

## NOTE

### YOU CAN'T CHOOSE YOUR PARENTS: WHY CHILDREN RAISED BY SAME-SEX COUPLES ARE ENTITLED TO INHERITANCE RIGHTS FROM BOTH THEIR PARENTS

#### I. INTRODUCTION

Imagine a bright eleven-year-old girl, Erin, who has recently lost her mother, Jane, in a car accident. Jane was only forty-two years old and she died without a will.<sup>1</sup> Normally this would entitle someone like Erin to receive proceeds from Jane's estate. However, in this case, the court held she was left with nothing.<sup>2</sup> This inequity occurs because Jane was not Erin's biological mother; she was instead the life partner of Erin's natural mother, Carol. Carol and Jane were in a committed relationship for twenty years, and together they made the decision to parent a child. Jane was there for Carol's artificial insemination, throughout the pregnancy, and acted as Erin's parent since her birth. The fact that Jane raised Erin for eleven years and maintained a close parent-child relationship with her is simply not enough for Erin to inherit from Jane's estate. As the law stands, the only people entitled to inherit intestate from Jane are her heirs, and as the state does not recognize Erin (or Carol) as such, Erin is left to mourn her loss without any financial support. Jane's only heirs may be cousins or other relatives with no substantial relationship or connection with Jane and yet as the law stands they are entitled to everything.

Children born to same-sex parents should not suffer legal disadvantages simply because society may not approve of their parents' way of life. To withhold this benefit and protection from these children leaves them in a vulnerable and unjust position. Further, it violates their constitutional rights. Because a child has no control over who his or her parents are, denying these children equal inheritance rights violates the Constitution. It is now an accepted notion that non-marital children cannot be denied inheritance from either of their parents,<sup>3</sup> and since children of same-sex parents are similarly situated, denying them the

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1. She never made a will; this is unfortunately very common in the United States. *See infra* notes 27-29.

2. Note that this is only a hypothetical case.

3. In *Trimble v. Gordon*, the Supreme Court held that to deny children of non-marital parents the right to recover intestate from both parents violated their equal protection rights. 430 U.S. 762, 776 (1977).

right to inherit from both parents is unconstitutional.

This Note will focus on the inheritance rights of children of same-sex parents and why there is need for recognition of these rights. It calls for a statutory response, expanding the legislation that addresses the inheritance rights of non-marital children. The proposal incorporates aspects of the equitable parent, equitable adoption and de facto parent theories, thereby emphasizing the quality and nature of the parent-child relationship and not simply the biological or current legal relationship. Enactment of the statute called for would allow a child lacking a genetic connection to a parent to receive the recovery that was intended for her. With such changes, states would avoid violating the constitutional rights of these children, and be able to set guidelines and requirements for the courts to follow when examining the rights to recovery.

Part II describes the state of inheritance laws for children of same-sex parents and the options that are currently available for these parents and children to use in an attempt to gain inheritance rights. Part II also articulates some of the alternative common law theories, such as de facto parent and equitable adoption, which have been asserted in support of acknowledging non-traditional parent-child relationships. But, these theories are not the best option for these children and their parents. Not only do they require the time and expense of litigation, but also they are decided on a case-by-case basis, and while they have been somewhat successful for custody and visitation proceedings, they have not proved significant for inheritance purposes.

Part III presents a constitutional analysis that addresses the evolution of inheritance rights for out-of-wedlock children and compares them to children of same-sex parents. It argues that excluding children of same-sex parents from inheritance violates their equal protection rights in the same way that it violates the rights of children born out of wedlock who were denied two lines of inheritance.

Part IV offers a suggestion for state legislatures on how to meet the constitutional needs of children of same-sex parents by allowing them to inherit from both their parents. A state should amend its inheritance statutes, which are applicable to non-marital children, or create new statutes that incorporate some of the components of the alternative theories discussed in Part II. In so doing, each state can still determine the level of proof that will be necessary to demonstrate that a parent-child relationship worthy of intestate recognition exists. By expanding the current laws, children of same-sex parents can provide sufficient evidence of such a relationship, which will in turn allow them to recover from the estate of their non-biological parent. This proposal will allow the child to obtain inheritance rights without granting the other parent

any additional rights, such as inheritance or benefits relating to the death of his or her partner. Therefore, this statute should be enacted whether or not the state chooses to recognize domestic partnerships or same-sex marriages. If the legislatures refuse to take this initiative, then the courts should intervene and declare the current statutes unconstitutional on equal protection grounds.

## II. PRELIMINARY ANALYSIS

### A. *The Facts and Why There Is a Problem*

When an individual dies without a will, “an intestate statute provides an ‘estate plan’ designed by the state legislature.”<sup>4</sup> This is essentially a default doctrine<sup>5</sup> planned by the state to distribute the assets of someone who dies without any formal writing directing how his or her estate should be divided.<sup>6</sup> When there is no will<sup>7</sup> available, the state usually requires that the estate be distributed to the decedent’s spouse, and then other blood relatives.<sup>8</sup> Unless there is a formal adoption, the other partner is a legal stranger to the child and the child has no right to inherit from the nonbiological parent.<sup>9</sup> In most cases, children are entitled to inherit intestate from their natural or biological parents or their adoptive parents.<sup>10</sup> While the general rule is that children can have only two legal parents,<sup>11</sup> determining who can recover intestate from a decedent is a power delegated to the states,<sup>12</sup> and the procedure followed differs from state to state. However, states are reluctant to grant inheritance rights to a child of someone who is not a legal parent.<sup>13</sup> And, as the law stands, the ability to become a legal parent is limited to biological and adoptive parents.<sup>14</sup>

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4. ROGER W. ANDERSEN, UNDERSTANDING TRUSTS AND ESTATES § 3, at 13 (3d ed. 2003).

5. *Id.*

6. See JOEL C. DOBRIS ET AL., ESTATES AND TRUSTS: CASES AND MATERIALS 62 (2d ed. 2003).

7. A will is a “document by which a person directs his or her estate to be distributed upon death.” BLACK’S LAW DICTIONARY 1628 (8th ed. 2004).

8. See Susan N. Gary, *Adapting Intestacy Laws to Changing Families*, 18 LAW & INEQ. 1, 2 (2000).

9. JOAN M. BURDA, ESTATE PLANNING FOR SAME-SEX COUPLES 63, 69 (2004).

10. See Gary, *supra* note 8, at 2; see also UNIF. PROBATE CODE § 2-114, 8 U.L.A. 91 (1998).

11. See Ralph C. Brashier, *Children and Inheritance in the Nontraditional Family*, 1996 UTAH L. REV. 93, 99 n.8.

12. See RALPH C. BRASHIER, INHERITANCE LAW AND THE EVOLVING FAMILY 4 (2004).

13. This is because the “[l]egislatures have been reluctant to expand the definition of family for purposes of intestacy.” Gary, *supra* note 8, at 4.

14. See *id.* at 40-41. *Black’s Law Dictionary* defines legal parent as:

The lawful father or mother of someone. In ordinary usage, the term denotes more than

This is a problem for children being raised by homosexual parents, and this type of family is becoming more prevalent across the country, not just in states that have granted rights to these couples or have illustrated some level of acceptance. In fact, with the experience of the “gayby” boom in the 1990s, the number of lesbian and gay parents in this country increased dramatically.<sup>15</sup> It seems probable that most of these parents would expect their children to recover from their estates,<sup>16</sup> and be afforded both the psychological and financial protection that would accompany the recognition of these non-traditional families.<sup>17</sup>

Intestate laws are designed (in theory) to reflect the presumed desires of the decedent, so that the estate is distributed according to what is assumed to be the individual’s intention. A primary objective is to protect dependent family members.<sup>18</sup> Of course, this suggests an incongruity when the wishes of the decedent and the dependent children are not covered in the state inheritance statutes. Therefore, current laws need to adapt to meet these changing desires. The Uniform Probate Code, a model statute, suggests policy for the states to adopt, and provides: “Any part of a decedent’s estate not effectively disposed of by

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responsibility for conception and birth. The term commonly includes (1) either the natural father or the natural mother of a child, (2) the adoptive father or adoptive mother of a child, (3) a child’s putative blood parent who has expressly acknowledged paternity, and (4) an individual or agency whose status as guardian has been established by judicial decree. In law, parental status based on any criterion may be terminated by judicial decree. In other words, a person ceases to be a legal parent if that person’s status as a parent has been terminated in a legal proceeding.

BLACK’S LAW DICTIONARY 1144 (8th ed. 2004).

15. BURDA, *supra* note 9, at 63. The exact numbers vary but “[t]he American Bar Association’s Family Law Section estimates that four million lesbian or gay parents are raising eight million to ten million children.” *Id.* The Lambda Legal Defense Fund puts the number at six to ten million homosexual parents raising six to fourteen million children. *Id.* “[T]he May 2000 edition of *Demography* . . . states that 21.6[%] of lesbian homes and 5.2[%] of gay male homes include children.” *Id.* And, the 2000 Census estimates that 33% of same-sex female partners and 22% of gay male partners are raising children. U.S. CENSUS BUREAU, MARRIED-COUPLE AND UNMARRIED-PARTNER HOUSEHOLDS: 2000, at 10 (2003), available at <http://www.census.gov/prod/2003pubs/censr-5.pdf>.

16. *But see* Lynn Waddell, *Gays in Florida Seek Adoption Alternatives*, N.Y. TIMES, Jan. 21, 2005, at A20. Those who recognize the legal restrictions on their children’s rights are concerned. For example, a Tampa accountant, Cathy James, is the breadwinner in her relationship and her partner is a stay at home mom. She worries that if something should happen to her, the four-year-old son that she and her partner are raising together would not be entitled to her inheritance or social security benefits and thus would suffer substantially in terms of his financial needs. *Id.*

17. *See* Gary, *supra* note 8, at 57 (discussing how intestacy laws have adapted in response to changes within society, such as with regard to adoption and the status of illegitimate children). Therefore, it is neither unreasonable nor impossible for the statutes governing inheritance to forego another transformation to better meet the realities of current families.

18. ANDERSEN, *supra* note 4, § 3, at 13-14.

will pass . . . to the decedent's heirs . . . ."<sup>19</sup> The Code further requires that a relationship of a parent and child must be established to determine succession. It proposes that an adopted person is the child of an adopting parent and not the natural parents, except in cases concerning a spouse of a natural parent.<sup>20</sup> It further states that a person is the child of his or her parents regardless of the marital status of the parents,<sup>21</sup> a concept advocated by the Uniform Parentage Act.<sup>22</sup>

While the Code has expanded to address some non-traditional families, it does not offer an opportunity for the children of same-sex partners to whom the child is not biologically tied, or legally tied through the means of a lawful adoption, a chance to recover from this parent's estate. This in turn leaves such a child without inheritance rights should the non-legal parent die intestate.

Some may argue that since children cannot be born to one parent alone, there must be another biological parent from whom they can recover. In this sense, the child is still entitled to recover from two separate lines and is thus not denied equal protection of the laws. However, this straightforward two-parent logic has become outdated with the increase of artificial insemination and sperm or egg donations.<sup>23</sup> In addition, the extent to which a child may inherit,<sup>24</sup> the sources from whom he or she may inherit, is determined by the state, and therefore

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19. UNIF. PROBATE CODE § 2-101, 8 U.L.A. 79 (1998).

20. *Id.* § 2-114(b), 8 U.L.A. at 91 ("An adopted individual is the child of his [or her] adopting parent or parents and not of his [or her] natural parents, but adoption of a child by the spouse of either natural parent has no effect on (i) the relationship between the child and that natural parent or (ii) the right of the child or a descendant of the child to inherit from or through the other natural parent.").

21. *Id.* § 2-114, 8 U.L.A. 91 cmt. (1998).

22. UNIF. PARENTAGE ACT § 202, 9B U.L.A. 309 (2001).

23. The precise number of births through artificial insemination is difficult to ascertain; however by the 1990s, the number of births from artificial insemination by donor (i.e., by a donor other than the woman's husband) was estimated at nearly 30,000 per year, and at the end of the twentieth century, it was suggested that 60,000 births occurred each year in the United States because of donor insemination. BRASHIER, *supra* note 12, at 170. In the vast majority of these cases, a donor waives their right to any children subsequently born, by signing a contract. *See id.* at 172 (asserting that "[s]tatutes governing artificial insemination may provide generally that the donor is not the father of the child," and that in cases of anonymous donation, "courts have protected the apparent intentions of the parties" by finding the "donor has no rights or responsibilities to the resulting child"); *see also* COLO. REV. STAT. ANN. § 19-4-106(2) (West 2003); *In re Guardianship of I.H.*, 834 A.2d 922, 927 (Me. 2003) (holding in part that an anonymous sperm donor was not entitled to notice of petition for guardianship); UNIF. PARENTAGE ACT § 702, 9B U.L.A. 355 (2001).

24. *See, e.g., In re Wagner*, 748 P.2d 639, 641 (Wash. Ct. App. 1987) (finding that the inheritance rights of an adopted child, for example, are determined by the law of the state in which the property is located).

can vary state by state.<sup>25</sup> In other cases, a child may in fact have a second biological parent, perhaps due to a past relationship, but the child might have no contact with this parent, or the rights of this parent may have been relinquished or terminated, which again leaves the child at a disadvantage.<sup>26</sup> It is shameful that these children are placed in an unequal and disadvantageous position, where it is impossible to recover inheritance from two parents, since this is a right that is granted to children of heterosexual parents.

