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## Article

# Restructuring Rebuttal of the Marital Presumption for the Modern Era

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### INTRODUCTION

The marital presumption of paternity, which arose from English common law, has served as a core component of the law governing parentage in the United States since the nation's inception.<sup>1</sup> Pursuant to the marital presumption, a husband is presumed to be the legal father of any child born to or conceived by his wife during the marriage.<sup>2</sup> Historically, the marital presumption was extremely difficult to rebut, generally requiring 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.<sup>3</sup> As these early grounds for rebuttal made clear, a husband was deemed the legal parent of a child born to or conceived by his wife during the marriage unless it was proven that the husband could not possibly be the child's biological father. Today, the question of whether a biological tie exists between the husband and child, which can now be accurately resolved through simple DNA testing procedures, continues to be a core consideration in actions to rebut the marital presumption.<sup>4</sup> The

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1. *See infra* Part I.A.
2. Theresa Glennon, *Somebody's Child: Evaluating the Erosion of the Marital Presumption of Paternity*, 102 W. VA. L. REV. 547, 562 (2000).
3. *Id.* at 565.
4. *See infra* note 41 and accompanying text.

nationwide legalization of same-sex marriage, however, calls into question the future of the marital presumption, and, in particular, the future role that genetics-based considerations will play in the application of the marital presumption.

The Supreme Court's 2015 decision in *Obergefell v. Hodges* struck down all remaining state bans on same-sex marriage and held that states must provide marriage to same-sex couples on the same terms accorded to different-sex couples.<sup>5</sup> Two years later, in *Pavan v. Smith*, the Supreme Court held that, pursuant to *Obergefell*'s mandate that marriage be accorded to same-sex couples on the same terms accorded to different-sex couples, if a state provides the different-sex spouses of individuals who give birth with the right to be listed on the child's birth certificate, it must do the same for same-sex spouses.<sup>6</sup> As a result of the Supreme Court's decisions in *Obergefell* and *Pavan*, it is likely that states will need to either extend the marital presumption to encompass both different- and same-sex spouses of individuals<sup>7</sup> who give birth or abolish the presumption entirely.<sup>8</sup> Because the

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5. 135 S. Ct. 2584, 2607 (2015).

6. 137 S. Ct. 2075, 2078 (2017).

7. It is important to note that, in addition to women, 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>]. Although this Article uses gendered terms at certain points when necessary to accurately reflect the language of past or current statutes or case decisions, the author feels strongly that state laws that use gendered terms in referring to a person who gives birth must be amended to reflect that individuals other than women may give birth.

8. It is less likely that *Obergefell* and *Pavan* will be interpreted as requiring the extension of existing state marital presumptions of parentage to married male same-sex couples who utilize a surrogate to give birth to the biological child of one of the spouses. This is because it is generally recognized that the presumption of parentage created by the marital presumption stems from an individual's marriage to the person who has *given birth* to the child, as opposed to an individual's marriage to a person who is the child's biological parent. See, e.g., ME. REV. STAT. ANN. tit. 19-A, § 1881(1) (2015) ("A person is presumed to be the parent of a child if: [t]he person and the woman giving birth to the child are married to each other and the child is born during the marriage."); VT. STAT. ANN. tit. 15C, § 401(a) (2018) ("[A] person is presumed to be a parent of a child if: the person and the person who gave birth to the child are married to each other and the child is born during the marriage."); WASH. REV. CODE § 26.26A.115(1) (2019) ("An individual is presumed to be a parent of a child if: . . . [t]he individual and the woman who gave birth to the child are married . . . and the child is born during the marriage."). More specifically, it is gen-

marital presumption has, throughout United States history, played an essential role in the law governing the establishment

erally recognized that the marital presumption bestows a presumption of parentage upon the spouse of a married individual who has given birth to a child; it does not bestow a presumption of parentage to the spouse of a married individual who is merely the child's biological parent. For example, if a married man fathers a child with a person who is not his spouse, the marital presumption does not provide a presumption of parentage to his spouse. Susan Frelich Appleton, *Presuming Women: Revisiting the Presumption of Legitimacy in the Same-Sex Couples Era*, 86 B.U. L. REV. 227, 263 n.204 (2006). In fact, the marital presumption likely would not apply at all in that situation unless the person who gave birth to the child was married, in which case it would function to provide a presumption of parentage to their spouse. Although *Obergefell* and *Pavan* require states to extend marriage to same-sex couples on the same terms as those accorded to different-sex couples, the failure to extend the marital presumption to male same-sex couples does not necessarily run afoul of this mandate—under current marital presumption standards, the spouse of a biological father, regardless of whether the spouse is male or female, is not encompassed by the marital presumption.

