Mommy or Daddy and Me: A Contract Solution to a Child's Loss of the Lesbian or Trangender Nonbiological Parent

Kelly M. O'Bryan

Follow this and additional works at: https://via.library.depaul.edu/law-review

Recommended Citation
Kelly M. O'Bryan, Mommy or Daddy and Me: A Contract Solution to a Child's Loss of the Lesbian or Trangender Nonbiological Parent, 60 DePaul L. Rev. 1115 (2011)
Available at: https://via.library.depaul.edu/law-review/vol60/iss4/6
MOMMY OR DADDY AND ME:
A CONTRACT SOLUTION TO A CHILD'S LOSS OF
THE LESBIAN OR TRANSGENDER
NONBIOLOGICAL PARENT

INTRODUCTION

After five years in a committed lesbian relationship, Susan and Jane want to start a family. Unable to conceive a child together, they decide to use artificial insemination (AI). Prior to undergoing AI, Susan, Jane, and their doctor sign an agreement stating that both partners will be co-parents of the child. Susan is then inseminated with an anonymous donor's semen. Jane has no biological role in conception. A girl is born—Lesley—and Susan and Jane raise her together. Ten years later, Susan and Jane decide to split up. After they tell ten-year-old Lesley the news, Jane moves out of the family home and the child remains with Susan. As tensions escalate between the ex-partners, Susan eventually decides to end Lesley’s relationship with Jane. Lesley, who has spent ten years with two mothers, is now denied the emotional, mental, and financial support of a woman she has always known as “Mom.”

Jane hires an attorney to establish custody and visitation rights, but her attorney warns her that it is unlikely the courts will grant either. The attorney tells Jane that although the three of them have been living as a family for over a decade, the law in their state only explicitly provides protections for heterosexual nonbiological parents. The courts will not enforce Susan and Jane’s legal parentage agreement because the state’s Parentage Act only deems such agreements enforceable for heterosexual couples. Furthermore, while the state has recognized the applicability of certain common law parentage doctrines in nonbiological parents’ parental rights cases, the state supreme court has refused to apply these doctrines to lesbian nonbiological parents who were never married to the biological parents. Although Susan and Jane had essentially functioned as a married couple for over a decade, they were never able to legally marry under state law.

When Jane commenced action to gain custody of Lesley, the court denied her custody and visitation, holding that she did not have legal standing as a lesbian, unmarried, and nonbiological parent. Therefore, after a lifetime with a two-parent family, her ten-year-old girl experienced the traumatic loss of her mother.
Unfortunately for children conceived through AI by lesbian or transgender \(^1\) couples, Jane’s experience is an increasingly common problem.\(^2\) Lesbian and transgender nonbiological parents\(^3\) face unique barriers to establishing parentage of their children after the deterioration of their relationships with the biological parents.\(^4\) The determination of parentage is of "profound" significance in a custody or visitation proceeding.\(^5\) A nonbiological parent "must have standing . . . to seek custody or visitation before a court will address the merits of the petition."\(^6\) While legal parents both have standing to bring an action for custody or visitation rights after the termination of their

---

1. Transgender is an umbrella term that refers to people who live differently than the gender presentation and roles expected of them by society. . . . Transsexual is a term for people who seek to live in a gender different from the one assigned at birth and who may seek or want medical intervention (through hormones and/or surgery) for them to live comfortably in that gender.


2. See Bettina B. Boxtall, Laws Mean Lesbian Custody Battles Often Are One-Sided, L.A. TIMES, Jan. 27, 1997, at A1 ("[A] [c]ouple break[s] up, share[s] the child’s custody for a while. Then the biological mother, often after forming a new relationship, starts limiting her former partner's visits with the child, sometimes stopping them altogether. The woman discovers that however long the child may have called her 'mom,' she is a nobody to the law."); see also Jonathan Saltzman, Partner Child Support at Issue, BOSTON GLOBE, Mar. 1, 2004, at B1 (quoting Bennett H. Klein, a lawyer for Gay & Lesbian Advocates & Defenders: "One of the realities of the world today is that more and more children are being born through reproductive technologies where they have a biological connection to one parent and not to the other . . . . Part of the reason we're seeing this case is because the law has not fully caught up with that reality.").

3. While gay men may also have difficulty establishing parentage when using AI to conceive a child through a surrogate mother, this issue is beyond the scope of this Comment. For an explanation of legal barriers to gay men’s parental rights under current AI and surrogacy law, see generally Catherine DeLair, Ethical, Moral, Economic and Legal Barriers to Assisted Reproductive Technologies Employed by Gay Men and Lesbian Women, 4 DePaul J. Health Care L. 147 (2000).

4. See Melanie B. Jacobs, Micah Has One Mommy and One Legal Stranger: Adjudicating Maternity for Nonbiological Lesbian Coparents, 50 Buff. L. Rev. 341, 345 (2002); see also David Crary, Lesbians Face Custody Battleground Law: When Female Partners Separate After Rearing Children, One May Find Herself Cut off and Without Recourse, L.A. TIMES (Oct. 24, 1999), [http://articles.latimes.com/1999/oct/24/news/mn-25720 ("[W]renching cases are surfacing across the nation as more lesbian partners rear children born after artificial insemination. When such couples separate, dissolving a union that no state recognizes as marriage, the partner who is not the biological parent finds herself in legal limbo.")].


relationship, nonlegal parents are often denied standing to bring an
action at all.

In heterosexual relationships, both parents are often biological and
legal parents to the children. If one or both parents in a heterosexual
couple are not biological parents, presumptions of parentage in state
law usually apply if the parties intended to raise the child together.
However, courts often refuse to grant parentage to lesbian and trans-
gender nonbiological parents in similar circumstances. These nonbi-
ological parents are often denied standing to pursue custody or
visitation. In these cases, the child suffers the trauma of losing a fit
caring parent.

The relevant statutory law and common law parentage doctrines
governing these issues vary widely across jurisdictions. Part II of
this Comment reviews the current status of parentage statutes and
common law doctrines that courts apply to cases in which nonbiologi-
cal parents claim parentage. Different states have adopted the 1973
version of the Uniform Parentage Act, the 2000 version of the Uni-
form Parentage Act, or neither. Because the AI sections of state
parentage statutes usually include gender-specific language, courts

7. See Polikoff, supra note 5, at 471 n.47 (citing MINN. STAT. § 518.17(3) (West Supp. 2005)
(“In determining custody, the court shall consider the best interests of each child and shall not
prefer one parent over the other solely on the basis of the sex of the parent.”) and WASH. REV.
CODE § 26.09.002 (2005) (“In any proceeding between parents under this chapter, the best inter-
est of the child shall be the standard by which the court determines and allocates the parties’
parental responsibilities.”)).
8. See Polikoff, supra note 5, at 472.
10. See infra notes 43–102 and accompanying text.
11. See Jacobs, supra note 4, at 345; see also Crary, supra note 4 (“Courts in many . . . states
have sided categorically with the biological mother in such disputes, ruling that estranged lesbian
partners have no more legal right to demand visitation than a long-term nanny or close family
friend.”).
12. Non-heterosexual parents are not “unfit” by definition due to their sexual orientation.
See, e.g., Lisa Belkin, What's Good for the Kids, N.Y. TIMES, Nov. 8, 2009, at 9 (“In most ways,
the accumulated research shows, children of same-sex parents are not markedly different from
those of heterosexual parents. They show no increased incidence of psychiatric disorders, are
just as popular at school and have just as many friends.”).
13. See, e.g., In re Parentage of A.B., 818 N.E.2d 126, 131 (Ind. Ct. App. 2004) (stating that
when lesbian nonbiological parents are considered “legal strangers,” children can be “denied the
affection of a ‘parent’ who has been with them from birth”).
14. DeLair, supra note 3, at 162 n.135 (“Many states have not enacted any statutes dealing
with assisted reproductive technologies.”). The following discussion on parentage statutes illus-
trates how state courts have interpreted identical statutes differently, especially in regards to
lesbian and transgender nonbiological parents.
15. See Jacobs, supra note 4, at 348.
16. See infra notes 43–215 and accompanying text.
17. Kira Horstmeyer, Note, Putting Your Eggs in Someone Else's Basket: Inserting Uniformity
into the Uniform Parentage Act's Treatment of Assisted Reproduction, 64 WASH. & LEE L. REV.
often hold that these statutes do not apply to lesbian or transgender couples.\textsuperscript{18} Without statutory recourse, lesbian or transgender nonbiological parents sometimes request that courts apply common law doctrines to their parentage claims.\textsuperscript{19} However, the common law doctrines often result in dramatically different results across jurisdictions. Some courts refuse to accept these doctrines in the context of lesbian or transgender nonbiological parentage claims at all.\textsuperscript{20}

Part III of this Comment demonstrates that the inconsistent statutes, doctrines, and applications of law in this area lead to inconsistent and inequitable results for lesbian and transgender parents, disregarding both the autonomy of the parties and the best interests of the children.\textsuperscript{21} This Part proposes the use of contract law in all AI parentage determinations.\textsuperscript{22} Biological and nonbiological parents often sign pre-insemination AI agreements, illustrating their intent to co-parent the resulting children. If courts recognize the children of these parties as the intended third-party beneficiaries of pre-insemination AI agreements, the children should be entitled to specific performance of these agreements.\textsuperscript{23} The specific performance under such agreements is the nonbiological parent's promise to be a legal parent and to provide physical, mental, emotional, and financial support for the child.\textsuperscript{24}

Part IV of this Comment illustrates that despite judicial resistance to applying contract law in a family law context, a contractual approach is appropriate in determining parentage of children conceived through AI.\textsuperscript{25} The contract framework ensures uniform and equitable results, as it will not distinguish between heterosexual, homosexual, or transgender parents.\textsuperscript{26} It also respects the best interest of the children and the parents' autonomous decisions to create families.\textsuperscript{27} For these reasons, courts should use a child-focused contract approach for custody disputes between biological and nonbiological parents.
II. Background

Couples who wish to start a family often turn to assisted reproductive technologies when they cannot or will not conceive through sexual intercourse. Assisted reproductive technologies include "(a) [i]ntrauterine insemination; (b) [d]onation of eggs; (c) [d]onation of embryos; (d) [i]n-vitro fertilization and transfer of embryos; and (e) [i]ntracytoplasmic sperm injection."

AI is "the 'introduction of semen into a woman's vagina or uterus, other than by sexual intercourse.' While the first human AI procedure was performed in the United States in 1866, women out of heterosexual wedlock have only begun to use AI over the last several decades. Because lesbian and transgender couples cannot conceive children through sexual intercourse, many now use assisted reproductive technologies, such as AI, to conceive children. According to a recent estimate by the American Bar Association, approximately ten million children are being raised by gay, lesbian, or bisexual parents in the United States.

While some state legislatures have enacted statutes designed to establish the parentage of nonbiological parents of children conceived...
through AI, the vast majority of these statutes do not explicitly include lesbian or transgender couples within their scope.\textsuperscript{36} Therefore, although some courts adopt a gender-neutral interpretation of parentage statutes to grant parental status to lesbian or transgender nonbiological parents, others consider the nonbiological lesbian or transgender parents to be legal strangers to the children and "decline to expand the current laws to recognize the nonbiological partner's parental rights."\textsuperscript{37} Furthermore, while some courts have used various common law doctrines of functional parenthood to grant nonbiological parents their parental status, others may grant partial parental rights or refuse to grant parentage at all under these doctrines.\textsuperscript{38}

Section A of this Part examines the different parentage statutes adopted by the states and the various interpretations of those statutes by different state courts.\textsuperscript{39} It also discusses a potential trend among a few states of adopting gender-neutral language and interpretation.\textsuperscript{40} Section B of this Part reviews the current status of several common law doctrines that courts sometimes apply in cases where nonbiological parents claim parentage of children conceived through AI.\textsuperscript{41} Finally, Section C notes that some lesbian or transgender nonbiological parents may attempt to sidestep the issues associated with statutory or common law remedies through second-parent adoption.\textsuperscript{42}

\section*{A. Parentage Statutes}

When determining parentage, "[c]ourts have traditionally applied statutory law."\textsuperscript{44} Historically, however, states did not have statutes regulating the parental rights and obligations of nonbiological parents to children conceived through AI.\textsuperscript{44} Without a legal standard, chil-

\textsuperscript{36} Many state parentage statutes are modeled after the AI sections of the UPA (1973) or the UPA (2000). Both of these AI sections include gender-specific language, which, if interpreted strictly, would exclude lesbian and transgender couples. \textit{See} \textit{Unif. Parentage Act} § 703 (2000) (revised 2002); \textit{Unif. Parentage Act} § 5(a) (1973).


\textsuperscript{38} See infra notes 138–206 and accompanying text.

\textsuperscript{39} See infra notes 43–102 and accompanying text.

\textsuperscript{40} See infra notes 103–37 and accompanying text.

\textsuperscript{41} See infra notes 138–206 and accompanying text.

\textsuperscript{42} See infra notes 207–15 and accompanying text.


\textsuperscript{44} Walter Wadlington, \textit{Artificial Insemination: The Dangers of a Poorly Kept Secret}, 64 \textit{Nw. U. L. Rev.} 777, 785 (1970) ("Most of the legal profession today is either in ignorance or in hiding concerning artificial insemination. Until recently a handful of British Commonwealth decisions and a few trial court cases, not always officially reported, were the only sources available upon which to construct a legal framework for the process.").
Children born to married or unmarried couples through AI were found "illegitimate." In 1973, the National Conference of Commissioners on Uniform State Laws (the Conference) proposed a comprehensive set of model laws regarding parentage rights, including a section on the parentage of children conceived through AI. The Conference aimed to create a uniform application of parentage law across jurisdictions. However, many states have adopted variations of the model laws or no statutes at all, and state courts have interpreted identical statutes differently. Therefore, conflicts still arise when courts attempt to determine the parental status of lesbian or transgender nonbiological parents.