Another argument that could be made is that all the non-biological parent need do is to execute a will in which the child is provided for to receive the protection being advocated.<sup>27</sup> Wills do not, however, provide full protection for the inheritance rights of same-sex couples. "Most Americans die without wills."<sup>28</sup> There are many explanations for why this happens. First, executing a will is an emotional and financial burden. Also, many people are reluctant to consider death and therefore will put off the actual drafting of a will.<sup>29</sup> Additionally, many people distrust lawyers, and for homosexual couples, there likely exists an additional hesitance to explain their relationship to a lawyer, especially in a conservative community.<sup>30</sup> Furthermore, even if a facially valid will has

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25. See, e.g., ANDERSEN, *supra* note 4, § 5[A][2], at 21 (explaining that states differ in how they afford inheritance rights to adopted children); see also ALA. CODE § 43-8-48 (1991) (providing that a child is considered the child of adopted parents only and has no inheritance rights through natural parents after such adoption); cf. ME. REV. STAT. ANN. tit. 18-A, § 2-109 (1998) ("An adopted person is the child of an adopting parent and not of the natural parents except that an adopted child inherits from the natural parents and their respective kin if the adoption decree so provides . . .").

26. In cases where a second biological parent is involved, albeit to a minor degree, the partner could be examined under the same rationale as step-parents. As this last category seems to lack the urgency of the other ones, it is not the scenario that brings about the most concern. It can be argued that these children are provided with equal rights and if the biological parent's partner intends for them to inherit, he or she may have to provide for them in a written will.

27. Executing a will to provide for loved ones is sound logic, as all competent adults are encouraged to make a will to ensure their property and wealth passes to those whom they wish to receive it, and also to exercise the ability to delegate shares and specific items if so desired. However, many adults, homosexual and heterosexual alike, fail to draft legally binding wills, for whatever reason. See Gary, *supra* note 8, at 15. ("Surveys consistently show that many Americans die without wills.")

28. DOBRIS ET AL., *supra* note 6, at 62.

29. It is estimated that seven out of ten Americans die without a will. Grace Weinstein, *Where There's a Will, There Are Mistakes*, BUS. WK., Jan. 8, 1996, at 114E-2. And among adults over age fifty, only sixty percent have a will. AARP RESEARCH GROUP, WHERE THERE IS A WILL . . . LEGAL DOCUMENTS AMONG THE 50+ POPULATION: FINDINGS FROM AN AARP SURVEY 1 (2000), available at <http://assets.aarp.org/rgcenter/econ/will.pdf>.

30. BRASHIER, *supra* note 12, at 70-71 (stating that "many homosexuals in committed relationships . . . die intestate" and suggesting that, with respect to unmarried couples generally, there may be hesitation about revealing confidential information to a lawyer in a conservative community). It follows that if even heterosexual unmarried partners should feel hesitant to disclose

been executed, there is still concern that the default rules of intestate succession will govern the distribution of property. Blood relatives may contest the validity of the will using theories of fraud, incapacity or undue influence.<sup>31</sup> And since the interpretation of validity is a jury question, individual prejudices may triumph, or a surviving partner and child may instead agree to forego the trial and settle with the family out of court, ultimately resulting in a loss as well.<sup>32</sup>

Since the law has not yet adapted to provide for such children, not only with regard to inheritance, but also in the areas of support, visitation, custody and other related family matters, these children are denied assistance for no reason aside from their parents' status.<sup>33</sup> The responses to this problem have taken many forms. Some advocate for legal recognition of the parents' relationship,<sup>34</sup> others suggest second-parent adoptions are the best way to secure rights for the children involved,<sup>35</sup> and still others propose functional definitions of the parent-child relationship.<sup>36</sup> Each of these suggestions holds merit and will be

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their testamentary desires to a lawyer, homosexual partners would also share these fears. *But see* Gary, *supra* note 8, at 18-19 (suggesting an additional reason for the general failure to make a will was limited actual knowledge of the intestate scheme, and citing a survey conducted by the American Bar Association indicating that 63.6% of those without wills cited laziness as the primary explanation).

31. BRASHIER, *supra* note 12, at 71-72; *see also* Frances H. Foster, *The Family Paradigm of Inheritance Law*, 80 N.C. L. REV. 199, 210 (2001).

32. BRASHIER, *supra* note 12, at 72; *see also* BURDA, *supra* note 9, at 21 ("Estranged family members often rise up like a tsunami wave to claim their 'right' to the property of their lesbian or gay relative . . . [They] challeng[e] any document, . . . deny[ing] that the decedent was gay and . . . deny[ing] there was an intimate relationship between the decedent and the surviving partner. These arguments find a sympathetic ear from a judge who shares the family's distaste for same-sex relationships.").

33. *See, e.g.*, Tiffany L. Palmer, *Family Matters: Establishing Legal Parental Rights for Same-Sex Parents and Their Children*, HUM. RTS., Summer 2003, at 9 ("Without a legal relationship with the second parent, a child has no right of financial support or inheritance from the nonlegal parent and cannot receive social security, retirement, or state workers' compensation benefits . . .").

34. They may advocate either for full-fledged marriage or an alternative, such as a civil union or domestic partnership. For an interesting discussion about the shifting views in reaction to some changes in this area of the law and the limitations of marriage and civil unions as far as same-sex couples are concerned, *see* Paula L. Ettelbrick, Speech, *Domestic Partnership, Civil Unions, or Marriage: One Size Does Not Fit All*, 64 ALB. L. REV. 905 (2001).

35. For a discussion of the pros and cons of second-parent adoptions, *see* Erin J. Law, Comment, *Taking a Critical Look at Second Parent Adoption*, 8 LAW & SEXUALITY 699 (1998).

36. *See, e.g.*, Gary, *supra* note 8, at 81-82 (proposing a statute that adds a functional definition and includes an evidentiary presumption that such a relationship existed); *see also* Jennifer R. Boone Hargis, Note, *Solving Injustice in Inheritance Laws Through Judicial Discretion: Common Sense Solutions from Common Law Tradition*, 2 WASH. U. GLOBAL STUD. L. REV. 447, 466 (2003) (discussing the need for judicial discretion and suggesting that courts should also consider the present and future financial needs of the applicant, the applicant's present and future resources and capacity, and the nature of the estate); *cf.* Foster, *supra* note 31, at 231-33 (agreeing with the flaws

analyzed in turn, but this Note suggests that while each proposal has its strengths, the best method is to leave the decision to individual state legislatures and allow the states to amend their statutes in a way that does not explicitly provide that children of same-sex parents can inherit from the parent's estate, but allows this to occur nonetheless.

### B. *What Can Same-Sex Parents Do Now?*

The options presently available for these non-traditional families, outside of drafting a will, are inadequate and insufficient. Civil unions or domestic partnerships, as well as formal adoptions, are offered only in limited jurisdictions, and reliance on theories of contract law, such as co-parenting agreements or equitable adoption, can later be disputed. Overall, there are few legal ways that same-sex parents can ensure their child will receive the rights examined here, and the scope of the options is relatively limited.

#### 1. Marriage, Domestic Partnerships, and Civil Unions

The parents of these children could theoretically move to one of the few states that allow them to enter into a civil union or a domestic partnership, would grant inheritance rights to them. This may or may not be an effective route for the child. It would seem logical that if these states grant intestate rights to the partner, the child would be entitled to these rights as well, but it is possible that, unless these rights are explicitly provided for, a court could choose to deny them to the child.<sup>37</sup> Currently only seven states and the District of Columbia legally recognize homosexual couples.<sup>38</sup> And while there may be hope that more

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in current American inheritance law, but suggesting that the functional approach discussed by Professor Gary, as well as the formal approach and decedent-controlled approach "share a common limitation" because "[t]hey continue to use 'family' as their point of reference"). See generally E. Gary Spitko, *An Accrual/Multi-factor Approach to Intestate Inheritance Rights for Unmarried Committed Partners*, 81 OR. L. REV. 255 (2002) (discussing survivorship rights of a committed partner, and calling for an accrual and multi-factor approach derived from Article II of the Uniform Probate Code and influenced by the duration of the relationship).

37. Right now marriage is the only clear partnership that grants children the same inheritance rights as children of opposite-sex couples. But Massachusetts is the only state that explicitly offers this option, Jana Singer, *Marriage, Biology, and Paternity: The Case for Revitalizing the Marital Presumption*, 65 MD. L. REV. 246, 246 n.2 (2006) (citing *Goodridge v. Dep't of Pub. Health*, 798 N.E.2d 941 (Mass. 2003)), and while many homosexual partners have traveled to Canada to obtain marriage licenses, their home states may not recognize the rights granted in Canada. See, e.g., Jay Weiser, *Foreword: The Next Normal—Developments Since Marriage Rights for Same-Sex Couples in New York*, 13 COLUM. J. GENDER & L. 48, 63-64 (2004) (discussing the mini-DOMAs, state laws modeled after the federal Defense of Marriage Act, which sometimes bar recognition of same-sex marriages or same-sex relationships).

38. See Enrique A. Monagas, *California's Assembly Bill 205, The Domestic Partner Rights and Responsibilities Act of 2003: Is Domestic Partner Legislation Compromising the Campaign for*



states will follow suit, there actually seems to be a growing resistance to such recognition by many individuals, as well as many states, especially following the *Goodridge v. Department of Public Health* decision, which held that to deny the right of marriage to same-sex couples violated the Massachusetts Constitution.<sup>39</sup> In fact, eighteen states have already enacted constitutional amendments against same-sex marriage, and other states are considering similar amendments.<sup>40</sup> As for the states that do provide some protection to homosexual couples, each form of domestic partnership is different depending on the state, so the rights granted vary as well. For example, under California's form of domestic partnership, a same-sex couple is entitled to "equivalent rights for property, children, government benefits, and arrangements after death,"<sup>41</sup> but Hawaii's reciprocal beneficiary relationship, while granting the surviving partner intestate succession rights, does not confer the same status upon the children;<sup>42</sup> thus, such children would still have just one legal parent. Vermont's civil union, on the other hand, is a more complete alternative because it incorporates most of the concepts of traditional marriage and places it in a new legal structure.<sup>43</sup> There has also been a recent and interesting development in this area of the law in New Jersey. In October of 2006, the state supreme court, while finding no fundamental right of same-sex couples to marry, held there is a

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*Marriage Equality?*, 17 HASTINGS WOMEN'S L.J. 39, 43 (2006). Massachusetts, through the courts, recently decided that to deny the right of marriage to same-sex couples violated the Massachusetts Constitution. See *Goodridge*, 798 N.E.2d at 969. Since homosexuals are granted the right to marry in Massachusetts, same-sex partners should be able to claim rights under the step-parent exception, without resorting to second-parent adoptions. In addition, even without evidence of a biological relationship, it is likely that because of the marriage, these children will be able to meet the current requirements of proof for intestate succession. In October 2006, the New Jersey Supreme Court ruled that same-sex couples are entitled to the same state rights, benefits and obligations as opposite-sex couples. *Lewis v. Harris*, 908 A.2d 196, 220-21 (N.J. 2006). Vermont has legalized same-sex civil unions and Connecticut recently started to allow homosexuals to enter into civil unions as well. VT. STAT. ANN. tit. 15, §§ 1201(2), 1202 (2002); CONN. GEN. STAT. ANN. §§ 46b-38aa, 6b-38bb (West Supp. 2006). The California legislature also recently legalized same-sex marriage; however, the governor quickly vetoed the new law, claiming the statute was unconstitutional, and thus this was an area for the courts, not the legislature, to address. See Dean E. Murphy, *Schwarzenegger to Veto Same-Sex Marriage Bill*, N.Y. TIMES, Sept. 8, 2005, at A18. However, California does allow domestic partnerships, as does the District of Columbia and Hawaii. CAL. FAM. CODE § 297 (West 2004); D.C. CODE ANN. §§ 32-701(3)-(4), 32-702 (LexisNexis 2006); HAW. REV. STAT. §§ 572C-2, 572C-4 (Supp. 2005).

39. 798 N.E.2d at 941; Lynn D. Wardle, *The "End" of Marriage*, 44 FAM. CT. REV. 45, 50 (2006).

40. R. Stephen Painter, Jr., *Reserving the Right: Does a Constitutional Marriage Amendment Necessarily Trump an Earlier and More General Equal Protection or Privacy Provision?*, 36 SETON HALL L. REV. 125, 126 (2005).

41. Weiser, *supra* note 37, at 61; see also CAL. FAM. CODE § 297.5 (West Supp. 2006).

42. Gary, *supra* note 8, at 36-37; see also HAW. REV. STAT. §§ 572C-2, 572C-4 (Supp. 2005).

43. Weiser, *supra* note 37, at 62; VT. STAT. ANN. tit. 15, § 1201 (2002).

constitutional right to receive the same state benefits, protections, and obligations that heterosexual married couples receive.<sup>44</sup> The court left the remedy up to the legislature, deciding to rule only on the constitutional issues and therefore allowing the legislature to either amend the current marriage statutes to include same-sex couples, or to create a statutory scheme, such as a civil union, in a manner similar to that of Connecticut or Vermont.<sup>45</sup>

## 2. Adoption as a Means of Legitimacy

In some states adoption is a viable option. One way to form a legal parent-child relationship is through the use of “traditional adoptions, in which a lesbian or gay person adopts a foster child or a child whom the adoptive parent has previously not cared for.”<sup>46</sup> Recently, states have begun to allow a homosexual couple to jointly adopt<sup>47</sup> a child, instead of forcing them to go through an additional court proceeding.<sup>48</sup> Also, a fairly new development that has received widespread attention, both in literature and by the courts, is second-parent adoptions.