Consequently, the analysis set forth in this Article does not explicitly address the application of the marital presumption to male same-sex couples. It is essential to note that establishing a marital presumption applicable to male same-sex couples is an extremely important goal that merits attention. The difficulty in creating such a marital presumption stems from the fact that male same-sex couples who desire biological children generally require a surrogate. Jessica Feinberg, *A Logical Step Forward: Extending Voluntary Acknowledgments of Parentage to Female Same-Sex Couples*, 30 YALE J.L. & FEMINISM 99, 118, 134 (2018). The surrogate presents a significant issue because the law generally grants parental status to individuals based upon the act of giving birth, and most states only recognize a maximum of two individuals as a child's legal parents. *Id.* In order to apply a marital presumption of parentage to male same-sex couples, most states would need to change their parentage laws 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 individuals serving as surrogates. *Id.* Another option would be for states to structure the marital presumption such that, in the surrogacy context, the presumption would become effective as to the spouse of the child's remaining legal parent at the point following the child's birth when the surrogate's parental rights were legally terminated. It seems likely that, in the pursuit of equity and justice, in the near future some states will utilize a method similar to those mentioned above in order to create a marital presumption that applies to male same-sex couples. In fact, a New York appellate court recently applied the state's marital presumption to a male same-sex couple. *In re Maria-Irene D.*, 153 A.D.3d 1203, 1204–05 (N.Y. App. Div. 2017) (applying the marital presumption of parentage to the biological father's same-sex spouse where the child was born via surrogate during the marriage, the couple had jointly executed a surrogacy agreement, and the surrogate's rights were terminated following the child's birth). For states that extend the marital presumption to male same-sex couples, the analysis set forth in this Article regarding modern grounds for rebuttal will be equally relevant.

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of legal parentage, it is highly unlikely that many states will choose the latter option.<sup>9</sup> As a result, it is probable that in the near future, there will be a number of states that seek to extend their marital presumptions to same-sex spouses. Given that in most cases involving same-sex couples the spouse of the individual who gave birth will not be genetically connected to the child, in order to establish a marital presumption that effectively and fairly encompasses same-sex couples, states must engage in the important undertaking of restructuring their current marital presumption standards so that a spouse's lack of genetic connection to the child is no longer the basis for rebuttal.

The initial step that each state will need to take in crafting an updated marital presumption is to reconceptualize the presumption as furthering objectives unrelated to the bestowment of parentage to the individual most likely to be the child's second genetic parent. There are a number of other core objectives that states could identify for the marital presumption. Specifically, states may identify the provision of parentage to the individual most likely to be the child's second intended parent or the provision of parentage to the individual most likely to function in the role of the child's second parent as the primary purpose of the marital presumption. Objectives related to identifying the child's second intended or functional parent will likely play a key role in most states' modern marital presumptions, as under current law intent and function have emerged as the primary alternatives to genetics as the basis for the establishment of parental rights.<sup>10</sup> Additional or alternative state marital presumption objectives may include the protection of marital family units from outside intrusion, the promotion of marriage as the preferred site for parentage establishment, and the furtherance of children's best interests. After determining which objectives it views as most important, each state can then structure its marital presumption in the way that most effectively furthers its goals.

There are a number of critical decisions that states will need to make in structuring the details of a modern marital presumption. For most states, one of the most significant determinations will center on identifying the basis for rebuttal. Since parental intent and function have emerged as the primary alternatives to genetics as the basis for the establishment of parental rights, re-

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9. See *infra* Part I.A.

10. See *infra* Part II.A.

buttal of modern marital presumptions likely will focus on proving either that the individual who gave birth and their spouse did not mutually intend for the spouse to be the child's second parent or that the spouse did not function as the child's parent. There are significant strengths and weaknesses to each of these approaches, and states will need to weigh a number of competing factors in determining whether to adopt one of these standards over the other or to instead create rebuttal grounds that encompass both intent- and function-based considerations. Other important decisions states will need to make include identifying the categories of individuals granted standing to challenge the marital presumption and deciding whether to place time limitations on rebuttal actions. Finally, states will need to make an important decision regarding whether to establish one uniform marital presumption or two separate marital presumptions, an approach which would likely involve the state maintaining its preexisting marital presumption standard for conceptions that occur through sexual means and applying an updated marital presumption standard only for conceptions that occur through nonsexual means.

This Article sets forth a comprehensive analysis of the various methods states may utilize to restructure their marital presumptions in the era of same-sex marriage. The choices that states make in the process of restructuring their marital presumptions are of great importance. The law governing the establishment of parentage in the United States has reached a critical juncture—the historical reliance on genetics-related considerations in determining parentage increasingly is being called into question and states have begun to place greater importance on considerations such as intent and function in making parentage determinations. In restructuring their marital presumptions, states will be forced to reevaluate what considerations are most important in identifying the individuals entitled to recognition as a child's legal parents, and the decisions that states make in this process likely will play a significant role in the modern development of the law governing the establishment of parentage.

The Article proceeds in the following manner. Part I first traces the history and development of the marital presumption, from its English common law roots to its current iterations under state law. It then explores recent state law developments regarding the extension of the marital presumption to same-sex couples and explains why structuring a marital presumption that effectively encompasses the same-sex spouses of individuals who give

birth will require significant changes to current marital presumption standards. Part II considers how states could reconceptualize the marital presumption as promoting objectives unrelated to the identification of the individual most likely to be the child's second biological parent. The alternative objectives explored include: the provision of parentage to the individual most likely to be the child's second intended parent, the provision of parentage to the individual most likely to function in the role of the child's second parent, the protection of marital family units from outside intrusion, the promotion of marriage as the preferred site for parentage establishment, and the furtherance of children's best interests. Part III analyzes the various options available to states for restructuring the marital presumption and concludes by arguing that an approach to rebuttal that encompasses both intent- and function-based considerations will be most effective in furthering the objectives that most states likely will seek to further through a modern marital presumption. Finally, Part IV explores the possibility of states establishing two distinct marital presumption standards, the applicability of which would depend upon whether conception occurred through sexual or nonsexual means.

