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SAME-SEX PARENTING AMONG A PATCHWORK OF LAWS: AN ANALYSIS OF NEW YORK SAME-SEX PARENTS' OPTIONS FOR GAINING LEGAL PARENTAL STATUS

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INTRODUCTION

While national attention has focused on the recent Supreme Court decision, *Obergefell v. Hodges*,[1] which legalized same-sex marriage, less attention has been paid to the aftermath: how will those same-sex couples, now legally married, use laws drafted for different-sex couples? This Note will focus on one of these conflicts: the children born to and adopted by same-sex couples, and the legal relationship between the couples and their children within the state of New York. As nontraditional families have become more prevalent,[2] the law has lagged behind and families have been forced to apply outdated laws to new arrangements. This is often seen in relation to same-sex couples, whether married or unmarried, and their children.[3] This Note will

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[1] 135 S. Ct. 2584 (2015).

[2] For purposes of this Note "traditional families" are defined as a two-parent household where both parents are different sexes, and in which the children are biologically related to both parents or have been adopted by both parents. *See* Katharine T. Bartlett, *Rethinking Parenthood as an Exclusive Status: The Need for Legal Alternatives When the Premise of the Nuclear Family Has Failed*, 70 VA. L. REV. 879, 880 (1984) ("[A]n increasing number of children do not live in traditional nuclear families."); Susan N. Gary, *Adapting Intestacy Laws to Changing Families*, 18 LAW & INEQ. 1, 4 (2000) ("The family structure in the United States has changed dramatically. Stepfamilies, blended families, unmarried heterosexual and gay and lesbian cohabitants with or without children—many persons now live in families that no longer fit the Cleaver family norm." (footnotes omitted)); Doris Nhan, *Census: More in U.S. Report Nontraditional Households*, NAT'L J., May 1, 2012 ("Married straight couples with families now make up less than half of U.S. households, marking the first time the group has dropped below 50 percent since census data on families was first collected in 1940."); Derek Thompson, *The Slow Death of 'Traditional' Families in America*, THE ATLANTIC (Nov. 27, 2013), http://www.theatlantic.com/business/archive/2013/11/the-slow-death-of-traditional-families-in-america/281904 ("Gay marriage laws have happily extended legal rights to same-sex couples, but over the last half century, a less auspicious family development has been the rise of single moms and dads and the decline of two-parent households, particularly among lower-income and less-educated families.").

[3] For example, the U.S. Census estimated an 80.4% increase in the number of households with same sex-partners from 2000 to 2010. *Households and Families: 2010*, U.S. CENSUS BUREAU (April 2012), http://www.census.gov/prod/cen2010/briefs/c2010br-14.pdf. It is important to note, however, that it is possible that the change indicated by the Census is due, at least in part, to an increase in the number of reported same-sex households rather than an actual increase. *See, e.g.*, David de Vaus, *Diversity and Change in Australian Families: Statistical Profiles*, AUSTRALIAN INST. OF FAMILY STUDIES, 83 (July 2004), http://www.aifs.gov.au/institute/pubs/diversity/DiversityAndChange.pdf (analyzing the Australian census's "likely underestimates" of same-sex couples, and finding that older same-sex couples might be more reluctant to self-report their relationship). *But see* Gregory M. Herek et al., *Avoiding Heterosexist Bias in Psychological Research*, 46 AM. PSYCHOLOGIST 957, 959 (1991), http://www.apa.org/pi/

address the issue of same-sex parents who are forced to utilize New York's laws and procedures which were designed for different-sex couples. Because of obvious biological differences—a same-sex couple cannot reproduce without outside involvement—the application of laws designed with only a father and mother in mind to same-sex couples will have unintended results.

This Note will proceed in three parts. Part I will discuss several current and previous methods used by same-sex couples to gain legal parental status in New York. Because of the patchwork nature of laws across states, the relevance and efficacy of most of these methods within other jurisdictions will vary, depending in part on the level of legal recognition granted to same-sex couples in a given jurisdiction.[4] Methods discussed will include types of adoption, gaining parental status through equitable estoppel, the presumption of legitimacy through marriage, and acknowledgments of paternity. Additionally, this section will discuss New York's Marriage Equality Act[5] and the legislative history and intent behind portions of the Act.

Part II of this Note will examine the problems facing same-sex couples seeking full legal parental rights over their children. This section will examine recent illustrative cases in New York to demonstrate the immediacy of the problem, and thus the urgency of a viable solution. The section will focus on a low-level trial court case in which one member of a lesbian couple sought—unsuccessfully—to affirm her legal parental relationship with the child born to her wife, indicative of the types of problems faced by same-sex parents.

Part III will propose that New York courts utilize the Marriage Equality Act to reinterpret existing statutory and common law in a gender-neutral manner, and in a way that places same-sex couples on equal footing with different-sex couples. Rather than altering each individual statute pertaining to marriage, a broadly worded portion of

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lgbt/resources/avoiding-bias.aspx ("In the past, researchers often have assumed that lesbians, gay men, and bisexuals could not be sampled through probability methods because of their status as "hidden" minorities in the United States. Recently, however, survey items about sexual behavior and orientation have been successfully administered to probability samples . . . . These studies suggest that the problem of nonresponse in surveys of sexual behavior or orientation, although serious, may not be qualitatively different from that encountered with other samples.").

[4] Same-sex marriage is perhaps the most commonly cited type of recognition sought by same-sex couples, but other rights varying by state include the ability to visit a significant other in the hospital, and protections in housing, employment, parenting, and against hate crimes. The possibility to have some, but not all, of these rights, and the differences in each state, can lead to a patchwork of laws. *See, e.g.*, *Maps of State Laws & Policies*, HUMAN RIGHTS CAMPAIGN, http://www.hrc.org/state_maps (last visited May 22, 2016) (containing maps showing state laws on the rights of lesbian, gay, bisexual, and transgender individuals in the context of, *inter alia*, employment discrimination, housing discrimination, public accommodation, hate crimes, and school anti-bullying).

[5] Marriage Equality Act, 2011 N.Y. Sess. Laws Ch. 95 (McKinney).

the Act functions as a catchall provision and allows later interpreters to apply it to any relevant gender-specific language or terms. This Note will propose ways that New York courts should utilize this statute in order to increase equality between same-sex and different-sex parents. As examples, this Note proposes the creation of a gender-neutral "acknowledgment of parentage," better utilizing the existing marital presumption of legitimacy, and making use of equitable estoppel in same-sex couples. Finally, this Part also addresses other potential remedies for the problem that were rejected as impractical or undesirable.[6]

I. CURRENT METHODS OF GAINING LEGAL PARENTAL STATUS

Prior to the legalization of same-sex marriage in some states, before the practice was legalized nationwide,[7] same-sex couples still needed a method of ensuring that both members of the couple were able to have a legal relationship with a child they were raising together.[8] The reasons for this are readily apparent. A parent who is a legal stranger has no rights to make decisions for the child, for example, in the event of a medical emergency; conversely, the child has no right to benefits, such as health insurance, through that parent, nor would the child automatically inherit in the event of that parent's death.[9] Furthermore,

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[6] For example, proposals such as passing a new law or delegating the problem to the courts of another state were dismissed as unlikely or impractical. For purposes of this Note, it is assumed that an individual seeking to ensure that his or her legal rights as a parent are valid will seek a substantive confirmation, rather than merely a right to seek such a confirmation at a later date. *E.g.*, Sacha M. Coupet, *"Ain't I A Parent?": The Exclusion of Kinship Caregivers from the Debate over Expansions of Parenthood*, 34 N.Y.U. REV. L. & SOC. CHANGE 595, 630 (2010) ("[E]ven in those states where same-sex marriage, domestic partnerships, or the equivalent, are legal, and where by statute or caselaw [sic] presumptive parentage attaches, same-sex partners of parents are advised to petition for parental rights through either stepparent or second-parent adoption.").

[7] *See* Obergefell v. Hodges, 135 S. Ct. 2584 (2015).

[8] *See, e.g.*, Nancy D. Polikoff, *This Child Does Have Two Mothers: Redefining Parenthood to Meet the Needs of Children in Lesbian-Mother and Other Nontraditional Families*, 78 GEO. L.J. 459, 468–73 (1990) (discussing the necessity of allowing both members of same-sex couples to have legal rights to a child, rather than limiting legal rights to the two biological parents).

[9] Many of these issues are analogous to those faced by same-sex partners who were previously unable to marry; those situations are also better documented. *See, e.g.*, Tara Parker-Pope, *How Hospitals Treat Same-Sex Couples*, N.Y. TIMES (May 12, 2009, 12:00 PM), http://well.blogs.nytimes.com/2009/05/12/how-hospitals-treat-same-sex-couples ("A Bakersfield, Calif., couple rushed their child to the emergency room with a 104 degree fever. The women were registered domestic partners, but the hospital only allowed the biological mother to stay with the child. Although hospitals typically allow both parents to stay with a child during treatment, in this case, the second parent was forced to stay in the waiting room."); *see also* Jan Ellen Rein, *Relatives by Blood, Adoption, and Association: Who Should Get What and Why (The Impact of Adoptions, Adult Adoptions, and Equitable Adoptions on Intestate Succession and Class Gifts)*,

should the couple separate, the non-biological parent would have no standing to seek custody or visitation of the child—though there are some narrow exceptions.[10] These illustrations are merely some of the examples of privileges and benefits associated with a full and legal parent/child relationship.

A. *Original Notions of Parental Rights*

Historically, the law considered a child born out of wedlock as "*filius nullius*," meaning a child of no one with no legal father.[11] Over time, the United States Supreme Court began to strike down many laws that distinguished between those children born to a married couple and those born out of wedlock.[12] Similarly, adopted children were initially regarded differently from "naturally born" children.[13] Today, of course, adoption is much more widespread in the United States.[14] Because two

37 VAND. L. REV. 711, 713 (1984) ("our succession law started with the assumption that inheritance rights are based on consanguinity [biological relationship] and that any deviation from this principle requires express authorization either by legislation or by a private dispositive instrument . . . .").

10 *See, e.g.*, N.Y. FAM. CT. ACT § 447(a) (McKinney 2014) ("In the absence of an order of custody or of visitation . . . the court may make an order of custody or of visitation . . . requiring one *parent* to permit the other to visit the children at stated periods . . . even where the *parents* are divorced and the support order is for a child only." (emphasis added)). The quoted statute refers explicitly to parents. Implicit in that is the notion that it is a *parent* who is entitled to custody or visitation—someone not considered a legal parent would not be so entitled; *see also infra* Part I.C (discussing equitable estoppel).

11 *See* Brewer's Lessee v. Blougher, 39 U.S. 178, 197 (1840) ("According to the principles of the common law, an illegitimate child is filius nullius, and can have no father known to the law."); *see also* SUSAN FRELICH APPLETON & D. KELLY WEISBERG, ADOPTION AND ASSISTED REPRODUCTION: FAMILIES UNDER CONSTRUCTION 8 (2009).

12 *E.g.* Weber v. Aetna Cas. & Sur. Co., 406 U.S. 164, 175 (1972) ("The status of illegitimacy has expressed through the ages society's condemnation of irresponsible liaisons beyond the bonds of marriage. But visiting this condemnation on the head of an infant is illogical and unjust. . . . 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."); Stanley v. Illinois, 405 U.S. 645 (1972) (holding that it is a violation of the Equal Protection Clause for the State to require a hearing before assuming the custody of children born to married parents, divorced parents, or unmarried mothers, but to declare children of unmarried fathers dependent without a hearing or proof of neglect).

13 Stephen B. Presser, *The Historical Background of the American Law of Adoption*, 11 J. FAM. L. 443, 501 (1971) ("A sampling of the decisions that interpreted the adoption acts in the years following their passage shows that courts felt that the rights of adopted children differed significantly from those that might have been accorded to natural children of the adopting parents."). For example, for a time certain intestacy laws provided that an intestate adopted child's estate would be given to his natural—not adopted—parents. *Id.* Similarly, other laws provided that adopted children were not considered siblings of "natural" children of their adopted parents and that adopted children were subject to additional taxes not collected from natural children. *Id.*

14 The United States Department of Health estimated that nearly 51,000 children were adopted with the involvement of a public child-welfare agency in the 2013 fiscal year, with nearly

individuals of the same sex are biologically incapable of conceiving a child without outside involvement, adoption presents one prominent option for same-sex couples seeking to raise a child.[15]

B. *Adoption*[16]

There are two types of adoption typically used by same-sex couples: stepparent adoptions and second-parent adoptions.[17] A stepparent adoption, in its simplest form, is where a biological parent remarries—or marries for the first time, if the child was born out of wedlock—and the new spouse adopts the child, becoming a legal parent.[18] A second-parent adoption is typically defined as a legal procedure in which an individual adopts a child whom he or she is co-parenting, but with whom he or she has no existing legal relationship.[19]

The main difference between a stepparent adoption and a second-parent adoption is that typically in a stepparent adoption one biological parent loses his or her legal rights to the child,[20] whereas in a second-parent adoption a new adult gains a legal relationship with the child

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59,000 more children waiting to be adopted. CHILDREN'S BUREAU, U.S. DEP'T OF HEALTH AND HUMAN SERVS., THE AFCARS REPORT 1 (July 2014), http://www.acf.hhs.gov/sites/default/files/cb/afcarsreport21.pdf. This statistic does not include other types of adoption utilized in the United States.