1. The 1973 Uniform Parentage Act

The stated purpose of the original Uniform Parentage Act (UPA (1973)) is to uniformly provide "substantive legal equality of children regardless of the marital status of their parents." The Conference noted that a series of Supreme Court decisions had mandated equal legal treatment of children born in and out of wedlock under the Equal Protection Clause of the Fourteenth Amendment, specifically as it relates to intestate succession. However, much of the law across jurisdictions was, at the time, "either unconstitutional or subject to grave constitutional doubt." Concerned with every child's ability to assert her equal legal rights, the Conference established a network of presumptions and rules to identify the child's legal parents.

However, while other sections of the UPA (1973) ensure equal treatment for children born in and out of wedlock, § 5 of the UPA (1973), which specifically addresses the parentage issues involving children conceived through AI, states that if "a wife is inseminated artificially with semen donated by a man not her husband, the husband is treated in law as if he were the natural father of a child thereby conceived." Despite the Conference's stated goal of equal-

45. Id. at 785–86.
46. UNIF. PARENTAGE ACT prefatory note (1973).
47. Id.
48. See DeLair, supra note 3, at 162 n.135 ("Many states have not enacted any statut[es dealing with assisted reproductive technologies.").
49. See Nilsson, supra note 43, at 484.
50. UPA (1973) prefatory note.
51. Id.
52. Id.
53. Id.
54. UPA (1973) § 5(a) (emphasis added).
izing the treatment of children born in and out of wedlock, the use of the terms “husband” and “wife” excludes unmarried couples and their children conceived through AI from the parentage protections of the UPA.55

Eight states adopted § 5 of the UPA (1973).56 Other UPA (1973) states did not adopt § 5, but two of these states enacted similar AI sections.57 In states that follow the UPA (1973), courts often refuse to apply the AI section protections to lesbian and transgender nonbiological parents. For example, Missouri adopted the UPA (1973) in 1987,58 and in 2009, a Missouri appellate court refused to apply the AI section of the parentage statute to a dispute between former lesbian partners.59 In White v. White, Michelle and Leslea each conceived one child through AI, in 2001 and 2004 respectively, and raised the two children together as a family.60 Each partner was the biological parent to one child and the nonbiological parent to the other child.61 After the relationship ended in 2005, Leslea sought joint parental rights to both children.62 Michelle, however, sought to deny Leslea any parental rights to Michelle’s biological child.63 Leslea attempted to establish parentage of her nonbiological child through the Missouri parentage statute.64 The court held that the Missouri statute only al-

55. Id.

58. “If, under the supervision of a licensed physician and with the consent of her husband, a wife is inseminated artificially with semen donated by a man not her husband, the husband is treated in law as if he were the natural father of a child thereby conceived.” Mo. Ann. Stat. § 210.824 (West 2010).
59. See White v. White, 293 S.W.3d 1, 9 (Mo. Ct. App. 2009).
60. Id. at 6.
61. Id.
62. Id.
63. Id.
64. Id. at 9. Leslea also stated claims for relief on the basis of her being the de facto parent of, or one standing in loco parentis to, Michelle’s biological child. Id. at 11. Leslea also claimed that
lowed claims for parentage rights based on a biological tie or a presumption of parentage due to marriage or attempted marriage. As a former partner in a non-marital relationship with no biological ties to Michelle's biological child, Leslea could not assert parental rights to the child under the Missouri statute.

Transgender nonbiological parents face unique issues in parentage claims under statutes that include the terms "husband" and "wife." In some states, a marriage involving a transsexual partner may be declared an invalid same-sex marriage if that partner has not completed the sex reassignment process. In In re Marriage of Simmons, an Illinois appellate court refused to apply the Illinois Parentage Act to a custody dispute between a female-to-male transsexual nonbiological parent and a female biological parent, despite the fact that they were married. During their marriage, the female partner was inseminated with donor sperm. Prior to insemination, both the female partner and the transsexual male partner signed a parentage agreement, as

Michelle was equitably estopped from refuting the parent-child relationship between Leslea and Michelle's biological child. Id. These issues are discussed later in this Comment.

65. Id.
66. Id.
67. Among the states, "there is not uniformity in whether, and how, a birth certificate can be modified for surgically treated transsexuals." See Richard Green, Transsexual Legal Rights in the United States and United Kingdom: Employment, Medical Treatment, and Civil Status, 39 Archives of Sexual Behavior 153, 156 (2010). Some states will only recognize a marriage with a transsexual partner if he has completed sexual reassignment surgery and is legally the opposite sex of his partner. See, e.g., In re Marriage of Simmons, 825 N.E.2d 303, 309 (Ill. App. Ct. 2005). Other states do not recognize a postoperative transsexual's marriage within the reassigned sex. See, e.g., Kantaras v. Kantaras, 884 So. 2d 155, 161 (Fla. Dist. Ct. App. 2004) ("[T]he Florida statutes governing marriage [do not] authorize a postoperative transsexual to marry in the reassigned sex.")

68. 750 Ill. Comp. Stat. 40/3(a) (2008). The A1 section of the statute, adopted from the UPA (1973), states,

If, under the supervision of a licensed physician and with the consent of her husband, a wife is inseminated artificially with semen donated by a man not her husband, the husband shall be treated in law as if he were the natural father of a child thereby conceived. The husband's consent must be in writing executed and acknowledged by both the husband and wife. The physician who is to perform the technique shall certify their signatures and the date of the insemination, and file the husband's consent in the medical record where it shall be kept confidential and held by the patient's physician. However, the physician's failure to do so shall not affect the legal relationship between father and child.

Id.

69. Simmons, 825 N.E.2d at 311.
70. Id.
71. The agreement stated,

It is further agreed that [a] the moment of conception the husband hereby accepts the act as his own, and agrees:
1. That such child or children so produced are his own legitimate child or children and are heirs of his body; and
required by the AI section of the Illinois Parentage Act. The relationship deteriorated, the nonbiological parent filed a petition for the dissolution of marriage and sought custody of the child.

The biological parent alleged that the nonbiological parent lacked standing because the same-sex marriage was invalid under Illinois law, and he was neither the biological nor adoptive parent. The nonbiological parent argued that he was a parent under the Illinois Parentage Act. The court interpreted the Illinois Parentage Act, which uses the terms "husband" and "wife" in the AI section, to include only legally married couples in its scope. While the transsexual nonbiological parent underwent several surgeries in the sex reassignment process during the marriage, he still had external female genitalia at the time of the dispute. Therefore, the court held that the nonbiological parent was not legally male, and the couple's marriage was an invalid same-sex marriage. The nonbiological parent did not have standing to seek custody of the child under the Illinois Parentage Act.

2. The 2000 Uniform Parentage Act

In 2000, the Conference promulgated a new Uniform Parentage Act to replace the UPA (1973) as the official recommendation of the Conference on the subject of parentage. The Conference explained that the new laws were necessary because "case law has not always reached consistent results in construing UPA (1973). Moreover,

---

2. That he hereby completely waives forever any right which he might have to disclaim such child or children as his own; and
3. That such child or children so procedure [sic] are, and shall be considered to be, in all respects including descent of property, child or children of his own body.

Id. at 310 (alteration in original) (emphasis omitted).

72. See supra note 68.
73. Simmons, 825 N.E.2d at 307.
74. Id.
75. Id. at 308. The nonbiological parent also alleged that his marriage was valid because he was legally male, or alternatively that he was a parent under common law doctrine. Id. at 308, 312.
76. Id. at 311.
77. Id. at 309.
78. Id.
79. Id. at 313. The court also ruled that he did not have standing under common law doctrines because standing must be found solely under Illinois statutes. Id. See also Kantaras v. Kantaras, 884 So. 2d 155, 161 (Fla. Dist. Ct. App. 2004), which reversed a trial court decision that a female-born transsexual nonbiological parent was legally male and invalidated his marriage. The appellate court held that Florida statutes governing marriage do not authorize a postoperative transsexual to marry in the reassigned sex. Id. The court held that the terms "male" and "female" refer to "immutable traits determined at birth." Id.
widely differing treatment on subjects not dealt with by the Act has been common.\textsuperscript{81} The Conference also noted that the law needed to keep up with new technologies and resulting legal issues, such as the increased use of assisted conception.\textsuperscript{82} While the 2000 version of the UPA (UPA (2000)) originally used the terms “husband” and “wife” in its AI section, the 2002 amendments replaced those terms with “man” and “woman.”\textsuperscript{83}

The revised UPA (2000) aimed to modernize the model parentage laws by applying the assisted reproduction provisions to children born in and out of wedlock.\textsuperscript{84} Section 703 of the revised UPA (2000) states that “[a] man who provides sperm for, or consents to, assisted reproduction by a woman as provided in [§] 704 with the intent to be the parent of her child, is a parent of the resulting child.”\textsuperscript{85} The AI section of the revised UPA (2000) made two major changes from the UPA (1973): the revised UPA (2000) lists the parents as “man” and “woman” instead of “husband” and “wife,” ending the exclusion of unmarried couples, and bases parentage on the intent of the nonbiological parents to raise the children conceived through AI.\textsuperscript{86} Nine states have adopted the original or revised UPA (2000).\textsuperscript{87} Eight of those states currently use the AI section of the original or revised UPA (2000).\textsuperscript{88}

Regardless of the new focus on the nonbiological parent’s intent to parent the child,\textsuperscript{89} at least one state has still refused to apply its parentage statute to lesbian nonbiological parents who expressed an in-
tent to parent the children. In *In re Parentage of L.B.*, the Supreme Court of Washington stated that a lesbian nonbiological parent did not have a statutory remedy in the Washington parentage statute. The court held that the AI section of the statute, which included the terms "husband" and "wife," did not apply to same-sex couples. The court stated that the "legislature has been conspicuously silent when it comes to the rights of children like L.B., who are born into nontraditional families, including any interests they may have in maintaining their relationships with the members of the family unit in which they are raised." However, the court recognized the status of de facto parent as a means of determining parentage in addition to the UPA (2000). The court remanded the case for a determination of whether the nonbiological parent was a de facto parent.

Although the Conference noted that there was a need for a new model parentage law due to inconsistent interpretations of the UPA (1973) and the increasing prevalence of assisted reproduction in marital and nonmarital families, only nine states adopted either the original or the revised UPA (2000). Similar to the UPA (1973), the revised UPA (2000) excluded same-sex couples from its AI parentage protections by specifying that the section is only applicable to a couple that includes a "man" and "woman." While the revised UPA (2000) states differ on how they enforce and interpret the AI section of their statutes, at least one state has refused to apply the UPA (2000) to a lesbian nonbiological parent.

90. *Id.* at 163.
91. The nonbiological parent in this case did not actually claim that she was a parent under the AI section of the Washington UPA, but the court still made a point to say that the entire UPA did not apply in this case. *See id.* at 166 n.5.
92. *Id.* at 166. The nonbiological parent also stated claims for relief on the basis of her being the de facto parent of the child. This issue will be discussed later in this Comment.
93. "If a husband provides sperm for, or consents to, assisted reproduction by his wife . . . he is the father of a resulting child born to his wife." *Wash. Rev. Code Ann.* § 26.26.710.
94. *L.B.,* 122 P.3d at 169.
95. *Id.*
96. De facto parentage is a common law doctrine discussed below. *See infra* notes 142–74 and accompanying text.
98. *Id.* at 180.
100. *See sources cited supra* note 87.
102. *L.B.,* 122 P.3d at 166 n.5.
3. Gender-Neutral Trends

As discussed above, state parentage statutes often do not directly address the parentage of lesbian or transgender nonbiological parents whose partners conceive children through AI. Recently, however, some courts have applied a gender-neutral interpretation of parentage statutes to oblige a same-sex partner to pay child support, and even to recognize the legal parenthood of same-sex partners.103 For example, the New Jersey Parentage Act specifically refers to “husbands” and “wives,” seemingly excluding lesbian and transgender nonbiological parents from its scope.104 Yet in In re Parentage of Robinson, the New Jersey state trial court granted a lesbian nonbiological parent legal parent status despite the statutory exclusion of same-sex couples.105 The couple established domestic partnership under New York law in 2003 and was married in Canada in 2004.106 Shortly thereafter, they moved to New Jersey to be closer to family and friends once they started a family.107

When one of the partners was artificially inseminated, the couple sought a pre-birth order establishing that the nonbiological parent was the second legal parent to the child.108 Although the New Jersey Parentage Act specifically referred to “husbands” and “wives,”109 the couple argued that “[t]o deny the children of same-sex partners the security of a legally recognized relationship with their second parent serves no legitimate state interest,” and that construing the AI statute to include same-sex couples would serve the best interest of the child.110 The court noted that the couple had “availed themselves of every legal opportunity open to them to declare they [were] committed domestic partners, a married couple and a dedicated family.”111 Taking into account the strong public policy that the state must focus on the best interests of the children, the court held that the child was

105. Robinson, 890 A.2d at 1042.
106. Id. at 1037.
107. Id. at 1037–38.
108. Id. at 1038.
110. Robinson, 890 A.2d at 1038 (quoting the plaintiffs’ brief). The couple also argued that if the parentage statute did not apply to a lesbian couple in a domestic partnership, then it violated their equal protection rights under the New Jersey constitution. Id.
111. Id. at 1041.
born within the circumstances that the AI statute requires\textsuperscript{112} and granted the nonbiological parent legal parentage.\textsuperscript{113}

Similarly, in 2005, the Supreme Court of California held that the provision of the California parentage statute—which states that a “\textit{man} is presumed to be the natural \textit{father} of a child” if he receives the child into his home and openly considers the child his own—applies equally to women.\textsuperscript{114} In \textit{Elisa B. v. Superior Court}, Elisa and Emily were unmarried partners in a committed lesbian relationship who decided to each bear a child through AI and raise the children together in a two-parent family.\textsuperscript{115} Elisa was to be the primary breadwinner, and Emily was to be the stay-at-home mother.\textsuperscript{116} Sharing a sperm donor, Elisa gave birth to one child and Emily gave birth to twins.\textsuperscript{117} After the couple ended their relationship, Elisa refused to pay financial support to Emily and the twins.\textsuperscript{118} The appellate court held that she had no obligation to pay child support because she was not a parent of the twins within the meaning of the California parentage statute.\textsuperscript{119}

