A Logical Step Forward: Extending Voluntary Acknowledgments of Parentage to Female Same-Sex Couples

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ABSTRACT: Under current law, stark differences exist between different- and same-sex couples who welcome children into the world with regard to the ease through which the member of the couple who did not give birth to the child is able to obtain legal parent status. While a number of simple, efficient procedures exist for establishing legal parentage for different-sex partners of women who give birth, same-sex partners of women who give birth often have to go through significantly more complex, time-consuming, and expensive procedures in order to establish legal parentage. The inequitable treatment of same-sex couples in establishing legal parentage has extremely harmful consequences for these couples and their children, and legal reform to address the unfair treatment of same-sex parents is long overdue.

The hesitation to extend to same-sex couples the simple, efficient methods of establishing legal parent status available to different-sex couples likely stems from the longstanding tie between genetic connections and the establishment of legal parentage. While the law's historical privileging of genetic connections in parentage determinations poses some challenges for same-sex couples in obtaining access to the simple, efficient methods of establishing legal parentage in existence today, these challenges are far from insurmountable. This Article sets forth a comprehensive proposal for the federal government to require states to extend voluntary acknowledgments of parentage, which currently allow a birth mother’s different-sex partner to establish paternity through the execution of a document at the time of the child’s birth, to female same-sex couples who conceive children using sperm provided in compliance with state donor non-

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paternity laws. The proposal represents a logical, modest step in the right direction for ameliorating the difficulties faced by same-sex parents in obtaining legal parentage without requiring significant upheaval to state laws governing the rights of genetic parents or federal laws governing voluntary acknowledgments of parentage.

INTRODUCTION

For different- and same-sex couples alike, welcoming a child into the world usually stands out as a momentous and joyous event in family life. Yet different-
and same-sex couples’ experiences diverge significantly with respect to the ease through which the member of the couple who did not give birth to the child is able to obtain legal parent status. While a number of simple, efficient procedures exist for establishing legal parent status for different-sex partners of women who give birth, same-sex partners of women who give birth often have to go through significantly more complex, time-consuming, and expensive procedures in order to obtain legal parent status. In addition, under existing law in a number of jurisdictions, non-marital same-sex partners of women who give birth are completely denied access to any avenues of establishing legal parent status. The current legal framework governing parentage in the United States leads to unfair, harmful results, and is in need of significant reform.

The unequal treatment of same-sex couples under current laws governing the establishment of parentage is deeply problematic for a number of reasons. As an initial matter, it is simply unfair that same-sex couples who wish to establish legal parentage for the non-birth parent not only often have to expend significantly more time and resources than their different-sex counterparts, who have access to simple, efficient avenues to establishing parentage, but also that unmarried same-sex couples are denied access to any avenues of establishing legal parentage for the non-birth parent in a number of jurisdictions. More importantly, significant harm and instability for same-sex parents and their children can result if the non-birth parent is unable to establish legal parent status. In situations in which the non-birth parent is unable to establish legal parent status, the couple’s children are deprived of the emotional benefits, stability, and significant legal protections and benefits that would arise from having two legally recognized parents, and the non-birth parent is deprived of the important rights and protections that would arise from having a legally recognized relationship with the couple’s children.

1. See infra Section II.
2. It is important to note that non-binary people and transgender men also may give birth. See Nancy Coleman, Transgender Man Gives Birth to a Boy, CNN, Aug. 1, 2017, https://www.cnn.com/2017/07/31/health/trans-man-pregnancy-dad-trnd/index.html [https://perma.cc/MC69-WXZ4]. The author recognizes that some individuals do not identify as male or female; when this Article uses gender-specific language, it is for purposes of clarity and coherence within the discussion.
3. Id.
4. See infra note 68 and accompanying text.
6. See infra notes 77–79 and accompanying text.
In order to ameliorate the unfair and harmful treatment of same-sex parents and their children under current law governing the establishment of parentage, the law must be reformed to provide same-sex couples with greater access to simple, efficient methods of establishing legal parent status for the non-birth parent. Structuring realistic, effective proposals for legal reform in this area requires first examining the characteristics of the legal framework governing parentage that likely have led to the law’s hesitancy to extend to same-sex couples the simple, efficient methods of establishing legal parent status available to different-sex couples. An examination of the development of the law governing parentage reveals that considerations based upon genetic connections are likely at the heart of the current legal treatment of same-sex parents. More specifically, there is a long history in the United States of tying genetic connections to legal parentage. The law has privileged genetic connections both by making genetic connections a significant consideration in determining whether someone is a legal parent and by setting a high bar for severance of the legal relationship between a child and their genetic parent.

Parentage law’s reliance on genetic connections poses two primary issues for same-sex couples with regard to obtaining greater access to simple, efficient avenues to establishing legal parent status. The first issue is that it is generally only possible for one member of a same-sex couple to be a genetic parent of the couple’s child, which means that there will be one member of the couple who is not genetically connected to the child. This issue, however, does not present a major concern, as a number of the simple, efficient avenues to establishing legal parent status in existence today do not require that the parent in question share a genetic connection to the child. The second issue faced by same-sex couples in obtaining access to the simpler, more efficient avenues to obtaining legal parent status is that, generally speaking, there will necessarily be someone outside of a same-sex couple’s relationship whose genetic materials were used in conceiving children.
This is a more significant issue when considering the current legal framework governing parentage, as laws throughout the United States provide significant rights and protections to individuals who are genetic parents. Considering that states' parentage laws generally only recognize two individuals as a child's legal parents, laws allowing the non-birth parent in a same-sex relationship to obtain the status of the child's second legal parent through simple, efficient avenues could conflict with existing state laws that provide protections to genetic parents or create a situation in which, contrary to current law in most states, more than two people are entitled to parental rights. Fortunately, however, there is a realistic, relatively simple way through which this issue could be addressed so that a significantly greater number of same-sex couples could gain access to a simple, efficient avenue to establishing legal parentage without running afoul of existing state parentage laws.

This Article proposes that the federal government require states to extend voluntary acknowledgments of parentage ("VAPs"), which are governed by federal law and currently allow the different-sex partner of an unmarried birth mother to establish legal parentage through the execution of a document at the time of the child's birth, to female same-sex couples who conceive children using sperm provided in compliance with state donor non-paternity laws. This proposal represents a logical, realistic, and modest step in the right direction for ameliorating the difficulties currently faced by same-sex couples in establishing both members as legal parents. When a female same-sex couple conceives a child using sperm provided in compliance with a state's donor non-paternity law, there is no issue involving possible parental rights for the second genetic parent outside of the same-sex couple's relationship—in that situation, the sperm provider is not a legal parent. As a result, allowing a birth mother's same-sex partner to obtain legal parent status through the completion of a VAP in these cases would be a more appropriate title. See Leslie J. Harris, Voluntary Acknowledgments of Parentage for Same-Sex Couples, 20 AM. U. J. GENDER SOC. POL'Y & L. 467, 470 (2012).
situations will not conflict with state laws governing the rights and obligations of genetic parents.

Moreover, extending VAP procedures to female same-sex couples who conceive children using sperm provided in compliance with state donor non-paternity laws would advance the federal government's primary goal in establishing VAP requirements in the first place: decreasing government spending on welfare programs by identifying two legal parents, each of whom is legally obligated to provide financial support for the child, for every child as soon as possible following the child's birth.\textsuperscript{16} While there have been thoughtful proposals from scholars and commentators urging states to extend VAPs to same-sex couples,\textsuperscript{17} there will almost certainly be a significant number of states that decline to take such action on their own accord.\textsuperscript{18} The proposal set forth in this Article aims to take advantage of the unique federal nature of VAPs to advocate for reform at the federal level in order to help a greater number of same-sex couples throughout the United States obtain legal parentage.\textsuperscript{19} Overall, if implemented, the proposal would be a significant step toward ameliorating the unjust and harmful treatment of same-sex parents and their children under current law governing the establishment of parentage.

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\item \textsuperscript{16} See Susan F. Paikin \& William L. Reynolds, Parentage and Child Support: Interstate Litigation and Same-Sex Parents, DEL. LAW., Spring, 2006, at 26, 28–29 ("Spurred to action by the burgeoning number of nonmarital children and the attendant child poverty and welfare dependence associated with single-parent families, Congress required states to enact and use expedited procedures to streamline paternity establishment . . . to ensure that nonmarital children gained the financial and emotional benefit of two parents."); Julia Saladino, Is a Second Mommy a Good Enough Second Parent?: Why Voluntary Acknowledgements of Paternity Should be Available to Lesbian Co-Parents, 7 MOD. AM. 2, 2 (2011) (explaining that the goals of the federal government in adopting VAP requirements included the establishment of legal parentage for two individuals "as early in a child's life as possible," in order to facilitate the collection of child support).
\item \textsuperscript{17} See, e.g., Harris, supra note 14 (proposing that states extend the use of VAPs as a tool for granting legal parentage to all unmarried same-sex couples); UNIF. PARENTAGE ACT § 301, cmt. (2017), available at http://www.uniformlaws.org/shared/docs/parentage/UPA2017_Final_2017sep22.pdf ("This section has been revised to permit an intended parent under Article 7 or a presumed parent to sign an acknowledgment of parentage, in addition to an alleged genetic parent. This change not only furthers the goal of ensuring that the act applies equally to children born to same-sex couples, but it also furthers the goal of establishing parentage quickly and with certainty.").
\item \textsuperscript{18} See, e.g., Joanna Piacenza \& Jessica Walthall, Attitudes on Same-sex Marriage in Every State, PPRI, Apr. 20, 2015, https://www.prori.org/spotlight/map-every-states-opinion-on-same-sex-marriage/ [https://perma.co/52SF-X5EG] (discussing regional differences in attitudes toward extending marriage to same-sex couples).
\item Professor Courtney Joslin has proposed that Congress enact legislation requiring states to adopt a VAP-like administrative registration system for individuals who are already entitled to recognition as legal parents under the existing laws of the birth state governing the parentage of children conceived through assisted reproduction. Courtney Joslin, Travel Insurance: Protecting Lesbian and Gay Parent Families Across State Lines, 4 HARV. L. \& POL'Y REV. 31, 43–45 (2010). Professor Joslin's proposal, if implemented, would ensure that same-sex parents who are entitled to recognition as legal parents under the existing laws of the birth state will be recognized as legal parents across jurisdictions without first having to go to court to obtain a judgment of parentage. \textit{Id.} at 45 n.68. It would not, however, help those individuals who are not already entitled to recognition as legal parents under the existing laws of the birth state to establish legal parentage. \textit{Id.}
\end{itemize}
The Article is organized in the following manner. Section II identifies and analyzes the current inequality faced by same-sex couples in establishing legal parent status by comparing the avenues to obtaining legal parent status available to different-sex partners of women who give birth with the avenues available to same-sex partners of women who give birth. Section III discusses the law’s longstanding reliance on genetic connections in parentage determinations and explains why this reliance presents a problem for same-sex couples in obtaining access to simple, efficient methods of establishing legal parent status. Section IV sets forth a detailed proposal for the extension of VAP procedures to female same-sex couples who conceive children using sperm provided in compliance with state donor non-paternity laws. Finally, Section V identifies and addresses the likely concerns that will be raised regarding the proposed legal reform.

I. THE INEQUALITY FACED BY SAME-SEX COUPLES IN ESTABLISHING BOTH MEMBERS OF THE COUPLE AS LEGAL PARENTS

Significant differences exist between different- and same-sex couples who welcome children into the world with regard to the ability of the member of the couple who did not give birth to obtain legal parent status. There are a number of simple, efficient procedures that exist for establishing legal parent status for different-sex partners of women who give birth. For same-sex partners of women who give birth, however, obtaining legal parent status often requires undertaking significantly more cumbersome and expensive procedures, and non-marital same-sex partners of women who give birth may be denied access to any procedures in some jurisdictions. This Section will discuss the simple, efficient methods of establishing legal parent status that are available to different-sex partners of women who give birth, and contrast these methods with the procedures that same-sex partners of women who give birth must undertake in order to reach the same result.20

A. The Simple, Efficient Methods Currently Available to Different-Sex Couples for Establishing Both Members as Legal Parents

For married different-sex couples, under the marital presumption of paternity, which exists in some form in every state, the husband of a woman who

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20. This Section will focus on formal avenues to obtaining parental rights as opposed to functional avenues such as equitable parenthood doctrines and "holding out presumptions," which generally provide parental rights to a person who has functioned as a child's parent for a sufficient period of time. See generally Jessica Feinberg, Whither the Functional Parent? Revisiting the Need for Equitable Parenthood Doctrines in Light of the Increasing Availability to Same-Sex Parents of Avenues to Obtaining Formal Legal Parent Status, 83 BROOK. L. REV. 59-60 (2017) [hereinafter Feinberg, Whither the Functional Parent?].
gives birth to a child is presumed by law to be the child’s second legal parent. Consequently, when a woman in a different-sex marriage gives birth to a child, generally no action needs to be taken in order for her husband to be considered the child’s second legal parent. With regard to married different-sex couples who conceive children through the use of assisted reproductive technology (“ART”), pursuant to statutory or common law rules, a husband who consents to his wife’s use of ART with the intent to be the resulting child’s parent generally is presumed or conclusively determined to be the child’s second legal parent regardless of whether the child is conceived using the husband’s sperm or donor sperm. While the laws of some jurisdictions require that the husband’s consent be in writing and/or that the procedure be performed by or under the supervision of a physician, these laws nonetheless provide husbands of women who conceive children using ART with a relatively simple and efficient method of obtaining legal parent status.

