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A Mother Yesterday, but Not Today: Deficiencies of the Uniform Parentage Act for Non-Biological Parents in Same-Sex Relationships

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A MOTHER YESTERDAY, BUT NOT TODAY: DEFICIENCIES OF THE UNIFORM PARENTAGE ACT FOR NON-BIOLOGICAL PARENTS IN SAME-SEX RELATIONSHIPS

I. INTRODUCTION

Angie and Marcie met in college and have been together for five years.¹ They live in a nice two-story brick house in a small neighborhood in the suburbs of Cleveland, Ohio. Like many typical couples, they dream of having a family and growing old together with their children and grandchildren. Eventually, the couple starts a family. Although Angie gives birth to three beautiful children, Marcie is equally a parent. She financially supports the children and family, takes the children to doctor's appointments, picks them up from school, attends basketball games and dance recitals, helps them with their homework, and tucks them in at night. Marcie never thinks of the children as being anything but her own. But despite Angie and Marcie raising their children together as a family, Marcie cannot legalize her relationship with her children because Ohio does not recognize second parent adoption.

Unfortunately, after twelve years, the couple decides to separate. For any divorcing couple, a custody battle can be a long and draining process, but it generally ends with each parent receiving some type of custodial or visitation rights. However, because Marcie was in a same-sex partnership not legally recognized by the state of Ohio, Marcie is not eligible for custody or visitation rights upon the dissolution of their partnership. Because Angie bore the three children through artificial insemination, she is the biological and legal parent of the couple's three children. Consequently, Marcie has no legal rights over her children and cannot obtain rights to control or contribute to their upbringing; nor can she obtain a regulatory, court enforced visitation schedule. Ultimately, Marcie loses her children because of her sexual orientation.

Marriage provides numerous benefits to heterosexual couples that are unavailable to same-sex couples, including a presumption of parental

¹ This hypothetical is based on *In re Mullen*, 953 N.E.2d 302 (Ohio 2011). See *In the Matter of L.K.M.*, LAMBDA LEGAL, <http://www.lambdalegal.org/in-court/cases/in-the-matter-of-lkm> (last visited Jan. 11, 2013) (discussing this case further). During their seven year relationship, the lesbian couple decided to have a child together through artificial insemination. *Id.* Two years after the child was born, the couple ended their relationship. *Id.* Despite raising and financially supporting the child since birth, the non-biological mother was denied custody. *In re Mullen*, 953 N.E. 2d at 308-09. In a 4-3 decision, the Ohio Supreme Court granted sole custody over the child to the biological parent. *Id.*

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status.² Most states do not allow same-sex marriage, which creates difficulty for same-sex couples wanting to be parents.³ In addition to prohibiting same-sex couples from marrying, many states deny same-sex couples the ability to become parents through second parent adoption.⁴ Second parent adoption provides the ability for another individual to jointly adopt a child without terminating the legal parental status of the biological parent.⁵ Without second parent adoptions, states often do not

² See *An Overview of Federal Rights and Protections Granted to Married Couples*, HUM. RIGHTS CAMPAIGN, <http://www.hrc.org/resources/entry/an-overview-of-federal-rights-and-protections-granted-to-married-couples> (last visited Aug. 12, 2012) (providing examples of some of the 1,138 federal benefits same-sex partners cannot receive because of existing federal law). Same-sex marriage is an issue of both state and federal law, because, although states may grant the right for same-sex couples to marry, the Defense of Marriage Act ("DOMA") is a federal law that defines marriage as only between a man and a woman for the purpose of any federal law or regulation. 1 U.S.C. § 7 (2006). DOMA further limits same-sex couples by stating that "[n]o State . . . shall be required to give effect to any public act, record, or judicial proceeding of any other State . . . respecting a relationship between persons of the same sex that is treated as a marriage under the laws of such other State . . . or a right or claim arising from such relationship." 28 U.S.C. § 1738C (2006). Regardless if a state recognizes same-sex marriage, DOMA prohibits that marriage from being recognized by the federal government, as well as by other states. *Id.*

³ See, e.g., *In re Mullen*, 302 N.E.2d at 305 (providing that Ohio statutes do not recognize the non-biological parent in a same-sex relationship as a parent). As of January 2013, nine states and the District of Columbia currently recognize legal marriage between same-sex individuals: Connecticut, Iowa, Maine, Maryland, Massachusetts, New Hampshire, New York, Vermont, and Washington. *Defining Marriage: Defense of Marriage Acts and Same-Sex Marriage Laws*, NAT'L CONF. OF STATE LEGISLATURES, <http://www.ncsl.org/issues-research/human-services/same-sex-marriage-overview.aspx> (last updated June 2012). Maine, Maryland, and Washington were the first states to recognize same-sex marriage through popular vote in the November 2012 election. *Gay Marriage Comes to Maine: Couples Wed When Law Takes Effect After Midnight*, NBCNEWS, http://usnews.nbcnews.com/_news/2012/12/29/16225220-gay-marriage-comes-to-maine-couples-wed-when-law-takes-effect-after-midnight?lite (Dec. 29, 2012). In addition to these states, Illinois introduced legislation in January 2013 to legalize same-sex marriage and to expand the civil union rights that the state already permits to same-sex couples. John O'Connor & Sara Burnett, *Quick Push for Gay Marriage in Illinois Set Back*, YAHOO!NEWS, <http://news.yahoo.com/quick-push-gay-marriage-illinois-set-back-035718597.html> (Jan. 13, 2013). See generally Jeffrey A. Parness, *Lost Paternity in the Culture of Motherhood: A Different View of Safe Haven Laws*, 42 VAL. U. L. REV. 81 (2007) (explaining that, in some instances, biological mothers may not know what is best for their children).

⁴ *Parenting Laws: Second Parent Adoption*, HUM. RIGHTS CAMPAIGN, <http://www.hrc.org/resources/entry/maps-of-state-laws-policies> (last updated Jan. 18, 2011). States like Kentucky, Nebraska, and Ohio do not recognize second parent adoption. *Id.* Consequently, in a same-sex union, it is difficult for the non-biological parent to obtain legal rights over a child. Monica K. Miller, *How Judges Decide Whether Social Parents Have Parental Rights: A Five-Factor Typology*, 49 FAM. CT. REV. 72, 72 (2011). For example, the lack of legal parenting status creates a serious disadvantage when making decisions, like serious medical decisions, for the welfare of the child. *Id.*

⁵ DENIS CLIFFORD, FREDERICK HERTZ & EMILY DOSKOW, *A LEGAL GUIDE FOR LESBIAN AND GAY COUPLES* 84 (Emily Doskow ed., 15th ed. 2010). The process of second parent

consider a non-biological parent, like Marcie, to be a legal parent, therefore eliminating a non-biological parent's ability to gain legal rights over a child at the end of a same-sex relationship.⁶ Consequently, both the parent and child lose legal rights they are entitled to as members of a parent-child relationship.⁷

A non-biological parent in a same-sex relationship has limited avenues available in pursuit of legal rights over the child without the ability to adopt as a second parent.⁸ Jurisdictions are greatly divided in the treatment of non-biological parents, which results in a lack of uniformity among the states for individuals wishing to establish legal parental status.⁹ In part, this division is the result of some states recognizing the de facto parent doctrine.¹⁰ This doctrine is an equitable remedy that allows a non-biological parent to establish legal parental rights when the individual has acted as a parent.¹¹ Also, because only some states have enacted the Uniform Parentage Act ("UPA"), there is a further divide among states in defining the word "parent."¹² The UPA is an attempt to encourage states to enact uniform legislation for equal

adoption allows a non-biological parent to become a legal parent through adoption, while the natural or first adoptive parent retains legal parental status. *Id.* Therefore, states permitting second parent adoptions allow both parents in a same-sex couple to be legal parents. *Id.* Eighteen states and the District of Columbia have statutes that allow for second parent adoptions, and eight states allow a petition for a second parent adoption despite no explicit statutory recognition. *Parenting Laws: Second Parent Adoption, supra* note 4.

⁶ See *infra* Part II.C (illustrating how courts differ when considering the parentage status of a non-biological parent in a same-sex relationship who is attempting to obtain legal rights).

⁷ See Miller, *supra* note 4, at 72, 74 (explaining the financial and legal consequences of the failure to establish the legal parent-child relationship); see also D'Arcy L. Reinhard, Note, *Recognition of Non-Biological, Non-Adoptive Parents in Arkansas, Florida, Mississippi, and Utah: A De Facto Parent Doctrine to Protect the Best Interests of the Child*, 13 J. GENDER RACE & JUST. 441, 446 (2010) (discussing how research has shown that homosexual parents are able to raise happy and healthy children and how the termination of a parent-child relationship in such a family structure can be detrimental to the child).

⁸ See *infra* Part II.B (comparing states that have enacted the UPA with states that have not to illustrate the various routes states have taken in defining a parent).

⁹ See *infra* Part II.B-C (discussing the various approaches jurisdictions take to grant or deny parental rights to the non-biological parent in a same-sex partnership).

¹⁰ See *infra* Part II.C (illustrating the division in judicial recognition of the de facto parent doctrine, based in part on state legislatures' definitions of a parent in their statutes).

¹¹ See Robin Fretwell Wilson, *Trusting Mothers: A Critique of the American Law Institute's Treatment of De Facto Parents*, 38 HOFSTRA L. REV. 1103, 1112 (2010) (explaining the definition of de facto parent by the American Law Institute, which requires a de facto parent to establish three things: (1) residency; (2) a caretaking role; and (3) that the legal parent agreed for the non-parent to become a de facto parent).

¹² See *infra* Part II.B.1 (discussing the different ways states have either extended or limited the language of the UPA).

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treatment to children born in and out of marriage.¹³ Although the UPA creates non-discriminatory means to establish parentage of children who are born out of marriage, its definition of “parent” fails to recognize other types of non-traditional families, including same-sex couples.¹⁴ Therefore, the UPA does not protect same-sex couples when second parent adoption is not available.¹⁵

While the UPA is primarily used as a guide for states when enacting parentage statutes, it is a critical starting point for how states define a legal parent.¹⁶ As a result, this Note proposes that the language of the UPA be revised to include same-sex couples by recognizing a de facto parent and amending its current language in consideration of same-sex couples.¹⁷ This Note begins by explaining the sources that states use in legislative and judicial definitions of parentage: the UPA and the de facto parent doctrine.¹⁸ Next, Part II of this Note discusses the state statutes that have and have not enacted the UPA, specifically how state legislatures define parent.¹⁹ It then explains the judicial interpretation of those state statutes, which permit or deny legal parental status to a non-biological parent in a same-sex relationship.²⁰ Part III of this Note looks at the benefits and limitations of the UPA in comparison to parental statutes of states that have chosen not to enact the UPA.²¹ Finally, Part IV of this Note recommends amending three specific provisions of the UPA to better guide state legislatures in defining a legal parent.²²

¹³ UNIF. PARENTAGE ACT (2000) Prefatory Note (amended 2002), 9B U.L.A. 5 (Supp. 2012).

¹⁴ See *infra* Part II.A (discussing the current version of the UPA, which fails to recognize same-sex relationships in defining a parent).

¹⁵ See *infra* Part III.A.2 (illustrating the current UPA limitations in protecting non-biological parents in same-sex relationships).

¹⁶ See *infra* Part II.A (discussing how the UPA was created to be a model statute to create uniformity among states in parenting statutes).

¹⁷ See *infra* Part IV (proposing amendments to the UPA that would legally recognize a de facto parent and establish a non-biological parent’s legal rights when consenting to artificial insemination).

¹⁸ See *infra* Part II.A (presenting the valuable provisions of the UPA that impact the determination of parentage and discussing the definition of a de facto parent).

¹⁹ See *infra* Part II.B (discussing the various approaches legislatures have taken in defining a parent and determining child custody within the confines of the UPA or without the guidance of the UPA).

²⁰ See *infra* Part II.C (explaining judicial decisions to extend equitable doctrines of psychological parenting to grant custody to a non-biological parent in a same-sex relationship under the confines of statutory language).

²¹ See *infra* Part III (comparing the advantages and disadvantages of those states that have enacted the UPA).

²² See *infra* Part IV (proposing amendments to the UPA that would better guide states in enacting statutes that are beneficial to same-sex parents and addressing potential problems).

II. BACKGROUND

The ability to establish one's self as the legal parent over a child is essential for both the parent and the child.²³ Although not legally binding, the UPA guides state legislatures in creating statutes to define a legal parent.²⁴ States also look to common law equitable doctrines when deciding to expand the definition of a parent to include a de facto parent.²⁵ First, Part II.A explains the language of the UPA used by state legislatures in creating parenting statutes.²⁶ Part II.B discusses the legislative enactment of the UPA, as well as statutes in states that have chosen not to enact the UPA, illustrating the differences in the definition of a parent.²⁷ Finally, Part II.C explains the judicial interpretations of statutes defining a parent when determining whether to grant non-biological parents in same-sex relationships legal parental rights.²⁸

²³ See Miller, *supra* note 4, at 72–73 (explaining that providing the social parent with legal parental status is beneficial in providing security to the family situation, such as the ability to handle medical situations or estate issues). By being defined as a legal parent, an individual is granted rights over her child that are otherwise unavailable, such as the ability to obtain custody or to make medical decisions. *Id.* Legal parental status will provide rights to a child as well, like the right to inherit from such parents and the right to receive financial support from the non-biological parent. See MARK STRASSER, SAME-SEX UNIONS ACROSS THE UNITED STATES 91–92 (2011) (discussing that the failure by a court to establish a non-biological parent as a legal parent creates a financial disadvantage, because the non-parent is no longer required to financially support the child at the end of a relationship).

²⁴ See 1 DONALD T. KRAMER, *The Uniform Parentage Act (UPA)* § 7:23, at 645–46, in LEGISLATIVE RIGHTS OF CHILDREN (2d ed. 2005) (discussing that, although the UPA is not universally recognized because states are not mandated to enact it, many states use the UPA as the exclusive means to establish parentage); see also Lindsay J. Rohlf, Note, *The Psychological-Parent and De Facto-Parent Doctrines: How Should the Uniform Parentage Act Define "Parent"?*, 94 IOWA L. REV. 691, 713–14 (2009) (discussing the development of the UPA and its guiding principles on states). The following states have enacted some version of the UPA: Alabama, California, Colorado, Delaware, Hawaii, Illinois, Kansas, Minnesota, Montana, Nevada, New Jersey, New Mexico, North Dakota, Ohio, Oklahoma, Rhode Island, Texas, Utah, Washington, and Wyoming. KRAMER, *supra*, at 646.

²⁵ See 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, 223 (2009) (discussing a Washington court case, which used the de facto parent doctrine to grant custody to a non-biological parent in a same-sex relationship). A de facto parent is an equitable common law doctrine that recognizes a person as a legal parent when there is a parent-like relationship. See *Smith v. Gordon*, 968 A.2d 1, 11 (Del. 2009) (discussing the ALI's definition of the de facto parent doctrine).

²⁶ See *infra* Part II.A (explaining the UPA and the important provisions that implicate issues for same-sex parents).

²⁷ See *infra* Part II.B (providing examples of how states liberally or conservatively enact parenting statutes, both within and outside the confines of the UPA).

²⁸ See *infra* Part II.C (illustrating how courts rely on the language of statutes to determine the ability of granting parenting rights to non-biological parents of same-sex couples).

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A. *The Uniform Parentage Act and the Definition of a De Facto Parent*

The UPA was first approved in 1973 to create uniformity among states in the establishment of parentage.²⁹ During this time, state statutes often discriminated against children born out of marriage; therefore, the UPA was created to be a model statute to define parentage without the consideration of marital status.³⁰ As a result of medical advances in conception, the UPA was further amended in 2000 and 2002 to include a definition of a parent in relation to a child who was conceived through artificial insemination.³¹ Although the UPA does not exclusively define a parent on the basis of marital status, the current UPA only recognizes the conception of a child in heterosexual relationships, because it defines parentage strictly in terms of a man and a woman.³²

²⁹ UNIF. PARENTAGE ACT (2000) Prefatory Note (amended 2002), 9B U.L.A. 5–6 (Supp. 2012). During this time, many states differentiated between children born in and out of marriage, which resulted in a significant disadvantage for children born out of marriage. *Id.* Aside from the UPA, the National Conference of Commissioners on Uniform State Laws addresses various topics, including parentage and probate, to create model statutes for states. *Id.* The Commissioners create model state laws as a way to promote uniformity among states, finding it a necessity as the mobility between states has increased for individuals. *About the ULC*, UNIF. LAW COMM'N, <http://www.uniformlaws.org/Narrative.aspx?title>About%20the%20ULC> (last visited Aug. 12, 2012). Uniformity among state laws in parentage is important as mobility is increasing. *See* STRASSER, *supra* note 23, at 88 (discussing the importance in uniformity for parenting laws in order to prevent complications for parents and children in same-sex couples).

³⁰ *See* 1 KAREN MOULDING, *SEXUAL ORIENTATION AND THE LAW* § 1:15, at 96 (2012) (stating the UPA's purpose was to eliminate laws that defined children as "illegitimate" and therefore deprived these children of certain rights, such as inheritance rights). The UPA was originally created after the Supreme Court held that the Equal Protection Clause of the Fourteenth Amendment required legislation to treat children born in and out of marriage equally and refused to allow a distinction in laws based on the marital status of parents. *See* Rohlf, *supra* note 24, at 713 (discussing the intended purpose of the UPA).