## I. THE MARITAL PRESUMPTION: PAST AND PRESENT

### A. THE DEVELOPMENT OF THE MARITAL PRESUMPTION: A BRIEF HISTORY

The marital presumption of paternity has been described as “one of the most firmly-established and persuasive precepts known in law.”<sup>11</sup> As far back as the early 1700s, the common law of England set forth a presumption that a woman's husband was the legal father of any child born to or conceived by the woman during the marriage.<sup>12</sup> This presumption was extremely difficult to rebut—generally the husband or wife was required to prove that during the time of conception the husband was “beyond the four-seas,”<sup>13</sup> and thus he was outside “the reach of both England and the child's mother.”<sup>14</sup> The presumption became even more

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11. *Baker v. Baker*, 582 S.E.2d 102, 103 (2003).

12. Glennon, *supra* note 2, at 562.

13. MICHAEL GROSSBERG, GOVERNING THE HEARTH: LAW AND THE FAMILY IN NINETEENTH-CENTURY AMERICA 201 (1985).

14. David D. Meyer, *Parenthood in a Time of Transition: Tensions Between Legal, Biological, and Social Conceptions of Parenthood*, 54 AM. J. COMP. L. 125,

difficult to rebut with the establishment of Lord Mansfield's Rule in 1777.<sup>15</sup> This rule barred both the wife and husband from testifying about the husband's non-access to his wife during the time of conception.<sup>16</sup> In the early years of the United States, courts applied both the marital presumption and Lord Mansfield's Rule.<sup>17</sup>

In the early 1900s, states began to abolish Lord Mansfield's Rule.<sup>18</sup> The marital presumption of paternity, however, continued to be in force in most states pursuant to statute or the common law.<sup>19</sup> The presumption was generally rebuttable through proof of the husband's impotence, sterility, lack of cohabitation with or access to his wife during the time of conception, or proof of adultery on the part of the wife.<sup>20</sup> The marital presumption could also be rebutted when the child's race did not match the husband's race.<sup>21</sup> As Professor Theresa Glennon has noted, "[d]espite these common law bases for rebuttal, the marital presumption prevailed in all but a very limited set of circumstances through the first half of the twentieth century."<sup>22</sup> As a result, the marital presumption has been described as "one of the strongest [presumptions] known to law."<sup>23</sup>

There were a variety of justifications set forth for making the presumption so difficult to rebut. As an initial matter, it was viewed as necessary to further the interests and well-being of children. The presumption protected children from being deemed illegitimate, a status that carried a profound stigma and deprived children of significant legal rights and protections.<sup>24</sup>

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127 (2006); *see also* Glennon, *supra* note 2, at 562–63 ("The mother and presumed father could only rebut that presumption by proving that the husband did not have access to his wife during the crucial period of conception.").

15. Glennon, *supra* note 2, at 563.

16. *Id.* at 563.

17. *Id.* at 564–65.

18. *Id.* at 565.

19. *Id.*

20. *Id.*

21. Appleton, *supra* note 8, at 251.

22. Glennon, *supra* note 2, at 565.

23. Susan Frelich Appleton, *Illegitimacy and Sex, Old and New*, 20 AM. U. J. GENDER, SOC. POL'Y & L. 347, 350 n.14 (2012).

24. *Michael H. v. Gerald D.*, 491 U.S. 110, 125 (1989) ("The primary policy rationale underlying the common law's severe restrictions on rebuttal of the presumption appears to have been an aversion to declaring children illegitimate, thereby depriving them of rights of inheritance and succession, and likely making them wards of the state." (citations omitted)).

For example, under early English common law, children who were deemed illegitimate were considered *filius nullius* or the child of no one, and they did not have the right to receive support or inherit from either of their parents.<sup>25</sup> In the United States, although in most states children deemed illegitimate had the right to receive support and inherit from their mother, the majority of states did not provide these children with the right to inherit from their father.<sup>26</sup> In addition, fathers generally were only required to provide support if the child was receiving public assistance,<sup>27</sup> and any support children deemed illegitimate were entitled to receive from their fathers was usually unequal in amount and duration to the support to which children deemed legitimate were entitled.<sup>28</sup> Conversely, when the marital presumption of paternity was applied, children were provided with a legal father who had the duty to care for and support them from the time they were born.<sup>29</sup>

Another justification set forth for the presumption was that it promoted parenthood within marriage, something which was widely viewed at the time as furthering children's best interests.<sup>30</sup> Moreover, in an era when scientific advancements did not yet allow for the definitive determination of biological paternity, the presumption avoided "evidentiary impasses"<sup>31</sup> and assigned parentage to the man who, as a general matter, was viewed as

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25. Laurence C. Nolan, "Unwed Children" and Their Parents Before the United States Supreme Court From Levy to Michael H.: *Unlikely Participants in Constitutional Jurisprudence*, 28 CAP. U. L. REV. 1, 6–7 (1999).

26. *Id.* at 8; June Carbone, *The Missing Piece of the Custody Puzzle: Creating a New Model of Parental Partnership*, 39 SANTA CLARA L. REV. 1091, 1096 (1999); Leslie Joan Harris, *The Basis for Legal Parentage and the Clash Between Custody and Child Support*, 42 IND. L. REV. 611, 616–17 (2009); Courtney G. Joslin, *The Evolution of the American Family*, 36 HUM. RTS. 2, 4 (2009).