15 *See, e.g.*, Sabrina Tavernise, *Adoptions by Gay Couples Rise, Despite Barriers*, N.Y. TIMES (June 13, 2011), http://www.nytimes.com/2011/06/14/us/14adoption.html.

16 For a general history of adoptions, see Presser, *supra* note 13.

17 For an earlier look at same-sex adoption, see Ralph C. Brashier, *Children and Inheritance in the Nontraditional Family*, 1996 UTAH L. REV. 93, 160 (1996) ("In their efforts to establish legally recognized relationships among themselves and their children, homosexual families are increasingly turning to adoption laws."). Though it is not discussed further in this Note, some jurisdictions allow more than two individuals to be legal parents to a child. *E.g.*, CAL. FAM. CODE § 7612(c) (West 2014) ("a court may find that more than two persons with a claim to parentage . . . are parents"); DEL. CODE ANN. tit. 13, § 8-201 (West 2013) (allowing de facto parents); D.C. CODE § 16-831.01 (2012) (allowing de facto parents, including in situations where there are two existing parents); Jacob v. Shultz-Jacob, 923 A.2d 473, 475–76, 481–82 (Pa. Super. Ct. 2007) (affirming the trial court's custody order, which granted shared custody to three adults). *See generally* Laura Nicole Althouse, *Three's Company? How American Law Can Recognize A Third Social Parent in Same-Sex Headed Families*, 19 HASTINGS WOMEN'S L.J. 171 (2008); Ann E. Kinsey, Comment, *A Modern King Solomon's Dilemma: Why State Legislatures Should Give Courts the Discretion to Find That A Child Has More Than Two Legal Parents*, 51 SAN DIEGO L. REV. 295 (2014).

18 Under common law, the stepparent does not have a legal relationship to the child, unless there is an affirmative adoptive process, all other things being equal. *See* Bartlett, *supra* note 2, at 912–13 ("Under the common law, the stepparent-stepchild relationship does not itself give rise to any legal rights or obligations. For example, the stepparent need not support his stepchild or accept the child into his home.").

19 ARTHUR S. LEONARD & PATRICIA A. CAIN, SEXUALITY LAW 419 (2005).

20 *See, e.g.*, Margaret M. Mahoney, *Stepparents As Third Parties in Relation to Their Stepchildren*, 40 FAM. L.Q. 81, 85 (2006); APPLETON & WEISBERG, *supra* note 11, at 177; Brashier, *supra* note 17, at 155.

without either of the existing legal parents having to lose any parental rights.[21] Additionally, whereas in many second-parent adoptions the two parents often plan to start the family together prior to the birth of the child,[22] a classic stepparent adoption is inherently one in which the new parent begins parenting the child later than the other co-parent.[23] Furthermore, in a second-parent adoption, the new parent does not need to have a legal relationship—such as marriage—with the existing parent.[24]

The most basic adoption scheme is often called a "stranger" paradigm, and can be seen as a precursor to a stepparent adoption because in a stranger adoption both biological parents lose their right to the child.[25] This is meant to apply to situations in which a child is completely removed from his or her birth parents—hence the term "stranger."[26] In order to permit stepparent adoptions,[27] an exception is created to that stranger paradigm in which only one parent's rights are terminated, allowing the other parent to continue to have a legal relationship with the child, and allowing the stepparent to gain legal

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[21] *See* COURTNEY G. JOSLIN, SHANNON P. MINTER, & CATHERINE SAKIMURA, LESBIAN, GAY, BISEXUAL AND TRANSGENDER FAMILY LAW § 5:3 (2015); LEONARD & CAIN, *supra* note 19, at 419.

[22] *See* JOSLIN ET AL., *supra* note 21, § 5:3.

[23] *Id.*

[24] *E.g.*, Sharon S. v. Super. Ct. of Cal., San Diego Cnty., 73 P.3d 554 (Cal. 2003), *cert. denied*, 540 U.S. 1220 (2004) (denying a petition for certiorari and thereby allowing to stand a California Supreme Court decision allowing a former domestic partner to complete a second-parent adoption of a child conceived during the partnership). *See generally* Ann K. Wooster, *Adoption of Child by Same-Sex Partners*, 61 A.L.R. 6th 1 (2011); JOSLIN ET AL., *supra* note 21, § 5:3.

[25] *See, e.g.*, N.Y. DOM. REL. LAW § 117(2)(a) (McKinney 2014) ("[A]fter the making of an order of adoption, adopted children and their issue thereafter are strangers to any birth relatives for the purpose of the interpretation or construction of a disposition in any instrument . . . ."); Peter Wendel, *Inheritance Rights and the Step-Partner Adoption Paradigm: Shades of the Discrimination Against Illegitimate Children*, 34 HOFSTRA L. REV. 351, 361–64 (2005); APPLETON & WEISBERG, *supra* note 11, at 176–77; Bartlett, *supra* note 2, at 893–94 ("Adoption severs the relationship between the child and the natural parents, who become legal 'strangers.'").

[26] WILLIAM N. ESKRIDGE, JR. & NAN D. HUNTER, SEXUALITY, GENDER, AND THE LAW 834 (3d ed. 2011).

[27] Stepparent adoptions are considered to be desirable in the sense that they allow the parent who is actually raising the child—and is married to one of the biological parents—to have a legal relationship with the child. *E.g.*, *In re* Estate of Seaman, 543 N.Y.S.2d 252, 254–55 (Sur. Ct. 1989) *aff'd* 559 N.Y.S.2d 216 (App. Div. 1990), *rev'd on other grounds* 583 N.E.2d 294 (N.Y. 1991) (explaining that an intestate individual likely wants his or her estate to be distributed to close relatives regardless of whether the relationship is through biology or due to adoption). Under common law, without the benefit of a stepparent adoption, the stepparent has no legal rights deriving from the child, nor obligations to him. *See* Bartlett, *supra* note 2, at 912–13 ("Under the common law, the stepparent-stepchild relationship does not itself give rise to any legal rights or obligations. For example, the stepparent need not support his stepchild or accept the child into his home. A stepfather may not give his name to his stepchild if the natural father objects, and usually a stepchild cannot inherit from his stepparent." (footnotes omitted)).

parental status over the child as well.[28] In other words, one biological parent loses his or her legal rights to the child, and a new adult gains legal rights.

As an example of a stepparent adoption, suppose Parent A and Parent B are married with a child. After Parents A and B divorce, then Parent A marries Parent C. Finally, Parent C adopts the child, gaining full parental rights. However, Parent B loses his or her parental rights in the process.[29]

When applied to same-sex couples, a stepparent adoption becomes more complicated.[30] In recent years, same-sex couples who are in jurisdictions that permit same-sex marriage, or similar legal relationships, have become able to utilize stepparent adoptions in the same way a different-sex couple would.[31] However, pre-*Obergefell*, couples in jurisdictions without legal recognition of same-sex relationships could not take advantage of this type of adoption,[32] and there was a gray area in which some jurisdictions that recognized same-sex domestic partnerships or other legal relationships—but not same-sex marriage—allowed same-sex couples to utilize stepparent adoptions.[33]

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[28] *See, e.g.*, David M. Cotter, *Current Trends in Second-Parent Adoptions*, 17 No. 9 DIVORCE LITIG. 141 (2005); Wendel, *supra* note 25, at 364–68.

[29] *See, e.g.*, Linda D. Elrod, *Stepparent Adoption*, 1 KAN. LAW & PRAC., Family Law § 6:3 ("Often a stepparent adoption occurs when a widowed parent remarries. A more difficult scenario arises when a divorced parent wants a new spouse to adopt the child to formalize the family.").

[30] For example, in a common same-sex parenting arrangement there may be three parents—two birth parents, and the same-sex partner of one of those parents. Depending on each person's wishes, it may be difficult to ensure that everyone has the legal rights they desire, since in a stepparent adoption a biological parent would have to give up his or her legal rights to the child. *E.g.*, Gary, *supra* note 2, at 32–33 ("For same-sex committed partners, if one partner seeks to adopt his or her partner's child, the couple may find that the adoptive mother's (or father's) legal tie to the child will cut off the biological mother's (or father's) legal connection."). A perhaps obvious, but important, note is that much of the complication in this area derives from the fact that same-sex couples are utilizing and adapting systems intended for different-sex couples. *See, e.g.*, Coupet, *supra* note 6, at 628 ("The form of parental rights for partners of parents in same-sex relationships—and also the subsequent confusion over their parental status—comes from the application of default rules based on heterosexual marital norms. That is, the more that same-sex couples can look like a traditional heterosexual married couple or stepfamily, the more likely that a same-sex partner will obtain parental rights.").

[31] *E.g.*, CAL. FAM. CODE § 9000(g) (West 2014) (stating that domestic partners can utilize stepparent adoptions procedures); N.J. STAT. ANN. § 37:1-31(e) (West 2014) ("The rights of civil union couples with respect to a child of whom either becomes the parent during the term of the civil union, shall be the same as those of a married couple with respect to a child of whom either spouse or partner in a civil union couple becomes the parent during the marriage.").

[32] *E.g.*, *In re* Adoption of Baby Z., 724 A.2d 1035 (Conn. 1999) (finding, *inter alia*, that the Connecticut stepparent adoption statute was not meant to apply to an unmarried same-sex couple).

[33] *See, e.g.*, WASH. REV. CODE § 26.33.902 (2015) ("For the purposes of this [adoption] chapter, the term[] spouse . . . shall be interpreted as applying equally to state registered domestic partnerships or individuals in state registered domestic partnerships . . . ."); *In re* M.M.D., 662

As mentioned above, the other main type of adoption utilized by same-sex couples is called a second-parent adoption.[34] Stepparent adoptions are often preferable to second-parent adoptions, in part because they frequently are less costly: second-parent adoptions can require expensive home studies before the adoption is approved, whereas stepparent adoptions do not.[35]

Stepparent adoptions are seen as having laid the groundwork for second-parent adoptions.[36] As mentioned above, in a second-parent adoption the adopting parent has no preexisting legal relationship with the child,[37] and, unlike in a stepparent adoption, neither existing parent loses a legal relationship with the child.[38] One more key difference is that in a second-parent adoption, the new parent does not need to have a legal relationship with the existing parent.[39] It is this latter difference that makes second-parent adoptions so valuable to same-sex couples: it allows couples to gain joint legal parentage over a child without having to be in a jurisdiction that recognizes same-sex marriage. Though still relevant today, this was even more important prior to the legalization of same-sex marriage, as second-parent adoptions were granted long before same-sex marriage was legalized anywhere in the country.[40] However, second-parent adoptions are not available in all states.[41] Some

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A.2d 837, 841 (D.C. 1995) (holding that members of a same-sex couple which "have committed themselves to each other as a family to the extent legally possible" were eligible to petition the court for a decree of adoption, despite being unmarried).

[34] *See* JOSLIN ET AL., *supra* note 21, § 5:3 ("The most common means by which non-biological LGBT co-parents can establish their legal parentage is through a 'second parent' or 'co-parent' adoption.").

[35] *See, e.g.*, N.Y. COMP. CODES R. & REGS. tit. 18, § 421.15 (providing that authorized adoption agencies shall, *inter alia*, conduct at least one home visit). New York regulations provide that the adoption study process, of which the home visit is a part, shall examine many different characteristics of prospective parents, including their ability to care for a child, their health, age, and family composition. *Id.* at § 421.16; *see also* Mahoney, *supra* note 20. For example, California's statute imposes a maximum cost of $700 on prospective adoptive parent in a stepparent adoption, but a cost of $4,500 in an "independent" adoption. CAL. FAM. CODE § 9002 (West 2015); CAL. FAM. CODE § 8810(a)(1) (West 2015).

[36] *See* Patricia J. Falk, *Second-Parent Adoption*, 48 CLEV. ST. L. REV. 93, 95 (2000); Julie Shapiro, *A Lesbian-Centered Critique of Second-Parent Adoptions*, 14 BERKELEY WOMEN'S L.J. 17, 28 (1999).

[37] Leonard & Cain, *supra* note 19, at 419.

[38] *Id.* This is often compared to a stepparent adoption, as both share the feature of one of the parents retaining all of his or her rights. But a second-parent adoption does not necessarily terminate an individual's parental rights. *See* JOSLIN ET AL., *supra* note 21, § 5:3.