³¹ David D. Meyer, *Parenthood in a Time of Transition: Tensions Between Legal, Biological, and Social Conceptions of Parenthood*, 54 AM. J. COMP. L. 125, 134 (2006). The 2000 amendment revised the original UPA's limitation of artificial insemination procedures by a licensed physician. *Id.* In 2002, the UPA further changed this provision to include a presumption of fatherhood regardless of marital status or biological link to the child. *Id.* Although family structures are changing, the law has been slow to reform to the needs of such changes, including consideration of same-sex couples. *Id.* at 133–34.

³² *See generally* Nicole L. Parness, Note, *Forcing a Square into a Circle: Why Are Courts Straining to Apply the Uniform Parentage Act to Gay Couples and Their Children?*, 27 WHITTIER L. REV. 893, 907 (2006) (explaining that the UPA was not created with homosexuals in mind, because it fails to apply to same-sex couples and does not recognize parental relationships within these couples). The UPA does not contain the words "gay," "lesbian," "homosexual," or "domestic partnerships," including within the UPA provision regarding artificial insemination. *See, e.g.*, UNIF. PARENTAGE ACT (2000) § 703 (amended 2002), 9B U.L.A. 71 (Supp. 2012) (providing the UPA provision that defines the establishment of parentage in the context of artificial insemination procedures). The language of the current UPA clearly indicates it was created to determine parentage of

Currently, the UPA defines a “mother” (a female as a legal parent) as a biological or adoptive relationship between a parent and a child.³³ A mother-child relationship is established only through a woman’s giving birth or through legal adoption.³⁴ The father-child relationship is defined by the same traditional definitions of a parent, through biology or an adoption, but expands the definition to include presumptions of paternity beyond these links.³⁵ For example, section 204 of the UPA states that a legal father-child relationship may be established if “for the first two years of the child’s life, [the individual claiming paternity] resided in the same household with the child and openly held out the child as his own.”³⁶ Section 204 also presumes a legal father-child relationship for a child born within a marriage.³⁷ In both of these

children born in heterosexual relationships. Parness, *supra*, at 907. For example, section 201 of the UPA, Establishment of Parent-Child Relationship, explains the definition of a mother and father relationship with a child, failing to provide the ability to establish two women or two men as parents. UNIF. PARENTAGE ACT (2000) § 201 (amended 2002), 9B U.L.A. 21 (Supp. 2012). In addition, only a male may be established as a father by presumption, thereby denying the ability for a second female to be established as a mother by a similar process. UNIF. PARENTAGE ACT (2000) § 703 (amended 2002), 9B U.L.A. 71 (Supp. 2012).

³³ UNIF. PARENTAGE ACT (2000) § 201(a) (amended 2002), 9B U.L.A. 21 (Supp. 2012).

³⁴ *Id.* The provision defining the legal mother-child relationship states, “(a) The mother-child relationship is established between a woman and a child by: (1) the woman’s having given birth to the child . . . ; (2) an adjudication of the woman’s maternity; [or] (3) adoption of the child by the woman” *Id.*

³⁵ UNIF. PARENTAGE ACT (2000) § 201(b) (amended 2002), 9B U.L.A. 21 (Supp. 2012). The provision establishing a legal father-child relationship goes beyond a traditional biological or adoptive parent because it allows for a presumption of paternity. *Id.*

³⁶ UNIF. PARENTAGE ACT (2000) § 204(a)(5) (amended 2002), 9B U.L.A. 24 (Supp. 2012).

³⁷ UNIF. PARENTAGE ACT (2000) § 204(a)(1) (amended 2002), 9B U.L.A. 23 (Supp. 2012). This provision of the UPA provides for a presumption of paternity in the following circumstances:

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

(1) he and the mother of the child are married to each other and the child is born during the marriage;

(2) he and the mother of the child were married to each other and the child is born within 300 days after the marriage is terminated by death, annulment, declaration of invalidity, or divorce [, or after a decree of separation];

....

(4) after the birth of the child, he and the mother of the child married each other in apparent compliance with law, whether or not the marriage is or could be declared invalid, and he voluntarily asserted his paternity of the child, and;

(A) the assertion is in a record filed with [state agency maintaining birth records];

(B) he agreed to and is named as the child’s father on the child’s birth certificate; or

provisions, a legal parental relationship is established without the male proving his biological or adoptive link to the child.³⁸

In addition to section 204, section 703 of the UPA provides for the presumption of paternity in situations in which a male intends to be a father of the child conceived through artificial reproduction.³⁹ This provision further allows for the establishment of a legal father-child relationship without the presumed father donating his sperm to conceive the child.⁴⁰ Although the UPA allows a presumption of paternity, no provision specifically addresses the issue of a de facto parent as a legal parent.⁴¹ In addition to the UPA, legislatures and courts have used equitable remedies, such as the de facto parent doctrine, to define a legal parent despite the UPA failing to recognize it.⁴²

The de facto parent doctrine is an equitable remedy used to establish a legal parent when an individual has in essence acted like a parent, but

(C) he promised in a record to support the child as his
own

UNIF. PARENTAGE ACT (2000) § 204(a) (amended 2002), 9B U.L.A. 23-24 (Supp. 2012). Therefore, under this provision, a male may be presumed to be a legal parent without a biological link, as long as there is a marriage. *Id.* This is the only provision in which marriage is applied to determine parentage, but it is not the sole avenue to establish parentage. *Id.*; see also UNIF. PARENTAGE ACT (2000) § 201 (amended 2002), 9B U.L.A. 21 (Supp. 2012). (defining parent without considering marital status).

³⁸ UNIF. PARENTAGE ACT (2000) § 204 (amended 2002), 9B U.L.A. 24 (Supp. 2012).

³⁹ UNIF. PARENTAGE ACT (2000) § 703 (amended 2002), 9B U.L.A. 71 (Supp. 2012). Section 703 states, "A man who provides sperm for, or consents to, assisted reproduction by a woman . . . with the intent to be the parent of her child, is a parent of the resulting child." *Id.* Therefore, the UPA establishes paternity for the intended father rather than granting paternity to the actual sperm donor. *Id.*

⁴⁰ *Id.*

⁴¹ UNIF. PARENTAGE ACT (2000) § 204(a) (amended 2002), 9B U.L.A. 23-24 (Supp. 2012); UNIF. PARENTAGE ACT (2000) § 703 (amended 2002), 9B U.L.A. 71 (Supp. 2012) (establishing a legal father-child relationship through a presumption rather than a biological or adoptive tie). The UPA has not recognized de facto parentage despite recommendations. *Smith v. Gordon*, 968 A.2d 1, 11 (Del. 2009); see also Rohlfs, *supra* note 24, at 705 (explaining how scholars have recommended changing the UPA to permit third parties who have a parent-like relationship with a child to establish legal parental status). Although the Act does not explicitly reference de facto parent, section 204 does recognize a type of parent comparable to the definition of a de facto parent for a father-child relationship by allowing paternity to be established when a male holds the child out as his own. UNIF. PARENTAGE ACT (2000) § 204(a) (amended 2002), 9B U.L.A. 23-24 (Supp. 2012). Even though the UPA does not recognize a de facto parent relationship, the commission creating uniform laws has recognized such a relationship in other model statutes. See UNIF. PROBATE CODE § 2-116 (amended 2010) (recognizing equitable adoption for purposes of probate).

⁴² See *In re Parentage of L.B.*, 122 P.3d 161, 176 (Wash. 2005) (applying the de facto parent doctrine as an equitable remedy where the enactment of the UPA left gaps in the definition of a parent).

there is no biological link to the child.⁴³ Although courts may vary as to the specific requirements necessary to establish de facto parental status, the general requirements of the doctrine have been defined by the American Law Institute as a parent who has lived with a child for a given amount of time and has essentially acted as a parent without having the legal obligation to do so.⁴⁴ In addition to judicial recognition of a de facto parent, some states have statutorily defined a de facto parent as a legal parent despite the UPA's failure to recognize the doctrine.⁴⁵ While some states statutorily or judicially recognize the de facto parent doctrine, others do not.⁴⁶ The division in states granting legal rights to a non-biological parent in a same-sex relationship is

⁴³ See, e.g., *id.* at 176 (holding that the de facto parent doctrine was available to establish legal parental status for a third party). The court stated the following requirements to establish de facto parental status:

- (1) the natural or legal parent consented to and fostered the parent-like relationship, (2) the petitioner and the child lived together in the same household, (3) the petitioner assumed obligations of parenthood without expectation of financial compensation, and (4) the petitioner has been in a parental role for a length of time sufficient to have established with the child a bonded, dependent relationship, parental in nature.

Id.

⁴⁴ AM. LAW INST., PRINCIPLES OF THE LAW OF FAMILY DISSOLUTION: ANALYSIS AND RECOMMENDATIONS § 2.03(1)(c), at 118 (2002) [hereinafter ALI PRINCIPLES]. The ALI is comparable to that of the Commissioners who have created the UPA. *ALI Overview*, THE AM. LAW INST., <http://www.ali.org/index.cfm?fuseaction=about.overview> (last visited Aug. 12, 2012). It is composed of lawyers, judges, and law professors who create model statutes and make other suggestions to the status of the law. *Id.* The ALI's definition of de facto parent provides:

- (c) A *de facto parent* is an individual other than a legal parent or a parent by estoppel who, for a significant period of time not less than two years,
 - (i) lived with the child and,
 - (ii) for reasons primarily other than financial compensation, and with the agreement of a legal parent to form a parent-child relationship, or as a result of a complete failure or inability of any legal parent to perform caretaking functions,
 - (A) regularly performed a majority of the caretaking functions for the child, or
 - (B) regularly performed a share of caretaking functions at least as great as that of the parent with whom the child primarily lived.

ALI PRINCIPLES, *supra*, § 2.03(1)(c), at 118.

⁴⁵ See, e.g., DEL. CODE ANN. tit. 13, § 8-201 (West 2009) (enacting, within its state statutes, the ability to establish oneself as a de facto parent and, thus, a legal parent).

⁴⁶ See *infra* Part II.C (comparing court decisions that have recognized a de facto parent to those states that fail to apply the doctrine to non-biological parents).

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dependent on the legislative definition of a parent and the judicial interpretations of such statutes.⁴⁷

B. Legislative Definitions of a Parent

Legislative decisions have led to states differing in the definition of a parent.⁴⁸ Only some states have enacted the UPA.⁴⁹ Other states choose to define parentage without enacting the UPA.⁵⁰ Adding to the division among states, some states have liberally defined a parent within their statutes, whereas other states conform to traditional definitions of a parent.⁵¹ As a result, granting legal rights to a non-biological parent in a same-sex relationship is heavily dependent on the language of the statute.⁵²

1. State Statutory Enactments of the UPA

The UPA is a model for states, and some states have chosen to enact the UPA with its current language while other states have enacted altered versions of the UPA.⁵³ In states that have altered the language of

⁴⁷ See *infra* Part II.B-C (illustrating the inconsistency among states in enactment of parental statutes and interpretation of such statutes to allow for the de facto parent doctrine).

⁴⁸ See *Smith v. Guest*, 16 A.3d 920, 924 (Del. 2011) (reasoning that the state legislature made the conscious decision to adopt de facto parent within its UPA). But see *Jones v. Barlow*, 154 P.3d 808, 817 (Utah 2007) (discussing that it is the role of the legislature to determine the applicable laws, and Utah's legislature has yet to recognize a de facto parent as a legal parent, therefore, it was not up to the court to create it).

⁴⁹ See *supra* note 24 (detailing the states that have enacted the UPA). Other jurisdictions have not adopted the UPA in its entirety but have used its language or certain provisions of the UPA in their statutes. See, e.g., OHIO REV. CODE ANN. § 3111.95 (West 2011) (using similar language as the UPA section 703 but only granting a husband legal status as a father when consenting to the artificial insemination of the wife).

⁵⁰ See, e.g., IND. CODE ANN. § 31-9-2-35.5 (West 2008) (recognizing de facto parents despite not enacting the UPA); N.C. GEN. STAT. ANN. § 50-13.1 (West 2011) (failing to adopt the UPA but allowing a third party standing to seek custody).

⁵¹ Compare DEL. CODE ANN. tit. 13, § 8-201 (West 2009) (providing a legal parent-child relationship to be established through de facto parent, thereby not requiring a biological or adoptive link), with LA. CHILD. CODE ANN. art. 116(17) (2004) (defining parent by a biological or adoptive tie).

⁵² See *Smith*, 16 A.3d at 924 (applying the de facto doctrine to a non-biological parent in a same-sex relationship, because the legislature clearly intended the application in these circumstances based on language of the statute); *White v. White*, 293 S.W.3d 1, 15 (Mo. Ct. App. 2009) (refusing to extend the de facto doctrine because the legislature did not explicitly provide for the doctrine within the statute); *Jones*, 154 P.3d at 819 (refusing to apply the de facto doctrine based on statutory language).

⁵³ See, e.g., DEL. CODE ANN. tit. 13, § 8-201 (adopting the majority of the UPA but including new provisions, including the definition of de facto parent); MO. ANN. STAT. § 210.822 (West 2010) (enacting the UPA-like provisions, but omitting section 204(a)(5) of

the UPA, some use expansive language to define a parent, which is inclusive of same-sex couples.⁵⁴ Other states conservatively alter the UPA's language to limit the rights of same-sex couples.⁵⁵

Some states choose to enact the UPA and liberally modify the definition of a parent beyond traditional definitions.⁵⁶ One way states have done this is to include gender-neutral terminology within their provisions.⁵⁷ For example, Washington is a state that has liberally amended its version of the UPA.⁵⁸ First, it uses gender-neutral language, where the original UPA uses "man" and "woman."⁵⁹ This is illustrated in Washington's enactment of UPA section 703.⁶⁰ In section 703 of the original UPA, a male is legally recognized as a parent to a child conceived by artificial insemination, despite not being the sperm donor, so long as he consents and intends to be the parent of that child.⁶¹ Washington amended this provision to state, "A person who provides gametes for, or consents in a signed record to assisted reproduction with another person, with the intent to be the parent of the child born, is the

the UPA, which allows a presumption of paternity when a man holds the child out as his own).

⁵⁴ See, e.g., DEL. CODE ANN. tit. 13, § 8-201 (including de facto parent within the definition of a parent-child relationship); WASH. REV. CODE ANN. §§ 26.26.011 et seq. (West 2005) (including gender-neutral language and recognizing same-sex relationships).

⁵⁵ See, e.g., MO. ANN. STAT. § 210.822 (eliminating the presumption of paternity available in the current UPA when a man holds a child out as his own); UTAH CODE ANN. §§ 78B-15-204, 78B-15-703 (West 2012) (amending the presumption of paternity language of sections 204 and 703 of the UPA).

⁵⁶ Compare UNIF. PARENTAGE ACT (2000) § 703 (amended 2002), 9B U.L.A. 71 (Supp. 2012) ("A man who provides sperm for, or consents to, assisted reproduction by a woman . . . is a parent of the resulting child."), with WASH. REV. CODE ANN. § 26.26.710 ("A person who provides gametes for, or consents in a signed record to assisted reproduction with another person, with the intent to be the parent of the child born, is the parent of the resulting child.").

⁵⁷ See, e.g., WASH. REV. CODE ANN. §§ 26.26.011 et seq. (enacting the UPA with gender-neutral provisions).

⁵⁸ *Id.* The Washington legislature amended its version of the UPA in 2011 not only to include gender-neutral terms, but it has also included domestic partnerships in certain provisions in order to provide any parent the ability to seek the determination of parentage. SCOTT J. HORENSTEIN, *Scope and Purpose of Parentage Action*, in 21 WASHINGTON PRACTICE SERIES, FAMILY AND COMMUNITY PROPERTY LAW § 45.1, at 10 (Scott Horenstein ed., 2011).

⁵⁹ WASH. REV. CODE ANN. § 26.26.710. For example, under the adoption of the UPA's artificial insemination provision, Washington's UPA allows for parentage to be established by "[a] person who provides gametes for, or consents . . . to assisted reproduction with another person, with the intent to be the parent of the child born, is the parent of the resulting child." *Id.* (emphasis added). *Contra* UNIF. PARENTAGE ACT (2000) § 703 (amended 2002), 9B U.L.A. 71 (Supp. 2012) (providing that only a male may establish parentage over a child conceived through artificial insemination by consent).

⁶⁰ WASH. REV. CODE ANN. § 26.26.710.

⁶¹ UNIF. PARENTAGE ACT (2000) § 703 (amended 2002), 9B U.L.A. 71 (Supp. 2012).

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parent of the resulting child.”⁶² Accordingly, Washington’s provision of section 703 is expansive to include a presumption of parentage to both males and females.⁶³

Another way states have liberally altered their enactment of the UPA is to include language like “domestic partnerships.”⁶⁴ Although the UPA does not solely base parentage on marital status, there are provisions that use the term “marriage” as a basis for the presumption of paternity.⁶⁵ Because same-sex couples are unable to marry in many states, this presumption cannot apply.⁶⁶ Washington further modified its version of the UPA to include the term “domestic partnership” within this provision.⁶⁷ When the UPA does use the term marriage as a way to establish parentage, states like Washington allow a domestic partnership

⁶² WASH. REV. CODE ANN. § 26.26.710; see Kelly M. O’Bryan, Comment, *Mommy or Daddy and Me: A Contract Solution to a Child’s Loss of the Lesbian or Transgender Nonbiological Parent*, 60 DEPAUL L. REV. 1115, 1126 (2011) (explaining that, prior to amending its language, the provisions of Washington’s enactment of the UPA could not be applied to same-sex couples because of the gender specific terms).

⁶³ See *supra* note 58 (discussing Washington’s enactment of the UPA to include both gender-neutral terms and the words domestic partnerships in order to be inclusive of same-sex couples establishing parentage).

