Florida State University Law Review

Volume 34 | Issue 3 Article 6

2007

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LAW REVIEW

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VOLUME 34 SPRING 2007 NUMBER 3

Recommended citation: Katherine M. Swift, *Parenting Agreements, the Potential Power of Cotnract, and the Limits of Family Law*, 34 FLA. ST U. L. REV. 913 (2007).

PARENTING AGREEMENTS, THE POTENTIAL POWER OF CONTRACT, AND THE LIMITS OF FAMILY LAW

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ABSTRACT

There has been a trend among feminists and family law scholars toward privatization. The idea is that private agreements can take the place of public marriage contracts. Private agreements can determine property disposition, confer the right to make medical decisions, and, potentially at least, also confer parental status on a nonbiological parent. But the scholarly trend does not fully address how courts treat private family agreements when children are involved. In short, family courts do not enforce contracts regarding children. Biology and adoption tend to be the only way to achieve parentage. In custody and visitation proceedings, courts follow the "best-interests-of-the-child" doctrine to determine who should play the part of parent, regardless of contrary parental intent. This Article describes the conflict between the scholarly trend toward privatization and the family court reality. The Article then argues that properly drafted parenting agreements should be enforced by family courts, both in determining parental status and in determining custody. In other words, custody courts should not be allowed to disregard parenting agreements in the course of an ad hoc best-interests analysis. Parents—biological, adoptive, and contractual—should be on the same footing in the best-interests evaluation.

* Law clerk, Honorable Mark Filip, U.S. District Court, Northern District of Illinois, 2006–07; J.D. 2006, The University of Chicago. Special thanks to Elizabeth Emens for always offering thorough feedback and advice. Additional thanks to Lisa Bernstein, Emily Buss, Arden Rowell, and participants in the Legal Scholarship Workshop at The University of Chicago Law School.

I. INTRODUCTION

M. and J.A.[1] dealt with an increasingly common problem when they decided to have a baby. Because they are both women, their marriage is not recognized by the state where they live. Therefore, the child of one is not automatically recognized as the child of the other. They went ahead with artificial insemination anyway, using sperm from an anonymous donor so the "father's" parental rights would not be an issue, and in October 2006, J.A. gave birth to a boy.

"We thought a lot about the law when we were considering using a known donor," says J.A. "[T]here are many legal issues that can come into play when you are asking someone to give up their parental rights. We've heard some of the horror stories about donors (or their family members) later fighting for custody and winning. We are happy that we won't have to deal with those types of issues." Still, there will be issues. "Mostly we want to figure out how/if we can do a [second-]parent adoption," J.A. says.[2] M. and J.A. know of one family law judge in their state who performs second-parent adoptions for gay couples. That state is not named here, because M. and J.A. fear that if this judge draws attention for performing such adoptions, the state legislature may react by banning the practice. "If we can't do the [second-]parent adoption, what type of documents do we need to put in place to assure [M.] custody and other parental rights?"

The answer to this question is unclear. There has been a trend in family law toward privatization, and some scholars argue that private family agreements can take the place of the marriage contract

1. M. and J.A. shared their story via e-mail. *See* E-mail from M. and J.A. to author (Mar. 7, 2005, 16:25:35 CST) (on file with author). Initials are used to preserve anonymity.

2. "Second-parent adoption" refers to the procedure whereby the spouse or partner of a biological parent adopts the child of that parent without terminating the biological parent's parental rights. After the adoption, both parents have equal parenting rights in the child. Second-parent adoption is distinguished from traditional adoption in that the latter requires the biological parent to give up all parental rights. *See infra* Part II.D.

in providing parenting rights and responsibilities.[3] Such contracts may become even more prevalent as constitutional amendments banning gay marriage are passed throughout the country.[4] But *establishing* parental status is only the first half of the equation. When that status really matters—in a custody dispute, for example—family courts may implicitly disregard parental status in determining the best interests of the child. Moreover, even establishing parental status in the first place is a large hurdle because under most state statutes, parentage is largely a function of biology.[5] Even if a family law court nominally enforces a contract establishing status, the court may find that its own ad hoc assessment of the child's best interests trumps the parents' agreement. In other words, any contract regarding parental status between same-sex parents is unlikely to be enforced because of these twin obstacles: (1) the statutory requirements for establishing parental status and (2) the best-interests analysis.

The best-interests doctrine, and family law generally, is suffused with notions of conscience and equity not present in traditional contract cases. Family law does not respect the traditional rules of contract. Thus, principles protecting expectations and reliance do not apply in the family law setting. Though well-intentioned, family courts may place unwarranted obstacles between parents who have tried to create rights via contract and their children. This issue is not limited to gay parents, but it is particularly pertinent to them because often one gay parent is not biologically related to the child. Unmarried heterosexual parents, though they face similar obstacles to establishing parental status, are generally helped by being able to point to a biological relationship with the child. More broadly, the conflict between contract and family law highlighted here reveals that all parents—even married heterosexuals—may face limits in attempting to modify their rights and responsibilities to their children.

This Article addresses the limits family law puts on parents and children, as exemplified by the conflict between contract doctrine and the best-interests doctrine. In particular, family law limits who may be a parent, both in status and in practice. The conflict is starkest

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3. *See infra* note 9.

4. As many as "45 states have approved constitutional amendments or statutes to define traditional marriage in a way that would bar same-sex marriage." Shailagh Murray, *Gay Marriage Amendment Fails in Senate*, WASH. POST, June 8, 2006, at A01. Some of these laws may also ban contracts designed to establish rights similar to those established by marriage. *See* VA. CODE ANN. § 20-45.3 (2004) (banning any "civil union, partnership contract or other arrangement between persons of the same sex purporting to bestow the privileges or obligations of marriage"). Laws like the one in Virginia notwithstanding, it seems likely that gay couples increasingly will turn to private agreements to try to create permanent, formal family rights for themselves and their children.

5. *See, e.g.*, UNIF. PARENTAGE ACT § 1 (1973) (defining "parent and child relationship" as including only "the legal relationship . . . between a child and his natural or adoptive parents").

where a nonbiological, same-sex parent[6] seeks custody of a child. First, that parent's *status* might not be recognized if it is established by contract. Second, even if parental status is recognized, family courts may still grant custody to the biological parent, implicitly or explicitly determining that to do so is in the child's best interests, notwithstanding agreements between the parents manifesting a contrary intent.

This Article proposes a two-part solution to this problem. First, courts should recognize contracts between unmarried parents establishing parental status. Second, such contracts should receive consideration in any subsequent best-interests analysis. In other words, courts should not use the open-ended nature of the best-interests analysis to undo the rights and responsibilities the parents have established by contract. States have a compelling interest in the welfare of their children and are therefore unlikely to take a hands-off approach to these cases; they should at least treat unmarried parents with a valid parenting agreement—contractual parents—the same way they treat married parents or adoptive parents. Contractual parents should enter the best-interests evaluation on equal footing. In practice, this approach would require family courts to defer to parenting contracts in the course of determining a child's best interests.

To be clear, the parenting contract contemplated by this Article would establish merely parental status. It would not address custody or visitation rights. A large part of this Article's project is to separate the issue of status from the issue of custody and visitation. The law treats these issues separately, but courts often conflate them. Parenting status tends to be governed by biology (one aspect of the law that this Article argues for changing) or by establishment of a legal parenting relationship with the child (usually by adoption). Custody and visitation are governed by best-interests analysis. As discussed below, both types of analysis disadvantage gay, nonbiological parents.[7]

The Article proceeds in three parts. Part I discusses the trend of privatization in family law. What is called "privatization" here could also be conceptualized as the state's loosening of the reins on the evolution of family relationships. This Part covers the shift from legal

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6. The same-sex partner of a biological parent is referred to here as the "nonbiological parent," although using the term "parent" assumes one of the points in question. This is intentional. These partners are parents inasmuch as they intend, with the biological parent, to bring a child into the world or at least to rear that child. Some courts have referred to these partners as "functional parents," "psychological parents," or "de facto parents" because they fulfill the role of parent despite their lack of a biological or legal connection. The term used here is similar, but "nonbiological parent" or "same-sex parent" is more specific.

7. Adoption law reveals how the issues can become intertwined. Adoption is principally about establishing parental status in the adoptive parent, but (inasmuch as adoptive parents often have no biological connection to the child) the law requires that any adoption be in the child's best interests. *See infra* Part II.D.

recognition of only traditional heterosexual families to the allowance of private modifications to marriage contracts (notably including premarital agreements and surrogacy agreements) and, ultimately, to the limited recognition of so-called alternative family arrangements. Part II discusses the best-interests-of-the-child doctrine and its use today as an ad hoc method of resolving family disputes that may deny same-sex parents of rights they have attempted to create by contract. This Part concludes with a discussion of the law surrounding second-parent adoption, which, though not universally available, is the only sure method of securing parental rights for same-sex, nonbiological parents. Part III proposes a new approach: enforcement of parenting agreements so that "contractual parents" would be treated the same as married, biological, or adoptive parents in a best-interests analysis. The parenting agreement would eliminate the priority often given to the biological parent so that both parents have an equal shot at custody as well as equal rights and responsibilities to the child outside the courtroom.[8]

II. THE PRIVATIZATION OF FAMILY LAW

This Part discusses the shift from state-defined, one-size-fits-all legal families to state acceptance of limited, private modifications to those legal relationships. Scholars have argued that the logical conclusion of this shift is widespread use of contract to establish privately what cannot be established publicly, including parental rights.[9] There is a debate over whether marriage rights *should* be the ultimate goal for same-sex couples, but that debate is beyond the scope of this Article.[10] However, it is worth considering that the move

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8. For example, the nonbiological parent would also be on equal footing with the biological parent in making medical decisions for the child. Courts struggle with cases of parental disagreement even where parents *are* on equal footing, suggesting that where there is an opportunity to prefer one parent (biological) over the other (nonbiological), courts will take it. *See generally In re* K.I., 735 A.2d 448, 453–56 (D.C. 1999) (holding that, where the mother had been deemed neglectful and the parents disagreed about medical treatment, the court had the power to implement a do-not-resuscitate order against the mother's wishes because it was found to be in the child's best interests).

9. *See generally, e.g.*, Katharine K. Baker, *Bargaining or Biology? The History and Future of Paternity Law and Parental Status*, 14 CORNELL J.L. & PUB. POL'Y 1, 2 (2004) (arguing that the law should abandon its interest in determining biological paternity and concentrate instead on contracts for paternity); Patricia A. Cain, *Imagine There's No Marriage*, 16 QUINNIPIAC L. REV. 27, 48–49 (1996) (arguing that contracts regarding child-rearing, support, and custody ought to be enforced, so long as they are negotiated with the child's best interests in mind); Jill Schachner Chanen, *The Changing Face of Gay Legal Issues*, A.B.A. J., July 2004, at 46, 49–50 (advising on the importance of having contracts detailing family agreements but also pointing out that second-parent adoption is the best way to ensure rights regarding children).

10. *See* WILLIAM N. ESKRIDGE, JR., THE CASE FOR SAME-SEX MARRIAGE: FROM SEXUAL LIBERTY TO CIVILIZED COMMITMENT 60–61 (1996) (describing the debate among gay rights and feminist advocates about whether gay marriage is worth the fight).

toward contract may be as much normative as it is strategic. Many same-sex couples would not marry if they could because they believe marriage is a hierarchical, sexist arrangement between a dominant man and a submissive woman.[11] For them, contract offers a more egalitarian model where both parties are presumed to be on equal footing for bargaining purposes.[12] On the other hand, the use of contract may be simply strategic for couples trying to create the rights that exist between formally married couples.

This Part begins with a refresher in the basics of contract doctrine, both to orient the reader and to highlight the contrast between the objective nature of contract theory and the subjective, norms-laden realm of family law.

A. Contract Basics

Courts ordinarily enforce contracts between two parties where there has been an offer, acceptance, and consideration.[13] Courts tend not to look closely at the nature of the consideration. So long as the parties know what they are bargaining for and their bargaining power is not so unequal that the contract is unconscionable, courts generally take a hands-off approach and enforce the contract.[14] Courts enforce the contract terms that are objectively manifest. They do not look for the subjective intentions of the parties at the time they entered the agreement.[15] The theory behind these principles is that private parties should be allowed to order their conduct privately and that courts should enforce the agreements they make without passing judgment on those agreements, so long as they are not illegal or in violation of public policy.[16] Where a contract is not il-

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11. *See id.*

12. *See supra* note 9.

13. "A contract by ancient definition, is 'an agreement between competent parties, upon a consideration sufficient in law, to do or not do a particular thing.' " Steinberg v. Chicago Med. Sch., 371 N.E.2d 634, 639 (Ill. 1977) (quoting People v. Dummer, 113 N.E. 934, 935 (Ill. 1916)). "An offer, an acceptance . . . , and consideration . . . are basic ingredients of a contract." *Id.* at 639.

14. *See* Hamer v. Sidway, 124 N.Y. 538, 544–45, 548–51 (1891) (enforcing a contract between an uncle and his nephew where the uncle promised to pay the nephew if he gave up carousing); *see also* Dahl v. HEM Pharms. Corp., 7 F.3d 1399, 1404–05 (9th Cir. 1993) (discussing *Hamer v. Sidway*).

15. *See* Embry v. Hargadine, McKittrick Dry Goods Co., 105 S.W. 777, 778–79 (1907) (holding that a contract is created if the words used therein would be interpreted as a contract by a reasonable person, regardless of the parties' subjective intentions); s*ee also* Townsend v. Daniel, Mann, Johnson & Mendenhall, 196 F.3d 1140, 1146 (10th Cir. 1999) (discussing *Embry v. Hargadine, McKittrick Dry Goods Co.*).

16. *See* RESTATEMENT (SECOND) OF CONTRACTS § 179 (1981) ("A public policy against the enforcement of promises or other terms may be derived by the court from (a) legislation relevant to such a policy, or (b) the need to protect some aspect of the public welfare . . . ."); *see also* Holzer v. Deutsche Reichsbahn-Gesellschaft, 14 N.E.2d 798, 799–800 (N.Y. 1938) (concluding that a defense of legal compulsion based on the Nazi laws of Germany, in a

legal, courts generally look only for "(1) the existence of a contract, (2) performance by the plaintiff, (3) a breach by the defendant, and (4) damage or loss to the plaintiff."[17] The remainder of this Part addresses the contractarian nature of marriage and family and how it has changed from a state-defined institution to one defined, at least somewhat, by private parties.