In terms of unmarried different-sex couples, although only eleven jurisdictions have statutes establishing parentage for unmarried men who consent to a partner’s use of ART, in every jurisdiction the male partner of an unmarried woman who gives birth can establish legal parent status through the execution of a VAP. VAPs provide a simple and efficient procedure that allows unmarried different-sex couples to establish legal parent status for the male member of the couple by simply signing a document acknowledging his paternity. Reform to federal child support and welfare laws in the 1990s led to the creation of the VAP procedures currently in effect. States are required to comply with the federal guidelines regarding VAPs in order to receive federal funding for their child welfare and child support programs, and because the

22. See id.
24. See id.
federal funding is “critical to the functioning of the state programs,” all states
have opted to comply with the guidelines. The goal of the federal government
in requiring states to adopt VAP procedures was to facilitate the identification of
two legal parents from whom child support could be sought as early as possible
following the child’s birth in order to decrease government spending on welfare
programs.

The federal guidelines mandate that VAPs be offered by all birthing
hospitals, both public and private, as well as all birth records offices. Birthing
hospitals must have in place voluntary paternity establishment services that focus
on the time period immediately before and after the birth of a child born to an
unmarried mother. Notice must be provided to the birth mother and putative
father, both orally and in writing, “of the alternatives to, the legal consequences
of, and the rights and responsibilities of acknowledging paternity.” Both
the birth mother and putative father must sign the document acknowledging the
putative father’s paternity, and the signatures must be authenticated by a notary
or witness. The hospital is required to submit the document to the state registry
of birth records.

Either signatory may rescind the VAP until sixty days have passed or there
has been an administrative or judicial proceeding relating to the child, whichever
occurs earlier. After that point, VAPs can only be challenged on the grounds
of duress, material mistake of fact, or fraud. Importantly, pursuant to federal
law, a VAP that is not rescinded within 60 days must be “considered a legal
finding of paternity.” In addition, federal law requires that states give full faith
and credit to out-of-state VAPs executed in compliance with federal law and the
law of the issuing state. Today, VAPs have become the most common method
of establishing legal parent status for the male partners of unmarried women who
give birth, with over one million unmarried different-sex couples executing

30. Harris, supra note 14, at 475.
31. See supra note 16 and accompanying text; see also Jayna M. Cacioppo, Voluntary
Acknowledgements of Paternity: Should Biology Play a Role in Determining who Can be a Legal
Father?, 38 IND. L. REV. 479, 481 (2005) ("Thus, in an effort to ensure support for a child born out
of wedlock, the government has made it virtually effortless to become a legally recognized father.").
32. 45 C.F.R. §§ 303.5(g)(1)(i)–(ii) (2016); Harris, supra note 14, at 476.
33. 45 C.F.R. § 303.5(g)(1)(i).
34. Id. § 303.5(g)(2)(i).
35. Id. § 303.5(g)(4).
36. Id. § 303.5(g)(8).
37. OFFICE OF INSPECTOR GEN., U.S. DEP’T OF HEALTH & HUMAN SERVS., PATERNITY
ESTABLISHMENT: USE OF VOLUNTARY PATERNITY ACKNOWLEDGMENTS 1 (2000), available at
38. Id.
40. Id. § 666(a)(5)(C)(iv).
VAPs each year. The popularity of the VAP is easy to understand, as it serves as a simple, inexpensive, and efficient way for unmarried different-sex couples to ensure that both members of the couple are recognized as legal parents.

B. The Methods Currently Available to Same-Sex Couples for Establishing Both Members as Legal Parents

With regard to the avenues currently available to married same-sex couples for establishing legal parentage, as a result of the 2015 Supreme Court decision in Obergefell v. Hodges, which held that states may not "bar same-sex couples from marriage on the same terms as accorded to couples of the opposite sex," the marital presumption of paternity should apply to both different- and same-sex spouses of women who give birth. Unfortunately, however, while most of the courts that have addressed the issue have held that the marital presumption of paternity applies to married same-sex couples, not every court has reached

41. Harris, supra note 14, at 469.
43. JOSLIN ET AL., supra note 23, § 5:22 ("After Obergefell v. Hodges, all marriage-based parentage rules—including the marital presumption—should be applied equally to same-sex spouses (although some states may initially resist this proposition."). This reading of Obergefell is further supported by the Supreme Court's recent decision in Pavan v. Smith, in which the Court held that under Obergefell, Arkansas could not refuse to list the name of a birth mother's female spouse on the child's birth certificate when state law generally required the name of birth mothers' male spouses to appear on birth certificates. 137 S. Ct. 2075, 2077 (2017). However, Pavan concerned only birth certificates, not the presumption of parentage itself, and generally "a birth certificate is merely prima facie evidence of the information stated within." JOSLIN ET AL., supra note 23, § 5:24.
44. See, e.g., McLaughlin v. Jones ex rel. County of Pima, 401 P.3d 492, 496–98 (Ariz. 2017) (holding that Obergefell requires the extension of the state's marital presumption of parentage to same-sex couples); Joseph O. v. Danielle B., 71 N.Y.S.3d 549, 552 (App. Div. 2018) (holding that the state's marital presumption of parentage applies to same-sex couples); Christopher YY. v. Jessica ZZ., 69 N.Y.S.3d 887, 893 (App. Div. 2018) ("While a workable rubric has not yet been developed to afford children the same protection regardless of the gender composition of their parents' marriage, and the Legislature has not addressed this dilemma, we believe that it must be true that a child born to a same-gender married couple is presumed to be their child."); Barse v. Pasternak, No. HHBFA124030541S, 2015 WL 600973, at *10 (Conn. Super. Ct. Jan. 16, 2015) ("[T]his court finds that the protections of Connecticut's common-law presumption of legitimacy apply equally to children of same-sex and opposite-sex married couples and that the marital presumption applies equally to same-sex and opposite-sex marriages."); Gartner v. Iowa Dep't of Pub. Health, 830 N.W.2d 335, 340–41 (Iowa 2013) (holding that due to its language excluding married female same-sex couples, the existing marital presumption statute was unconstitutional and striking down the portion of the statute containing the exclusionary language); cf. Miller-Jenkins v. Miller-Jenkins, No. 454-11-03, 2004 WL 6040794 (Vt. Super. Ct. Nov. 17, 2004) (ruling that because civil unions granted same-sex couples all of the rights and obligations of marriage, the marital presumption of paternity applied to same-sex couples who had entered into civil unions). See also Kerry Abrams & R. Kent Piacenti, Immigration's Family Values, 100 VA. L. REV. 629, 709 (2014) ("Most states that recognize same-sex marriages, for example, also extend the marital presumption of paternity to gay and lesbian couples, even though in many of these instances there is no chance that the marital parent is also the genetic parent."). The vast majority of cases addressing the application of the marital presumption of paternity to same-sex couples have involved female same-sex couples, and it is unclear whether courts will be willing to apply the presumption to male same-sex couples, who require a surrogate in order to conceive a child via ART. See Susan F. Appleton, Presuming Women:
the same result and only a handful of jurisdictions have amended their marital presumption statutes to clarify that the presumption applies to a birth mother’s spouse regardless of the spouse’s sex. Moreover, for marital presumptions of paternity to be applied effectively and justly to same-sex couples, states will need to amend their existing procedures and grounds for rebuttal, which generally focus on proving that the birth mother’s husband is not the child’s genetic parent. An additional result of Obergefell should be that ART statutes applicable to married different-sex couples, which generally establish parentage, apply to the same-sex spouses of women who conceive children via ART. Although courts that have addressed the issue generally have ruled that ART statutes that on their face apply only to married different-sex couples extend to married same-sex couples, only a limited number of courts have

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Revisiting the Presumption of Legitimacy in the Same-Sex Couples Era, 86 B.U. L. REV. 227, 260–61 (2006); Alexandra Eisman, The Extension of the Presumption of Legitimacy to Same-Sex Couples in New York, 19 CARDOZO J.L. & GENDER 579, 593–95 (2013). However, a New York appellate court recently held that the state’s marital presumption of paternity applied to a male same-sex couple who had jointly entered into a valid surrogacy agreement during their marriage. In re Maria-Irene D., 153 61 N.Y.S.3d 221, 223 (App. Div. 2017).

45. See, e.g., In re A.E., No. 09-16-00019-CV, 2017 WL 1535101, at *8 (Tex. App. Apr. 27, 2017) (declining to apply the marital presumption of paternity to a same-sex couple and stating that ‘‘Obergefell did not hold that every state law related to the marital relationship or the parent-child relationship must be ‘gender neutral’’’); In re Paczkowski v. Paczkowski, 10 N.Y.S.3d 270, 271 (App. Div. 2015) (holding that the statutory marital presumptions of paternity did not apply to the wife of a woman who conceived a child during the couple’s marriage, ‘‘since the presumption of legitimacy [the statutes] create is one of a biological relationship, not of legal status ... and, as the nongestational spouse in a same-sex marriage, there is no possibility that [the wife] is the child’s biological parent’’ (citations omitted)); Q.M. v. B.C., 995 N.Y.S.2d 470, 474 (Fam. Ct. 2014) (declining to apply the marital presumption of paternity to a same-sex couple and explaining that the state’s ‘‘Marriage Equality Act does not require the court to ignore the obvious biological differences between husbands and wives’’).


47. See Christopher YY v. Jessica ZZ., 69 N.Y.S.3d 887, 892 (App. Div. 2018) (“Application of existing case law involving different-gender spouses, addressing whether the presumption has been rebutted, to a child born to a same-gender married couple is inherently problematic, as it is not currently scientifically possible for same-gender couples to produce a child that is biologically the ‘product of the marriage.’’’); Jessica Feinberg, Consideration of Genetic Connections in Child Custody Disputes Between Same-Sex Parents: Fair or Foul?, 81 MO. L. REV. 331, 334, 342 (2016) [hereinafter Feinberg, Consideration of Genetic Connections] (“The evidence most commonly used to rebut the marital presumption is genetic testing results. Moreover, under the Uniform Parentage Act of 2002 ... [the only evidence that is admissible to rebut the marital presumption ... is genetic testing results.”).

48. JOSLIN ET AL., supra note 23, § 3:3 (“After the decision in Obergefell v. Hodges requiring that states permit and recognize marriages between same-sex spouses on the ‘same terms and conditions’ as for different-sex spouses, these rules should be applied equally to same-sex couples who have children through assisted reproduction during their marriage.”).

addressed the issue to date, and less than one-third of existing state statutes that grant parentage based upon consent to a spouse’s use of ART currently are written in gender neutral terms.

Because only a limited number of courts have addressed the applicability of marital presumptions of paternity and marriage-based ART statutes to married same-sex couples, and because those courts have not reached uniform results, "many legal advocates encourage same-sex couples who have children during a marriage . . . to continue to complete adoptions or otherwise obtain judgments establishing the legal parentage of both partners." Even if a married same-sex couple’s home state recognizes the non-birth parent as a legal parent based upon its marital presumption of paternity or marriage-based ART statute, other states may not. Consequently, many legal experts continue to recommend that all married same-sex couples obtain parentage judgments for the non-birth parent, even those couples who reside in states in which marital presumptions of paternity or marriage-based ART statutes apply to same-sex couples. Such judgments, which must be respected by other states under principles of full faith and credit, ensure that both members of a same-sex couple will be recognized as legal parents across jurisdictions.