Second-parent adoptions are adoptions by a cohabitating partner of a legal parent, which results in recognition of this second parent as an additional legal parent without terminating the parental rights of the birth parent.<sup>49</sup> With regard to second-parent adoptions, the courts have not

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44. *Lewis v. Harris*, 908 A.2d 196, 220-21 (2006). The New Jersey statute at the time of the ruling was only a weak domestic partnership act that conferred limited medical visitation, decision-making rights, tax exemptions and some health and pension benefits. *See* N.J. STAT. ANN. § 26:8A-2(d) (West Supp. 2005); Weiser, *supra* note 37, at 61. The New Jersey legislature has enacted legislation effective February 2007, establishing civil unions between same-sex couples and granting these couples the same recognition, rights and benefits of married couples. N.J. STAT. ANN. § 26:8A-4.1 (West Supp. 2006) (effective Feb. 19, 2007); N.J. STAT. ANN. § 37:1-28 (West Supp. 2006) (effective Feb. 19, 2007).

45. *Lewis*, 908 A.2d at 221.

46. Marc E. Elovitz, *Adoption by Lesbian and Gay People: The Use and Mis-use of Social Science Research*, 2 DUKE J. GENDER L. & POL'Y 207, 207 (1995). Of course, this approach can only be taken if the individual resides in a state that allows homosexuals to adopt.

47. “The term ‘joint adoption’ was used to designate adoption of a child by both members of a couple, a practice unheard of earlier unless the couple was married.” David L. Chambers & Nancy D. Polikoff, *Family Law and Gay and Lesbian Family Issues in the Twentieth Century*, 33 FAM. L.Q. 523, 538 (1999).

48. *See, e.g.*, CAL. FAM. CODE § 9000(b) (West 2004 & Supp. 2006); VT. STAT. ANN. tit. 15A, § 1-102(b) (2002); Editorial, *The Adoption of Common Sense*, N.Y. TIMES, Dec. 22, 1997, at A26 (discussing New Jersey’s decision to allow homosexual couples to adopt).

49. RESTATEMENT (THIRD) OF PROP.: WILLS & OTHER DONATIVE TRANSFERS § 2.5 reporter’s note 6, cmt. i (Tentative Draft No. 2, 1998). The reasoning behind second-parent adoptions is that to eliminate the rights of a legal parent who intended to continue to raise and rear the child would go against common sense, and not serve the best interests of the children involved. *See, e.g.*, *Adoption of B.L.V.B.*, 628 A.2d 1271, 1274 (Vt. 1993) (discussing a Vermont adoption statute that provided a step-parent exception and a D.C. case, which “likened same-sex partners who adopted to step-parents”).

distinguished between cases where one of the parents is a genetic parent of the child, and cases where one of the parents had already adopted the child.<sup>50</sup> The Uniform Adoption Act illustrates one of the few legislative attempts to facilitate joint parenting arrangements among partners in non-marital relationships.<sup>51</sup> And, “promot[ing] the interest[s] of minor children in being raised by individuals who are committed to, and capable of, caring for them” is one of the primary aims of the Act.<sup>52</sup>

Second-parent adoptions allow same-sex parents, who are generally prohibited from marrying each other, to have legally recognizable families. A child benefits by having two stable parental units with the concomitant duties and responsibilities of being a parent, including custody, visitation, support, and inheritance, rather than only one legally recognized parent.<sup>53</sup> The Human Rights Campaign Foundation reports that second-parent adoptions have been allowed by statute or approved by appellate courts in eight states and the District of Columbia.<sup>54</sup> Second-parent adoptions have also been permitted by multiple lower courts, but this means that the question of whether such an adoption will be granted depends on the individual regional jurisdiction or county, and not the state as a whole.<sup>55</sup>

The first state to allow second-parent adoptions was Vermont.<sup>56</sup> The case, *In re Adoption of B.L.V.B.*,<sup>57</sup> involved a lesbian couple who

50. See Mark A. Momjian, *Cause of Action for Second-Parent Adoptions*, in 25 CAUSES OF ACTION SECOND § 36, at 29 (2004).

51. See Jane S. Schacter, *Constructing Families in a Democracy: Courts, Legislatures and Second-Parent Adoption*, 75 CHL-KENT L. REV. 933, 934-35 (2000). Section 4-102 of the Uniform Adoption Act, can be applied to second-parent adoptions, stating:

(a) A stepparent has standing under this [article] to petition to adopt a minor stepchild who is the child of the stepparent’s spouse . . . [and] (b) For good cause shown, a court may allow an individual who does not meet the requirements of subsection (a), but has the consent of the custodial parent of a minor to file a petition for adoption under this [article]. A petition allowed under this subsection must be treated as if the petitioner [parent] were a stepparent.

Uniform Adoption Act § 4-102(a)-(b), 9 U.L.A. 104-05 (1994). Additionally, the Act provides:

An adoption by a stepparent does not affect . . . the relationship between the adoptee and the adoptee’s parent who is the adoptive stepparent’s spouse or deceased spouse; . . . [or] the right of the adoptee or a descendant of the adoptee to inheritance or intestate succession through or from the adoptee’s former parent . . .

*Id.* § 4-103, 9 U.L.A. at 106.

52. Momjian, *supra* note 50, § 4, at 12.

53. See *id.* §§ 7-8, at 13-14.

54. Human Rights Campaign Foundation, *Second-Parent Adoption*, <http://www.hrc.org/Template.cfm?Section=Adoption&ContentID=18341&Template=/ContentManagement/ContentDisplay.cfm> (last visited Mar. 17, 2007) [hereinafter Human Rights].

55. *Id.*

56. Craig W. Christensen, *If Not Marriage? On Securing Gay and Lesbian Family Values by a “Simulacrum of Marriage”*, 66 FORDHAM L. REV. 1699, 1767 (1998).

57. 628 A.2d 1271 (Vt. 1993).

decided together to parent a child. One mother had two children by artificial insemination and the other partner wished to adopt the children. The Vermont Supreme Court looked to the intent of the legislature when analyzing the adoption statute. The court claimed it was “furthering the purposes of the statute . . . by allowing the children of such unions the benefits and security of a legal relationship with their de facto second parents.”<sup>58</sup>

The courts in the cases that have allowed second-parent adoptions<sup>59</sup> have emphasized the best interests of the child and have suggested that “[s]econd parent adoption can secure the salutary incidents of legally recognized parentage for a child of a nonbiological parent who otherwise must remain a legal stranger.”<sup>60</sup> Recognizing the second parent who is and wants to continue playing the parental role will benefit the child by providing both psychological and financial support. So, there has been a significant development in this area of the law, and in quite a few jurisdictions, same-sex parents have secured another way to legalize their families.<sup>61</sup>

Unfortunately, there are many jurisdictions where the children in these situations are only allowed to have one legally recognized parent. This is because there are many states that do not allow same-sex couples to qualify for these second-parent adoptions,<sup>62</sup> as well as many states where only certain counties or courts have allowed this type of adoption.<sup>63</sup> Courts that deny second-parent adoptions “are likely to read the state adoption statute narrowly, interpreting it to prohibit a child

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58. *Id.* at 1276.

59. *See, e.g.*, Sharon v. Superior Court, 73 P.3d 554, 557-58 (Cal. 2003); *In re Adoption of K.S.P.*, 804 N.E.2d 1253, 1260 (Ind. Ct. App. 2004); *In re Adoption of Tammy*, 619 N.E.2d 315, 321 (Mass. 1993); *In re Adoption of Two Children*, 666 A.2d 535, 539 (N.J. Super. Ct. App. Div. 1995); *In re Jacob*, 660 N.E.2d 397, 405 (N.Y. 1995) (“[A] construction of the [statute’s] section that would deny children . . . the opportunity of having their two de facto parents become their legal parents, based solely on their biological mother’s sexual orientation or marital status, would not only be unjust under the circumstances, but also might raise constitutional concerns in light of the adoption statute’s historically consistent purpose—the best interests of the child.”).

60. *Sharon*, 73 P.3d at 568.

61. *See* Human Rights, *supra* note 54.

62. *See, e.g.*, FLA. STAT. ANN. § 63.042 (West 2005); *Lofton v. Sec’y of Dep’t of Children & Family Servs.*, 358 F.3d 804, 827 (11th Cir. 2004) (upholding Florida statute banning adoption by homosexual parents). According to the Human Rights Watch Foundation Campaign, only twenty-six states offer second-parent adoptions as an option (and eighteen of those are determined county by county and are in jeopardy of being overturned); this leaves twenty-four states that provide no second-parent adoption possibility. Human Rights, *supra* note 54; *see also, e.g.*, *In re Adoption of T.K.J.*, 931 P.2d 488, 496 (Colo. Ct. App. 1996); *In re Adoption of Luke*, 640 N.W.2d 374, 383 (Neb. 2002); *infra* note 69 and accompanying text.

63. This is because, as Chief Judge Kaye observed, “the decision regarding whether to confer legal status to both mothers is solely within the discretion of the court.” *See* Law, *supra* note 35, at 708 (citing *Jacob*, 660 N.E.2d at 404 n.4).

from having two legally recognized same-sex parents.”<sup>64</sup> Since “[a]doption is a creature of statute,”<sup>65</sup> courts have the ability to interpret the applicable statutes accordingly, and courts that take this approach are not required to consider the best interests of the child.<sup>66</sup> In addition, there are a few states that do not allow homosexuals to adopt at all,<sup>67</sup> and one that explicitly prohibits them from doing so.<sup>68</sup>

An example of a court that refused to extend the step-parent exception in the applicable statute to same-sex parent situations, is *In re Interest of Angel Lace M.*<sup>69</sup> The child at issue had been adopted by a husband and a wife prior to their divorce, and the husband voluntarily relinquished his rights in order to allow the child to be adopted by the mother’s new female partner. The court found that the only way the partner could adopt the child was if the birth mother’s rights were terminated.<sup>70</sup> Not only is this an unacceptable option for a child who is being deprived of the benefits and securities associated with two loving and committed parents, but it fails to solve the larger problem discussed in this Note.

However, the answer is not to secure second-parent adoptions in the still-hesitant jurisdictions. Second-parent adoptions are a good “in the meantime” solution, but they are certainly not the best solution. In fact, even in states that allow this option, many children are still not guaranteed the rights that are given without question to children of heterosexual parents. For example, some parents will simply forego the adoption route if they are content with the situation as it is, and will not

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64. BRASHIER, *supra* note 12, at 160.

65. *Id.* at 163.

66. *Id.*

67. See Momjian, *supra* note 50, § 30, at 27-28. Even where state statutes do not explicitly state that homosexuals cannot adopt, some make it almost impossible for them to do so. *Id.* One example is Utah, where the statute says 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.” UTAH CODE ANN. § 78-30-1 (2002). Since a homosexual cannot marry in Utah, UTAH CODE ANN. § 30-1-2(5) (2002), this effectively forbids adoption of a child. And Mississippi, where unmarried individuals have the right to adopt, and thus presumably a gay or lesbian person could adopt alone, the statute explicitly states: “Adoption by couples of the same gender is prohibited.” MISS. CODE ANN. § 93-17-3 (West Supp. 2005).

68. Florida’s adoption statute states: “No person eligible to adopt under this statute may adopt if that person is a homosexual.” FLA. STAT. ANN. § 63.042 (West 2005). In *Lofton v. Secretary of the Department of Children and Family Services*, the court upheld the Florida statute that forbids homosexuals from adopting children. The Eleventh Circuit determined “it is not in the best interests of its displaced children to be adopted by individuals who ‘engage in current, voluntary homosexual activity’” and that there is “nothing in the Constitution that forbids this policy judgment.” 358 F.3d 804, 827 (11th Cir. 2004) (quoting *Dep’t of Health & Rehabilitative Servs. v. Cox*, 627 So. 2d 1210, 1214 (Fla. Dist. Ct. App. 1993)).

69. 516 N.W.2d 678 (Wis. 1994).

70. *Id.* at 686.

think about the future of the children involved. Or, they may intend to go forward with adoption proceedings but, for one reason or another, the adoption simply does not occur. It is unjust and irrational to punish the children for this lapse of judgment on the part of their parents. Furthermore, even if same-sex parents obtain a second-parent adoption in one state, other states may refuse to enforce the order.<sup>71</sup> Second-parent adoptions are not the best way to address the needs of these children. While they illustrate a positive alternative in the meantime, the change needs to be more comprehensive and it must be available to all children who are living with two parents of the same sex, regardless of the state in which they happen to be born or raised.

### 3. Co-parenting Agreements

Another option that warrants brief mention is the use of shared (or co-) parenting agreements. These agreements “serve the purpose of providing the non-biological parent with specific rights and responsibilities toward a child.”<sup>72</sup> These agreements have typically been used for custody and support issues, but there is no guarantee that a court will uphold such an agreement, even if it serves the best interests of the child.<sup>73</sup>

In fact, a recent Florida decision, *Wakeman v. Dixon*, declined to enforce a joint parenting agreement between two lesbian parents that stipulated that, in the event of a separation, Wakeman, who sought to be deemed the child’s de facto parent, would be entitled to visitation.<sup>74</sup> The court reasoned that Florida does not allow non-parents to seek custody and visitation, and that essentially Wakeman was a non-parent. The district court found that the material facts were indistinguishable from a prior case, *Music v. Rachford*, where Music sought shared parental responsibility and visitation after jointly raising the child with her former partner.<sup>75</sup> In that case, the biological mother denied contact and the court denied Music recognition as a de facto parent.<sup>76</sup> The fact that *Wakeman* involved an actual co-parenting agreement was irrelevant since such “agreements are unenforceable to the extent they purport to grant parental rights” to a non-parent.<sup>77</sup> Of course, in essence, this decision

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71. While states are supposed to give full faith and credit to decisions made by other states, they sometimes get around this requirement using the argument of states’ rights, declaring recognition of the adoption to be contrary to public policy. See BURDA, *supra* note 9, at 25.