B. Marriage and Family: Public Institutions

It is commonly said that courts will not enforce contracts for sex.[18] However, "[o]ur law considers marriage in no other light than as a civil contract."[19] If marriage is a contract, and the state officially condones only marital sex, then marriage is fundamentally a contract for sex. Because marriage is a contract, it must be based on a binding offer and acceptance.[20] No particular words are required to create a marriage contract. It is sufficient that both parties agree to the engagement,[21] so long as they have the legal capacity to enter the contract[22] and it is free from duress or fraud.[23]

Marriage and family are essentially public institutions defined by the state. This may seem counterintuitive insofar as the *privacy* of the family has been used for centuries to shield marital rape and child abuse from criminal and civil sanctions.[24] But families are pub-

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suit by a Jew for wrongful discharge by his German employer, does not violate the public policy of New York).

17. *See, e.g.*, Alpha Telecomms., Inc. v. Int'l Bus. Machs. Corp., 194 F. App'x 385, 389 (6th Cir. 2006).

18. *See* RESTATEMENT (SECOND) OF CONTRACTS § 190 (1981) (declaring unenforceable any promise to "change some essential incident of the marital relationship"); RESTATEMENT (FIRST) OF CONTRACTS § 587 (1932) ("A bargain between married persons or persons contemplating marriage to change the essential incidents of marriage is illegal."); *see also, e.g.*, Roush v. Battin, 30 N.W.2d 453, 454 (Wis. 1947) (holding that "illicit cohabitation"—presumably a euphemism for sex—cannot be consideration for an agreement to marry).

19. WILLIAM BLACKSTONE, BLACKSTONE'S COMMENTARIES: REVISED AND ABRIDGED 300 (Henry Winthrop Ballentine ed., Blackstone Inst., Modern American Law No. 15, 1915).

20. *See, e.g.*, Abdallah v. Sarsour, No. CH-2005-2339, 2006 WL 1134034, at *1 (Va. Cir. Ct. Mar. 20, 2006) (finding that a marriage contract was not void for lack of consideration where there was an offer to marry and an acceptance).

21. *See id.*

22. *See* Moe v. Dinkins, 533 F. Supp. 623 (S.D.N.Y. 1981), *aff'd*, 669 F.2d 67 (2d Cir. 1982) (holding that the state was within its parens patriae power when it determined that minors lacked the capacity to marry); *see also* Lowe v. Quinn, 267 N.E.2d 251 (N.Y. 1971) (holding that an agreement to marry is void as against public policy where one of the parties is already married to a third party and that the agreed marriage is not saved "by the fact that the married individual contemplated a divorce and that the agreement was conditioned on procurement of the divorce").

23. *See, e.g.*, Kuhn v. Marquart, 178 N.W. 428, 428–30 (N.D. 1920) (holding that where the defendant breached his promise to marry, he could rebut the claim with proof that he had been released from the contract by his fiancée's agreement to marry another man).

24. *See, e.g.*, DeShaney v. Winnebago County Dep't of Soc. Servs., 489 U.S. 189, 201 (1989) (holding that the state does not have an affirmative duty to protect a child from harm by his parent, a private individual, even if the state knows of the danger to the child).

lic in the sense that they are publicly defined. Traditionally, "family" meant a heterosexual married couple and their children. When straight couples marry, one set of legal consequences automatically attaches to their union.[25] They do not have to write their own contract specifying what it means to them to be married or which burdens and benefits they intend to assume. The state has defined marriage for them. The state decides who may marry and how those who marry may divorce.[26] And, although marriages are infinitely varied, everyone understands what it means to be "married" without having to inquire, "what sort of marriage are *you* in?" Married means one thing in the eyes of the law.

1. What "Married" Means to the State

At common law, the husband and wife were one person.[27] Marriage subsumed the wife's identity into that of the husband; he owned her property, and only he could represent her in court.[28] Marital rape was not rape, legally speaking,[29] and if she left the marriage, he retained custody of the children.[30] Marriage was a patriarchal man-woman dichotomy. This framework was rigid and did not allow for alternative arrangements—that is, children born out of wedlock

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25. As one scholar has noted,

> Perhaps the most significant way the law traditionally regulated intimate behavior was by distinguishing sharply, in virtually all important contexts, between married persons and persons in nonmarital intimate relationships. Through laws criminalizing adultery, fornication and nonmarital cohabitation, the law carved out marriage as the only legitimate arena for sexual intercourse. Tort causes of action for enticement, alienation of affections and criminal conversation penalized third parties who intentionally interfered with the marriage relationship; loss of consortium claims protected husbands (and later wives) against those who negligently impaired marital relations. No similar doctrines protected nonmarital intimate relationships from deliberate or negligent third party impairment.

Jana B. Singer, *The Privatization of Family Law*, 1992 WIS. L. REV. 1443, 1447 (citations omitted).

26. Marjorie Maguire Shultz (among others) has made this same observation and highlighted the irony that "precisely in that zone where exclusion of contractual principles is justified on the ground that family life is too 'private' for legal intervention, there we impose standardized public content about the expectations and obligations of intimacy." Marjorie Maguire Shultz, *The Gendered Curriculum: Of Contracts and Careers*, 77 IOWA L. REV. 55, 60 (1991).

27. *See* BLACKSTONE, *supra* note 19, at 304.

28. *See id.*; *see also* Fleming v. Griswold, 3 Hill 85, 85–87 (N.Y. Sup. Ct. 1842) (holding that a wife's inability to sue due to coverture did not prevent the statute of limitations from running against her).

29. *See* CATHARINE A. MACKINNON, SEX EQUALITY 856 (Found. Press 2001) (explaining that under the marital rape exception "no amount of force and explicitness of nonconsent makes particular sex acts into rape").

30. *See id.* at 554 (noting the rule granting custody only to fathers, which was replaced with the presumption that the mother would win custody, which was replaced with the best interests doctrine).

were denied the benefits of "legitimate" children.[31] The wife could not be the dominant partner within a marriage, nor could husband and wife establish equal roles. Neither wife and wife nor husband and husband could fit themselves into the established mold. This latter restriction still applies in most states.[32]

Today the publicly defined marriage contract is far less rigid and also far less sexist. Women are legally independent of their husbands, and the marital rape exception has been largely abolished.[33] Marriage also entails numerous rights and benefits for the couple. The following is a representative list, compiled by Professor William Eskridge:

- The right to receive, or the obligation to provide, spousal support, and (in the event of separation or divorce) alimony and an equitable division of property
- Preference in being appointed the personal representative of an intestate decedent . . .
- Priority in being appointed guardian of an incapacitated [spouse] or in being recognized as [making health-care decisions for that spouse]
- All manner of rights relating to the involuntary hospitalization of the spouse, including the right to petition, the right to be notified, and the right to initiate proceedings leading to release
- The right to bring a lawsuit for the wrongful death of the spouse and for the intentional infliction of emotional distress through harm to one's spouse
- The right to spousal benefits statutorily guaranteed to public employees, including health and life insurance and disability payments, plus similar contractual benefits for private sector employees
- The right to invoke special state protection for "intrafamily offenses"
- The right to visit one's spouse on furlough while incarcerated in prison
- The right to claim an evidentiary privilege for marital communications
- A presumption of joint ownership of real estate as a tenancy in common and a right not to be held to a mortgage or assignment of rights to creditors without the spouse's written permission

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31. *See id.* at 577 (quoting 1 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAW OF ENGLAND 434 (Chicago Press 1979) (1765–69)) (noting that children were "of two sorts, legitimate, and spurious, or bastards").

32. *See supra* note 4.

33. *See* Mustafa K. Kasubhai, *Destabilizing Power in Rape: Why Consent Theory in Rape Law Is Turned on Its Head*, 11 WIS. WOMEN'S L.J. 37, 58–59 (2006) ("Today, most jurisdictions have either restricted this marital rape exemption or abolished it.").

- A right to priority in claiming human remains and to make anatomical donations on behalf of the deceased spouse
- Various inheritance rights, including priority in inheriting the property of an intestate decedent, the right to a family allowance, and the right to dower
- The right for one's non-American spouse to qualify as an "immediate relative" (i.e., receive preferential immigration treatment) and become an American citizen under federal law
- The right to receive additional Social Security benefits based on the spouse's contribution
- Survivor's benefits on the death of a veteran spouse[34]

It goes without saying that, insofar as gay marriage is illegal in most states, these rights are denied to same-sex couples unless they can establish them privately through contract.

2. The Marital Presumption

Marriage also entails the presumption that the husband is the father of the wife's children.[35] At common law, and in many states by statute, this presumption was irrebutable.[36] It persisted despite any evidence to the contrary and, in effect, created a contract theory of parenthood. If you married a woman, you agreed to be the father of her child, even if he did not look like you.[37] As with the marriage contract generally, parties were not allowed to alter the terms of the marital presumption.[38]

> Traditionally, by agreeing to enter into that status, husband and wife were agreeing to support and raise any children born to the marriage. Because husband and wife agreed to raise children, they were bound to be father and mother, regardless of whether the children born to the marriage were biologically related.[39]

Genetic testing has chipped away at adherence to the marital presumption, and courts and legislatures have begun releasing husbands from their parental status where they have established that

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34. ESKRIDGE, *supra* note 10, at 66 (footnotes omitted).

35. *See* Goodright v. Moss, (1777) 98 Eng. Rep. 1257, 1258 (K.B.) (stating Lord Mansfield's Rule presuming that a mother's husband is the father of all children born to her during the marriage).

36. *See* Michael H. v. Gerald D., 491 U.S. 110, 119–21 (1989) (upholding California's "conclusive presumption" that a child born into an intact marriage is the legal child of the mother's husband).

37. *See id.*

38. *See* Baker, *supra* note 9, at 12 ("[F]or most intents and purposes, the marital presumption of the husband's paternity was irrebuttable."). "Marriage is a contract to be together and regardless of whether the wife was also 'together' with someone else, she is still in a unit with the husband." *Id.* at 24.

39. *Id.* at 25.

they have no genetic link to their wives' children.[40] Still, the assumption that the husband is the father persists in the law.[41] The marital presumption suggests that parentage is more about functioning as a parent than it is about a biological connection to the child. This is true at least insofar as being married to a child's mother suggests the intent to share her life and help rear her children. Indeed, some courts have begun to recognize the "de facto parent" doctrine, which focuses on the fact of acting like a parent rather than on a genetic link with a child.[42]

Broadly speaking, the marital presumption and the de facto parent doctrine both rely on the traditional marriage contract to determine parentage. The former does so explicitly. The latter looks to marriage as a model: if the relationship looks like a marriage and the parties are rearing a child together, some courts will infer a parental relationship. Furthermore, just as the marital contract provides an example upon which courts have built the de facto parent doctrine, marriage can also provide an example upon which nontraditional families can build. But first, they need the right to make changes to the traditional variety.

C. Modifications to the Marriage Contract

1. Premarital Agreements

The state-defined marriage contract was inflexible until the early 1970s, when courts began recognizing both no-fault divorce and premarital agreements determining property disposition upon divorce, rather than just upon the death of one spouse.[43] These changes gave couples some freedom to modify the traditional marriage contract, at least as it applied to property and finances. Still, the state maintains control over premarital agreements by engaging in some level of substantive review of their terms instead of taking a hands-off approach to enforcement, as a court would do with a commercial contract. The American Law Institute (ALI) explains why this is:

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40. *See* Elizabeth Bartholet, *Guiding Principles for Picking Parents*, 27 HARV. WOMEN'S L.J. 323, nn.4–5 (2004) (listing cases).

41. *See* Baker, *supra* note 9, at n.47 (noting that California has codified the common law marital presumption and that all states, by statute or common law, have at least a rebuttable presumption that a husband is the father of his wife's children).

42. *See, e.g.*, V.C. v. M.J.B., 748 A.2d 539, 549–50 (N.J. 2000) (holding that a biological mother's former partner had standing to seek custody as the children's "psychological parent" and listing cases where other courts had recognized such nonbiological parents). *See generally id.* at 542–46 (more thoroughly discussing the de facto parent doctrine).

43. *See, e.g.*, Gant v. Gant, 329 S.E.2d 106, 111 (W. Va. 1985) (enforcing a premarital agreement in which the wife waived alimony even though she was not represented by independent counsel); *see also* Katharine B. Silbaugh, *Marriage Contracts and the Family Economy*, 93 NW. U. L. REV. 65, 72 (1998) (discussing premarital agreements). *See generally* Singer, *supra* note 25, at 1470–74 (discussing the development of no-fault divorce in law).

> The traditional defenses to enforcement [of premarital contracts] are justified by two general limitations to the bargain principle that have particular relevance to premarital agreements. First, the bargain principle assumes that the parties themselves are the best judges of their own self-interest, and thus of whether a bargain's terms are advantageous to them. . . . Second, the law's willingness to enforce a bargain presupposes that it does not contain terms that violate other important public policies.[44]

As to the first limitation, premarital agreements often involve (1) unrealistic optimism about the future of the relationship and (2) the tendency to discount the importance of contractual terms that would apply only in the event of divorce.[45] As to the second limitation, the ALI envisions that enforcement of premarital agreements is likely to violate public policy in particular situations, for example, where a child has been born during the marriage.[46] In these situations, the ALI recommends that such agreements be reviewed for substantial injustice, but only when the party resisting enforcement requests such review. Thus, although under the ALI principles such agreements would receive a more searching review than the standard commercial contract, there is still room for far more contractual freedom than couples enjoyed prior to the acceptance of such agreements. The level of review recommended by the ALI for premarital agreements provides a preview for how courts review family agreements between same-sex couples. There, too, courts engage in substantive review, although for somewhat different reasons and with different results.