⁶⁴ See WASH. REV. CODE ANN. § 26.26.051(2) (“The provisions in this chapter apply to persons in a domestic partnership to the same extent they apply to persons in a marriage, and apply to persons of the same sex who have children together to the same extent they apply to persons of the opposite sex who have children together.”). The current language of the UPA does use marriage as one method to establish a presumption of paternity of a child-parent relationship, stating a “man is presumed to be the father of a child if . . . he and the mother of the child are married to each other and the child is born during the marriage . . .” UNIF. PARENTAGE ACT (2000) § 204(a) (amended 2002), 9B U.L.A. 23 (Supp. 2012). Washington has amended its UPA to state:

- (1) In the context of a marriage or a domestic partnership, a person is presumed to be the parent of a child if:
 - (a) The person and the mother or father of the child are married to each other or in a domestic partnership with each other and the child is born during the marriage or domestic partnership

WASH. REV. CODE ANN. § 26.26.116(1).

⁶⁵ UNIF. PARENTAGE ACT (2000) § 204(a) (amended 2002), 9B U.L.A. 23–24 (Supp. 2012). Although the UPA does not require marriage as a prerequisite to establish parentage, it does provide that marriage is one way to establish a presumption of paternity. UNIF. PARENTAGE ACT (2000) § 204(a)(1) (amended 2002), 9B U.L.A. 23 (Supp. 2012).

⁶⁶ See *supra* note 3 and accompanying text (discussing the limited number of states that permit same-sex couples to legally marry).

⁶⁷ WASH. REV. CODE ANN. § 26.26.051. The old version of Washington’s UPA was an exact version of the original UPA; therefore, the gender specific terms and the presumption for marriage could not be applied to determine parentage for same-sex couples. See, e.g., *In re Parentage of L.B.*, 122 P.3d 161, 176 (Wash. 2005) (finding that the current version of the state’s enactment of the UPA did not allow for it to be applied to same-sex couples but did allow for the application of the de facto parent doctrine in such circumstances).

to establish parentage under the same conditions, therefore permitting the presumption to apply to same-sex couples.⁶⁸

Finally, states have amended the UPA by defining a de facto parent.⁶⁹ Although the current version of the UPA does not explicitly recognize a de facto parent, some states, like Delaware, have chosen to define a de facto parent as a legal parent within its enacted version of the UPA.⁷⁰ Section 201 of the original UPA defines how to establish a parent-child relationship.⁷¹ Under the Delaware UPA, this provision provides that either mother or father may be established as a de facto parent by meeting the requirements.⁷² Therefore, Delaware allows a parent-child relationship regardless of gender and biological link.⁷³ Despite some states expanding the definition of a parent in their enacted version of the UPA to include same-sex parents, other states have done

⁶⁸ See UNIF. PARENTAGE ACT (2000) § 204(a)(2) (amended 2002), 9B U.L.A. 23 (Supp. 2012) (allowing a male to be presumed legal father over a child in certain circumstances, like marriage); see also WASH. REV. CODE ANN. § 26.26.116 (using similar presumption circumstances as the UPA, but changing the language to include domestic partnership; therefore a person of either sex can be a presumed a legal parent when the child was conceived during a domestic partnership).

⁶⁹ See DEL. CODE ANN. tit. 13, § 8-201(c) (West 2009) (defining de facto parent as a legal parent within its enactment of the UPA).

⁷⁰ Compare UNIF. PARENTAGE ACT (2000) § 204(a) (amended 2002), 9B U.L.A. 23-24 (Supp. 2012) (failing to explicitly recognize a de facto parent as a legal parent but allowing for presumption of paternity in certain circumstances), with DEL. CODE ANN. tit. 13, § 8-201(c) (adopting the UPA to include de facto parent within the definition of legal parent, which is applicable to both females and males).

⁷¹ UNIF. PARENTAGE ACT (2000) § 201 (amended 2002), 9B U.L.A. 21 (Supp. 2012). This provision allows a mother-child relationship to be established only when a female is the biological mother or adoptive mother. *Id.* As for fathers, this provision of the UPA allows paternity to be established on the basis of a presumption set out in section 204 and section 703 of the UPA. UNIF. PARENTAGE ACT (2000) § 204 (amended 2002), 9B U.L.A. 23-24 (Supp. 2012); UNIF. PARENTAGE ACT (2000) § 703 (amended 2002), 9B U.L.A. 71 (Supp. 2012). This presumption of parentage is not available for females attempting to establish a legal parent-child relationship. *Id.*

⁷² DEL. CODE ANN. tit. 13, § 8-201(c). A de facto parent under the statute will be established if the court determines that the individual:

(1) Has had the support and consent of the child's parent or parents who fostered the formation and establishment of a parent-like relationship between the child and the de facto parent;

(2) Has exercised parental responsibility for the child as that term is defined in [section] 1101 of this title; and

(3) Has acted in a parental role for a length of time sufficient to have established a bonded and dependent relationship with the child that is parental in nature.

Id.

⁷³ See, e.g., *Smith v. Guest*, 16 A.3d 920, 923-24, 933 (Del. 2011) (holding that Delaware's de facto parent statute enabling a non-biological mother to have joint custody was constitutional).

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the opposite and used restrictive language in altering their version of the UPA.⁷⁴

Some states have chosen to conservatively enact the UPA and alter the language to uphold traditional definitions of a parent that restrict same-sex parents.⁷⁵ To achieve this, states restrict the application of the UPA by removing or editing the language of provisions that allow for a presumption of paternity.⁷⁶ For example, although Ohio has only enacted portions of the UPA, it has eliminated the presumption of paternity provisions available under the UPA.⁷⁷ In enacting section 703 of the UPA, the Ohio legislature utilized “husband,” whereas the original UPA uses “male.”⁷⁸ In the original UPA, the provision allows

⁷⁴ See, e.g., MO. ANN. STAT. § 210.824 (West 2010) (instituting a requirement of marriage that is not found in the UPA); UTAH CODE ANN. § 78B-15-703 (West 2012) (amending the presumption of paternity language of UPA section 703 to restrict the ability for presumed paternity only within marriage).

⁷⁵ See, e.g., MO. ANN. STAT. § 210.824 (using comparably similar language to the UPA’s section 703 for artificial reproduction, but amending the provision to only allow a husband to be a father without a biological donation, as long as he consents to his wife’s procedure). See generally Emmalee M. Miller, Note, *Are You My Mother? Missouri Denies Custodial Rights to Same-Sex Parent*, 75 MO. L. REV. 1377, 1384–85 (2010) (noting that, despite changes in the 2002 UPA, some states have enacted different versions of the UPA, including Missouri, to impose a marital requirement under certain provisions of the UPA). In promoting the traditional framework for family—a husband and wife—some argue that same-sex couples should not raise children because it denies children the fundamental right of being raised by both a mother and father. Lynn D. Wardle, *The Attack on Marriage as the Union of a Man and a Woman*, 83 N.D. L. REV. 1365, 1377 (2007).

⁷⁶ See, e.g., MO. ANN. STAT. § 210.824 (amending the UPA provision section 703 to only allow a presumption of paternity within artificial insemination for a husband); OHIO REV. CODE ANN. § 3111.95 (West 2011) (amending its enactment of section 703, as Missouri has, to only allow a presumption of paternity for husbands); see also *White v. White*, 293 S.W.3d 1, 10 (Mo. Ct. App. 2009) (providing that Missouri’s enactment of the UPA has eliminated the presumption available under the original UPA when a male holds a child out as his own). See generally Miller, *supra* note 75, at 1385–87 (discussing how Missouri adopted its UPA to include marital terms, thereby placing restrictions on presumptions for paternity).

⁷⁷ OHIO REV. CODE ANN. § 3111.95. But see *supra* Part II.A (discussing the provisions of the UPA that provide for a presumption of paternity in certain circumstances).

⁷⁸ OHIO REV. CODE ANN. § 3111.95. The provision states:

(A) If a married woman is the subject of a non-spousal artificial insemination and if her husband consented to the artificial insemination, the husband shall be treated in law and regarded as the natural father of a child conceived as a result of the artificial insemination, and a child so conceived shall be treated in law and regarded as the natural child of the husband.

Id. § 3111.95(a). See, e.g., *In re Bonfield*, 780 N.E.2d 241, 247 (Ohio 2002) (reasoning that the language of the statute could not be applied to same-sex couples, and therefore it precluded the non-biological parent from fitting within the definition of parent).

for a male to be a presumed the father regardless of marital status.⁷⁹ By amending the language of these provisions, Ohio and similar states have precluded the UPA from being applied to non-married parents.⁸⁰

In addition to adding marital language to the UPA, other states have removed the provision that allows for a presumption of paternity when a male holds the child out as his own.⁸¹ Missouri and other states have eliminated this provision, thereby prohibiting a presumption of parentage that is comparable to a de facto parent.⁸² As a result, these states have limited the application of the UPA, because it cannot be applied to non-marital or non-traditional families.⁸³ Just as states enacting the UPA have amended it to provide for a broad or narrow definition of a parent, states choosing not to enact the UPA have similarly differed in defining a parent.⁸⁴

2. Statutory Definitions of a Parent Without the UPA

States choosing not to enact the UPA have various statutory approaches in defining a legal parent and child custody.⁸⁵ But just like states enacting the UPA, these states can liberally define a parent to grant legal rights to non-biological parents.⁸⁶ On the contrary, other states

⁷⁹ See *supra* notes 35–40 and accompanying text (discussing the provisions of the UPA that allow a male to be established as a legal father because of a presumption, even when not married to the child’s mother).

⁸⁰ OHIO REV. CODE ANN. § 3111.95. Like Ohio, Missouri and Utah only permit husbands to be the presumed father of a child conceived through artificial insemination. MO. ANN. STAT. § 210.824; UTAH CODE ANN. § 78B-15-703 (West 2012). See, e.g., *White*, 293 S.W.3d at 11 (explaining that Missouri’s legislature intended for presumptions to apply in the context of marriage).

⁸¹ See *supra* text accompanying note 36 (discussing section 204(a)(5), which allows a male to be the presumed father when he “held the child as his own”).

⁸² MO. ANN. STAT. § 210.822; UTAH CODE ANN. § 75B-15-204; see, e.g., *White*, 293 S.W.3d at 10 (explaining that the legislature intentionally left out the presumption of paternity when a father holds a child as his own).

⁸³ See *White*, 293 S.W.3d at 11 (holding Missouri’s UPA could not be applicable to same-sex couples); see also *Miller*, *supra* note 75, at 1385 (discussing that Missouri has made significant changes in its enactment of the UPA to limit its application).

⁸⁴ See *infra* Part II.B.2 (discussing how non-UPA states have defined parent in their child-custody statutes).

⁸⁵ Compare LA. CIV. CODE ANN. art. 133 (2004) (granting custody only to legal parents unless there is substantial harm to the child), with N.C. GEN. STAT. ANN. § 50-13.1 (West 2011) (allowing non-biological individuals the ability to seek custody over a child).

⁸⁶ See, e.g., IND. CODE ANN. § 31-9-2-35.5 (West 2008) (allowing a de facto custodian to establish custody of a child); KY. REV. STAT. ANN. § 403.270(1) (2006) (providing for a de facto custodian, within a child custody statute, who has the same ability as a biological or adoptive parent in seeking custody over a child); N.C. GEN. STAT. ANN. § 50-13.1(a) (allowing for third parties to seek custody over a child and be granted joint custody along with a biological or adoptive parent).

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have conservatively defined a parent to restrict the legal rights of non-biological parents.⁸⁷

Some states not enacting the UPA have created statutes that expansively define a parent by including a de facto parent as a legal parent.⁸⁸ For example, Kentucky's legislature has defined a de facto parent as a legal parent.⁸⁹ Kentucky recognizes a de facto parent when it is demonstrated that he or she is the primary caregiver and financial supporter of the child for a required period of time.⁹⁰ In addition, the statute specifies that a "court shall determine custody in accordance with the best interests of the child and equal consideration shall be given to each parent and to any de facto custodian."⁹¹ Consequently, a non-

⁸⁷ See, e.g., LA. CIV. CODE ANN. art. 133 (granting custody only to legal parents unless there is a showing of substantial harm to the child); *Whitman v. Williams*, 6 So. 3d 852, 853 (La. Ct. App. 2009) (holding natural parents have "parental primacy" that gives the parent a "paramount right to custody of a child, and may be deprived of such right only for compelling reasons" (quoting *Wilson v. Paul*, 997 So. 2d 572, 574 (La. Ct. App. 2008))).

⁸⁸ See IND. CODE ANN. § 31-17-2-8.5(c)-(d) (providing for a de facto custodian to establish custody of a child); KY. REV. STAT. ANN. § 403.270(1) (providing a de facto custodian the ability to seek custody despite no biological or adoptive link).

⁸⁹ KY. REV. STAT. ANN. § 403.270(1)(a). The statute defines de facto custodian as:

[A] person who has been shown by clear and convincing evidence to have been the primary caregiver for, and financial supporter of, a child who has resided with the person for a period of six (6) months or more if the child is under three (3) years of age and for a period of one (1) year or more if the child is three (3) years of age or older or has been placed by the Department for Community Based Services.

Id. Further, "[o]nce a court determines that a person meets the definition of de facto custodian, the court shall give the person the same standing in custody matters that is given to each parent . . ." *Id.* § 403.270(1)(b).

⁹⁰ *Id.* § 403.270; see, e.g., *Mullins v. Picklesimer*, 317 S.W.3d 569, 573-74 (Ky. 2010) (explaining that a de facto custodian must show that he or she was the primary caregiver rather than simply parenting alongside another parent); *Sullivan v. Tucker*, 29 S.W.3d 805, 807 (Ky. Ct. App. 2000) (discussing Kentucky's de facto custodian statute and explaining it requires "actual possession" of the child to establish the relationship). Because of such, the statute therefore limits the applicability of de facto custodian status. See *Mullins*, 317 S.W.3d at 574, 579 (reasoning the non-biological parent in a same-sex relationship could not establish de facto parental status, but was able to demonstrate that the natural mother had made an effective waiver of parenting status to allow for joint custody over the child).

⁹¹ KY. REV. STAT. ANN. § 403.270(2). In addition to Kentucky, Indiana also recognizes a de facto custodian for child custody purposes. IND. CODE ANN. § 31-9-2-35.5. It provides that, when a child is in the care of a de facto custodian, the court will look at the nature and extent of the relationship with the de facto custodian when considering an action for custody against the natural parent. IND. CODE ANN. § 31-17-2-8.5(c)-(d). Therefore, a court must consider the wishes of a de facto custodian in Indiana when determining custody versus the wishes of a natural parent. *Id.* But, in Indiana, the de facto parent must overcome the presumption of the natural parent when attempting to gain custody. *In re Guardianship of L.L.*, 745 N.E.2d 222, 230 (Ind. Ct. App. 2001).

biological parent may be a legal parent when able to establish himself or herself as a de facto parent.⁹²

In addition to defining a de facto parent, these non-UPA states have enacted broad child custody statutes to allow for persons not of legal parental status the ability to seek custody.⁹³ North Carolina's legislature has taken this approach.⁹⁴ North Carolina does not expressly recognize a de facto parent, but it allows a third party, who is not a legal parent, to seek custody.⁹⁵ Further, the statute allows for two persons to be granted custody of a child, thereby allowing a non-biological parent of a same-sex relationship to obtain joint custody of the child with a biological parent.⁹⁶ Although some non-UPA states' legislatures provide avenues for non-biological parents seeking legal rights, other non-UPA states have taken the contrary approach to restrict parenting rights solely to traditional parents.⁹⁷

In contrast to states like Kentucky and North Carolina, other non-UPA states' statutes limit same-sex parents' ability to obtain custody because the restrictive language is only applicable to heterosexual parents.⁹⁸ For example, in Louisiana the legal relationship between a parent and a child is only established by being the biological mother or father or through legal adoption.⁹⁹ Presumption of paternity only

⁹² KY. REV. STAT. ANN. § 403.270.

⁹³ See, e.g., N.C. GEN. STAT. ANN. § 50-13.1(a) (West 2011) (allowing third parties to seek custody over a child).

⁹⁴ *Id.*

⁹⁵ *Id.* The statute states, "Any parent, relative, or other person . . . claiming the right to custody of a minor child may institute an action or proceeding for the custody of such child . . ." *Id.* In addition, any order for custody by such a person will be determined by what "will best promote the interest and welfare of the child . . ." *Id.* § 50-13.2(a). See, e.g., *Regan v. Smith*, 509 S.E.2d 452, 454 (N.C. Ct. App. 1998) (reasoning that parties seeking custody have equal standing, because there is no burden of proof on third parties when determining the best interest of the child in determining custody).

⁹⁶ N.C. GEN. STAT. ANN. § 50-13.2(b). This part of the statute states that an order for custody may "grant custody to two or more persons." *Id.* See, e.g., *Patterson v. Taylor*, 535 S.E.2d 374, 378 (N.C. Ct. App. 2000) ("[North Carolina's joint custody statute] is relatively unrestrictive, requiring a court ordering 'joint custody' to focus on the best interests and welfare of the child, but otherwise allowing the court substantial latitude in fashioning a 'joint custody' arrangement.").

⁹⁷ See, e.g., LA. CIV. CODE ANN. art. 133 (2004) (granting custody to a third party only when there is a showing of substantial harm due to the legal parents having custody).

⁹⁸ See KY. REV. STAT. ANN. § 403.270(1) (West 2006) (recognizing de facto parents and, thereby, allowing a non-biological parent of a same-sex couple to establish legal parental status). *But see* LA. CIV. CODE ANN. art. 133 (restricting the granting of child custody to parents unless there is a substantial harm to the child).