[39] *E.g.*, Sharon S. v. Super. Ct. of Cal., San Diego Cnty., 31 Cal. 4th 417 (Cal. 2013), *cert. denied*, 540 U.S. 1220 (2004). *See generally* Wooster, *supra* note 24; JOSLIN ET AL., *supra* note 21, § 5:3.

[40] Jane S. Schacter, *Sexual Orientation, Social Change, and the Courts*, 54 DRAKE L. REV. 861, 876 (2006) ("Beginning at least as early as 1985, trial courts in Oregon and Alaska construed their respective state adoption statutes to permit second-parent lesbian adoptions.").

[41] *See Statewide Non-Discrimination in Adoption Laws*, HUMAN RIGHTS CAMPAIGN, http://www.hrc.org/map/pdf?tid=25 (last updated Jan. 7, 2016) (showing two states, Mississippi and

states explicitly prohibit the practice by statute.[42] Several other states have court rulings prohibiting second-parent adoptions,[43] though these rulings are potentially subject to reinterpretation in light of *Obergefell*.

Prior to the Supreme Court decision in *Obergefell*, when same-sex marriage was not legal in all states, before determining which types of adoption were permitted by a state, same-sex couples had to ensure that adoption by same-sex couples—or even by lesbian, gay, or bisexual individuals—was allowed in the first place.[44] For example, the Ohio Supreme Court held in *In re Adoption of Charles B.*[45] that while an unmarried gay man was within the contemplated definition of the state's adoption statute and therefore statutorily permitted to adopt,[46] the decision to allow him to do so was discretionary, to be determined on a case-by-case basis.[47] The court additionally made it a point to mention that "immoral conduct"—meaning sexual conduct between unmarried individuals—could be taken into account in adoption or custody proceedings if it was shown to have an adverse impact on the child.[48] Of course, at that time any same-sex sexual activity was inherently considered immoral, as same-sex marriage was not legal in the state, and so all sexual activity between persons of the same sex was

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Nebraska, as "refusing to comply with non-discrimination in adoption" and the majority of states as having unknown policies).

[42] *E.g.*, MISS. CODE ANN. § 93-17-3(5) (West 2015) ("Adoption by couples of the same gender is prohibited."). However, it is important to note that recent developments may affect the interpretation of these statutes. For example, a case challenging Mississippi's ban on same-sex marriage was ultimately decided in favor of the plaintiffs in light of *Obergefell*, but the suit only addressed statutes pertaining to marriage, not to adoption. Campaign for S. Equal. v. Bryant, 791 F.3d 625 (5th Cir. 2015).

[43] An intermediate-appellate Kansas court held that "if an unmarried individual wishes to adopt a child, the birth parents of the child are required to relinquish all parental rights to the child." *In re* Adoption of I.M., 288 P.3d 864, 868 (Kan. Ct. App. 2012). The potential implication of this is that a woman who gives birth to a child would have to renounce her parental rights in order for her partner to adopt the child. The Nebraska Supreme Court reached a similar conclusion. B.P. v. State (*In re* Luke), 640 N.W.2d 374, 383 (Neb. 2002) ("With the exception of a stepparent adoption . . . when the parent or parents' rights have not been terminated, a child must be relinquished by the existing parent or parents to be eligible for adoption . . . ."); *see also* Georgina G. v. Terry M. (*In re* Interest of Angel Lace M.), 516 N.W.2d 678, 684 (Wis. 1994) (holding that a same-sex co-parent was prohibited from adopting a child by statute, despite a trial court ruling that the adoption was in the best interests of the child).

[44] *See, e.g.*, William E. Adams, Jr., *Whose Family Is It Anyway? The Continuing Struggle for Lesbians and Gay Men Seeking to Adopt Children*, 30 NEW ENG. L. REV. 579 (1996); Joseph Evall, *Sexual Orientation and Adoptive Matching*, 25 FAM. L.Q. 347 (1991); Devjani Mishra, *The Road to Concord: Resolving the Conflict of Law Over Adoption by Gays and Lesbians*, 30 COLUM. J.L. & SOC. PROBS. 91 (1996).

[45] 552 N.E.2d 884 (Ohio 1990).

[46] The court found the petitioner to meet the definition of an "unmarried adult," which is one of the categories of persons allowed to adopt under Ohio statute. *Id.* at 886; *see also* OHIO REV. CODE ANN. § 3107.03(B) (West 2014).

[47] *In re Charles B.*, 552 N.E.2d at 886.

[48] *Id.* at 888.

unavoidably extramarital.[49]

Even after the *Obergefell* decision the legality of same-sex adoption is unclear in many states.[50] In the wake of the Supreme Court's decision the effects on adoption laws are still in flux, with some courts still making adverse decisions based on prospective parents' same-sex relationships.[51]

C. *Equitable Estoppel*

Outside the realm of same-sex parenting, New York courts have long looked to the best interests of a child in making determinations in areas like parental rights and custody, even where parents did not utilize any type of adoption.[52] At times, this has resulted in decisions granting parental rights to individuals with no biological or preexisting legal relationship to a child. This is often accomplished through a doctrine called equitable estoppel,[53] or sometimes de facto parenting.[54] The

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[49] The Ohio ban on same-sex marriage was later codified. *See* OHIO REV. CODE ANN. § 3101.01(C) (West 2014) ("Any marriage between persons of the same sex is against the strong public policy of this state. Any marriage between persons of the same sex shall have no legal force or effect in this state and, if attempted to be entered into in this state, is void ab initio and shall not be recognized by this state."). This was one of the statutes directly challenged—and ultimately abrogated—in *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015).

[50] *See generally* Rebecca Beitsch, *Despite Same-Sex Marriage Ruling, Gay Adoption Rights Uncertain in Some States*, PEW CHARITABLE TRUSTS (Aug. 19, 2015), http://www.pewtrusts.org/en/research-and-analysis/blogs/stateline/2015/08/19/despite-same-sex-marriage-ruling-gay-adoption-rights-uncertain-in-some-states. Further, the effects of the *Obergefell* decision, even solely within the realm of marriage, are still not yet completely clear. For example, the District Court for the District of Puerto Rico held that, because *Obergefell* discussed its application to "states," the opinion did not bind the territory of Puerto Rico. Conde Vidal v. Garcia-Padilla, No. CV 14-1253 (PG), 2016 WL 901899 (D.P.R. Mar. 8, 2016). The First Circuit quickly took exception to this interpretation, overruling the judge and removing him from the case altogether. In re Conde Vidal, No. 16-1313, 2016 WL 1391897 (1st Cir. Apr. 7, 2016). A similar interpretation battle is playing out in Alabama. *See, e.g.*, Campbell Robertson, *Roy Moore, Alabama Judge, Suspended Over Gay Marriage Stance*, N.Y. TIMES (May 6, 2016), http://www.nytimes.com/2016/05/07/us/judge-roy-moore-alabama-same-sex-marriage.html.

[51] *See, e.g.*, Justin Wm. Moyer, *Utah Judge Removes Lesbian Couple's Foster Child, Says She'll Be Better Off With Heterosexuals*, WASH. POST (Nov. 12, 2015), https://www.washingtonpost.com/news/morning-mix/wp/2015/11/12/utah-judge-removes-foster-child-from-lesbian-couple-saying-shell-be-better-off-with-heterosexuals.

[52] *E.g.*, Eschbach v. Eschbach, 436 N.E.2d 1260, 1262 (N.Y 1982) ("Any court in considering questions of child custody must make every effort to determine what is for the best interest of the child, and what will best promote its welfare and happiness."); Bennett v. Jeffreys, 356 N.E.2d 277, 281 (N.Y. 1976) ("[I]n [an] extraordinary circumstance, when there is a conflict, the best interest of the child has always been regarded as superior to the right of parental custody."); Ex parte Lee, 116 N.E. 352, 354 (N.Y. 1917) ("[I]t was the duty of the court in a proceeding involving the custody of the child to look solely to his welfare and to decide accordingly.").

[53] *See, e.g.*, ESKRIDGE & HUNTER, *supra* note 26, at 809 (defining parenthood by estoppel as a situation in which "the state will treat an adult as a legal parent when the adult is (i) is obligated

doctrine is traditionally used—at least within New York—in situations where a man mistakenly believes himself to be a child's biological father, and after acting as a parent, discovers that another man is in fact the biological father, but nevertheless wishes to continue parenting the child.[55] However, it is not difficult to adapt the concept to same-sex couples and their children.[56]

The New York Court of Appeals has held that equitable estoppel can be used to preserve an existing parent-child relationship, even if that relationship is not biological in nature.[57] In determining a child's best interests, New York courts have often used the notion that an individual's involvement as a parent is more important than an actual biological relationship with the child.[58]

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to pay child support or (ii) lived with the child for two or more years and had a good-faith belief that he was the child's father or (iii) lived with the child since the child's birth and accepted full responsibilities as a parent as part of a co-parenting agreement to raise the child together and the court finds that recognition of such responsibility is in the child's best interests or (iv) lived with the child for two or more years and accepted parenting responsibilities pursuant to a co-parenting agreement with the child's legal parent(s) and the court finds that recognition of such responsibilities is in the child's best interests."); Brashier, *supra* note 17, at 172 ("Most states recognize that circumstances may warrant treating a child as an adopted child even when the adoptive parents fail to comply with the statutory adoption procedures. A so-called equitable adoption or adoption by estoppel may occur, for example, when the adoptive parent agrees to adopt the child, actually rears the child and holds it out as his own, and the child mistakenly believes it has been properly adopted." (footnote omitted)). The New York Court of Appeals has stated that:

> The purpose of equitable estoppel is to preclude a person from asserting a right after having led another to form the reasonable belief that the right would not be asserted, and loss or prejudice to the other would result if the right were asserted. . . . Its purpose is to prevent someone from enforcing rights that would work injustice on the person against whom enforcement is sought and who, while justifiably relying on the opposing party's actions, has been misled into a detrimental change of position.

Shondel J. v. Mark D, 853 N.E.2d 610, 613 (N.Y. 2006).

[54] *See* ESKRIDGE & HUNTER, *supra* note 26, at 809 ("De Facto Parenting, whereby the state will provide some legal rights to an adult who lived with the child for two or more years *and* for non-financial reasons and with the agreement of the legal parent(s) or as a result of their failure/inability to perform caretaking functions regularly performed a majority of the caretaking functions for the child or regularly performed a share of caretaking functions at least as great as that performed by the parent with whom the child primarily lived."); *see also* V.C. v. M.J.B., 748 A.2d 539 (N.J. 2000) (allowing and explaining "psychological parents").

[55] *E.g.*, Samantha T. v. Jeffrey S.K., 2012 WL 3156443, at *2 (N.Y. Fam. Ct. Aug. 3, 2012) ("The usual situation is where the father is told falsely that the child is his . . . .").

[56] Just as a man can parent a child to whom he is not biologically related—albeit unwittingly—a same-sex partner of either gender can parent a child to whom he or she is not biologically related. The difference is that in the former instance the man mistakenly believes himself to be the biological father, whereas in the latter case the parent is aware that he or she is not biologically related.

[57] *Shondel J.*, 853 N.E.2d at 615 ("It is true that a child in a support proceeding has an interest in finding out the identity of her biological father. But in many instances a child also has an interest—no less powerful—in maintaining her relationship with the man who led her to believe that he is her father.").

[58] *E.g.*, Savel v. Shields, 872 N.Y.S.2d 597, 598–99 (App. Div. 2009) (denying genetic

In one prominent example of this phenomenon, the New York Court of Appeals applied a fairly broad standard—in *Shondel J. v. Mark D.*[59]—and held that the best interests of the child governed, even over biological relationships.[60] The court held that a child had a strong interest in maintaining a parent/child relationship with a man who acted as her father, despite not actually being related to the child.[61] However, *Shondel*'s broad holding was later narrowed when the New York Court of Appeals stated in *Debra H. v. Janice R.* that *Shondel*'s holding was limited to the procedure for determining paternity for purposes of child support, as distinct from being used to determine visitation or custody arrangements.[62] *Debra H.* involved two female members of a same-sex couple who had been raising a child together.[63] The couple subsequently separated, and the non-biological mother was fighting for custody of the child.[64]

The court in *Debra H.* distinguished between determining paternity for purposes of ordering child support, and determining paternity for purposes of ordering custody or visitation.[65] Under the court's reasoning, this distinction was intended to prevent a man from shirking his assumed responsibility as a parent, regardless of whether he was biologically related to the child.[66] However, though the court did not want the man to be able to abandon the child, the court also did not want the man to be able to claim a parental relationship if the mother—the biological parent—objected.[67] In other words, a man who is not biologically related to the child whom he has been raising can be forced to pay child support, but he is not guaranteed to have the same custody

testing as against the child's best interests in order to "preserve the established father-child relationship" where the petitioner signed an acknowledgment of paternity and acted as the child's only father figure); Gina L. v. David W., 826 N.Y.S.2d 338, 338–39 (App. Div. 2006) ("Where a child justifiably relies on the representations of a man that he is his or her father with the result that the child will be harmed by the man's denial of paternity, the man may be estopped from asserting that denial."); Enrique G. v. Lisbet E., 769 N.Y.S.2d 533, 534 (App. Div. 2003) ("[I]t would be detrimental to the interests of the child, six years of age at the time of the Family Court proceedings, to countenance the disruption of her close relationship with petitioner, whom she has always known and loved as her father."); Lorie F v. Raymond F, 657 N.Y.S.2d 235, 236 (App. Div. 1997) (denying genetic testing on the grounds that "injustice will result if petitioner is permitted to compel respondent to undergo a blood-grouping test and definitively establish that the only father the child has known throughout her entire life is not in fact her father.").