2. Surrogacy Agreements

Surrogacy agreements are controversial, but the law surrounding these arrangements offers critical guidance for parties attempting to establish parental status by contract, because a surrogacy agreement is, in essence, a contract for parental status. If drafted properly, such agreements should create enforceable parental status. This subpart discusses the law of surrogacy, how it tends to prefer biological parents to nonbiological parents (at least where one biological relation-

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44. PRINCIPLES OF THE LAW OF FAMILY DISSOLUTION § 7.05 cmt. a (2002).

45. *Id.* at 986.

46. *Id.* at 985. See also *id.* at § 7.05(2)(a)–(c), recommending that courts should engage in substantive review of such agreements

> if, and only if, the party resisting its enforcement shows that one or more of the following have occurred since the time of the agreement's execution:
> (a) more than a fixed number of years have passed, that number being set in a rule of statewide application;
> (b) a child was born to, or adopted by, the parties, who at the time of execution had no children in common;
> (c) there has been a change in circumstances that has a substantial impact on the parties or their children, but when they executed the agreement the parties probably did not anticipate either the change, or its impact.

ship clearly exists), and how surrogacy agreements should be treated, as well as how they can be used by parents attempting to create parental status by contract.

According to the Uniform Parentage Act of 2002, approximately half of the states have statutory or case law on the legality of surrogacy.[47] About half of those states recognize such agreements, and the other half reject them.[48] Two cases described below illustrate the major divisions over the issue.[49] There are two types of surrogacy. *Traditional surrogacy* involves a surrogate woman being inseminated with a man's sperm (generally the male member of the couple that intends to become the child's parents) and then surrendering her rights to her genetic child to the intended parents. Traditional surrogacy is more controversial than *gestational surrogacy*, where an embryo (typically created from the egg and sperm of the couple intending to become parents) is implanted in the surrogate's womb. In gestational surrogacy, the surrogate is not genetically related to the child, but a gestational surrogate still has a parental claim to the child and still must surrender her rights to the child before the intended parents may establish parental status and custody.

Though the law is unsettled, courts seem more willing to enforce gestational surrogacy agreements than traditional surrogacy agreements.[50] This seems to be because in gestational surrogacy the surrogate is not surrendering rights to her *genetic* child. In other words, she is not what we think of as a "biological parent," even though she gave birth to the child. This fits with the biological basis for parental status that pervades much of family law, but, as discussed below, it works unfairness on nonbiological parents and often ignores the bond between gestational mother and child.

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47. *See* UNIF. PARENTAGE ACT art. 8, cmt. (amended 2002).

48. *See id.*

> A survey in December, 2000, revealed a wide variety of approaches: eleven states allow gestational agreements by statute or case law; six states void such agreements by statute; eight states do not ban agreements per se, but statutorily ban compensation to the gestational mother, which as a practical matter limits the likelihood of agreement to close relatives; and two states judicially refuse to recognize such agreements. In states rejecting gestational agreements, the legal status of children born pursuant to such an agreement is uncertain. If gestational agreements are voided or criminalized, individuals determined to become parents through this method will seek a friendlier legal forum. This raises a host of legal issues. For example, a couple may return to their home state with a child born as the consequence of a gestational agreement recognized in another state. This presents a full faith and credit question if their home state has a statute declaring gestational agreements to be void or criminal.

Id.; *see also* J.F. v. D.B., 66 Pa. D. & C.4th 1, 12–16 (Ct. Com. Pl. 2004) (discussing the variety in state surrogacy law).

49. *Compare* Johnson v. Calvert, 851 P.2d 776 (Cal. 1993), *with In re* Baby M., 537 A.2d 1227 (N.J. 1988).

50. *See supra* note 48.

(a) Gestational Surrogacy

In the California case *Johnson v. Calvert*,[51] a married couple entered a contract with a surrogate to carry their genetic embryo (the husband's sperm and the wife's egg) in the surrogate's womb.[52] When the baby was born, the surrogate, Anna, tried to renege on the deal, claiming that she was the "natural" mother. The court found that "[b]ecause two women each have presented acceptable proof of maternity, we do not believe this case can be decided without enquiring into the parties' intentions as manifested in the surrogacy agreement."[53] Based on those intentions, the court held that the genetic parents were to have custody of the child.[54]

> [The husband and wife] affirmatively intended the birth of the child, and took the steps necessary to effect in vitro fertilization. But for their acted-on intention, the child would not exist. Anna agreed to facilitate the procreation of Mark's and Crispina's child. The parties' aim was to bring Mark's and Crispina's child into the world, not for Mark and Crispina to donate a zygote to Anna. Crispina from the outset intended to be the child's mother. Although the gestative function Anna performed was necessary to bring about the child's birth, it is safe to say that Anna would not have been given the opportunity to gestate or deliver the child had she, prior to implantation of the zygote, manifested her own intent to be the child's mother. No reason appears why Anna's later change of heart should vitiate the determination that Crispina is the child's natural mother.[55]

Of course, one reason *does* appear, which explains why Anna's later change of heart might vitiate the determination that Crispina is the child's "natural mother": Anna carried the child to term. But instead of addressing whether the gestational mother's claim might be superior to the genetic mother's, the court simply calls the two claims to motherhood a draw and looks to intent to break the tie. This is the appropriate outcome of this case, but it is worth considering whether the genetic connection merits the priority it is often given.

Prioritizing genetics over gestation is another way of prioritizing biology over conduct. But the gestational mother is intimately connected to the child in a way that a genetics-only mother (or any father) will never be. The gestational mother's conduct throughout the pregnancy has a direct impact on the child's health and well-being. These considerations no doubt play a large part in the law's discomfort with surrogacy. But, to the extent that courts explicitly attribute

51. 851 P.2d 776 (1993).
52. *Id.* at 778.
53. *Id.* at 782.
54. *Id.*
55. *Id.*

that discomfort to any aspect of surrogacy, they tend to attribute it to the fact that the surrogate is giving up a child who is not genetically related to her, not the fact that she is giving up a child with whom she has shared an intimate prenatal relationship.[56] In other words, courts tend to emphasize biology (genetics) over conduct (gestation) in assigning parental rights.

A New York case following *Johnson v. Calvert* challenges this understanding. Citing *Johnson*, *McDonald v. McDonald*[57] held that the gestational mother, not the egg donor, was the parent because that was the parties' manifest intent.[58] *McDonald* underscored the fact that *Johnson* avoided the issue of who has the preferred claim to motherhood when the gestational mother is not the genetic mother. Both cases focused instead on the parties' manifest intentions, and this focus aligns them with traditional contract doctrine.

But lower California courts have limited the scope of *Johnson v. Calvert* to cases where there are multiple claims to a biological relationship, so that biology does not conclusively determine parentage.[59] Where biology is clear (that is, in traditional surrogacy arrangements where only one woman has a claim as the "natural" mother), such cases hold that it is unnecessary to look to the parties' intentions to determine parenthood. In such cases, biology controls.

(b) Traditional Surrogacy

Likewise, in the famous case of *Baby M.*,[60] biology helped determine the outcome. In that case, the New Jersey Supreme Court held that a traditional surrogacy agreement was unenforceable. In *Baby M.*, there was only one biological mother—the surrogate—and she challenged the agreement after her child was born. The court refused to terminate the surrogate mother's *parental rights* without her consent but still granted *custody* to the intended parents—the biological father and his wife—because, the court determined, that was in the child's best interests. This case highlights the distinction in the law between using biology to determine parental *status* while using the

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56. *See, e.g.*, 7 SAMUEL WILLISTON & RICHARD A. LORD, A TREATISE ON THE LAW OF CONTRACTS § 16:22 (4th ed. 1999).

57. 608 N.Y.S.2d 477 (App. Div. 1994).

58. *Id.* at 480.

59. *See In re* Marriage of Moschetta, 30 Cal. Rptr. 2d 893, 900 (4th Dist. 1994); *see also* Kristine Renee H. v. Lisa Ann R., 16 Cal. Rptr. 3d 123, 133–36 (Dist. Ct. App. 2004), *rev'd on other grounds*, 37 Cal. 4th. 156 (2005) (citing *Moschetta*, 25 Cal. App. 4th at 1231) (*Johnson* does not "endorse contractual stipulations of parentage based on the parties' intentions without regard to the [California Parentage] Act. In those cases the court looked at the parties' intent as a part of the interpretation and application of the Act. Only when the Act was unclear or yielded an ambiguous result did the courts consider intent to determine parentage.").

60. *In re* Baby M., 537 A.2d 1227 (N.J. 1988).

best-interests analysis to make decisions regarding *custody*.

The *Baby M.* court held that the traditional surrogacy agreement violated state statutes regarding surrender of parental rights and the state policy of keeping children with their "natural" parents.[61] The New Jersey statutes governing surrender of parental rights provide that parental rights cannot be terminated without either a declaration of parental unfitness or voluntary surrender of the child to a state agency.[62] In the case of voluntary surrender, the law requires formality: the biological parent must give written consent to ensure that the surrender is knowing and voluntary and that the biological parent has received counseling and is well informed about what she is giving up. None of that formality was present in the surrogacy agreement at issue in *Baby M.* But the court was even more concerned about the role of money in the contract—the court found a profit motive in the agreement that was akin to criminal babyselling.[63]

Both of these problematic aspects of the surrogacy agreement—the lack of formality (which led the court to fear that the agreement took advantage of a vulnerable woman not fully informed of her rights) and the profit motive (which violated the state's policy against babyselling)—could have been addressed by proper drafting of the agreement. Why not require such agreements to include provisions that fully inform the surrogate mother of her rights and ban provisions treating the agreement as a commercial transaction (no premiums allowed)? (This seems to have been the way the contract in *Johnson* was written, which may have contributed to the court's willingness to enforce it.) If the court is willing to operate within the framework of contract law, there should be little problem with enforcing a surrogacy agreement—particularly one that looks like an adoption agreement, which is what the contract just described would look like. To be more specific, such an agreement should be enforceable so long as it fully informs the biological parent of what is involved in terminating her parental rights, it does not pay a premium for termination of rights, and it provides for a window after the baby is born during which the parent can change her mind.

But the court in *Baby M.* was not willing to operate within the contract framework (perhaps primarily because of the problems with the contract in question). The court was also concerned about upholding New Jersey's public policy of keeping children with their natural

61. *Id.* at 1243.

62. *See id.* ("Our statutes, and the cases interpreting them, leave no doubt that where there has been no written surrender to an approved agency or to DYFS, termination of parental rights will not be granted in this state absent a very strong showing of abandonment or neglect. . . . It is clear that a 'best interests' determination is never sufficient to terminate parental rights; the statutory criteria must be proved.").

63. *See id.* at 1240.

parents.[64] Again, when the question is one of parental status (as opposed to custody), the court relies on biology, not conduct or parental intent. The court's explanation for this policy focused on the emotional drama of the case at hand (and the "tug-of-war" between the biological parents) without discussing the theoretical underpinnings of the law's preference for biological parents. Indeed, the court's primary concern seemed to be the defects in the surrogacy agreement, which, as discussed above, are solvable through careful drafting.

(c) "Surrogacy" Without Technology

The above cases involved the use of reproductive technology, such as in vitro fertilization and artificial insemination. In the absence of such technology, courts are even less likely to enforce a surrogacy agreement that cuts against a biological relationship with a child. For example, *Budnick v. Silverman*[65] held that a contract between a "sperm donor" and an infertile couple was unenforceable because the sperm was donated "the old-fashioned way," without the assistance of reproductive technology.[66] The sperm donor was allowed to assert his parental rights despite the existence of a preconception agreement signing away those rights.[67] Still, it is important to note that biology does not always carry the day, even when only one parent can claim a biological relationship. In *N.A.H. v. S.L.S.*,[68] the wife/mother conceived a child out of wedlock and the biological father sued to have his paternity established.[69] Rather than rule conclusively that fatherhood is determined either by biology or by a marital relationship with the mother, the appellate court remanded with instructions that a best-interests-of-the-child analysis should determine legal paternity.[70]

The uncertainty in surrogacy law (and, in particular, its tendency to rely on biology in assigning parental status) creates unfair distinctions among parents. Only couples who can afford in vitro fertilization of their own embryo in a gestational surrogate's womb have a

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64. *See id.* at 1246–47 ("The surrogacy contract guarantees permanent separation of the child from one of its natural parents. Our policy, however, has long been that to the extent possible, children should remain with and be brought up by both of their natural parents.").

65. 805 So. 2d 1112 (Fla. 4th DCA 2002).

66. *Id.* at 1114.

67. *Id.*

> Florida courts have held that agreements relieving a parent of the duty to support are void as against public policy. . . . The rights of support and meaningful relationship belong to the child, not the parent; therefore, neither parent can bargain away those rights. . . .
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> . . . The total abdication of parental responsibility present in the instant Preconception Agreement cannot be said to protect the best interests of the child.

Id. at 113–14.

68. 9 P.3d 354 (Colo. 2000).

69. *Id.* at 357-58.

70. *See id.* at 362.

(relatively) good chance of having their surrogacy agreements enforced. Those who can only afford traditional surrogacy and couples where one member is sterile likely will not receive the same protection for their agreements.

This distinction works the greatest unfairness among gay couples—gay men, in particular. Whereas lesbian couples potentially can have the egg of one (fertilized by the sperm of an anonymous donor) implanted in the womb of the other, such that both women have a biological claim to parenthood, gay men must rely on a third party to carry their child. Even if they use an anonymous egg donor, so that the gestational mother cannot claim a genetic relationship, courts likely will grant parental rights to that gestational mother if she reneges on a surrogacy agreement.[71] Her rights as a gestational mother, though perhaps deemed inferior (or at best equal) to the rights of a genetic mother, will trump the rights of intended parents with no biological connection at all.

D. Private Ordering of Family Relationships

When unmarried couples use contract to attempt to create family ties that are as tight as those created by marriage, courts tend to leave objective contract theory and engage in substantive review of contract terms, with widely varying outcomes. Whether considering an *implied contract* for parental rights between same-sex partners, an *equitable claim* to such rights by the nonbiological parent in a custody dispute, or an *express agreement* between partners, courts, on average, tend to disregard the preconception intent of the parties and favor the biological parent. Even where courts nominally follow the intent of the parties, they do so only where it is in the best interests of the child, as determined by the court, thus conflating the rules for establishing parental *status* with those for determining *custody*.