⁹⁹ LA. CIV. CODE ANN. art. 184, 185. Louisiana does not permit the establishment of a legal parent outside a biological or adoptive parent. *Id.* The state does allow for a presumption of paternity when the child was born within 300 days of marriage; therefore, the husband is the presumed father. *Id.* art. 185. The definition of a parent within

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applies in the context of a legally recognized marriage.¹⁰⁰ Therefore, the definition of a legal parent is severely limited.¹⁰¹ In addition, Louisiana child custody statutes are restrictive and only permit courts to award custody to non-legal parents in circumstances where granting custody to the legal parents creates a substantial harm to the child.¹⁰² Because of this strict statutory language, same-sex couples have difficulty obtaining legal rights over their child in Louisiana.¹⁰³

States' legislatures greatly differ in defining a legal parent, as well as in the determination of custody.¹⁰⁴ States enacting the UPA may alter its language to include a more expansive or restrictive definition of a legal parent.¹⁰⁵ Similarly, non-UPA states also differ in formulating parentage

Louisiana's statute is important because its child custody statutes define the ability to grant custody in terms of whether one is considered a parent. *Id.* art. 133. The legislature has provided that child custody be granted only between the parents. *Id.* art. 132. The statute only allows the granting of custody to a non-parent in circumstances where it "would result in substantial harm to the child." *Id.* art. 133. Because the statute limits the definition of marriage, the child custody statute is limited in application to same-sex couples. *See id.* art. 185 (explaining that presumption of paternity is limited to within a marriage).

¹⁰⁰ *Id.* art. 185.

¹⁰¹ *See id.* art. 184, 185 (providing legal parental rights only to married women who can prove maternity by a preponderance of the evidence).

¹⁰² *See, e.g.,* Jones v. Coleman, 18 So. 3d 153, 159 (La. Ct. App. 2009) (interpreting article 133 to mean "[w]hen the parent competes with a nonparent of the child, the parent's right to custody is superior unless the parent is unable or unfit, having forfeited parental rights" (citing Wood v. Beard, 290 So. 2d 675 (La. 1974))). Furthermore, the Louisiana court has interpreted the statutes to invalidate parenting agreements between a parent and a non-parent, despite authority to uphold a parenting agreement in the context of a divorce, thereby further limiting remedies for same-sex couples. *See id.* at 163 (stating that the purpose of the statute was to exclusively promote parenting agreements between legal parents, thereby foreclosing the ability of a court to uphold a child custody agreement between a parent and non-parent).

¹⁰³ *See, e.g.,* Black v. Simms, 12 So. 3d 1140, 1444 (La. Ct. App. 2009) (holding substantial harm was equivalent to "parental unfitness, inability to provide a home, and abandonment of parental rights, other circumstances that would cause the child to suffer positive and substantial harm" (quoting Merritt v. Merritt, 550 So. 2d 882, 889 (La. Ct. App. 1989))). The court, interpreting Louisiana's child custody statutes, held that the non-biological parent in a same-sex relationship was unable to obtain custody, because she was not considered a parent under the statute and could not demonstrate a substantial harm to remove the child from the biological mother's custody. *Id.* at 1145.

¹⁰⁴ *See, e.g.,* DEL. CODE ANN. tit. 13, § 8-201(c) (West 2009) (allowing for a de facto parent within the enactment of the UPA); LA. CIV. CODE ANN. art. 133 (limiting a third party to seek custody only when there is substantial harm to the child in the custody of the biological or adoptive parents); MO. ANN. STAT. § 210.824 (West 2010) (limiting the presumption of paternity only to husbands); N.C. GEN. STAT. ANN. § 50-13.1(a) (West 2011) (providing third parties the ability to seek custody over a child).

¹⁰⁵ *See* WASH. REV. CODE ANN. § 26.26.116(1) (West 2005) (taking same-sex couples into consideration by including "domestic partnership" within its version of the UPA). *But see* MO. ANN. STAT. § 210.822 (omitting the presumption of paternity when a male holds the child as his own, found within the current language of the UPA).

and child custody statutes.¹⁰⁶ The granting of rights to a non-biological parent will depend heavily on the judicial interpretation of the legislative language.¹⁰⁷

C. *Judicial Interpretation of Parenting Statutes*

Based on the language of states' statutes that define a parent and child custody, courts are able to extend equitable remedies like the de facto parent doctrine to non-biological parents.¹⁰⁸ But like the variation among states' legislatures, courts may or may not be willing to extend such doctrines based on the state's statutory language.¹⁰⁹ This difference among the courts varies within states enacting the UPA, as well as within states choosing not to enact the UPA.¹¹⁰

1. *Judicial Interpretation Within States Enacting the UPA*

Judicial application of the de facto parent doctrine is dependent on the particular state's statutory language.¹¹¹ Courts rely on the language

¹⁰⁶ See KY. REV. STAT. ANN. § 403.270 (West 2006) (recognizing a de facto parent within the statutory definition). *But see* LA. CIV. CODE ANN. art. 185 (allowing a presumption of parentage only for a male married to the mother of a child). Because courts rely heavily on statutes, it is the legislatures that are imperative in combating discrimination against a non-biological parent in a same-sex couple. See Miller, *supra* note 4, at 75, 80 (discussing how legislatures must be specific in their parenting laws in order to guide courts correctly in the intent behind the laws).

¹⁰⁷ See *infra* Part II.C (discussing the difference among court interpretations of statutory language to allow for, or prohibit, non-biological parents of a same-sex relationship the ability to have parental rights over their child).

¹⁰⁸ See *In re Parentage of L.B.*, 122 P.3d 161, 176 (Wash. 2005) (applying the de facto parent doctrine, because the court found it was within the legislature's intent to recognize such relationships, and it was within the judicial discretion of the court to apply such for an equitable remedy).

¹⁰⁹ See *White v. White*, 293 S.W.3d 1, 11 (Mo. Ct. App. 2009) (failing to apply de facto parental status, because the state's enactment of the UPA "only allows claims for declaration of a parent-child relationship based on a biological tie or a presumption due to marriage or attempted marriage"); Meyer, *supra* note 31, at 136 (explaining how courts in California and Washington have allowed both a biological and non-biological parent in a same-sex relationship to be legal parents because each held the child out as her own).

¹¹⁰ See *In re Parentage of L.B.*, 122 P.3d at 176 (applying the de facto doctrine as a common law remedy where the state's enactment of the UPA left a gap); see also *Boseman v. Jarrell*, 704 S.E.2d 494, 504-05 (N.C. 2010) (allowing a non-biological parent the ability to seek custody over a child conceived in a same-sex relationship). *But cf. White*, 293 S.W.3d at 15 (reasoning that there was no support for application of the common law doctrine of a de facto parent); *Black v. Simms*, 12 So. 3d 1140, 1143 (La. Ct. App. 2009) (precluding the ability of a non-biological parent to seek custody without demonstrating great substantial harm to the child).

¹¹¹ Miller, *supra* note 4, at 75. Some courts have difficulty in determining whether the legislature intended to allow equitable doctrines like de facto parent or to strictly interpret

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and the intent of the legislature to determine if such remedies are available.¹¹² Some courts refuse to apply the doctrine, because the UPA has not explicitly recognized it as a viable definition of a legal parent.¹¹³ For example, before Delaware adopted de facto parenting within its UPA statute, a court denied applying the doctrine to a non-biological parent in a same-sex relationship because the General Assembly did not include or recognize it.¹¹⁴ It was not until the Delaware UPA codified de facto parenting that the Delaware courts extended the doctrine to a non-biological parent of a same-sex relationship.¹¹⁵

Even when a state's legislature does not explicitly recognize de facto parenting within the state's UPA, courts have allowed for a non-biological parent in a same-sex relationship to assert custodial rights.¹¹⁶

statutes, thereby refusing to allow de facto parent when such doctrines are not codified. *Id.* In comparison, other courts are willing to find common law remedies like de facto parent, despite the legislature's failure to codify it, because it fills in the gaps the legislature has ignored. *Id.*

¹¹² See *Smith v. Gordon*, 968 A.2d 1, 14 (Del. 2009) (holding that, because the legislature did not explicitly recognize de facto parent, the court did not have the ability to use this doctrine); see also *Miller*, *supra* note 4, at 75 (discussing a California court decision broadly applying the presumption of paternity under the UPA to a non-biological mother in a lesbian relationship).

¹¹³ *Smith*, 968 A.2d. at 15; see also *White*, 293 S.W.3d at 11, 13 (stating that the state's UPA was to be used to determine parentage and it did not include de facto parenting); *Miller*, *supra* note 4, at 74 (discussing that a strict interpretation of the UPA often results in a court not viewing de facto parents as legal parents).

¹¹⁴ *Smith*, 968 A.2d at 14–15. In *Smith*, a non-biological mother sought custody over a child the lesbian couple raised together. *Id.* at 3. *Smith* had legally adopted the child while the couple was together, but *Gordon* did not legally adopt the child. *Id.* After the couple ended their eleven-year relationship, *Gordon* sought custody of the child because she raised and cared for the child as her own. *Id.* This case took place before the Delaware legislature had amended its UPA to include a de facto parent as a legal parent; therefore, the court denied *Gordon* the ability to have custody over the child. *Id.* at 15.

¹¹⁵ *Smith v. Guest*, 16 A.3d 920, 932 (Del. 2011). The Delaware Supreme Court held that de facto parenting was statutorily recognized by the legislature; therefore, it must be applied when the party meets the requirements. *Id.* *Guest*, the actual adoptive parent of the child in the lesbian relationship, attempted to argue that the application of de facto parent violated her due process rights because she was the sole parent. *Id.* at 930. The Court distinguished the Delaware de facto parent doctrine from the visitation statute at issue in the U.S. Supreme Court case of *Troxel v. Granville*. *Id.* at 931 (citing *Troxel v. Granville*, 530 U.S. 57, 60 (2000)). In *Troxel*, the Supreme Court held that a state visitation statute violated the due process rights of the natural parent, because it “effectively permit[ted] any third party seeking visitation to subject any decision by a parent concerning visitation of the parent’s children to state-court review.” *Id.* at 930 (quoting *Troxel*, 530 U.S. at 67). Delaware distinguished the *Guest* case because the issue before the Delaware court was not whether the court infringed on the fundamental rights of a parent; rather, the issue was whether *Guest* was established as a legal parent under the statutory framework. *Id.* at 931 (quoting *Troxel*, 530 U.S. at 60).

¹¹⁶ See *Id.* at 13 n.86 (discussing how other courts have applied de facto parenting despite the doctrine not being within a state statute). In deciding not to apply the de facto

A Washington court applied the de facto parent doctrine because it was “necessary ‘to fill the interstices that [the] current legislative enactment fails to cover in a manner consistent with [the] laws and stated legislative policy.’”¹¹⁷ Unlike Delaware, the Washington court used the doctrine despite it not being legislatively recognized in its UPA enactment.¹¹⁸

Other courts have not explicitly applied the de facto parent doctrine but have still interpreted the state’s UPA as permitting a non-biological parent to seek custodial rights over a child.¹¹⁹ In Texas, a court held that a non-biological parent had the ability to seek custody over a child of a same-sex relationship.¹²⁰ Although Texas has not defined a de facto parent as a legal parent within its UPA, the court interpreted the child custody statute as permitting a non-biological parent to seek custody, because it allowed a person with “actual care, control, and possession of a child” to seek custody over the child.¹²¹ As these cases demonstrate, courts are able to extend legal rights to non-biological parents in same-sex relationships based on their interpretation of legislative language

parent doctrine, the Delaware court recognized that other UPA states, like Washington, have used de facto parent despite the failure of the legislature to recognize it. *Id.* at 13. Washington had based its decision to apply de facto parent to a non-biological parent in a lesbian relationship by determining the legislature did not preclude it. *Id.* at 13–14. Regardless of this precedent, Delaware failed to follow this line of reasoning and did not extend de facto parenting to the non-biological parent of the same-sex couple because of the statutory language of the Delaware UPA. *Id.* at 15.

¹¹⁷ *In re Parentage J.M.W.*, No. 64334-7-I, 2010 WL 4159385, at *3 (Wash. Ct. App. Oct. 25, 2010) (quoting *In re Parentage of L.B.*, 122 P.3d 161, 707 (Wash. 2005)).

¹¹⁸ *Id.*

¹¹⁹ *See In re M.K.S.-V*, 301 S.W.3d 460, 465 (Tex. Ct. App. 2009) (holding that a non-biological mother had standing to seek conservatorship over a child conceived during the lesbian relationship through artificial insemination).

¹²⁰ *Id.* In the case of *M.K.S.-V*, the couple was together for six years before deciding to conceive a child through artificial insemination. *Id.* at 462. Together, they decided to parent the child. *Id.* After the couple split, the birth mother and the non-biological mother agreed to a visitation schedule. *Id.* They continued to adhere to the schedule for two years until the birth mother abruptly discontinued the visits. *Id.* The non-biological mother then filed suit to seek custody over the child she had parented for four years. *Id.* The Texas legislature has defined conservatorship as “a person . . . who has had actual care, control, and possession of [a] child for at least six months ending not more than 90 days preceding the date of the filing of the petition [for conservatorship].” *Id.* at 464 (quoting TEX. FAM. CODE ANN. § 102.003(a)(9) (West 2008)). Because of this statute, the court reasoned that the non-biological mother in a same-sex relationship has the ability to seek custody over the child. *Id.* at 465.

¹²¹ *See* TEX. FAM. CODE ANN. § 102.003(a)(9) (providing a Texas statute outside of its UPA enactment that allows third-party standing for custody by showing the necessary elements of conservatorship). *But cf. id.* at §§ 160.001 et seq. (2011) (declaring that Texas’s enactment of the UPA does not include the de facto parent doctrine); *see also In re M.K.S.-V*, 301 S.W.3d at 464 (explaining that the conservatorship statute allows individuals to have standing to seek custody over a child).

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and intent.¹²² But when legislators narrowly define parenting and child custody statutes, courts have less discretion to extend equitable doctrines to these types of parents.¹²³

Most often, when states restrict the language of the UPA, courts will not recognize a de facto parent.¹²⁴ In Missouri, the legislature enacted a restrictive version of the UPA, eliminating and narrowing the presumption of parentage provisions.¹²⁵ A court determined the de facto parent doctrine was not available because the legislature had intended to exclude such when it narrowed the language of its UPA.¹²⁶ Therefore, the court refused to extend equitable remedies to non-biological parents in same-sex relationships.¹²⁷ The judicial ability to extend the de facto

¹²² See, e.g., *Smith v. Guest*, 16 A.3d 920, 932 (Del. 2011) (upholding the legislature's enactment of de facto parent doctrine within its UPA as constitutional); *In re Parentage of L.B.*, 122 P.3d at 177 (holding that the de facto parent doctrine was an equitable remedy to grant a non-biological mother in a same-sex relationship custody over the child).

¹²³ See *White v. White*, 293 S.W.3d 1, 11, 15 (Mo. Ct. App. 2009) (holding that de facto parenting could not be used because the legislature enacted the UPA with strict requirements of parentage).

¹²⁴ See *Miller*, *supra* note 75, at 1388–89 (discussing Missouri's unwillingness to apply the de facto parent doctrine to same-sex couples); see also *White*, 293 S.W.3d at 10 (discussing Missouri's enactment of the UPA that amended language from the current version of the UPA); *Jones v. Barlow*, 154 P.3d 808, 818–19 (Utah 2007) (enacting the UPA with marital language, and thereby the courts have rejected de facto parent because it was not within the UPA). Non-biological parents in these states have attempted to assert in loco parentis. See, e.g., *Jones*, 154 P.3d at 811–12 (discussing a non-biological parent who sought standing to seek custody under the loco parentis doctrine, which was denied). “[I]n loco parentis is applied when someone who is not a legal parent nevertheless assumes the role of a parent in a child's life” but is only able to assert visitation rights rather than custodial rights. *Id.* at 811. Ultimately, it is a failing argument for gay and lesbian non-biological parents, because courts have held the end of the romantic relationship will terminate the parent-like child relationship the biological parent gave to the non-biological parent. *Id.* at 815.

¹²⁵ MO. ANN. STAT. § 210.822 (West 2010); see also *supra* note 74 (discussing Missouri's and Utah's amendments of the UPA).

¹²⁶ See *White*, 293 S.W.3d at 11 (“MoUPA only allows claims for declaration of a parent-child relationship based on a biological tie or a presumption due to marriage . . .”); *Miller*, *supra* note 75, at 1395 (discussing that under Missouri's enactment of the UPA, a non-biological mother could not establish standing to seek custody).

¹²⁷ *White*, 293 S.W.3d at 15. In *White*, Leslea and Elizabeth had been together for eight years. *Id.* at 6. Each woman gave birth to a child conceived through artificial reproduction, and the two children were raised by both women. *Id.* After the couple separated, Leslea petitioned the court to declare that each woman was a co-parent of the two children. *Id.* However, Missouri's UPA did not allow third parties to seek custody or visitation rights over a child, essentially prohibiting a non-biological parent of a child conceived during a lesbian partnership from seeking custody over the child. *Id.* at 11. Like Missouri, Utah adopted a restrictive version of the UPA, including marital terms within provisions where the UPA did not, as well as eliminating certain presumption of paternity provisions. See UTAH CODE ANN. §§ 78B-15-204, 78B-15-703 (West 2012) (eliminating the presumption of paternity when a male holds a child out as his own and restricting the artificial insemination provision to husbands). As a result, some courts have refused to apply de

parent doctrine to a non-biological parent in a same-sex relationship depends on the state's enactment of the UPA.¹²⁸ Similarly, non-UPA states will also differ in judicial application of the de facto parent doctrine on the basis of statutory language.¹²⁹

2. Judicial Interpretation Within States Not Enacting the UPA

Similar to states enacting the UPA, judicial interpretation of statutes not enacting the UPA will vary based on the expansive or restrictive definition of a parent.¹³⁰ Aside from recognizing the de facto parent doctrine, states have granted a non-biological parent legal rights over a child through other avenues.¹³¹ For example, North Carolina child

facto parenting because it would "exceed the proper bounds of the judiciary." *Jones*, 154 P.3d at 816.