Obtaining a legal judgment of parentage for the member of a married same-sex couple who did not give birth to the child generally requires undertaking a stepparent adoption. Stepparent adoption allows the spouse of a child’s existing legal parent to adopt the child without the existing legal parent losing their parental rights, provided that the child does not already have a second legal parent or the second legal parent has consented to the termination of their parental rights. Although the stepparent adoption process is generally less onerous than other forms of adoption, it is nonetheless a substantial undertaking. Even in jurisdictions that waive requirements such as financial accountings and home studies for stepparent adoptions, many individuals require the assistance of an attorney to navigate the process, and the procedure often

50. NeJaime, supra note 46, app. A.
51. Id. at 2294 n.163.
52. JOSLIN ET AL., supra note 23, § 3:4. See also NAT’L CTR. FOR LESBIAN RIGHTS, LEGAL RECOGNITION OF LGBT FAMILIES 1 (2016), available at http://www.nclrights.org/wp-content/uploads/2013/07/Legal_Recognition_of_LGBT_Families.pdf [https://perma.cc/4TE8-MHUQ] (“Regardless of whether you are married or in a civil union or comprehensive domestic partnership, NCLR always encourages non-biological and non-adoptive parents to get an adoption or parentage judgment, even if you are named on your child’s birth certificate.”).
53. JOSLIN ET AL., supra note23, § 5:23.
54. Id.
55. Id.
56. JOSLIN ET AL., supra note 23, § 5:2.
58. Id. at 80.
requires submitting various documents, paying court fees, appearing in court, submitting to a background check, and undergoing some form of post-placement supervision. Consequently, in order to guarantee that they will be recognized as legal parents, married same-sex couples often must undertake a parentage establishment process that is significantly more complex, expensive, and time-consuming than the process required for their married different-sex counterparts, to whom marital presumptions of paternity and marriage-based ART statutes clearly apply across jurisdictions.

While it is likely that the rights of married same-sex couples to use the simple, efficient methods of obtaining legal parent status available to married different-sex couples through the marital presumption of paternity and marriage-based ART statutes will become more clearly established, unmarried same-sex couples are for the most part left without any simple, efficient method of establishing legal parent status for the member of the couple who did not give birth. With regard to differences in how the law of parentage treats unmarried different- and same-sex couples, while eleven jurisdictions have extended to unmarried different-sex couples statutes establishing parentage based upon consent to a partner’s use of ART, only eight of those jurisdictions’ statutes also include unmarried same-sex couples. A more striking difference in the law’s treatment of unmarried different- and same-sex couples, however, is that the overwhelming majority of states have failed to extend to unmarried same-sex couples the most common method of establishing legal parent status for unmarried different-sex couples: the VAP. As a result, unmarried same-sex couples often are left without any simple, efficient method of establishing both members of the couple as parents.

Due to a lack of other options, second parent adoption is the avenue most commonly used by unmarried same-sex couples to establish legal parent status

59. "Many individuals require the assistance of an attorney to navigate the [stepparent adoption] process and thus incur attorney’s fees, and the procedure often requires, inter alia, submitting various documents, paying court fees, appearing in court, and submitting to a background check.”).

60. "Id."

61. JOSLIN ET AL., supra note 23, § 3:3.

62. Harris, supra note 14, at 470. In terms of some notable state advancements in this area, in 2017 Nevada adopted a bill that adds voluntary acknowledgements of parentage to its existing parentage establishment procedures, which already included voluntary acknowledgements of paternity. 2017 NV A.B. 191. The bill provides that voluntary acknowledgements of parentage may be executed by the child’s birth mother and “a person who wishes to acknowledge the parentage of a child.” Id. In addition, in 2018 Washington adopted the 2017 Uniform Parentage Act, which extends the use of VAPs to a birth mother’s same-sex partner who qualifies as an “intended parent” or a “presumed parent” under the Act. S.B. 6037, 65th Leg., Reg. Sess. (Wa. 2018), available at http://lawfilesext.leg.wa.gov/biennium/2017-18/Pdf/Bills/Session%20Laws/Senate/6037-S.SL.pdf [https://perma.cc/8T2R-NFLV]. This law will become effective on January 1, 2019. "Id.

63. Harris, supra note 14, at 469–70.
for the member of the couple who did not give birth to the child.\textsuperscript{64} Second parent adoption generally allows the same-sex partner of a child’s legal parent to become the child’s second legal parent in situations in which the child only has one existing legal parent.\textsuperscript{65} Unfortunately, however, second parent adoption is not available in all jurisdictions.\textsuperscript{66} Only fourteen states grant second parent adoptions on a statewide basis; an additional fourteen states grant second parent adoptions in certain counties.\textsuperscript{67} In jurisdictions that do not grant second parent adoptions, unmarried same-sex couples who conceive children are often left without any avenue to obtaining legal parent status for the non-birth parent.\textsuperscript{68} Even in jurisdictions in which second parent adoption is available, establishing legal parent status for the non-birth parent through this method is far from efficient or simple.

The second parent adoption process can be complicated, time-consuming, and expensive. Like stepparent adoption, the second parent adoption process usually requires the couple to hire an attorney, appear in court, pay court fees, execute various documents, and submit to background checks.\textsuperscript{69} Unlike stepparent adoptions, however, second parent adoptions often require home studies, which, in addition to being intrusive and costly, can also prolong the adoption process.\textsuperscript{70} During the home study process, potential adoptive parents

\begin{itemize}
  \item \textsuperscript{64} For unmarried same-sex couples who conceive children via ART and wish to establish the non-birth parent as the child’s legal parent, unless the relevant jurisdiction is one of the eight jurisdictions in which the statute providing parental status to an individual who consents to a partner’s use of ART to conceive extends to unmarried same-sex couples, second parent adoption usually is the only formal avenue available. See \textsc{Joslin et al.}, supra note \textsuperscript{23}, § 3:3.
  
  \item \textsuperscript{65} \textsc{Nat’l Ctr. for Lesbian Rights}, supra note \textsuperscript{52}, at 2.
  
  \item \textsuperscript{66} \textit{Id}.
  
  \item \textsuperscript{67} \textit{Id}.
  
  \item These couples will be left without an avenue to obtaining legal parent status for the non-birth parent unless the relevant jurisdiction is one of the few jurisdictions in which the statute providing parental status to an individual who consents to a partner’s use of ART to conceive extends to unmarried same-sex couples or one of the few jurisdictions in which non-birth parents in non-marital same-sex relationships can obtain legal parent status through equitable parenthood doctrines. See \textsc{Joslin et al.}, supra note \textsuperscript{23}, § 3:3; \textsc{Me. Rev. Stat. Ann.} tit. 19-a, §§ 1851, 1891 (2016) (establishing that an adjudication of de facto parentage is one way to establish legal parenthood); \textsc{Del. Code Ann.} tit. 13, §§ 8-201, 8-203 (2016) (stating that one way for an individual to establish a parent-child relationship is to be adjudicated a de facto parent and that “a parent-child relationship established under this chapter applies for all purposes”); \textit{In re Parentage of L.B.}, 122 P.3d 161, 177 (Wash. 2005) (“We thus hold that henceforth in Washington, a de facto parent stands in legal parity with an otherwise legal parent, whether biological, adoptive, or otherwise.”). While a number of other jurisdictions have equitable parenthood doctrines, these doctrines generally only explicitly provide qualifying individuals with rights relating to custody or visitation, as opposed to legal parent status. \textsc{Courtney G. Joslin}, \textit{Leaving No (Nonmarital) Child Behind}, 48 FAM. L.Q. 495, 502 (2014).
  
  \item \textsuperscript{69} \textsc{Feinberg}, \textit{Whither the Functional Parent?}, supra note \textsuperscript{20}, at 81.
  
  \item \textsuperscript{70} \textsc{Alexander Newman}, \textit{Same-Sex Parenting Among a Patchwork of Laws: An Analysis of New York Same-Sex Parents’ Options for Gaining Legal Parental Status}, 2016 CARDOZO L. REV. \textsc{De Novo} 77, 84 (2016) (“Stepparent adoptions are often preferable to second-parent adoptions, in part because they frequently are less costly: second-parent adoptions can require expensive home studies before
generally must engage in several interviews, undergo training, provide references, and present evidence that they are healthy enough, both physically and financially, to care for a child.\footnote{71} An investigation of the home is also generally required, and the home study process generally takes between two and ten months to complete.\footnote{72} On average, second parent adoption costs between $2000 and $3000,\footnote{73} and, depending on the jurisdiction, can cost upwards of $5000.\footnote{74}

The discrimination faced by same-sex couples under current law is deeply problematic for a number of reasons. As an initial matter, it is unfair both that same-sex couples often have to spend significantly more time and money than their different-sex counterparts in establishing legal parent status for the member of the couple who did not give birth, and that in a number of jurisdictions unmarried same-sex couples are denied access to any avenues of establishing legal parent status for the non-birth parent.\footnote{75} More importantly, if a same-sex couple is not able to establish the member who did not give birth as the legal parent of the couple’s children, whether due to a lack of resources to pursue the available avenues or a lack of available avenues, significant harm and instability can result. The children of same-sex couples who are unable to establish both members of the couple as legal parents are deprived of the emotional benefits, stability, and significant legal protections and benefits that arise from having two legally recognized parents.\footnote{76} For example, a child with two legally recognized parents has access to important financial support and inheritance, healthcare, social security, and other benefits from two sources instead of just one.\footnote{77}
Moreover, non-birth parents may lack legal rights to make important decisions relating to the child, including decisions relating to the child's emergency medical care. The non-birth parent also may be deprived of rights to child custody or visitation if his or her relationship with the birth parent ends, resulting in the severance of the relationship between a child and an individual who the child views as his or her parent. In addition to being unfair and harmful to the non-birth parent, severing a relationship between a child and an individual who the child views as a parent can have significantly detrimental short- and long-term effects on the wellbeing of the child. While it is clear that reform to laws governing the establishment of parentage is needed to ameliorate the unfair, harmful treatment of same-sex parents and their children, structuring realistic, effective proposals for reform requires first examining the likely reasons for why the law largely has failed to extend to same-sex couples the simple, efficient methods of establishing legal parent status available to different-sex couples.

78. Jacobs, supra note 77, at 347 ("Without an adjudication of parentage, lesbian coparents have no legal authority to make important medical or educational decisions for their children."); Lieberman, supra note 77, at 302 (stating that recognition as a legal parent provides an individual with the right to "consent for medical care, or make educational and other important decisions on behalf of the child"); Mertus, supra note 5, at 186 ("Furthermore, should anything ever happen to the child which required hospitalization, the non-legal parent would have no authority to make decisions regarding treatment."); Note, Joint Adoption: A Queer Option? 15 VT. L. REV. 197, 213 n.124 (1990) (stating that when a child has two legal parents, "there are two people who may consent to emergency medical care").

79. Jacobs, supra note 77, at 347 ("Through custody and visitation statutes, legal parent status ensures for both parent and child the possibility of an ongoing emotional relationship. Unfortunately, lesbian coparents who seek to preserve their parental relationship with the child that they have helped raise, after the termination of their romantic relationship with the child's mother or after the biological lesbian mother dies, are often precluded from doing so because the law fails to recognize their parental status."). In many cases, non-birth parents raising children in same-sex relationships who have not obtained legal parent status have been denied standing to seek custody or visitation. Feinberg, Consideration of Genetic Connections, supra note 47, at 334 n.8 (listing cases in which non-birth parents in same-sex relationships were denied standing to seek custody or visitation). Even in cases in which standing to seek custody or visitation is granted, the non-birth parent usually faces an uphill battle in seeking to obtain custody or visitation over the wishes of the child's legal parent, who has a fundamental constitutional right to make decisions relating to the child's care, custody, and control. Troxel v. Granville, 530 U.S. 57, 65 (2000) ("The liberty interest at issue in this case—the interest of parents in the care, custody, and control of their children—is perhaps the oldest of the fundamental liberty interests recognized by this Court."); Feinberg, Consideration of Genetic Connections, at 353–54 (discussing the presumptions often employed in favor of the legal parent when individuals who have not obtained legal parent status are granted standing to seek visitation or custody); Feinberg, Whither the Functional Parent?, supra note 20, at 59–60. Although in jurisdictions that have equitable parenthood doctrines qualifying individuals receive standing to seek custody or visitation, most of the doctrines treat equitable parents as legally inferior to legal parents in the determination of custody and visitation rights. Id. at 59.