1. Establishing Parental Status by Statute

Theoretically, there could be no legal difference between someone who establishes parental status by procreating and someone who establishes parental status by contract, where all else between them is the same. This is controversial. Many argue that nonbiological parents are incapable of the same attachments that biological parents

71. *See, e.g.*, J.F. v. D.B., 66 Pa. D. & C.4th 1, 22–24 (Pa. Com. Pl. 2004) (holding a gestational surrogacy agreement void as against public policy because it did not provide for a legal mother and it allowed the parties to bargain away the children's custody and support rights and finding gestational mother to be the legal mother because of her actions as a parent); *see also* Jaycee B. v. Superior Court, 49 Cal. Rptr. 2d 694, 701 (Ct. App. 1996) (holding where neither intended parent had a biological connection to the child, surrogate mother probably could have challenged the surrogacy agreement to retain her parental rights).

have with their children. But generally speaking, we do not question the love that adoptive parents have for their children. And we do not question the fact that many biological parents do not intend to become parents or are bad parents. This Article merely attempts to put contractual parents on the same footing as biological and adoptive parents. It does not intend to denigrate the fierce attachments that biological parents have to their children. It does, however, argue that nonbiological parents may have the same fierce attachments to *their* children.

But the law treats these parents very differently. Statutorily, the law generally recognizes only two kinds of legal parents: natural parents and adoptive parents.[72] Biological parents may petition courts to establish parentage *without a best-interests analysis*.[73] In other words, a biological parent may establish parental status even if it is not in the child's best interests. Adoptive parents, however, are not awarded parental status without a searching inquiry into whether they would make good parents.[74] Furthermore, the revised Uniform Parentage Act calls for recognition of *gestational* surrogacy agreements only and allows for establishment of parental status under such agreements where those agreements have been validated by a court.[75] Many states that recognize surrogacy agreements similarly limit the establishment of parental status to intended parents who are biologically related to the child.[76]

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72. *See* UNIF. PARENTAGE ACT § 1 (1973) ("As used in this Act, 'parent and child relationship' means 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. It includes the mother and child relationship and the father and child relationship."). Several states have adopted language similar to that of the uniform statute. *See, e.g.*, 750 ILL. COMP. STAT. ANN. 45/1 (West 2006).

73. *See* J.S.A. v. M.H., 797 N.E.2d 705, 708–09 (Ill. App. Ct. 2003) (finding that the court was statutorily prohibited from conducting a best-interests hearing to determine whether the adjudication of parentage was in the child's best interests).

74. *Compare* 750 ILL. COMP. STAT. 45/11 (2006) (providing for a court determination of parentage based only on biology), *with* 750 ILL. COMP. STAT. 50/20a (2006) ("The best interests and welfare of the person being adopted shall be of paramount consideration in the construction and interpretation of [the Adoption Act]."); *see also* Steven N. Peskind, *Who's Your Daddy?: An Analysis of Illinois' Law of Parentage and the Meaning of Parenthood*, 35 LOY. U. CHI. L.J. 811, 815-16 (2004) ("Pervasive notions of children's interests that permeate the Illinois Marriage and Dissolution of Marriage Act and the Adoption Act are conspicuously absent from statutory provisions that determine who should be afforded the opportunity to parent a child.") (citations omitted).

75. *See* UNIF. PARENTAGE ACT § 801 (amended 2002) (providing for recognition of gestational surrogacy agreements); *id.* art. 6 (granting standing to maintain a parentage proceeding to intended parents under a gestational agreement authorized by article 8).

76. *See* 750 ILL. COMP. STAT. § 45/6 (2007).

2. Implied Contracts and Equitable Doctrines: The De Facto Parent

Some courts have held that nonbiological parents may assert at least limited parenting rights by virtue of having acted as a "psychological parent" or "de facto parent" of the child. De facto parent cases invoke equitable and implied-contract theories similar to those first recognized in *Marvin v. Marvin*,[77] which held in part that "[i]n the absence of an express contract, the courts should inquire into the conduct of the parties to determine whether that conduct demonstrates an implied contract, agreement of partnership or joint venture, or some other tacit understanding between the parties."[78] Often in de facto parent cases, the nonbiological parent is simply granted standing to sue for *custody*, not full parental *status*.[79] These cases seem to fragment what it means to be a parent, granting some rights but not full parental status to the nonbiological parent. In some sense, then, these cases challenge what it means to be a parent in the first place. The same thing arguably happens in a custody dispute between biological parents, but there, neither parent has the lack of a biological connection acting as a strike against custody. Some would argue that parenting is more of an all-or-nothing proposition and that splitting up the bundle of parenting rights as though they were property rights violates due process.[80]

Where a court *does* grant parental status to a de facto parent, it may fall back on biology to do so. This Part analyzes a variety of de facto parent cases—both those that do and do not adopt the doctrine of the de facto parent—and then discusses how the de facto parent doctrine supports this Article's argument for enforcing contracts that establish parental status.

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77. 557 P.2d 106 (Cal. 1976).

78. *Id.* at 110.

79. *See, e.g.*, *In re* Guardianship of Olivia J., 84 Cal. App. 4th 1146, 1152 (Ct. App. 2000) (holding that the former same-sex partner of a biological mother could file a petition for guardianship of the mother's child); *In re* E.L.M.C., 100 P.3d 546 (Colo. Ct. App. 2004) (holding that a former same-sex partner had standing, as a psychological parent, to petition for equal parenting time after the relationship ended, even though the former partner had no legal relationship to the child or the mother); King v. S.B., 837 N.E.2d 965 (Ind. 2005) (holding former same-sex partner not necessarily precluded from being awarded parental rights and responsibilities with respect to the biological mother's child, conceived through artificial insemination during the parties' domestic relationship); Gestl v. Frederick, 754 A.2d 1087 (Md. Ct. Spec. App. 2000) (finding that the biological mother's former same-sex partner had standing to bring a custody suit under the Uniform Child Custody Jurisdiction Act because she held herself out to others as the child's parent); C.E.W. v. D.E.W., 845 A.2d 1146 (Me. 2004) (holding that the former partner of a biological mother was entitled to be considered for an award of parental rights and responsibilities where the trial court found that she was the child's de facto parent).

80. *See generally* Emily Buss, *"Parental" Rights*, 88 VA. L. REV. 635, 662–63 (2002) (discussing parental rights and the Due Process Clause).

An unusually pertinent example of the de facto parent doctrine is in *K.M. v. E.G.*[81] There, the California Supreme Court recognized that two women who had formerly been a lesbian couple—one of whom donated her ova to be fertilized and implanted into the womb of the other—were the parents of twins born to them.[82] The women disputed what they had agreed upon regarding parental rights prior to conceiving the twins.[83] E.G., the gestational mother, claimed they agreed that she would be the sole parent and that she had only agreed to be implanted with K.M.'s ova on the condition that K.M. relinquish her parental rights.[84] An ova donor consent form signed by K.M., which explicitly stated she was relinquishing all rights in any child conceived, supports this view.[85] K.M., on the other hand, claimed they agreed to raise the children together and that she only read the donor consent form minutes before signing it (and only signed it because she thought it was a formality required before donating her eggs).[86] The couple's later conduct—they lived together with the children, and both women supported the children[87]—supports this view.

In reaching its decision that both women were parents, the court relied on *Johnson v. Calvert*, the *in vitro* fertilization case discussed above,[88] and on provisions of the Uniform Parentage Act regarding presumptions of paternity. The court concluded that " 'genetic consanguinity' could be the basis for a finding of maternity just as it is for paternity."[89] Thus, the court relied in part on the biological relationship between K.M. (the ova donor) and the children and in part on the parties' conduct after the twins were born, treating this conduct as a sort of implied intent. There was considerable evidence that K.M., the genetic mother, had acted for years as a de facto parent, although neither of the women revealed to family and friends that she was genetically related to them.[90]

> Before the twins were born, some friends held a baby shower honoring both E.G. and K.M. After the birth, E.G. and K.M., as a couple, received other congratulatory cards and gifts. But E.G. never revealed to her friends or family that K.M. was the egg donor. Nor did K.M. disclose that she was genetically related to the

81. 117 P.3d 673 (Cal. 2005).
82. *Id.* at 680–81.
83. *Id.* at 679.
84. *See id.*
85. *See id.* at 676.
86. *See id.*
87. *See id.* at 676–77.
88. *See infra* Part I.C.2.a.
89. *K.M.*, 117 P.3d at 678 (quoting Johnson v. Calvert, 851 P.2d 776, 781–82 (1993)).
90. *See* K.M. v. E.G., 13 Cal. Rptr. 3d 136, 141–42 (Ct. App. 2004).

> children, even though the children came to refer to K.M.'s parents as "Granny" and "Papa."
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> . . . E.G. listed K.M. as a "co-parent" on the school enrollment forms. However, it was E.G. who signed the enrollment forms and paid the preschool tuition. Both E.G. and K.M. took the children to pediatric appointments. However, they never revealed to the children's pediatrician that K.M. was genetically related to the girls.
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> . . . K.M. and E.G. then continued to live together until August 2001, when E.G. moved with the girls to Massachusetts. E.G. listed K.M. as a parent on the Massachusetts school forms. K.M. and E.G. each paid half the tuition for the Massachusetts school.[91]

The court distinguished this case from the true egg donation case where the donor is not known by the intended parents and has no later relationship to the child.[92] The reasoning here seems to be, if it looks like a family and acts like a family, we're going to treat it as a family. Of course, this reasoning ignores whether K.M. and E.G. *subjectively* wanted to be a family. But, from a contracts point of view, that might be justifiable: the facts regarding intent were in dispute, so the court looked to the objective manifestation of intent, namely that K.M. and E.G. were raising the children in their home as parents. That, coupled with K.M.'s genetic relationship to the children, was enough to call her a parent. Of course, this objective manifestation of intent assumes there is general agreement on what counts as a family, which is admittedly a big assumption. In both *K.M.* and *Johnson*, the courts seem driven to create family units with two parents. *Johnson* looked to the parties' intent to create a family composed of a married couple and a baby; *K.M.* looked to biology and the conduct of the parties to create a family composed of two mothers and their babies. E.G. might argue that it's unnecessary for children to have two parents, if that's not what the parties wanted in the first place. But K.M. might respond that E.G.'s conduct suggests otherwise.

From a strictly contractarian perspective, it may be impossible for a court to determine the actual terms of agreement or even whether there was a meeting of the minds at all, when facts are as heavily disputed as they are in *K.M.* Indeed, *K.M.* reversed a decision by the California Court of Appeal, which had ruled in favor of the gestational mother. The lower court had based its decision on the ova donor consent form K.M. had signed, relinquishing her parental rights to the twins. The lower court's decision prioritized the ova donor

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91. *Id.*

92. *K.M.*, 117 P.3d at 679 ("Thus, even accepting as true E.G.'s version of the facts (which the superior court did), the present case, like *Johnson,* does not present a 'true "egg donation" ' situation. K.M. did not intend to simply donate her ova to E.G., but rather provided her ova to her lesbian partner with whom she was living so that E.G. could give birth to a child that would be raised in their joint home.") (quoting *Johnson*, 851 P.2d at 782).

form—an *express* agreement—over the *implied* agreement between the couple to raise the children together. The supreme court's opinion represents the better view. The terms of the ova donor form were ambiguous as applied to these parties, because K.M. was not an anonymous donor. The later conduct between the parties spoke more strongly of an implied agreement to be parents.

In *Kristine Renee H. v. Lisa Ann R.*,[93] the court rejected an express parenting agreement between the parties but established parenting rights in the nonbiological parent anyway based on the presumed parent doctrine (which is equivalent to the de facto parent doctrine).[94] The presumed parent doctrine, codified in the California Family Code,[95] was drafted to address issues of uncertain paternity—its purpose was to establish paternity in one who takes a child into his home and openly holds out the child as his own. Cases like *Kristine Renee H.* have held that the presumption applies to women as well as men, based on a gender-neutral reading of the statute. Thus, a presumption that was intended to track biology (much like the marital presumption—if you're holding out a child as your own, chances are that child *is* your own) was extended to cover de facto parents, regardless of biology.

In rejecting a parenting agreement but finding parental status based on the presumed parent doctrine, *Kristine Renee H.* represents a clear preference by the California courts: they prefer to take the time to investigate the conduct of the parties rather than to defer to a contract between them. Perhaps this represents the wise use of caution in a new area of law—that regarding reproductive technology. But this judicial preference for hands-on decision making can also be seen as encroachment: it brings parental status cases involving de facto parents within the realm of the best-interests doctrine. As they do in custody cases, family courts are imposing their own norms on de facto parent cases, rather than leaving things to the parents themselves as they tend to do in parentage cases where biological parents are involved.

In a larger number of cases, however, courts have ignored any implied contract between the parties and declined to invoke equitable doctrines in favor of the nonbiological parent. Often, these

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93. 16 Cal. Rptr. 3d 123 (Ct. App. 2004), *rev'd on other grounds*, 117 P.3d 690 (Cal. 2005). *Kristine Renee H.* is also discussed in Part I.D.3, *infra*, which addresses judicial acceptance of express parenting agreements.

94. *Kristine Renee H.* distinguished *Johnson v. Calvert* (which, you will recall from the previous Part, upheld a parenting agreement where biology was ambiguous) in holding that, where biology is clear, there can be no resort to a contract for parenting rights. 16 Cal. Rptr. 3d at 133–34; *see also supra* Part I.C.2.