¹²⁸ See *In re M.K.S.-V*, 301 S.W.3d 460, 465 (Tex. Ct. App. 2009) (allowing a non-biological parent the ability to seek custody). *But see White*, 293 S.W.3d at 6 (prohibiting a non-biological parent the ability to seek custody over a child conceived during her relationship).

¹²⁹ See *infra* Part II.C.2 (discussing the difference in court interpretations of non-UPA state statutes in considering whether the court could apply psychological parenting doctrines to a non-biological parent in a same-sex relationship).

¹³⁰ See *Boseman v. Jarrell*, 704 S.E.2d 494, 505 (N.C. 2010) (holding second parent adoption was not permitted for same-sex couples, but a non-biological parent was granted joint custody over the child because the biological mother had lost her paramount parenting right by consenting with the non-biological mother to co-parent the child). *But see Black v. Simms*, 12 So. 3d 1140, 1145 (La. Ct. App. 2009) (refusing to allow a non-biological parent custody over a child conceived through artificial insemination during the lesbian relationship because a natural parent's paramount right was unable to be disturbed absent unusual circumstances). In *Boseman*, the partners agreed to jointly parent a child conceived through artificial insemination during their romantic relationship. *Boseman*, 704 S.E.2d at 497. The non-biological mother participated in the pregnancy and birth of their child by various actions, including attending doctor appointments and reading to their child in the womb. *Id.* The non-biological parent was an active parent throughout the child's life. *Id.* After approximately six years of raising the child together, the couple decided to split. *Id.* at 498. The non-biological parent continued to provide financial support for the child after the split. *Id.* The court granted joint custody to each parent. *Id.* at 494. On the contrary, a Louisiana court refused to grant joint custody despite the non-biological parent acting as a parent. *Black*, 12 So. 3d at 1145. A lesbian couple had a child together using artificial insemination. *Id.* at 1141. At first, the biological mother permitted weekend visits with the non-biological parent but then disallowed such visits; therefore, the non-biological parent sought custody. *Id.* Ultimately, the court held that the removal of the non-biological parent from the child's life did not meet the substantial harm threshold required by statute, and it subsequently denied the non-biological mother custodial rights. *Id.* at 1145.

¹³¹ See KY. REV. STAT. ANN. § 403.270 (2006) (allowing an individual to be determined a de facto custodian and given equal standing for custody of a child); N.C. GEN. STAT. ANN. § 50-13.1(a) (West 2011) ("Any parent, relative, or other person, agency, organization or institution claiming the right to custody of a minor child may institute an action or proceeding for the custody of such child . . ."). A North Carolina statute allows for a court

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custody statutes allow third parties to seek custody over a child when a parent-child like relationship has been established.¹³² Therefore, courts are able to grant custodial rights to a non-biological parent.¹³³

In some instances, courts have granted custodial rights to a non-biological parent in a same-sex relationship when the court finds that the natural parent has waived or relinquished his or her superior right as a parent.¹³⁴ For example, Kentucky has recognized that a non-biological parent in a same-sex relationship had a legal right over the couple's child, because the biological mother waived her superior parenting right when she brought the third party into the household and held her out to be a parent.¹³⁵ By the biological mother bringing in the third party to act as a parent, the court reasoned that the biological mother intended to waive her superior rights over the child, which entitled the non-biological parent to legal rights.¹³⁶ Although courts in North Carolina and Kentucky have permitted a non-biological parent to seek custody, this is heavily dependent on the interpretation of the respective statutory

to grant custody and visitation to third parties, as long as it is in the best interest of the child. N.C. GEN. STAT. ANN. § 50-13.2.

¹³² N.C. GEN. STAT. ANN. § 50-13.1(a); see also *Smith v. Barbour*, 571 S.E.2d 872, 877-78 (N.C. Ct. App. 2002) (stating that the statute does not leave unlimited ability for any person to establish custody over a child, but it is more narrowly applied to third parties who can establish a parent-child like relationship).

¹³³ See *Ellison v. Ramos*, 502 S.E.2d 891, 895 (N.C. Ct. App. 1998) (providing a non-biological parent standing after illustrating and establishing a parent-child like relationship); see also *Boseman*, 704 S.E.2d at 504-05 (reasoning that the biological mother acted "inconsistently with her paramount parental status" by sharing parental responsibilities with the third party, which allowed the third party (the non-biological mother) to establish a claim for joint custody).

¹³⁴ See *Boseman*, 704 S.E.2d at 503. Regardless of the unavailability of second parent adoption, the court reasoned that a third party is able to assert rights to custody when the natural parent has "acted inconsistent with her paramount parental rights." *Id.* at 502. Furthermore, the act of bringing a third party, who acts as a parent to the child, into the family unit is evidence of a natural parent acting inconsistent with such paramount right, which allows a third party standing for custody. *Id.* at 504-05.

¹³⁵ *Mullins v. Picklesimer*, 317 S.W.3d 569, 579 (Ky. 2010). In *Mullins*, the Kentucky Supreme Court followed a similar line of reasoning as North Carolina when determining custody of a child conceived through artificial insemination during a lesbian relationship. *Id.* It reasoned a third party may establish a right to custody by showing: "(1) that the parent is shown by clear and convincing evidence to be an unfit custodian, or (2) that the parent has waived his or her superior right to custody by clear and convincing evidence." *Id.* at 578 (footnote omitted). Similar to North Carolina, waiver was explained to be a parent's "intentional surrender or relinquishment" of his or her superior right to the child by allowing a third party acting as a parent into the home. *Id.* at 578.

¹³⁶ *Id.* at 579; see also *Boseman* 704 S.E.2d at 503 ("[W]hen a parent brings a nonparent into the family unit, represents that the nonparent is a parent, and voluntarily gives custody of the child to the nonparent without creating an expectation that the relationship would be terminated, the parent has acted inconsistently with her paramount parental status.").

language.¹³⁷ Therefore, those states that have restrictive language are more likely to deny such rights to a non-biological parent.¹³⁸

Judicial interpretation in states not enacting the UPA may result in the denial of parental rights to a non-biological parent in a same-sex relationship.¹³⁹ These courts deny legal rights by adhering to a paramount parental right of biological parents.¹⁴⁰ These courts determine the biological parent has a paramount parental right that a third party cannot disturb without showing a “substantial harm” to the child.¹⁴¹ Courts in Louisiana have used this approach to deny a non-biological parent of a same-sex couple legal parental rights, because granting sole custody to the biological parent did not create a substantial harm to the child.¹⁴² Because of these narrowed child custody statutes, joint custody between a natural and non-biological parent is not allowed, because it would infringe on the paramount rights of the natural parent.¹⁴³ Therefore, courts often refuse to apply any equitable remedies the legislature has not explicitly provided.¹⁴⁴

¹³⁷ See *Ellison*, 502 S.E.2d at 895 (interpreting the state’s third-party custody statute as allowing those who have established a parent-child like relationship to seek custody). *But see* *Black v. Simms*, 12 So. 3d 1140, 1143 (La. Ct. App. 2009) (limiting third-party standing for custodial suits based on the restrictive nature of the child custody statutes).

¹³⁸ See, e.g., *Black*, 12 So. 3d. at 1145 (denying a non-biological parent custodial rights because such rights are given solely to biological parents unless there is substantial harm).

¹³⁹ *Id.*

¹⁴⁰ *Id.* at 1143. The court in *Black* stated a heightened standard is required to establish a third party’s right to custody and is limited only to situations in which there would be substantial harm to a child by remaining with the natural parent. *Id.* The non-biological parent argued that substantial harm would occur by severing the relationship between the third party and child. *Id.* at 1143–44. But the court reasoned that only in rare situations of abuse or neglect would a third party have standing to interfere with the natural parent’s rights. *Id.* at 1144.

¹⁴¹ *Id.* at 1143 (“[T]he paramount right of a parent in the care, custody, and control of his or [her] child, the legislature has provided that an award of custody to a non-parent as opposed to a parent can only occur in rare circumstances.”) Further, based on the language of the statutes, the court reasoned an award of custody to a non-biological parent “first requires a finding that an award of sole custody to the parent would cause substantial harm.” *Id.* Therefore, the Louisiana court refused to allow joint custody to a non-biological parent based on this idea of paramount parental right. *Id.* at 1145.

¹⁴² *Id.* at 1145.

¹⁴³ *Id.* The idea behind the paramount right of a natural parent has been affirmed by the U.S. Supreme Court in *Troxel v. Granville*, which held “that parents have a fundamental constitutional right to direct the upbringing of their children.” Meyer, *supra* note 31, at 141. Because of such, some states have reasoned parental rights are unable to be extended to non-biological parents. *Id.* But this holding in *Troxel* did not explicitly restrict the parental rights of non-biological parents. *Id.* at 142. Rather, the decision was a narrow holding for the given facts and left flexibility for future decisions on parental rights. *Id.* Those who wish to uphold a traditional family—a mother and father—advance arguments against gays and lesbians as parents. See generally Alysse ElHage, *Why Gender Matters to Parenting: All Families Are Not Created Equal*, N.C. FAM. POL’Y COUNCIL,

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Overall, it is clear that states have inconsistent approaches in determining the legal parental status of a non-biological parent in a same-sex relationship.¹⁴⁵ The language of a state statute that defines a parent and child custody determines whether a non-biological parent can obtain rights over a child conceived during the same-sex relationship.¹⁴⁶ As a result, Part III of this Note scrutinizes the legislative language that gives rise to the judicial interpretation to grant or deny parenting rights in a same-sex couple.¹⁴⁷

III. ANALYSIS

Legal recognition as a parent grants many rights and benefits to both the parent and the child.¹⁴⁸ Marriage is a simple way to establish legal parental status over a child that is conceived during a marriage.¹⁴⁹ Unfortunately, many states do not legally recognize same-sex marriage; therefore, a non-biological parent may not be considered a legal parent.¹⁵⁰ In addition, because second parent adoption is not available in many states, a non-biological parent cannot jointly adopt a child conceived through artificial insemination or adopted during the

www.ncfamily.org/FNC/1104S1-GenderMatters.pdf (last visited Aug. 12, 2012) (arguing a child suffers when they are not raised by a father and a mother). Despite these arguments, studies have shown that homosexual parents are no different than heterosexual parents. See 64 AM. JUR. PROOF OF FACTS 3D *Custody and Visitation of Children by Gay and Lesbian Parents* § 3 (2001) (asserting that the numerous studies comparing homosexual parents to heterosexual parents have shown there is no difference to preclude same-sex couples from parenting). See generally William N. Eskridge Jr., *Six Myths that Confuse the Marriage Equality Debate*, 46 VAL. U. L. REV. 103 (2011) (providing six myths about homosexual marriage that are factually unfounded).

¹⁴⁴ See *Black*, 12 So. 3d at 1143 (refusing to extend custody to a non-biological parent based on the state statutes).

¹⁴⁵ See *Miller*, *supra* note 4, at 74 (discussing the various approaches taken by courts in determining parental status).

¹⁴⁶ See *supra* note 130 (comparing the interpretation of North Carolina's broad custody statute, which allows non-biological parents in same-sex relationships to seek custody of a child, with Louisiana's restrictive statutory language, which only allows legal parental rights to a non-biological parent in rare circumstances).

¹⁴⁷ See *infra* Part III (examining the benefits and limitations in the approaches taken by states in determining whether to grant legal parental status to same-sex couples).

¹⁴⁸ See *supra* note 23 (discussing the importance of establishing a legal parent-child relationship).

¹⁴⁹ See, e.g., UNIF. PARENTAGE ACT (2000) § 204 (amended 2002), 9B U.L.A. 23–24 (Supp. 2012) (permitting a presumption of paternity when a child is born within a marriage).

¹⁵⁰ See *supra* notes 3–5 and accompanying text (surveying the legal recognition of same-sex marriage and discussing the availability of second parent adoption for same-sex parents).

relationship.¹⁵¹ As a result, non-biological parents lose their child if the partnership ends.¹⁵² As the UPA is an influential model for states creating parenting statutes, it is necessary to analyze its effect on parents and children within same-sex relationships.¹⁵³

This Part analyzes the UPA in its current form.¹⁵⁴ First, it examines the UPA's benefits as a whole and as it is applied to same-sex couples.¹⁵⁵ Next, it details the numerous limitations of the UPA that result in its inapplicability to same-sex couples, depriving them of legal parental status.¹⁵⁶ Further, this Note compares the UPA against the parenting statutes of non-UPA states, illustrating how the UPA fails to protect parents and children of same-sex couples.¹⁵⁷ As this analysis shows, it is necessary for state legislatures to enact effective statutes that expansively define parentage and child custody to ensure a non-biological parent in a same-sex relationship—who has been a parent in every other possible way—continues to be legally recognized as a parent if the couple's relationship ends.¹⁵⁸

A. *The Benefits and Limitations of the UPA on Same-Sex Couples*

Although the UPA is not binding on any state, it is an influential model and one that many states have enacted in its entirety.¹⁵⁹ Because of the UPA's intended purpose of protecting children born out of marriage, the UPA has certain beneficial aspects, even for same-sex

¹⁵¹ See *supra* notes 4–5 and accompanying text (explaining the definition of second parent adoption and its availability for same-sex couples to establish legal parental status within the United States).

¹⁵² See, e.g., *In re Mullen*, 953 N.E.2d 302, 308–09 (Ohio 2011) (denying a non-biological parent custody rights after the same-sex relationship ended).

¹⁵³ See *supra* note 24 and accompanying text (explaining how the UPA is a model statute to guide states in creating uniform laws on the definition of parentage); see also *infra* Part III.A (analyzing the UPA's application to parents within same-sex relationships).

¹⁵⁴ See *infra* Part III.A (analyzing the impact of the UPA on a non-biological parent in a same-sex relationship by showing its benefits and limitations).

¹⁵⁵ See *infra* Part III.A.1 (examining the benefits of the UPA by looking at its intent and purpose).

¹⁵⁶ See *infra* Part III.A.2 (explaining that the current language of the UPA cannot be applied to same-sex couples, thereby resulting in parents and children losing legal rights).

¹⁵⁷ Compare *infra* Part III.A (scrutinizing the states that have enacted the UPA), with *infra* Part III.B (examining the statutes in effect in non-UPA states to illustrate the disadvantages of the UPA for same-sex couples).

¹⁵⁸ See *infra* Part IV (contributing amendments to the language of the UPA to correct its deficiencies in regards to non-biological parents of same-sex relationships).

¹⁵⁹ See *supra* Part II.A (explaining the UPA and the provisions that are instrumental in determining parentage); *supra* note 24 (discussing the states that have enacted the UPA). Even when states enact the UPA, they may choose to alter its language. See, e.g., WASH. REV. CODE ANN. §§ 26.26.101 et seq. (West 2005) (enacting the UPA but including gender-neutral language and the term domestic partnership within marriage presumptions).

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couples.¹⁶⁰ However, at the same time, the language of the UPA negatively affects same-sex couples seeking legal parental status and is overall ineffective in protecting the non-biological parent of a same-sex couple.¹⁶¹

1. Benefits of States Enacting the UPA for Same-Sex Couples

As the UPA stands, it has minimal benefits for same-sex couples, which arise only when the intent of the UPA's provisions are broadly interpreted.¹⁶² One positive aspect of the UPA is that it determines parentage without the consideration of marital status.¹⁶³ Because the intent of the UPA was to create equality among children born in and out of marriage, states, in theory, are able to promote this intent and extend the UPA to children of same-sex couples, despite these couples being unable to marry.¹⁶⁴ Even in states that do not recognize same-sex marriage, same-sex couples would not be precluded from establishing parenthood on the basis of the inability to marry, because the intent of the UPA can apply despite gender-specific language, thereby benefiting same-sex couples.¹⁶⁵ Although some may argue that the UPA was not enacted to extend rights to individuals in same-sex relationships, the UPA inadvertently extends its coverage to parents in same-sex relationships because of this intent to treat children born in and out of marriage equally.¹⁶⁶

¹⁶⁰ See *infra* Part III.A.1 (discussing the benefits of the UPA).

¹⁶¹ See *infra* Part III.A.2 (explaining the deficiencies of the current UPA, because it fails to recognize and protect all types of parents).

¹⁶² See *supra* note 64 (explaining how Washington has enacted the UPA but changed its language, thereby allowing the provisions to apply to same-sex couples).

¹⁶³ See *supra* note 30 and accompanying text (noting that the UPA was created in response to the Supreme Court holding that the Fourteenth Amendment required states to treat children born in and out of wedlock equally).

¹⁶⁴ See *MOULDING*, *supra* note 30, at 102-03 (discussing how a California court applied the UPA presumption of paternity provision, which grants paternity when holding a child out as one's own, to a non-biological mother of a same-sex relationship based on the intent of the provision).

