R. v. Utah*, 261 F. Supp. 2d

birth conceived the child using donor ova with the intent to be the child's parent and there were no intended parents with whom the individual had entered into a surrogacy agreement or something akin to it, her maternity likely could not be disestablished based solely upon her lack of genetic tie to the child.<sup>313</sup> Thus, many states' current standards governing the rebuttal and disestablishment of maternity in situations involving unenforceable surrogacy agreements consider not only genetics but also intent. In addition to being a logical extension of existing standards governing maternity rebuttal and disestablishment, the proposed standard will remedy the deeply problematic current situation wherein something as important as the gestational surrogate's parentage often hinges upon whether the intended parents utilized ova from the intended mother or a donor.<sup>314</sup>

It is possible that some states, in an effort to acknowledge the essential work undertaken by the individual who carries and gives birth to a child, would seek to structure maternity rebuttal actions such that only the surrogate could seek to rebut and disestablish her legal parentage. This would at least alleviate the problem of surrogates having legal parentage attach to them against their wishes. Furthermore, even a restricted rebuttal avenue such as this would help the vast majority of married male same-sex couples who conceive via surrogacy, since in most cases both the surrogate and the intended parents wish to establish the intended parents as the child's legal parents.<sup>315</sup> However, a rule providing that only the person who gave birth may seek to rebut and disestablish their legal parentage would place intended parents in an extremely risky position, leaving them without adequate protections in situations in which the surrogate changed her mind after entering into the surrogacy agreement. Moreover, the requirements of the proposed standard — the lack of genetic tie between the surrogate and child and the parties' undertaking of the child's conception with the intent and understanding that the child's intended parent(s) would be the child's sole legal parent(s) — do not include that the surrogate's intent remain static following conception.

After establishing procedures for the rebuttal and disestablishment of the presumed legal parentage that attaches to an individual based upon

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1268, 1270 (D. Utah 2002) ("W.K.J. agreed to serve as a gestational carrier surrogate for a child to be conceived *in vitro* by J.R. and M.R.").

<sup>313</sup> This assumes that the ova were provided by the donor in compliance with the jurisdiction's gamete donor non-paternity laws. See Feinberg, *A Logical Step Forward*, *supra* note 3, at 121-22 (discussing gamete donor non-paternity laws).

<sup>314</sup> See *supra* note 146 and accompanying text.

<sup>315</sup> See *supra* notes 228-30 and accompanying text.

the act of giving birth, states will need to amend their existing marriage-based avenues of establishing parentage to specify that the avenues will apply to the spouses of biological, legally recognized fathers in instances when the legal parentage of the individual who gave birth is rebutted and disestablished through the relevant procedures. Specifically, marital presumption of parentage laws will need to be amended to reflect that if the child is born or conceived during marriage, the spouse of a biological, legally recognized father will be presumed to be the child's parent when the parentage of the individual who gave birth has been rebutted and disestablished through the requisite procedures. Similarly, consent to assisted reproduction laws will need to be amended to reflect that when a child is conceived through assisted reproduction, the spouse of the child's biological, legally recognized father is the child's parent if the spouse consented to the biological father's use of assisted reproduction and the parentage of the individual who gave birth has been rebutted and disestablished. In addition, to avoid confusion, laws setting forth marriage-based parentage presumptions should specify that they are not applicable to the spouse of an individual whose presumed legal maternity based upon the act of giving birth has been rebutted and disestablished. Finally, it is important that individuals in same-sex marriages who qualify as legal parents pursuant to the marriage-based avenues available in their state nonetheless obtain court orders reflecting their parental status in order to ensure that other states will recognize their legal parentage.<sup>316</sup>

It is important to note that this proposal also would open the door for the extension of existing *non-marital* avenues of establishing parentage to male same-sex couples who conceive a child via surrogacy using donor ova and sperm from one member of the couple. For example, if the surrogate's maternity is rebutted and disestablished through the relevant procedures, statutes that provide legal parentage to a non-marital partner who consents to an individual's use of assisted reproduction to become pregnant could be extended to a non-marital partner who consents to the biological father's use of surrogacy to have a child.<sup>317</sup> Similarly, voluntary acknowledgment of parentage procedures also could be extended to the biological father's non-marital

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<sup>316</sup> See Appleton, *supra* note 44, at 290 n.371 (explaining that "the full faith and credit owed to other states' laws . . . permits the second forum to refuse recognition based on its own public policy, [while] the full faith and credit owed to other states' judgments and decrees . . . leaves no room for nonrecognition based on public policy").

<sup>317</sup> See JOSLIN ET AL., *supra* note 11, § 3:3 (identifying jurisdictions that have statutes providing parentage based upon consent to a spouse or partner's use of assisted reproduction that are gender neutral and do not require the parties to be married).

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partner.<sup>318</sup> With the surrogate's maternity disestablished, there will be no need for an adoption procedure to terminate the surrogate's legal rights and no reason to fear that the extension of non-marital avenues of establishing parentage to male same-sex couples will necessarily lead to the simultaneous establishment of legal parentage in more than two individuals.

Finally, while this Article has focused on providing male same-sex couples with access to non-adoptive methods of establishing parentage, it is important to note that the proposal also will aid in the establishment of parentage for non-biological intended mothers in the surrogacy context. As discussed above, when a different-sex married couple enters into a gestational surrogacy agreement in which a child is conceived using sperm from the intended father and ova from a gamete donor, only a minority of jurisdictions recognize the intended mother as a legal parent.<sup>319</sup> Consequently, in most jurisdictions, a non-biological intended mother must pursue costly, invasive adoption procedures in order to establish herself as the legal parent of a child conceived via surrogacy using sperm from her husband and donor ova. Under the proposal, however, upon rebuttal of the surrogate's legal parentage, the spouse of the child's biological, legally recognized father, regardless of their gender, will be able to establish legal parentage through marriage-based avenues. As a result, the proposal will provide critical parentage rights for both same- and different-sex couples who conceive children via surrogacy using sperm from one member of the couple and donor ova.

#### CONCLUSION

The exclusion of male same-sex couples from non-adoptive marriage-based avenues of establishing parentage is extremely problematic. It is essential to challenge the harmful, inaccurate assumptions and beliefs that underlie this exclusion, as neither gender nor sexual orientation is determinative of an individual's parenting abilities. Moreover, the conclusive provision of parentage based upon the act of giving birth, which presents a significant barrier to the extension of marriage-based avenues of establishing parentage to male same-sex couples, is an outdated concept that is in need of reform. Establishing laws that permit rebuttal and disestablishment of the presumed parentage that attaches to an individual based upon the act of giving birth in appropriate circumstances and extending marriage-based parentage presumptions

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<sup>318</sup> See *supra* notes 177–81 and accompanying text.

<sup>319</sup> See *supra* note 103 and accompanying text.

to the spouse of the child's biological, legally recognized father when rebuttal occurs, will advance a more equitable and effective legal framework for the establishment of parentage. In addition, laws that facilitate parentage for male same-sex couples will help to dismantle the persistent gender-based stereotypes around caretaking that harm and confine women and men both in the workplace and in the domestic sphere.