27. Carbone, *supra* note 26, at 1096 ("In the United States, non-marital children were viewed as part of their mother's, but not their father's, families. The father might bear some responsibility to the extent that his non-marital child imposed a burden on the state, but the child had no claim to his father's name, property, support, or companionship."); Harris, *supra* note 26, at 616–17.

28. Nolan, *supra* note 25, at 8.

29. Mikaela Shotwell, Note, *Won't Somebody Please Think of the Children?: Why Iowa Must Extend the Marital Presumption to Children Born to Married, Same-Sex Couples*, 15 J. GENDER RACE & JUST. 141, 144 (2012).

30. Glennon, *supra* note 2, at 590–91.

31. Debi McRae, *Evaluating the Effectiveness of the Best Interests Marital Presumption of Paternity: It Is Actually in the Best Interests of Children to Divorce the Current Application of the Best Interests Marital Presumption of Paternity*, 5 WHITTIER J. CHILD & FAM. ADVOC. 345, 349–50 (2006).

the individual most likely to be the biological father of a child born to a married woman: her husband.<sup>32</sup> Another primary justification for maintaining a strong marital presumption related to promoting the harmony and integrity of the marital family unit by automatically identifying the husband as the child's legal father and protecting the marital family unit from challenges to the husband's paternity.<sup>33</sup> Finally, the marital presumption was believed to reduce government spending by ensuring that a greater number of children had two legal parents obligated to support them from the time of birth.<sup>34</sup>

States began to amend their marital presumptions as, over time, a number of the traditional justifications for the maintenance of a strong marital presumption faded. For example, although the law continues to treat non-marital children differently than marital children in certain respects,<sup>35</sup> the Supreme Court, applying the Equal Protection Clause, has struck down laws providing for the unequal treatment of non-marital children in a number of important areas.<sup>36</sup> Notably, today every state has extended "the rights and responsibilities of parenthood [to] both the mothers and fathers of nonmarital children, and nonmarital children are entitled to inherit through both of their parents."<sup>37</sup> Moreover, the traditional justification for the marital presumption based upon the impossibility of determining with certainty whether a man is a child's biological father has become irrelevant. With scientific and medical advancements in the area of DNA testing, it has become quite straightforward and simple to

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32. Melanie B. Jacobs, *Parental Parity: Intentional Parenthood's Promise*, 64 BUFF. L. REV. 465, 478 (2016) ("And, in the majority of instances, a mother's husband is, indeed, the child's biological father."); Marjorie Maguire Shultz, *Reproductive Technology and Intent-Based Parenthood: An Opportunity for Gender Neutrality*, 1990 WIS. L. REV. 297, 317 (1990) ("[O]ne presumptive purpose [of the marital presumption] has been the codification of empirical inference—the best available method of determining factual biological paternity. Who is the biological father? The most likely candidate is the man having sexual intercourse with the mother. Who is most likely having sexual intercourse with the mother? Her husband.")

33. *Michael H. v. Gerald D.*, 491 U.S. 110, 125 (1989).

34. Appleton, *supra* note 8, at 246–47; Glennon, *supra* note 2, at 563.

35. Joslin, *supra* note 26, at 4.

36. *Trimble v. Gordon*, 430 U.S. 762 (1977) (inheritance); *Gomez v. Perez*, 409 U.S. 535 (1973) (support); *Weber v. Aetna Casualty & Surety Co.*, 406 U.S. 164 (1972) (workers' compensation benefits); *Levy v. Louisiana*, 391 U.S. 68 (1968) (wrongful death claims).

37. Joslin, *supra* note 26, at 4.

accurately determine whether a man is a child's biological father.<sup>38</sup>

Today, while every state continues to apply the marital presumption of paternity in some form, there have been some significant changes with regard to the structure of states' marital presumptions.<sup>39</sup> A majority of states, approximately two-thirds, through statute or court decision have extended standing to challenge the presumption not only to the individual who gave birth, their spouse, and child support enforcement agencies, but also to biological fathers who conceive children with individuals who are married to someone else.<sup>40</sup> Rebutting the marital presumption usually requires, at a minimum, DNA testing indicating that the putative father is the child's biological father or that the husband of the individual who gave birth is not the child's biological father.<sup>41</sup> However, in a number of states, courts can refuse to admit genetic testing evidence if the court determines

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38. *Paternity Tests: Blood Tests and DNA*, FINDLAW, <https://family.findlaw.com/paternity/paternity-tests-blood-tests-and-dna.html> [<https://perma.cc/H9BA-5U4A>].

39. See Harris, *supra* note 26, at 622–23.

40. UNIF. PARENTAGE ACT § 607 cmt. (UNIFORM LAW COMM'N 2002) (“As of the year 2000, the right of an ‘outsider’ to claim paternity of a child born to a married woman varies considerably among the states. Thirty-three states allow a man alleging himself to be the father of a child with a presumed father to rebut the marital presumption. Some states have granted this right through legislation, while in other states case law has recognized the alleged father’s right to rebut the presumption and establish his paternity.”); June Carbone & Naomi Cahn, *Jane the Virgin and Other Stories of Unintentional Parenthood*, 7 UC IRVINE L. REV. 511, 513 (2017) [hereinafter Carbone & Cahn, *Jane the Virgin*] (“Today, however, two-thirds of the states permit a biological father to contest the marital presumption, whatever the intent of the parties at the time of conception or the parties’ respective roles after the birth.”).