¹⁶⁵ *Id.* Although California does not recognize same-sex marriage, it ignored the gender-specific language and used its enactment of UPA section 204(a)(4) presumption of paternity to deny custody rights to a lesbian couple because of the intent of the provision. *Id.*

¹⁶⁶ See *supra* notes 29-30 and accompanying text (explaining that the UPA was intended to create uniformity among children born in and outside of marriage; therefore, in applying the UPA's overarching purpose, marital status should not be a factor in determining legal parental status). The UPA was created to promote equality among children who were born in and out of wedlock. *Kramer*, *supra* note 24, at 645. The UPA intended to create a model statute for states in order to equalize legal rights and erase discrimination that occurred based on parental, marital status. *Id.* Arguably, this purpose should extend to children of same-sex relationships in order to promote equality among children. *Id.*

Moreover, the UPA provides for several instances of presumed parentage that are beneficial to non-biological parents in a same-sex relationship, because these provisions do not require a biological link.¹⁶⁷ For example, the UPA recognizes a presumption of parentage that is analogous to a de facto parent.¹⁶⁸ Because section 204 of the UPA defines a legal parent as one who essentially acts like a parent, courts reasonably interpret the UPA to permit the application of equitable remedies like the de facto parent doctrine, which further broaden the application to same-sex couples.¹⁶⁹ Regardless of the gender-specific language, this presumption of parental status can be extended to any non-biological parent in a same-sex relationship, because the purpose of the provision is to grant legal parental status when an individual acts like a parent.¹⁷⁰ Because the UPA recognizes a presumption of parental status similar to a de facto parent, a state can interpret this as intent to create a presumption in a mother-child relationship for a non-biological parent in a lesbian relationship.¹⁷¹ Even when courts strictly adhere to the gender-specific terms of this provision, it still protects a non-biological father in a same-sex relationship, because he is able to establish himself as a father by holding the child out as his own without showing a biological link.¹⁷² As a result, section 204 can protect non-biological parents when courts look at its purpose without considering gender.¹⁷³

¹⁶⁷ UNIF. PARENTAGE ACT (2000) § 204 (amended 2002), 9B U.L.A. 23–24 (Supp. 2012); UNIF. PARENTAGE ACT (2000) § 703 (amended 2002), 9B U.L.A. 71 (Supp. 2012). These two provisions of the UPA allow for fatherhood to be established without proving a biological link. *Id.* For example, section 204 allows a male to be a legal father if he was married to the woman who gave birth to the child during the marriage. UNIF. PARENTAGE ACT (2000) § 204(a) (amended 2002), 9B U.L.A. 23–24 (Supp. 2012). It also allows for a presumption of paternity when a male holds a child out to the world as his own. UNIF. PARENTAGE ACT (2000) § 204(a)(5) (amended 2002), 9B U.L.A. 24 (Supp. 2012).

¹⁶⁸ UNIF. PARENTAGE ACT (2000) § 204(a) (amended 2002), 9B U.L.A. 23–24 (Supp. 2012). This provision provides that a male is a presumed father when “for the first two years of the child’s life, he resided in the same household with the child and openly held out the child as his own.” UNIF. PARENTAGE ACT (2000) § 204(a)(5) (amended 2002), 9B U.L.A. 24 (Supp. 2012).

¹⁶⁹ See Miller, *supra* note 4, at 75 (discussing how a California court applied this UPA provision, despite the gender terms, deeming the non-biological mother in a lesbian relationship as a legal parent).

¹⁷⁰ *Id.*

¹⁷¹ UNIF. PARENTAGE ACT (2000) § 204(a)(5) (amended 2002), 9B U.L.A. 24 (Supp. 2012). Although the UPA does not explicitly mention de facto parent, the presumption for paternity is analogous to the definition of de facto parent, therefore essentially allowing a father to be established as a de facto parent. *Id.*

¹⁷² *Id.* Because the provision does not require the presumption of paternity in the context of a heterosexual relationship, it could be applied to a non-biological male parent attempting to establish himself as a legal parent over a child. *Id.*

¹⁷³ *Id.*

Further benefiting same-sex couples, section 703 of the UPA allows a presumption of a parent-child relationship when one partner conceives a child through artificial insemination.¹⁷⁴ By looking at the purpose of this provision, courts can extend this presumption to same-sex couples who use such procedures to conceive a child.¹⁷⁵ The UPA allows for parentage without a biological link because the father intended to be the child's parent.¹⁷⁶ Thus, this presumption can be broadly extended to same-sex couples in which the non-biological parent consents to the procedures and intends to be the parent of the child.¹⁷⁷ Even if courts refuse to apply the provision to a female in a same-sex relationship because of the gender-specific language of the provision, it will apply to the non-biological father and biological father of a same-sex relationship

¹⁷⁴ UNIF. PARENTAGE ACT (2000) § 703 (amended 2002), 9B U.L.A. 71 (Supp. 2012). This provision states that “[a] man who provides sperm for, or consents to, assisted reproduction by a woman as provided in Section 704 with the intent to be the parent of her child, is a parent of the resulting child.” *Id.*

¹⁷⁵ See Polikoff, *supra* note 25, at 222 (discussing how a court in New Jersey applied the presumption of paternity, in a case involving artificial insemination, to a lesbian couple despite the marital language of husband and wife).

¹⁷⁶ UNIF. PARENTAGE ACT (2000) § 703 (amended 2002), 9B U.L.A. 71 (Supp. 2012); see also WASH. REV. CODE ANN § 26.26.710 (West 2005) (enacting a similar provision to section 703 of the UPA but using gender-neutral terms, and, therefore, it is applicable to lesbian couples who use artificial insemination and creates a presumption of parentage for the non-biological parent). By extending this presumption of parentage to include same-sex couples, a non-biological parent in a lesbian relationship is able to establish legal parentage over a child conceived through artificial reproduction during the relationship. *Id.*

¹⁷⁷ See, e.g., WASH. REV. CODE ANN. § 26.26.710 (allowing a provision similar to section 703 of the UPA to be applied to both genders, thereby enabling presumption of parentage provisions to be applicable to same-sex couples). The provision allows for a male to be presumed the father when he consents to assisted reproduction by a woman and intends to parent the child. UNIF. PARENTAGE ACT (2000) § 703 (amended 2002), 9B U.L.A. 71 (Supp. 2012). The comment to the provision demonstrates that this provision “reflects the concern for the best interests of nonmarital” children of assisted reproduction. UNIF. PARENTAGE ACT (2000) § 703 cmt. (amended 2002), 9B U.L.A. 71 (Supp. 2012). Because the provision can be applied without consideration of gender, it will apply to same-sex couples to presume parentage for the non-biological parent. See MOULDING, *supra* note 30, at 102-03 (explaining how a California court broadly applied the UPA presumption provision to grant legal parental status to a non-biological mother because of the intent); Polikoff, *supra* note 25, at 222-23 (discussing the New Jersey court that applied the New Jersey insemination statute without consideration of gender).

who commission a surrogate.¹⁷⁸ As a result, this provision of the UPA is greatly advantageous for male parents in same-sex relationships.¹⁷⁹

Unfortunately, the benefits of the UPA for parents in a same-sex relationship are limited.¹⁸⁰ In its current form, the UPA can only protect parents of a same-sex couple if courts look solely to the intent of the provisions and apply them without regard to gender.¹⁸¹ The gender-specific language of the UPA creates greater limitations than benefits to parents in a same-sex relationship, and non-biological male fathers are more protected than similarly situated females.¹⁸²

2. Limitations of the UPA to Same-Sex Couples

Overall, the UPA hinders same-sex couples from establishing legal parental status.¹⁸³ The UPA is inapplicable to parents of same-sex couples for three major reasons: (1) it uses gender-specific language; (2) it does not explicitly recognize the de facto parent doctrine; and (3) it allows for a presumption of parentage within the context of marriage.¹⁸⁴ First, the language of the UPA's presumption of parentage provision is deceptive because it only allows for a presumption of paternity, not parentage.¹⁸⁵ Although these provisions are applicable to a male non-

¹⁷⁸ UNIF. PARENTAGE ACT (2000) § 703 (amended 2002), 9B U.L.A. 71 (Supp. 2012). The language states that “[a] man who . . . consents to[] assisted reproduction by a woman . . . with the intent to be the parent of her child, is a parent of the resulting child.” *Id.* Arguably, if one male donates the sperm to be used by a surrogate, the male partner, who is a non-biological parent, can be established as a father through this presumption provision because he consents to the surrogate and intends to be the father. *Id.*

¹⁷⁹ See *supra* notes 35-40 and accompanying text (discussing the presumption of paternity statutes available to establish a legal father relationship that are unavailable for mothers, therefore, giving non-biological male parents in a same-sex relationship more avenues to establish legal parental status because of their gender).

¹⁸⁰ See *infra* Part III.A.2 (illustrating that the limitations of the UPA as applied to same-sex couples are greater than the benefits).

¹⁸¹ Compare *supra* note 175 (showing how a court applied the presumption of paternity for heterosexual couples using artificial insemination, regardless of gender; therefore, it applied to a lesbian couple as well), with *supra* note 126 (discussing how a Missouri court strictly adhered to the gender specific language of the presumption provisions and refused to apply similar presumptions to a same-sex couple).

¹⁸² See *infra* Part III.A.2 (scrutinizing the language of the UPA in its current form to demonstrate the UPA is deficient because it cannot apply to same-sex couples).

¹⁸³ See *supra* note 32 (discussing how the UPA was not created in consideration of gay and lesbians parents, despite the opportunity to make changes in its latest 2002 amendment).

¹⁸⁴ See, e.g., UNIF. PARENTAGE ACT §§ 101 et seq. (amended 2000), 9B U.L.A. 299-376 (2001) (reading the UPA in its entirety, there is no provision explicitly recognizing the de facto parent doctrine).

¹⁸⁵ See UNIF. PARENTAGE ACT (2000) § 204 (amended 2002), 9B U.L.A. 23-24 (Supp. 2012); UNIF. PARENTAGE ACT (2000) § 703 (amended 2002), 9B U.L.A. 71 (Supp. 2012) (permitting a

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biological parent in a same-sex relationship, it limits the legal parental status of female non-biological parents.¹⁸⁶ When the language is strictly enforced, it forecloses the ability of a female non-biological parent in a same-sex relationship to assert parental status under the provisions.¹⁸⁷ Therefore, the gender-specific language of section 703 of the UPA unfairly makes it inapplicable to a lesbian couple who uses artificial insemination to conceive a child.¹⁸⁸

Furthermore, although the UPA allows for a presumption of paternity similar to a de facto parent, this provision fails to protect same-sex couples because it does not explicitly recognize a de facto parent, and it limits this presumption solely to males.¹⁸⁹ As a result of the UPA's failure to clearly provide for de facto parental status, states may refuse to permit the doctrine, reasoning that the legislature did not provide for such a remedy.¹⁹⁰ Therefore, the UPA unjustly limits the application of the de facto parent doctrine despite it providing presumptive parenting provisions.¹⁹¹ When courts do allow for this presumption, its language will only be applicable to a male non-biological parent.¹⁹² Thus, these

presumption of paternity in certain circumstances, including marriage and consent in artificial reproduction cases).

¹⁸⁶ UNIF. PARENTAGE ACT (2000) § 703 (amended 2002), 9B U.L.A. 71 (Supp. 2012). Because the language specifically states that “[a] man who . . . consents to[] assisted reproduction by a woman . . . with the intent to be the parent,” a court strictly adhering to the language will be unable to apply this to a female non-biological parent. *Id.* See *White v. White*, 293 S.W.3d 1, 11 (Mo. Ct. App. 2009) (reasoning Missouri’s UPA could not apply to a non-biological female in a same-sex relationship because the paternity presumptions did not apply to a female).

¹⁸⁷ UNIF. PARENTAGE ACT (2000) § 703 (amended 2002), 9B U.L.A. 71 (Supp. 2012).

¹⁸⁸ See *supra* notes 34–35 and accompanying text (explaining how UPA provisions for the presumption of paternity are applied solely to males; therefore, these UPA provisions are not available to establish a mother-child relationship).

¹⁸⁹ Compare UNIF. PARENTAGE ACT (2000) § 204(a)(5) (amended 2002), 9B U.L.A. 24 (Supp. 2012) (recognizing paternity when a male holds the child out as his own, but the Act does not explicitly define de facto parent as a legal parent), with ALI PRINCIPLES, *supra* note 44, § 2.03(1)(c), at 18 (recognizing a de facto parent when the parent shows that he or she is the primary caregiver for a period no less than two years).

¹⁹⁰ See *Smith v. Gordon*, 968 A.2d 1, 14–15 (Del. 2009) (refusing to apply the de facto parent doctrine because the legislature did not explicitly recognize it within its UPA enactment); *White*, 293 S.W.3d at 15 (refusing to apply the de facto parent doctrine that was used in other states like Wisconsin).

¹⁹¹ See *supra* note 41 and accompanying text (discussing how the UPA failed to recognize the de facto parent doctrine recommendations); see also *Smith*, 968 A.2d at 14 (refusing to recognize the de facto parent doctrine because the legislature did not recognize it in its enactment of the UPA).

¹⁹² See UNIF. PARENTAGE ACT (2000) § 204(a) (amended 2002), 9B U.L.A. 23–24 (Supp. 2012) (providing language permitting only a presumption of paternity).

presumption provisions of the UPA unfairly discriminate against female non-biological parents in same-sex relationships.¹⁹³

Further restricting its application to same-sex relationships, the UPA does not include terms applicable to same-sex relationships, like domestic partnerships.¹⁹⁴ Even a gender-neutral interpretation of section 204, which presumes paternity when a child is conceived within marriage, cannot be applied to same-sex couples.¹⁹⁵ Same-sex marriage is not legalized in many states; therefore, a court cannot interpret the provision broadly and apply it to a same-sex couple regardless of gender.¹⁹⁶ As a result, the UPA neglects to consider same-sex couples in the determination of parentage, because the presumption of parentage provisions cannot be applied to same-sex couples based on the gender and marital requirements.¹⁹⁷

Although the UPA was intended to equalize the status of children, it contradicts this purpose by treating children and the non-biological parent of a same-sex relationship differently than those in a heterosexual relationship.¹⁹⁸ This restricts the ability of a non-biological parent in a same-sex relationship to establish a legal parent-child relationship, which is necessary to ascertain custodial rights.¹⁹⁹ In recognizing the

¹⁹³ *Id.*

¹⁹⁴ Compare UNIF. PARENTAGE ACT (2000) § 204(a)(1) (amended 2002), 9B U.L.A. 23 (Supp. 2012) (permitting a presumption of paternity when a child is born within a legally recognized marriage), with WASH. REV. CODE ANN. § 26.26.116 (West 2005) (amending the UPA with the addition of domestic partnership in UPA's section 201(a)(1), thereby allowing a presumption of parentage over a child conceived during a same-sex relationship).

¹⁹⁵ UNIF. PARENTAGE ACT (2000) § 204 (amended 2002), 9B U.L.A. 23–24 (Supp. 2012).

¹⁹⁶ *Id.*

¹⁹⁷ See *id.* (establishing a father-child relationship, regardless of a biological link, when the male is married to the woman and the child is born within that marriage).

¹⁹⁸ See *supra* notes 31–32 (discussing how the Commissioners did not consider same-sex couples in creating the UPA or its subsequent amendments). Although the UPA does not consider same-sex couples, studies have shown that children raised in same-sex relationships are well adjusted and just as equipped as children raised in heterosexual households. 64 AM. JUR. PROOF OF FACTS 3D *Custody and Visitation of Children by Gay and Lesbian Parents* § 3 (2001).

¹⁹⁹ Compare UNIF. PARENTAGE ACT (2000) § 204 (amended 2002), 9B U.L.A. 23–24 (Supp. 2012); UNIF. PARENTAGE ACT (2000) § 703 (amended 2002), 9B U.L.A. 71 (Supp. 2012) (limiting the ability of same-sex couples to establish parentage through a presumption, because the language of these UPA provisions only apply to heterosexual couples), with WASH. REV. CODE ANN. §§ 26.26.116, 26.26.710 (adopting an amended version of the UPA to include domestic partnerships and gender neutral language). Washington's enactment of the UPA with liberal language demonstrates the ineffectiveness of the UPA, because Washington's version can be applied to same-sex couples, whereas the UPA, in its current form, is unavailable to same-sex couples. *Id.*; UNIF. PARENTAGE ACT (2000) § 204 (amended 2002), 9B U.L.A. 23–24 (Supp. 2012); UNIF. PARENTAGE ACT (2000) § 703 (amended 2002), 9B U.L.A. 71 (Supp. 2012).

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UPA's limitations, some states have chosen to amend the deficiencies of the UPA and extend its application to same-sex couples.²⁰⁰ But without such state amendments, the UPA fails to grant a non-biological parent of a same-sex couple legal parental status.²⁰¹ The UPA does not fully protect the legal rights of same-sex parents, but failing to enact the UPA does not always result in greater access to legal rights for same-sex couples.²⁰²

B. The Benefits and Limitations of Not Enacting the UPA for Same-Sex Couples

Despite the inequities of the UPA, a state's decision to create its own parenting statutes, rather than enact the UPA, does not guarantee greater legal rights for non-biological parents in a same-sex relationship.²⁰³ Whether a state has enacted the UPA or chosen not to, the determinative factor in granting legal parental status to a non-biological parent is the expansive or restrictive language of the statutes.²⁰⁴ Although there are benefits to states creating their own parenting statutes, states are still able to restrict parental status, thereby denying parents and children legal rights they rightfully deserve.²⁰⁵

1. Benefits of Not Enacting the UPA for Same-Sex Couples

The decision of a state not to enact the UPA can be beneficial for a non-biological parent in a same-sex couple.²⁰⁶ The greatest benefit is that these states are not limited by the UPA's gender-specific and restrictive language; therefore, states can expansively define a parent and be

²⁰⁰ See *supra* notes 57–68 and accompanying text (discussing how Washington has amended its version of the UPA to be gender neutral, as well as include language such as domestic partnerships, thereby allowing provisions to apply to same-sex parents).