II. THE HESITANCY TO EXTEND SIMPLE, EFFICIENT METHODS OF ESTABLISHING LEGAL PARENT STATUS TO SAME-SEX COUPLES

A. The Longstanding Tie Between Legal Parent Status and Genetic Connections

1. The Role of Genetics in Establishing Legal Parent Status

There is a long history in the United States of tying genetic connections to the establishment of legal parent status. For women, the act of giving birth has long resulted in the automatic establishment of legal parent status. Since for most of the nation’s history women could only give birth to children with whom they shared a genetic connection, and today the vast majority of women share a genetic connection with the child to whom they give birth, the practice of automatically granting legal parent status to birth mothers has, for the most part, remained unchallenged. The continuing tie between genetics and the establishment of legal parent status is also reflected in current laws governing surrogacy. Traditional surrogacy arrangements, which involve a surrogate whose genetic materials are used to conceive the child, are significantly less likely to be legally recognized than gestational surrogacy agreements, which involve a surrogate who is not genetically related to the child. That surrogacy agreements that purport to sever a relationship between the surrogate and resulting child when a genetic relationship is involved are significantly less likely to receive legal recognition demonstrates the continuing emphasis on genetic connections in the law’s determination of legal parent status for women.

85. Feinberg, Consideration of Genetic Connections, supra note 47, at 352.
For men, establishing legal parent status has been more complicated, but genetic connections have long played an important role in paternity laws. Early on, before the arrival of DNA testing, "the law did the best it could to infer biological paternity through a network of presumptions and defenses."\textsuperscript{86} Although the marital presumption of paternity has long provided legal parent status to men based upon marriage to the child’s birth mother, the initial establishment of the presumption likely was based in part upon the belief that a woman’s husband was the man most likely to be the child’s biological father.\textsuperscript{87} Importantly, genetic connections long have played a key role in the application of the marital presumption of paternity. The early bases for rebutting the presumption, including proof of the husband’s non-access to his wife during the time of conception, the husband’s sterility or impotence, or adultery on the part of the wife, all clearly related to proving that the husband was not the child’s biological father.\textsuperscript{88}

Today, genetic connections continue to play a key role in the application of the marital presumption of paternity. For example, while historically only the husband or wife had standing to challenge the marital presumption of paternity, today most states also grant standing to the biological father of a child born to a woman who is married to another man.\textsuperscript{89} Moreover, the evidence most commonly used to rebut the marital presumption of paternity is genetic testing results.\textsuperscript{90} The 2002 Uniform Parentage Act, which allows interested parties such as the wife, husband, and alleged biological father to challenge the marital presumption of paternity within two years of the child’s birth,\textsuperscript{91} mandates that genetic testing results are the only evidence that can be used to rebut the presumption.\textsuperscript{92} The laws, which can result in the elevation of genetic connections over concerns as important as protecting the marital family unit, reflect the significant role genetic connections continue to play in parentage determinations for men.\textsuperscript{93}

With regard to unmarried men, while at one point the biological fathers of children born out of wedlock had almost no legal rights to their children, this

\textsuperscript{86} Meyer, supra note 81, at 127.
\textsuperscript{87} Id.
\textsuperscript{89} Feinberg, Consideration of Genetic Connections, supra note 47, at 341–42.
\textsuperscript{91} UNIF. PARENTAGE ACT § 607 (amended 2002).
\textsuperscript{92} Id. § 631 ("The paternity of a child having a presumed, acknowledged, or adjudicated father may be disproved only by admissible results of genetic testing excluding that man as the father of the child or identifying another man as the father of the child.").
\textsuperscript{93} Feinberg, Consideration of Genetic Connections, supra note 47, at 342.
changed as a result of a series of Supreme Court decisions beginning in the 1970s. These decisions explained that an unmarried biological father’s genetic connection to his child “offers [him] an opportunity that no other male possesses to develop a relationship with his offspring.” Under the “biology plus” standard established in this line of cases, if an unmarried biological father “grasps that opportunity and accepts some measure of responsibility for his child’s future,” he can establish a constitutionally protected parent-child relationship. Overall, in order for an unmarried man to establish a constitutionally protected relationship with his offspring under the biology plus standard, he must demonstrate both a sufficient commitment to parenthood and a shared biological relationship with the child. An unmarried man’s genetic connection to his child thus plays a key role in creating a constitutionally protected parent-child relationship under the existing biology plus standard.

There are two primary avenues for establishing legal parent status for unmarried men: legal proceedings and VAPs. Genetic connections play a differing role within the procedures governing each avenue. Legal proceedings arise when an interested party such as the mother, the alleged father, or a child support agency commences legal action seeking to establish the alleged father’s paternity. Generally, “scientific evidence of [genetic] paternity creates a presumption of paternity,” and the biology plus requirement only applies in situations in which a genetic father is seeking paternity against the wishes of another interested party. Importantly, in order to receive critical federal funding, states must establish child support procedures that require the child and alleged father to submit to genetic testing when it is requested by a party who is

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96. Id. See also Laura Oren, Thwarted Fathers or Pop-Up Pops?: How to Determine When Putative Fathers Can Block the Adoption of Their Newborn Children, 40 FAM. L.Q. 153, 154 (2006) (“[W]hen a putative father seeks to protect his personal interests in his child, he only enjoys constitutional protection if he can meet a ‘biology plus’ standard, which requires him to step forward and grasp the opportunity to develop a relationship with his child.”).
97. Id. The Supreme Court has held that the biology-plus standard is not applicable to situations in which an unmarried man conceives a child with a woman who is married to someone else. Michael H. v. Gerald D., 491 U.S. 110, 110 (1989).
98. Id.
100. Glennon, supra note 88, at 569.
101. Id. at 568.
102. See Michael J. Higdon, Marginalized Fathers and Demonized Mothers: A Feminist Look at the Reproductive Freedom of Unmarried Men, 66 ALA. L. REV. 507, 524 (2015) (“Typically, these cases [employing the biology plus doctrine] concern a biological father who is attempting to block the child’s adoption by another male. In contrast, when it is another party (or, most frequently, the state) who is attempting to adjudicate a man’s paternity—typically for purposes of ordering him to pay child support—a biological connection is all that is needed.”).
seeking to establish or deny the paternity of the alleged father. Furthermore, the state procedures also must "create a rebuttable or, at the option of the State, conclusive presumption of paternity upon genetic testing results indicating a threshold probability that the alleged father is the father of the child." Genetic connections thus play a key role in the establishment of paternity through legal proceedings.

With regard to VAPs, the proliferation of VAPs has provided unmarried couples with a method of establishing legal paternity that does not require the commencement of legal proceedings. Pursuant to federal law, states cannot require putative fathers to submit to genetic testing before signing a VAP. Genetic connections, however, may nonetheless play a role in VAP procedures. As an initial matter, some states' VAP forms or accompanying instructions indicate that only biological fathers should sign. In addition, following the sixty-day period in which either party may rescind the VAP, the most frequent challenges to VAPs are based upon claims "that the woman committed fraud by misleading the man about his biological paternity or that there is a material mistake of fact because the man is not the biological father." Most courts that have ruled on the issue have allowed challenges to VAPs based upon genetic testing results; however, proof that the man identified in the VAP is not the child's biological father does not always result in the court granting rescission of the VAP. Some courts have required evidence of fraud or mistake in addition to the genetic testing results, denied rescission if doing so would be contrary to the best interests of the child, or used theories of equitable estoppel to deny rescission. Overall, although pursuant to federal law an unmarried man can establish paternity through a VAP without proof of a genetic connection between himself and the child, genetic connections may nonetheless become a significant consideration if the VAP is later challenged.

2. Termination of the Rights of Genetic Parents

The continuing tie between genetic connections and legal parentage is also reflected in the law governing the termination of parental rights. Although the

103. 42 U.S.C. § 666(a)(5)(B)(j) (2012). The requesting party needs to have set forth facts that establish a "reasonable possibility of the requisite sexual contact between the parties" or lack thereof. Id.
105. Harris, supra note 14, at 476.
107. Harris, supra note 14, at 479.
108. Id. at 480.
109. Id. at 480–81.
110. Baker, supra note 106, at 1687 ("Congress did not mandate that the VAP be tied to genetics.").
specific rules and procedures governing termination differ by state, the laws generally provide only narrow circumstances in which the involuntary or voluntary termination of parental rights may occur. In terms of the involuntary termination of parental rights, as a general matter, it has long been very difficult to terminate a genetic parent’s rights against their wishes.\textsuperscript{111} Today, proof by clear and convincing evidence of parental unfitness, usually involving abuse, neglect, or abandonment,\textsuperscript{112} as well as a determination that termination is in the child’s best interests, is generally required for the involuntary termination of parental rights to occur.\textsuperscript{113} For unmarried genetic fathers, however, the bar for termination of parental rights can be lower. Under existing Supreme Court precedent,\textsuperscript{114} the relationship between an unmarried biological father and his child is entitled to constitutional protection only if the father can meet the biology plus standard by demonstrating that he has grasped the opportunity to develop a relationship with the child and has “accept[ed] some measure of responsibility for his child’s future.”\textsuperscript{115} As a result, depending on state law, an unmarried genetic father who has not had his paternity established through legal action or a VAP may not have any parental rights in the first place or may have his parental rights terminated involuntarily if he has failed to sufficiently support or establish a significant relationship with the child.\textsuperscript{116}

The voluntary termination of parental rights most often arises in the adoption context.\textsuperscript{117} The severance of the genetic parents’ legal relationship to the child is a critical part of the adoption process.\textsuperscript{118} Unless grounds exist for the involuntary termination of the genetic parents’ rights or one of the genetic parents is an unmarried father who has failed to establish parental rights, both genetic parents must consent to the termination of their parental rights before the child can be

\begin{itemize}
  \item \textsuperscript{111} Feinberg, Consideration of Genetic Connections, supra note 47, at 345.
  \item \textsuperscript{112} ANN M. HARALAMBIE, 2 HANDLING CHILD CUSTODY, ABUSE AND ADOPTION CASES § 13:16 (2017) (“The nature of the crime should be of a type to reflect the unfitness of the parent as a parent.”).
  \item \textsuperscript{113} Feinberg, Consideration of Genetic Connections, supra note 47, at 345; HARALAMBIE, supra note 112, § 13:7.
  \item \textsuperscript{114} See supra note 94 and accompanying text.
  \item \textsuperscript{115} Lehr v. Robertson, 463 U.S. 248, 262 (1983).
  \item \textsuperscript{117} M. ELAINE BUCCIERRI ET AL., 43 C.J.S. INFANTS § 24 (2018) (“There is authority that a parent may not voluntarily surrender his or her parental rights to a child in a context other than the adoption of the child.”); HARALAMBIE, supra note 112, § 13:7 (“[V]oluntary relinquishment of parental rights is possible, particularly in contemplation of the child’s adoption.”).
  \item \textsuperscript{118} See generally CHILD WELFARE INFO. GATEWAY, CONSENT TO ADOPTION (2013), available at https://www.childwelfare.gov/pubPDFs/consent.pdf [https://perma.cc/LQN7-DCCY] [hereinafter CONSENT TO ADOPTION].
\end{itemize}
adopted. Moreover, even after a genetic parent whose child is being placed for adoption has consented to the voluntary termination of their parental rights, state laws generally allow for revocation of that consent under certain circumstances prior to the issuance of the adoption decree. In the context of stepparent and second parent adoptions, while the child’s genetic parent whose spouse or partner is seeking to adopt the child does not have to relinquish his or her parental rights, the adoption cannot occur unless the child’s second genetic parent has voluntarily waived his or her parental rights or grounds exist for the involuntary termination of such rights. Outside of the adoption context, genetic parents generally may not voluntarily relinquish their parental rights in order to avoid parental responsibilities. Voluntary termination of a genetic parent’s rights, which would result in that parent having no obligation of support to the child, is only permitted if a court determines it would further the best interests of the

119. Id. at 2 (“In all States, the District of Columbia, American Samoa, Guam, the Northern Mariana Islands, Puerto Rico, and the U.S. Virgin Islands, the birth mother and the birth father (if he has properly established paternity) hold the primary right of consent to adoption of their minor child.”).

120. Feinberg, Consideration of Genetic Connections, supra note 47, at 344; CONSENT TO ADOPTION, supra note 118, at 6. State laws differ with regard to the time-periods during which a birth parent’s consent can be revoked and the grounds for revocation. Id. at 5–7.