Despite the statute’s inclusion of gender-specific terms, the California Supreme Court held that Elisa was a parent under the statute and required her to pay child support.\textsuperscript{120} The court held that where a nonbiological parent “actively consented to, and participated in, the artificial insemination of her partner with the understanding that the resulting . . . children would be raised by [them] as coparents, and they did act as coparents for a substantial period of time,” the presumption of parenthood applies to the nonbiological parent, regardless of gender.\textsuperscript{121} The court noted that “[r]ebutting the presumption that Elisa is the twin’s parent would leave them with only one parent and would deprive them of the support of their second parent,” which would go against the recognized value of “having two parents, rather than one,

\begin{itemize}
  \item \textsuperscript{112} “As the Artificial Insemination statute requires, we have a child born within the context of a marriage with two spouses, the alternate insemination having been performed by the necessary medical professional.” \textit{Id.} at 1042.
  \item \textsuperscript{113} \textit{Id.}
  \item \textsuperscript{114} \textit{Elisa B. v. Superior Court} of El Dorado Cnty., 117 P.3d 660, 664–65 (Cal. 2005) (emphasis added).
  \item \textsuperscript{115} \textit{Id.} at 663.
  \item \textsuperscript{116} \textit{Id.}
  \item \textsuperscript{117} \textit{Id.}
  \item \textsuperscript{118} \textit{Id.} at 663–64.
  \item \textsuperscript{119} \textit{Id.} at 662.
  \item \textsuperscript{120} \textit{Id.} at 664.
  \item \textsuperscript{121} \textit{Id.} at 669.
\end{itemize}
as a source of both emotional and financial support."\textsuperscript{122} The court deemed Elisa a parent under the California parentage statute.\textsuperscript{123}

In \textit{Shineovich v. Shineovich}, an Oregon appellate court held that that state’s marriage-based AI provision was unconstitutional because it denied parentage based on sexual orientation.\textsuperscript{124} The statute at issue read,

The relationship, rights and obligation between a child born as a result of artificial insemination and the mother’s \textit{husband} shall be the same to all legal intents and purposes as if the child had been naturally and legitimately conceived by the mother and the mother’s \textit{husband} if the \textit{husband} consented to the performance of artificial insemination.\textsuperscript{125}

The court concluded that “[t]here appears to be no reason for permitting heterosexual couples to bypass adoption proceedings by conceiving a child through mutually consensual artificial insemination, but not permitting same-sex couples to do so.”\textsuperscript{126} Therefore, the court extended the statute “so that it applies when the same-sex partner of the biological mother consented to the artificial insemination.”\textsuperscript{127}

There is also a possible emerging trend in state legislatures of passing new parentage statutes that use gender-neutral language. In 2009, the District of Columbia passed a law conferring the status of legal parent to any nonbiological parent who intends to be a parent to a child born through AI.\textsuperscript{128} Using gender-neutral language, the new law states that a \textit{person} who consents to a woman’s insemination with the intent to be a parent of the resulting child is the parent of the child.\textsuperscript{129} The law also states that “[c]onsent by a woman, and a \textit{person} who intends to be a parent of a child born to the woman by artificial insemination, shall be in writing signed by the woman and the intended par-

\textsuperscript{122} \textit{Id.}
\textsuperscript{123} \textit{Id. at 670.}

We conclude, therefore, that Elisa is a presumed mother of the twins under section 7611, subdivision (d), because she received the children into her home and openly held them out as her natural children, and that this is not an appropriate action in which to rebut the presumption that Elisa is the twins’ parent with proof that she is not the children’s biological mother because she actively participated in causing the children to be conceived with the understanding that she would raise the children as her own together with the birth mother, she voluntarily accepted the rights and obligations of parenthood after the children were born, and there are no competing claims to her being the children’s second parent.

\textit{Id.}

\textsuperscript{125} \textit{OR. REV. STAT.} § 109.243 (2003) (emphasis added).
\textsuperscript{126} \textit{Shineovich}, 214 P.3d at 40.
\textsuperscript{127} \textit{Id.}
\textsuperscript{128} \textit{D.C. CODE ANN.} § 16-909 (LexisNexis Supp. 2010).
\textsuperscript{129} \textit{D.C. CODE} § 16-909(e)(1) (2008).
The law went into effect on July 18, 2009, and is both marital-status neutral and gender neutral. In the District of Columbia, parentage stems entirely from the intent of the parties as demonstrated through their written consent or behavior. New Mexico made a similar revision to the state parentage law, which became effective on January 1, 2010.

As discussed above, some courts have recently begun to apply a gender-neutral interpretation of parentage statutes to enforce child support or grant legal parentage. These courts have relied on the public policies of the “best interests of the children” and the value of having two parents to ignore gender-specific language in the parentage statutes. Furthermore, at least two state legislatures have passed new parentage statutes that use gender-neutral language. While there could be a gender-neutral trend emerging, the majority of states with parentage statutes still use gender-specific language and interpretation.

B. Common Law Doctrines

In many states, lesbian and transgender nonbiological parents are without statutory recourse to preserve their parental rights. Many courts deny these parents standing to bring claims for parental rights because state parentage statutes do not explicitly cover lesbian or transgender families. Some nonbiological parents ask the courts to apply “a variety of legal theories” to grant them standing to petition for their parental rights. Two frequently used common law doctrines are de facto parenthood and in loco parentis. However,
courts apply vastly different standards for the use of these doctrines, and consequently, nonbiological parents experience vastly different results by jurisdiction.

1.  *De Facto Parenthood*

The term "de facto parent" means "parent in fact" and is used to describe a person, with no biological relation to a child, who claims parental rights to that child based on a psychological and functional parent–child relationship. According to the American Law Institute, a de facto parent must have formed a parent–child relationship with the consent of the legal parent and "regularly performed a share of caretaking functions at least as great as that of the parent with whom the child primarily lived." If an individual is granted de facto parent status, she has standing to bring custody and visitation claims in a legal proceeding. According to the New Jersey Supreme Court, "At the heart of the [de facto] parent cases is a recognition that children have a strong interest in maintaining the ties that connect them to adults who love and provide for them."

In 1995, the Wisconsin Supreme Court set forth criteria that demonstrate the existence of a psychological parent/de facto parent relationship:

1. that the biological or adoptive parent consented to, and fostered, the petitioner's formation and establishment of a parent-like relationship with the child; and
2. that the petitioner and the child lived during their marriage as the natural father if he meets a certain set of criteria. *Id.*

Under the equitable parenthood doctrine, a nonbiological parent may "acquire the rights of [parenthood]" as an equitable parent if

1. the husband and the child mutually acknowledge a relationship as father and child, or the mother of the child has cooperated in the development of such a relationship over a period of time prior to the filing of the complaint for divorce, (2) the husband desires to have the rights afforded to a parent, and (3) the husband is willing to take on the responsibility of paying child support.


If an individual obtains the status of equitable parent, he or she is a legal parent to the child and the courts will consider the child to have two legal parents when making custody and visitation determinations. See Polikoff, *supra* note 5, at 501. Courts have been hesitant to extend the equitable parenthood doctrine to lesbian or transgender nonbiological parents. Durkin, *supra* note 19, at 336. Because equitable parenthood is currently only used by heterosexual couples, this Comment will not discuss it further.

142. Janice M. v. Margaret K., 948 A.2d 73, 84 (Md. 2008).

143. *American Law Institute, Principles of the Law of Family Dissolution: Analysis and Recommendations* § 203(1)(c) (2002). The definition also notes that the individual must have lived with the child for at least two years and must have performed the caretaking functions for reasons other than financial compensation. *Id.*


together in the same household; (3) that the petitioner assumed obligations of parenthood by taking significant responsibility for the child's care, education and development, including contributing towards the child's support, without expectation of financial compensation; and (4) that the petitioner has been in a parental role for a length of time sufficient to have established with the child a bonded, dependent relationship parental in nature.146

Some state courts use the Wisconsin criteria to determine de facto parentage.147 Other state legislatures have codified similar criteria for the determination of de facto parentage.148 At least one state only recognizes de facto parenthood when the parent is the primary caregiver to the child149 and has parented the child without the biological parent.150 At least four states have recognized the application of the de facto parent doctrine to lesbian or transgender nonbiological parents.151

If a nonbiological parent establishes de facto parenthood, courts may treat him or her as a parent equal to the biological parent.152 In V.C. v. M.J.B., the Supreme Court of New Jersey used the de facto parent doctrine to grant a lesbian nonbiological parent standing and

---

147. See, e.g., In re Parentage of L.B., 122 P.3d 161, 176 (Wash. 2005); V.C., 748 A.2d at 551.
148. See, e.g., DEL. CODE. ANN. tit. 13, § 8-201(c) (2009). In Delaware, a de facto parent (1) [h]as had the support and consent of the child's parent or parents who fostered the formation and establishment of a parent-like relationship between the child and the de facto parent; (2) [h]as exercised parental responsibility for the child . . . ; and (3) [h]as acted in a parental role for a length of time sufficient to have established a bonded and dependent relationship with the child that is parental in nature.

Id.
149. KY. REV. STAT. ANN. § 403.270(1)(a) (LEXISNEXIS 2010):
"[D]e facto custodian" means a person who has been shown by clear and convincing evidence to have been the primary caregiver for, and financial supporter of, a child who has resided with the person for a period of six (6) months or more if the child is under three (3) years of age and for a period of one (1) year or more if the child is three (3) years of age or older or has been placed by the Department for Community Based Services.

150. Mullins v. Picklesimer, 317 S.W.3d 569, 574 (Ky. 2010) ("It has been held that parenting the child alongside the natural parent does not meet the de facto custodian standard in KRS 403.270(1)(a) . . . . Rather, the nonparent must 'literally stand in the place of the natural parent.'" (citations omitted)).

151. See E.N.O. v. L.M.M., 711 N.E.2d 886, 891 (Mass. 1999) (holding that a lesbian nonbiological parent may be found to be a de facto parent of a child); V.C. v. M.J.B., 748 A.2d 539, 551–53 (N.J. 2000) (holding that a lesbian nonbiological parent may be found to be a de facto parent of a child); L.B., 122 P.3d at 177 (holding that a de facto parent stands in legal parity with an otherwise legal parent, whether biological, adoptive, or otherwise); H.S.H.-K., 533 N.W.2d at 421 (holding that a lesbian nonbiological parent can be found to be a psychological parent of a child).

152. See Rohlf, supra note 20, at 700.
153. Although the New Jersey parentage statute includes a section on AI based on the UPA (1973), the nonbiological parent in V.C. did not attempt to use the statute. 748 A.2d at 550.
subsequent visitation rights to twins conceived by her ex-partner through AI. After ending the relationship, the biological parent refused to allow her ex-partner visitation with the children conceived through AI during their relationship. In arguing that the nonbiological parent had no standing to petition for custody or visitation, the biological parent claimed the nonbiological parent was more of a “helper” than a co-parent. The nonbiological parent, however, argued that because the couple made the decision to have children together, prepared for birth together, opened savings accounts for the children together, and functioned as a family unit, she was a co-parent to the children. The court applied the Wisconsin de facto parenthood criteria and held that the nonbiological parent was a de facto parent of the children. The court found that the biological parent had ceded over a measure of parental authority and autonomy to the nonbiological parent and that the nonbiological parent had a strong parent–child bond with the children. Therefore, a de facto parent–child relationship was “voluntarily created by the legally recognized parent” and “may not be unilaterally terminated after the relationship between the adults end[ed].”

Among courts that recognize the de facto parenthood doctrine, some will only afford a de facto parent partial parental status or rights. In Kazmierazak v. Query, a Florida appellate court held that while a court may apply a de facto parenthood doctrine to grant custody or visitation to a nonbiological parent, the doctrine does not give a de facto parent rights that are equivalent to a biological parent. In Robinson, the New Jersey Superior Court granted a petition for a pre-birth order establishing the legal parentage of a lesbian nonbiological parent under the artificial insemination section of the parentage statute. 890 A.2d at 1042.

154. V.C., 748 A.2d at 555. The court stated that the biological and nonbiological parents were “essentially equal,” but only granted visitation rights because the nonbiological parent did not seek joint physical custody. Id. She did seek joint legal custody for decision making, but the court held that to interject her as a decision maker after four years of separation from that role would “be unnecessarily disruptive for all involved.” Id.