95. *See* CAL. FAM. CODE § 7611 (West 2006).

courts find that there is no statutory authority to grant rights to a same-sex parent.[96]

For example, in *State ex rel D.R.M.*,[97] the biological mother's partner left her shortly before she discovered their efforts at artificial insemination had been successful. The *D.R.M.* court held that the ex-partner was not a parent because she was not biologically related to the child and had not adopted the child.[98] The court declined to create an "intended parent" or "partial parent" who would owe child support but not gain any other parental rights.[99] This case contrasts sharply with *K.M. v. E.G.* This case also diverges from those in which the de facto parent doctrine is used to fragment parenting rights.[100] The court held strictly to the statutory requirements for establishing parental status. *D.R.M.* explained that the outcome would have been the same if the ex-partner were a man not married to the mother or a stepparent who later divorced the mother.[101] The court rejected a promissory estoppel claim by the biological mother because it found that both parties had understood that for the ex-partner to have any rights, the arrangement would have had to proceed to an adoption.[102] The exchange had to be completed on both sides. No adoption meant no child support. Furthermore, the court concluded that the biological mother would have had the child with or without the ex-partner, so there was no reliance.[103]

In *T.F. v. B.L.*,[104] the Massachusetts court held that there was an implied contract between the mother and her former domestic partner, but that the contract was unenforceable because

> [t]he 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." "Parenthood by contract" is not the law in Massachusetts, and, to

96. *See, e.g.*, Kazmierazak v. Query, 736 So. 2d 106, 110 (Fla. 4th DCA 1999) (holding an alleged psychological parent lacked a parental status equivalent to a biological mother and was not entitled to custody or visitation over the objection of the biological mother); Liston v. Pyles, No. 97APF01-137, 1997 WL 467327, at *3 (Ohio Ct. App. 1997) (affirming the dismissal of a nonbiological mother's complaint for child support and motion for temporary visitation). *But see* Elisa B. v. Superior Court, 117 P.3d 660, 671–72 (Cal. 2005) (overturning Curiale v. Reagan, 272 Cal. Rptr. 520 (Ct. App. 1990) and holding that there is statutory authority under the Uniform Parentage Act to grant rights to a same-sex parent).

97. 34 P.3d 887 (Wash. Ct. App. 2001).

98. *Id.* at 891–92.

99. *Id.* at 894.

100. *See infra* notes 79–89 and accompanying text.

101. *D.R.M.*, 34 P.2d at 893–94.

102. *Id.* at 897; *cf.* K.M. v. E.G., 33 Cal. Rptr. 3d 61, 66 (Ct. App. 2005) (disregarding E.G.'s claim that the couple agreed she would be the sole parent unless K.M. eventually adopted the children). *K.M.* may have implicitly granted a promissory estoppel claim to parenthood based on the fact that K.M. had treated E.G.'s children as her own for years.

103. *D.R.M.*, 34 P.2d at 897.

104. 813 N.E.2d 1244 (Mass. 2004).

> the extent the plaintiff and the defendant entered into an agreement, express or implied, to coparent a child, that agreement is unenforceable.[105]

The court, emphasizing that the result would have been the same if the couple were heterosexual, declined to invoke its equitable powers to create a duty requiring the former domestic partner to pay child support.[106] The court, in denying parenthood by contract, ignored the fact that a marriage contract often creates a parenting contract, as discussed in Part I.A.2 of this Article.

Likewise, in *McGuffin v. Overton*,[107] a case involving a dispute as to the custody of a child whose biological mother had died, the court awarded custody to the child's biological father and held that the mother's same-sex partner lacked standing to seek custody, despite the mother's expressed wishes that the partner be named the child's guardian and the fact that the biological parents were never married.[108] The mother had executed a will which purported to make her partner the guardian of her children.[109] The will stated that the mother did not want the father named as guardian because he had failed to establish a relationship with the children.[110] Furthermore, at the time of the mother's death, the father's support obligation regarding the children was approximately $20,000 in arrears.[111] In the father's defense, it could be asked why he had been ordered to pay child support if he had never developed a relationship with the child and had never been married to the mother. Moreover, granting custody to the mother's partner without terminating the father's parental status would have been constitutionally questionable.[112] The court, however, stressed that the legislature had been very specific in limiting those third persons who were permitted to bring an action for custody, and the partner came within none of the statutory classes.[113]

This Article's argument that parties should be allowed to contract for parental status draws somewhat on the de facto parent doctrine. The de facto parent doctrine is a basic contract doctrine about protecting expectations and reliance based on implicit private agreements.[114] The de facto parent is recognized as a parent because his or her conduct manifests an intent to be a parent and that conduct has created expectations and reliance on the part of the child and the

105. *Id.* at 1251 (citations omitted).
106. *Id.* at 1252–53.
107. 542 N.W.2d 288 (Mich. Ct. App. 1995).
108. *Id.* at 289–92.
109. *Id.* at 289.
110. *Id.*
111. *Id.*
112. *See* Troxel v. Granville, 530 U.S. 57, 62–63 (2000).
113. *McGuffin*, 542 N.W.2d at 291–92.
114. *See supra* notes 77–80 and accompanying text.

other parent.[115] If courts are willing to grant standing to de facto parents to sue for custody—a right typically reserved to those with parenting status established by biology or adoption—then courts should also enforce contracts explicitly establishing such status.

Of course, the courts that reject the de facto parent doctrine often do so precisely because they also do not allow anyone but a biological or an adoptive parent to petition for custody.[116] These courts do not want to create "partial parents," who may have a right to custody or a responsibility to pay support but not full parental rights.[117] This position makes sense, insofar as it makes parenting an all-or-nothing bargain. But it ignores the bargain. Biological and adoptive parents engage in bargaining over parental status just as much as nonbiological parents. Biological parents enter a marriage contract before conception, or else they petition a court to declare parentage.[118] Adoptive parents enter an adoption agreement that terminates rights in the birth mother and establishes rights in the adoptive parents, based on specified conditions.

As demonstrated by *Kristine Renee H.*, California family courts have expressed a preference for the de facto parent doctrine over enforcement of explicit parenting agreements. But within the rubric of contract law, explicit parenting agreements should be preferred. Express agreements save the court (and the parties) time and energy. Instead of going through the effort (and potentially difficult issues of proof) of establishing that someone is a de facto parent, enforcing parenting agreements would allow the court to simply refer to a contract, which, if drafted properly, would leave no doubt about who a child's parents are. Furthermore, a policy of enforcing express agreements but not implied agreements would create an incentive for parents to be clear about their wishes and to draft a formal agreement reflecting those wishes.

There is an argument against this proposal: determining parentage is tricky business, and courts should not be quick to leave it to contract. They should handle these cases carefully and exercise their discretion to make thoughtful, individualized decisions. But who does that help? It leaves the law indeterminate, and it takes decisions out of the hands of those best able to make them—parents. Major corporations would not be happy to leave the interpretation of their critical agreements to the ad hoc decision making of a court. Corporations

115. *See id.*

116. *See supra* notes 97-102 and accompanying text (discussing *D.R.M.*).

117. *See id.*

118. A court declaration of parentage may be the furthest of these examples from traditional notions of contract, but a court declaration does establish a form of contractual relations between parents: the right to have a parental relationship with the child is granted in exchange for taking on responsibilities for that child.

enjoy the benefit of the business judgment rule, which acknowledges that directors and officers tend to know best what is in the interest of their companies.[119] Parents should be no happier to have a court make critical decisions regarding their children; at least as to the question of parentage, they should be similarly expected to know what is in the best interests of their children. Admittedly, when the relationship between parents breaks down, often parents are unable to reach sensible decisions about *custody*, and it may be necessary for a court to step in and make the best impartial decision it can make. But, if those parents have in place an ex ante agreement about their *status as parents*, at least that agreement should be honored in the best-interests analysis.

3. Express Parenting Agreements

Several courts have held that parenting agreements between a legal/biological parent and a nonbiological parent are unenforceable. But some courts have enforced such agreements—*if the agreement was in the child's best interests.* Once again, this conflates the issue of parenting *status* (which should be free from best-interests considerations) with the issue of *custody and visitation* (which is, for better or worse, based on best interests). This Part discusses two cases, one where an express agreement was found to be unenforceable, and one where such an agreement was enforced.

(a) Not Enforceable

As discussed in the previous Part, in *Kristine Renee H. v. Lisa Ann R.*,[120] the court ruled that it could not accept the parties' stipulation as a basis for entering a judgment regarding parental status. "A determination of parentage cannot rest simply on the parties' agreement."[121] However, the court found that it *could* determine parentage under the Uniform Parentage Act, so that although resort to contract failed, the court's gender-neutral reading of the relevant statute achieved the same goal as enforcement of the parties' parenting agreement would have. "While such a conclusion under the Act may not be a result that the Legislature *expressly* contemplated, the Act does mandate that we read the provisions in a gender-neutral manner and that mandate compels our conclusion."[122]

119. *See, e.g.*, Hanson Trust PLC v. ML SCM Acquisition, Inc., 781 F.2d 264, 273 (2d Cir. 1986) ("[A] presumption of propriety inures to the benefit of directors.").

120. 16 Cal. Rptr. 3d 123 (App. 2004), *rev'd on other grounds*, 117 P.3d 690 (Cal. 2005).

121. *Id.* at 126.

122. *Id.* (footnote omitted).

(b) Enforceable

Davis v. Kania[123] appears to be something of an anomaly in this area, at least for the time being. The Connecticut court recognized and enforced an agreement establishing two men as the legal parents of a child conceived via artificial insemination from the sperm of one of the men and the egg of a surrogate.[124] Relying on an earlier case, the court found that " 'the egg donor agreement and the gestational carrier agreement [were] valid, enforceable, irrevocable and of full legal effect' under the laws of the state of Connecticut."[125] The court appears not to have conditioned enforcement of the contract on a best-interests analysis. Instead, it simply enforced the intent of the parties.

III. BEST INTERESTS OF THE CHILD

This Part describes the best-interests standard. It then discusses how the standard has operated to deprive gay parents of their parental rights, both where a gay biological parent is in a dispute with a straight parent and where a gay nonbiological parent is in a dispute with a gay biological parent. It discusses the different forms the best-interests standard can take when applied to gay parents, particularly the "per se rule" and the "nexus rule," and it addresses how the best-interests standard has been used to trump private agreements between same-sex partners. Finally, this Part discusses the law of second-parent adoption, the only sure way for nonbiological parents to secure parental rights in the biological children of their partners.

A. The Best-Interests Standard

The child's best interests are the primary consideration in *custody* determinations (as opposed to determinations of parental *status*), and judges have broad discretion in determining what those interests are.[126] There are good reasons for instituting the best-interests doctrine: where parents cannot agree, it may be necessary for an impartial judge to make custody and visitation decisions regarding the child. Perhaps more important, the best-interests doctrine can be justified as a protection against third-party harms (the child being the

123. 836 A.2d 480 (Conn. Super. Ct. 2003).

124. *Id.* at 483.

125. *Id.* (quoting Vogel v. Kirkbride, No. FA 02-024718505, 2002 WL 34119315 (Conn. Super. Ct. Dec. 19, 2002)).

126. *See, e.g.*, Patrick v. Byerley, 325 S.E.2d 99, 100–01 (Va. 1985) (holding that a child's best interests would be served by his remaining in the care of his stepmother instead of his biological mother and awarding her custody on that basis); *see also* ROBERT H. MNOOKIN & D. KELLY WEISBERG, CHILD, FAMILY, AND STATE 913 (4th ed. 2000) (noting that the best interest of the child is the primary consideration and that judges have broad discretion in custody cases).

third party) inflicted by parents' otherwise private decisions.[127] But in each case it is important to ask, what is the harm prevented? Secondarily, we must ask whether the best-interests doctrine has the potential to cause more harm than it prevents. This Article just touches the surface of these questions.[128]

The best-interests standard replaced the "maternal-preference" standard for awarding custody in the 1970s.[129] It was meant to be a neutral replacement for the gender inequalities inherent in the maternal-preference standard, but the best-interests standard is indeterminate and largely standardless. Indeed, the best-interests standard is so malleable that at least one commentator has argued, contrary to the position taken in this Article, that the best-interests standard is being used to *protect* the parenting rights of same-sex parents.[130]

The best-interests standard has been adopted by statutes in all fifty states.[131] The statutes include either lists of relevant factors for a judge to consider in deciding what is in the best interests of the child or a general directive to courts. A typical example is Alaska's Judgments for Custody Statute.[132] The statute states that

> In determining the best interests of the child the court shall consider:
>
> (1) the physical, emotional, mental, religious, and social needs of the child;
>
> (2) the capability and desire of each parent to meet these needs;
>
> (3) the child's preference if the child is of sufficient age and capacity to form a preference;
>
> (4) the love and affection existing between the child and each parent;

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127. Protecting third parties is a bedrock tenet of liberal thought. *See* JOHN STUART MILL, ON LIBERTY 68 (Gertrude Himmelfarb ed., Penguin Books 1974) (1859) ("The only purpose for which power can be rightfully exercised over any member of a civilized community against his will is to prevent harm to others.").

128. The "harm" contemplated in this context typically centers around notions of morality (for example, whether it is moral to enter contracts regarding children and whether it is moral to rear children in a household headed by a gay couple) and the fear of the slippery slope (whether marriage and family can survive the kind of expansion contemplated by articles like this one). And surely individual liberty must be balanced with—and at times give way to—the needs of society, which include the need to impose some public "morals" (for example, thou shalt not kill) on individuals. "But it does not follow that everything to which the moral vetoes of accepted morality attach is of equal importance to society; nor is there the slightest reason for thinking of morality as a seamless web: one which will fall to pieces carrying society with it, unless all its emphatic vetoes are enforced by law." H.L.A. Hart, *Immorality and Treason*, *in* THE PHILOSOPHY OF LAW 83, 85 (R.M. Dworkin ed., 1977).

129. Mary Becker, *Maternal Feelings: Myth, Taboo, and Child Custody*, 1 S. CAL. REV. L. & WOMEN'S STUD. 133, 168–69 (1992).

130. *See* Dahlia Lithwick, *Family Fuse*, SLATE, Mar. 11, 2006, www.slate.com/id/2137879.

131. *See* Theresa E. Ellis, *Loved and Lost: Breathing Life into the Rights of Noncustodial Parents*, 40 VAL. U. L. REV. 267, 276 n.45 (2005).