59 853 N.E.2d 610.

60 *Id.* at 615.

61 *Id.*

62 Debra H. v. Janice R., 930 N.E.2d 184, 191 (N.Y. 2010), *cert. denied*, 131 S. Ct. 908 (2011).

63 *Id.* at 186.

64 *Id.*

65 *Id.* at 191.

66 *Id.*

67 *Id.*

or visitation rights as a biological father. This holding has largely been enforced by lower courts.[68] Thus, the decision implies that non-biological parents, including those in same-sex couples, cannot rely on equitable estoppel to protect their parental rights.

For example, in *P. v. B.*,[69] a man who had acted as the father to two children—but was not biologically related to them—attempted to use equitable estoppel to establish paternity.[70] The Family Court cautioned that the Court of Appeals applied equitable estoppel on a case-by-case basis, and ultimately held that that case fell within the purview of *Debra H.* and therefore the non-biological father could not utilize equitable estoppel in his petition.[71]

D. *Presumption of Legitimacy*

After New York passed its same-sex marriage equality statute in June 2011, same-sex couples gained many, if not all, of the same rights as different-sex couples.[72] Among those rights was the marital presumption of "legitimacy"; this is a presumption that when a child is born to a married couple, that child is the child of both members of the couple.[73] The presumption of legitimacy is a valuable right to same-sex couples;[74] once they have married, any subsequent children are

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[68] *See, e.g.*, White v. Wilcox, 973 N.Y.S.2d 498 (App. Div. 2013), *appeal dismissed in part, denied in part*, 4 N.E.3d 970 (N.Y. 2014); Palmatier v. Dane, 948 N.Y.S.2d 181, 182 (App. Div. 2012). However, there are some exceptions, such as instances of judicial estoppel. *E.g.*, Estrellita A. v. Jennifer D., 963 N.Y.S.2d 843 (Fam. Ct. 2013) (denying respondent's motion to dismiss a custody and visitation petition because respondent had previously represented petitioner as the child's parent in order to obtain child support).

[69] 906 N.Y.S.2d 865 (Fam. Ct. 2010).

[70] *Id.* at 865–66.

[71] *Id.* at 870 ("[T]he Court of Appeals has so far approved of applying the doctrine of equitable estoppel with respect to paternity related issues in particularized instances determined on a case by case basis.").

[72] N.Y. DOM. REL. LAW § 10-a(2) (McKinney 2015); Nicholas Confessore & Michael Barbaro, *New York Allows Same-Sex Marriage, Becoming Largest State to Pass Law*, N.Y. TIMES (June 24, 2011), http://www.nytimes.com/2011/06/25/nyregion/gay-marriage-approved-by-new-york-senate.html.

[73] N.Y. DOM. REL. LAW § 24(1) ("A child heretofore or hereafter born of parents who prior or subsequent to the birth of such child shall have entered into a civil or religious marriage, or shall have consummated a common-law marriage where such marriage is recognized as valid, in the manner authorized by the law of the place where such marriage takes place, is the legitimate child of both birth parents . . . ."); N.Y. FAM. CT. ACT § 417 (McKinney 2015) ("A child born of parents who at any time prior or subsequent to the birth of said child shall have entered into a ceremonial marriage shall be deemed the legitimate child of both parents for all purposes of this article . . . .").

[74] Though outside the focus of this Note, it may be worth examining whether the presumption of legitimacy is still relevant in either same-sex or different-sex relationships. The presumption of legitimacy was originally based on biology: before paternity tests were easily available, a woman's husband was considered the most likely father of her child. *See* Marjorie Maguire

presumed to be "legitimate," granting both parents legal rights and eliminating the need for costly legal procedures such as second-parent adoptions.[75] However, given that the legality of same-sex parenting is still being litigated in some states,[76] there remains a possibility that a state other than New York might not recognize the legal relationship resulting from a presumption of legitimacy.[77] Because of this uncertainty, some couples understandably look to take additional legal steps to ensure their legal rights to their children are protected.[78] This will be discussed further below.[79]

E. *Acknowledgment of Paternity*

One of the additional steps to establish one's legal parental rights is the acknowledgment of paternity, the procedures for which are set forth in New York Family Court Act section 516-a.[80] An acknowledgment of paternity is defined as a document in which both parents agree that the father listed on the document is the only possible biological father; this

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Shultz, *Reproductive Technology and Intent-Based Parenthood: An Opportunity for Gender Neutrality*, 1990 WIS. L. REV. 297, 316–18 (1990). The continued existence of the presumption arguably implies that there is a policy decision in favoring traditional family structures, even though the technology exists to definitively determine a child's biological parents. *Id. But see* Camilla Taylor & Kyle Palazzolo, Opinion, *It's Not Marriage Equality Until Same-Sex Parents Both Appear On Birth Certificates*, THE GUARDIAN (Oct. 26, 2015 7:15 AM), http://www.theguardian.com/commentisfree/2015/oct/26/its-not-marriage-equality-until-same-sex-parents-both-appear-on-birth-certificates ("The states that continue to fight [same-sex] families in court argue that birth certificates are a proxy for biology, and that the members of a same-sex couple can't both be biologically related to their child."); *see also infra* Part III.A.2.

[75] *See supra* Part I.B.

[76] *See* Taylor & Palazzolo, *supra* note 74.

[77] *See, e.g.*, Susan Frelich Appleton, *Presuming Women: Revisiting the Presumption of Legitimacy in the Same-Sex Couples Era*, 86 B.U. L. REV. 227, 290 (2006) ("This vulnerability to challenge in other states, however, presents a problem . . . [for] those who rely on a default rule, like the presumption of legitimacy, which some jurisdictions might choose not to respect."); Barbara J. Cox, *Adoptions by Lesbian and Gay Parents Must Be Recognized by Sister States Under the Full Faith and Credit Clause Despite Anti-Marriage Statutes That Discriminate Against Same-Sex Couples*, 31 CAP. U. L. REV. 751 (2003) (arguing that same-sex adoption should be fully recognized by other states, but acknowledging that this is not always the case). As an illustrative example, months after the *Obergefell* decision Arkansas officials refused to list the names of both same-sex parents on a child's birth certificate, leaving the parents to seek recognition through the state court system. Steve Barnes, *Arkansas Supreme Court Halts Birth Certificates for Same-Sex Partners*, REUTERS (Dec. 10, 2015, 10:24 PM), http://www.reuters.com/article/us-arkansas-gaymarriage-idUSKBN0TT35U20151211.

[78] *E.g.*, *In re* Seb C-M, N.Y. L.J., Jan. 31, 2014, at 1 (N.Y. Sur. Ct. Jan. 6, 2014) ("The petitioner appears to have filed the instant application out of an abundance of caution, perhaps to ensure that, with the support of judicial imprimatur, her existing parental relationship with the infant is less susceptible to challenge in the event of the family's re-location to a jurisdiction less hospitable to the rights of same-sex couples to marry and adopt children.").

[79] *See infra* Part II.

[80] N.Y. FAM. CT. ACT § 516-a (McKinney 2014).

document has the same legal effect as a court order declaring parentage.[81] Furthermore, an order of filiation[82] can result from an acknowledgment of paternity, and that court order is presumptively subject to full faith and credit[83] by courts in other jurisdictions.[84]

Should an acknowledgment of paternity be used in the context of same-sex couples, one issue that may arise is an allegation of fraud[85]—in this context, fraud might be interpreted as acknowledging paternity while knowing that there is no biological relationship between a parent and child. For example, suppose a male same-sex couple conceived a child using Partner A's sperm and an anonymously donated egg, and the egg is implanted in a surrogate. The couple could sign an acknowledgment of paternity stating that Partner B—who did not donate sperm—is the father. If that couple later separates, in an attempt to revoke Partner B's parental rights, Partner A might allege fraud, stating that Partner B fraudulently signed the acknowledgment despite knowing that he was not biologically the child's father. On the other hand, Partner B could make the same allegation in an effort to avoid his parental responsibilities.[86] The ability of either partner to challenge the acknowledgment is one example of the need to update this type of

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[81] N.Y. PUB. HEALTH LAW § 4135-b(1)(a) (McKinney 2015) ("[T]he signing of the acknowledgment of paternity by both parties shall have the same force and effect as an order of filiation entered after a court hearing by a court of competent jurisdiction . . . .").

[82] An order of filiation is a judicial declaration of paternity. *See* N.Y. FAM. CT. ACT § 542(a) (McKinney 2015) ("If the court finds the male party is the father of the child, it shall make an order of filiation, declaring paternity.").

[83] Full Faith and Credit is derived from Article IV of the United States Constitution, the first section of which reads: "Full Faith and Credit shall be given in each State to the public Acts, Records, and judicial Proceedings of every other State. And the Congress may by general Laws prescribe the Manner in which such Acts, Records and Proceedings shall be proved, and the Effect thereof." U.S. CONST. art. IV, § 1. It is also codified in federal statute. 28 U.S.C. § 1738 (2012) ("Such Acts, records and judicial proceedings or copies thereof, so authenticated, shall have the same full faith and credit in every court within the United States and its Territories and Possessions as they have by law or usage in the courts of such State, Territory or Possession from which they are taken."). *See, e.g.*, McDonald v. City of W. Branch, Mich., 466 U.S. 284, 287 (1984) ("Our cases establish that § 1738 obliges federal courts to give the same preclusive effect to a state-court judgment as would the courts of the State rendering the judgment.").

[84] *See In re* Sebastian, 879 N.Y.S.2d 677, 692 (Sur. Ct. 2009) (stating that of three options available to a parent, "first, to be listed on [the child's] birth certificate; second . . . to execute a statutorily prescribed acknowledgment of paternity [filiation]; and third, to obtain a judicial order of filiation. Only the last of these is presumptively subject to Full Faith and Credit."); *see also* 42 U.S.C. § 666(a)(11) (2012) ("Procedures under which a State must give full faith and credit to a determination of paternity made by any other State, whether established through voluntary acknowledgment or through administrative or judicial processes."); 45 C.F.R. § 302.70(a)(11) (2015) (same).

[85] An allegation of fraud is one of the ways in which a signatory to an acknowledgment of paternity can challenge the acknowledgment. N.Y. FAM. CT. ACT § 516-a(b)(iv). The other ways are by alleging duress or material mistake of fact. *Id.*

[86] For a similar situation, see, e.g., Felton R. v. Gloria P., 880 N.Y.S.2d 475 (App. Div. 2009); Demetrius H. v. Mikhaila C.M., 827 N.Y.S.2d 810 (App. Div. 2006).

procedure to be fully applicable to same-sex couples.

For purposes of rescission of an acknowledgement of paternity, courts have held that a petitioner father did not make a prima facie showing of fraud in cases in which the petitioner father knew, at the time of signing the acknowledgment, that he was not in fact the biological father of the child.[87] Applying the same logic to the example above, the non-biological father could not allege fraud in an attempt to rescind the acknowledgment and thereby avoid parental responsibilities.

Though less common, the inverse argument has been accepted as well: namely, if a mother knew, upon signing an acknowledgment of paternity, that the other signatory was not the biological father, then she cannot make a prima facie argument of fraud on that basis.[88] For example, in *Samantha T. v. Jeffrey S.K.*,[89] the male defendant signed an affidavit asserting that he had fathered the female plaintiff's child, despite both individuals knowing that this was untrue.[90] In that case, the Family Court stated that New York's statute regarding acknowledgment of paternity was not meant to refer to a situation in which both "parents" signed such an acknowledgment despite knowing that the father was not actually related to the child.[91] Rather, it was meant to apply to the more typical situation in which a man is incorrectly told that he is biologically related to a child.[92] Under that reasoning, in the example above, the biological father could not successfully allege fraud against the non-biological father, since both signatories knew that the non-biological father was unrelated to the child when they signed the acknowledgment of paternity.

Finally, as the court notes, a mother's claim in the situation discussed in *Samantha T.* is hypocritical, as the mother is presumably just as complicit in any fraud as the biological father when she signed the acknowledgment of paternity.[93] Furthermore, a court may take into consideration the fact that signatories are apprised of the responsibilities conferred by signing an acknowledgment of paternity.[94] Thus, based on this chain of logic, a court might accept a same-sex couple's acknowledgment of paternity or maternity, regardless of biological relation.