155. Id. at 544.
156. Id. at 543.
157. Id. at 542.
158. Id. at 555.
159. Id. at 552. The court noted that while a legal parent has the “absolute ability to maintain a zone of autonomous privacy for herself and her child,” she “cannot invite a third party to function as a parent to her child” and expect to maintain the zone of privacy. Id.
160. Id.
161. Kazmierazak v. Query, 736 So. 2d 106, 110 (Fla. Dist. Ct. App. 1999); see also Nancy S. v. Michele G., 279 Cal. Rptr. 212, 216 (Cal. Ct. App. 1991) (stating that the nonbiological parent in a lesbian couple might be entitled to status as a de facto parent, but this status does not necessarily entitle her to “the same rights as a parent to seek custody and visitation over the objection of the children’s natural mother”).
stead, the biological parent has superior rights to the nonbiological parent, except when the biological parent’s custody would be detrimental to the child.\textsuperscript{162}

Other courts will only grant visitation rights under the de facto parentage doctrine to parents and grandparents.\textsuperscript{163} In \textit{Music v. Rachford}, another Florida appellate court dismissed a lesbian nonbiological parent’s claim that she was a de facto parent to the child her former partner conceived through AI.\textsuperscript{164} When the couple ended their relationship, the biological parent prohibited the nonbiological parent from seeing the child.\textsuperscript{165} The appellate court affirmed the dismissal of the nonbiological parent’s complaint, holding that although the nonbiological parent helped make the decision to conceive the child, was present during the birth of the child, and helped raise the child, the court had no authority to grant visitation rights to a party who is neither a parent, grandparent, or great-grandparent.\textsuperscript{166}

Finally, other state courts refuse to recognize claims under the de facto parenthood doctrine at all.\textsuperscript{167} In \textit{Jones v. Barlow}, a lesbian couple entered into a civil union and decided to have a child to-

\begin{footnotes}
\footnote{162. \textit{Kazmierazak}, 736 So. 2d at 108.}
\footnote{164. \textit{Id.} at 1234–35.}
\footnote{165. \textit{Id.}}
\footnote{166. \textit{Id.} The court stated that ‘‘[v]isitation rights are, with regard to a non-parent, statutory, and the court has no inherent authority to award visitation.’’ \textit{Id.} (alteration in original) (quoting Meeks v. Garner, 598 So. 2d 261 (Fla. Dist. Ct. App. 1992)).}
\footnote{167. \textit{See, e.g., In re Matter of Visitation with C.B.L.}, 723 N.E.2d 316, 320 (Ill. App. Ct. 1999) (holding that Illinois statutory law supersedes the common law doctrines of de facto parentage and in loco parentis, and any petition for parental rights must be brought under the relevant Illinois statutes); Janice M. v. Margaret K., 948 A.2d 73, 74 (Md. 2008) (holding that Maryland law does not recognize de facto parenthood); Alison D. v. Virginia M., 572 N.E.2d 27, 29 (N.Y. 1991) (holding that because the legislature did not recognize de facto parenthood, a lesbian nonbiological parent could not use the doctrine to attempt to assert parental rights); \textit{In re Thompson}, 11 S.W.3d 913, 923 (Tenn. Ct. App. 1999) (holding that a nonparent who is not and has not been married to either of the children’s parents does not have a statutory, common law, or constitutional right to visitation as a de facto parent); Titchenal v. Dexter, 693 A.2d 682, 685 (Vt. 1997) (finding that there is no history in Vermont of interfering with the rights and responsibilities of fit parents absent statutory authority, and declining to do so through the de facto parent doctrine or the \textit{in loco parentis} doctrine); \textit{Stadler v. Siperko}, 661 S.E.2d 494, 499 (Va. Ct. App. 2008) (finding that no appellate court in Virginia ever applied the de facto parent doctrine and declining to do so).}
\footnote{168. \textit{Jones v. Barlow}, 154 P.3d 808, 810 (Utah 2007). In 2006, the Vermont Supreme Court took a different approach to the parentage determination of a nonbiological parent in a civil union. The court affirmed a family court’s grant of parental status to a nonbiological parent in a civil union with the biological parent, relying on the intent of the parties to raise the child together and the joint participation in creating the child through AI. \textit{Miller-Jenkins v. Miller-Jenkins}, 912 A.2d 951, 970 (Vt. 2006). The court stated, ‘‘[T]he couple’s legal union at the time of the child’s birth is extremely persuasive evidence of joint parentage.’’ \textit{Id.} at 971.}
\end{footnotes}
Two years after their daughter was born, the couple decided to end their relationship. The nonbiological parent brought suit seeking custody and visitation, claiming she had standing under the common law doctrine of in loco parentis. The Supreme Court of Utah stated that the nonbiological parent was asking the court to apply the de facto parentage doctrine and refused to "judicially create visitation rights" by adopting the doctrine. While the court recognized that a nonbiological parent may have a strong relationship with a child, it refused to "subtract from the legal parent's right to direct the upbringing of her child" based on "elusive factual determinations" as to whether she intended to relinquish those rights to a third party. Although the court stated that there were principled arguments for adopting a de facto parent doctrine, it noted that these reasons were policy based and that making social policy is a job for the legislature.

2. Standing In Loco Parentis

In loco parentis is the legal status of a person who assumes parental responsibilities but is neither the biological nor legal parent of a child. In loco parentis "literally means 'in the place of a parent,' and refers to a party '[a]cting as a temporary guardian of a child.'" The in loco parentis doctrine is most frequently used to grant visitation rights to a stepparent after a dissolution of the stepfamily. However, some courts have extended the doctrine to grant visitation rights to same-sex nonbiological parents after the termination of the same-sex relationship. To stand in loco parentis to a child, a nonbiological parent must (1) assume the status of the parent and (2) discharge parental duties. Unlike the de facto parent doctrine, the in loco parentis doctrine does not require an individual to function as a

169. Jones, 154 P.3d at 810.
170. Id.
171. Id.
172. Id. at 815. The court also refused to apply the in loco parentis doctrine because the termination of the in loco parentis relationship also terminates the corresponding parent-like rights and responsibilities. Id. at 812.
173. Id. at 816 (quoting Van v. Zahorik, 575 N.W.2d 566, 570 (Mich. Ct. App. 1997)).
174. Id. at 817.
176. Janice M. v. Margaret K., 948 A.2d 73, 84 n.8 (Md. 2008) (alteration in original) (quoting BLACK'S LAW DICTIONARY 791 (7th ed. 1999)).
177. See Sella, supra note 32, at 156.
178. See, e.g., T.B., 786 A.2d at 914.
179. Id. at 916-17.
child’s psychological parent. Instead, it only requires that the individual assume functional parental duties. If an individual obtains in loco parentis standing to a child, a court may grant her limited parental rights to that child.

Applications of the in loco parentis doctrine to nonbiological parents of children conceived through AI vary greatly by jurisdiction. Some states recognize the application of the in loco parentis doctrine to lesbian or transgender nonbiological parents’ custody or visitation rights. In T.B. v. L.R.M., the Supreme Court of Pennsylvania held that a lesbian partner who established that she assumed a parental status and completed parental duties with the consent of the biological parent had standing in loco parentis to bring action for partial custody. In arguing against the nonbiological parent’s standing, the biological parent noted that under Pennsylvania case law, same-sex marriage and adoption by a parent’s same-sex partner was prohibited. She argued that because the nonbiological parent could never legally adopt the child, she could not “assume the obligations of a ‘lawful parent.’” However, the court held that the “ability to marry the biological parent and the ability to adopt the subject child have never been and are not now factors in determining whether the third party assumed a parental status and discharged parental duties.” The biological parent consented to and facilitated the nonbiological parent’s parental relationship with the child, and the nonbiological parent assumed a parental status. Therefore, the court found that the nonbiological parent stood in loco parentis to the child and had standing to seek partial custody for purposes of visitation.

Other courts have only applied the in loco parentis doctrine within the context of a marriage. In 1999, a Florida appellate court ad-
dressed the *in loco parentis* doctrine as it applied to a lesbian nonbiological parent.\(^{190}\) In *Kazmierazak v. Query*, the nonbiological parent claimed that she stood *in loco parentis* to the child conceived by her ex-partner, and thus she should be granted parental rights to the child.\(^{191}\) The court held that although the Florida courts applied the *in loco parentis* doctrine to find that a nonbiological parent has an obligation of support, the doctrine applies “only in the context of a marital relationship.”\(^{192}\) Because the nonbiological parent and biological parent in this case were not married, the court held that the doctrine was inapplicable.\(^{193}\)

Other courts have held that a nonbiological parent can only stand *in loco parentis* to a child when the nonbiological parent and child are currently living together.\(^{194}\) In *White v. White*, the nonbiological parent, Leslea, argued that she had standing to bring action based on her *in loco parentis* relationship to her nonbiological child because she and the biological parent, Michelle, “jointly raised the children with each other’s consent, and treated each child, and held each child out to the world, as the children of both of them.”\(^{195}\) Although Leslea was no longer living with the child, she claimed that she stood *in loco parentis* to the child.\(^{196}\) The Missouri appellate court interpreted the *in loco parentis* doctrine to follow the same rules as the stepparent parental rights statute in Missouri, which states that “a stepparent shall support his or her stepchild . . . so long as the stepchild is living in the same home as the stepparent.”\(^{197}\) Therefore, the court held that even if Leslea stood *in loco parentis* to the child while the couple lived together, “that status terminated when they separated.”\(^{198}\)

Finally, some courts have refused to adopt the *in loco parentis* doctrine at all.\(^{199}\) In *In re Visitation with C.B.L.*, an Illinois appellate


\(^{191}\) *Id.* at 109.

\(^{192}\) *Id.* at 110.

\(^{193}\) *Id.*

\(^{194}\) *White v. White*, 293 S.W.3d 1, 16 (Mo. Ct. App. 2009); see also *Jones v. Barlow*, 154 P.3d 808, 815 (Utah 2007) (“While Jones may have stood in loco parentis to the child during the time she was actually living with her and providing for her care, her in loco parentis status terminated when Barlow and the child moved out. According to common law principles, Jones does not have standing to extend the in loco parentis relationship against Barlow’s wishes.”).

\(^{195}\) *White*, 293 S.W.3d at 15.

\(^{196}\) *Id.* at 6–7.

\(^{197}\) Mo. REV. STAT. § 453.400 (2000).

\(^{198}\) *White*, 293 S.W.3d at 16.

\(^{199}\) See, e.g., *In re Visitation with C.B.L.*, 723 N.E.2d 316, 321 (Ill. App. Ct. 1999) (holding that Illinois statutory law supersedes the common law doctrines of de facto parentage and *in loco parentis* and any petition for parental rights must be brought under the relevant Illinois statutes); *Titchenal v. Dexter*, 693 A.2d 682, 685 (Vt. 1992) (finding that there was no history in Vermont
court held that a lesbian nonbiological parent could not assert standing to petition for visitation under the common law doctrine of *in loco parentis* or de facto parentage.\(^{200}\) The nonbiological parent was in a long-term lesbian relationship with the biological parent, and the child was conceived via AI and born during their relationship.\(^{201}\) For the first year and a half of the child’s life, the couple raised the child together as a family.\(^{202}\) After the couple ended their relationship, the biological parent cut off all communication between the child and the nonbiological parent.\(^{203}\) The nonbiological parent claimed that she had standing to petition for visitation of the child under the common law doctrines of de facto parentage and *in loco parentis*.\(^{204}\) The court, however, held that the Marriage Act superseded the common law visitation doctrines in Illinois and that any standing must be found within the specific provisions of that Act.\(^{205}\) Because the nonbiological parent conceded that she did not have standing under the Act, the court affirmed the dismissal of her petition.\(^{206}\)

### C. Second-Parent Adoption

While this Comment focuses on the current means for lesbian and transgender nonbiological parents to assert their parental rights after the deterioration of a relationship, it is worth noting that lesbian or transgender nonbiological parents may attempt to sidestep the issues associated with statutory or common law remedies through second-parent adoption.\(^{207}\) In a second-parent adoption, “a child born to one partner is adopted by his or her nonbiological or non-legal second parent, with the consent of the legal parent, and without changing the latter’s rights and responsibilities.”\(^{208}\) If the nonbiological parent can adopt the child as a second parent she “stands in parity with the bio-

---

\(^{200}\) C.B.L., 723 N.E.2d at 321.  
\(^{201}\) Id. at 317.  
\(^{202}\) Id.  
\(^{203}\) Id.  
\(^{204}\) Id. at 318.  
\(^{205}\) Id. at 321.  
\(^{206}\) Id. at 320–21.  
\(^{207}\) Ralph Ranalli, *A Victory For Gay Mothers, But This Case Called Unique*, BOSTON GLOBE, Aug. 11, 2000, at B1 (“Most lesbian couples who have children through artificial insemination must go through the process of having the non-birth parent legally adopt the child in order to be granted joint custody.”).  
logical parent and has all the rights and responsibilities that flow from legal parenthood."

However, as with the parentage statutes, case law, and common law doctrines, the adoption statutes and case law vary widely by state. While a few states explicitly allow second-parent adoption in their statutes or case law, one state's statutes still explicitly prohibit same-sex partners from adopting children. Other states limit second-parent adoption by allowing the sexual orientation of prospective parents to be considered in adoption proceedings, or effectively prohibit second-parent adoption by either requiring the biological parent to relinquish all parental rights before adoption may take place or limiting second-parent adoption to stepparents or spouses.

The UPA (1973) and the UPA (2000) were created to fill a gap in parentage law for children conceived through AI. Although the Conference intended these model acts to create a uniform parentage law across the country, an examination of state statutes illustrates that parentage laws vary widely across jurisdictions. Furthermore, common law doctrine applications vary greatly by jurisdiction. Therefore, a lesbian or transgender nonbiological parent who is claiming parentage of a child conceived through AI will succeed or fail depending on her state of residence.


211. See, e.g., In re Adoption of Tammy, 619 N.E.2d 315, 318 (Mass. 1993) (holding that a same-sex partner may adopt the child of a legal co-parent in Massachusetts); In re Adoption of R.B.F. & R.C.F., 803 A.2d 1195, 1199, 1202 (Pa. 2002) (holding that although the Pennsylvania statute required that legal parents give up their parental rights in a second-parent adoption, except in the case of stepparent adoptions, the statute also gave the courts discretion to permit adoptions in the best interests of the children when not all of the statutory requirements were met).

212. FLA. STAT. ANN. § 63.042 (West 2005) (repealed 2010). The statute states, "No person eligible to adopt under this statute may adopt if that person is a homosexual." Id.

213. See, e.g., CONN. GEN. STAT. ANN. § 45a-726a (West 2004).

214. See, e.g., In re Adoption of Kassandra B., 540 N.W.2d 554, 559 (Neb. 1995); In re Angel Lace M., 516 N.W.2d 678, 682 (Wis. 1994). "States with statutes of this type tend to construe them to mean that in order for the natural parent's same-sex partner to adopt the child, the legal parent has to relinquish his or her parental rights, which is obviously not the result that same-sex couples desire." Laura L. Williams, Note, The Unheard Victims of the Refusal to Legalize Same-Sex Marriage: The Reluctance to Recognize Same-Sex Partners as Parents Instead of Strangers, 9 J. GENDER RACE & JUST. 419, 430-31 (2005).

III. Analysis

When a lesbian or transgender couple terminates its relationship, the biological parent may attempt to terminate the nonbiological parent’s relationship with the child.216 The nonbiological parent has no other choice but to turn to a legal system that currently applies varied principles of law, often with inequitable outcomes for lesbian and transgender families.217 With diverse statutes, common law doctrine, and applications across jurisdictions, there is a need for a new, uniform approach to parentage determinations for nonbiological parents.