132. ALASKA STAT. § 25.24.150(c) (2004).

> (5) the length of time the child has lived in a stable, satisfactory environment and the desirability of maintaining continuity;
>
> (6) the willingness and ability of each parent to facilitate and encourage a close and continuing relationship between the other parent and the child, except that the court may not consider this willingness and ability if one parent shows that the other parent has sexually assaulted or engaged in domestic violence against the parent or a child, and that a continuing relationship with the other parent will endanger the health or safety of either the parent or the child;
>
> (7) any evidence of domestic violence, child abuse, or child neglect in the proposed custodial household or a history of violence between the parents;
>
> (8) evidence that substance abuse by either parent or other members of the household directly affects the emotional or physical well-being of the child;
>
> (9) *other factors that the court considers pertinent.*[133]

The final factor in this list opens the door to consideration of anything the judge deems relevant, including homosexuality. Most individual factors (including homosexuality), in most cases, are not per se determinative, unless they adversely affect the child.[134]

Potentially complicating matters further, courts often rely heavily on the expert testimony of a social worker and/or the report and recommendation of a guardian ad litem (GAL) in determining the child's best interests.[135] The GAL may be an attorney appointed to represent the child, in which case he or she would present arguments, not tes-

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133. *Id.* (emphasis added); *see also* MNOOKIN & WEISBERG, *supra* note 126, at 913 n.92 (citing an empirical study of cases in which judges generally relied on ten major factors with forty-three subfactors deemed important in determining children's best interests).

134. *See* MNOOKIN & WEISBERG, *supra* note 126, at 919, 927, 929–31.

135. *See, e.g.*, Beck v. Beck, 207 S.E.2d 378, 380 (N.C. Ct. App. 1974) (allowing the testimony of a social worker notwithstanding the contention of the children's mother that the testimony should have been disallowed because the social worker spent only two hours in the home).

> [T]he GAL's report is based on subjective conclusions, dependent to a great extent on the quality and training of that individual. In Vermont, GALs are volunteers. There are no specific qualifications necessary for appointment, and GAL training is inconsistent among the courts. Their work is performed without supervision, and there is no review of the factors that they consider in recommending custody. When GALs were surveyed by the Gender Bias Task Force about the attitudes they bring to their work, the task force found that (1) there is a significant amount of gender bias among the GALs surveyed; (2) in custody cases, many GALs are not following applicable law in formulating their recommendations and are considering impermissible factors; and (3) judges rely heavily upon the recommendations of guardians.

Gilbert v. Gilbert, 664 A.2d 239, 242 n.2 (Vt. 1995) (citing VT. SUPREME COURT & VT. BAR ASS'N, GENDER AND JUSTICE: REPORT OF THE VERMONT TASK FORCE ON GENDER BIAS IN THE LEGAL SYSTEM, 199–200 (1991); *see* Patty Nelson, *How to Be a Guardian Ad Litem in Minor Guardianships*, ILLINOIS PRO BONO, July 27, 2006, http://www.illinoisprobono.org/index.cfm?fuseaction=home.dsp_content&contentID=2688.

timony, to the court. There is considerable confusion and disagreement over the proper role of the attorney GAL.[136] Such experts and advocates are not subject to the rules of evidence in their investigations, and they often conduct their investigations on an ex parte basis.[137] The court, however, does retain discretion to disregard the testimony/argument of such witnesses/advocates if it is contradicted by that of other witnesses or evidence.[138] Still, in cases involving same-sex parents there is a nontrivial danger that the biases of a child representative will lead to a recommendation that the biological parent, not his or her same-sex partner, deserves custody of their children.

B. A Different Best-Interests Standard for Gay Parents

The best-interests standard looks different when it is applied to gay parents.[139] Three tests have developed in this area: the so-called "per se rule," the "nexus rule," and a rule shifting the burden of proof of fitness to the homosexual parent. The tests were developed in the context of determining *custody and visitation* rights (not parental *status*) between a gay biological parent and a straight biological parent, but, as established in the previous Part, courts often apply the best-interests standard in establishing parental status as well. The per se rule, which is disappearing from the case law, explicitly assumes a parent's homosexuality will have a negative effect on a child. The nexus rule, though arguably a step in the right direction away from the per se rule, implicitly suggests that, if a parent's homosexuality has any effect on a child, that effect will be negative. The burden-shifting rule also assumes that a parent's homosexuality will be detrimental to a child and forces the gay parent to prove otherwise. Thus, even where the gay parent is also the biological parent, the best-interests standard has been applied differently depending on sexual orientation.

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136. *See generally, e.g.*, Emily Buss, "*You're My What?" The Problem of Children's Misperceptions of Their Lawyers' Roles*, 64 FORDHAM L. REV. 1699 (1996).

137. *See, e.g.*, Margaret Z. Johns, *A Black Robe Is Not a Big Tent: The Improper Expansion of Absolute Judicial Immunity to Non-Judges in Civil-Rights Cases*, 59 SMU L. REV. 265, 285–86 (2006).

138. *See, e.g.*, Fritschler v. Fritschler, 208 N.W.2d 336, 338 (Wis. 1973) (holding that the recommendations of a social worker are not mandatory); *see also* Goodman v. Goodman, 141 N.W.2d 445, 449 (Neb. 1966) ("Hearsay, opinion, gossip, bias, prejudice, and the hopes and fears of social workers should not be the basis for a change of custody" and "[f]indings of fact must rest on a preponderance of evidence, the verity of which has been carefully and legally tested.").

139. *See, e.g.*, *Ex Parte* H.H., 830 So. 2d 21, 26 (Ala. 2002) (Moore, C.J., concurring specially) (concurring in the denial of custody to a lesbian mother on the ground that "[h]omosexual conduct is . . . abhorrent, immoral, detestable, a crime against nature, and a violation of the laws of nature and of nature's God . . . . It is an inherent evil against which children must be protected.").

1. The Per Se Rule

Early custody cases involving gay parents followed a "per se" rule against custody "based on the 'immorality' of the . . . 'lifestyle.' "[140] The per se rule states that a parent's homosexual orientation is per se detrimental to the child. A seminal case in this area granted custody to a lesbian mother and her partner, but only on the condition that the couple not live together.[141] As it is applied today, the per se rule does not always make homosexuality an outright bar to custody or visitation, as its name implies, but instead counts homosexuality as a factor against the gay parent. Although this rule is now followed by only a minority of courts,[142] courts have followed some form of this rule as recently as 2001.[143]

2. The Burden-Shifting Rule

A modern manifestation of the per se rule is found in *Bowen v. Bowen*,[144] which shifted the burden to the allegedly gay parent to prove no adverse impact upon the child from the parent's homosexuality.[145] In that case, the court separated two brothers, awarding custody of one to the father and of the other to the mother, based on the determination that one of the boys would not be able to handle the stigma from rumors that his mother was a homosexual. The court reasoned:

> Based on what I heard Jeremy has been really hurt by the so-called rumors. And whether the relationship is true or not true, it's still hurting these children. And I realize that anybody can go out

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140. WILLIAM N. ESKRIDGE JR. & NAN D. HUNTER, SEXUALITY, GENDER, AND THE LAW 832 (Found. Press 1997) (citing Bennett v. Clemens, 196 S.E.2d 842 (Ga. 1973)); *see* Immerman v. Immerman, 1 Cal. Rptr. 298, 301 (Ct. App. 1959); Commonwealth *ex rel.* Bachman v. Bradley, 91 A.2d 379, 381–82 (Pa. Super. Ct. 1952).

141. *See* Schuster v. Schuster, 585 P.2d 130, 131, 133 (Wash. 1978).

142. *See* Am. Bar Ass'n Section of Family Law, Am. Bar Ass'n, *A White Paper: An Analysis of the Law Regarding Same-Sex Marriage, Civil Unions, and Domestic Partnerships*, 38 FAM. L.Q. 339, 360 n.68 (2004) [hereinafter *White Paper*] (listing cases).

143. *See, e.g.*, *Ex parte* J.M.F., 730 So. 2d 1190, 1196 (Ala. 1998) (modifying custody in favor of the father and declaring a preference for the father's heterosexual marriage to the mother's same-sex relationship); Taylor v. Taylor, 47 S.W.3d 222, 223, 226 (Ark. 2001) (affirming a restriction that allowed a mother custody only if she did not live in a house with her same-sex partner or have the partner as an overnight guest). But see Hodson v. Moore, 464 N.W.2d 699, 700–02 (Iowa Ct. App. 1990), which granted custody to a homosexual mother but stated,

> > While we do not find a discreet homosexual relationship to be a per se bar against a mother's custody, we do find the behavior of those sharing a custodial parent's home an important factor in continuing that custody and if that behavior can be found to harm the child, the child's interests would require either curtailment of the harmful situation or a change of custody.

144. 688 So. 2d 1374 (Miss. 1997).

145. *See* MNOOKIN & WEISBERG, *supra* note 126, at 918–19.

> anywhere and as counsel alluded to the Salem witch trials three hundred years ago, people can start rumors on anybody [sic.] And it's a hard thing to overcome once it's started. And I realize that. But in this case I think Linda could have and I think Linda should have done something to alleviate those rumors even if it was cutting off her relationship with Lynn.[146]

3. The Nexus Rule

The "nexus rule," followed by the majority of courts,[147] creates a presumption in favor of custody or visitation for the gay parent, rebuttable by a showing that there is a nexus between the gay parent's lifestyle and harm to the child.[148] Courts disagree on the degree of harm necessary to remove a child from a gay parent's custody. Some courts hold that the social stigma of living with a gay parent is a sufficient harm, whereas other courts hold that taunting by the child's peers is not enough of a harm to deny custody.[149] The cases denying custody or visitation based on the nexus rule tend to be older cases.[150]

However, even recent nexus opinions, which are written as though they are progressive and, indeed, do have positive results for many gay parents, still allow consideration of a parent's homosexuality within the best-interests analysis, despite the fact that numerous studies have concluded that homosexuality has no relevant impact on parenting abilities.[151] These cases suggest implicitly that homosexu-

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146. *Bowen*, 688 So. 2d at 1381.

147. *See* MNOOKIN & WEISBERG, *supra* note 126, at 919.

148. *See* Bezio v. Patenaude, 410 N.E.2d 1207, 1216 (Mass. 1980) (holding that there must be a specific showing of harm to the child, exclusive of general cultural prejudice, to justify depriving a lesbian or gay parent of custody).

149. *Compare* Doe v. Doe, 452 N.E.2d 293, 296 (Mass. Ct. App. 1983) (finding that a child should be free from taunting by his peers), *and* S. v. S., 608 S.W.2d 64, 66 (Ky. Ct. App. 1980) (accepting as a fact that the mother's lesbian lifestyle "forces on the child a need for secrecy and the isolation imposed by such a secret, thus separating the child from his or her peers"), *with* M.P. v. S.P., 404 A.2d 1256, 1261–63 (N.J. Super. Ct. App. Div. 1979) (finding that taunting by peers is not enough to deny custody). Consider *Palmore v. Sidoti*, 466 U.S. 429, 432–34 (1984), holding that private biases and the injury they might inflict were impermissible considerations under the Equal Protection Clause for denying custody to a biological mother who had remarried a man of a different race.

150. *See, e.g.*, N.K.M. v. L.E.M., 606 S.W.2d 179, 186 (Mo. 1980) (conceding that " '[f]undamental rights of parents may not be denied, limited or restricted on the basis of sexual orientation, *per se*' " but then removing the child from the lesbian mother's custody because of presumed but undemonstrated harm (quoting appellant)); L. v. D., 630 S.W.2d 240, 245 (Mo. Ct. App. 1982) (denying a modification of custody sought by a lesbian mother despite numerous factors in her favor and against the unaffectionate father because contact with the mother's lover would "impair the [children's] emotional development").

151. *See* Howard v. Child Welfare Agency Review Bd., No. CV 1999-9881, 2004 WL 3154530, at *5–7 (Ark. Cir. Ct. Dec. 29, 2004) (citing studies and medical expert testimony that homosexuality has no relevant impact on parenting); *see also* NAT'L CTR. FOR LESBIAN RIGHTS, ADOPTION BY LESBIAN, GAY AND BISEXUAL PARENTS: AN OVERVIEW OF CURRENT LAW 2 (2004), http://www.nclrights.org/publications/pubs/adptn0204.pdf, citing the following studies: Am. Acad. of Pediatrics, *Technical Report: Coparent or Second-Parent*

ality is a negative factor that could lead to a child's harm. *Damron v. Damron*[152] is an example. There, the appellate court reversed a custody modification (granting custody to the father) that had been ordered because of the mother's lesbian relationship. The court stated, "[o]ther courts generally have recognized that, in the absence of evidence of actual or potential harm to the children, a parent's homosexual relationship, by itself, is not determinative of custody."[153] Although not as egregious as a per se rule that homosexual parents are detrimental to their children, this formulation of the best-interests standard still suggests something untoward about homosexuality and asserts the state's right to do something about it.

In re Marriage of R.S.[154] provides another example. There, too, the appellate court reversed a modification of custody to the father based on the mother's homosexuality, stating, "[w]hile a court may consider the custodial parent's homosexual relationship when making a custody determination, the trial court's function is limited to determining the effect of the parent's conduct upon the children."[155] Again, the court suggests that a homosexual relationship will have a negative effect. Why else may a court consider a parent's homosexual relationship in making a custody determination?

Even in cases that seem intent on making no distinction between gay and straight parents, such distinctions *are* made. Gay parents are subtly discriminated against even when the court seems to think it is eschewing that discrimination. For example, in *In re Marriage of Walsh*[156] the Iowa Supreme Court removed a restriction on a gay fa-

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Adoption by Same-Sex Parents, 109 PEDIATRICS 341, 341 (2002), http://pediatrics.aappublications.org/cgi/reprint/109/2/341.pdf ("A growing body of scientific literature demonstrates that children who grow up with 1 or 2 gay and/or lesbian parents fare as well in emotional, cognitive, social, sexual functioning as do children whose parents are heterosexual."); AM. PSYCHOLOGICAL ASS'N, LESBIAN AND GAY PARENTING 15 (2005), http://www.apa.org/pi/lgbc/publications/lgparenting.pdf ("Not a single study has found children of lesbian or gay parents to be disadvantaged in any significant respect relative to children of heterosexual parents. Indeed, the evidence to date suggests that home environments provided by lesbian or gay parents are as likely as those provided by heterosexual parents to support and enable children's psychosocial growth."); Susan Golombok & Fiona Tasker, *Do Parents Influence the Sexual Orientation of Their Children? Findings from a Longitudinal Study of Lesbian Families*, 32 DEVELOPMENTAL PSYCHOLOGY 3, 9 (1996) ("[T]here is no evidence . . . to suggest that parents have a determining influence on the sexual orientation of their children . . . ."); Charlotte Patterson, *Lesbian and Gay Parenthood*, *in* HANDBOOK OF PARENTING 255 (M.H. Bornstein ed., 1996) (noting that lesbians and gay men have proved to be just as committed to the parental role and just as capable of being good parents as their heterosexual counterparts).