72. *Id.*

73. *See id.*

74. 921 So. 2d 669, 669 (Fla. Dist. Ct. App. 2006).

75. *See id.* at 673 (citing *Music v. Rachford*, 654 So. 2d 1234 (Fla. Dist. Ct. App. 1995)).

76. *Music*, 654 So. 2d at 1235.

77. *Wakeman*, 921 So. 2d at 673.

solidified the position that the non-biological parent in a gay or lesbian relationship has no right to even visit with the child.<sup>78</sup> As a corollary, this means that children of such relationships have no legal rights with regard to this parent either.<sup>79</sup>

In addition, shared parenting agreements also carry some of the same problems as wills in that they have to be drafted and are subject to challenges. And while there are cases that have sustained these agreements when they reflect the best interests of the child, they tend to deal with custody and visitation, rather than inheritance.<sup>80</sup> In addition, where second-parent adoptions are permitted, the states fail to encourage shared parenting agreements, and thus the parties do not receive the degree of legal protection for their families that they otherwise would.<sup>81</sup>

### C. Common Law Doctrines (Alternative Theories)

The common law has long served as a method for securing additional rights or allowances that are not easily drawn from a statutory provision.<sup>82</sup> Common law doctrines tend to reflect underlying public policy, and thus provide another route that same-sex couples can take when attempting to legitimize or secure the relationships with their children. The underlying principle that governs most common law claims is the best interest and welfare of the child.<sup>83</sup>

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78. Since Florida does not allow homosexuals to marry, join in a domestic partnership or civil union, nor does it recognize any other similar arrangement, FLA. STAT. ANN. § 741.212 (LexisNexis 2005), and because Florida does not allow gays or lesbians to adopt, *see supra* note 68 and accompanying text, shared parenting agreements provided the only possible avenue of protection for the children of same-sex parents. Refusing to recognize such an agreement leaves the child completely vulnerable and with no possible remedy.

79. This fact was actually recognized in Judge Van Nortwick's concurrence in *Wakeman*: "[T]he child in the non-traditional family in Florida is not protected either by statutory rights or by the ability of courts to secure the best interests of the child when the household dissolves." *Wakeman*, 921 So. 2d at 675 (Van Nortwick, J., concurring).

80. *See, e.g.*, A.C. v. C.B., 829 P.2d 660, 663-64 (N.M. Ct. App. 1992); *see also* 7 SAMUEL WILLISTON, A TREATISE ON THE LAW OF CONTRACTS § 16:21, at 469-70 (Richard A. Lord ed., 4th ed. 1997) ("[S]ome co-parenting agreements, granting visitation rights to a parent's companion, do not necessarily violate public policy and are not unenforceable *per se*; instead they are subject to modification by the court based on the best interests of the child.").

81. BURDA, *supra* note 9, at 27.

82. *See, e.g.*, Judith S. Kaye, *State Courts at the Dawn of a New Century: Common Law Courts Reading Statutes and Constitutions*, 70 N.Y.U. L. REV. 1, 15, 20 (1995) ("Indeed, the common law and state constitutional law often stand as alternative grounds for individual rights. . . . Even in a world dominated by statutes, there remain clear, direct links with the common law.") (footnote omitted).

83. *See, e.g.*, *Ex parte G.C.*, 924 So. 2d 651, 664 (Ala. 2005) (Smith, J., concurring); *see also Developments in the Law—The Law of Marriage and Family, Changing Realities of Parenthood: The Law's Response to the Evolving American Family and Emerging Reproductive Technologies*, 116 HARV. L. REV. 2052, 2064 (2003) ("[T]he rationales underlying judicial efforts to expand

The treatise *Principles of the Law of Family Dissolution* describes a parent as either a legal parent, a parent by estoppel, or a de facto parent.<sup>84</sup> The treatise suggests that marriage is not essential to the creation of parental status, nor is it essential that the parents be of the opposite sex; thus, it allows a same-sex couple to undertake joint parenting rights and responsibilities, and deems them permanent.<sup>85</sup> One condition, for both a parent by estoppel and a de facto parent, is that there be an agreement between the legal parent and the other parent.<sup>86</sup> While this agreement may be implied, it requires affirmative acts demonstrating a willingness and anticipation of shared parental responsibilities.<sup>87</sup>

A de facto parent is “one who, ‘on a day-to-day basis, assumes the role of parent, seeking to fulfill both the child’s physical needs and his [or her] psychological need for affection and care.’”<sup>88</sup> A de facto parent has also been referred to as a psychological parent or a functional parent.<sup>89</sup>

*Rubano v. DiCenzo*<sup>90</sup> provides a discussion of the idea surrounding a de facto parent. The Rhode Island Supreme Court ruled that where parents jointly decided to conceive a child by artificial insemination and raise him or her together, the petitioner is entitled to “[l]egal recognition of a de facto or ‘psychological parent’ and child relationship— notwithstanding the absence of any biological ties.”<sup>91</sup>

In *In re Custody of H.S.H.-K.*,<sup>92</sup> a Wisconsin court went further, allowing visitation where there is a parent-like relationship and significant triggering event, and applying a four-part test to demonstrate

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recognition of parents support the actual bestowal of parental status on nonparents and recognition that the best interests of a child should sometimes govern the determination of who functions as his or her parent.”).

84. AM. LAW INST., *PRINCIPLES OF THE LAW OF FAMILY DISSOLUTION: ANALYSIS AND RECOMMENDATIONS* § 2.03(1), at 107-08 (2002). These recommendations are controversial but at the very least they provide some excellent guidelines for states to consider.

85. *See id.*

86. *Id.*

87. *See id.*

88. Susan E. Dalton, *From Presumed Fathers to Lesbian Mothers: Sex Discrimination and the Legal Construction of Parenthood*, 9 MICH. J. GENDER & L. 261, 295 (2003) (quoting *In re B.G.*, 523 P.2d 244, 253 n.18 (Cal. 1974)).

89. *V.C. v. M.J.B.*, 748 A.2d 539, 546 n.3 (N.J. 2000). *Black’s Law Dictionary* defines a psychological parent as “[a] person who, on a continuing and regular basis, provides for a child’s emotional and physical needs . . . . The psychological parent may be the biological parent, a foster parent, a guardian, a common-law parent, or some other person unrelated to the child.” BLACK’S LAW DICTIONARY 1145 (8th ed. 2004).

90. 759 A.2d 959 (R.I. 2000).

91. *Id.* at 974.

92. 533 N.W.2d 419 (Wis. 1995).



the existence of a parent-child relationship.<sup>93</sup> This test has been cited and used by many subsequent courts in analyzing this question.<sup>94</sup> However, this test was developed in response to an issue of visitation, so it is questionable how far a court would be willing to extend its application. In fact, in none of these cases has a child been able to inherit from a psychological parent who died intestate.<sup>95</sup> Rather, this theory has been successful primarily in visitation proceedings.<sup>96</sup>

The second theory is referred to as “in loco parentis,” and “literally means in the place of a parent.”<sup>97</sup> A person with such standing “has put him or herself in the situation of a lawful parent by assuming the obligations incident to the parental relation, without going through the formalities necessary to a legal adoption.”<sup>98</sup> Thus, an in loco parentis relationship exists only in situations where the parent intends to assume this parental status for the child.<sup>99</sup>

Another common law doctrine is that of the equitable parent, which allows a husband who is not biologically related to a child to be considered the natural father if the child was born during the marriage, where a relationship has been mutually acknowledged.<sup>100</sup> This theory essentially creates a presumption of paternity that serves to legitimize the child.

Equitable estoppel can also be applied as a fourth theory to obtain

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93. The four elements that the petitioner must prove are:

(1) that the biological or adoptive parent consented to, and fostered, the petitioner’s formation and establishment of a parent-like relationship with the child; (2) that the petitioner and the child lived together in the same household; (3) that the petitioner assumed obligations of parenthood by taking significant responsibility for the child’s care, education and development, including contributing towards the child’s support, without expectation of financial compensation; and (4) that the petitioner has been in a parental role for a length of time sufficient to have established with the child a bonded, dependent relationship parental in nature.

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

94. *See, e.g.,* Youmans v. Ramos, 711 N.E.2d 165, 170 n.15 (Mass. 1999); *V.C.*, 748 A.2d at 551.

95. *See* BURDA, *supra* note 9, at 70.

96. *E.N.O. v. L.M.M.*, 711 N.E.2d 866, 893 n.11 (Mass. 1999); *V.C.*, 748 A.2d at 555.

97. 67A C.J.S. *Parent and Child* § 345, at 425 (2003 & Supp. 2006) (citing *Geibe v. Geibe*, 571 N.W.2d 774, 781 (Minn. Ct. App. 1997)).

98. *Id.* § 345, at 425-26 (citing *State ex rel. Hopkins v. Batt*, 573 N.W.2d 425, 433 (Neb. 1998)).

99. *Geibe*, 571 N.W.2d at 781 (stating that “residing with a child is a necessary, but not alone sufficient, condition for an in loco parentis relationship” and that Minnesota, as well as other states relying on the principle of in loco parentis, requires that the parent “intend to assume parental responsibilities”).

100. *See, e.g.,* York v. Morofsky, 571 N.W.2d 524, 526 (Mich. Ct. App. 1997).

rights normally reserved for legal parents.<sup>101</sup> Equitable estoppel occurs when a spouse is estopped from denying paternity when he represents or holds himself out to be the father of the child. Likewise, a mother may be estopped from denying paternity in these situations.<sup>102</sup> Again, these theories have been invoked primarily in custody battles and cases concerning visitation, so while some courts have allowed same-sex parents to secure minimal rights under these doctrines, they are not a particularly viable route for inheritance issues. However, in some instances equitable adoption has been utilized to secure inheritance rights for the child.

Equitable adoption is generally considered “a limited, last-resort inheritance claim” brought “when a child reasonably believed and relied on the putative parents’ indications that they were his adoptive parents.”<sup>103</sup> It incorporates aspects of the other equitable theories and allows a child to recover based on actions and reliance, even in the absence of a formal adoption. It is therefore the only doctrine that directly addresses the problem of inheritance laws discussed in this Note.

Equitable adoption has been justified on the grounds that the child detrimentally relied on his or her foster parent’s promise to adopt, which allows the court to provide an equitable remedy entitling the child to inherit as if the promise had not been broken.<sup>104</sup> Other courts, relying on contract theory, require adequate consideration by the party in question to achieve equitable adoption.<sup>105</sup> An equitable adoption must be affirmatively established, and must be decided on the basis of its own facts and evidence. As such, equitable adoption might be said to be a hybrid blended theory of contract law and equity:

Under common law principles . . . a child may become “equitably” adopted by judicial declaration, notwithstanding the purportedly exclusive statutory scheme for adoption . . . .

. . . “The theoretical underpinnings of [this theory]” are based upon either “the specific performance of a contract to adopt or an equitable

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101. *Principles of the Law of Family Dissolution* discusses a theory of parent by estoppel that contains elements of the equitable parent doctrine and equitable estoppel, as an individual who, though not a legal parent, has acted as a parent under specified circumstances that serve to estop the legal parent from denying the individual’s status. AM. LAW INST., *supra* note 84, § 2.03(b), at 107.

102. See, e.g., *In re Paternity of D.L.H.*, 419 N.W.2d 283, 286 (Wis. 1987).

103. BRASHIER, *supra* note 12, at 167. The “doctrine is sometimes referred to as virtual adoption, adoption by estoppel, or de facto adoption.” *Id.* at 164.

104. Spitko, *supra* note 36, at 280.

105. See *D’Accardi ex rel. Vigil v. Chater*, 96 F.3d 97, 100 (4th Cir. 1996) (applying New Jersey law).

estoppel to deny that an adoption” has been agreed to between the putative adopter and adoptee.”<sup>106</sup>

Most courts require proof of a valid contract to adopt between the decedent and the natural parent.<sup>107</sup> However, there is another approach that focuses less on the contract and more on the function of the relationship, psychological parent theories, and the “equities of the scenario.”<sup>108</sup> This approach was adopted by the West Virginia Supreme Court of Appeals in *Welch v. Wilson*.<sup>109</sup>

The doctrine, as adopted by the *Welch* court, requires proof “by clear, cogent, and convincing evidence that [the equitable child] has stood from an age of tender years in a position exactly equivalent to that of a formally adopted or natural child.”<sup>110</sup> The court suggested that a “family centered society presumes that bonds of love and loyalty will prevail in the distribution of family wealth along family lines . . . . [A]n equitably adopted child in practical terms is as much a family member as a formally adopted child and should not be the subject of discrimination.”<sup>111</sup> The doctrine is essentially meant to apply to those who have filled the place of a natural child but have not been legally adopted because of fault or oversight and the intent to adopt is established by the evidence.<sup>112</sup>

Of course, there are jurisdictions that will not allow equitable adoptions,<sup>113</sup> and the burden of proof is not an easy one to meet. The

106. William G. Reeves, *Inheritance by Equitable Adoption: An Overview of Theory and Proof*, 57 J. MO. B. 130, 130 (2001) (quoting *Weidner v. Am. Family Mut. Ins. Co.*, 928 S.W.2d 401, 403 (Mo. Ct. App. 1996)).