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87 *See, e.g.*, *Felton R.*, 880 N.Y.S.2d 475; *Demetrius H.*, 827 N.Y.S.2d 810.

88 Samantha T. v. Jeffrey S.K., 2012 WL 3156443, at *2 (N.Y. Fam. Ct. Aug. 3, 2012).

89 *Id.*

90 *Id.* at *1.

91 *Id.* at *2.

92 *Id.* ("The usual situation is where the father is told falsely that the child is his.").

93 *Id.* ("[P]etitioner's claim hypocritically ignores the fact that petitioner was equally fraudulent when she signed the acknowledgment.").

94 S.E.R. v. M.S.C., 845 N.Y.S.2d 701, 705 (Fam. Ct. 2007).

F. *New York's Marriage Equality Act*

The legalization of marriage between two individuals of the same sex has important implications for same-sex parenting, especially for the presumption of legitimacy discussed above. New York's Marriage Equality Act was passed in June 2011,[95] and, *inter alia*, amended section 10-a of the Domestic Relations Laws.[96] The first part of section 10-a legalized same-sex marriage in the state.[97] The second part of the statute is somewhat less straightforward; it purportedly provides all rights and benefits to same-sex couples—in the context of marriage—that are available to different-sex couples, and provides that "gender-specific language or terms shall be construed in a gender-neutral manner" where necessary.[98] It is this latter section that is open to interpretation—the statute does not specify a particular section of gender-specific language to be modified, but rather modifies all "necessary" gender-specific language in the context of marriage.[99] As the statute is phrased broadly, later courts—as well as administrative agencies and any other state bodies that interpret marriage laws—are likely to examine the legislative intent in determining whether to reexamine gender-specific language in light of the Act.[100]

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[95] Marriage Equality Act, 2011 N.Y. Sess. Laws Ch. 95 (McKinney). The Act became effective thirty days later in July 2011. *Id.*

[96] The Act also amended or created three other sections of the Domestic Relation Law. *Id.* These other changes referred primarily to exceptions for religious organizations, and also slightly changed the language of the statute governing marriage licenses. *Id.*; *see also* N.Y. DOM. REL. LAW §§ 10-b, 11, 13 (McKinney 2014).

[97] N.Y. DOM. REL. LAW § 10-a(1) ("A marriage that is otherwise valid shall be valid regardless of whether the parties to the marriage are of the same or different sex.").

[98] The full text of the section reads:

> No government treatment or legal status, effect, right, benefit, privilege, protection or responsibility relating to marriage, whether deriving from statute, administrative or court rule, public policy, common law or any other source of law, shall differ based on the parties to the marriage being or having been of the same sex rather than a different sex. When necessary to implement the rights and responsibilities of spouses under the law, all gender-specific language or terms shall be construed in a gender-neutral manner in all such sources of law.

N.Y. DOM. REL. LAW § 10-a(2).

[99] *Id.*

[100] *See* N.Y. STAT. LAW § 124 (McKinney 2014) ("In ascertaining the purpose and applicability of a statute, it is proper to consider the legislative history of the act, the circumstances surrounding the statute's passage, and the history of the times."); *see also, e.g.*, Riley v. Cnty. of Broome, 742 N.E.2d 98, 102 (N.Y. 2000) ("[T]he legislative history of an enactment may also be relevant and is not to be ignored, even if words [of the statute] be clear . . . . Pertinent also are the history of the times, the circumstances surrounding the statute's passage, and . . . attempted amendments."); Astoria Gas Turbine Power, LLC v. Tax Comm'n of City of N.Y., 788 N.Y.S.2d 417 (App. Div. 2005), *leave to appeal dismissed*, 835 N.E.2d 662 (N.Y. 2005), *leave to appeal granted*, 844 N.E.2d 792 (N.Y. 2006), *judgment aff'd*, 2006 WL 2945433 (N.Y. 2006).

Arguably the best source of legislative intent is in the Marriage Equality Act session law;[101] this text was actually voted by the legislature into law, and thus is least vulnerable to criticism. In this case, the session law included a statement of legislative intent which indicated that the legislators intended for same-sex couples to have equal access to all benefits and protections of marriage.[102] Furthermore, it stated that the legislature intended to remove all distinctions related to marriage based on gender, even if not explicitly enumerated in the statute.[103]

Other elements of legislative intent are instructive as well, even if not actually voted on by the legislature. For example, the sponsor's memorandum sets forth the specifics of a proposed bill, as well as a statement explaining why this particular bill is deemed necessary.[104] The sponsor's memorandum for the Marriage Equality Act provides, *inter alia*, that civil marriage creates benefits in areas including "child custody" specifically, and "marital privacy" more generally.[105] Similarly, the bill jacket[106] states that the Act's main goal is to reduce discrimination against same-sex couples and their families.[107]

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101 Marriage Equality Act, 2011 N.Y. Sess. Laws Ch. 95 § 2 (McKinney).

102 *Id.* ("Same-sex couples should have the same access as others to the protections, responsibilities, rights, obligations, and benefits of civil marriage.").

103 The Act stated:

> The omission from this act of changes to other provisions of law shall not be construed as a legislative intent to preserve any legal distinction between same-sex couples and different-sex couples with respect to marriage. The legislature intends that all provisions of law which utilize gender-specific terms in reference to the parties to a marriage, or which in any other way may be inconsistent with this act, be construed in a gender-neutral manner or in any way necessary to effectuate the intent of this act.

Id.

104 *See generally R5* (Jan. 7, 2015), https://www.nysenate.gov/legislation/resolutions/2015/r5 (adopting the Rules of the Senate for the 2015–16 Sesion) ("Every bill introduced . . . shall be accompanied by the introducer's memorandum . . . . Such memorandum shall contain a statement of the purposes and intent of the bill and, if the member deems it appropriate, may set forth such other statements that the member feels necessary . . . ."); *Rules of the Assembly of the State of New York 2015–2016* § 1(f) (Jan. 7, 2015) http://assembly.state.ny.us/Rules/2015rules.pdf ("There shall be appended to every bill introduced in the Assembly, an introducer's memorandum. . . ."); *see also* Eric Lane, *Legislative Process and Its Judicial Renderings: A Study in Contrast*, 48 U. PITT. L. REV. 639, 646 (1987) ("New York legislative rules require that a sponsor's bill memorandum accompany the introduction of all bills. The memorandum must contain a statement of the purposes and intent of the bill.").

105 N.Y. STATE ASSEMB., MEMORANDUM IN SUPPORT OF A.B. 8354, 234th Leg., Reg. Sess. (2012).

106 While citations to bill jackets were rare before the 1990s, the New York Court of Appeals began a marked increase in bill jacket citations in the 1990s. *See* William H. Manz, *The Citation Practices of the New York Court of Appeals: A Millennium Update*, 49 BUFF. L. REV. 1273, 1287–89 (2001). Since then citations to bill jackets have even gained somewhat favored status. *E.g.*, Konviser v. State, 687 N.Y.S.2d 877, 880 (Ct. Cl. 1999) ("[T]he court should look to the legislative history . . . especially the Bill Jacket . . . ." (citation omitted)).

107 Letter from Daniel O'Donnell, Member of Assembly, N.Y. State Assembly to The Hon.

While these various indicators of legislative intent were not codified into law, they should still be utilized by courts interpreting the Marriage Equality Act. This is especially relevant in relation to the Domestic Relations Law section 10-a(2), which was deliberately phrased broadly in the hope that courts and other interpreters would make use of it to fill in any loopholes not addressed by statute.[108]

II. ANALYSIS OF THE NEED FOR SAME-SEX PARENTAL PROTECTIONS

The above-mentioned methods for establishing legal parental rights are especially important for same-sex couples, as existing rules and conventions are less likely to apply precisely to their situations. This section of this Note provides several examples in which the existing system was unable to properly address the needs of same-sex parents.

Those couples looking for additional legal protections in same-sex adoption recently suffered a setback in a January 2014 Surrogate's Court ruling, *In re Seb C-M*.[109] In the case, one member of a married same-sex couple had given birth to a child who was being raised by both members of the couple.[110] In the petition, the mother who was not biologically related to the child sought to legally adopt him.[111] The court ultimately held that the non-biological mother was not entitled to adopt that couple's child.[112] The court reasoned that the couple already had full legal rights, and that prior courts had held that adoption was not intended to reaffirm legal relationships that already existed, but only to create new ones.[113] Furthermore, the judge stated that if the parents

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Mylan Denerstein, Counsel to the Governor, June 14, 2011, N.Y. BILL JACKET, 2011 A.B. 8354, 234th Leg., Reg. Sess. (2011).

108 The Legislature's methodology in drafting the statute has been described as follows:

> Rather than amending each and every marriage, divorce, annulment, ancillary relief, or other section in the Domestic Relations Law, the Legislature has broadly decreed that, when necessary to implement the rights and responsibilities of spouses under the law, "all gender-specific language or terms shall be construed in a gender-neutral manner in all such sources of law". [sic] The phrase "all such sources of law" may be read as implying that the Family Court Act, the General Obligations Law and all other statutes impacting marital rights and responsibilities shall be so construed, as should case law precedents.

N.Y. DOM. REL. LAW § 10-a(2), *construed in* Alan D. Scheinkman, *Practice Commentaries*, N.Y. DOM. REL. LAW § 10-a (McKinney 2011).

109 *In re* Seb C-M, N.Y. L.J., Jan. 31, 2014 (N.Y. Sur. Ct. Jan. 6, 2014). It should be noted that this case was heard in Surrogate's Court—a low-level trial court—and thus may be of limited precedential value, though it is a noteworthy decision in regards to the subject matter it addresses. *See* N.Y. Const. art. VI, § 12 (providing for the creation of Surrogate's Court and its jurisdiction).

110 *Seb C-M*, N.Y. L.J., Jan. 31, 2014, at 1–2.

111 *Id.*

112 *Id.* at 4.

113 *Id.* at 1 ("Adoption is not utilized for, nor . . . is it available to reaffirm, an already existing

intended to obtain additional protections for their legal relationship to their child in case the family traveled to a jurisdiction less friendly to same-sex couples, then the parents should have litigated in the courts of that hostile jurisdiction.[114] Though second-parent adoptions, like the one attempted in *Seb C-M*, were previously a preferred method of establishing parental rights, this decision makes clear the necessity of discerning a new method applicable to same-sex couples post-marriage equality. The decision in *Seb C-M* left the non-biological mother unclear on her legal rights to her child in other jurisdictions,[115] a situation which is untenable, even after the decision in *Obergefell*.

However, this hypothetical new method should also be applicable to couples without that presumption of legitimacy—in other words, couples who were not married prior to having a child together. These couples are at an even greater risk than those with such a presumption, as their rights can be questioned even within New York.[116] As a recent example, in *In re Jann P. v. Jamie P.*, the Family Court held that a woman who parented a child for virtually his entire life had no legal right to the child because she was not married to the child's biological mother.[117] The court acknowledged that the petitioner in that case was situated differently as a woman, because there is no existing statutory equivalent of paternity proceedings for women.[118] However, despite citing New York's Marriage Equality Act, the court chose to leave the matter to the legislature for further remedy.[119] This Note posits that while the court in *Jann P.* recognized the issues, it could—and should—have gone further and applied the Marriage Equality Act to the existing

parent/child relationship." (citing *In re Sebastian*, 25 Misc.3d 567, 572 (Sur. Ct. N.Y. Co. 2009))). The court also noted that in New York, a birth certificate is prima facie evidence of parentage. *Id.* at 2 (citing N.Y. PUB. HEALTH LAW § 4103 (McKinney 2014)).

114 *Id.*

115 *Id.* at 3–4. Though at the time the focus of other jurisdictions was states which did not recognize same-sex marriage, the underlying concern is still applicable to states which may have differing laws on adoption or parentage, or other countries which do not recognize same-sex relationships at all. For example, the Supreme Court recently held that an adoption order from one state must be given full faith and credit by another state. V.L. v. E.L., 136 S. Ct. 1017 (2016). However, the opinion does not require a state to give any particular rights to same-sex couples, but only to honor certain rights granted by other states. *Id.*

116 As discussed previously, the New York Court of Appeals has held that, at least in some cases, a biological stranger's lack of relationship to a child can trump equitable estoppel, resulting in a parent losing his or her legal rights to the child. *See* Debra H. v. Janice R., 930 N.E.2d 184 (N.Y. 2010), *cert. denied*, 131 S. Ct. 908 (2011); s*ee also supra* Part I.C.

117 *In re* Jann P. v. Jamie P., N.Y. L.J., July 25, 2014, at 6–7 (N.Y. Fam. Ct. June 30, 2014); *see also* John Leland, *Parenthood Denied by the Law: After a Same-Sex Couple's Breakup, a Custody Battle*, N.Y. TIMES (Sept. 12, 2014), http://www.nytimes.com/2014/09/14/nyregion/after-a-same-sex-couples-breakup-a-custody-battle.html.