Section A of this Part illustrates the current system’s weaknesses in determining the parentage of nonbiological parents whose ex-partners have conceived children through AI.218 Section B of this Part proposes a uniform, equitable solution in the law of contracts that respects both the best interest of the child and the couple’s autonomous decision to parent the child together.219 Section C of this Part notes the current arguments against using contract principles in a family law context.220 Section D of this Part establishes that it is legally appropriate to enforce pre-insemination agreements granting legal parentage to a nonbiological parent.221

A. Weaknesses in Current Approaches

Courts often reject the lesbian or transgender nonbiological parent’s claim of parental rights under the relevant state statute or theories of common law.222 This “not only disadvantage[s] the non-legal co-parent, but also risk[s] harm to the child by denying the child the stability of a continuing relationship with both of her [parents] without any justification related to the quality of the non-legal co-parent’s performance of her parental duties.”223 This outcome disregards both the best interest of the children and the parents’ autonomous decision to co-parent the children. In addition, the current system leads to gross inconsistencies between states and inequitable outcomes for les-

216. See Crary, supra note 4.
217. See Jacobs, supra note 4, at 348; Williams, supra note 214, at 426.
218. See infra notes 222–65 and accompanying text.
219. See infra notes 266–313 and accompanying text.
220. See infra notes 314–28 and accompanying text.
221. See infra notes 329–49 and accompanying text.
222. See Jacobs, supra note 4, at 344–45; see also Crary, supra note 4.
bian and transgender families. Therefore, there is "a growing need for clear standards determining parentage for [these] couples."225

1. The Current System Is Not Uniform Across Jurisdictions

State parentage statutes vary widely across the United States. While some states have adopted the UPA (1973), others adopted the UPA (2000), and still others adopted neither. Furthermore, of those that have adopted a version of the UPA, some modified it before adoption. The different statutes lead to different results across jurisdictions for lesbian and transgender nonbiological parents and their children. Courts also vary in whether they strictly interpret gender-specific language or marriage-specific language in their statutes to exclude lesbian, transgender, or unmarried couples.

The application of common law doctrines to grant legal parentage also varies by state. Some courts allow the use of common law principles, such as de facto parentage and in loco parentis, when there is no available statutory recourse. Other courts have held that any standing for parental or visitation rights must be found solely within the parentage statutes. Yet even when the courts apply common law doctrines to parentage determinations, some courts only apply common law doctrine within the context of a marriage or cohabitation.

As the Conference recognized when drafting both the UPA (1973) and the UPA (2000), there is a need for consistency in the law across jurisdictions. Yet the various statutory and common law approaches result in vastly different outcomes for similarly situated nonbiological parents seeking custody or visitation of a child conceived through AI. For example, while a lesbian nonbiological parent who signed a pre-insemination agreement to co-parent a child may be granted parental status in California,227 she would likely be denied parentage in Missouri228 under the same facts.229 Because heterosexual, lesbian, and transgender couples "are increasingly choosing to conceive by artificial insemination," there is a growing need for pre-

224. See Polikoff, supra note 5, at 483 (noting that there are "gross inconsistencies across state lines [and] inconsistencies within states" in how courts apply these doctrines).
228. See, e.g., White v. White, 293 S.W.3d 1, 11 (Mo. Ct. App. 2009).
229. Although both of these states adopted the UPA (1973), Missouri courts have refused to apply the AI section protections to a lesbian nonbiological parent, while California courts have held that the AI section applies equally to a lesbian nonbiological parent. See supra notes 227–28 and accompanying text.
dictable law and precedent on which all nonbiological parents can rely to establish parentage. Although there may be a small but increasing trend of gender-neutral statutes or interpretation, "realistically, legislatures nationwide are not likely to undertake statutory reform of the laws regarding parenthood."

2. The Current System Yields Inequitable Results for Lesbian and Transgender Families

While many state parentage statutes grant parental status to married or male nonbiological parents of children born via AI, the vast majority of them do not explicitly grant parentage to lesbian or transgender nonbiological parents. Courts have consistently refused to apply a gender-neutral interpretation to state parentage statutes. In *In re Marriage of Simmons*, an Illinois appellate court held that while the parties were married and signed a pre-insemination agreement to co-parent the child, the AI section of the Illinois Parentage Act does not apply to a transsexual nonbiological parent who has not completed sex reassignment surgery. Because the transsexual nonbiological parent was not legally male, the couple’s marriage was an invalid same-sex marriage. The court noted that the Illinois legislature meant the parentage statute to “apply to ‘husbands’ and ‘wives’ as those terms are ordinarily and popularly understood,” which did not include transsexuals who are in the process of becoming male. Had the nonbiological parent been born a male, or had he completed his sexual reassignment surgery by the time of the legal proceedings, the court would have likely determined he was a legal parent to his nonbiological child under the AI section of the Illinois

231. See Sella, supra note 32, at 161.
232. See *In re Marriage of Simmons*, 825 N.E.2d 303, 308–09, 311 (Ill. App. Ct. 2005) (refusing to grant parental rights to a transsexual nonbiological parent who had not completed his sex reassignment surgery because he was not considered male under the law).
233. See supra notes 43–102 and accompanying text.
234. See 750 ILL. COMP. STAT. 40/3(a) (2008).
236. Id. at 309.
237. Id. at 311.
Parentage Act.\textsuperscript{238} Instead, the court treated the couple's marriage as invalid and refused to grant parentage to the nonbiological parent.\textsuperscript{239} As noted by one court, "no [legitimate] reason exists to provide the children born to lesbian parents through the use of reproductive technology with less security and protection than that given to children born to heterosexual parents through artificial insemination."\textsuperscript{240} The court went on to state that while the current statutory framework does not explicitly accommodate lesbian families in this situation, "we cannot close our eyes to the legal and social needs of our society."\textsuperscript{241} Courts should apply the same law and principles in AI parentage cases regardless of the gender or sexual orientation of the nonbiological parent.

3. The Current System Disregards the Parties' Autonomous Decisions to Create Families

Generally, a couple that chooses to use AI to conceive a child has made a thoughtful, informed decision to bear that child.\textsuperscript{242} They have invested significant financial resources into conception and have discussed co-parenting the child.\textsuperscript{243} As one commentator noted,

\textsuperscript{238} The court noted in Simmons that the AI agreement was invalid regardless of the same-sex marriage because the physician who performed the procedure did not certify the signatures and date of the insemination on the consent agreement. 825 N.E.2d at 311. However, had the nonbiological parent been legally male, he would have retained his right to parentage under the presumption of parenthood in the Illinois Parentage Statute. \textit{Id.} at 312. The court quoted the Illinois Parentage Act:

Section 5 of the Parentage Act . . . states in relevant part:

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

(1) he and the child's natural mother are or have been married to each other, even though the marriage is or could be declared invalid, and the child is born or conceived during such marriage;

(2) after the child's birth, he and the child's natural mother have married each other, even though the marriage is or could be declared invalid, and he is named, with his written consent, as the child's father on the child birth certificate[.]"

\textit{Id.} at 311 (alteration in original). However, the court held that this presumption of parenthood did not apply to the transsexual nonbiological parent because it "confers a presumption on a 'man' to be the natural father of a child" and "is based on the premise that the parties who are involved are a man and a woman." \textit{Id.} at 312.

\textsuperscript{239} \textit{Id.} at 315.


\textsuperscript{241} \textit{Id.}


\textsuperscript{243} \textit{See id.}
"[W]hen one is artificially inseminated . . . one acts directly and unambiguously to achieve procreation." 244 Despite the existence of an informed, autonomous decision to parent between two parties, courts have used gender-specific or marital status-specific language in parentage statutes to effectively terminate longstanding parent–child relationships in lesbian or transgender families. 245 Courts have also refused to grant lesbian or transgender nonbiological parents their parental rights under the various equitable common law doctrines discussed in the previous Part. 246

Judicial refusal to grant parental rights to nonbiological parents who helped make the decision to conceive children, intended to raise the children in a family unit with the biological parents, and fulfilled parental responsibilities since the children's birth, ignores the parties' autonomous intentions to create a family. 247 As a New Jersey court noted when granting parentage to a nonbiological lesbian parent, the couple had "availed themselves of every legal opportunity open to them to declare they are committed domestic partners, a married couple and a dedicated family." 248 In other words, their intent to create a family together as co-parents was clear. The court also noted that the AI section of the state parentage statute makes clear that parentage determinations are based on intent. 249

Courts should not disregard a couple's autonomous decision to create a family by terminating a healthy parent–child relationship. The nonbiological parent should not be denied her parental rights when she and her partner made the mutual decision to become parents together, simply because she is not biologically tied to the child. 250

245. See supra notes 43–102 and accompanying text.
246. See supra notes 138–206 and accompanying text.
247. See Rachel E. Shoaf, Note, Two Mothers and Their Child: A Look at the Uncertain Status of Nonbiological Lesbian Mothers Under Contemporary Law, 12 WM. & MARY J. WOMEN & L. 267, 293 (2005) (citing Palmore v. Sidoti, 466 U.S. 429, 434 (1984); Loving v. Virginia, 388 U.S. 1, 11–12 (1967)) ("The United States Supreme Court has firmly held that, in family life, individuals should be allowed to direct their families' own destinies and that prejudice is not a valid reason for disallowing that autonomy.").
249. Id. at 1042. "The designation of parent at birth is not limited by the strict definition of paternity. Rather, the individual seeking equal treatment under the Artificial Insemination statute must show indicia of commitment to be a spouse and to be a parent to the child." Id.
250. See, e.g., Elisa B. v. Superior Court of El Dorado Cnty., 117 P.3d 660, 670 (Cal. 2005): Elisa is a presumed mother of the twins . . . because she received the children into her home and openly held them out as her natural children, and that this is not an appropriate action in which to rebut the presumption that Elisa is the twins' parent with proof that she is not the children's biological mother because she actively participated in
Some lesbian or transgender couples go so far as to create pre-insemination parentage agreements, in which both parties agree to parent the resulting child, to settle any future question about legal parentage.\textsuperscript{251} As one commentator notes, "When two competent individuals enter into a decision to start a family and go through the legal processes to ensure that both of them will be considered equal parents to a child under the law, that decision should be binding."\textsuperscript{252}

4. The Current System Disregards the Best Interests of the Child

Perhaps most importantly, depriving a child of a fit\textsuperscript{253} parent disregards the best interest of that child. The lesbian and transgender nonbiological parents in the cases discussed above provided physical, emotional, mental, and financial support to their children, some for many years.\textsuperscript{254} If, after the termination of the lesbian or transgender couple’s relationship, the biological parent chooses to prohibit visitation between the nonbiological parent and the child, she is depriving the child of a longstanding parent–child relationship.\textsuperscript{255}

The courts consider the best interest of the child to be “paramount and [it] will, at times, take priority over the interest of parents.”\textsuperscript{256} It is in a child’s best interest, and it is a “compelling state interest,” for a child to have “two parents, rather than one, as a source of both emotional and financial support, especially when the obligation to support the child would otherwise fall to the public.”\textsuperscript{257} As the Supreme Court of New Jersey stated, “[C]hildren have a strong interest in

\begin{quote}
causing the children to be conceived with the understanding that she would raise the children as her own together with the birth mother.
\end{quote}

\textsuperscript{251} See, e.g., In re Marriage of Simmons, 825 N.E.2d 303, 310 (Ill. App. Ct. 2005).
\textsuperscript{252} Shoaf, supra note 247, at 293.
\textsuperscript{253} As the United States Supreme Court stated in Troxel v. Granville, [S]o long as a parent adequately cares for his or her children (i.e., is fit), there will normally be no reason for the State to inject itself into the private realm of the family to further question the ability of that parent to make the best decisions concerning the rearing of that parent’s children.
\textsuperscript{254} See, e.g., V.C. v. M.J.B., 748 A.2d 539, 555 (N.J. 2000) (“[The nonbiological parent] and [the biological parent] are essentially equal. Each appears to be a fully capable, loving parent committed to the safety and welfare of the twins.”); In re Parentage of L.B., 122 P.3d 161, 164 (Wash. 2005) (“[T]he trial judge found that ‘there is a substantial relationship between [the nonbiological parent] and the child in this case’ and that ‘both parties care deeply’ for the child.”).
\textsuperscript{255} See, e.g., Elisa B., 117 P.3d at 669 (“Rebutting the presumption that Elisa is the twin’s parent would leave them with only one parent and would deprive them of the support of their second parent.”).
\textsuperscript{257} Elisa B., 117 P.3d at 669; see also Robinson, 890 A.2d at 1038.
In Robinson, the New Jersey Superior Court stated,
maintaining the ties that connect them to adults who love and provide for them. That interest, for constitutional as well as social purposes, lies in the emotional bonds that develop between family members as a result of shared daily life."

Another court noted that the AI section of the state parentage statute "has as its underpinning the interest in identifying a child's [second] parent for the benefit of the child and, secondarily, to repose financial responsibility upon that parent rather than upon the citizenry."

If a child has two fit, loving parents, it is beneficial for that child to maintain relationships with both of those parents, regardless of their sexual orientation. For this reason, courts should extend the best interest of the child principle to all families, regardless of the sexual orientation of the parents. An appellate court in Indiana noted,

[The courts'] paramount concern should be with the effect of our laws on the reality of children's lives. It is not the courts that have engendered the diverse composition of today's families. It is the advancement of reproductive technologies and society's recognition of alternative lifestyles that have produced families in which a biological, and therefore a legal, connection is no longer the sole organizing principle. But it is the courts that are required to define, declare and protect the rights of children raised in those families, usually upon their dissolution.

Yet despite the well-established public policy of the child's best interest taking precedent over other interests, children of lesbian and transgender parents are often denied the benefit of two fit parents, which goes against the children's best interests.