107. See Spitko, *supra* note 36, at 280.

108. BRASHIER, *supra* note 12, at 164.

109. 516 S.E.2d 35 (W. Va. 1999). In *Welch*, the appellant was transferred to her maternal grandmother’s home within six months of her birth, and was raised by her grandmother and her step-grandfather, John Wilson, for fifteen years. *Id.* at 36. “While the Wilsons did not seek formal adoption, school records indicated that [they] were the Appellant’s parents. The evidence indicated they functioned as the parental authorities . . . .” *Id.* at 36. Upon John’s death, appellant claimed she had been equitably adopted by the decedent. The West Virginia Supreme Court found that the appellant proved by “clear, cogent, and convincing evidence, that she enjoyed a status within the decedent’s home and family identical to that of a formally adopted child.” *Id.* at 38.

110. *Id.* at 37 (citing *Wheeling Dollar Sav. & Trust Co. v. Singer*, 250 S.E.2d 369, 373 (W. Va. 1978)).

111. *Id.*

112. *In re Estate of Furia*, 126 Cal. Rptr. 2d 384, 387 (Ct. App. 2002).

113. A narrow majority of jurisdictions do allow equitable adoption. Kristine S. Knaplund, *Grandparents Raising Grandchildren and the Implications for Inheritance*, 48 ARIZ. L. REV. 1, 6 (2006). Those that do not include, for example, Indiana, Kansas, Louisiana, South Carolina, and Wisconsin. See *King v. Schweiker*, 647 F.2d 541, 545-46 (5th Cir. 1981) (applying Louisiana law); *Lindsey v. Wilcox*, 479 N.E.2d 1330, 1332 (Ind. Ct. App. 1985); *In re Estate of Robbins*, 738 P.2d 458, 462-63 (Kan. 1987); *Alley v. Bennett*, 379 S.E.2d 294, 295 (S.C. Ct. App. 1989); *In re Custody of H.S.H.-K.*, 533 N.W.2d 419, 431 (Wis. 1995).

child must be unaware that there was no legal adoption and in order to receive anything from the decedent's intestate estate, the mistaken belief that he or she was in fact adopted must come from the words or conduct of the decedent.<sup>114</sup> The child must further demonstrate that the decedent took him or her in at a relatively young age and illustrate that the decedent did in fact raise the child as his or her own.<sup>115</sup> Generally, a child seeking to inherit must also prove circumstances that merit a finding of equitable adoption, such as: "the benefits of love and affection accruing to the adopting party, the performances of services by the child, . . . society, companionship and filial obedience of the child, . . . [and] reliance by the adopted person upon the existence his [or her] adoptive status."<sup>116</sup> While this list is certainly not exhaustive, and is discussed with regard to establishing an equitable parent relationship between a child and his or her foster or putative adoptive parents, the elements of proof can arguably be applied in similar situations, including relationships involving same-sex couples and their children.

But these are difficult requirements, and this doctrine is limited. In addition, while the elements of this doctrine may be broadly interpreted by the courts to apply to same-sex parents and their children, this was not the area it was meant to address and therefore many jurisdictions will probably refuse to extend it to do so. While the other theories have been used by homosexual parents to gain custody, support and visitation rights, it does not appear that equitable adoption, although the best option for inheritance purposes, has been raised by a child with parents of the same gender, or by a non-biological parent on the child's behalf. Thus, it is unclear whether any court would allow such a child to recover under this doctrine.

On the other hand, the other common law doctrines are being invoked at an increasing rate by same-sex parents who have no other means to secure the relationship with their child. California has adopted

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114. BRASHIER, *supra* note 12, at 164.

115. *Id.*

116. Welch v. Wilson, 516 S.E.2d 35, 38 (W. Va. 1999); see also WILLISTON, *supra* note 80, § 16:21, at 470-71 (1997). Williston outlines the following principles:

1. The promisor must promise in writing or orally to adopt the child;
2. Consideration flowing to the promisor must consist of the promisee parents turning the child over to the promisor, and the child must thereafter give filial affection, devotion, association and obedience to the promisor during the latter's lifetime;
3. In such a case, if, upon the death of the promisor, the child has not been made the legally adopted child of the promisor, equity will decree that to be done which was intended to be done and specifically enforce the contract to adopt; and
4. The child will then be entitled to inherit that portion of the promisor's estate which he would have inherited had the adoption been formal.

*Id.*

the Uniform Parentage Act,<sup>117</sup> allowing a court to determine that a child may have two parents, both of whom are women.<sup>118</sup> This court suggested that same-sex couples who raise children have the same rights and responsibilities as heterosexual parents.<sup>119</sup> And, other courts have been granting similar protection to the non-legal parent in homosexual relationships upon the dissolution of the relationship.<sup>120</sup> Courts are therefore attempting to “vindicate the public interest in the children’s financial support and emotional well-being by developing theories of parenthood, so that ‘legal strangers’ who are de facto parents may be awarded custody or visitation or reached for support.”<sup>121</sup> These rulings illustrate a trend of acceptance of this notion that a child may in fact have two parents of the same gender. However, there is still a significant number of jurisdictions that will not extend the common law doctrines to same-sex families.<sup>122</sup> Additionally, these theories are unpredictable and are subject to interpretation by each court; thus, the decisions are not uniform and their application will vary from state to state. Also, even in those jurisdictions that do grant these parents some rights, the doctrines have not been successful in achieving inheritance rights for the children. The theories simply are not broad enough to secure rights for this type of family. Furthermore, they are determined on a case-by-case basis. In other words, the doctrines can only be of use to those individuals who choose (and who can afford) litigation, and even then there is no guarantee that their rights will be recognized.

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117. CAL. FAM. CODE § 7600 (West 2004).

118. See *Elisa B. v. Superior Court*, 117 P.3d 660, 673 (Cal. 2005) (Kennard, J., concurring). Judge Kennard further stated that the children, “no less than any other children in the state, have a right to support from *both* their parents.” *Id.*

119. *Id.* at 666 (majority opinion) (observing that the court “perceive[s] no reason why both parents of a child cannot be women”); see also Bob Egelko, *Court Grants Equal Rights to Same-Sex Parents: Breaking up Partnerships Doesn’t End Parental Obligations*, S.F. CHRON., Aug. 23, 2005, at A1.

120. In *V.C. v. M.J.B.*, the court stated that “[a]lthough the case arises in the context of a lesbian couple, the standard we enunciate is applicable to all persons who have willingly, and with the approval of the legal parent, undertaken the duties of a parent to a child not related by blood or adoption.” 748 A.2d 539, 542 (N.J. 2000). The Massachusetts court in *E.N.O. v. L.M.M.* similarly stated:

The recognition of de facto parents is in accord with notions of the modern family. An increasing number of same gender couples . . . are deciding to have children. It is to be expected that children of nontraditional families, like other children, form parent relationships with both parents, whether those parents are legal or de facto.

711 N.E.2d 886, 891 (Mass. 1999).

121. *Adoption of B.L.V.B.*, 628 A.2d 1271, 1276 (Vt. 1993).

122. In addition, it is likely that recovery under many of these common law doctrines would be prohibited under state versions of DOMA. See, e.g., TEX. FAM. CODE ANN. § 6.204 (Vernon 2002 & Supp. 2006) (barring recognition of foreign same-sex marriages and civil unions).

#### D. *None of the Available Options Are Acceptable*

None of the options available to children of same-sex parents in their attempts to secure inheritance rights are sufficient. All of the options mentioned have a common and fundamental flaw in that they focus on the parents' status and not on the rights of the children. In addition, there are only limited jurisdictions that allow same-sex marriage, civil unions or domestic partnerships, and this Note is not intended to advocate for that change. Second-parent adoptions are only temporary, and do not solve the underlying problem that these children face since there is a fear that in many cases a formal adoption will not actually take place. The common law alternatives provide broad interpretations to current statutory laws, but most of these doctrines cannot be applied to ensure inheritance rights. Even if courts were to allow recovery under an equitable adoption theory, the only way to assert such a right is through litigation and this continues to leave the rights of these children to the discretion of the courts.

### III. CONSTITUTIONAL ANALYSIS

The Fourteenth Amendment to the Constitution provides that no state shall "deny to any person within its jurisdiction the equal protection of the laws."<sup>123</sup> Children raised by gay or lesbian parents are no different than children raised by heterosexual parents, single parents, grandparents or any other type of family in the United States today. Children raised by same-sex parents actually share many of the same attributes as children born out of wedlock.<sup>124</sup> Since the Supreme Court in 1977 held it unconstitutional to discriminate against non-marital children,<sup>125</sup> it follows that denying children of same-sex parents the right to inherit from both of their parents violates their constitutional rights under the Equal Protection Clause.

#### A. *The Road to Equal Rights*

A challenge to a statutory classification under equal protection uses one of three standards of review.<sup>126</sup> Strict scrutiny is applied when a fundamental right is at issue, or when the targeted group is a suspect

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123. U.S. CONST. amend XIV, § 1.

124. *See infra* Part III.C.

125. *Trimble v. Gordon*, 430 U.S. 762 (1977).

126. For an overview of the standards, see generally 3 RONALD D. ROTUNDA & JOHN E. NOWAK, TREATISE ON CONSTITUTIONAL LAW: SUBSTANCE AND PROCEDURE § 18.3, at 216-18 (3d ed. 1999).

class, like a group of a particular race or national origin.<sup>127</sup> This standard requires the state to prove it has a compelling interest in the regulation of the group, and to show that the legislation is narrowly tailored to address this interest.<sup>128</sup> The intermediate level of review is used when the nature of the classification is a quasi-suspect class, such as sex<sup>129</sup> or illegitimacy.<sup>130</sup> This level of review requires a showing that the legislation is substantially related to an important state interest.<sup>131</sup> The easiest burden to satisfy is rational basis review and is used to uphold state legislation that affects a non-suspect class, like age or mental disability.<sup>132</sup> Under this analysis, the state must only indicate there is a legitimate state interest involved and show that the legislation is reasonably related or connected to such interest.<sup>133</sup> The courts also tend to give great deference to state legislation considered to be social or economic regulation and apply rule of rational basis review.<sup>134</sup>

### B. *The Story of the Fatherless*

Under the common law, children born out of wedlock were deemed illegitimate; that is, they were considered children of no one and had no rights to inheritance.<sup>135</sup> Eventually they gained recognition as their mothers' children, but most states still refused to allow these children to inherit from their fathers outside the institution of marriage,<sup>136</sup> unless they were explicitly provided for in a will. Intestate laws allowed only for recovery through the mother and therefore left these children without the financial support they deserved and to which they were entitled.

The rights of non-marital children developed throughout the 1970s and 1980s. *Levy v. Louisiana*<sup>137</sup> was one of the first cases to recognize that children in this situation were entitled to constitutional protection. The Court held that illegitimate children are not non-persons; rather, "[t]hey are clearly 'persons' within the meaning of the Equal Protection Clause of the Fourteenth Amendment."<sup>138</sup> This case dealt with recovery

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127. *See id.* § 18.3, at 216-28; *See, e.g.,* *Loving v. Virginia*, 388 U.S. 1 (1967).

128. *City of Cleburne v. Cleburne Living Ctr., Inc.*, 473 U.S. 432, 440 (1985).

129. *United States v. Virginia*, 518 U.S. 515, 555 (1996).

130. *Trimble*, 430 U.S. at 767.

131. *Cleburne*, 473 U.S. at 441.

132. *See, e.g., id.* at 444-46.

133. *Id.* at 440.

134. *Id.*

135. ANDERSEN, *supra* note 4, § 5, at 18; SCOTT E. FRIEDMAN, *THE LAW OF PARENT-CHILD RELATIONSHIPS: A HANDBOOK* 80 (1992).

136. Dalton, *supra* note 88, at 269.

137. 391 U.S. 68 (1968).

138. *Id.* at 70, 72 (holding that denial to illegitimate children of right to recover for wrongful

under a wrongful death statute rather than inheritance law, but it signified the start of the trend in recognizing the rights of this class of citizens.

Following *Levy*, in *Weber v. Aetna Casualty & Surety Co.*, the Court held that a state statute that denied equal workmen's compensation recovery rights to unacknowledged non-marital children violated the Equal Protection Clause.<sup>139</sup> The Court stated that the children at issue were "*dependent children*, and as such are entitled to rights granted to other *dependent children*."<sup>140</sup> Reiterating the logic in *Levy*, the Court went further and held:

[I]mposing disabilities on the illegitimate child is contrary to the basic concept of our system that legal burdens should bear some relationship to individual responsibility or wrongdoing. Obviously, no child is responsible for his birth and penalizing the illegitimate child is an ineffectual—as well as an unjust—way of deterring the parent.<sup>141</sup>

In *Trimble v. Gordon*,<sup>142</sup> the Court held that a provision of the Illinois Probate Act, which allowed children born out of wedlock to inherit through intestate succession only from their mothers, denied equal protection as that classification was based on illegitimacy and bore no rational relation to a legitimate state purpose.<sup>143</sup> The court indicated that the state interest in promoting legitimate family relationships is unrelated to the difference in the rights afforded to illegitimate children as compared to the rights given to legitimate children in the estates of their mothers and fathers.<sup>144</sup> The Court stated that "parents have the ability to conform their conduct to societal norms, but their illegitimate children can affect neither their parents' conduct nor their own status."<sup>145</sup> The Court also suggested that "[e]vidence of paternity may take a variety of forms, some creating more significant problems of inaccuracy and inefficiency than others. The states . . . are free to recognize these

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death of their mother on whom they were dependent constituted invidious discrimination against the children).