118 *Jann P.*, N.Y. L.J., July 25, 2014 at 6.

119 *Id.* at 6–7 ("[T]he passage of the Marriage Equality Act is a significant step toward the view that removing gender distinctions from the framework of our matrimonial laws will strengthen New York's families.").

paternity statutes, rather than waiting for the legislature to craft a new solution.

In *Seb C-M*, the judge stated that after New York's legalization of same-sex marriage, it was necessary to apply the presumption of legitimacy to all children of legal marriages, regardless of the method of conception and birth.[120] Much of the basis of the judge's decision was an attempt—presumably in good faith—to grant all due deference to the newly held rights of same-sex couples and same-sex parents in New York.[121] Additionally, the decision was based on the worry that doing otherwise would potentially raise Equal Protection[122] violations.[123] These concerns stemmed from the judge's belief that allowing the petitioner to adopt her child—to whom the judge said she should have legal rights based on the marital presumption of legitimacy—would imply that petitioner's marriage is not fully equal to that of a different-sex couple.[124] However, the court's concerns are based on the presumption of legitimacy, not the additional affirmation through adoption.[125] This is a fallacy in logic—the court is assuming that affirming petitioner's legal rights would imply that it is necessary to do so for all married same-sex parents. However, this is not true; instead, the court would merely be affirming an already-existing right; it would neither be creating a new privilege nor requiring same-sex couples to engage in additional steps to receive the right.[126]

Here, the court's view of the Equal Protection argument creates an unnecessary complication: under the court's existing logic, by granting the petitioner's request to adopt the child the court would be denigrating the legal status of same-sex relations in New York.[127] However, denying

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120 *Seb C-M*, N.Y. L.J., Jan. 31, 2014, at 2 ("[R]ecognition of marriage equality rights, coupled with advances in assisted reproductive technologies, necessarily results in application of the presumption of legitimacy to offspring of parents in lawful same-sex and opposite-sex marriages, regardless of the circumstances of conception, gestation and birth of such children.").

121 *Id.* at 3.

122 *See* U.S. CONST. amend. XIV, § 1.

123 *Seb C-M*, N.Y. L.J., Jan. 31, 2014, at 3.

124 *Id.* ("[W]ere this court to entertain the instant petition, such action would imply that, notwithstanding the existing and lawful marital relationship between the petitioner and her spouse, true marriage equality remains yet to be attained, and that, although legally recognized in this state, a same-sex marriage remains somehow insufficient to establish a parent-child relationship between one particular parent and any child born within that marriage, thereby raising equal protection concerns.").

125 *Id.* at 2–3.

126 This logic is based on the underlying notion of the common law system. Under the common law, courts do not create new rights from thin air, but rather reinterpret existing law to clarify rights that were not previously recognized. *See, e.g.*, *Common Law*, BLACK'S LAW DICTIONARY (10th ed. 2014).

127 *Seb C-M*, N.Y. L.J., Jan. 31, 2014, at 3 ("Indeed, were this court to entertain the instant petition, such action would imply that, notwithstanding the existing and lawful marital relationship between the petitioner and her spouse, true marriage equality remains yet to be

the petition forces her to seek out a hostile jurisdiction if she still desires to affirm her legal parental rights.[128] Instead, the court would be better served by granting petitioner's request, and explaining that it is doing so in order to *avoid* equal protection concerns—specifically those concerns raised by subjecting petitioner and her child to a jurisdiction which does not recognize same-sex rights from other states, let alone allow those rights to be created within its own state.

The judge in *Seb C-M* posited that states could not deny marriages performed in other states under the Due Process Clause, thus obviating the need for additional legal procedures—beyond marriage and the resulting presumption of legitimacy—within New York.[129] However, this is not quite true, or at least does not apply to all states.[130]

While there are many other arguments in favor of having all courts recognize valid adoptions regardless of a parent's gender, in many cases that is all they currently are—arguments.[131] In reality, not all states have recognized such adoptions.[132] Thus, the question remains, what can parents in the shoes of the plaintiffs in *Seb C-M* do to avoid such an unfavorable ruling?

III. PROPOSAL TO UTILIZE NEW YORK'S MARRIAGE EQUALITY ACT TO

attained, and that, although legally recognized in this state, a same-sex marriage remains somehow insufficient to establish a parent-child relationship between one particular parent and any child born within that marriage, thereby raising equal protection concerns.").

128 *Id.* ("If in fact the petitioner's and M.M.'s intent is to secure additional protection of their family's legal relationship in order to assure its recognition in the event of relocation to a jurisdiction hostile to marriage equality, the more appropriate, and indeed necessary, course of action would be to seek redress of the denial of their civil rights in such jurisdiction.").

129 *Id.* at 3–4. The opinion also uses the Equal Protection Clause as grounds for petitioners to seek redress in other jurisdictions' courts. *Id.*

130 *Seb C-M* cites some of the successful same-sex marriage cases which had been litigated up to that time. *Id.* Though same-sex marriage has since been legalized, it is far from clear that the presumption of legitimacy will be applied to same-sex couples in states like New York, let alone states less friendly to same-sex interests. *See* Taylor & Palazzolo, *supra* note 74.

131 *E.g.*, Christine L. Olson, *Second-Class Families: Interstate Recognition of Queer Adoption*, 43 FAM. L.Q. 161, 162 (2009) ("This article will argue that every state must recognize queer adoptions from other states. To refuse to do so violates the Full Faith and Credit Clause of the U.S. Constitution, the Parental Kidnapping Prevention Act (PKPA), the Equal Protection Clause of the Fourteenth Amendment, the Due Process Clause of the Fourteenth Amendment, and the fundamental right to travel."); Robert G. Spector, *The Unconstitutionality of Oklahoma's Statute Denying Recognition to Adoptions by Same-Sex Couples from Other States*, 40 TULSA L. REV. 467 (2005).

132 Mishra, *supra* note 44, at 91–92 ("Although adoption in the United States has always been left to the statutory control of each state, the states have reached a level of agreement over most aspects of adoption policy that is remarkable—so much so, in fact, that cases in which states refuse to recognize each other's adoption decrees merit barely a footnote in conflict of laws texts . . . . Yet over the last decade, states have diverged sharply with respect to one category of adoption cases—namely, adoption by gays and lesbians."). However, the recent Supreme Court ruling will likely at least partially address this issue. *See* V.L. v. E.L., 136 S. Ct. 1017 (2016).

This section proposes that courts utilize the portion of the Marriage Equality Act calling for gender neutrality to reinterpret existing statutes and procedures to be more inclusive of same-sex couples and their families. As several examples of such interpretation, courts could change the acknowledgment of paternity to a gender-neutral acknowledgment of parentage, allow same-sex couples to utilize the martial presumption of legitimacy, and similarly allow same-sex couples to gain legal parental rights through equitable estoppel. This section will also examine—and ultimately reject—several other potential solutions to the problems faced by New York's same-sex parents.

A. *Proposal*

One of the biggest problems with New York case law addressing same-sex parental rights after the passage of the Marriage Equality Act is that, while they recognize a shortcoming in the current state of the law, the courts recommend that the petitioners find a better avenue for addressing the issue, rather than the court doing so itself.[133] This Note proposes that New York courts, such as the ones which decided *Seb C-M* and *Jann P.*, should instead interpret the Marriage Equality Act to allow same-sex couples to affirm their parental rights and to gain equal footing with different-sex parents.

As discussed above, the statutory language created by the Marriage Equality Act provides that same-sex couples should obtain all benefits from marriage that different-sex couples are entitled to.[134] Furthermore, the legislative history shows that the intent behind the law was to provide full equality and rights to same-sex couples in relation to marriage and its resulting privileges.[135] Arguably, one of the privileges resulting from marriage is the right to raise children together[136]—for

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133 For example, in *Seb C-M*, the judge stated that the petitioner would have to seek redress in a jurisdiction which denied her parental rights, rather than being able to preemptively establish them as the petitioner sought to. *Seb C-M*, N.Y. L.J., Jan. 31, 2014, at 3. In *Jann P.*, the judge notes "[t]he inequity of the imbalance of remedies available to the petitioner" but leaves any solution to the legislature, and ultimately dismisses the petition. *In re* Jann P. v. Jamie P., N.Y. L.J, July 25, 2014, at 6–7 (N.Y. Fam. Ct. June 30, 2014).

134 N.Y. DOM. REL. LAW § 10-a(2) (McKinney 2014).

135 *See supra* Part I.F.

136 This principle was cited by the Supreme Court in its decision legalizing same-sex marriage. Obergefell v. Hodges, 135 S. Ct. 2584, 2600 (2015) ("A third basis for protecting the right to marry is that it safeguards children and families and thus draws meaning from related rights of childrearing, procreation, and education. . . . Marriage also affords the permanency and stability

example, as previously discussed, the presumption of legitimacy is based on a valid marriage.[137] Thus, in order to fully effectuate the legislature's intent in passing the Marriage Equality Act, courts should treat same-sex couples as equal to different-sex couples, even if the specifics of statutory law have not yet caught up.

In this context, a court would look to the specifics of the gender-neutrality provision of the Marriage Equality Act[138] in order to determine how to treat same-sex and different-sex couples equally. As discussed earlier, this statutory language calls for treating gender-specific language in a "gender-neutral manner" "[w]hen necessary to implement the rights and responsibilities of spouses under the law."[139] Though there is limited case law interpreting this portion of the statute, it is clear that the law requires substituting "spouse" for "husband" or "wife."[140] The Act's legislative history, discussed above, indicates that the legislature intended the Act to encompass more than the simple action of marriage; among other factors, the legislature intended to grant equal rights for the families of same-sex couples.[141] Thus, in addition to superficial changes like replacing gendered pronouns—he, she, etc.—the Marriage Equality Act also requires the creation of new gender-neutral procedures that provide same-sex couples with all the options available to different-sex couples in the realm of marriage and its associated rights and responsibilities—including parenting. Several examples of this are set forth below.

1. Acknowledgment of Parentage

One implementation of creating gender-neutral procedures would be that any parent, regardless of gender, would be able to seek what is now known as an acknowledgment of paternity.[142] Though Family

important to children's best interests.").

137 *See supra* Part I.D.

138 N.Y. DOM. REL. LAW § 10-a(2).

139 *Id.*; *see also supra* Part I.F.

140 *See* Wendy G-M. v. Erin G-M., 985 N.Y.S.2d 845, 855 (Sup. Ct. 2014) ("The implication of the MEA is unmistakable: wherever the words 'husband' or 'wife' exist in statute or common law, the MEA requires the courts to read the terms as gender non-specific and extend the same rights to same-sex couples as exist for opposite-sex couples. The MEA eradicates any distinction between the sexes, but it does not address the definition of parenthood—it does not include a definition of 'parent.'").

141 *See supra* Part I.F (discussing the sponsor's memorandum and bill jacket, including references within those documents to the inclusion of children and family within the understanding of family and the intent of the Act).

142 A similar proposal would be to create equivalent rights through private contract among all individuals who could claim parental rights. However, the current statutory scheme provides for procedures and protections surrounding the acknowledgment of paternity that would be absent

Court Act section 516-a—which governs acknowledgments of paternity—specifically refers to "paternity," courts should interpret the word to mean "parentage," or alternatively, "paternity or maternity." This is pursuant to the portion of the Marriage Equality Act which requires gender neutrality in relation to marriage, "[w]hen necessary to implement the rights and responsibilities of spouses."[143] Arguably, one of the "rights and responsibilities" referred to is that of claiming a child as one's own in a paternity proceeding—or a parentage (to use the gender-neutral term) or maternity proceeding.

The Marriage Equality Act only amended a handful of statutes,[144] but it specified that the Act was meant to provide full equality to same-sex couples—in the realm of marriage[145]—even in statutes not explicitly mentioned.[146] This, along with the gender-neutral provision of the statute, provides courts with the ability and authorization to create a common law order of parentage.

Thus, in *Jann P.*,[147] the judge should not have appealed to a legislative solution, but rather should have allowed a petition seeking an order of maternity—as the judge clearly wanted to do.[148] In implementing a maternity proceeding, the judge could—and should—have read the statute governing acknowledgments of paternity in a gender-neutral manner, as required by the Marriage Equality Act.[149]

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from any private contractual arrangement. Furthermore, a private contract would require additional effort and expense on the part of same-sex couples, whereas in some cases the statute instructs the state to provide assistance to different-sex couples without prompting. *E.g.*, N.Y. PUB. HEALTH LAW § 4135-b(1)(a)–(b) (McKinney 2014) ("Immediately preceding or following the in-hospital birth of a child to an unmarried woman, the person in charge of such hospital . . . shall provide to the child's mother and putative father . . . the documents and written instructions necessary for such mother and putative father to complete an acknowledgment of paternity . . . [and] the mother and the putative father shall be provided . . . with such information as is required pursuant to this section with respect to their rights and the consequences of signing a voluntary acknowledgment of paternity . . . .").