Some courts use common law doctrine to establish the parentage of lesbian or transgender nonbiological parents in order to serve the best

Arguably, the benefits to a child of having two legal parents are numerous and would certainly include economic security such as the right to support, the right to inherit by intestacy . . . , and the right to inherit free of the fifteen percent New Jersey inheritance tax. Additionally, the child would be eligible for health insurance as a dependent . . . and would be entitled to insurance and social security benefits in the event of [the nonbiological parent's] death.

890 A.2d at 1038.

258. V.C., 748 A.2d at 550.

259. Robinson, 890 A.2d at 1042 (emphasis added).

260. The American Psychological Association (APA) publicly supports two-parent gay and lesbian families. "Research and clinical experience indicate that when children have been raised from birth or an early age by lesbian couples, co-parent adoption will ordinarily provide significant psychological and social benefits to them and therefore will ordinarily be in their best interests." Brief for the American Psychological Association as Amici Curiae, in re Adoption of Luke, 640 N.W.2d 374 (Neb. 2002) (No. S-01-0053).


262. See supra notes 43–206 and accompanying text.
interests of the children. As the Supreme Court of Washington stated, the Washington legislature intended "a strong presumption in favor of parental involvement, fostering and protecting a child's significant relationships" when creating the legal visitation system. The "best interest of the child is ordinarily served when the existing pattern of interaction between a parent and child is altered only to the extent necessitated by the changed relationship of the parents or as required to protect the child from physical, mental, or emotional harm." As the Washington court noted, cutting ties between a child and her nonbiological parent, whom she has known to be her parent all her life, goes directly against her interest in maintaining familial relationships.

While courts almost always grant legal parent status to heterosexual nonbiological parents of children conceived through AI through parentage statutes or common law doctrine, they often deny legal parent status to similarly situated lesbian or transgender nonbiological parents. These nonbiological parents then lack standing to seek custody or visitation with the minor children, despite their intentions and actions to parent the children. This discrepancy results in a lack of uniformity in parentage decisions, is inequitable, ignores the autonomy of the parties, and disregards the child's best interests. There is a need for a new approach that can and will be applied to all nonbiological parents, regardless of their sexual orientation or gender identity.

B. A Solution in the Law of Contracts

Without reliable statutory or common law recourse, lesbian and transgender couples may sign pre-insemination contracts to attempt to "mitigate the effects of uncertain legal consequence of AI." These contracts establish that the sperm donor is not a parent to the resulting child. They also establish that the biological parent's partner, or


264. L.B., 122 P.3d at 172.
265. Id. at 173.
266. Fiser & Garrett, supra note 242, at 19.
267. Id. at 20. However, as noted by this Comment, the UPA (2000) provides, “[T]he rights of a donor are often clearly expressed by legislation, as the ‘donor is not a parent of a child conceived by means of assisted reproduction.’” Id. (citing UNIF. PARENTAGE ACT § 702 (2000) (revised 2002)).
the nonbiological parent, is an equal co-parent to the resulting child.268

Many state courts hold that the existence of these pre-insemination agreements, or even an oral agreement, can establish a nonbiological parent’s legal parentage.269 A grant of legal parentage to a nonbiological parent simultaneously grants parental rights and responsibilities.270 It also grants a child the right to receive various types of parental support from that nonbiological parent.271 Although some courts argue that contract principles have no place in parentage decisions,272 courts should reconceive contract principles as applicable to parentage determinations, especially in the case of assisted reproductive technology where the intent of the parties plays a key role in the creation of a family.

Courts should rely on pre-insemination parentage contracts to determine a party’s legal parentage, regardless of the nonbiological parent’s gender or marital status.273 The future biological and nonbiological parents—private parties to the contracts—enter into these agreements in order to illustrate their intentions to parent their children together.274 The agreements also illustrate the parents’ inten-

268. Id. at 20–21.
269. See, e.g., Elisa B. v. Superior Court of El Dorado Cnty., 117 P.3d 660, 670 (Cal. 2005) (“As we noted in the context of a husband who consented to the artificial insemination of his wife using an anonymous sperm donor, but later denied responsibility for the resulting child: ‘One who consents to the production of a child cannot create a temporary relation to be assumed and disclaimed at will, but the arrangement must be of such character as to impose an obligation of supporting those for whose existence he is directly responsible.’") citing People v. Sorensen, 437 P.2d 495, 499 (Cal. 1968)); In re Parentage of G.E.M., 890 N.E.2d 944, 954 (Ill. App. Ct. 2008) (“The Act allows that fatherhood is not always created by pure genetics. Consent is as legally binding on a parent as a DNA determination when that unconditional acceptance of the role of parent is voluntarily accepted for purposes of an adoption or a voluntary acceptance of paternity:”); L.M.S. v. S.L.S., 312 N.W.2d 853, 855 (Wis. Ct. App. 1981) (“We hold that a husband who, because of his sterile condition, consents to his wife’s impregnation, with the understanding that a child will be created whom they will treat as their own, has the legal duties and responsibilities of fatherhood, including support.”).
270. See, e.g., Melanie B. Jacobs, Why Just Two? Disaggregating Traditional Parental Rights and Responsibilities to Recognize Multiple Parents, 9 J. L. & FAM. STUD. 309, 314 (2007) (“Legal parentage entitles a parent to all the rights, responsibilities, privileges, and benefits of parenthood. Lack of parental status often renders other adults as legal strangers without standing or recourse to establish or maintain a relationship with a child.”).
271. See, e.g., 750 I.LL. COMP. STAT. 45/1.1 (2008) (“Illinois recognizes the right of every child to the physical, mental, emotional and monetary support of his or her parents under this Act.”).
273. See Fiser & Garrett, supra note 242, at 20 (“One strategy for mitigating judicial bias and clearly establishing intentionality has been a two-step contract to ensure the rights of co-parents. . . . [T]he first step includes terminating the parental rights of the donor, and the second step involves providing rights to the nonbiological co-parent . . . .” (citing Durkin, supra note 19, at 342)).
274. Id.
tion to give the child the benefit of both parents' support. As required by the UPA (1973), the supervising physician may certify these agreements. When a biological parent terminates the child's relationship with the nonbiological parent, she is breaching the pre-insemination contract by denying the child his right to the support of his nonbiological parent. As third-party beneficiaries to the agreements, the children should be able to bring an action against the breaching parties for specific performance of the pre-insemination contracts.

First, before an agreement is "deemed a third party beneficiary contract, it must . . . be deemed a contract." To create a valid contract, the parties must have objectively intended to contract and there must have been valid consideration. Without the means to reproduce their own biological children, lesbian and transgender couples rely on the principle of intent to establish their families. As noted by several commentators, "There is a distinct difference between parents of a child created by accident during heterosexual intercourse and parents of a child born through AI processes. Most often, a great amount of thought and often significant financial outlay has occurred in AI cases." The conscious decision to parent that corresponds with the process of AI is evidence that the parties intended to create a family with a binding pre-insemination agreement.

The question becomes whether there was valid consideration for both parties. To constitute consideration, a performance must be bargained for, or sought by the promisor in exchange for his promise and given by the promisee in exchange for that promise. The performance itself "may consist of (a) an act other than a promise, or (b) a forbearance, or (c) the creation, modification, or destruction of a legal relation." If the contract lacks consideration, it is not a valid and enforceable contract. The contracting parties, not the third-party beneficiaries, must supply the requisite consideration.

---

275. UNIF. PARENTAGE ACT § 5(a) (1973) ("The physician shall certify their signatures and the date of the insemination, and file the husband's consent with the [State Department of Health], where it shall be kept confidential and in a sealed file." (alteration in original)).


277. See WILLISTON, supra note 276, § 37:23.

278. Fiser & Garrett, supra note 242, at 27 (citing Hopkins, supra note 242, at 220).

279. RESTATEMENT (SECOND) OF CONTRACTS § 71.

280. Id. § 71(3).

281. See id. § 71.

282. See WILLISTON, supra note 276, § 37:23 ("The general rule, adopted by the overwhelming majority of jurisdictions, is that the plaintiff beneficiary is not required to furnish the consideration. So long as there is consideration for the promisor's undertaking, the promise is enforceable by the third party beneficiary." (footnote omitted)).
There is valid consideration between the biological and nonbiological parent in a pre-insemination contract. The parties agree to establish the legal parentage of the nonbiological parent, despite her lack of a biological connection to the child. The biological parent promises to hold her partner as a second, equal parent to the child. The nonbiological parent promises to “assume the duties of parenthood in exchange for the coordinate rights.”

Parental responsibilities go far beyond financial obligations and include “the obligation to insure the physical, mental, and emotional well-being of the child.” The Illinois Supreme Court, for example, recognized these broader rights and responsibilities under the Illinois Parentage Act:

[T]he purpose of [the Illinois Parentage Act] is to further the public policy of Illinois to “recognize[] the right of every child to the physical, mental, emotional and monetary support of his or her parents under this Act.” ... The provisions of the Parentage Act underscore that the importance of parentage hinges upon the rights and responsibilities that are attendant to the parent and child relationship. As such, the Parentage Act defines the term “parent and child relationship” as “the legal relationship existing between a child and his natural or adoptive parents incident to which the law confers or imposes rights, privileges, duties and obligations.”

If a court refuses to recognize the parentage of a nonbiological parent, she has “no legal authority to make important medical or educational decisions for [her] children, or to influence religious or moral decisions.”

The responsibilities attendant to the creation of a parent–child relationship, as detailed above, serve as valid consideration for the pre-insemination contracts. The nonbiological parent is seeking these rights and in exchange, promising to meet these responsibilities for the child. Simultaneously, the biological parent is promising to uphold the nonbiological parent as a legal parent in exchange for the nonbiological parent’s promise to meet all the responsibilities of parentage, including financial responsibilities in case the couple separates. Therefore, as long as the agreement meets all other requirements to constitute a valid contract, it is a contract.


284. See Durkin, supra note 19, at 345.


287. See Jacobs, supra note 4, at 347.
In Illinois, for example, pre-insemination agreements are mandatory contracts for partners in a married couple and their parentage statuses. As the Illinois Supreme Court held in In re Parentage of M.J., "The failure to provide or obtain written consent will preclude a claim for paternity and child support under the Illinois Parentage Act." The nonbiological parent must sign a pre-insemination agreement for each AI procedure completed "under the supervision of a licensed physician" and "acknowledged by both the husband and wife."

Second, in order to rely on contract law to establish parentage, the child must show that she is a third-party beneficiary to the contract. While "'[a]s a general rule, strangers to a contract acquire no rights under such a contract,'" the doctrine of third-party beneficiary contracts is an established exception. Under this doctrine, "an individual who is not a party to a contract can enforce the contract" if he is a beneficiary of the promise. A third person is a beneficiary if "the promisee intends to give the beneficiary the benefit of the promised performance." If the third party is only an incidental beneficiary, he is not a beneficiary with rights under the contract. If the third party is an intended beneficiary, the promisor has a contract duty to both the promisee and the third party. It must appear from the facts and circumstances surrounding the contract that it was made for the direct benefit of the third person. Furthermore, "if the beneficiary would be reasonable in relying on the promise as manifesting an intention to confer a right on him, he is an intended beneficiary."

In the case of pre-insemination AI agreements, the resulting child is an intended third-party beneficiary to her parents' contract. One pur-
pose of these contracts is to establish that the biological parent and her partner will both be equal, legal parents to the child. The promise indicates, or specifies, that they will both provide physical, emotional, and financial support to the child. This agreement directly benefits the child, who receives the support of two parents. Both parents intend to give the child–beneficiary the benefit of the promised performance. While the contract might not explicitly state “the resulting child is a direct beneficiary of this agreement,” the language of the contract illustrates that the contract is made with the intention to benefit the child with two sources of parental support.

Once it is established that the AI contract is valid and enforceable and that the child is a third-party beneficiary, the child should be able to bring action for specific performance if one of the parties breaches the contract. Specific performance is a form of equitable relief that “may be granted after there has been a breach of contract by either nonperformance or repudiation.” An order of specific performance “is intended to produce as nearly as is practicable the same effect that the performance due under a contract would have produced.” It often orders a party who breached his contract duty to perform a specific act that was promised in the contract. The order may be directed at the injured party as well, if appropriate to achieve justice. A court may also grant relief by ordering an injunction against the violation of a negative promise.

Courts grant specific performance of a contract duty at their discretion and generally will only grant equitable relief if damages are inadequate to protect the expectation interest of the injured party. For

298. See Fiser & Garrett, supra note 242, at 27.
299. See id. at 20.
300. See Shultz, supra note 244, at 351. Shultz states,
Enforcing reproductive and parental agreements would make such commitments binding at an earlier stage than is now typical. However, the fact that the intentions at issue here are formed before any child is conceived—that the expectations and reliance include the very creation of the child itself—suggests that there are strong reasons to accept an earlier cutoff point.
Id.
301. See Farnsworth, supra note 294, § 10.7.
302. Id. § 12.5.
304. Id. § 357.
305. See Farnsworth, supra note 294, § 12.5.
306. See Williston, supra note 276, § 67:53.
307. See Restatement (Second) of Contracts § 357; see also Farnsworth, supra note 294, § 12.6. According to Williston, there are six factors that may affect the granting or denial of specific performance:
(1) [T]here must be no adequate remedy at law;
(2) there must be a contract sufficiently explicit and certain to warrant enforcement;
example, damages may be insufficient "because the subject matter of the contract is so unique or of such a special nature that it resists translation into quantitative terms" or "because it is impossible to arrive at a legal measure of damages at all, or at least with any sufficient degree of certainty."\(^3\)

As third-party beneficiaries, children conceived through AI should be entitled to specific performance of pre-insemination contracts. The biological parent may breach the contract by terminating the child's relationship with the nonbiological parent when the relationship between the two parents ends.\(^3\) If the biological parent refuses to allow the child to have a relationship with the nonbiological parent, damages are an inappropriate remedy for breach of the pre-insemination parentage agreement because the loss of a parent's emotional and mental support cannot be substituted for dollars.\(^3\) The only remedy that can protect a child's interest in maintaining the support of his nonbiological parent is specific performance.\(^3\)

The performance of sharing custody or visitation, or securing the "performance of promises regarding who will be the parent" are "relatively easy for a court to supervise . . . [because] legal designation of parental status is directly within the law's control."\(^3\) Therefore, "an order specifically to perform—together with an order declaring legal parental status according to the terms of the agreement—may well be appropriate."\(^3\) As a third-party beneficiary to the pre-insemination parentage agreement, the child should be able to bring an action under the contract to stop the biological parent from denying the par-

---

(3) the consideration underlying the contract must be adequate and not disproportionate;
(4) enforcement must not result in undue hardship;
(5) the decree must not be futile, as where performance is impossible; and,
(6) the suit must be timely; that is, the parties seeking enforcement must not be guilty of laches.