152. 670 N.W.2d 871 (N.D. 2003).

153. *Id.* at 875.

154. 677 N.E.2d 1297 (Ill. App. Ct. 1996).

155. *Id.* at 1300 (citation omitted); *see also In re* Marriage of Birdsall, 243 Cal. Rptr. 2890–91 (Ct. App. 1988) (vacating a restriction on a homosexual father's visitation rights and holding that such a restriction requires a showing of harm).

156. 451 N.W.2d 492 (Iowa 1990).

ther's visitation rights that had limited visitation to times when " 'no unrelated adult' " was present and noted that the father was "a good, loving and responsible father to his children."[157] The court adopted an almost indignant tone toward the lower court for instituting the restriction. "We find no reason for the requirement that Michael's visitations be restricted to times when 'no unrelated adult' is present. This unusual provision was obviously imposed on account of Michael's homosexual lifestyle."[158] Yet in the very next sentence, the court reveals its own bias against homosexuality. "Michael argues against this restriction and the concern which precipitated it by insisting the children would have no exposure to his lifestyle."[159] Instead of ruling that the father's homosexuality was not to be held as a factor against him, the court found that the children would not be exposed to his "lifestyle," thus suggesting that such exposure could have a negative impact.[160]

Despite the connotations of the nexus rule, it is a step in the right direction. Following a history of depriving gay parents of their rights per se, something positive can be seen in courts affirmatively stating that gay parents have parenting rights, even if that affirmation is qualified with a phrase like "unless the lifestyle causes harm to the child."

C. Best Interests Trump Private Agreements

Same-sex parents face even greater hurdles than their biological-parent partners do when they assert parental rights. It is often unclear whether courts are applying a nexus test to same-sex partners asserting parental rights, but courts routinely discount their preconception parenting agreements,[161] holding that they will be enforced only if it is in the best interest of the child.[162] These claims of parental rights generally come up in *custody* determinations, which explains why courts are so quick to apply best-interests analysis, but that decision operates as a rule favoring the biological parent because the nonbiological parent never gets an equal shot at establish-

157. *Id.* at 493.
158. *Id.*
159. *Id.*
160. *See id.*
161. Again, a preconception parenting agreement would simply be an agreement entered into before the conception of a child, contemplating and intending that conception, and, in this case, establishing parenting rights in a nonbiological parent.
162. *See, e.g.*, E.N.O. v. L.M.M., 711 N.E.2d 886, 892–93 (Mass. 1999) (stating that the parties' coparenting agreement was enforceable insofar as it was in the best interests of the child and holding that an award was properly made under the court's equity jurisdiction, since the partner was the child's de facto parent and visitation would be in the child's best interest); A.C. v. C.B., 829 P.2d 660, 663–65 (N.M. Ct. App. 1992) (holding that the visitation provisions of an agreement between the parties settling the action would be enforceable if the provisions were in the child's best interest).

ing parental rights in the first place.[163] The goal should be, first, to establish parental *status* and, second, to treat contractual parents the same as biological or adoptive parents in the best-interests *custody* analysis.

The argument for preferring biological parents in determining parentage or custody is that biological parents are more invested in a child's well-being than are nonbiological parents. Stepparents offer a model here. Evolutionary biologists have argued that stepparents and other nonrelatives generally care less than biological parents for children living in their homes.[164] However, for most same-sex couples, it is impossible for both members to be biological parents to a child. Furthermore, unlike stepparents, the same-sex parents in all of the cases discussed here were involved in the decision to conceive the child, and, absent biological limitations, would gladly have become a genetic parent. These circumstances make nonbiological parents different from stepparents—even loving stepparents—who may or may not intend to play a true parenting role to their spouse's children.

The Supreme Court potentially has created still more hurdles for same-sex parents by bolstering the rights of biological parents. In *Troxel v. Granville*,[165] the Court found that the best-interests standard carries a presumption that "fit parents act in the best interests of their children."[166] *Troxel* overturned a visitation statute that granted visitation to any petitioner (the paternal grandparents in this case) if the court determined that the visitation was in the best interests of the child. The Court ruled that it was not up to the state to make this determination if the child was in the custody of a fit parent and held that the statute violated the biological parent's due process right to make decisions concerning the care, custody, and control of her children.[167]

> [T]he decision whether such an intergenerational relationship would be beneficial in any specific case is for the parent to make in the first instance. And, if a fit parent's decision of the kind at issue here becomes sub-

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163. *See* MNOOKIN & WEISBERG, *supra* note 126, at 922 (listing cases where courts "have refused to recognize the claim to visitation rights by a lesbian coparent").

164. *See* ROBERT WRIGHT, THE MORAL ANIMAL: EVOLUTIONARY PSYCHOLOGY AND EVERYDAY LIFE 103 (Vintage Books 1995).

> Substitute parents will generally tend to care less profoundly for children than natural parents [with the result that] children reared by people other than their natural parents will be more often exploited and otherwise at risk. Parental investment is a precious resource, and selection must favor those parental psyches that do not squander it on nonrelatives.

MARTIN DALY & MARGO WILSON, HOMICIDE (Aldine de Gruyter 1988).

165. 530 U.S. 57 (2000).

166. *Id.* at 68.

167. *Id.* at 68–69, 75.

> ject to judicial review, the court must accord at least some special weight to the parent's own determination.[168]

Thus, although *Troxel* removes some of the state's discretion in making best-interests determinations, it does so in favor of the biological parent, which means that even without judicial bias, nonbiological parents seeking parental rights face an uphill battle.

Some lower courts have interpreted *Troxel* as creating a "narrow definition of 'parents' for the purpose of standing in custody and visitation cases" and have relied on *Troxel* to deny custody or visitation to same-sex partners.[169]

D. Second-Parent Adoption

As discussed previously in this Article, states typically recognize only two kinds of legal parents: biological and adoptive.[170] This Part discusses adoption, and in particular, second-parent adoption. Several courts have granted requests by lesbian partners to allow the nonbiological parent to adopt the biological child of the other partner.[171] This kind of adoption is called second-parent adoption, and it is distinguished from traditional adoption in that the biological parent retains her parental rights in a second-parent adoption and agrees to share those rights with a nonbiological parent.

Second-parent adoption provides one solution to the problems described throughout this Article. It grants parental status to a nonbiological parent, so that parent has the same rights in a child as are possessed by the biological parent. Unlike a parenting agreement between partners, a judge may not disregard a second-parent adoption, not even if that judge thinks disregarding it is in the best interests of the child. The best-interests standard still applies to adoptive parents throughout the adoption process and in custody and visitation disputes, but once the adoption has taken effect, adoptive parents stand on equal footing with biological parents. Thus, just as *Troxel* determined for biological parents, adoptive parents should also re-

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168. *Id.* at 70.

169. Sean H. v. Leila H., 783 N.Y.S.2d 785, 788 (Sup. Ct. 2004) (stating that, even before *Troxel*, "[t]he Court of Appeals has made it unequivocally clear that biological or legal strangers to a child have no standing under these statutes to pursue custody or visitation"). *But see* Bartholet, *supra* note 40, at 327 ("*Troxel* makes it clear that 'parents' are constitutionally protected against inappropriate intervention in their families by nonparents, but it does nothing to limit how states may define parents and thus little to limit development of the functional parent trend.").

170. *See, e.g.*, UNIF. PARENTAGE ACT § 1 (1973).

171. *See* MNOOKIN & WEISBERG, *supra* note 126, at 922 (listing cases); *see also* UNIF. ADOPTION ACT § 4-102 cmt. 9 pt. IA (explaining that the provision conferring standing on a de facto parent to adopt with a custodial parent's consent also applies to second-parent adoptions).

ceive the presumption that they are acting in the best interests of their children.[172]

But second-parent adoption is not a cure-all. For one thing, it is not legal for homosexuals to adopt children in every state. Florida bans adoption by homosexuals outright,[173] and other states, such as Utah and Mississippi, limit adoption to married couples and couples not of the same gender.[174] Furthermore, even in the number of states where second-parent adoption by homosexuals is legal,[175] it may be prohibitively expensive for many couples. Of course, the same could be said for artificial insemination or in vitro fertilization, both of which are relatively expensive.[176] Moreover, and perhaps much more significant, prior to the issuance of a final adoption decree, the biological mother may be able to revoke her consent to the adoption for any reason, including that she does not want her child to be reared by a gay couple.[177] Relatedly, courts use the best-interests standard

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172. However, the language of *Troxel* does admit a possible distinction. The presumption is that "fit" parents act in their children's best interests. An argument could be made, at least in the minority of states still following the "per se" rule, that homosexual parents are not "fit." However, this argument is unlikely to succeed in the context of two gay parents disputing custody or visitation because of its pot-calling-the-kettle-black nature. Furthermore, as the prevalence of the "nexus test" reveals, the trend among most courts is away from viewing homosexuality as a negative factor, at least per se.

173. *See* FLA. STAT. § 63.042(3) (2006) ("No person eligible to adopt under this statute may adopt if that person is a homosexual."). Florida's ban on gay adoption was upheld in *Lofton v. Secretary of Department of Children and Family Services*, 358 F.3d 804, 827 (11th Cir. 2004).

174. *See* UTAH CODE ANN. § 78-30-1(3)(b) (2006) ("A child may not be adopted by a person who is cohabiting in a relationship that is not a legally valid and binding marriage under the laws of this state. For purposes of this Subsection (3)(b), 'cohabiting' means residing with another person and being involved in a sexual relationship with that person."); MISS. CODE ANN. § 93-17-3(5) (2006) ("Adoption by couples of the same gender is prohibited.").

175. *See White Paper*, *supra* note 142, at 362 (stating that second-parent adoption is available by statute or appellate decision in California, Connecticut, the District of Columbia, Illinois, Indiana, Massachusetts, New York, New Jersey, Pennsylvania, and Vermont and that second-parent adoptions have been granted by trial court judges in counties of Alabama, Alaska, Delaware, Hawaii, Iowa, Louisiana, Maryland, Michigan, Minnesota, Nevada, New Mexico, Oregon, Rhode Island, Texas, and Washington).

176. An attorney who has consulted with J.A. and M. stated that the costs for a second-parent adoption are roughly $1500. That's in addition to the $5500 they spent on the artificial insemination. This is inexpensive compared to an international adoption. *See* Irena Choi Stern, *From Russia, Looking for Love*, N.Y. TIMES, July 4, 2004, at 14WC (stating that adoption of a Russian child could cost $15,000 or more). But it is far more expensive than having a child (and acquiring parenting rights) naturally.

> [I]n the Midwest having a baby with a normal delivery procedure has an average cost of $10,249, including physician and hospital cost. If you have a health plan, it probably has negotiated a payment of only $5,150, of which the patient will pay only about $940. Uninsured patients are often charged the full list price.

Terry Savage, *Comparing Costs for Health Care Just Got Easier*, MERRILLVILLE POST-TRIBUNE (Merrillville, Ind.), Oct. 1, 2006, at E2.

177. *See*, *e.g.*, Commonwealth Adoptions International, Inc., Commonly Asked Domestic Adoption Questions, http://www.commonwealthadoption.org/adoption.php?id=USA (last visited Feb. 27, 2006) (discussing birth mother's rights to revoke consent under Florida law); LawInfo.com, Adoption and Adoptive Parents Rights FAQ,

to determine whether someone is fit to adopt, which introduces relatively standardless decision making into the adoption process, just as it exists elsewhere in family law.

Beyond these fundamental hurdles, some courts have trouble with the concept of second-parent adoption, even where the couple involved is heterosexual. This is because standard adoption procedures require the biological parents to relinquish parental rights.[178] Second-parent adoption modifies the procedure such that one biological parent retains parental rights and agrees to share those rights with the second parent. Many adoption statutes create second-parent exceptions for stepparents, but, inasmuch as "stepparents" are by definition married to a parent, courts sometimes do not allow same-sex couples to take advantage of these provisions because they are not legally married and therefore not technically stepparents.[179] According to one recent overview of the law, second-parent adoption by unmarried couples is allowed in California, Connecticut, the District of Columbia, Illinois, Indiana, Massachusetts, New York, New Jersey, Pennsylvania, and Vermont.[180]

There is another potential barrier to second-parent adoptions: a judge may determine that the second-parent adoption decree does not confer jurisdiction on the court to rule on disputes concerning child custody or support if a same-sex couple breaks up.[181] Instead, a judge may find that there must be a marriage dissolution or paternity proceeding to confer statutory jurisdiction on the court.[182] Neither of those applies in the case of a same-sex, second-parent adoption. One judge in M. and J.A.'s state solved this problem by finding that there is equitable jurisdiction to hear the issues, despite the ab-

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http://resources.lawinfo.com/index.cfm?action=results1&cat=104&act=faq&keywords=&state=&subcatid=268&i=a (last visited Feb. 27, 2006) (discussing birth mother's rights to revoke consent generally).

178. At least four state supreme or appellate courts have held that their adoption statutes do not allow second-parent adoptions. *See In re* Adoption of T.K.J., 931 P.2d 488, 492–93 (Colo. Ct. App. 1996); *In re* Adoption of Luke, 640 N.W.2d 374, 383 (Neb. 2002); *In re* Adoption of Doe, 719 N.E.2d 1071, 1072 (Ohio Ct. App. 1998); *In re* Angel Lace M., 516 N.W.2d 678, 682–83 (Wis. 1994).