139. 406 U.S. 164, 174-76 (1972).

140. *Id.* at 170.

141. *Id.* at 175.

142. 430 U.S. 762 (1977) (declaring unconstitutional a statute that required subsequent marriage for recovery, and finding that the fact that the father could have made a will did not cure the constitutional defect).

143. *Id.* at 764-66. Children born out of wedlock have been recognized as a constitutionally protected quasi-suspect class the classification of which must survive a heightened level of scrutiny. *See, e.g., id.* at 767; *see also* *City of Cleburne v. Cleburne Living Ctr., Inc.*, 473 U.S. 432, 442 (1985).

144. *See Trimble*, 430 U.S. at 768 n.13 (1977); FRIEDMAN *supra* note 135, at 81.

145. *Trimble*, 430 U.S. at 770.



differences in fashioning their requirements of proof.”<sup>146</sup> The holding in *Trimble* applies to forms of proof that would not compromise the state’s interest, for example where there is a prior adjudication or a formal acknowledgement of paternity.<sup>147</sup>

A year after the Court decided *Trimble*, it heard *Lalli v. Lalli*, a case brought by an out-of-wedlock son to recover from his father’s estate.<sup>148</sup> A plurality of the court found that the New York statute requiring a filiation order during the lifetime of the father was substantially related to the important state interest in providing for the just and orderly disposition of property at death.<sup>149</sup> Therefore, section 4-1.2 of the New York Estates, Powers and Trusts Law, the statute at issue in *Lalli*, was held not to violate the Equal Protection Clause.<sup>150</sup>

Finally, in 1986 the Court made clear that restrictions regarding children born out-of-wedlock were entitled to an intermediate level of scrutiny. In *Clark v. Jeter*, a Pennsylvania six-year statute of limitations for paternity actions did not withstand the changed, heightened level of scrutiny required of legislation disadvantaging this class under the Equal Protection Clause.<sup>151</sup> While this case dealt with support in general, rather than inheritance law, the use of this higher level of scrutiny further emphasized the need for constitutional protection with regard to this class of children, and affirmed that this was the correct standard to apply when addressing equal protection challenges.

Since these rulings, a majority of states have amended their intestate laws or have passed new statutes that allow for children born out of wedlock to recover from both their mother and their father. As indicated in *Trimble*, the states retain some leeway in determining the requirements for meeting the standard of proof to recover from the father.<sup>152</sup> Most of the state statutes require one or more of a given list of

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146. *Id.* at 773 n.14.

147. *Id.*

148. 439 U.S. 259, 261-62 (1978).

149. *Id.* at 275. The dissent suggested the state could meet its goals in less drastic ways: “New York has available less drastic means of screening out fraudulent claims . . . . The New York statute on review here, like the Illinois statute in *Trimble*, excludes ‘forms of proof which do not compromise the State[’s] interests.’” *Id.* at 278-79 (Brennan, J., dissenting) (quoting *Trimble*, 430 U.S. at 772 n.14).

150. *Id.* at 275-76 (majority opinion). The New York statute was amended in 1979, so as to provide that a child born out of wedlock can inherit from his or her father if the filiation order was obtained in the first ten years of the child’s life (not merely during the first two years), or if the father had signed an instrument acknowledging paternity. 1979 N.Y. Sess. Laws 378 (McKinney); see also N.Y. EST. POWERS & TRUSTS LAW § 4-1.2 (Consol. 2006); RESTATEMENT (THIRD) OF PROP.: WILLS & OTHER DONATIVE TRANSFERS § 2.5 reporter’s note 1, cmt. a (Tentative Draft No. 2, 1998).

151. 486 U.S. 456, 461, 463 (1988).

152. See *Trimble*, 430 U.S. at 773 n.14.

options. These conditions include (but are not limited to): the mother and father attempted to marry or participated in a marriage ceremony even if the marriage is later determined to be void; there is a notarized or witnessed statement or written acknowledgement that the child is in fact the father's child; the father openly treated the child as his own; the father's name is on the birth certificate; or a genetic test proves paternity.<sup>153</sup>

### C. *Why the Current Statutes Are Unconstitutional*

Children of same-sex parents are entitled to an intermediate standard of review. The Supreme Court has determined that illegitimacy deserves a more exacting analysis,<sup>154</sup> as legislation targeting such groups is usually based in part on prejudices and biases and frequently bears no relation to the person's ability to perform or contribute to society.<sup>155</sup> The Court has acknowledged that classifications based on gender and illegitimacy are usually arbitrary, and thus unconstitutional under the Equal Protection Clause. Heightened scrutiny is a difficult burden for the state to meet, and since the Supreme Court "has struck down illegitimacy classifications with some frequency,"<sup>156</sup> the current inheritance statutes are not likely to meet the required standard.

Children of same-sex parents are a quasi-suspect class because they are analogous to children born out-of-wedlock for inheritance and equal protection purposes. Children of same-sex parents are non-marital children by their very definition.<sup>157</sup> Also, as the Supreme Court has already suggested with regard to laws that targeted children born out of wedlock, children cannot choose their parents.<sup>158</sup> In fact, the Court has "expressly considered and rejected the argument that a State may

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153. See, e.g., ARIZ. REV. STAT. ANN. § 25-814(A) (Supp. 2006); CONN. GEN. STAT. ANN. § 45a-438(b) (West 2004); GA. CODE ANN. § 53-2-3(2)(A) (1997); MD. CODE ANN., EST. & TRUSTS § 1-208 (LexisNexis 2001); MICH. COMP. LAWS. ANN. § 700.2114 (West 2002 & Supp. 2006); N.Y. EST. POWERS & TRUSTS LAW § 4-1.2(a)(2) (Consol. 2006); S.D. CODIFIED LAWS § 29A-2-114(c) (2004); WIS. STAT. ANN. § 852.05(1) (West 2002 & Supp. 2006).

154. The Supreme Court has granted a higher level of scrutiny to classes with a "history of purposeful unequal treatment' or [that have] been subjected to unique disabilities on the basis of stereotyped characteristics not truly indicative of their abilities." *City of Cleburne v. Cleburne Living Ctr., Inc.*, 473 U.S. 432, 441 (1985) (quoting *Mass. Bd. of Ret. v. Murgia*, 427 U.S. 307, 313 (1976)).

155. See, e.g., *id.* (discussing gender as a classification that warrants heightened scrutiny).

156. KATHLEEN M. SULLIVAN & GERALD GUNTHER, *CONSTITUTIONAL LAW* 689 (14th ed. 2001).

157. Because only Massachusetts allows same-sex couples to marry, a child born of their relationship in any of the remaining states will be out-of-wedlock. See *supra* note 37 and accompanying text.

158. See *Trimble v. Gordon*, 430 U.S. 762, 770 (1977).

attempt to influence the actions of men and women by imposing sanctions on the children born of their illegitimate relationships.”<sup>159</sup> Since most states view relationships between two men or two women as illegitimate, to punish or sanction these children is, as far as the Court and the Constitution are concerned, the same as punishing or sanctioning children born out-of-wedlock. In addition, children of same-sex parents are subjected to a social stigma just like illegitimate children, “both classes of children were or are punished by the law for the actions or status of their parents and both classes of children were or are scorned by the larger society.”<sup>160</sup> Additionally, dependent children of same-sex parents are entitled to recover from the estate of both parents.<sup>161</sup> To deny this right places them in an arbitrary group and violates their constitutional rights: “[A] statutory classification based on birth out-of-wedlock must, in order to withstand constitutional challenge, be reasonable and necessary, accommodate the greatest inclusiveness reasonably possible, and bear an evident and substantial relation to the particular state interest which the statute is designed to serve.”<sup>162</sup>

Although “courts have usually upheld state statutes which impose reasonable prerequisites upon a nonmarital child’s inheritance rights,”<sup>163</sup> the current statutes are not reasonable and make it wholly impossible for a child with same-sex parents to recover intestate from both parents’ estates. While at least some of the interests put forth by the state are important governmental interests, the link between the interests and the targeted legislation “bears only the most attenuated relationship to the asserted goal”<sup>164</sup> and therefore, under an intermediate standard of review, they must be declared unconstitutional.

The interests that have been asserted by the states in past cases, and that are likely to be invoked if future litigation arises, are almost all

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159. *Id.* at 769.

160. See Kyle C. Velte, *Towards Constitutional Recognition of the Lesbian-Parented Family*, 26 N.Y.U. REV. L. & SOC. CHANGE 245, 303 (2000-2001) (presenting an equal protection argument as one of three constitutionally based models to create rights for same-sex parents and their children and discussing these rights in the context of visitation, custody and child support). The equal protection argument endorsed in this article can similarly be used to secure inheritance rights for children with same-sex parents.

161. These children are much like the children in *Weber v. Aetna Casualty & Surety Co.*, 406 U.S. 164 (1972), discussed *supra* notes 139-41.

162. 14 C.J.S. *Children Out-of-Wedlock* § 65, at 354-55 (2005) (citing *United States v. Clark*, 455 U.S. 23, 26-27 (1980); *Cox v. Schweiker*, 684 F.2d 310, 322 (5th Cir. 1982); *In re Estate of Jensen*, 162 N.W.2d 861, 877 (N.D. 1968)).

163. JOHN DE WITT GREGORY ET AL., *UNDERSTANDING FAMILY LAW* 133 (3d ed. 2005).

164. *Trimble v. Gordon*, 430 U.S. 762, 768 (1977) (finding that the state’s interest in promoting “[legitimate] family relationships” is not apparent from a statute that penalizes the children born out of these relationships) (alteration in original).

legitimate goals. The smooth distribution of estates is an important governmental interest, and legislation designed to deter frivolous lawsuits is certainly valid.<sup>165</sup> The fear that non-relatives will come out of the woodwork with claims of an inheritance-worthy relationship is also, unfortunately, a genuine fear. A state therefore has the right and the need to eliminate claims of fraud. However, encouraging traditional families may no longer be accepted as a legitimate legislative aim.<sup>166</sup> So, while the preservation of traditional values may be a justifiable interest, the understanding of family has changed dramatically in recent years and as the courts begin to recognize the existence of these non-traditional relationships,<sup>167</sup> this reason may no longer be valid.<sup>168</sup> In addition, the Court in *Trimble* indicated that “[f]or at least some significant categories of illegitimate children . . . inheritance rights can be recognized without jeopardizing the orderly settlement of estates or the dependability of titles to property passing under intestacy laws.”<sup>169</sup>

The issue of biology is also a very real concern and many states may suggest that without something as solid as genetics, the standard will be too loose. Legislatures may fear that the definition of a parent would become too easy to achieve and this would in turn leave room for individuals who claim to be children of the decedent, even in only a functional or psychological way, to attempt to recover from the decedent’s estate. If the line at which states determine who is and who is

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165. The court in *Trimble* found that the state’s interest in establishing a method of property disposition was substantial, especially with regard to the “difficulty of proving paternity and the related danger of spurious claims.” *Id.* at 770. However, the Court suggested that there was a “middle ground between the extremes of complete exclusion and case-by-case determination of paternity.” *Id.* at 770-71.

166. The claimed state interest in “preservation of the traditional family” is fundamentally flawed as it is “under-inclusive because the positive aspects of familial relations can be achieved in non-traditional structures as well,” including same-sex relationships, and over-inclusive in light of those traditional relationships that are “destructive and dangerous.” Linda Fitts Mischler, *Personal Morals Masquerading as Professional Ethics: Regulations Banning Sex Between Domestic Relations Attorneys and Their Clients*, 23 HARV. WOMEN’S L.J. 1, 37 (2000); see also Gary, *supra* note 8, at 27. However, as demonstrated by state DOMAs, states may still decide who may marry and therefore may still influence the definition of family. For a discussion of state DOMAs, see Peter Hay, *Recognition of Same-Sex Legal Relationships in the United States*, 54 AM. J. COMP. L. 257 (Supp. 2006) and Weiser, *supra* note 37.

167. See, e.g., *Trimble*, 430 U.S. at 762; see also *Lawrence v. Texas*, 539 U.S. 558 (2003) (protecting the sexual intimacy of homosexual relationships).

168. Cf. David D. Meyer, *Family Ties: Solving the Constitutional Dilemma of the Faultless Father*, 41 ARIZ. L. REV. 753, 806 & n.239, 808 (1999) (explaining that the law continues to reflect traditional definitions of marriage, but citing to social scientists who have noted various social changes that have urged reconsideration of traditional definitions of family). See also Debra Carrasquillo Hedges, Note, *The Forgotten Children: Same-Sex Partners, Their Children and Unequal Treatment*, 41 B.C. L. REV. 883, 906 (2000).

169. *Trimble*, 430 U.S. at 771.

not a child were left open to subjective interpretation, this could lead to claims by alleged children, which the decedent did not intend and with whom there was not a sufficient connection, to inherit from the estate. As the need to eliminate fraudulent claims is an important government concern, the requirements of who fits the definitions of parent and child need to be clear and even burdensome, and the burden should belong to the party claiming that such a relationship exists.