²⁰¹ Compare *supra* notes 57–63 (discussing Washington's liberal enactment of the UPA to include gender neutral language, which results in it being applicable to same-sex couples), with *supra* notes 75–76 (discussing how states have enacted the UPA to include marital terms, resulting in provisions being inapplicable to same-sex couples).

²⁰² See *infra* Part III.B (analyzing the language of state parenting statutes that did not enact the UPA and its subsequent effect on same-sex parents).

²⁰³ See *supra* Part II.B.2 (explaining the limitations of non-UPA parental statutes, which hinder non-biological parents attempting to seek custody).

²⁰⁴ See *supra* Part III.A.1; *infra* Part III.B.1 (showing that the benefit of state statutes for non-biological parents is dependent on whether the state expansively defines parent).

²⁰⁵ See *infra* Part II.B.2 (discussing the limitations of narrow state statutes that restrict same-sex couples from establishing themselves as legal parents).

²⁰⁶ See *supra* notes 88–96 and accompanying text (discussing how states like Kentucky and North Carolina have enacted liberal statutes that allow third parties to seek custody over a child).

inclusive in the granting of custody.²⁰⁷ These statutes are comparably better than the UPA, because the statutes rectify legal inequalities that exist for non-traditional families within the UPA.²⁰⁸ For example, one way states correct deficiencies in the UPA is by recognizing (or codifying) a de facto parent as a legal parent, whereas the UPA does not recognize the de facto parent doctrine.²⁰⁹ As a result, a non-biological parent who has raised and supported a child for a given amount of years can continue to be a parent rather than “sever[ing] a parent-child relationship between [the child] and the person she knows to be her mother.”²¹⁰ As a result of this progressive thinking by legislatures in codifying the de facto parent doctrine, it is better for parents in a same-sex couple to be within a non-UPA jurisdiction.²¹¹

Another benefit for same-sex couples within non-UPA jurisdictions is the embracing nature of the child custody statutes often recognized within these states.²¹² Despite the fact that a state may not provide for a de facto parent within its definition of a legal parent, states have permitted a third party to ascertain claims for custody despite not having a biological connection.²¹³ By enabling a third party who has established a parent-child-like relationship with the child to gain legal custody over

²⁰⁷ See, e.g., KY. REV. STAT. ANN. § 403.270 (2006) (allowing de facto custodian status to an individual who was not biologically linked to a child to gain legal parental status); N.C. GEN. STAT. ANN. § 50-13.1(a) (West 2011) (permitting third parties to sue for custody of a child when in the best interests of a child).

²⁰⁸ Compare KY. REV. STAT. ANN. § 403.270 (explicitly recognizing de facto custodian), with MO. ANN. STAT. § 210.822 (West 2010) (failing to recognize de facto parent as a result of the UPA’s current language).

²⁰⁹ KY. REV. STAT. ANN. § 403.270. Although Delaware has enacted the de facto parent doctrine within its UPA, other states have not; therefore, as a whole, UPA states have not codified the doctrine, whereas other states, such as Indiana and Kentucky, have. See *supra* notes 90–91 (discussing the enactment of the de facto parent doctrine within parenting statutes).

²¹⁰ See *In the Matter of L.K.M.*, LAMBDA LEGAL, <http://www.lambdalegal.org/in-court/cases/in-the-matter-of-lkm> (last visited Aug. 12, 2012) (discussing the consequences of a recent Ohio decision in which the state supreme court denied a non-biological mother parenting rights over a child, thereby severing the mother-child relationship the child had relied upon).

²¹¹ Compare *Boseman v. Jarrell*, 704 S.E.2d 494, 503–05 (N.C. 2010) (allowing a non-biological parent custody over a child of a same-sex relationship, because the liberal non-UPA statute allowed joint custody between a biological mother and a non-biological parent when a parent-child like relationship was created), with *White v. White*, 293 S.W.3d 1, 1 (Mo. Ct. App. 2009) (denying a non-biological parent custody over a child raised in a lesbian relationship and refusing to apply any equitable doctrines, because the UPA did not establish her as a legal parent).

²¹² See *supra* notes 88–96 and accompanying text (discussing states that have not enacted the UPA and their liberal construction of child custody statutes).

²¹³ See *supra* notes 93–96 and accompanying text (providing North Carolina as an example of a state that has enacted statutes allowing a third party to seek custody).

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the child, these states' legislatures and courts have endorsed a de facto-like parent, which will provide the non-biological parent of a same-sex couple legal rights over the child, ensuring that the relationship is not severed.²¹⁴ Accordingly, these states are able to extend parent and child custody statutes to a non-biological parent in same-sex couples, whereas a narrow interpretation of the UPA cannot apply to these types of parents.²¹⁵ As a result, a non-biological parent in a same-sex couple is able to gain legal rights over their child, ameliorating both the parent and child.²¹⁶

Another benefit of states enacting broad custodial provisions is that the judicial decisions interpreting the statutes are also broad and inclusive of same-sex couples.²¹⁷ Therefore, even if an individual cannot meet all required elements for a de facto parent, courts of these states interpret the statutes to include a waiver of natural parenting rights.²¹⁸ This waiver doctrine is beneficially equivalent to the de facto parent doctrine, because courts apply it in situations when a biological parent has intended and consented to a third party who assists in the parenting of a child, like a de facto parent.²¹⁹ Because a state codification of the de facto parent doctrine may require the de facto parent to be the sole caregiver, this application of waiver, as a result of broad custodial statutes, allows non-biological parents another avenue to pursue legal

²¹⁴ See, e.g., *Boseman*, 704 S.E.2d at 504–05 (affirming a decision for joint custody between the biological mother and non-biological mother). North Carolina has not enacted the UPA, but its state statute allows third parties to seek custody once a parent-child relationship has been established. *Id.* This is contrary to many UPA states, which have held that the UPA enactment within their state prohibited the use of the de facto parenting doctrine. *Jones v. Barlow*, 154 P.3d 808, 818–19 (Utah 2007).

²¹⁵ Compare UNIF. PARENTAGE ACT (2000) § 201 (amended 2002), 9B U.L.A. 21 (Supp. 2012) (limiting the ways in which an individual can be established as a parent), with *supra* notes 91–94 (explaining that non-UPA states have been inclusive in their statutory framework in defining and granting custody).

²¹⁶ See, e.g., KY. REV. STAT. ANN. § 403.270 (2006) (providing for de facto custodian third parties); N.C. GEN. STAT. ANN. § 50-13.1(a) (West 2011) (allowing third parties to seek custody).

²¹⁷ See *supra* notes 133–37 (discussing judicial interpretations that have construed custodial statutes broadly).

²¹⁸ See *supra* notes 134–37 (discussing cases in which the court found a waiver of paramount parenting status when a natural parent intentionally brought a third party in the home to co-parent).

²¹⁹ See *id.* (explaining case law that recognized a non-biological parent's right to custody on the rationale that the biological mother waived superior parenting rights when she brought in a lesbian partner who was an active mother, and, as a result, the biological mother created a psychological parent).

rights over their child.²²⁰ Therefore, when non-UPA states expand their definition of parent and custody in consideration of non-traditional families, judiciaries have a greater ability to grant legal rights to parents in same-sex relationships compared to heterosexual parents and the restrictive language of the UPA.²²¹

As evidenced above, states that have not enacted the UPA are comparably better in providing legal rights to same-sex parents.²²² But because state statutes vary to a great degree, the law is convoluted among states without the UPA, which consequently restricts the ability of non-biological parents in same-sex relationships to establish themselves as a legal parent.²²³

2. Limitations of Not Enacting the UPA on Same-Sex Couples

In greatly limiting same-sex parents' rights, states have narrowly defined the word "parent" comparably similar to the UPA.²²⁴ Contrary to the UPA's purpose, these non-UPA states often use marriage as a means to define parentage.²²⁵ Such states are restrictive in their definition of a parent, even going so far as to limit it to a biological or adoptive link.²²⁶ Because these states do not recognize a presumption of parentage outside of marriage, their statutes prohibit a court from extending equitable relief, such as the *de facto* parent doctrine, in

²²⁰ See *Mullins v. Picklesimer*, 317 S.W.3d 569, 570 (Ky. 2010) (reasoning the biological parent waived her superior right when she brought in a non-biological parent, thereby giving the non-biological parent standing to seek custody).

²²¹ Compare *supra* notes 88–96 and accompanying text (discussing states that have not enacted the UPA but have enacted broad custodial statutes because they are not limited by the UPA), with *supra* notes 33–41 (detailing the provisions of the UPA that limit the definition of legal parents).

²²² See, e.g., KY. REV. STAT. ANN. § 403.270 (2006) (allowing for non-biological individuals to seek custody); N.C. GEN. STAT. ANN. § 50-13.1(a) (West 2011) (allowing third parties to seek custody). But see, e.g., *Jones v. Barlow*, 154 P.3d 808, 818–19 (Utah 2007) (refusing to allow a non-biological mother to gain custody because of the enactment of the UPA).

²²³ See, e.g., LA. CIV. CODE ANN. art. 133 (2004) (limiting non-parental custody to instances when there is a substantial harm to the child).

²²⁴ See, e.g., *supra* note 102 (discussing Louisiana's statute, which requires a legal parent to have a biological or adoptive link).

²²⁵ See *supra* note 99 (explaining how Louisiana has extremely limited the ability of non-biological parents in a same-sex relationship to seek custody because of its statutory language). Similar to Louisiana, states enacting the UPA have also limited the language of the UPA by including marital terms. See *supra* note 80 (discussing how Missouri, Ohio, and Utah have enacted their UPA by imposing marital requirements for the presumption provision of section 703). This is contrary to the UPA's purpose. See *supra* note 30 and accompanying text (explaining that the purpose of the UPA was to create equality among marital and non-marital children).

²²⁶ See *supra* note 99 (explaining how Louisiana has narrowly defined parent and how its custody statutes foreclose the ability for a non-biological parent to obtain custody).

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accordance with the legislatures' will.²²⁷ As a result, non-biological parents in same-sex relationships have remarkably limited avenues to establish themselves as a parent in comparison to the UPA, because the UPA allows for greater presumptions of parentage without consideration of marital status.²²⁸ Thus, when a state statute uses marriage as a way to define a parent, it unjustly eliminates any possibility for a non-biological parent to obtain custody over a child.²²⁹ In addition to narrowly defining parenting statutes, these states adhere to a traditional standard of parenting based on biology.²³⁰

As a counter argument to the granting of same-sex couples parenting rights, some states see the biological parent as having paramount rights, which can only be interrupted in limited and exceptional circumstances.²³¹ This principal is problematic because it will only grant a non-biological parent legal rights when the biological parent creates a substantial harm for the child; therefore, both individuals in a same-sex couple are unable to be recognized as a legal parent.²³² By adhering to such a traditional and archaic view of parenting and family, these states limit the ability for any third party to seek custody of a child despite acting as a parent in every way.²³³ In enacting such statutes, these states perpetuate the belief that individuals in same-sex relationships are unable to parent.²³⁴ Further, these archaic statutes promote an idea of

²²⁷ *Jones*, 154 P.3d at 819 (explaining its refusal to grant de facto parental status, because the legislature clearly did not intend for such an interpretation based on its parenting statutes).

²²⁸ *Id.*

²²⁹ *See supra* note 78 (illustrating how marital language may foreclose the ability of a non-biological parent in a same-sex relationship to establish parentage since the presumption provision cannot apply to relationships that are not legalized in that state).

²³⁰ *Id.*

²³¹ *See supra* note 99 (explaining how some states have a heightened view of superior natural parenting rights, and, therefore, these courts are unwilling to grant non-biological parents legal rights without a showing of substantial harm).

²³² *Compare supra* note 135 (explaining how a court rationalized its decision when a biological parent consented and intended for another individual to help parent, and thus the biological parent waived superior title as a parent, and the two parents were to have joint custody over the child), *with supra* note 141 (explaining how some courts may heighten this paramount parental right to prohibit joint custody with a non-biological parent).

²³³ *See supra* note 140 (discussing a case in which a Louisiana court denied a non-biological parent rights to her child, because the biological mother had a superior right that could not be interfered with without a showing of substantial harm).

²³⁴ *See ElHage, supra* note 143, at 2 (advancing policy arguments for the adherence to a traditional family structure of both a mother and father). Despite arguments that children are best raised in these "traditional" families, studies show that the modern family is not composed of these old notions of family; in addition, homosexual parents are capable of raising functioning children. *See* 64 AM. JUR. PROOF OF FACTS 3D *Custody and Visitation of*

family—a male and female married with children—that is no longer the norm.²³⁵ As these states refuse to redefine a family, same-sex couples will likely never have the same legal rights as a traditional family.²³⁶

By assessing the benefits and limitations of the UPA in comparison to states that have chosen not to enact the UPA, it is clear that changes to the current version of the UPA are necessary to protect the rights of non-biological parents of a same-sex relationship.²³⁷ Moreover, granting legal status to a non-biological parent protects the legal rights of a child.²³⁸ The UPA intended to protect the legal rights of children born out of marriage, but, because of its current language, it fails to protect children born in same-sex relationships, resulting in both the parent and child being denied certain legal rights.²³⁹

States are divided in applying the de facto parent doctrine because the UPA has not explicitly recognized the doctrine.²⁴⁰ Moreover, the gender-specific and heterosexual language of the UPA makes it inapplicable to same-sex couples.²⁴¹ Although the UPA is not binding and not all states have enacted it, amending the UPA in consideration of these deficiencies to protect same-sex couples will provide future legislatures guidance in defining parent to include parents in non-traditional families.²⁴² Because states look to the UPA in composing their

Children by Gay and Lesbian Parents § 3 (2001) (discussing research on same-sex couples raising children).

²³⁵ See Meyers, *supra* note 31, at 132 (discussing how the idea of “traditional families” has changed and that traditional marriage is no longer a societal norm). The “traditional family”—a married heterosexual couple raising children—has decreased from forty percent in 1970 to less than twenty-five percent in 2000. *Id.*

²³⁶ See, e.g., *White v. White*, 293 S.W.3d 1, 10–11 (Mo. Ct. App. 2009) (strictly enforcing Missouri’s enactment of the UPA and refusing to extend the presumption provisions to a female in a same-sex relationship because of the gender-specific marital language and the additional marital requirement for a presumption of paternity).

²³⁷ See *supra* Part III.A.2 (illustrating the overwhelming limitations of the UPA when applied to same-sex couples).

²³⁸ See *supra* note 23 (illustrating the numerous legal rights, like inheritance, a child is entitled to from a legal parent, as well as the overall emotional factors in separating a child from a parent who has raised him or her).

²³⁹ See Miller, *supra* note 4, at 81 (explaining that the failure to establish a legal parent-child relationship results in a child being unable to benefit from Social Security and life insurance benefits, unable to file a wrongful death lawsuit, and unable to inherit through intestacy).

²⁴⁰ Compare *supra* notes 69–73 and accompanying text (discussing Delaware’s enactment of the UPA to include de facto parent, despite the UPA not recognizing such), with *supra* notes 124–27 and accompanying text (exploring how states enacting the UPA have refused to recognize the de facto parent doctrine because the UPA has not explicitly recognized it).

²⁴¹ See *supra* note 24 (asserting that the UPA is influential as a guiding source for legislatures and courts to define parent within various statutes).

²⁴² See *id.* (noting that the UPA is influential as a guiding source for legislatures and courts to define parent within their statutes); see also *Jones v. Barlow*, 154 P.3d 808, 819

own statutes regarding the definition of parent, amending the UPA with these considerations in mind will enable states to better combat issues regarding the legal parental status of a non-biological parent in a same-sex relationship.²⁴³

IV. CONTRIBUTION

As has been discussed, there is no uniformity among states in the determination of legal rights for a non-biological parent over a child conceived in a same-sex relationship.²⁴⁴ Status as a legal parent triggers many legal rights and entitlements for both parent and child.²⁴⁵ State uniformity in parenting and child custody laws is essential as society is increasingly mobile.²⁴⁶ Furthermore, lack of uniformity among states essentially forces same-sex couples to reside in a state based on the applicable parenting laws.²⁴⁷ Because the UPA does not protect non-biological parents of same-sex couples, the UPA should be amended.²⁴⁸ The following amendments to the UPA will result in a greater application of the UPA and correct the deficiencies of the current version. Therefore, this Note recommends modifications to three specific UPA provisions: section 201, section 204, and section 703.²⁴⁹ Amending these sections is the first step in guiding states' legislatures to construct statutes that are inclusive for non-biological parents of same-sex relationships in states already enacting the UPA, as well as in states not enacting the UPA needing assistance in such issues.²⁵⁰

(Utah 2007) (refusing to apply the de facto parent doctrine because the legislature did not include such in its enactment of the UPA).

²⁴³ See *infra* Part IV (commenting on the proposed amendments' effect on parents in a same-sex relationship).

²⁴⁴ See *supra* Part II.B, Part II.C (discussing the legislative and judicial approaches taken by states in determining legal parental status).

²⁴⁵ See *supra* note 23 (exploring the legal rights associated with the establishment of a legal parent-child relationship).

²⁴⁶ Miller, *supra* note 4, at 72-73 (discussing the lack of uniformity in court decisions for custody and visitation, which results in uncertainty for non-traditional families).

²⁴⁷ *Id.* at 79 (explaining that same-sex parents may need to consider the state they reside in or plan to move based on such laws in order to protect their families).

²⁴⁸ See *supra* Part III.A.2 (analyzing the limitations of the UPA because it is inapplicable to parents of same-sex relationships).

²⁴⁹ See *infra* Part IV (amending sections 201, 204, and 703 of the current UPA).

²⁵⁰ See *infra* Part IV (commenting on the advantages of the amendments to the UPA provisions).