121. Unlike in other forms of adoption, however, the genetic parent who is seeking to have their spouse or partner adopt the child does not have to relinquish their parental rights. Melinda Coolidge, Adoption and Foster Care, 8 GEO. J. GENDER & L. 583, 595 (2007) (“However, most states include a statutory exception that allows adoption by a stepparent without termination of the biological parental right of the parent who is married to the stepparent.”); Jeffrey G. Gibson, Lesbian and Gay Prospective Adoptive Parents: The Legal Battle, HUM. RTS., Spring, 1999, at 7, 10 (1999) (“Most state adoption statutes provide that a biological parent who consents to the adoption of a child must give up or ‘cut off’ his or her own parental rights, unless the adopting party is the parent’s legal spouse and thus a stepparent to the child.”); NAT’L CTR. FOR LESBIAN RTS., ADOPTION BY LGBT PARENTS 1 (2015), available at http://www.nclrights.org/wp-content/uploads/2013/07/2PA_state_list.pdf [https://perma.cc/P6Q8-QL9K] (“A second parent adoption (also called a co-parent adoption) is a legal procedure that allows a same-sex parent, regardless of whether they have a legally recognized relationship to the other parent, to adopt her or his partner’s biological or adoptive child without terminating the first parent’s legal status as a parent.”).

122. Carmel B. Sella, When a Mother Is a Legal Stranger to her Child: The Law’s Challenge to the Lesbian Nonbiological Mother, 1 UCLA WOMEN’S L.J. 135, 150 (1991) (“Stepparents are precluded from adopting their stepchildren unless the biological, noncustodial parent . . . first consents.”). For same-sex couples undertaking stepparent or second parent adoptions of children conceived using gamete providers, a common way of proving that the child’s second biological parent has waived their parental rights is through proof that the gametes were provided in compliance with the relevant donor non-paternity law, and thus the gamete provider has no legal rights relating to the child. JOSSLIN ET AL., supra note 23, § 5:17; Kathryn M. Wayne-Spindler, An Advance Look at Second Parent Adoption in Michigan, LINKEDIN, June 16, 2015, https://www.linkedin.com/pulse/advance-look-second-parent-adoption-michigan-wayne-spindler [https://perma.cc/99Q9-9PCY]; Adoption Options for Same-Sex Couples: An Interview with California Adoption Lawyer Emily Doskow, FAM. ADVOC., Summer, 1997, at 40. 

child, something which would rarely occur if there was not another individual seeking to take on legal responsibility for the child through adoption.\footnote{124. Id. §§ 13:7, 13:21; Bucci\textit{er} et al., \textit{supra} note 117, § 24 ("A parent should not be permitted to avoid or evade child support obligations by voluntarily terminating parental rights, especially when no adoption is contemplated.")}

One important exception to the general rule that genetic parents may not voluntarily relinquish their parental rights and responsibilities outside of the adoption context is in the area of gamete donation. As one scholar has explained "there is abundant legal precedent for male progenitors to relinquish their parental rights and obligations along with their sperm."\footnote{125. Deborah L. Forman, \textit{Embryo Disposition, Divorce & Family Law Contracting: A Model for Enforceability}, 24 COLUM. J. GENDER & L. 378, 395 (2013).} More specifically, it is widely recognized under current law that a man who provides sperm to a licensed physician for use in the artificial insemination\footnote{126. Courts have reached differing conclusions with regard to whether parentage laws that on their face address only the parentage of children conceived through artificial insemination are applicable to situations in which children were conceived through in vitro fertilization. \textit{Compare} Sieglein v. Schmidt, 136 A.3d 751, 754 (Md. 2016) (holding that the statutory term "artificial insemination" encompassed in vitro fertilization); \textit{In re Adoption of a Minor}, 29 N.E.3d 830, 834 (Mass. 2015) (same) \textit{with} Patton v. Vanterpool, 806 S.E.2d 493, 496 (Ga. 2017) (holding that the statutory term "artificial insemination" did not encompass in vitro fertilization); \textit{In re Parentage of J.M.K.}, 119 P.3d 840, 849 (Wash. 2005) (same).} of a woman other than his wife,\footnote{127. While the majority of non-paternity statutes apply to the insemination of both married and unmarried women, there are a few states in which the statute's applicability to inseminations of unmarried women is questionable because the statute only explicitly mentions married women and no published case law exists addressing the statute's applicability to the insemination of unmarried women. Joslin et al., \textit{supra} note 23, § 3:13.} a process which typically includes the donor signing a consent form agreeing to relinquish parental rights to any children conceived using the sperm, is not the legal parent of any resulting children unless the parties have agreed otherwise.\footnote{128. Forman, \textit{supra} note 125, at 396. See, e.g., D.C. CODE § 16-909(e)(2) (2012) ("A donor of semen to a person for artificial insemination, other than the donor's spouse or domestic partner, is not a parent of a child thereby conceived unless the donor and the person agree in writing that said donor shall be a parent."); Kan. Stat. Ann. § 23-2208(f) (2018) ("The donor of semen provided to a licensed physician for use in artificial insemination of a woman other than the donor's wife is treated in law as if he were not the birth father of a child thereby conceived, unless agreed to in writing by the donor and the woman.").} In terms of the specific requirements of donor non-paternity laws, some states' laws require that the sperm be provided to a licensed physician;\footnote{129. See, e.g., N.J. Stat. Ann. § 9:17-44(b) (2018) ("Unless the donor of semen and the woman have entered into a written contract to the contrary, the donor of semen provided to a licensed physician for use in artificial insemination of a woman other than the donor's wife is treated in law as if he were not the father of a child thereby conceived and shall have no rights or duties stemming from the conception of a child."); Kan. Stat. Ann. § 23-2208(f) (2018) ("The donor of semen provided to a licensed physician for use in artificial insemination of a woman other than the donor's wife is treated in law as if he were not the birth father of a child thereby conceived, unless agreed to in writing by the donor and the woman."); Wis. Stat. § 891.40(2) (2018) ("The donor of semen provided to a licensed physician for use in artificial insemination of a woman other than the donor's wife is not the natural father of a child conceived, bears no liability for the support of the child and has no parental rights with regard to the child."). Even in states with donor non-paternity statutes that do not on their face require the assistance of a licensed physician, "because of the interaction
in these states, failure to comply with this requirement "may result in a finding that the provision is inapplicable and, therefore, that the [provider] is a legal parent." Donor non-paternity statutes generally do not distinguish between known and anonymous providers, and most courts that have ruled on the issue have found such statutes applicable to both anonymous and known providers. However, in the context of known sperm providers, a lack of evidence reflecting the clear intent of the parties for the provider to relinquish all parental rights and responsibilities may render the donor non-paternity law inapplicable, and may result in the provider being recognized as a legal parent.

Notably, under current law, individuals who provide sperm in compliance with state donor non-paternity laws, unlike most other categories of genetic parents, are allowed to voluntarily relinquish their parental rights and duties to their genetic children without judicial involvement. Because the relinquishment of parental rights takes place before the child is even conceived, the genetic connection between an individual who provides sperm in compliance with a state's donor non-paternity law and any resulting offspring simply does not give rise to parental rights or responsibilities in the first place.

with other statutory provisions or public policy principles, courts may interpret the donor non-paternity statutes as requiring the involvement of a physician." JOSLIN ET AL., supra note 23, § 3:13.


131. Forman, supra note 125, at 396–97 ("Nonetheless, the law does not typically require anonymity to extinguish parental rights for sperm donors. State statutes have not distinguished between anonymous and known donors. Furthermore, several cases have upheld contracts with known donors, preserving their status as legal strangers to the resulting offspring."); JOSLIN ET AL., supra note 23, § 3:15 ("Where the parties did comply with the terms of the relevant donor non-paternity statute, the majority of courts have concluded that the statute applies regardless of whether the donor is known or unknown.").

132. JOSLIN ET AL., supra note 23, §§ 3:16, 3:17. Issues also may arise if a sperm provider who qualifies under a non-paternity provision engages in post-birth conduct that is sufficient to establish legal parenthood under other parentage provisions. For example, courts in a couple of states have held that a sperm provider who lacks parental rights under the relevant non-paternity statute could nonetheless acquire legal parenthood through post-birth actions that serve as the basis for establishing legal parenthood through other legal avenues, such as by executing a VAP or receiving the child into his home and holding the child out as his own. Id. § 3:18 ("If a provider of sperm properly completes such a form, he may be considered the child’s legal parent even if, in the absence of the properly completed VAP, a donor nonpaternity provision would have established his nonpaternity."); Jason P. v. Danielle F., 171 Cal. Rptr. 3d 789, 796 (Ct. App. 2014) (holding that although a man recognized as a sperm donor under the relevant non-paternity statute could not establish parenthood based upon his biological connection to the child, he may establish parenthood pursuant to another provision providing a presumption of parenthood to an individual who "receives the child into his or her home and openly holds out the child as his or her natural child"). For a discussion regarding the variety of legal issues and outcomes that may arise when known sperm providers are used, see generally Susan F. Appleton, Between the Binaries: Exploring the Legal Boundaries of Nonanonymous Sperm Donation, 49 FAM. L.Q. 93 (2015); Forman, supra note 13.

133. See supra note 128 and accompanying text.

134. This assumes that the known sperm provider and birth mother have not taken post-birth actions which would result in the provider's obtainment of legal parenthood through other avenues. See supra note 132.
Consequently, gamete donation represents a notable exception to the longstanding tie between genetic connections and legal parenthood.\footnote{Susan B. Apel, Cryopreserved Embryos: A Response to "Forced Parenthood" and the Role of Intent, 39 Fam. L.Q. 663, 668 (2005) (describing sperm donors as a “category of men who despite genetic ties to an offspring are held almost universally not to be the legal fathers” (emphasis in original)).}

Overall, although genetic connections are not always determinative of legal parenthood, genetic connections considerations long have featured prominently in the legal framework governing parental rights. Actual or presumed genetic connections to a child continue to play a significant role in the current laws addressing the initial establishment of parental rights.\footnote{Although an individual who lacks genetic connections to a child but shares a specified relationship with the child’s birth mother may be able to establish legal parent status, the individual’s lack of genetic connections to the child may nonetheless come into play if his legal parent status is later challenged. This is true for the establishment of legal parent status through both the marital presumption of paternity and VAPs. See supra notes \textsuperscript{89-93, 107-110}.} Moreover, the laws in place today governing the termination of parental rights, which provide only limited circumstances in which a genetic parent’s rights may be terminated, further highlight the important role of genetic connections in determinations of legal parenthood. Importantly, the law privileges genetic connections both by making genetic connections a significant consideration in the determination of whether someone is a legal parent and by setting a high bar for severance of the legal relationship between a child and their genetic parent.

\textbf{B. The Genetic Connections Problem for Same-Sex Couples}

The failure of the law thus far to extend widely to same-sex couples the simple, efficient methods of establishing legal parent status available to different-sex couples likely stems, in significant part, from the longstanding tie between genetic connections and the establishment of legal parenthood.\footnote{See, e.g., In re Paczkowski v. Paczkowski, 10 N.Y.S.3d 270, 271 (App. Div. 2015) (stating that the marital presumption of paternity does not extend to same-sex couples because the presumption created “is one of a biological relationship, not of legal status and, as the nongestational spouse in a same-sex marriage, there is no possibility that [the petitioner] is the child’s biological parent” (internal citations omitted)); Q.M. v. B.C., 995 N.Y.S.2d 470, 474 (Fam. Ct. 2014) (stating that the marital presumption of paternity does not extend to same-sex couples because although existing law “requires same-sex married couples to be treated the same as all other married couples, it does not preclude differentiation based on essential biology”).} The genetic connections problem faced by same-sex couples is twofold. First, because it is generally only possible for one member of a same-sex couple to be a genetic parent of the couple’s child, there will be one member of the couple who is not genetically connected to the child.\footnote{Reproductive technology has not yet found a way to feasibly allow both same-sex partners to achieve genetic parenthood of the same child.” While female same-sex couples who choose to conceive their children via reciprocal IVF (wherein one member provides genetic material and the other carries the pregnancy) will each have a biological...} Second, as a general matter,
there will necessarily be someone outside of a same-sex couple’s relationship whose genetic materials were used in conceiving the child.\footnote{139} While each of the two problems undoubtedly play a role in the hesitation to extend to same-sex couples the more simple, efficient avenues to establishing legal parent status, current parentage law suggests that the lack of genetic connection between one member of the same-sex couple and the child is a less significant problem than the existence of a genetic parent outside of the couple’s relationship.