However, the current wording of statutes eliminates any and all claims brought by children of same-sex parents, who not only have a sufficient connection with their non-biological parent, but also would be the intended beneficiaries from this parent's estate. As the Court in *Trimble* recognized, there is a middle ground between the extremes of complete exclusion and case-by-case determination of paternity.<sup>170</sup> While it may be more complicated to prove parenthood without the use of genetic testing, these “[d]ifficulties . . . in some situations do not justify the total statutory disinheritance of . . . children.”<sup>171</sup> The *Trimble* Court ultimately found that the statute at issue excluded those categories of illegitimate children unnecessarily and was thus “constitutionally flawed.”<sup>172</sup> Therefore, the current statutes do not need to be amended to allow children to inherit from any individual in a relationship with her parent, but only to allow the particular parent-child relationships discussed here to fall under the intestacy structure.

States may also suggest that amending their current statutory scheme to create rights for the children of same-sex couples implies a social acceptance of same-sex marriage, or, at the very least, tends to legitimize this type of relationship. By amending the statutes, children of other non-traditional parents will also have the right to recover intestate; the benefits will not be limited solely to children of same-sex couples. In addition, this Note does not advocate same-sex marriage or recognition of same-sex relationships in general; rather it approaches the issue from the children's perspective and suggests that penalizing them for the lifestyles of their parents is “an ineffectual—as well as an unjust—way of deterring the parent.”<sup>173</sup> The parents at least have the ability to conform to societal traditions and norms,<sup>174</sup> “but their . . . children can

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170. *Id.*

171. *Id.* at 772.

172. *Id.* at 771.

173. *Id.* at 770 (quoting *Weber v. Aetna Cas. & Sur. Co.*, 404 U.S. 164, 175 (1972)).

174. This is with regard to the decision to raise children. This Note does not explore or assert whether homosexuality itself is something genetic or something the individual chooses. For one point of view, see A. Dean Byrd & Stony Olsen, *Homosexuality: Innate and Immutable?*, 14 REGENT U. L. REV. 383 (2002).

affect neither their parents' conduct nor their own status."<sup>175</sup> Therefore, by approaching the topic with the best interests of the child in mind, children can enjoy their constitutional entitlements without expanding the rights of their parents. By focusing on the nature and quality of the relationship between the parent and the child and not the nature and quality of the relationship between the parent and the parent's partner, the proposal would allow the child to obtain inheritance rights without granting the other parent any additional rights. This also mirrors the rationale behind some equitable doctrines, since both the equitable parent and equitable adoption theories would allow a child to inherit from the parent, but do not in turn allow the parent to inherit from the child or the parent to inherit from his or her partner.

Because children of same-sex parents are non-marital children by nature, and because they are analogous to children born out-of-wedlock for equal protection purposes, they are entitled to a heightened standard of review using an intermediate level of scrutiny. As previously noted: "To withstand intermediate scrutiny, a statutory classification must be substantially related to an important governmental objective."<sup>176</sup> The stated governmental interests are not substantially related to legislation that denies children the right to inherit from individuals who have been acknowledged as their parents. Since these parents and their children lack the biological connection required by many states, as well as the legal adoptive connection, the statutes must be drawn in a way that still allows the simple and smooth distribution of estates. This will prevent the courts from being flooded with sham lawsuits and ensure that unnecessary time and money are not expended. Since the Supreme Court has invalidated, and will likely continue to invalidate, "classifications that burden illegitimate children for the sake of punishing the illicit relations of their parents,"<sup>177</sup> these important state interests can and must be achieved without violating the rights of the innocent children involved.

Unlike non-marital children who can prove through genetics a relationship with both a father and a mother, many of the children discussed in this Note were conceived through the use of artificial insemination or other procedures that leave them with only one biological parent from whom they can legally inherit. This, however, does not justify a denial of their constitutional rights; they are still children of unwed parents entitled to inheritance from both parents,

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175. *Trimble*, 430 U.S. at 770. Although, as this Note indicates, what is or is not considered a societal norm is constantly changing. See, e.g., *supra* note 168 and accompanying text.

176. *Clark v. Jeter*, 486 U.S. 456, 461 (1988).

177. *Id.*

biologically related or not. Accepting a functional or psychological definition of a parent-child relationship is one way to prove the presence of two parents, and this is a method that has been advocated by lawyers and professors alike.<sup>178</sup> Bringing an equal protection argument on behalf of the child<sup>179</sup> puts the focus where it belongs—on the child—rather than on the parent, as occurs with the application of the alternative functional theories. Therefore, while the parent-child relationship is by nature a functional one rather than a biological one, the best solution is not to invoke these common law doctrines but rather to phrase the current inheritance statutes in a manner that will allow these parent-child relationships to meet the requirements.

*D. How Cases Like Trimble Help Children of Same-Sex Parents*

As the states have adjusted their laws to meet the constitutional needs of children born to non-marital families, so should they reexamine their statutes to allow children raised by same-sex parents to recover from both of their parents. In order to accomplish this, states may amend their current intestate succession laws by substituting gender-neutral language where needed and adding elements that, while requiring a considerable amount of evidence, will be achievable by these parents and children. Some of the language in the current statutes may be applied, but to assure the rights of these children, additional clauses that apply to these families should be included as well.

There are, however, difficulties with simply extending current state laws to apply to children in the same-sex setting. Since the term “natural father” is employed in much of the legislation,<sup>180</sup> this indicates that a child is meant to be entitled to intestate succession from his or her biological father and mother. Some states have included inheritance for adoptive children in these laws as well, and provide that these children shall inherit from an adoptive parent as if the adoptive parent were a natural parent.<sup>181</sup> However, by listing the inheritance rights of adopted children in this manner, it suggests that the list is inclusive and does not leave the door open for any of the equitable theories.

A child with two mothers or two fathers is at a disadvantage as this

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178. See, e.g., Gary, *supra* note 8, at 50, 72.

179. See, e.g., Velte, *supra* note 160, at 304-05 (“[I]f such theories and arguments are presented in the context of an equal protection claim for the child, the court will be faced with competing constitutional interests and protected rights.”).

180. See, e.g., KY. REV. STAT. ANN. § 391.105 (LexisNexis 1999). Other phrases used include “birth parent” and “biological father.” See S.D. CODIFIED LAWS § 29A-2-114(a) (2004); TEX. PROB. CODE ANN. § 42(b) (Vernon 2003).

181. See, e.g., ALA. CODE § 43-8-48(1) (1991); CAL. PROB. CODE § 6450 (West Supp. 2006).

fact of biology is impossible to prove in both of his or her parents. Even where one mother has provided the genetic material for the child and the other was the gestational mother, states may only recognize one as the legal mother.<sup>182</sup> Therefore, in jurisdictions where homosexuals may not jointly adopt a child, or where second-parent adoptions are not allowed, there is no way to satisfy the current wording of intestate and probate statutes. The Court in *Trimble* suggested that the encouragement of legitimate families may be a sufficient state interest but “the Equal Protection Clause requires more than the mere incantation of a proper state purpose.”<sup>183</sup> In addition, most states have a legitimate, and even important, interest in the orderly disposition of a decedent’s estate and in protecting innocent adults and those duly interested in their estates from fraudulent claims and harassing litigation brought by supposed children asserting themselves as heirs.<sup>184</sup> The problem presented with regard to children of same-sex parents is how to broaden the requirements enough to allow them a plausible route to recovery, but still keep this avenue limited enough so the state is not flooded with frivolous claims or forced to employ an unreasonable amount of time and resources, and to ensure that the allocation and administration of estates continue to run smoothly.

#### IV. PROPOSAL

##### A. *Where the Change Should Originate*

It is clear that this issue is a serious and legitimate concern for children of same-sex parents and this problem, therefore, needs to be addressed. While it is not as certain where the change should begin, there are only two real options: the courts and the legislatures.

The courts provide an avenue where new issues in public policy can be addressed in order to better meet the needs of a changing society. Thus, courts can create new judge-made law that has the ability to influence and persuade sister jurisdictions to do the same. Courts protect constitutional rights and declare statutes unconstitutional if necessary.

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182. See *K.M. v. E.G.*, 13 Cal. Rptr. 3d 136, 149-50 (Ct. App. 2004), *rev'd*, 117 P.3d 673 (Cal. 2005). The California Court of Appeal used the intention test set forth in *Johnson v. Calvert*, 851 P.2d 776 (Cal. 1993), and held that E.G. as the surrogate was the intended parent, and therefore the only parent. This ruling was reversed, but because the intention test is still likely to be used for questions of motherhood in jurisdictions less liberal than California, the lower court’s opinion provides interesting reasoning for why the rights of a second mother who contributed her genetics might still not be recognized.

183. *Trimble v. Gordon*, 430 U.S. 762, 769 (1977).

184. *Lalli v. Lalli*, 439 U.S. 259, 268, 271 (1978).



Because there is not a lot of law in this area, there is not much binding precedent and judges have the ability to interpret statutes broadly so as to allow same-sex parents and their children to recover under the current inheritance statutes.

But, the courts were not meant to be the rule-makers. They were designed to enforce the law, not write it. And, while the lack of binding precedent can be seen as a boon to children of same-sex parents seeking to adjudicate their rights, this same absence of law gives judges the discretion to interpret statutes narrowly and thus limit rights instead of granting new ones. Moreover, favorable decisions are always at risk of being overruled. Furthermore, litigation is expensive, time-consuming and uncertain. And, since each case is decided on its own facts, while the courts may provide an acceptable method for those individuals who can afford it, litigation provides no assurance of protection for other families in similar situations.

Addressing this problem in the legislature allows individual states to have a say in what the requirements should be and what it should take to prove there is a parent-child relationship worthy of recognition. In this way, the states may differ on the level of proof they require for an individual to qualify under intestate succession, but the courts within the state will not be able to interpret a statute too broadly so long as the wording is clear and unambiguous. This also provides for a uniform application of the laws within states by eliminating the possibility of conflicting decisions among lower courts.

The legislative approach has its flaws, of course. First, there are many states that will be hesitant to expand any statute that would legalize and grant rights to any relationship between homosexuals, even for the narrow and limited purpose of children's inheritance rights.<sup>185</sup> Second, it is not easy to amend a statutory scheme. The process is a long one and in the meantime there may be other developments in society or the legal world that should then be considered, which again would lead the states to be cautious about making these changes.

While both approaches have pros and cons, seeking change in the legislature is the better answer. The legislative method provides clearer standards that would not likely be overruled by subsequent court decisions, unless, of course, the statute is held unconstitutional. It also offers more defined guidelines, providing the courts with plain rules to follow. However, if the states refuse to take the initiative and pass new laws or amend their current inheritance statutes, then the courts must

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185. For example, most states that have enacted their own versions of DOMA will likely be reluctant to grant children of same-sex couples any rights.

take action and hold the current statutes unconstitutional, since they violate children's equal protection rights.

*B. Proposal for the Legislature*

This Note suggests that the constitutional rights of children require the states to take action and draft legislation that allows a child of same-sex parents to inherit from the parent who has not been deemed "legal." The states must simply re-evaluate their current laws and make minor changes in the language in order to incorporate the children at issue. The elements in the statute may be achievable by proof of a parent-child relationship, or the states can alter the words in their current statute so they do not apply only to one gender and so that a biological relationship is not an absolute requirement.

Constitutional recognition of these children's rights is both necessary and in order. States should therefore take action to keep their inheritance laws from being declared unconstitutional. In order to meet the needs of children, as well as the constitutional requirements of the Fourteenth Amendment, the states must implement a set of elements, as stringent or flexible as the individual state deems necessary. These elements then must be met in order to establish a parent-child relationship. Since the Supreme Court has suggested that punishing children as a way of deterring their parents is an "ineffectual" and "unjust way of deterring the parent,"<sup>186</sup> this reasoning easily extends to the children presented here.

This proposal urges the states to both examine the current language in their inheritance statutes and make only those changes necessary to protect the rights of children of same-sex parents.<sup>187</sup> This merely requires that proof of a genetic connection be optional, not mandatory, and that the statutory language not be limited to mother *and* father. In other words, where the statute lists ways in which a non-marital child can inherit from his or her father, the word "father" must be changed to allow for another parent of the same sex. By simply changing some of the wording in the statutes already in effect, states can assure that these children will receive their constitutional right of equal protection and their entitlement to inherit intestate from both of their parents.

This proposal would make the level of proof attainable without a blood test to prove paternity, but nevertheless would still require a high level of circumstantial proof to discourage frivolous and arbitrary litigation. For example, a written acknowledgment of a parent-child

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186. *Weber v. Aetna Cas. & Sur. Co.*, 406 U.S. 164, 175 (1972).

187. For specific examples of how these changes can be incorporated, see Appendix, *infra*.

relationship, signed by a notary,<sup>188</sup> is a condition that these parents and children can meet. In addition, some states allow for a child to receive the last name of one partner on a birth certificate even when the other parent provided the genetic material. For example, in California, a male partner can be named as the mother and a female can be named as the father on the birth certificate.<sup>189</sup> In states where these practices are allowed, they could be sufficient to guarantee recognition of both parents, and a child in this situation would be able to inherit from either estate. These examples represent some suggestions a state can incorporate, but they by no means imply the minimum or maximum level of proof required. The states can therefore allow a functional parent-child relationship to receive recognition under the law, but can do so by choosing the specific requirements necessary to prove entitlement to recovery.