143 N.Y. DOM. REL. LAW § 10-a(2).

144 Marriage Equality Act, 2011 N.Y. Sess. Laws Ch. 95 (McKinney).

145 As discussed above, based on the legislative history of the Marriage Equality Act courts should interpret the realm of marriage loosely, and therefore include parenting. *See supra* Part I.F.

146 Marriage Equality Act, § 2 ("The omission from this act of changes to other provisions of law shall not be construed as a legislative intent to preserve any legal distinction between same-sex couples and different-sex couples with respect to marriage.").

147 To briefly restate the facts of the case, the court held that a woman was unable to gain legal rights to the child whom she had raised because New York does not have a female equivalent of its paternity proceedings. Jann P. v. Jamie P., N.Y. L.J., July 25, 2014, at 6–7 (N.Y. Fam. Ct. June 30, 2014).

148 *Id.* at 6 ("While this predicament might have once been viewed as a normal and acceptable consequence of society's traditional view of what constitutes a family, the passage of the Marriage Equality Act is a significant step toward the view that removing gender distinctions from the framework of our matrimonial laws will strengthen New York's families. . . . The inequity of the imbalance of remedies available to the petitioner is highlighted in this case . . . ." (citation omitted)).

149 N.Y. DOM. REL. LAW § 10-a(2) (McKinney 2014) ("When necessary to implement the

One limitation of this solution is that an acknowledgement of parentage—like the existing acknowledgment of paternity—would require the consent of both individuals acting as parents.[150] Thus, an acknowledgment of parentage would likely not be utilized if the individuals seeking parental rights are divided in their wishes for who should parent the child.

2. The Marital Presumption of Legitimacy

Though the creation of an order of maternity or parentage is one way in which courts could effectuate the legislative intent behind the Marriage Equality Act, it is far from the only one. An example presents itself in remedying the paradox created by *Seb C-M*, the case in which the judge refused to allow one parent to adopt her child on the grounds that the parent already had full parental rights, despite the fact that other courts might not recognize those rights.[151] The judge attempted to pass the problem off to courts in other jurisdictions.[152] Instead, the judge should have read the Marriage Equality Act and the clear legislative intent[153] to provide equal treatment to the same-sex couple before the court. Different-sex couples do not have to seek additional rights in order to have their marriages recognized in other states,[154] and so to be fully equal, same-sex couples should not be subjected to further requirements either. Thus, the Surrogate's Court should have allowed the petitioner to adopt her child. One other reason the court dismissed the petition was because of New York common law's interpretation of adoption—namely that a parent cannot adopt a child to whom he or she already has legal rights.[155] However, this precedent should be viewed as abrogated by statute in light of the legislative intent behind the Marriage Equality Act.[156]

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rights and responsibilities of spouses under the law, all gender-specific language or terms shall be construed in a gender-neutral manner in all such sources of law.").

150 *See* N.Y. PUB. HEALTH LAW § 4135-b (McKinney 2014) (providing that the acknowledgment includes voluntary statements from both the mother and the father); *see also* N.Y. FAM. CT. ACT § 516-a (McKinney 2014); N.Y. SOC. SERV. LAW § 111-k (McKinney 2014).

151 *In re* Seb C-M, N.Y. L.J., Jan. 31, 2014 (N.Y. Sur. Ct. Jan. 6, 2014).

152 *Id.* at 3.

153 *See supra* Part I.F.

154 *E.g.*, Carr v. Carr, 104 N.Y.S.2d 269, 271 (Sup. Ct. 1951) ("The general rule in this and other States is, that the laws of the State where the marriage is contracted, if not contrary to the prohibitions of the natural law or the express provisions of a statute, determines its validity, even as between residents of this State who leave their domicile to be married in another State." (citing Cunningham v. Cunningham, 99 N.E. 845 (N.Y. 1912))).

155 *Seb C-M*, N.Y. L.J., Jan. 31, 2014 at 1 (citing *In re Sebastian*, 879 N.Y.S.2d 677 (Sur. Ct. 2009)).

156 *See supra* Part I.F (stating that the legislative intent behind the Marriage Equality Act was

Another illustration presents itself in a similar New York Family Court case, *Q.M. v. B.C.*[157] In that case a biological father brought a paternity petition against the biological mother and the biological mother's wife.[158] The defendant and her wife argued, *inter alia*, that because the child was born during their legal marriage, the presumption of legitimacy should protect the non-biological mother's legal relationship with the child.[159] The Family Court judge discussed the increasing irrelevance of the presumption of legitimacy in the face of new technologies, such as DNA testing, and new familial arrangements, such as same-sex couples.[160] Ultimately, the judge held that the non-biological mother was no different than any other stepparent, and did not fit the state's legal definition of "parent."[161]

The judge also noted that the non-biological mother had never adopted the child—implying that if she had done so there would then be a legal parental relationship.[162] Ironically, that adoption is analogous to the adoption that was denied by the Surrogate's Court in *Seb C-M*,[163] creating further confusion for couples seeking to protect their parental rights. Additionally, the judge in *Q.M.* specifically referenced the gender-neutral provision of the Marriage Equality Act,[164] but found that the statute "does not preclude differentiation based on essential biology."[165] The result of this case was that the non-biological mother, who acted as the child's second parent,[166] was found to have no rights to

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to, *inter alia*, create marital benefits including "marital privacy" and a reduction in discrimination against same-sex couples).

157 Q.M. v. B.C., 995 N.Y.S.2d 470 (Fam. Ct. 2014).

158 *Id.* at 471–72.

159 *Id.* at 472. In fact the lesbian couple was in the process of a divorce during these proceedings, but nevertheless, both women agreed that the father should be excluded from the child's life. *Id.* at 471–72. There was no dispute that the petitioner was the child's biological father. *Id.* at 472.

160 *Id.* at 473–74; *see also supra* note 74.

161 *Q.M.*, 995 N.Y.S.2d at 474–75.

162 *Id.* at 474 ("[T]he Court of Appeals has repeatedly declined to expand the traditional definition of a parent beyond biological or birth parents and adoptive parents. . . . As a result, [the non-biological mother] stands in the position of many loving step-parents, male and female, who are not legal parents and are not entitled to court ordered custody or visitation with their step-children. The fact that she was married to [the biological mother] at the time of [the child's] birth, under the facts here, does not change her status.").

163 *In re* Seb C-M, N.Y. L.J., Jan. 31, 2014 (N.Y. Sur. Ct. Jan. 6, 2014).

164 N.Y. DOM. REL. LAW § 10-a(2) (McKinney 2014) ("When necessary to implement the rights and responsibilities of spouses under the law, all gender-specific language or terms shall be construed in a gender-neutral manner in all such sources of law.").

165 *Q.M.*, 995 N.Y.S.2d at 474.

166 *Id.* at 473 ("In support of her position, Ms. C. notes that Ms. S. was at the hospital when J.C. was born, selected the child's name and signed her birth certificate. Both Ms. C. and Ms. S. testified that Ms. S. has a close relationship with J.C. and that since their separation, Ms. C. has permitted Ms. S. to have contact with the child.").

the child, whereas the father, who had only seen the child twice,[167] was able to seek custody or visitation of the child.[168]

Applying this Note's proposal to *Q.M.* would result in allowing the non-biological mother to utilize the presumption of legitimacy to gain a legal relationship with the child. In the actual case, the judge held the exact opposite.[169] This ruling was based on what the judge saw as the irrelevancy of the presumption of legitimacy itself, primarily due to the ease with which modern technology can determine biological parentage.[170] However, the ruling does not eliminate the use of the presumption of legitimacy completely, but rather only finds that it is inapplicable to same-sex couples.[171] This is clearly contrary to both the Marriage Equality Act's plain meaning[172] and the legislative intent behind it.[173] Thus, interpreting the Act requires the court to allow same-sex couples to utilize the marital presumption of legitimacy, just as it is used by different-sex couples.

3. Equitable Estoppel

Just as the marital presumption of legitimacy should be examined subsequent to the legalization of same-sex marriage in New York, the doctrine of equitable estoppel should be reanalyzed as well. Under the Marriage Equality Act courts should allow both members of same-sex couples to gain legal parental rights to their child, despite at least one member of the couple being unrelated to the child.

As discussed above, the New York Court of Appeals' decision in *Debra H.* presents a significant barrier to same-sex couples seeking to establish parental rights through the doctrine of equitable estoppel.[174]

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167 *Id.* at 472.

168 *See New York Court Refuses to Apply Parental Presumption for Married Same-Sex Couple*, LESBIAN/GAY L. NOTES, Dec. 2014, at 502–03 ("[The father] will have the status of a legal parent who can seek court-ordered custody and visitation, as against [the non-biological mother], who will have no such rights. If [the biological mother] were to die or become incapacitated from taking care of [the child], [the father] would hold all the cards in a dispute with [the non-biological mother] over custody and visitation.").

169 *Q.M.*, 995 N.Y.S.2d at 474.

170 *Id.* at 473.

171 *Id.* at 474. ("[The biological mother] argues that the rights of 'non-biological parents' are entitled to the same constitutional protections afforded biological parents and suggests that the Marriage Equality Act requires that all spouses be treated in a completely gender neutral manner. It is this court's view that the Marriage Equality Act does not require the court to ignore the obvious biological differences between husbands and wives.").

172 *See* N.Y. DOM. REL. LAW § 10-a(2) (McKinney 2014) ("When necessary to implement the rights and responsibilities of spouses under the law, all gender-specific language or terms shall be construed in a gender-neutral manner in all such sources of law.").

173 *See supra* Part I.F.

174 Debra H. v. Janice R., 930 N.E.2d 184 (N.Y. 2010); s*ee also supra* Part I.C.

However, the case was decided prior to the passage of the Marriage Equality Act,[175] and so should be reinterpreted in light of the Act's requirement that no government treatment, with respect to marriage, should be based on gender.[176]

Though the holding in *Debra H.*[177] is hostile to same-sex couples, one could argue that the holding, insofar as it pertains to non-biological parents and their right to invoke equitable estoppel, is dictum. The Court of Appeals emphatically stated its opposition to automatically granting parental rights to biological strangers, but its final holding was to grant the non-biological mother standing to seek visitation rights and/or custody of the child, based on the child's best interests.[178] This, in turn, was based on the fact that the couple had entered into a civil union in Vermont—where it was legal—and therefore, both partners would be considered a "parent" of any child resulting from that union.[179] Therefore, the court's holding on non-biological parents was largely irrelevant to the ultimate outcome of the case, as its final decision was predicated on the existence of a legal union, not on biology.[180]

While arguments exist to distinguish *Debra H.*, as it stands, the case presents a substantial hurdle to non-biological parents—"biological strangers," in the language of the court.[181] While *Debra H.* arose from a contested issue between two parents, it could also possibly stymie amicable efforts of same-sex parents to co-parent a child, as at least one parent remains a biological stranger and therefore potentially subject to the court's ruling.[182] Thus, if the portion of the case pertaining to

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175 The ruling in *Debra H.* was issued in May 2010, and the Marriage Equality Act was passed in June 2011. *Debra H.*, 930 N.E.2d 184; *see also* Marriage Equality Act, 2011 N.Y. Sess. Laws Ch. 95 (McKinney).

176 N.Y. DOM. REL. LAW § 10-a(2) ("No government treatment or legal status, effect, right, benefit, privilege, protection or responsibility relating to marriage, whether deriving from statute, administrative or *court rule*, public policy, common law or any other source of law, shall differ based on the parties to the marriage being or having been of the same sex rather than a different sex." (emphasis added)). Some courts have used this logic in the wake of *Obergefell*. For example, the Supreme Court of Oklahoma expanded that state's "equitable doctrine of *in loco parentis*"—similar to New York's equitable estoppel—to apply to same-sex couples, drawing on the principles discussed by the Court in *Obergefell*. Ramey v. Sutton, 362 P.3d 217 (Okla. 2015).

177 *Debra H.*, 930 N.E.2d 184.

178 *Id.* at 197. Though the best interest standard could in some cases protect the rights of same-sex parents, it is too amorphous a standard to be the only legal protection. That standard, if utilized alone, creates the potential for judges to make determinations based solely on a petitioner's sexual orientation. Alternatively, under this Note's proposal, a doctrine like equitable estoppel would apply gender-neutral factors to determine parental rights, which would *then* be subject to a court's determination of a child's best interests.

179 *Id.* at 196–97.

180 *Id.* at 194–95.

181 *Id.* at 189.

182 *Id.*

biological strangers is not considered dictum, it could additionally be considered abrogated by the Marriage Equality Act.

Much of the basis for the court's decision in *Debra H.* was the fact that the statute referred to "parents," and the court felt only the legislature should redefine the term.[183] The legislature's redefinition that the *Debra H.* court was looking for can be found in the Marriage Equality Act. While the Act does not explicitly include a definition,[184] it does make it clear that it intends to expand the privileges of marriage, including child rearing, to same-sex couples.[185] Therefore it is implicit in the statute that both members of a same-sex couple—including one which is necessarily a biological stranger—be considered parents.