The first genetics-related problem faced by same-sex couples in gaining access to the more simple, efficient avenues to establishing legal parent status—that one member of the couple will not be a genetic parent of the child—becomes a less significant problem when considering current parentage law. Importantly, a number of the simple, efficient avenues to establishing legal parent status in existence today do not require that the parent in question share a genetic connection to the child. Under current law, individuals may obtain legal parent status through simple, efficient avenues such as marital presumptions of paternity, statutes that establish parentage based upon consent to a spouse’s use of ART, or VAPs, without having to provide any evidence of a genetic connection to the child.\footnote{140} Notably, pursuant to each of these avenues, the law provides a simple, efficient method of establishing legal parent status to individuals who share a certain relationship with the child’s birth mother as either her spouse or desired co-parent at the time of the child’s conception or birth, without requiring the individual to demonstrate a genetic connection to the child.\footnote{141} While it is true both that some states’ VAP forms require men to aver biological fatherhood and that when different-sex couples obtain legal parent status through marital presumptions of paternity or VAPs it is at least possible that both members of the couple are genetic parents, if genetic connections were truly an essential component of these avenues then proof of such connections (which has become easy to obtain in the modern era) would be required.\footnote{142} Consequently, considering current parentage law, the fact that only one member of the couple will share a genetic connection with the child should not prevent extension of the existing simple, efficient methods of establishing legal parent status to same-sex couples.

connection to their child, only one member of the couple will have a genetic connection to the child. See Reciprocal IVF, supra note 10.

\footnote{139} See DiFonzo & Stern, supra note 10, at 112. It is important to note, however, that there is an exception to the general propositions stated in the text accompanying notes 138–139: a same-sex couple in which one member is transgender may be able to conceive a child using the genetic materials of both members of the couple and may not require genetic materials from an individual outside of the couple’s relationship in order to conceive. See Coleman, supra note 2.

\footnote{140} See supra Section II.A.

\footnote{141} See id.

\footnote{142} In fact, federal law mandates that states cannot require men to submit to genetic testing before executing a VAP. Harris, supra note 14, at 476.
The second genetics-related problem with regard to extending the more simple, efficient avenues to obtaining legal parent status to same-sex couples—that, as a general matter, there will necessarily be someone outside of the couple’s relationship who is a genetic parent—is the more significant problem when considering current parentage law. The existence of a genetic parent outside of the couple’s relationship poses a significant hurdle for same-sex couples in obtaining access to simple, efficient avenues to establishing legal parent status because, as discussed above, the law provides significant rights and protections to genetic parents. Importantly, the law allows for the termination of a genetic parent’s rights in only narrow circumstances, and judicial intervention generally is required before a genetic parent’s rights may be terminated.\\footnote{See supra Section III.A.2.}

Considering that, with few exceptions, parentage law across the United States recognizes only two individuals as a child’s legal parents, reform that allows the non-birth parent in a same-sex couple to obtain the status of the child’s second legal parent through simple, efficient methods could conflict with existing state parentage laws by denying the genetic parent outside of the couple’s relationship parental rights to which he or she is entitled or creating a situation in which more than two people are entitled to parental rights.\\footnote{Forman, supra note 13, at 45 (“The law also continues to presume that only two people can fill the role of parent.”).}

It is for these reasons that the necessary existence of a genetic parent outside of the couple’s relationship poses a significant problem in extending simple, efficient methods of establishing legal parent status to same-sex couples. Fortunately, however, there is a relatively simple way through which this issue can be addressed so that a significantly greater number of same-sex couples can establish legal parent status through a simple, efficient avenue without running afoul of existing state parentage laws. The following Section sets forth a proposal for the federal government to require states to extend the use of VAPs to female same-sex couples who can prove that their children were conceived using sperm provided in compliance with state donor non-paternity laws.

III. **A Step in the Right Direction: Extending VAPs to Female Same-Sex Couples Who Conceive Children Using Sperm Provided in Compliance with State Donor Non-Paternity Laws**

A federal mandate requiring states to extend the use of VAPs to female same-sex couples who conceive children using sperm provided in compliance with state donor non-paternity laws represents a logical, modest step in the right direction for ameliorating the difficulties currently faced by same-sex couples in obtaining legal parent status. As discussed above, the major legal concerns
underlying the hesitation to extend to same-sex couples simple, efficient methods of establishing legal parent status likely do not stem from the fact that one member of the couple will lack a genetic connection to the child, but rather from the fact that there is necessarily an individual outside of the couple’s relationship who will be the child’s second genetic parent and consequently may have parental rights under state law. When a female same-sex couple conceives a child using sperm provided in compliance with state donor non-paternity laws, however, there is no issue involving possible parental rights for the second genetic parent outside of the same-sex couple’s relationship—state donor non-paternity laws establish that individuals who provide sperm in compliance with the requirements of such laws are not legal parents. Unlike other categories of genetic parents, individuals who provide sperm in compliance with state donor non-paternity laws are able to voluntarily relinquish their parental rights and responsibilities without judicial involvement. As a result, allowing a birth mother’s same-sex partner to obtain legal parent status through the completion of a VAP in situations in which the child was conceived using sperm provided in compliance with state donor non-paternity laws will not conflict with existing state parentage laws.

A. The VAP: A Logical Choice for Extending a Simple, Efficient Avenue of Establishing Legal Parent Status to Female Same-Sex Couples

The VAP, a federally mandated method of establishing parentage that already exists in every state and is the most common method of establishing legal parentage for unmarried different-sex couples, is a logical vehicle for providing same-sex couples with a more simple, efficient method of establishing legal parent status. As an initial matter, the extension of VAPs to same-sex couples would directly advance the goals the federal government sought to achieve in requiring states to adopt VAP procedures in the first place: decreasing government spending on welfare programs by promoting the early identification of a second legal parent who has an obligation to support the child. The government’s strong interest in identifying two legal parents for each child as early as possible supports extending VAPs to female same-sex couples who conceive children using sperm provided in compliance with state donor non-paternity laws.

If VAPs were extended to female same-sex couples who conceive children using sperm provided in compliance with state donor non-paternity laws, not only would it be more likely that the children born to such couples would have two legal parents, but the identification of two legal parents would occur at a

145. See supra note 128 and accompanying text.
146. See supra notes 27–40 and accompanying text.
much earlier point. As it currently stands in the vast majority of jurisdictions, if the birth mother in a same-sex relationship is not married, her child will have only one legal parent upon birth. The man who donated sperm in compliance with state donor non-paternity laws will not be considered a legal parent and will have no duty of support to the child. The birth mother’s same-sex partner will only become a legal parent if the relevant jurisdiction is one that grants second parent adoptions and the couple is able to complete the expensive, intrusive, and lengthy procedures often involved in the adoption process. As a result, allowing female same-sex couples who have conceived children using sperm provided in compliance with state donor non-paternity laws to obtain legal parentage through VAP procedures will result in more children having two legally recognized parents and will allow for the identification of those two parents at a much earlier point. Moreover, because every state must recognize VAPs validly executed in other states, more children will have two parents who are entitled to legal recognition across state lines.

Moreover, VAPs already have proven to be an extremely effective method of establishing legal parentage. It is not difficult to understand why VAPs have become the most common way for the different-sex partners of unmarried birth mothers to obtain legal parent status—the process is simple, efficient, and inexpensive. VAPs are conveniently made available to parents in the hospital following their child’s birth, and parents are provided with explanations, both orally and in writing, regarding the legal rights and obligations that stem from the VAP. The VAP process does not require the birth mother’s partner to prove a genetic connection to the child in order to establish legal parent status. All that the birth mother and her partner must do in order to complete the process is to each sign the document in the presence of a witness or notary. The hospital submits the document to the state registry of birth records, and after sixty days the VAP becomes a legal finding of paternity entitled to full faith and credit. Importantly, with a few key changes to the requirements and processes for entering into and rescinding VAPs, this simple, efficient method of establishing legal parentage could be extended to female same-sex couples who conceive children using sperm provided in compliance with state donor non-paternity laws.

147. See supra notes 61–68 and accompanying text.
148. See supra note 128 and accompanying text.
149. This would be the case unless the relevant jurisdiction is one of the eight jurisdictions that has a statute granting parentage based upon consent to a partner’s use of ART that extends to unmarried same-sex couples. See JOSLIN ET AL., supra note 23, § 3:3.
151. See supra notes 32–34.
152. 45 C.F.R. § 303.5(g)(4) (2016).
153. See supra notes 36–40 and accompanying text.
B. Extending VAPs to Female Same-Sex Couples who Conceive Children Using Sperm Provided in Compliance with State Donor Non-Paternity Laws

1. The Availability of VAPs

While the federal Office of Child Support Enforcement seems to have indicated that states could offer VAPs to female same-sex couples without running afoul of the federal guidelines governing VAP procedures, the federal government should go a step further and mandate that each state make VAPs available to female same-sex couples who conceive children using sperm provided in compliance with the state’s donor non-paternity law. Taking this step is important for a number of reasons. As an initial matter, because of continuing hostility in certain parts of the country toward extending legal rights and protections to LGBT individuals and families, unless it is required, a significant number of states will likely decline to extend VAPs to any same-sex couples. Importantly, as detailed above, allowing states to deny VAPs to same-sex couples who conceive children using sperm provided in compliance with state donor non-paternity laws would conflict with the primary goal of the federal government in establishing VAP requirements in the first place: decreasing welfare spending by identifying two legal parents for every child as soon as possible after the child’s birth. In addition, the lack of a federal mandate on this issue would lead to even greater disarray and inequality among states with regard to the legal treatment of same-sex parents.

The federal government should also require that hospitals provide VAPs to both unmarried and married same-sex couples who conceive children using sperm provided in compliance with state donor non-paternity laws. Currently, federal law only mandates that hospitals provide VAPs when a child is born to an unmarried mother, and a number of state VAP forms specify that VAP

154. UNIF. PARENTAGE ACT Art. 3, cmt. (2017) (“Revised Article 3 of UPA (2017) [(which extends VAPs to a birth mother’s same-sex partner who is recognized as a presumed or intended parent under the Act)] was drafted in close consultation with the federal Office of Child Support Enforcement (OCSE) to be consistent with Title IV-D requirements. State law determines what support rights exist and are legally enforceable. These changes ensure that all children can have parengage established regardless of a parent’s gender and facilitate the establishment and enforcement of child support under state law.”).


156. See supra note 16 and accompanying text.

157. 45 C.F.R. § 303.5(g)(1)(i) (2016) (“The hospital-based portion of the voluntary paternity establishment services program must be operational in all private and public birthing hospitals statewide and must provide voluntary paternity establishment services focusing on the period immediately before and after the birth of a child born out-of-wedlock.”) (emphasis added).
procedures are unavailable when a child is born to a married mother. The likely reason that federal law does not require hospitals to offer VAP procedures when a child is born to a married woman is that every state presumes that a married woman’s husband is the legal father of any child born or conceived during their marriage; therefore, a VAP is not needed to establish a married