Because all of the current state statutes have components that can be met by the parent-child relationships discussed here, the changes need not be drastic. Instead the word “and” need only be replaced with “or,” terms must be made gender neutral, or the meaning behind certain phrases needs to be extended so as to allow recovery by these children. This will allow children of same-sex parents to inherit, but the qualifications adopted are ones that have already proven successful in terms of inheritance.

In addition to the examples discussed above, some of the common phrases in inheritance statutes will be sufficient to meet the constitutional needs of children of same-sex parents. Statutory language that can be employed requires the simple replacement of the word “father” with the word “parent,” and examples include: the parent openly and notoriously acknowledged or claimed or treated the child as his or her own and there is a presentation of clear and convincing evidence to support such a statement,<sup>190</sup> the parent signed a written acknowledgment of parenthood,<sup>191</sup> “the . . . parents participated in a

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188. See, e.g., N.Y. EST. POWERS & TRUSTS LAW § 4-1.2(2)(B)(i) (Consol. 2006).

189. *Davis v. Kania*, 836 A.2d 480, 481, 484 (Conn. Super. Ct. 2003) (finding one partner equitably estopped from attacking a California trial court’s judgment, which allowed one of two male partners to be listed as mother where the two men established a parental relationship with a child while residing in California); see also ARIZ. REV. STAT. ANN. § 25-814(A)(3) (West 2000 & Supp. 2006) (allowing birth certificate as evidence of paternity).

190. See, e.g., MD. CODE ANN., EST. & TRUSTS § 1-208(b)(3) (LexisNexis 2001); 20 PA. CONS. STAT. ANN. § 2107(c)(2) (West 2005); see also GA. CODE ANN. § 53-2-3 (1997) (discussing other clear and convincing evidence).

191. See, e.g., ARK. CODE ANN. § 28-9-209 (2004); see also MICH. COMP. LAWS ANN. § 700.2114(b)(i) (West 2002 & Supp. 2006) (using the term advocated by this Note: “acknowledgment of parentage”).

marriage ceremony before or after the birth of the child, even though the attempted marriage is void,<sup>192</sup> or there was a court order declaring said individual to be the parent of the child.<sup>193</sup>

The parent who is not biologically or legally related to the child can easily prove that he or she openly and notoriously acknowledged the child as his or her own, through evidence of notes, cards and paper documents as well as by providing for the child financially, or through testimony of members of the community. The same parent can also present a written acknowledgment that he or she is in fact the parent of the subject child. In addition, plenty of same-sex couples take part in marriage ceremonies,<sup>194</sup> and while there is, in nearly all states, no legally recognized marriage formed, the ceremony should be enough to evince intent to be married, and to raise any children as children of this marriage. Finally, in cases where one parent has taken the other to court for visitation, custody or support issues, such orders should serve as evidence of a parent-child relationship for inheritance purposes as well.

Another proposal is embodied in the Uniform Parentage Act, which “allows voluntary acknowledgement of paternity” and “specifies a procedure for such acknowledgement.”<sup>195</sup> While the Uniform Parentage Act focuses again on the functional nature of the parent-child relationship,<sup>196</sup> it contains suggestions for the legislatures on different sets of wording that would allow same-sex parents and their children to meet the definition of parent and child. Since this Note suggests that a voluntary acknowledgment of parenthood could be one of the elements in the amended statutes, it is this Note’s position that the Uniform Parentage Act provides good guidelines for the states to consider in

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192. KY. REV. STAT. ANN. § 391.105(1)(a) (LexisNexis 1999); *see also* NEB. REV. STAT. ANN. § 30-2309(2)(i) (LexisNexis 2001).

193. *See, e.g.*, OKLA. STAT. ANN. tit. 84, § 215 (West 1990); *see also* WIS. STAT. ANN. § 852.05(1)(a)-(b) (West 2002) (using two phrases, “father has been adjudicated to be the father” and “has admitted in open court that he is the father”).

194. *See, e.g.*, V.C. v. M.J.B., 748 A.2d 539, 543 (N.J. 2000); *see also* State v. Mallan, 950 P.2d 178, 245 (Haw. 1998) (Levinson, J., dissenting) (“Increasing numbers of [gay and lesbian couples surveyed] are celebrating their relationships in ceremonies of commitment. Those who participate commonly refer to the ceremonies as weddings and to themselves as married, even though they know that the ceremonies are not legally recognized . . . .” (quoting David L. Chambers, Essay, *What If? The Legal Consequences of Marriage and the Legal Needs of Lesbian and Gay Male Couples*, 95 MICH. L. REV. 447, 449 (1996))).

195. GREGORY ET AL., *supra* note 163, at 127; *see also* UNIF. PARENTAGE ACT §§ 201, 204, 301, 302, 9B U.L.A. 309, 311-14 (2001 & Supp. 2006).

196. The Act also creates a presumption of paternity that could be changed to a presumption of parentage and adapted to allow de facto parents to qualify as presumptive parents. *Id.* § 204, 9B U.L.A. at 311. *See* Jennifer L. Rosato, *Children of Same-Sex Parents Deserve the Security Blanket of the Parentage Presumption*, 44 FAM. CT. REV. 74, 81 (2006) (discussing presumed parenthood for children of same-sex parents and the Uniform Parentage Act).

determining what would qualify as an acknowledgment.<sup>197</sup>

Of course, many states may be hesitant to include gender-neutral language in their statutes or to expand the established requirements to make it possible for more people to recover under intestate succession, in the fear that it will open the doors to rights for homosexuals that they are not ready or willing to grant. This logic follows a “floodgate theory”<sup>198</sup>—expanding legislation and allowing this type of non-traditional parent-child relationship recovery opens the door to other claims by children alleging a legitimate and recognizable relationship with a decedent, until the lines are so blurred that anyone and everyone can recover. The floodgate theory also extends to expanding the type of relationships that are recognized. This refers to the fear that the recognition of children of same-sex parents would lead to recognition of the parents’ relationship as well. However, the only legislation at issue here is that which deals with the rights of children. Replacing “father” with “parent” and removing “natural” where it is not deemed entirely necessary in only those statutes that refer to the children’s inheritance rights will preserve for these children the rights to which they are entitled without expanding the rights of their parents.

States that are willing to fully re-examine their current inheritance laws are encouraged to incorporate aspects of the equitable theories in their legislative schemes to protect both the best interests and the constitutional rights of the children involved. While these doctrines are not perfect and have been interpreted differently by various courts, they provide some options to the legislature as to how to fashion the requirements of proof. The states, by including portions of these theories in their legislation, can also limit the theories to address only the inheritance issues for the children involved, while leaving the common law doctrines themselves intact as options for custody, support and visitation battles for both homosexual and heterosexual parents alike.

## V. CONCLUSION

Children raised by parents of the same sex are entitled to the same inheritance rights to which children raised by heterosexual parents are entitled. But because these children lack the two bloodlines from which

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197. The Uniform Parentage Act suggests that an acknowledgment of paternity must be in a record; must “be signed or otherwise authenticated”; and must “state that the signatories understand that the acknowledgment is the equivalent of a judicial adjudication of paternity.” UNIF. PARENTAGE ACT § 302, 9B U.L.A. at 314.

198. Professor Andrew Schepard, Director of the Center for Children, Families and the Law, and Professor of Law at Hofstra Law School, suggested the use of the phrase “floodgate theory” in this context.

most children inherit, they cannot prove parental relationships with science and genetics. If there has also been no formal adoption due to illegality or neglect by the parents, the states need to find alternative ways for these children to receive the rights to which they are entitled.

Because intestacy laws are designed to reflect the intention of the decedent, a homosexual parent who has loved, reared and supported a child since the child's conception or arrival into the family would presumably intend such a child to recover from his or her estate. Therefore, the states need to adapt to this changing reality by fashioning elements of proof that same-sex parents and their children can meet. Allowing states to draft their own legislation guided by a broad set of possibilities leaves the power in each individual state—where it belongs—to determine the best and most efficient way to administer distribution of estates while protecting the constitutional rights of the children involved.

Children of same-sex parents are analogous to children born out-of-wedlock for equal protection purposes, and under an intermediate scrutiny standard of review, most current statutes are unconstitutional. The statutes do not allow children of same-sex parents to recover from the estate of a parent who has not been established as a legal parent, and this leaves such children at an unfair disadvantage in terms of both financial and emotional support. Therefore, while the legislature provides the most efficient and effective method of addressing the needs of these children and adapting to the changes in society, if the states refuse to take action, then the courts must intervene and declare unconstitutional the existing statutes.

Children have no control over the way they are raised, or who raises them. To punish them because society may disapprove of the choices their parents have made is both ineffective and unjust. Accordingly, to meet the constitutional needs of these children, their rights to inheritance must be both recognized and remedied. Children of same-sex parents are entitled to the same recovery from both parents as children of opposite-sex parents. Therefore, children of same-sex parents should receive inheritance rights from both parents, legally recognized or otherwise.

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\* J.D. Candidate, 2007, Hofstra Law School. I would like to extend my gratitude to the editors of the *Hofstra Law Review* for all their help and hard work. I would especially like to acknowledge my *Law Review* colleagues; Stephanie Restifo, Erick Rivero, Stefanie Hyder, Sara Marrinan and Melanie Winegar for their dedication during the publication process, Alexis

## APPENDIX

This section provides two current state statutes and suggests changes in wording that would allow children of same-sex parents to inherit. It is included to clarify some of the suggestions made in Part IV and throughout this Note.

## A. EXAMPLE 1

1. *Current Statute: Florida*<sup>199</sup>

732.108. Adopted persons and persons born out of wedlock

....

- (2) For the purpose of intestate succession in cases not covered by subsection (1),<sup>200</sup> a person born out of wedlock is a lineal descendent of his or her mother and is one of the natural kindred of all members of the mother's family. The person is also a lineal descendent of his or her father and is one of the natural kindred of all members of the father's family, if:
- (a) The natural parents participated in a marriage ceremony before or after the birth of the person born out of wedlock, even though the attempted marriage is void.
  - (b) The paternity of the father is established by an adjudication before or after the death of the father.
  - (c) The paternity of the father is acknowledged in writing by the father.

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199. FLA. STAT. ANN. § 732.108 (West 2005). Florida may seem to be an unlikely choice as a model statute, since it is the one state that explicitly prohibits homosexuals from adopting. It would seem to follow that the legislature would be more than a little hesitant to adapt its intestacy laws to afford children of homosexuals any protection. However, it was selected because it contains a few of the phrases this author would encourage the states to use (after changing the words to be gender neutral) and to illustrate that the changes proposed can be applied to all states.

200. Section 732.108(1) concerns adopted individuals. *Id.*

## 2. Model Statute A<sup>201</sup>

....

- (2) For the purpose of intestate succession in cases not covered by subsection (1), a person born out of wedlock is a lineal descendent of his or her mother *or biological father* and is one of the natural kindred of all members of ~~the mother's~~ *this parent's* family. The person is also a lineal descendent of his or her ~~father~~ *other parent* and is one of the natural kindred of all members of ~~the father's~~ *his or her* family, if:
- (a) The ~~natural~~ parents participated in a marriage ceremony before or after the birth of the person born out of wedlock, even though the attempted marriage is void.
  - (b) ~~The paternity of the father~~ *Parenthood* is established by an adjudication before or after the death of ~~the father~~ *said parent*.
  - (c) ~~The paternity of the father~~ *Parenthood* is acknowledged in writing by ~~the father~~ *said parent*.

## B. EXAMPLE 2<sup>202</sup>

### 1. Current Statute: Pennsylvania<sup>203</sup>

#### § 2107 Persons born out of wedlock

....

- (c) Child of father—For purposes of descent by, from and through a person born out of wedlock, he shall be considered the child of his father when the identity of the father has been determined in any one of the following ways:
- (1) If the parents of a child born out of wedlock shall have married each other.
  - (2) If during the lifetime of the child, the father openly holds out the

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201. Deletions from the original statute are noted with strikethrough, while insertions are noted in italics.

202. Two examples are provided simply because three phrases are especially important to emphasize: (1) the idea of an acknowledgment in writing requirement contained in the Florida statute; (2) the participation in a marriage ceremony even if such marriage is void, also contained in the Florida statute; and (3) openly holding the child out to be his or hers and providing support for the child, embodied in the Pennsylvania statute.

203. 20 PA. CONS. STAT. ANN. § 2107 (West 2005).



child to be his and receives the child into his home, or openly holds the child out to be his and provides support for the child which shall be determined by clear and convincing evidence.

- (3) If there is clear and convincing evidence that the man was the father of the child, which may include a prior court determination of paternity.

## 2. Model Statute B

....

- (c) Child of ~~father~~ *other parent*—For purposes of descent by, from and through a person born out of wedlock, he *or she* shall be considered the child of ~~his father~~ *this parent* when the identity of ~~the father~~ *this parent* has been determined in any one of the following ways:
- (1) If the parents of a child born out of wedlock shall have ~~married each other~~ *participated in a marriage or commitment ceremony, even if such marriage is void.*
  - (2) If during the lifetime of the child, ~~the father~~ *this parent* openly holds out the child to be his *or hers* and receives the child into his *or her* home, or openly holds the child out to be his *or hers* and provides support for the child which shall be determined by clear and convincing evidence.
  - (3) If there is clear and convincing evidence that the ~~man~~ *person* was the ~~father~~ *parent* of the child, which may include a prior court determination ~~of paternity~~ *of parenthood.*