41. Leslie Joan Harris, Obergefell’s *Ambiguous Impact on Legal Parentage*, 92 CHI.-KENT L. REV. 55, 73 (2017) (“[T]oday, when the spouses are opposite-sex, the presumption may be rebutted with genetic evidence.”); Paula A. Monopoli, *Inheritance Law and the Marital Presumption After Obergefell?*, 8 EST. PLAN. & COMMUNITY PROP. L.J. 437, 448 (2016) (“In an opposite-sex marriage, the presumption would typically be rebutted by DNA evidence today. The court would order genetic testing and, if the husband had no genetic link to the child, the court may determine that he is not the legal parent.”); see also Joanna L. Grossman, *Parentage Without Gender*, 17 CARDOZO J. CONFLICT RESOL. 717, 738 (2016) (“Most marital presumptions are rebuttable today, some upon proof of no genetic tie between husband and child, some only if a court decree establishes paternity in another man.”).

that doing so would be contrary to the child's best interests<sup>42</sup> or that the party seeking to submit such evidence should be estopped from doing so on equitable grounds.<sup>43</sup> Additionally, even if the genetic testing evidence is admitted demonstrating that the husband is not the child's biological father, in some states similar types of analyses may occur to determine whether the husband should nonetheless maintain his status as the child's legal father.<sup>44</sup> As Professor June Carbone has explained, "proof that the husband is not the biological father does not solely rebut the presumption; instead, doing so may involve the consideration of the child's interests, the degree to which the husband assumed a paternal role, and/or the biological father's ability and willingness to provide support."<sup>45</sup> As a general matter, "[c]ourts are quite reluctant to undercut the marital presumption when the mother and her husband have co-parented the child, the husband has provided financial and emotional support to the child,

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42. See *infra* note 107; see also Harris, *supra* note 26, at 623 ("If the presumption is challenged by the offer of genetic evidence, a number of states have held that a court can refuse to admit that evidence if contrary to the child's best interests. Other courts have reached the same result on the basis that the party offering the rebuttal evidence is estopped to deny parentage because of the detrimental reliance of the other party or, sometimes, the child."); Monopoli, *supra* note 41, at 448 ("Courts do retain the equitable power to declare that, even despite a genetic connection and the rebuttal of the presumption, the child's best interests require the husband to retain legal parentage."); Rhonda Wasserman, *DOMA and the Happy Family: A Lesson in Irony*, 41 CAL. W. INT'L L.J. 275, 283 (2010) ("Some states permit the presumption of parentage to be rebutted only if doing so would serve the child's best interests. In these states, when alleged biological fathers claim paternity of children born during an intact marriage, courts decline to order blood tests or DNA tests to determine paternity unless the determination would be in the child's best interests.").

43. See *infra* notes 108–09 and accompanying text.

44. See, e.g., *In re Jesusa V.*, 85 P.3d 2, 15 (Cal. 2004) (holding that another man's biological paternity does not necessarily rebut the husband's presumption of parentage and that considerations based upon policy and logic, such as the welfare of the child, factor into the determination of who should be deemed the legal father); *N.A.H. v. S.L.S.*, 9 P.3d 354, 357 (Colo. 2000) ("We hold that the best interests of the child must be of paramount concern throughout a paternity proceeding, and therefore, must be explicitly considered as a part of the policy and logic analysis that is used to resolve competing presumptions of fatherhood [between a genetic father and the husband of the child's mother]."); *Kelly v. Cataldo*, 488 N.W.2d 822, 827 (Minn. Ct. App. 1992) (stating that the child's best interests should be considered in determining whether the mother's husband or the genetic father should be deemed the child's legal father).

45. June Carbone & Naomi Cahn, *Nonmarriage*, 76 MD. L. REV. 55, 87 (2016) [hereinafter Carbone & Cahn, *Nonmarriage*].

and the child has bonded with the husband.”<sup>46</sup> Finally, presumably in an effort to minimize harmful disruption to children and their established families, some states set forth time limitations for challenging the marital presumption.<sup>47</sup> These time limitations for challenging the presumption commonly range from two to five years after the child’s birth depending on the state.<sup>48</sup> Overall, under current law the marital presumption continues to play an extremely significant role in the establishment of parentage, as it remains the most common way of establishing a person other than the individual who gave birth as a child’s legal parent.<sup>49</sup>

#### B. THE EXTENSION OF THE MARITAL PRESUMPTION TO SAME-SEX COUPLES

Until relatively recently, no jurisdiction within the United States granted same-sex couples the right to marry. Consequently, use of the marital presumption to establish the same-sex partner of the individual who gave birth as the child’s second legal parent was simply not an option. In 2004, however, Massachusetts became the first state to legalize same-sex marriage.<sup>50</sup>

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46. Wasserman, *supra* note 42, at 283.

47. See PROPOSED REVISION OF THE UNIFORM PARENTAGE ACT § 605 cmt. (UNIFORM LAW COMM’N 1999) (stating that the two-year time limit on challenging the marital presumption was adopted because “a longer period may have severe consequences for the child”).