158. See, e.g., FLA. DEP’T OF HEALTH, ACKNOWLEDGEMENT OF PATERNITY 1 (2006), available at http://www.floridahealth.gov/certificates/certificates/birth/docs/DH_432_Ack_Paternity.pdf [https://perma.cc/SS84-5E8S] (requiring the parents to declare that “the mother was unwed at the time of birth”); LA. DEP’T OF HEALTH, ACKNOWLEDGEMENT OF PATERNITY AFFIDAVIT 1 (2017), available at http://new.dhh.louisiana.gov/assets/oph/Center-RS/vitalrec/AOP_2Party_Public.pdf [https://perma.cc/SE5B-PMBV] (requiring the mother to “declare and affirm that I am not married and that I have not been married in the past 300 days”); Acknowledgement of Paternity Affidavit, OHIO DEPT. OF HEALTH, https://www.odh.ohio.gov/en/vitalstatistics/legalinfo/pataffid [https://perma.cc/2CA2-ZMAB] (“The Acknowledgment of Paternity Affidavit is for women who are not married at the time of the child’s birth, or not married within 30 days from the date of conception.”); N.Y. OFFICE OF CHILD SUPPORT, ACKNOWLEDGMENT OF PATERNITY FOR A CHILD BORN TO AN UNMARRIED WOMAN 1 (2014), available at https://www.childsupport.ny.gov/dcse/pdfs/4418.pdf [https://perma.cc/2X2W-PX68] (“You CANNOT sign an Acknowledgment of Paternity if: The mother was married at any time during the pregnancy or when the child was born . . .”); CAL. DEP’T OF CHILD SUPPORT SERVS., DECLARATION OF PATERNITY 1 (2008), available at http://www .childsup.ca.gov/portals/0/cp/docs/c5909_english.pdf [https://perma.cc/4CKM-UNP9] (stating that a declaration of paternity “should be signed by a biological mother only if she is not married”), GA. DEP’T OF PUB. HEALTH, PATERNITY ACKNOWLEDGEMENT 2 (2016), available at https://dph.georgia .gov/sites/dph.georgia.gov/files/Paternity%20Acknowledgement%20%28Form%203940%29.pdf [https://perma.cc/72SK-W7PC] (“A PA cannot be used if the mother of the child was married to anyone within 10 months prior to the birth of this child.”); WIS. DEP’T OF CHILDREN AND FAMILIES, TO NEW MOMS AND DADS . . . HELP YOUR BABY GET A STEP AHEAD IN LIFE! 4 (2012), available at https://dfc.wisconsin.gov/files/publications/pdf/870.pdf [https://perma.cc/Z9G7-AZ43] (“You may not use this form if the mother was married at the time the child was conceived or born unless there is a court order stating that the husband is not the father.”). But see OR. HEALTH AUTH., VOLUNTARY ACKNOWLEDGMENT OF PATERNITY AFFIDAVIT (FORM 45-21) INSTRUCTIONS 1 (2016), available at http://www.oregon.gov/oha/PH/BIRTHDEATHCERTIFICATES/CHANGE VITALRECORDS/Documents/45-21instr.pdf [https://perma.cc/YAT5-ZM6U] (“If the mother is married 300 days prior to the birth of the child, or at any time during her pregnancy (including date of conception, date of birth, or anytime in between), her husband is the only man that may be listed [on the Voluntary Acknowledgement of Parentage] as the father, even if he is not the biological father.”). However, some states allow a woman who was married at the time of the child’s birth or conception to execute a VAP identifying a man other than her husband as the child’s father if the husband executes an affidavit of non-paternity. See, e.g., ARIZ. DEP’T OF HEALTH SERVS., ACKNOWLEDGEMENT OF PATERNITY 1 (2017), available at http://www.azdhs.gov/documents/licensing/vital-records/register-acknowledgement-paternity.pdf [https://perma.cc/86YG-Z2LS] (“This Acknowledgement of Paternity IS NOT applicable if the mother of the child was married at the time of birth or was married any time in the ten months immediately preceding such birth pursuant to A.R.S. § 25-814, unless accompanied by a Waiver of Paternity Affidavit.”); ARK. OFFICE OF CHILD SUPPORT ENFORCEMENT, ACKNOWLEDGMENT OF PATERNITY, available at http://www.dfa.arkansas.gov/offices/childSupport/Documents/aop/Page1English.pdf [https://perma.cc/V7Q3-SH4F] (last visited July 11, 2018) (“If the mother was married when she became pregnant or anytime while she was pregnant, but the husband is not the biological (natural) father, follow the instructions on the back of this Acknowledgement of Paternity (Denial of Husband’s Paternity.”); IDAHO DEP’T OF HEALTH AND WELFARE, ACKNOWLEDGEMENT OF PATERNITY AFFIDAVIT 1 (2005), available at http://healthandwelfare.idaho.gov/Portals/0/Health/Vital%20Records/Paternity AffidavitE.pdf [https://perma.cc/AC62-9Q6D] (allowing a married woman to execute a voluntary acknowledgement of parentage with a man who is not her husband if her husband signs a section of the form in which he attests that he is not the child’s father).
woman's husband as the child's second legal parent. Although VAP procedures may be unnecessary and repetitive with regard to identifying a married woman's different-sex spouse as the child's second legal parent, the same is not necessarily true when it comes to identifying a married woman's same-sex spouse as the child's legal parent.

Due to the fact that it has yet to be determined in many jurisdictions whether marriage-based presumptions of parentage extend to married same-sex couples, hospitals should be required to offer VAPs to both unmarried and married same-sex couples who conceive children using sperm provided in compliance with state donor non-paternity laws. Even if a same-sex couple's home state recognizes the non-birth parent as a legal parent based on existing marriage-based presumptions of parentage, since such presumptions are not legal judgments entitled to full faith and credit, the non-birth parent may not be recognized as a legal parent in other states. When it comes to VAPs, however, federal law requires that after sixty days a properly executed VAP becomes a legal finding of paternity entitled to full faith and credit in other states. Consequently, if the federal government extended VAPs to same-sex couples but continued to require hospitals to provide VAPs only to unmarried mothers, it would lead to the illogical result that a same-sex couple would need to remain unmarried in order to be assured access to a simple, efficient method of establishing legal parent status entitled to recognition across jurisdictions. Moreover, extending VAPs to both married and unmarried same-sex couples who conceive children using sperm provided in compliance with state donor non-paternity laws would promote the interests of the federal government by increasing the number of children who have two parents entitled to recognition as legal parents across jurisdictions.

2. Components of the VAP Procedure

i. Proof of Compliance with State Donor Non-Paternity Law

Unless the state chose to dispense with this requirement and extend VAPs more broadly to same-sex couples than required by federal law, same-sex

159. Gunderson, supra note 21, at 341.
160. This is why experts continue to encourage married same-sex couples to obtain a judgment of parentage for the member of the couple who did not give birth despite the nationwide legalization of same-sex marriage. See supra notes 52–54 and accompanying text. See also Joslin, supra note 19, at 43–45 (proposing that Congress enact legislation requiring states to adopt a VAP-like administrative registration system for individuals who are under the existing laws of the birth state entitled to recognition as the legal parent of a child conceived through assisted reproduction in order to ensure that such individuals will be recognized as legal parents across jurisdictions without first having to go to court to obtain a judgment of parentage).

161. See supra notes 39–40 and accompanying text.
couples who wished to utilize VAPs would need to supply proof that their child had been conceived using sperm provided in compliance with state donor non-paternity law. Because donor non-paternity laws differ somewhat by state, each state would need to identify the documentation that same-sex couples would be required to submit to prove that the sperm used in conceiving their child was provided in compliance with the state’s donor non-paternity law. As an initial matter, it is likely that all states would require proof that the individual who provided the sperm was an actual “donor” in the sense that he provided his sperm for use in assisted reproduction based on the understanding that he would have no parental rights or duties with regard to any resulting children. For same-sex couples who use sperm banks or similar facilities to obtain sperm from anonymous providers, this would require a sworn statement from an officer of the facility stating that the sperm was provided to the facility by an individual who had signed a contract in which he agreed to serve as an anonymous sperm provider and waived all rights and obligations relating to any resulting children. For same-sex couples who obtain sperm from known providers, a sworn statement executed by the provider prior to the child’s conception waiving all parental rights and obligations to any children resulting from the donation would be required. Finally, for states with donor non-paternity laws that require that the sperm be provided to a licensed physician, a sworn statement from a sperm bank official or independent licensed physician attesting to the fact that the sperm was provided to a licensed physician for use in assisted reproduction would be required.

Requiring same-sex couples who have conceived children using sperm provided in compliance with state donor non-paternity laws to provide documentation of such compliance would not be overly burdensome for the couples or the state. The attestations required for couples who use sperm banks and other facilities to purchase sperm from anonymous providers could likely be encompassed in one form as the officers of the facility from which the sperm was obtained could within a single document attest to the provider’s relinquishment of parental rights and, if required, the provision of the sperm to a licensed physician. It is likely that if such a system were implemented, sperm banks and similar facilities would provide this documentation to same-sex couples utilizing their services as a matter of course, minimizing the burden on

162. It is standard practice for sperm banks and similar facilities to require sperm providers to sign contracts or consent forms relinquishing parental rights to any resulting children. Forman, supra note 125, at 396.

163. Depending on how states’ licensed physician requirements within donor non-paternity laws are interpreted, sperm bank officials would need to attest that either the sperm had been provided to a licensed physician within the facility for use in assisted reproduction or that the sperm bank had sent the sperm to an independent licensed physician for use in assisted reproduction. JOSLIN ET AL., supra note 23, § 3:13 (describing the general requirement in a number of states’ donor non-paternity statutes that the sperm be “provided to a licensed physician”).
same-sex couples with regard to proving compliance with state donor non-paternity laws. For same-sex couples who use known sperm providers, a maximum of two documents would be required: one document executed by the sperm provider attesting to the waiver of his parental rights and obligations and, if necessary under the state’s donor non-paternity law, one document executed by a licensed physician attesting that the sperm was provided to him or her for use in assisted reproduction. Consequently, states would likely need to create a total of only three forms for same-sex couples to use in proving compliance with donor non-paternity law: one form for couples using anonymous providers and two forms for couples using known providers. Creation of these forms would have the added benefit of encouraging states to clearly identify the requirements of their donor non-paternity laws, which remain unclear in some states.¹⁶⁴ States would determine for themselves whether use of the state-created forms for proving compliance with donor non-paternity laws would be required or whether other forms of documentation would suffice provided they contained all of the information necessary to prove compliance with the state’s donor non-paternity law.

ii. Consent by Both Parties

In order to obtain legal parentage through VAP procedures, same-sex couples, like their different-sex counterparts, would also be required to execute a form in which they each consent to the member of the couple who did not give birth becoming the child’s second legal parent.¹⁶⁵ The federal guidelines currently governing VAP consent forms, such as when, where, and how they must be provided, would remain largely the same.¹⁶⁶ One change, however, would be that before providing VAP consent forms to same-sex couples, states would be required to remove any language from the forms or accompanying instructions that requires the person seeking to obtain legal parentage to attest to having a biological connection to the child or indicates that only individuals who are biologically related to the child should sign.¹⁶⁷ In fact, the VAP consent forms provided to same-sex couples should explicitly state that both parties understand that the person identified as the child’s second parent will obtain legal parent status regardless of whether the person shares any genetic or biological connections to the child and that this individual’s lack of biological or genetic ties to the child cannot be a basis for challenging the VAP.

¹⁶⁴. See Joslin ET AL., supra note 23, § 3:13. Greater clarity in terms of the requirements for complying with state sperm donor non-paternity laws would benefit both the families who use donor sperm to conceive children and the individuals who wish to serve as sperm donors.
¹⁶⁵. See supra note 35 and accompanying text.
¹⁶⁶. See supra notes 32–36 and accompanying text (describing federal guidelines for VAPs).
¹⁶⁷. See supra note 106 and accompanying text.
In terms of the rules governing the rescission of VAPs, the sixty-day period in which either party may rescind the VAP would remain the same, as would the grounds available for challenging the VAP following the rescission period—duress, material mistake of fact, and fraud. In practice, however, challenges to VAPs following the rescission period would look significantly different for same-sex couples. While for different-sex couples the most common challenges to VAPs are based upon claims of fraud or mistake stemming from a lack of genetic connection between the putative father and child, for same-sex couples the non-birth parent’s lack of genetic ties to the child generally would not provide a basis for challenging the VAP on the grounds of fraud or mistake. This is because in the context of a same-sex parent who lacks genetic connections to the child her partner conceived through the use of assisted reproduction, both members of the couple usually would be aware of the non-birth parent’s lack of genetic connection to the child from the outset. Moreover, allowing challenges to VAPs executed by same-sex couples on the basis of the non-birth parent’s lack of genetic connection to the child would leave the legal status of the non-birth parent in an entirely unstable position. For same-sex couples, following the sixty-day rescission period, challenges to VAPs on the grounds of material mistake of fact, fraud, or duress would need to be proven based upon arguments and evidence independent from the non-birth parent’s lack of genetic ties to the child.

IV. LIMITATIONS OF THE PROPOSAL

There are a number of likely concerns that will be raised regarding the proposal to extend VAPs to female same-sex couples who conceive children using sperm provided in compliance with state donor non-paternity laws. The proposal as detailed in the previous Section directly addresses many of the concerns likely to be raised by individuals who are hesitant to extend simple, efficient methods of establishing legal parentage to same-sex couples. However, the proposal also likely will face criticism from individuals who are in favor of making it significantly easier for same-sex couples to establish legal parent status, but who believe that the proposal does not go far enough in advancing that goal. Before delving into the details of the concerns that fall within this general category, however, it is important to note that although under the proposal states would only be required under federal law to extend VAPs to female same-sex couples who conceive children using sperm provided in compliance with state donor non-paternity law, this would merely establish the minimum states must do with regard to extending VAPs to same-sex couples. States would remain free to extend their VAP procedures more liberally to a

168. See supra notes 37–38 and accompanying text.
broader range of same-sex couples and to decline to adopt any requirements relating to proof of compliance with the state’s donor non-paternity law.

The first likely concern is that the proposal is unjust or inadequate because it does not require states to extend VAPs to male same-sex couples whose children are conceived using sperm from one member of the couple and ova provided in compliance with state gamete donor non-paternity laws. While both male and female same-sex couples can create children by combining the genetic materials of one member of the couple with genetic materials provided by a gamete donor, male same-sex couples who wish to have children in this manner necessarily require a surrogate to carry and give birth to the child. Because the law generally grants parental status to women based upon the act of giving birth, extending VAPs to male same-sex couples would be significantly more complicated and would require greater reform to current parentage law. In order to extend VAPs to male same-sex couples, the law would need to either recognize that a child may have more than two legal parents or deny the automatic obtainment of parental status based upon the act of giving birth to women serving as surrogates. Either option would require significant change to existing laws.