Some New York courts have already allowed same-sex couples to utilize equitable estoppel in asserting parentage,[186] but this is far from a uniform implementation.[187]

B. *Rejected Alternative Solutions*

In light of decisions such as the one in *Seb C-M*,[188] same-sex couples are left wondering how best to protect their legal parental rights while the courts attempt to pass the issue off to other bodies—be it the legislature or the courts of other states.[189] Though the preceding

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183 *Id.* at 193 ("[A]ny change in the meaning of 'parent' under our law should come by way of legislative enactment rather than judicial revamping of precedent.").

184 Marriage Equality Act, 2011 N.Y. Sess. Laws Ch. 95 (McKinney); *see also* Wendy G-M. v. Erin G-M, 985 N.Y.S.2d 845, 855 (Sup. Ct. 2014) ("The MEA eradicates any distinction between the sexes, but it does not address the definition of parenthood—it does not include a definition of 'parent.'").

185 *See supra* Part I.F.

186 *See* Arriaga v. Dukoff, 999 N.Y.S.2d 504 (App. Div. 2014), *lv. granted sub nom.* Estrellita A. v. Jennifer L.D., 38 N.E.3d 827 (N.Y. 2015). This case is the appeal of a Family Court decision in which a biological mother sought support from her former domestic partner, who had previously helped raise the child. *Id.* The non-biological mother was found to be a parent under the doctrine of equitable estoppel. *Id.*; *see also New York Appellate Division Finds Lesbian Birth Mother "Judicially Estopped" From Denying Former Partner's Parental Status*, LESBIAN/GAY L. NOTES, Jan. 2015, at 13.

187 *See, e.g.*, Q.M. v. B.C., 995 N.Y.S.2d 470 (Fam. Ct. 2014). *Q.M.* was decided in 2014, after the passage of the Marriage Equality Act. *Id.*; *see also* Marriage Equality Act, 2011 N.Y. Sess. Laws Ch. 95. In *Q.M.*, the judge ruled that equitable estoppel did not bar a biological father from commencing a paternity petition against the biological mother and her wife. *Q.M.*, 995 N.Y.S.2d at 476. The judge's logic is somewhat specific to the facts of the case—it is based in part on the age of the child at the commencement of the petition, and the fact that the father never agreed to allow the respondent couple to raise the child—and so it is unclear whether the decision would be different if the respondents were a different-sex couple. *Id.* at 474–76.

188 To reiterate the facts of the case, the judge denied the non-biological mother's request to adopt the child, and recommended that the petitioner seek redress in a different jurisdiction. *In re* Seb C-M, N.Y. L.J., Jan. 31, 2014, at 1 (N.Y. Sur. Ct. Jan. 6, 2014).

189 *See, e.g.*, David Dodge, *At the Cutting Edge of Gay Family Law*, N.Y. TIMES (June 17, 2014, 10:05 AM), http://parenting.blogs.nytimes.com/2014/06/17/at-the-cutting-edge-of-gay-

proposals by this Note present several solutions, they are far from the only possibilities, nor are they even the most optimal. This section will explore other potential solutions, and then explain why they were ultimately rejected.

Within New York State, an ideal solution would be for the legislature to amend the existing Marriage Equality Act to clarify that it is meant to encompass other more peripheral aspects of marriage, including parenting, in addition to the more obvious features of marriage. Such an ideal amendment would also provide specific examples of gender neutrality, though still requiring interpretation in other areas as the current law does.[190] Even more ideal would be national legislation requiring all states to recognize same-sex marriages performed elsewhere, along with other legal rights accompanying those marriages.[191] However, these idealized proposals are unrealistic, and this Note's proposal is one which could be implemented without legislative involvement.

One other simple option is for same-sex couples to seek out a more favorable court in their attempts to formalize legal relationships with their children.[192] While this option is not available everywhere, in New York, the Family Court and Surrogate's Court have concurrent jurisdiction over certain matters, including adoption and guardianship.[193] However, whereas Surrogate's Court is focused on

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family-law; James C. McKinley Jr., *N.Y. Judge Alarms Gay Parents by Finding Marriage Law Negates Need for Adoption*, N.Y. TIMES (Jan. 28, 2014), http://www.nytimes.com/2014/01/29/nyregion/ny-judge-alarms-gay-parents-by-finding-marriage-law-negates-need-for-adoption.html.

190 It is possible to provide instructive examples without simultaneously excluding situations which were not explicitly enumerated. *See, e.g.*, *Ejusdem Generis*, BLACK'S LAW DICTIONARY (10th ed. 2014) ("A canon of construction holding that when a general word or phrase follows a list of specifics, the general word or phrase will be interpreted to include only items of the same class as those listed.").

191 This has been proposed previously. *E.g.*, Lauren Lombardo, Note, *Does Heather Have Two Mommies?: The Importance of Full Faith and Credit Recognition Ftr [sic] Adoptions by Same-Sex Couples*, 39 FORDHAM URB. L.J. 1301, 1338 (2012) ("[T]his Note urges Congress to pass a 'Protection of Adopted Children Act,' which would guarantee same-sex adoptive parents the same rights as any other adoptive parents in the United States."); Nancy D. Polikoff, *A Mother Should Not Have to Adopt Her Own Child: Parentage Laws for Children of Lesbian Couples in the Twenty-First Century*, 5 STAN. J. C.R. & C.L. 201, 265 (2009) ("Enactment of a gender-neutral, marital status-neutral statute governing conception through donor insemination, along the lines of the Model ABA Act, is a plausible strategy to protect lesbian couples and their children.").

192 *Seb C-M* was heard in New York Surrogate's Court. *Seb C-M*, N.Y. L.J., Jan. 31, 2014.

193 *See* Fuss v. Niceforo, 665 N.Y.S.2d 781, 782 (App. Div. 1997) (stating that Surrogate's Court has concurrent jurisdiction with Family Court); Aleksander K. v. Elena K., 784 N.Y.S.2d 918 (Fam. Ct. 2004) ("Family Court and Surrogate's Court are both superior trial courts of limited jurisdiction. They have concurrent jurisdiction in certain areas, *e.g.*, adoptions and guardianships . . . ." (emphasis in original)); Robert M. Elardo, *Equal Protection Denied in New York to Some Family Law Litigants in Supreme Court: An Assigned Counsel Dilemma for the Courts*, 29 FORDHAM URB. L.J. 1125 (2002).

property issues, Family Court—as the name suggests—deals with family-related issues, and its overriding standard in cases involving children, generally, is the best interest of the child.[194] Thus, it is possible that a Family Court judge who specializes in family issues, and whose main focus is the best interests of a child, may be more receptive to a same-sex couple's arguments than a Surrogate's Court judge who deals with adoption and guardianship issues only as two of many unrelated areas of jurisdiction.[195] However, it is not a tenable solution to merely avoid certain courts altogether.

The solution proposed by the judge in *Seb C-M* was essentially for the petitioners to look to the courts of more hostile states, rather than relying on a state such as New York, which had already granted them full parental rights.[196] This presents several problems, the most apparent of which is standing. Generally, there is a "case and controversy" requirement in the Constitution which prevents advisory opinions—at its most basic this means that there has to be an actual harm which can be redressed in order for a federal court to hear a case.[197] Applying that requirement to parents seeking to affirm their legal parental rights, it would mean that first the parents must suffer an injury, such as a state denying them legal rights to their child. The reason *Seb C-M* was brought in the first place was to preemptively avoid such a denial.[198]

The parents could seek a declaratory judgment,[199] but even that proceeding requires that the issue not be completely hypothetical, which would make it moot.[200] In this case, that likely means that at the very

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194 *See, e.g.*, Eden M. v. Ines R., 410 N.Y.S.2d 997, 998–99 (Fam. Ct. 1978) (explaining the jurisdiction held by Family Court and by Surrogate's Court); Paul M. Coltoff, et al., *Concurrent jurisdiction of surrogate's court and family court*, 1 CARMODY-WAIT 2d § 2:221 (2015).

195 *See, e.g.*, TIMOTHY TIPPINS, 3 NEW YORK MATRIMONIAL LAW AND PRACTICE § 20:2 (2014) (discussing the history of the "best interest of the child" standard in New York, particularly in the context of custody).

196 *Seb C-M*, N.Y. L.J., Jan. 31, 2014 at 3 ("If in fact the petitioner's and M.M.'s intent is to secure additional protection of their family's legal relationship in order to assure its recognition in the event of relocation to a jurisdiction hostile to marriage equality, the more appropriate, and indeed necessary, course of action would be to seek redress of the denial of their civil rights in such jurisdiction.").

197 *See* U.S. CONST. art. III, § 1; Lujan v. Defenders of Wildlife, 504 U.S. 555, 560 (1992) ("Over the years, our cases have established that the irreducible constitutional minimum of standing contains three elements. First, the plaintiff must have suffered an 'injury in fact' . . . .").

198 *Seb C-M*, N.Y. L.J., Jan. 31, 2014 at 1 ("The petitioner appears to have filed the instant application out of an abundance of caution, perhaps to ensure that, with the support of judicial imprimatur, her existing parental relationship with the infant is less susceptible to challenge in the event of the family's re-location to a jurisdiction less hospitable to the rights of same-sex couples to marry and adopt children.").

199 A declaratory judgment is defined as "[a] binding adjudication that establishes the rights and other legal relations of the parties without providing for or ordering enforcement." *Judgment*, BLACK'S LAW DICTIONARY (10th ed. 2014).

200 *See, e.g.*, James Buchwalter, et al., 26 C.J.S. *Declaratory Judgments* §§ 31–32 (2015); *see also* Preiser v. Newkirk, 422 U.S. 395, 402 (1975) ("[T]his Court, noting the difficulty in

least, the parents would have to be likely to encounter a denial of their rights, such as by living in a jurisdiction which does not allow adoption by same-sex couples. Thus, it would be difficult for a parent to preemptively establish his or her legal parental rights without first entering a situation in which those rights are challenged.

One of the most discussed arguments surrounding same-sex parenting is that the Full Faith and Credit Clause should require—with no statutory changes—states to recognize out-of-state adoptions regardless of the parents' gender.[201] This seems the likely implication of the Supreme Court's recent decision in *V.L. v. E.L.*, but this decision still would not force states to grant parenting rights to same-sex couples, but only to recognize those already granted by other states.[202]

CONCLUSION

The specific proposals advanced by this Note are not an exhaustive list of reforms to the current statutory and common law scheme to remedy this issue. Rather, they are meant to illustrate several ways in which New York courts can examine problems currently faced by same-sex couples and solve them through the Marriage Equality Act.[203] There will be problems faced by couples not predicted by this Note, and the courts should utilize the same method—interpreting the legislative intent behind the Marriage Equality Act—in order to solve them, where possible. Thus, this Note and its proposals are meant as a starting point for courts to begin to address the barriers faced by same-sex parents

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fashioning a precise test of universal application for determining whether a request for declaratory relief had become moot, held that, basically, the question in each case is whether the facts alleged, under all the circumstances, show that there is a substantial controversy, between parties having adverse legal interests, of sufficient immediacy and reality to warrant the issuance of a declaratory judgment.").

201 *E.g.*, Joseph A. Fraioli, Note, *Having Faith in Full Faith & Credit: Finstuen, Adar, and the Quest for Interstate Same-Sex Parental Recognition*, 98 IOWA L. REV. 365 (2012); Steve Sanders, *Interstate Recognition of Parent-Child Relationships: The Limits of the State Interests Paradigm and the Role of Due Process*, 2011 U. CHI. LEGAL F. 233 (2011); Olson, *supra* note 131; Lombardo, *supra* note 191.

202 *See* V.L. v. E.L., 136 S. Ct. 1017 (2016). The ramifications of this decision remain to be seen, but some states have remained unwilling to enforce decisions in favor of same-sex marriage, a potential harbinger of states' reactions to this latest decision. For example, before same-sex marriage was legalized nationwide there was conflict between a federal court's holding permitting same-sex marriage, and Alabama state judges unwilling to implement the ruling. *See* Campbell Robertson & Shaila Dewan, *In Defiance on Gay Marriage, Alabama Sets Itself Far Apart*, N.Y. TIMES (Feb. 10, 2015), http://www.nytimes.com/2015/02/11/us/in-defiance-alabama-sets-itself-far-apart.html. After the Supreme Court's decision in *Obergefell* there continued to be conflict from less amenable states. *See, e.g.*, Emma Green, *Kim Davis Is Winning*, THE ATLANTIC (Sept. 9, 2015), http://www.theatlantic.com/politics/archive/2015/09/the-triumph-of-kim-davis/404410.

203 2011 N.Y. Sess. Laws Ch. 95 (McKinney).

immediately, without the need to wait for lethargic legislative action or for a Supreme Court ruling on the issue.