A. *Proposed Amendment to Section 201 to Define De Facto Parent as a Legal Parent*

First, this Note proposes an amendment to section 201 of the UPA to more adequately define the legal parent-child relationship.²⁵¹ In its current form, the provision only permits a mother-child relationship to be established by birth or adoption, whereas it allows a legal father-child relationship to be established by subsequent presumption provisions.²⁵² The proposed amendment to the section reads as follows:

Section 201-Establishment of Parent-Child Relationship

(a) The mother-child relationship is established between a woman and child by:

- (1) the woman's having given birth to the child [, except as otherwise provided in [Article] 8];
- (2) *an un rebutted presumption of the parentage of the child under section 204;*
- (3) an adjudication of the woman's maternity; [or]
- (4) adoption of the child by the woman [; or]
- (5) an adjudication confirming the woman as a parent of a child born to a gestational mother if the agreement was validated under [Article] 8 or is enforceable under other law];
- (6) *having consented to assisted reproduction under [Article] 7 which resulted in the birth of a child [;or*
- (7) *a determination by the court, based on clear and convincing evidence, that the woman is a de facto parent of the child, as established by section 201(c).*

(b) The father-child relationship is established between a man and a child by:

- (1) an un rebutted presumption of ~~the man's paternity~~ *parentage* of the child under section 204;
- (2) an effective acknowledgment of paternity by the man under [Article] 3, unless the acknowledgement has been rescinded or successfully challenged;
- (3) an adjudication of the man's paternity;
- (4) adoption of the child by the man; [or]
- (5) ~~the man's having consented to assisted reproduction by a woman~~ *under [Article] 7 which resulted in the birth of the child [;or*

²⁵¹ UNIF. PARENTAGE ACT (2000) § 201 (amended 2002), 9B U.L.A. 21 (Supp. 2012).

²⁵² *Id.*

- (6) an adjudication confirming the man as a parent of a child born to a gestational mother if the agreement was validated under [Article] 8 or is enforceable under other law]; or
- (7) *a determination by the court, based on clear and convincing evidence, that the man is a de facto parent of the child, as established by section 201(c).*
- (c) *De facto parental status is established, if determined by the court, with clear and convincing evidence, that an individual:*
- (1) *has had the support and consent of the child's biological or adoptive parent(s) who intended to foster the formation and establishment of the parent-like relationship between the child and the de facto parent;*
- (2) *has exercised parental responsibility for the child as a sole primary caregiver or as a joint caregiver in conjunction with another legal parent;*
- (3) *has acted in a parental role for a length of time sufficient to have established a bonded and dependent relationship that is parental in nature, greater than a period of one year.*
- (d) *Establishment of parentage based on one of the above methods is no greater or lesser in status as a legal parent, and all are considered as equal legal parental statuses in the eyes of the court in determination of custody or other legal matters regarding the child. Establishment of a de facto parent does not terminate the legal relationship of a biological or adoptive parent.*²⁵³

Commentary

The modification to this provision corrects three deficiencies within the current UPA. First, it expands the definition of a legal mother-child relationship. The original UPA only permits a legal mother-child relationship to be established through birth or legal adoption, whereas it allows for a male to be presumed the father without a biological or adoptive link.²⁵⁴ As a result, non-biological mothers in same-sex

²⁵³ The proposed amendments are italicized and are the contribution of the author and have been influenced by Delaware's enactment of the UPA. The unitalicized portions are modeled after the original UPA. See UNIF. PARENTAGE ACT (2000) § 201(a) (amended 2002), 9B U.L.A. 21 (Supp. 2012); DEL. CODE ANN. tit. 13, § 8-201(c) (West 2009).

²⁵⁴ UNIF. PARENTAGE ACT (2000) § 201(a) (amended 2002), 9B U.L.A. 21 (Supp. 2012).

relationships are at a disadvantage.²⁵⁵ Amending the provision to include the presumption of parentage already available for males allows for a female non-biological mother in a same-sex relationship to be established as a legal parent.

Second, this amendment removes the gender-specific language of the current UPA. Under the current UPA, section 201 defines the legal parental relationship, referencing subsequent presumption provisions.²⁵⁶ The presumption provisions are only applicable to a male in a heterosexual relationship.²⁵⁷ Taken as a whole, the provisions together do not apply to same-sex relationships.²⁵⁸ Therefore, it is necessary to amend this definitional provision to include gender-neutral terms in order to modify the subsequent presumption provisions, ensuring they are also gender-neutral. As a result, all the provisions can apply to either gender, as well as to same-sex couples.²⁵⁹

Finally, and most importantly, this amendment explicitly defines a de facto parent as a legal parent and sets the requirements necessary to establish this legal relationship. It is crucial to define a de facto parent as a legal parent to avoid judicial confusion in granting such an equitable remedy.²⁶⁰ This addition of the de facto parent takes into consideration limitations set by other de facto statutes, including the legal rights of the biological or adoptive parent.²⁶¹ The definition of a de facto parent requires evidence that the biological or adoptive parent intended to create this relationship. Therefore, the definition of a de facto parent is limited and cannot apply to any adult individual having an influential relationship over a child. Further considering the rights of a biological or adoptive parent, the legal recognition of a non-biological parent as a de facto parent will not terminate the legal rights of a natural or adoptive

²⁵⁵ See *supra* notes 192-93 and accompanying text (explaining that one limitation of the UPA is that it only allows for a presumption of paternity and does not allow a mother-child relationship to be established through a presumption).

²⁵⁶ UNIF. PARENTAGE ACT (2000) § 201 (amended 2002), 9B U.L.A. 21 (Supp. 2012).

²⁵⁷ UNIF. PARENTAGE ACT (2000) § 204 (amended 2002), 9B U.L.A. 23-24 (Supp. 2012); UNIF. PARENTAGE ACT (2000) § 703 (amended 2002), 9B U.L.A. 71 (Supp. 2012).

²⁵⁸ See *supra* notes 192-93 (discussing the inapplicability of the UPA's presumption provisions to female same-sex couples).

²⁵⁹ See 64 AM. JUR. PROOF OF FACTS 3D *Custody and Visitation of Children by Gay and Lesbian Parents* § 3 (2001) (explaining studies have shown that same-sex parents are comparable in parenting to heterosexual parents).

²⁶⁰ See *Smith v. Gordon*, 968 A.2d 1, 14-15 (Del. 2009) (refusing to apply the de facto parent doctrine to same-sex couples because the legislature did not explicitly recognize the doctrine); *Jones v. Barlow*, 154 P.3d 808, 818 (Utah 2007) (refusing to apply the de facto parent doctrine because it conflicted with statutory law).

²⁶¹ See DEL. CODE ANN. tit. 13, § 8-201 (West 2009) (requiring the de facto parent to show the relationship was established with the support and consent of the parents, thereby limiting the amount of individuals who can claim this status).

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parent, merely allowing for a joint parental relationship.²⁶² The definition allows for joint custody between the non-biological parent and the biological parent in a same-sex relationship, comparable to second parent adoption.²⁶³

B. *Proposed Amendment to Section 204 to Include a Gender-Neutral Presumption of Parentage and Legalized Same-Sex Relationships*

Next, this Note proposes an amendment to section 204 of the UPA. In its current form, this provision provides for the presumption of paternity in certain circumstances, including marriage to the biological mother, regardless of whether the man is the biological or adoptive father.²⁶⁴ Therefore, the recommended amendments for this provision extend the presumption to both genders. Further, it takes into consideration same-sex relationships in granting this presumption by recognizing domestic partnerships and civil unions. The proposed amendment to the section reads as follows:

Section 204-Presumption of ~~Paternity~~-Parentage

- (a) ~~a man~~ *an individual* is presumed to be the ~~father~~ legal parent of a child if:
- (1) ~~he~~ *that individual* and the biological mother or father of the child are married to each other, or in a domestic partnership or civil union, as recognized by state law, and the child is born during ~~the marriage~~ *that legal relationship*;
 - (2) ~~he~~ *that individual* and the biological mother or father of the child were married to each other, or in a domestic partnership or civil union, as recognized by state law, and the child is born within 300 days after the marriage, domestic partnership, or civil union is terminated by death, annulment, declaration of invalidity, or divorce[, or after a decree of separation];
 - (3) before the birth of the child, ~~he~~ *that individual* and the mother or father of the child were married to,

²⁶² See *In re Parentage of L.B.*, 122 P.3d 161, 179 (Wash. 2005) (explaining that de facto parental status “do[es] not infringe on the fundamental liberty interests of the other legal parent in the family unit” because it allows for joint custodial status).

²⁶³ See *supra* note 5 (discussing the definition of second parent adoption, which allows for joint parental status between biological and non-biological parents in a same-sex relationship).

²⁶⁴ UNIF. PARENTAGE ACT (2000) § 204 (amended 2002), 9B U.L.A. 23-24 (Supp. 2012).

or in a domestic partnership or civil union with, each other in apparent compliance with law, even if the attempted marriage, domestic partnership, or civil union is or could be declared invalid, and the child is born during the invalid marriage, domestic partnership, or civil union, or within 300 days after its termination by death, annulment, declaration of invalidity, or divorce[, or after a decree of separation];

(4) ~~after the birth of the child, he that individual~~ and the *biological mother or father* of the child each married, *in a domestic partnership or civil union with, each other in apparent compliance with the law, whether or not the marriage, domestic partnership, or civil union is or could be declared invalid, and the individual voluntarily asserted parentage of the child,* and;

(A) the assertion is in a record filed with [state agency maintaining birth records];

(B) ~~he that individual~~ agreed to be and is named as the child's ~~father~~ parent on the child's birth certificate; or

(C) ~~he that individual~~ promised in a record to support the child as his or her own.

(5) ~~for the first two years of the child's life, he resided in the same household with the child and openly held out the child as his own~~

(b) *a presumption of parentage will establish an individual as a legal parent in the eyes of the court.*²⁶⁵

Commentary

The current language of the UPA is gender-specific and does not consider same-sex relationships; therefore, it only applies to males in a heterosexual relationship.²⁶⁶ Amending this section to be gender-neutral, as well as inclusive of domestic partnerships and civil unions,

²⁶⁵ The proposed amendments are italicized and are the contribution of the author and have been influenced by Washington's enactment of the UPA. The unitalicized portions are modeled after the original UPA. See UNIF. PARENTAGE ACT § 204 (amended 2002), 9B U.L.A. 23-24 (Supp. 2012); WASH. REV. CODE ANN. §§ 26.26.101 et seq. (West 2005).

²⁶⁶ See UNIF. PARENTAGE ACT (2000) § 204(a) (amended 2002), 9B U.L.A. 23-24 (Supp. 2012) (permitting a presumption of paternity when the father is married to the mother of the child).

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extends the presumption of marriage to both genders and same-sex relationships.²⁶⁷ Section 204(a) has been eliminated because it is no longer necessary with the inclusion of the de facto parent doctrine under section 201.²⁶⁸ These amendments to this provision will remedy the deficiencies of the current UPA because it allows the presumption of parentage within a marriage to be extended to same-sex couples in a legal union—domestic partnership or civil union.²⁶⁹

C. *Proposed Amendment to Section 703 to Include a Gender-Neutral Presumption of Parentage Within Artificial Reproduction*

Finally, the Note proposes amendments to section 703 of the UPA, which will correct deficiencies in the current UPA. This provision allows a male to be a presumed legal father over a child when he consents to the artificial reproduction of the female and intends to parent the child.²⁷⁰ As it currently stands, the provision can only apply to males in a heterosexual relationship.²⁷¹ The proposed amendment to the section reads as follows:

Section 703-~~Paternity~~ *Parentage of Child of Assisted Reproduction*

A man who provides sperm for, or consents to, assisted reproduction by a woman as provided by Section 704 with the intent to be the parent of her child, is a parent of the resulting child.

*A person who biologically provides for, or consents to, assisted reproduction with another person, regardless of gender, with the intent to be the parent of the child born, is the parent of the resulting child. Such consent and intent to be the parent is sufficient to establish legal parentage status equivalent to the biological parent of such child in the eyes of the law.*²⁷²

²⁶⁷ See *supra* Part III.A.2 (analyzing the limitations of the current UPA, which arise because of its gender-specific language).

²⁶⁸ See *supra* note 171 (comparing the UPA's presumption provision to the ALI's definition of de facto parent).

²⁶⁹ See *supra* note 3 (discussing the states that have legalized domestic partnerships and civil unions for same-sex couples).

²⁷⁰ See *supra* notes 39–41 and accompanying text (explaining the presumption of paternity available under the current version of the UPA when a male consents and intends to be the father of a child conceived through artificial insemination, which is not available to establish a legally recognized mother-child relationship).

²⁷¹ *Id.* See also *supra* notes 186–87 and accompanying text (discussing the limitations of the gender-specific language of section 703 of the UPA).

²⁷² The proposed amendments are italicized and are the contribution of the author and have been influenced by Washington's enactment of the UPA. WASH. REV. CODE ANN.

Commentary

Although the UPA recognizes couples that use artificial insemination, including situations in which a third party's sperm is donated, the current language of the UPA fails to consider same-sex couples that use a similar procedure.²⁷³ Under the current language, when a lesbian couple conceives a child through artificial insemination, the non-biological mother will not be able to establish a presumed legal relationship.²⁷⁴ By amending the language of the current UPA to include gender-neutral language, it will be applicable to same-sex couples and provide a presumption of maternity for non-biological parents in same-sex relationships.²⁷⁵

V. CONCLUSION

A parent's legal status implicates numerous legal benefits for both the parent and child, including inheritance, medical decisions, and most importantly custody. The number of same-sex couples starting families through adoption or artificial reproduction is increasing.²⁷⁶ Same-sex couples are severely disadvantaged in establishing parenting rights, because the majority of states do not legally recognize same-sex marriage or second parent adoptions. Of greater importance, the risk for a non-biological or non-adoptive parent of losing custody over a child he or she has raised and loved over many years is of grave consequence for both parent and child.

The UPA is highly influential when states choose to enact statutes regarding parentage. The UPA was intended to create equality among children born in and out of marriage. Although it achieves this purpose in regards to heterosexual parents, the UPA does not create equality among parents in a same-sex relationship because of its gender specific

§ 26.26.710 (West 2005). The unitalicized portions are modeled after the original UPA. UNIF. PARENTAGE ACT (2000) § 703 (amended 2002), 9B U.L.A. 71 (Supp. 2012).

²⁷³ UNIF. PARENTAGE ACT (2000) § 703 (amended 2002), 9B U.L.A. 71 (Supp. 2012); *see supra* notes 186–87 and accompanying text (explaining that the gender-specific language precludes a female from being a presumed parent under section 703); *see also supra* note 177 and accompanying text (discussing that section 703 can only be beneficial to same-sex couples if it is applied without considering gender).

²⁷⁴ *See supra* notes 186–88 and accompanying text (illustrating the limitations of the current UPA, because the provision will not apply in its current form with gender-specific language to a female attempting to establish parentage).

²⁷⁵ *Id.*

²⁷⁶ Gary Gates, *Family Formation and Raising Children Among Same-Sex Couples*, WILLIAMS INST. (Jan. 2012), <http://williamsinstitute.law.ucla.edu/research/census-lgbt-demographics-studies/family-formation-and-raising-children-among-same-sex-couples/>. In the 2000 Census, approximately 63,000 same-sex couples were raising children, and this number has grown to 110,000. *Id.*

language. As previously explained, states that have enacted the UPA, as well as states that have not enacted it, greatly differ in statutory language, thereby causing inconsistency among states in the granting of parental rights for non-biological parents. In addition, some courts are not willing to extend equitable remedies, like de facto parenting, because of the narrow language of their statutes. Consequently, non-biological parents of same-sex couples have limited options if they want to gain legal parental status over their child.

As a result of these limitations, it is essential that the current version of the UPA be amended to consider non-traditional families—like same-sex couples. By amending the UPA, states will have better guidance in creating their own statutes for defining a de facto parent. In addition, amending the UPA to clearly allow same-sex couples to establish parenting status gives states greater clarity when faced with the issue of a non-biological parent establishing custodial rights.

Returning to the hypothetical described at the beginning of this Note: under the current version of the UPA, Marcie is unable to establish herself as a legal parent although she and Emma created a family together.²⁷⁷ Marcie was a parent—she loved, supported, and provided for her three children. Yet, under the current law, Marcie will not be recognized as a parent. In many states, she will lose her children and status as a mother merely because of her sexual orientation. However, Marcie would be protected as a legal parent if states enact the UPA with this Note's proposed amendments. Thus, equality compels the UPA to modernize its language and expand its definition of "parent."

Jennifer Sroka*

²⁷⁷ See *supra* Part I (presenting a hypothetical, based on a recent Ohio case, in which a non-biological mother in a same-sex relationship was denied legal parental status over the children raised by the couple together, and therefore she lost custody of her children).

* J.D. Candidate, Valparaiso University Law School (2013); B.A., Psychology and Cinema, Denison University (2007). First and foremost, I would like to thank my father, Mike, who always believed I could be a Supreme Court Justice and always pushes me to be the best I can be. Thank you to my mother, Rita, for her unconditional emotional support and encouragement. To my amazing sister, Sarah, who has always had my back and continually inspires me. Thank you to all my friends, without whom I could not have survived law school or the Note-writing process. I also would like to thank Jessica Levitt and Shea Maliszewski for all their help in getting this Note published. A special thank you to Professor Stuart, who has been an amazing mentor throughout my law school career and who taught me how to write to make this Note possible. And, finally, this Note is dedicated to all gay and lesbian individuals, especially those who are parents, who continuously fight for equality in hopes that one day there truly will be liberty and justice for all.