Williston, supra note 276, § 67:62 (footnotes omitted).

308. See Williston, supra note 276, § 67:8.


310. Accord id. Sella states,

Ordinarily, in the event of a contract breach, money damages are awarded. Yet, in the area of a parent-child relationship, a monetary remedy would be inappropriate. Money would not compensate for the loss of a parent-child relationship nor make the breached party whole. Thus, should the relationship between the mothers end and a breach of the parental rights agreement occur, the appropriate remedy would be specific performance in the form of shared custody or visitation.

Id.

311. Accord id. at 163.

312. Shultz, supra note 244, at 365.

313. Id. at 368.
entage (and corresponding rights and responsibilities) of the nonbiological parent.

C. Arguments Against Using Contract Principles in Family Law

While some state statutes assert that pre-insemination private contracts between the intended parents shall determine parentage, "enforceability remains the problem."314 First, some biological parents have argued that nonbiological parents should not be granted parental status through a pre-insemination contract due to the public policy of judicial deference to the legal parent.315 Federal and state law both "give significant deference to legal parents" to make decisions about the care, custody, and control of their children.316

In Troxel v. Granville, the U.S. Supreme Court further solidified this public policy when determining whether a child's grandparents could be granted visitation rights against the wishes of the child's legal parent.317 The Court stated, "The liberty . . . interest of parents in the care, custody, and control of their children [ ] is perhaps the oldest of the fundamental liberty interests recognized by this Court."318 The Court recognized that the "Due Process Clause of the Fourteenth Amendment protects the fundamental right of parents to make decisions concerning the care, custody, and control of their children,"319 and held that so long as the parent is fit, "there will normally be no reason for the State to inject itself into the private realm of the family to further question the ability of that parent to make the best decisions concerning the rearing of that parent's children."320 Therefore, the Court refused to grant the child's grandparents standing to assert their visitation rights over the wishes of the legal parent.321 Relying on Troxel, some courts have held that a contract for custody or visitation rights between a legal parent and a non-legal parent cannot su-

314. Fiser & Garrett, supra note 242, at 22.
315. See, e.g., In re Parentage of L.B., 122 P.3d 161, 177 (Wash. 2005) ("[The biological parent] asserts the recognition of [the nonbiological parent] as a defacto parent . . . violates [the biological parent's] constitutionally protected liberty interest to care for and control her child without unwarranted state intervention . . . .").
316. Jacobs, supra note 4, at 348. Jacobs notes that "[i]n their attempts to seek legal recognition of their parenthood and to maintain contact with their children, lesbian coparents have been treated as third parties. . . . [B]y categorizing lesbian coparents as mere third party petitioners or 'legal strangers,' courts overlook the actual parental relationship that has been established." Id. at 349–50.
318. Id. at 65.
319. Id. at 66.
320. Id. at 68–69.
321. Id. at 73.
persede the policy of deference to the legal parent. This "strong parental preference in custody cases has hurt the claims of legally unrecognized parents in planned lesbian and gay families."

Second, courts will often refuse to "enforce provisions concerning parentage of a child" because they consider it "abhorrent to public policy" to use contract law in parentage determinations. One court stated that "the decision to become, or not to become, a parent is a personal right of 'such delicate and intimate character that direct enforcement . . . by any process of the court should never be attempted.'" Therefore, even if a clear pre-insemination parentage contract exists, some courts ignore the agreement and rely solely on the state’s parentage statutes or common law doctrine to make a parentage determination. As one commentator noted, some courts resist applying the impersonal, marketplace rules of contract to the family. Other courts will only enforce a parentage agreement if they determine that the results are also consistent with the best interest of the child.

324. Williams, supra note 214, at 428.
325. T.F., 813 N.E.2d at 1250–51 (quoting A.Z. v. B.Z., 725 N.E.2d 1051 (Mass. 2000) (stating that although “[c]ontracts between unmarried same-sex couples concerning the welfare and support of a child stand on the same footing as any other agreement between unmarried cohabitants,” a contract establishing a person’s parental status is unenforceable, and noting that “‘[p]arenthood by contract’ is not the law in Massachusetts’”). However, a few years prior, the same court saw “a written coparenting agreement as demonstrative of the biological mother’s consent to and encouragement of the plaintiff’s de facto parental relationship with the child, as well as indicative of the parties’ belief regarding the child’s best interest; hence, the agreement could factor into the judge’s decision regarding visitation.” Deborah L. Forman, Same-Sex Partners: Strangers, Third Parties, or Parents? The Changing Legal Landscape and the Struggle for Parental Equality, 40 Fam. L.Q. 23, 41 (2006) (citing E.N.O. v. L.M.M., 711 N.E.2d 886, 892 n.10 (Mass. 1999)).
326. See, e.g., T.F., 813 N.E.2d at 1250–51. As noted by commentators, courts should not use the "best interest of the child" standard to determine parentage, but to make custody, visitation, and support determinations after parentage has already been established by the pre-insemination contract. See, e.g., Fiser & Garrett, supra note 242, at 30.
328. According to the Restatement (Second) of Contracts, “A promise affecting the right of custody of a minor child is unenforceable on grounds of public policy, unless the disposition as to
D. Pre-Insemination Contracts Are an Appropriate Means to Establish Parentage

Judicial hesitation to apply the principles of contract law is a disservice to both lesbian and transgender nonbiological parents and their children. Where a pre-insemination agreement establishes parentage of a nonbiological parent, that agreement is a clear indication that both parties intended for the nonbiological parent to be a legal parent to the child. The child should have the legal right to enforce that agreement and continue to receive the love and support of her nonbiological parent that she has enjoyed throughout her life.

It is appropriate to use contract law to establish parentage of all nonbiological parents, regardless of their gender or marital status. First, the use of contract principles in a family law context does not violate the public policy of parental deference espoused in Troxel. Second, courts already commonly use contract law in the family law context, with marriage presumptions, surrogacy agreements, and AI agreements in UPA (1973) or UPA (2000) states.

1. Contract Law Does Not Violate the Public Policy of Parental Deference

The use of contract principles to grant parentage to a nonbiological parent does not interfere with the liberty interest established in Troxel. As some courts have recognized, the lesbian and transgender nonbiological parents who seek legal parentage in these cases are not third parties; they are second parents to the children at issue. The parental deference principle established in Troxel is not used to weigh the competing interests of two parents, but to weigh the interest of a parent more heavily than that of a third party who seeks visitation rights to a child. As one commentator stated, “These [lesbian or transgender] nonbiological parents are very different from third par-
ties in that they actually plan and intend to be a parent to the child, just as heterosexual married couples plan to have a child together.”

*Troxel* places no “constitutional limitations on the ability of states to legislatively, or through their common law, define a parent or family.” The parental deference principle cannot be used to prohibit nonbiological (but legal) parents from bringing contract claims for custody or visitation to their children, or to prohibit the children from bringing contract claims for access to their nonbiological parents. Thus, because the nonbiological parents in these cases are not third parties, but second parents, *Troxel* does not apply.

Second, even if *Troxel* did apply, the liberty interest should apply to children as well as parents. As Justice Stevens stated in his dissent in *Troxel*,

> While this Court has not yet had occasion to elucidate the nature of a child’s liberty interests in preserving established familial or family-like bonds . . . it seems to me extremely likely that, to the extent parents and families have fundamental liberty interests in preserving such intimate relationships, so, too, do children have these interests, and so, too, must their interests be balanced in the equation. . . . The constitutional protection against arbitrary state interference with parental rights should not be extended to prevent the States from protecting children against the arbitrary exercise of parental authority that is not in fact motivated by an interest in the welfare of the child.  

If the courts were to recognize the child’s liberty interest in “preserving established familial or family-like bonds,” they would also recognize that this interest is bolstered by the use of contract law to establish parentage. As discussed above, the welfare of the child is implicated when a biological parent terminates a longstanding parental relationship between the child and her nonbiological parent. The child loses an established relationship with a parent, whom she has known her entire life. Children have an undeniable interest in maintaining the support of both of their parents. Contract law enables the child to bring an action for her right to emotional and financial support from her nonbiological parent. Therefore, the use of contract law to establish legal parentage bolsters the child’s interest in maintaining familial relationships and parental support by permitting the child to enforce these rights.

---

333. *L.B.*, 122 P.3d at 178; see also Polikoff, *supra* note 323, at 834 (“The grandparents in *Troxel* had never assumed a parental role in the children’s lives. Thus, *Troxel* does not define parenthood nor affect the ability of states to do so. Legally unrecognized lesbian mothers are parents. . . . Such recognition . . . guarantees equal status for both parents.”).
2. Courts Currently Use Contract Law to Establish Parentage or Non-Parentage

Arguments that contract law has no place in a family law context ignore the fact that contracts are already relied upon to determine parenthood in many situations. Some examples include the presumptions of parenthood that accompanies a marriage, AI contracts, and surrogacy contracts. First, there is a “common law presumption that the husband of a woman who gives birth to a child is the father of the child.”335 When a couple entered into a marriage, “[they] were [traditionally] agreeing to support and raise any children born to the marriage. Because [they] agreed to raise children, they were bound to be [parents], regardless of whether the children born to the marriage were biologically related.”336 This presumption may be rebuttable, depending on the state.337

Second, in some states, sperm donors and heterosexual couples engaging in AI currently rely on contracts to establish their parental statuses. The sperm donor signs a contract disavowing “his rights and obligations as a father. The law honors the sperm donor’s intent not to be a father and the contract in which he makes that intent known.”338 The male partners of the biological mothers often sign pre-insemination agreements establishing their intentions to be the nonbiological, but legal, parents to the children.339 Under the UPA and the adoptive states’ statutes, courts recognize these parentage contracts as valid by recognizing male nonbiological parents as legal parents when the couple terminates its relationship.340

Finally, most states also enforce surrogacy contracts, which determine the parentage and non-parentage of the intended parent and the surrogate, respectively.341 It is “through the contract, not the genetic contribution, that the ‘intended’ parents acquire their parental rights.”342 In Johnson v. Calvert, for example, both the surrogate birth mother and the intended mother “presented acceptable proof of maternity,” so the court stated that legal parentage of the child must be

---

335. Baker, supra note 327, at 12.
336. Id. at 25.
337. Id. at 12 (citing Leslie J. Harris & Lee E. Teitelbaum, Family Law 995–96 (2d ed. 2000)) (“Today, all states, by statute or common law, provide that a married woman’s husband is at least rebuttably presumed to be the father of her children.”)).
338. Id. at 26.
339. See id.
341. See Baker, supra note 327, at 26.
342. Id.
decided by "enquiring into the parties' intentions as manifested in the surrogacy agreement."343 The court found that all three parties intended to work together to bring the child into the world for the intended parents.344 The birth mother was never intended to be the child's mother.345 The court repeated one commentator's argument that "[w]ithin the context of artificial reproductive techniques... intentions that are voluntarily chosen, deliberate, express and bargained-for ought presumptively to determine legal parenthood."346 Using these principles, the court relied on the surrogacy contract in this case to hold that the intended parents were the legal parents of the child under California law.347

Contract law is not just an appropriate means to determine parentage; it is a well-established tool in certain family law contexts. Similar to the other contract applications in family law, a pre-insemination parentage "contract between [a] lesbian [or transgender couple] promotes rather than violates public policy by protecting the expectations of the parties and encouraging the formation and stability of families."348 Therefore, it is appropriate to consider a solution in contract law to the issue of parentage determinations for lesbian and transgender nonbiological parents.

In sum, when a lesbian or transgender couple ends its relationship and the biological parent attempts to terminate the nonbiological parent's relationship with the child, the nonbiological parent has no other choice but to turn to a legal system that currently applies varied principles of law.349 With often inequitable outcomes for lesbian and transgender persons across jurisdictions, a consistent disregard for the parents' autonomous decisions to create a family, and a consistent disregard for the best interest of the child, there is a need for a new approach to parentage determinations for nonbiological parents. Under a contractual framework, a child can bring an action as a third-party beneficiary to a pre-insemination contract for specific performance of her nonbiological parent's support. The courts should recognize contract principles as applicable to the creation of families, and

344. Id.
345. Id.
346. Id. at 783 (quoting Shultz, supra note 244, at 323).
347. Id. at 787. The court discussed possible public policy arguments against enforcement of a surrogacy contract, and held that the enforcement of the contract was not inconsistent with public policy. See id. at 783-86.
349. Accord Jacobs, supra note 4, at 348; Williams, supra note 214, at 426.
grant parentage to a child’s nonbiological parent through a child’s action for the specific performance of the pre-insemination agreement.

IV. IMPACT

The current legal system for determining the parentage status of nonbiological parents in AI cases disproportionately denies children in lesbian or transgender families relationships with one of their parents. When a court refuses to recognize a nonbiological parent’s standing to petition for custody or visitation due to her gender, marital status, or lack of a biological relation to the child, the child is adversely affected by losing her “involved, nurturing, loving, and supportive parents.” The contractual model for determining parentage would treat children of lesbian or transgender couples the same as children of heterosexual couples that use AI to conceive. Parental intent would govern parentage determinations, and children would no longer be denied the support of their parents due to their parents’ gender or marital status.

Section A of this Part illustrates that unlike the current legal system, contract law provides a uniform, equitable solution to the question of nonbiological parentage, respecting both the best interest of the children and the parents’ autonomous decision to parent their children together. Section B of this Part discusses the substance and implementation of the pre-insemination parentage contracts.