48. Though states differ with regard to the details, including the exceptions under which the time limitation is not applicable, a number of states have adopted some form of a time limitation for rebutting the marital presumption. See, e.g., CAL. FAM. CODE § 7541 (2018) (two years from the child’s birth); COLO. REV. STAT. § 19-4-107 (2017) (within a reasonable time, but in no event more than five years from the child’s birth); DEL. CODE ANN. tit. 13, § 8-607 (2018) (two years from the child’s birth); 750 ILL. COMP. STAT. ANN. 46/205 (West 2018) (two years after the petitioner gains knowledge of the relevant facts); ME. STAT. tit. 19-A, § 1882 (2015) (two years after the child’s birth); MINN. STAT. § 257.57 (2018) (two years after the party bringing the action has reason to believe that the presumed father is not the child’s biological father, but in no event more than three years from the child’s birth); N.D. CENT. CODE § 14-20-42 (2017) (two years after the child’s birth); OKLA. STAT. tit. 10, § 7700-607 (2018) (two years after the child’s birth); TENN. CODE ANN. § 36-2-304(b)(2)(A) (2018) (twelve months after the child’s birth); TEX. FAM. CODE ANN. § 160.607 (West 2017) (four years after the child’s birth); WYO. STAT. ANN. § 14-2-807 (2018) (within a reasonable time after obtaining the relevant knowledge, but in no event more than five years after the child’s birth).

49. Katharine K. Baker, *Legitimate Families and Equal Protection*, 56 B.C. L. REV. 1647, 1659 (2015).

50. *Looking Back at the Legalization of Gay Marriage in Mass.*, BOS. GLOBE

Between 2004 and 2015, same-sex marriage expanded rapidly throughout the United States, culminating with the Supreme Court's decision in *Obergefell v. Hodges*, which struck down the remaining state bans on same-sex marriage.<sup>51</sup> *Obergefell* set forth the important proposition that states may not “bar same-sex couples from marriage on the same terms as accorded to couples of the opposite sex.”<sup>52</sup> While *Obergefell* did not explicitly discuss the extension of the marital presumption to same-sex couples, if states must provide marriage to same-sex couples on the *same terms* as accorded to different-sex couples, the marital presumption of parentage<sup>53</sup> should apply equally to both different- and same-sex spouses of individuals who give birth.<sup>54</sup> This reading of *Obergefell* is further supported by the Supreme Court's 2017 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 same-sex spouse on the child's birth certificate when state law generally required the names of different-sex spouses of individuals who give birth to appear on birth certificates.<sup>55</sup>

Indeed, in several cases following a jurisdiction's legalization of same-sex marriage, courts have been asked to determine whether the marital presumption of parentage extends to the same-sex spouse of an individual who gives birth. To date, most

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(June 26, 2015), <https://www.bostonglobe.com/metro/2015/06/26/looking-back-legalization-gay-marriage-mass/uhCeyrSeJtWty9tSUde1PI/story.html>.

51. 135 S. Ct. 2584, 2608 (2015).

52. *Id.* at 2607.

53. With its extension to same-sex couples, it will make more sense to refer to the presumption as the “marital presumption of parentage” as opposed to the “marital presumption of paternity.”

54. COURTNEY G. JOSLIN ET AL., LESBIAN, GAY, BISEXUAL & TRANSGENDER FAMILY LAW § 5:22 (2018) (“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).”).

55. 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 54, § 5:25.

courts that have addressed the issue, though not all,<sup>56</sup> have answered this question in the affirmative.<sup>57</sup> In addition, a handful

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56. See, e.g., *In re Paczkowski v. Paczkowski*, 128 A.D.3d 968, 969 (N.Y. 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 marriage, “since the presumption of legitimacy [the statutes] create is one of a biological relationship, not of legal status . . . and, as the non-gestational 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.*, 999 N.Y.S.2d 470, 474 (N.Y. 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”); *In Interest of A.E.*, No. 09-16-00019-CV, 2017 WL 1535101, at \*8 (Tex. App. Apr. 27, 2017) (declining to apply the marital presumption 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’”).

57. See, e.g., *McLaughlin v. Jones ex rel. Cty. 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); *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); *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 . . . .”); 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.”); 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). 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 Appleton, *supra* note 8, at 260–61; Alexandra Eisman, *The Extension of the Presumption of Legitimacy to*

of jurisdictions have amended their marital presumption statutes to clarify that the presumption applies to the spouse of an individual who gives birth regardless of the spouse's sex.<sup>58</sup> It seems probable that in the near future a number of states, particularly those states that are generally friendly to LGBTQ rights, will explicitly extend the marital presumption to encompass the same-sex spouses of individuals who give birth.

Furthermore, assuming that *Obergefell* and *Pavan* are not overturned, all states will eventually be left with two options regarding the future of the marital presumption. To comply with *Obergefell's* mandate of according marriage to same-sex couples on the same terms accorded to different-sex couples,<sup>59</sup> states likely will need to either extend the presumption to the same-sex spouses of individuals who give birth or abolish the presumption entirely such that it does not apply to either the same- or different-sex spouses of individuals who give birth.<sup>60</sup> It is likely that if states are left with the option of either abrogating the marital presumption entirely or extending it to same-sex couples, most, if not all, will choose the latter alternative. As mentioned above, the marital presumption is one of the longest-standing and most firmly-established legal concepts, and it remains the most common way of establishing an individual as a child's second legal parent.<sup>61</sup>

In addition, although some of the traditional justifications for the marital presumption no longer exist,<sup>62</sup> there are a number of remaining justifications for the continued application of the presumption. The presumption serves as a simple, easy-to-

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*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 A.D.3d 1203, 1204–05 (N.Y. App. Div. 2017).