More specifically, with regard to the option of the law recognizing more than two legal parents, there are currently only a few states with laws that allow for a child to have more than two legal parents—the law in the vast majority of states recognizes a maximum of two legal parents for each child. As a result, a proposal to extend VAPs to male same-sex couples that was based upon the legal recognition of more than two parents would require substantial reform to the parentage laws of most states. With regard to denying the automatic obtainment

169. Sarah Abramowicz, Contractualizing Custody, 83 FORDHAM L. REV. 67, 95 (2014) (“In most states, largely as a matter of statutory law, anonymous donors terminate their parental status by agreeing to donate their gametes to intermediaries who then provide them to intended parents. While such laws were originally drafted to address anonymous sperm donation, many states have since updated their statutes to include ova donation as well, and others have achieved the same result through case law.”).

170. Appleton, supra note 44, at 261. An important exception to the general proposition that male same-sex couples require a surrogate involves male same-sex couples in which one member of the couple is transgender. See Coleman, supra note 2.

171. Appleton, supra note 44, at 263 (discussing extending the marital presumption to male same-sex couples either by providing parental rights to each member of male same-sex couples as well the woman who gives birth or withholding legal parent status from the woman who gives birth and stating that “each of these possibilities represents a sufficiently dramatic departure from ordinary parentage rules and terminology”).

172. California and Maine have enacted statutes that explicitly provide that a child may have more than two legal parents. CAL. FAM. CODE § 7601(c) (West 2016); ME. STAT. tit. 19-A, § 1853 (2015). While a number of states have adopted equitable parenthood doctrines that grant rights to individuals who function as parents to a child, in many of these jurisdictions it is unclear whether qualifying individuals have any rights besides those relating to custody and visitation. Joslin, Leaving No (Nonmarital) Child Behind, supra note 68, at 502 (“It remains unclear in many states whether equitable parents have rights or obligations outside the context of child custody and visitation.”).
of parental status based upon the act of giving birth to women serving as surrogates, this would also require significant reform to the laws of most states. Some states do not recognize surrogacy agreements at all, and many states have yet to pass laws directly addressing surrogacy.\textsuperscript{173} Even among states that do enforce surrogacy agreements, most require judicial intervention either before or after the child’s birth to transfer parental rights from the surrogate to the intended parent.\textsuperscript{174} Consequently, while providing male same-sex couples with simple, efficient methods of establishing legal parent status such as the VAP is an extremely important goal that merits attention, it would require a significantly different type and degree of reform to existing state law than the modest reform required for the proposal set forth in this Article. The goal of extending simple, efficient methods of obtaining legal parent status to same-sex couples would be best accomplished through separate proposals for female and male same-sex couples that focus on the unique issues faced by each in establishing legal parentage.

Another concern with the proposal is that, despite the fact that its implementation would make the establishment of parentage significantly less expensive and onerous for many couples who would otherwise need to pursue adoption to ensure that the non-birth parent is recognized as a legal parent, it will nonetheless have classist effects in some jurisdictions. Pursuant to the proposal, states are only required to extend VAPs to female same-sex couples who conceive children using sperm donated in compliance with state donor non-paternity laws, and a number of these laws require that the sperm be provided to a licensed physician.\textsuperscript{175} Low-income couples, however, may not be able to afford sperm donation or assisted reproductive procedures that involve a licensed physician.\textsuperscript{176} These couples would be excluded from VAP procedures in a number of states.\textsuperscript{177} The potential exclusion of low-income same-sex couples


\textsuperscript{174.} FINKELSTEIN ET AL., supra note 173, app. 2. States differ on whether the judicial intervention must occur before or after the child’s birth. Id. at 9–11.

\textsuperscript{175.} See supra note 129 and accompanying text.

\textsuperscript{176.} Jennifer Nadraus, Dodging the Donor Daddy Drama: Creating a Model Statute for Determining Parental Status of Known Sperm Donors, 53 FAM. CT. REV. 180, 182 (2015).

\textsuperscript{177.} Browne Lewis, Two Fathers, One Dad: Allocating the Paternal Obligations Between the Men Involved in the Artificial Insemination Process, 13 LEWIS & CLARK L. REV. 949, 984 (2009) (“Moreover, the requirement that a licensed physician perform the procedure makes the process cost prohibitive to some couples. In response, low- or moderate-income women have an incentive to self-inseminate using sperm donated by men they know.”).
from VAP procedures due to physician involvement requirements in donor non-paternity laws is undoubtedly a significant concern.

A primary justification for the requirement in many states' donor non-paternity laws that the sperm be provided to a licensed physician is that the physician's presence and involvement "can serve to create a formal, documented structure for the donor-recipient relationship, without which ... misunderstandings between the parties regarding the nature of their relationship and the donor's relationship to the child would be more likely to occur." A related justification is that the requirement serves an evidentiary purpose—if there are conflicting allegations about the manner through which conception occurred (sexual intercourse or assisted reproduction) the physician is an independent third party who can testify to the circumstances of the conception. These justifications for physician involvement requirements within donor non-paternity laws, however, are unconvincing, as simply requiring the execution of forms documenting the parties' agreement such as the ones proposed above would promote formality and serve an evidentiary function regarding the parties' understanding and the method of conception. Another justification for the requirement that the sperm be provided to a licensed physician is that it promotes the health of the recipient and potential child. Under FDA rules, individuals or entities that recover, process, store, or distribute sperm must ensure that sperm providers' medical records are screened for risk factors for, or evidence of, various communicable diseases, and that the sperm is tested for a number of infectious diseases. However, the logic of placing requirements aimed at protecting recipients of sperm donations from communicable diseases within donor non-paternity laws as opposed to within health care regulations governing assisted reproductive practices is highly questionable—it seems unwise for the

179. Susan F. Appleton, Reproduction and Regret, 23 YALE J.L. & FEMINISM 255, 310 (2011) ("In the absence of such evidence, the controversy about the method of conception and hence the legal status of the genetic father might easily devolve into a 'he said/she said' argument."); Lewis, supra note 177, at 984 ("A primary justification for the physician requirement is evidentiary. The lack of an independent third party, like a physician, to testify makes it difficult for a court to determine whether the child was conceived by artificial insemination or sexual intercourse. If the child was conceived by sexual intercourse, the man should not be permitted to disregard his paternal obligations.").
180. See supra Section IV.B.2.i.
181. Jhordan C., 224 Cal. Rptr. at 534 ("One [justification] relates to health: a physician can obtain a complete medical history of the donor (which may be of crucial importance to the child during his or her lifetime) and screen the donor for any hereditary or communicable diseases.").
182. What You Should Know - Reproductive Tissue Donation, U.S. FOOD & DRUG ADMIN. (Nov. 5, 2010), https://www.fda.gov/biologicsbloodvaccines/safetyavailability/tissuesafety/ucm232876.htm [https://perma.cc/D68U-6YPW]. The FDA regulations make an exception to the testing and screening requirements, however, when the sperm provider is a sexually intimate partner of the recipient. 21 C.F.R. § 1271.90(a)(2) (2012).
penalty for failing to ensure that sperm is free from communicable diseases to be legal parenthood for the sperm provider.¹⁸³

Despite the questionable benefits and classist implications of the physician involvement requirements within some states’ donor non-paternity laws, it would be highly unlikely that the federal government would require states to repeal such requirements. To do so would result in substantial federal intervention into a legal issue that long has been governed by the states: the determination of the circumstances under which an individual is allowed to voluntarily waive parental rights to their genetic children and the required procedures for doing so.¹⁸⁴ This particular type of intervention is especially unlikely because the federal government is concerned with identifying two legal parents for each child,¹⁸⁵ and removing the physician involvement requirement from state donor non-paternity laws would make it easier for one of the child’s two genetic parents to voluntarily waive his or her parental rights and responsibilities in situations where there is no guarantee that there is another person willing to take on those rights and responsibilities.¹⁸⁶ As a result, reform to donor non-paternity laws to remove the requirement of physician involvement will likely need to occur at the state level. This type of reform to state donor non-paternity laws should be pursued regardless of whether the proposal set forth in this Article is implemented—physician involvement requirements create unnecessary hardship for low-income individuals and families who wish to

¹⁸³. Some states have enacted laws governing the practice of medicine that require all inseminations to be performed or supervised by a licensed physician and provide penalties unrelated to the establishment of legal parentage. See, e.g., GA. CODE ANN. § 43-34-37(a) (2010) (“Physicians and surgeons licensed to practice medicine in accordance with and under this article shall be the only persons authorized to administer or perform artificial insemination upon any female human being. Any other person or persons who shall attempt to administer or perform or who shall actually administer or perform artificial insemination upon any female human being shall be guilty of a felony and, upon conviction thereof, shall be punished by imprisonment in the penitentiary for not less than one year nor more than five years.”); IDAHO CODE §§ 39-5402, 5407 (2002) (stating that “[o]nly physicians licensed under chapter 18, title 54, Idaho Code, and persons under their supervision may select artificial insemination donors and perform artificial insemination” and providing that a person who violates this provision is guilty of a misdemeanor).

¹⁸⁴. State law governs the voluntary waiver of parental rights both in the adoption context and in the gamete donation context. See supra Section III.A.2. See also CONSENT TO ADOPTION, supra note 118, at 4–6 (discussing the various state approaches to the voluntary waiver of parental rights in the adoption context); JOSLIN ET AL., supra note 23, § 3:13 (discussing the various state approaches to the voluntary waiver of parental rights for sperm providers through donor non-paternity laws); Shawn L. Murphy, The Supreme Court’s Revitalization of the Dying ‘Existing Indian Family’ Exception, 46 McGEORGE L. REV. 629, 634 (2014) (“Laws regulating the voluntary termination of parental rights vary considerably across the United States.”); Nancy D. Polikoff, Breaking the Link Between Biology and Parental Rights in Planned Lesbian Families: When Semen Donors are not Fathers, 2 GEO. J. GENDER & L. 57, 74–81 (2001) (discussing the various approaches taken by states to the voluntary waiver of parental rights).

¹⁸⁵. See supra note 31 and accompanying text.

¹⁸⁶. State donor non-paternity laws do not consider whether there is an individual willing to take on the role of the child’s second legal parent. See JOSLIN ET AL., supra note 23, § 3:13 (discussing state donor non-paternity laws).
conceive children using donor sperm. Overall, while implementation of the proposal unfortunately would not, by itself, solve the problems faced by every same-sex couple in every jurisdiction in establishing legal parent status, the proposal would be a modest, realistic step in the right direction that would aid a significant number of same-sex couples in establishing parentage.

A final likely concern with the proposal is that if same-sex couples are required to take the extra step of supplying proof that their child was conceived using sperm provided in compliance with state donor non-paternity laws in order to utilize VAP procedures, it will place an unfair burden on such couples. This is, of course, a legitimate concern. Ideally, all jurisdictions will undertake legal reform that makes establishing legal parent status equally as simple and efficient for same-sex couples as it is for different-sex couples. The proposal set forth in this Article, however, does not aim to articulate the legal framework governing the establishment of parentage for same-sex couples that would exist in an ideal world. Instead, it focuses on identifying realistic, effective legal reform that could provide a significantly greater number of same-sex couples across the nation with access to a simple, efficient method of establishing legal parentage without major upheaval to state laws governing the rights of genetic parents or existing federal VAP procedures. In furthering this goal, the proposal aims to structure the extra steps same-sex couples may have to take in establishing parentage through VAP procedures in a way that minimizes any extra burden placed on same-sex couples.

**CONCLUSION**

The current legal framework governing parentage in the United States is in critical need of reform. It is significantly more difficult for same-sex couples to obtain legal parent status for both members of the couple following the birth of their child. The inequitable treatment of same-sex couples in establishing legal parentage has extremely harmful consequences for these couples and their children. While the law’s historical privileging of genetic connections in parentage determinations poses some challenges for same-sex couples in obtaining access to the simple, efficient methods of establishing legal parentage in existence today, these challenges are far from insurmountable. A federal mandate requiring states to extend the use of VAPs to female same-sex couples who conceive children using sperm provided in compliance with state donor non-paternity laws represents a logical, modest step in the right direction for ameliorating the difficulties currently faced by same-sex parents in obtaining legal parent status without requiring significant upheaval to state laws governing the rights of genetic parents or federal VAP procedures.