179. *See In re* Angel Lace M., 516 N.W.2d at 683 n.8 (holding that the stepparent exception does not apply to same-sex couples even though an adoption by the same-sex partner of the biological parent would be in the child's best interest).

180. NAT'L CTR. FOR LESBIAN RIGHTS, *supra* note 151, at 8 (citing state statutes and case law on second-parent adoption).

181. *See* Russell v. Bridgens, 647 N.W.2d 56 (Neb. 2002) (denying summary judgment to a biological mother claiming the second-parent adoption decree awarding parental status to her partner was invalid under Pennsylvania law and that the Nebraska court lacked subject matter jurisdiction to hear a custody dispute between the former partners, but stating that a foreign judgment—the adoption decree—could be attacked by evidence that the rendering court lacked subject matter jurisdiction). *But see* 25 CAUSES OF ACTION 2d 1 § 8 (2006) (stating that second-parent adoptions *do* confer standing on second parents to sue for custody or visitation).

182. *See supra* note 96.

sence of any statutory jurisdiction. "But the problem is the original parent of a same sex couple could challenge the legality of the second parent adoption and the Court's exercise of equitable jurisdiction," their lawyer said. "And if the issue went to the Court of Appeals or [the] Supreme Court, they could decide that same sex second parent adoptions are not authorized in [this state]."[183]

IV. PARENTING BY CONTRACT IN A BEST-INTERESTS WORLD

This Part suggests a two-part solution for same-sex parents asserting parental rights in the biological children of their partners, particularly children conceived with the intention that both partners would rear them as their own. It proposes, first, that courts should enforce parenting agreements where such agreements are properly drafted, just as they enforce adoption agreements, declarations of parentage, and parentage established by a marriage contract. Second, contractual parents should be treated the same as other legal parents in a best-interests analysis. This part of the proposal is essentially a restatement of the first part, but it highlights the distinction between establishing *parental status* on the one hand and determining *custody* based on a best-interests analysis on the other. This Article argues that once a contractual parent has established legal parental status, there should be no discretion within the best-interests analysis to prefer the biological parent as such.

A. Contract-Only Proposals

This Article's proposal differs from other proposals that argue for strict enforcement of nonmarital family contracts. Such arguments tend to focus on the rights of the parents without wrestling with the problems presented by the best interests doctrine and the state's compelling interest in the welfare of its children. For example, Martha Ertman has written that business contracts are a useful model for marriage, cohabitation, and polyamory because the flexibility of the business contract better accommodates the wide variety of family relationships that exist today than does the traditional marriage contract.[184] Ertman also argues that recognizing business-like family contracts would help eradicate inequality by getting rid of the "race, sex, gender, sexual orientation, and class hierarchies" created by what she calls the "naturalized model of family."[185]

Ertman concludes that the benefits of privatization outweigh the drawbacks, but she does not address the state's interest in maintain-

183. E-mail from J.A. to author (May 6, 2005, 13:21:47 CST) (on file with author).

184. Martha M. Ertman, *Marriage as a Trade: Bridging the Private/Private Distinction*, 36 HARV. C.R.-C.L. L. REV. 79, 82, 100 (2001).

185. *Id.* at 80–81.

ing the well-being of children, which is potentially a large drawback. The state's interest in its children potentially conflicts with the private interest in enforcement of a business-like contract regarding parental rights.

Other scholars, such as Kathy Baker, agree that strict enforcement of parenting contracts is unrealistic.

> The idea that courts would use simple objective theories of contract interpretation when children's existence and ultimate care are at stake is rather simplistic. . . . The sheer novelty of contracts in the reproductive technology area makes it likely that courts will need to struggle with objective interpretation. There are no commonly understood conventions. In addition, the courts' and the parties' lack of familiarity with the technology make it important for courts to scrutinize the contracts particularly carefully. . . . It is implausible and arguably inappropriate to think that at this nascent stage of technological baby-making, a court would enforce a surrogacy contract with the facility and efficiency with which it enforces a contract for the sale of widgets.[186]

Yet, compared to the substantive review courts apply to parenting contracts between same-sex partners—and the ease with which courts disregard such contracts—surrogacy agreements almost *are* enforced "with the facility and efficiency with which [courts enforce] a contract for the sale of widgets," particularly when the surrogacy agreement involves a heterosexual married couple contracting with a gestational surrogate (so that the intended parents are genetically related to the child—their embryo is implanted in the gestational surrogate's womb).[187]

Perhaps Baker's assessment illustrates that, in the realm of contract enforcement, there is a spectrum of scrutiny granted by courts (something akin to the tiers of scrutiny in constitutional law), based on how controversial, or perhaps how personal or intimate, the terms of the contract are, or how "nascent" the technology involved is. If that is the case, it appears that the spectrum shifts according to contemporary norms (surrogacy agreements are more readily enforced today than they were in the 1980s, for example). And all that can be said of enforcement of parenting agreements is that, today, they are on the far end of the spectrum from agreements concerning the sale of widgets. And surrogacy agreements are somewhere in the middle. As for the de facto parent doctrine, courts prefer to take a hands-on approach there as well. Courts will investigate the conduct of the

186. Baker, *supra* note 9, at 30.
187. *See supra* Part I.C.2.

parties to determine whether someone is a de facto parent rather than take a contractarian approach.[188]

B. This Article's Proposal: Contract Within Best Interests

This Article's proposal incorporates recognition of parenting agreements into the best-interests doctrine. In practice, this would require a court to treat a contractual parent the same as a biological parent in the best-interests inquiry. The court would have no discretion to disregard a valid parenting agreement or to prefer a biological parent on the basis of biology alone. The contractual parent would have the same legal status as the biological parent.

By way of illustration, as the law exists today, a same-sex couple like M. and J.A. might hire a lawyer to help them write a contract establishing the same parental rights in M. that J.A. has by virtue of being the biological parent. They might have nothing but the child's best interests in mind; and in fact, the arrangement might be in the child's best interests (because, for example, it would establish a family unit with two legal parents, and the child would not have to worry that M. would someday be cut out of his life if M. and J.A. broke up). However, as the law stands today, a court charged with determining the child's best interests need not even read that contract. Some family courts may even find that they lack subject-matter jurisdiction to interpret such contracts because they do not form a part of a divorce decree or separation agreement.[189] In the event of a separation, the court may decide to grant full custody to J.A. for any number of reasons. As a nonparent, M. may not even be granted standing to challenge the court's order.

Under this Article's approach, however, the court would have to treat M. as an equal legal parent with J.A. This approach could be implemented by a variety of procedural devices. A simple way to implement it would be to develop a form contract that clearly and thoroughly informed the parties of their rights and what rights they were waiving. The form contract would state who was establishing parental rights and who (if anyone) was terminating parental rights. It would also provide a window of time during which the parties could change their minds (perhaps with a stipulated damages provision for any parties with sunk costs). Finally, a requirement that the form contract be filed with the state could serve a record-notice function similar to that of a marriage certificate or birth certificate.

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188. *See supra* note 42.

189. *See* Steven R.J. v. Nancy J., 459 N.Y.S.2d 249, 251 (Fam. Ct. 1983) ("Where as here [the parties'] 'contract' contains provisions beyond determining the issues of custody/visitation, Family Court lacks the requisite equitable jurisdiction to reform or modify them.").

In cases where a written parenting contract conflicts with the later, manifest intent of the parties (determined by their behavior toward each other or the child), standard contract rules could apply.[190] For example, if the parties enter into a parenting contract and later their intent changes such that both parties agree that one of them should no longer have custody of the child, the couple could be allowed to modify the contract to reflect their changed circumstances. At the same time, if one party decides to avoid the contract unilaterally, the other party should be allowed to sue for breach, as well as for support of the child. Allowing parties to contract away their parental *rights* is controversial, but parents avoid their parental *obligations* all the time, generally without the agreement of both parties. In the rare case where both parties agree to the modification, their renegotiated contract should be honored, at least in regard to *custody*, if not parental *status*. In the more common case where a parent unilaterally breaches, the legal consequences—a suit for breach or a suit for child support—are not that different. A less controversial approach would be simply to apply family law principles to disputes involving contractual parents. Where a contractual parent abandons a child, for example, the child or the parent should have a cause of action for support. Likewise, family courts should grant jurisdiction to hear contractual parents' custody and visitation disputes.

However implemented, this approach sends the message to all parents that enforcing the parents' private wishes *is* in the best interests of the child. This claim is based on the assumption that most parents—biological or not—want what is best for their children.[191]

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190. Different factual scenarios will create harder and easier cases. An easy case is one where the parents enter into a contract and their later behavior coincides with the terms of the contract. A hard case is one where the parties enter into a contract, but one of them does not realize the scope of the contract and the later behavior of both parties conflicts with that contract. This is similar to what happened in *K.M. v. E.G.*, 117 P.3d 673 (Cal. 2005). *See supra* Part I.D.1. The lower court enforced an ova donor form contract that conflicted with the conduct (or "intent") of the parties. *Id.* at 677–78. The California Supreme Court reversed, finding that the intent of the parties, based on their conduct, controlled, enforcing a sort of implied parenting contract. *Id.* at 679–82. This is perhaps the most difficult case because it requires delving into the subjective intent of two people whose relationship has since ended.

191. This is an empirical claim not proven here, but it can be assumed, perhaps optimistically, to be true. However, the literature on evolutionary biology suggests the contrary. *See* WRIGHT, *supra* note 164, at 103 (arguing that stepparents care less for their children than biological parents for reasons relating to evolutionary fitness). Even if nonbiological parents' private wishes regarding parenting generally do *not* coincide with the best interests of their children, it seems plausible that if the law treated parents as if that were the case, it could become a self-fulfilling prophecy. An analogy to this can be found in parenting: Parents who treat their children with respect and trust raise children who can be respected and trusted. Parents who do not expect much of their children tend to raise children who do not expect much of themselves.

It bears noting, too, that in the same-sex parenting agreements discussed here, one party is always a biological parent. Inasmuch as courts *do* defer to biological parents' wishes,

Enforcing parenting contracts rewards the couple for taking the time to think through how they want to rear their children and then putting those wishes into contractual terms. It rewards thoughtful, formal, family decision making, and it supports those decisions even if they do not fit the status quo. This approach places the responsibility for those contractual terms where it belongs: on the parents who entered into them.[192]

This would change the analysis in many cases. To give just one example, in a case like *Kristine Renee H. v. Lisa Ann R.*,[193] where the court refused to consider the parenting agreement but granted parenting rights under the presumed parent doctrine, this Article's approach would simplify the court's inquiry because it would allow reference to the contract to determine parentage. The court could then go straight to the best-interests inquiry without an investigation into whether the contractual parent was, in fact, a legal parent with standing to petition for custody. Limiting parents to those who have entered a formal agreement with the biological parent avoids the *Troxel* problem of allowing just any third party to petition for visitation and custody.

Even if courts are leery of honoring the intent of nonbiological parents, they should at least follow the intent of the biological parent who has signed onto a parenting agreement with his or her partner. The Supreme Court supports this view. *Troxel* held that the best-interests standard carries "a presumption that fit parents act in the best interests of their children."[194] A fit parent who has entered a parenting agreement with his or her partner should be presumed to have done so in the child's best interests.

Furthermore, some courts have gone the step further recommended by this Article and enforced private agreements without reference to best interests. *Davis v. Kania*[195] is an example, albeit in the minority, in the context of same-sex parents. This proposal differs

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they should also defer to the nonbiological parents' wishes where those wishes are the same as the biological parents' and are memorialized in a contract.

192. Granting custody to the biological parent without consideration of the parties' intent, on the contrary, lets the nonbiological parent out of the deal after the relationship has turned sour. Generally, in these cases, this is the parent fighting for parental rights, but it could work the other way too. The nonbiological parent may be the stereotypical "deadbeat dad." Without court enforcement of a parenting contract, the child is left with only one parent—a parent who might not have had that child if she knew the other parent would be relieved of parenting duties at a judge's discretion. This may be deemed acceptable if both parents know there is a strong possibility their contract will not be enforced and decide to have a child anyway, but if they enter a parenting contract expecting it to be binding, it is unfair to the child and the custodial parent, if not also to the noncustodial parent, not to enforce it.

193. 16 Cal. Rptr. 3d 123 (Ct. App. 2004), *rev'd on other grounds*, 117 P.3d 690 (Cal. 2005).

194. Troxel v. Granville, 530 U.S. 57, 68 (2000).

195. 836 A.2d 480 (Conn. Super. Ct. 2003); *see also supra* Part I.D.2.b.

from what many courts have been doing already, which is enforcing private agreements *if* they are in the child's best interests. This proposal would separate the inquiry. It would first allow parents to establish parental *status* by contract. Second, it would treat contractual parents the same as biological or adoptive parents in any subsequent best-interests analysis.

Finally, this solution sends the message to parents that parents—biological or not—presumptively act in their children's best interests, and it is generally not the place of courts to disturb their wishes, particularly where they have taken the time and effort to memorialize those wishes in contract. With that freedom comes responsibility for the children contemplated in the parenting agreement. Courts should presume to enforce such contracts, both to protect the rights of the nonbiological parent and to cement the responsibilities of that nonbiological parent to the child. This should be the right of all children with unmarried parents.

V. CONCLUSION

In time, same-sex couples likely will gain the right to marry and, with it, the rights that accompany parenting a child. At that future date, it may no longer seem necessary to protect those rights by contract.[196] But that future date may be a long way off. As noted at the beginning of this Article, states are increasingly banning gay marriage by constitutional amendment and state statute. Waiting around for someday could guarantee that that day comes later rather than sooner. Children grow up quickly. They could use the stability and certainty of two legal parents in the meantime.

196. However, as stated throughout, neither gay nor straight couples should be forced to marry to acquire parenting rights. Should they decide to contract for those rights instead of getting married—for whatever reason—their parenting contracts should be enforceable. I only point out that, as same-sex marriage eventually enters the mainstream, the *need* for parenting contracts may not seem quite as pressing because such contracts will no longer be the only way to establish parental rights.