58. See Douglas NeJaime, *The Nature of Parenthood*, 126 YALE L.J. 2260, 2339, app. A at 2363 (2017) (“While most states[] [marital presumptions] continue to refer to the man married to the mother, a handful of states have revised their statutory marital presumptions to recognize the *person* married to the mother.”).

59. See *Obergefell v. Hodges*, 135 S. Ct. 2584, 2608 (2015).

60. See JOSLIN ET AL., *supra* note 54, § 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.”); Harris, *supra* note 41, at 74 (“*Obergefell* very likely requires that same-sex couples have the benefit of the marital presumption.”).

61. See Baker, *supra* note 49, at 1659.

62. See *supra* notes 35–38 and accompanying text.

apply method of providing children born to a married person with a second legal parent from the moment of birth.<sup>63</sup> Providing children with two legal parents from birth, each of whom has a duty to care for and support the child, long has been viewed as promoting not only children's best interests,<sup>64</sup> but also societal interests.<sup>65</sup> In addition, many people continue to adhere to the belief that children benefit from being raised within a marital family unit.<sup>66</sup> Moreover, stable marital families are still viewed as "a critical social good," and the presumption continues to serve the purpose of protecting the integrity of marriages.<sup>67</sup> By automatically providing parental status to the spouse of the individual who gave birth without any requirement of proof of a biological tie between the spouse and child, the presumption promotes harmony and unity within the marital family unit. Furthermore, "by making it less likely that others will undermine

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63. See Jacobs, *supra* note 32, at 470 (stating that the presumption has "ease of application"); see also Shotwell, *supra* note 29, at 144 ("Because this legal status carries with it a number of rights and duties, the marital presumption, in effect, 'gives the child a legal father who must provide care and support for the child.'" (citation omitted)).

64. William M. Lopez, *Artificial Insemination and the Presumption of Parenthood: Traditional Foundations and Modern Applications for Lesbian Mothers*, 86 CHI.-KENT L. REV. 897, 902–03 (2011) ("[C]hildren benefit from the simple fact of having a legally recognized relationship with both parents."); see also Jennifer B. Mertus, *In re Adoption of R.B.F.: A Step Toward the Recognition and Acceptance of Non-Traditional Families*, 3 WHITTIER J. CHILD & FAM. ADVOC. 171, 185 (2003) ("Having two legal parents, regardless of their sexuality, provides many economic, legal, and psychological benefits to a child.").

65. See Appleton, *supra* note 8, at 246 ("A less altruistic version of the child-welfare rationale for the presumption of legitimacy shifts the focus to the public or society in general. On a purely practical level, the law's preference for the marital family long has helped protect the public purse and the public interest in clear rules of descent."); see also Mark Strasser, *Presuming Parentage*, 25 TEX. J. WOMEN, GENDER, & L. 57, 60 (2015).

66. See *Obergefell v. Hodges*, 135 S. Ct. 2584, 2590 (2015) (discussing "the significant material costs of being raised by unmarried parents," including being "relegated to a more difficult and uncertain family life"); see also *Goodridge v. Dep't of Health*, 798 N.E.2d 941, 964 (Mass. 2003) (describing marriage as the "foremost setting for the education and socialization of children" (citation omitted)); Appleton, *supra* note 8, at 243–47 ("According to one popular understanding today, the presumption of legitimacy has served and should continue to serve a child-welfare objective."); Glennon, *supra* note 2, at 590–91 ("Courts often justify privileging the marital relationship on the ground that parenthood within marriage best protects children.").

67. Vivian Hamilton, *Principles of U.S. Family Law*, 75 FORDHAM L. REV. 31, 39 n.25 (2006).

the stability of the family, the presumption increases the likelihood that the family will remain together.”<sup>68</sup> It has also been suggested that the security provided to the spouse of the individual who gives birth as a result of the presumption’s automatic provision of parental status increases the likelihood that the spouse will bond with the child.<sup>69</sup> Overall, in the vast majority of cases, the presumption is never challenged, and thus it generally serves to “protect[] [both] the functional parent-child relationship and the integrity of the marriage.”<sup>70</sup>

This is not to say that the marital presumption is the wisest, fairest, or most effective way to establish parentage—scholars have set forth a variety of innovative, thoughtful proposals for other methods of establishing parentage for married and unmarried individuals<sup>71</sup>—just that it is unlikely that most states will abrogate the marital presumption any time soon. As a result, it is probable that in the not-so-distant future, there will be a number of states that seek to extend their marital presumptions to same-sex spouses. In doing so, these states will need to grapple with how rebuttal of the presumption, which has traditionally focused on the lack of genetic connection between the spouse of the individual who gave birth and the child,<sup>72</sup> will now be structured given that in most cases involving same-sex couples the spouse will not be genetically connected to the child.<sup>73</sup> The remainder of the Article will explore the approaches that states

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68. Strasser, *supra* note 65, at 60.