A. Strengths in a Contract Approach to Parentage Determinations

As discussed above, the current system for determining parentage in AI cases disadvantages both lesbian or transgender nonbiological parents and their children. Courts often reject lesbian or transgender nonbiological parents’ claims of parentage under various statutes or common law doctrine, disregarding the parties’ autonomous decision to co-parent the children and the best interests of the children. The various statutes and common law doctrines also yield inconsistent and often inequitable results for lesbian and transgender families. The enforcement of AI contracts in parentage determinations would resolve these issues for lesbian or transgender nonbiological parents and their children. The application of contract law in this context would establish a uniform approach across jurisdictions, yield equitable results for

350. See supra note 2.
351. Jacobs, supra note 4, at 350.
352. See infra notes 354-73 and accompanying text.
353. See infra notes 374-85 and accompanying text.
all families, respect the parties’ autonomous decisions to co-parent, and take into account the best interests of the children.

First, a contract approach to all parentage determinations would alleviate inconsistency in the law by creating uniform standards across jurisdictions, regardless of the parties’ gender or marital statuses.\(^{354}\) In most states, lesbian and transgender nonbiological parents cannot rely on state statutes to protect their parentage rights.\(^{355}\) Many courts also do not apply the relevant common law doctrines to same-sex couples, even where they do apply those doctrines to heterosexual couples.\(^{356}\) If, regardless of their jurisdiction, all nonbiological parents were able to rely on the courts to enforce private contracts that clearly indicate their intentions to co-parent children, there would be “[p]redictable and consistent results in every state.”\(^{357}\) This “would keep [biological parents] from forum shopping, disrupting families and relocating children in order to obtain a ruling that might preclude the other party from claiming parental rights” and nonbiological parents from doing the same in order to find a jurisdiction that grants them standing to bring custody and visitation claims.\(^{358}\)

Second, although the law “provides parental status to heterosexual married” nonbiological parents, “[the] courts refuse to extend the same rights and obligations to members of same-sex couples.”\(^{359}\) While some courts cite the gender of lesbian or transgender nonbiological parents as the reason they cannot establish parentage under their statutes or common law doctrines, others cite their marital status.\(^{360}\) Regardless of the reason for the courts’ refusal to treat these nonbiological parents differently, it is an inequitable result for lesbian and transgender nonbiological parents and their children. As commentators have noted, “Equity and reason should hold that those parties who joined together with the intent to create a child—whether gay, straight, unmarried, or married—should be allowed to legally protect their interests as legal parents.”\(^{361}\) The enforcement of pre-insemination parentage contracts would provide an equal opportunity

---

\(^{354}\) Under the contract approach, courts would determine parentage based on the existence of a pre-insemination contract, regardless of marital status or gender. See supra notes 290–348 and accompanying text.

\(^{355}\) See supra notes 43–102 and accompanying text.

\(^{356}\) See supra notes 139–206 and accompanying text.

\(^{357}\) Horstmeyer, supra note 17, at 699–700.

\(^{358}\) Id. at 700.

\(^{359}\) Williams, supra note 214, at 422.

\(^{360}\) See, e.g., In re Marriage of Simmons, 825 N.E.2d 303, 311 (Ill. App. Ct. 2005); White v. White, 293 S.W.3d 1, 11 (Mo. Ct. App. 2009).

\(^{361}\) Fiser & Garrett, supra note 242, at 28.
for lesbian and transgender nonbiological parents to establish full parental status, regardless of their gender or marital status.

Third, unlike some heterosexual couples who accidentally create a child through intercourse, a couple that uses AI to conceive has generally made the autonomous decision to bear a child and parent that child together.\(^\text{362}\) A pre-insemination contract can provide a clear indication of a couple's intent to co-parent a child conceived through AI.\(^\text{363}\) In fact, some same-sex couples enter into these agreements "to serve as evidence of their intent at the time they decided to have a child, rather than assessing their intent following their separation."\(^\text{364}\) As one commentator notes, "[B]ecause its terms are drafted specifically for each couple, [a] contract best reflects the wishes of each lesbian [or transgender] couple."\(^\text{365}\)

Some state statutes explicitly take note of the parties' intent to coparent a child conceived through AI. As noted above, the UPA (2000), which only applies to heterosexual couples, bases parentage determinations on the parties' intent to parent children together. As one commentator stated, "[T]he court's failure to recognize the nonbiological parent in a same-sex couple as a legal parent to the child ignores the fact that he or she consented to the production of the child. This denies the nonbiological parent the parental rights he or she voluntarily assumed . . . ."\(^\text{366}\) Parents, regardless of their gender or marital status, should be able to rely on the courts to enforce their informed and autonomous decisions to parent a child as laid out in their private contracts.\(^\text{367}\)

Fourth, "[t]he law of contracts offers a solution for children raised in lesbian [or transgender] coparent relationships that is consistent with the best interests of those children."\(^\text{368}\) If the courts enforce pre-insemination agreements establishing the parentage of the nonbiological parent, the child will have access to two parents. It is in a child's best interest to have "two parents, rather than one, as a source of both emotional and financial support, especially when the obligation to support the child would otherwise fall to the public."\(^\text{369}\)
Terminating the child’s relationship with her nonbiological parent does more than remove a source of child support from the child’s life; it causes a lack of security and stability. As one commentator notes, “Continuity and consistency are fundamental requirements for a child’s healthy development.” These concerns are as applicable to children of lesbian and transgender parents as they are to children of heterosexual parents. While the current system does not provide a solution for children of same-sex parents consistent with their best interests, enforcing parentage contracts between couples undergoing AI would provide all children with the support of both parents.

In the hypothetical situation laid out in this Comment’s introduction, the lesbian couple made the decision to have a family together. They expressed their intentions to co-parent their child by signing a pre-insemination parentage agreement. This agreement explicitly stated that both partners would be legal parents to the child. They were their daughter’s co-parents for ten years. Yet, when they ended their relationship, the courts denied the ten-year-old girl the support of her nonbiological mother, despite the existence of a private, signed agreement between her parents stating their intentions to co-parent their child together. Had the girl’s parents been in a heterosexual relationship, their pre-insemination parentage contract would have been enforceable under the state’s parentage laws. The nonbiological mother would have had standing to bring action for the enforcement of the contract, and the child’s relationship with her nonbiological mother would have been effectively uninterrupted by the legal system. Instead, the state parentage act’s exclusion of same-sex couples “cause[d] the severance of a valued parent-child relationship and force[d] [the] child to lose a person . . . she has known as nothing other than a parent for . . . her entire life.”

The law of contracts provides the best solution. If the private agreement establishing legal parentage was enforceable in court, the girl would still have the support of and a relationship with her nonbiological mother. Her parents’ intentions to create a family and co-parent

---

Arguably, the benefits to a child of having two legal parents are numerous and would certainly include economic security such as the right to support, the right to inherit by intestacy . . . and the right to inherit free of the fifteen percent New Jersey inheritance tax. Additionally, the child would be eligible for health insurance as a dependent . . . and would be entitled to insurance and social security benefits in the event of [the nonbiological parent’s] death.

Robinson, 890 A.2d at 1038.
370. See Durkin, supra note 19, at 346.
371. Id. at 345–46.
372. See Williams, supra note 214, at 425 (citing Jacobs, supra note 4, at 375).
373. Williams, supra note 214, at 425.
their children would be respected. It takes into account what is in her best interest, as she is best served by having access to both of her fit, loving parents. Finally, this is the only equitable result for the nonbiological mother and her daughter. To remove this child's mother from her life simply because her parents were in a same-sex relationship discriminates against her for not being the child of a heterosexual couple.

In sum, the courts, using state statutes and various common law doctrines, often fail to recognize lesbian or transgender nonbiological parents as second parents to children conceived through Al. A contract law solution rightfully provides the children of all parents who use Al—regardless of gender or marital status—with two legal parents to provide support, so long as they both intended to co-parent the child together.

**B. Substance and Implementation of Pre-Insemination Parentage Contracts**

Pre-insemination parentage agreements "are legal documents that a . . . couple uses to explain the rights and responsibilities of each co-parent." The document "should state clearly the parties' intention that the wife be inseminated . . . [and] that the child so conceived shall be treated as the natural child of the parties." The agreements also bar the donor from bringing a parentage claim. The physician often provides the form, and an attorney for one of the parties may make changes to the standard form. In practice, the biological parent, the nonbiological parent, and the supervising physician all often sign the agreement.

While couples' pre-insemination parentage contracts will not be identical, *In re Marriage of Simmons* provides an example of an agreement that would have been a legally binding document had the nonbiological partner been legally married to his wife:

"It is further agreed that [at] the moment of conception, the husband hereby accepts the act as his own, and agrees:

1. That such child or children so produced are his own legitimate child or children and are heirs of his body; and
2. That he hereby completely waives forever any right which he might have to disclaim such child or children as his own; and

---

374. Osborne, supra note 139, at 370 (citing Rompala, supra note 6, at 1946).
375. ANN M. HARALAMBIE, HANDLING CHILD CUSTODY CASES § 17.03 (1983).
376. Id.
377. Id.
3. That such child or children so procedure [sic] are, and shall
be considered to be, in all respects including descent of
property, child or children of his own body.”

However, as a transsexual male who had not yet completed his sex
reassignment surgery, the Illinois court found the nonbiological parent
legally female. Therefore, his marriage to the female biological
parent was an invalid same-sex marriage, and the pre-insemination
parentage agreement was unenforceable.

To protect children from losing their relationships with their lesbian
or transgender nonbiological parents, pre-insemination agreements
should be gender neutral, use the gender of the nonbiological parent,
or specifically name the nonbiological partner as the legal co-parent.
For example,

It is further agreed that at the moment of conception, [the nonbio-
logical parent] hereby accepts the act as his/her own, and agrees:

1. That such child or children so produced are [his/her] own
legitimate child or children and are heirs of [his/her] body; and

2. That [(s)he] hereby completely waives forever any right
which [(s)he] might have to disclaim such child or children
as [his/her] own; and

3. That such child or children are, and shall be considered to
be, in all respects including descent of property, child or
children of [his/her] own body.

Had the parties in Simmons used the gender-neutral agreement
above, the Illinois court would still not be likely to grant the nonbio-
logical parent standing to seek custody or visitation of the child under
state law. The Illinois Parentage Act, which uses the language of
the UPA (1973), only protects nonbiological parents that are legally
married.

However, in states that have gender-neutral statutes or no applica-
ble parentage statues, courts could enforce the gender-neutral parent-
age agreement above for a lesbian or transgender couple within state
law. In those states with gender-specific parentage statutes, the courts
should follow New Jersey and California courts in interpreting those

378. In re Marriage of Simmons, 825 N.E.2d 303, 310 (Ill. App. Ct. 2005) (alterations in origi-

nal) (quoting the parties’ agreement).

379. Id. at 309.

380. Id.

381. The court stated, “It is clear from reading the statute in question that the legislature
intended that this statute apply to ‘husbands’ and ‘wives’ as those terms are ordinarily and popu-
larly understood.” Id. at 311.

382. 750 ILL. COMP. STAT. 40/3 (2008).
statutes to include same-sex couples. In Robinson, for example, the New Jersey court noted that although the state parentage statute applied only to "husbands" and "wives" on its face, the lesbian couple had clearly demonstrated their intent to parent the child together. Therefore, the court granted legal parent status to the nonbiological parent.

In sum, where the current system fails the children of lesbian and transgender nonbiological parents, contract law should protect them. When the courts consider parties' pre-insemination agreements to be contracts establishing the legal parentage of the nonbiological parents, they respect the autonomous decisions of those parties to parent, regardless of their marital status or gender. Furthermore, while the contracts may vary slightly by couple, consistent judicial enforcement of these contracts will result in predictable solutions for nonbiological parents. These parents will be able to protect their relationships with their children by entering into pre-insemination parentage agreements before conception. Finally, consistent enforcement of pre-insemination parentage agreements is also in the best interest of the children, who are better served by maintaining relationships with both fit parents.

V. Conclusion

In the case of Susan and Jane, the courts denied Jane standing to fight for custody or visitation of Lesley. After ten years of being a parent, Jane was left without means to access her child. This tragic outcome is not uncommon. Courts often deny children conceived through AI in non-heterosexual families the support of their nonbiological parents, even when they would recognize parentage in a heterosexual family with the same fact pattern.

The current system disadvantages same-sex couples and their children. It yields inequitable results for lesbian and transgender families, is far from uniform across jurisdictions, disregards the parties' autonomous decisions to create families, and most importantly, disregards the best interests of the children in these custody battles. Therefore, there is a need for a more equitable and uniform approach to parentage determinations.

The law of contracts provides that approach. A couple preparing to undergo AI to conceive a child often signs a private pre-insemination

384. Robinson, 890 A.2d at 1041.
385. Id. at 1042.
agreement establishing the legal parentage of the nonbiological parent. These agreements are valid contracts, illustrating both parents' intentions to grant legal parentage to the nonbiological parent. When Susan terminates the relationship between Jane and Lesley, she breaches that contract. As a third-party beneficiary to a pre-insemination parentage agreement between her biological and nonbiological parents, Lesley should be able to bring an action for specific performance of Jane's financial and emotional support.

Allowing these contracts to be enforceable in court ensures that children like Lesley will no longer be denied parental support, simply because of their parents' gender or marital status. A contract approach is also consistent with the best interest of the children at issue. Instead of being traumatized by the loss of her second mother, who has provided her love and support throughout her entire life, Lesley would be entitled to bring action for the specific performance of that parental relationship. Finally, enforcement of pre-insemination contracts respects the intentions of the parties to create families. Instead of denying Lesley and Jane their cherished parent–child relationship, a court should enforce Jane and Susan's parentage agreement and allow Lesley the opportunity to grow up with the love and support of both of her parents.

Kelly M. O'Bryan*

* J.D. Candidate 2011, DePaul University College of Law; B.A. 2003, George Washington University. I would like to thank DePaul College of Law Professors Allison Ortlieb and Michael Jacobs for their excellent comments and assistance during the preparation of this Comment.