69. *Id.*

70. Harris, *supra* note 41, at 67.

71. See, e.g., Katharine K. Baker, *Quacking Like a Duck? Functional Parenthood Doctrine and Same-Sex Parents*, 92 CHI.-KENT L. REV. 135, 160–64 (2017) (proposing an opt-in system for the establishment of legal parentage); Leslie Joan Harris, *Voluntary Acknowledgements of Parentage for Same Sex Couples*, 20 AM. U. J. GENDER, SOC. POL’Y & L. 467, 475–78 (2012) (proposing that voluntary acknowledgements of parentage be extended to all couples, regardless of sex); Jacobs, *supra* note 32, at 466–67 (proposing that “legislatures should consider intentional parenthood as the default, at-birth parentage establishment model” and that voluntary acknowledgements of parentage be offered to all parents); Shultz, *supra* note 32, at 322–25 (proposing an intent-based approach to parentage determinations in the assisted reproduction context); Richard F. Storrow, *Parenthood by Pure Intention: Assisted Reproduction and the Functional Approach to Parentage*, 53 HASTINGS L.J. 597, 679 (2002) (proposing an intent-based regime for parentage establishment).

72. See *supra* notes 20–21, 41.

73. The exception would be if the couple undertook co-maternity or reciprocal IVF, wherein one member of the couple provides genetic materials and the

may take to restructuring the marital presumption of parentage given its likely extension to same-sex couples.

## II. RECONCEPTUALIZING THE MARITAL PRESUMPTION OF PARENTAGE IN THE ERA OF SAME-SEX MARRIAGE

For states to determine how to best restructure their marital presumptions of parentage in order to encompass same-sex couples, they must first identify what they believe to be the primary modern purpose of the presumption. The extension of the marital presumption to same-sex couples would effectively dispense with any lingering notion that the presumption's primary purpose is to bestow parentage on the individual most likely to be the child's second genetic parent.<sup>74</sup> The focus of modern day marital presumptions and grounds for rebuttal therefore will need to move beyond genetics. There are a number of other potential purposes for the marital presumption that states could identify.<sup>75</sup> Specifically, states could identify as the primary purpose of the presumption the provision of parentage to the individual most likely to be the child's second intended parent or the provision of parentage to the individual most likely to function in the role of the child's second parent.<sup>76</sup> Additional or alternative purposes may include the protection of marital family units from outside intrusion, the promotion of marriage as the preferred site for parentage establishment, and the furtherance of children's best interests.<sup>77</sup> After determining which potential purposes it views as most important, the state can then structure

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other member carries the pregnancy. See Lauren B. Paulk, *Embryonic Personhood: Implications for Assisted Reproductive Technology in International Human Rights Law*, 22 AM. U.J. GENDER, SOC. POL'Y & L. 781, 788 (2014) (describing the reciprocal IVF process).

74. Appleton, *supra* note 8, at 285 (“[W]e can now see the presumption not as assumption of the husband’s probable genetic connection to the child.”); see also Grossman, *supra* note 41, at 739 (“In the context of two women who together plan for the conception and birth of a child, what is marriage a proxy for? It is certainly not a proxy for biology—our best guess about the identity of the child’s other genetic parent—as it was for married fathers.”); Douglas NeJaime, *Marriage Equality and the New Parenthood*, 129 HARV. L. REV. 1186, 1247 (2016) (“The same-sex couple, by contrast, makes the biological reality knowable and public, and thus explicitly disturbs the biological assumptions of the presumption.”).

75. See discussion *infra* Parts III.A–B.

76. See *infra* Part III.A.

77. See *infra* Part III.B.

its marital presumption in the way that most effectively furthers its objectives.

A. IDENTIFYING THE INDIVIDUAL MOST LIKELY TO BE THE CHILD'S SECOND INTENDED OR FUNCTIONAL PARENT

The idea that the marital presumption, given its extension to same-sex couples, can be reconceptualized as serving the purpose of providing parentage to the individual most likely to be the child's second intended parent has been advanced by a number of scholars.<sup>78</sup> This conception of the marital presumption appears to be grounded in the notion that in the vast majority of cases involving a child born to a married individual, the individual who gave birth and their spouse will have mutually intended for the spouse to be the child's second parent.<sup>79</sup> Under this view, the marriage serves as a proxy for the spouses' mutual intent to serve as the parents to any children conceived by or born to one of the spouses during the marriage.<sup>80</sup> If a state determines that the primary purpose of the marital presumption is to grant parentage to the individual most likely to be the child's second intended parent, then the grounds for rebuttal would focus on

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78. See, e.g., Carbone & Cahn, *Jane the Virgin*, *supra* note 40, at 534 (“[T]he marital presumption, in the context of same-sex couples, presumes that marriage means consent to the assumption of equal parent rights and responsibilities for children born into the union . . . .”); Harris, *supra* note 41, at 73 (“To recognize the marital presumption for same-sex couples is equivalent to recognizing that the spouse of the person who bore the child is a legal parent because she is the intended parent, the functional parent, or both.”); Douglas NeJaime, *The Family's Constitution*, in 32 CONST. COMMENT. 413, 439 (2017) (“Now, the presumption rests on the horizontal relationship between the partners and their mutual agreement regarding the parental role vis-à-vis the child. . . . The marital presumption, in other words, makes sense because it provides an indication of intent and conduct.”).

79. See Carbone & Cahn, *Nonmarriage*, *supra* note 45, at 89 (“[A]pplication of the marital presumption [to same-sex couples] assumes that by marrying, each spouse consents to the assumption of joint and equal parental roles.”).

80. Carbone & Cahn, *Jane the Virgin*, *supra* note 40, at 532 (“With the ability of same-sex couples to wed, courts will have to decide, first, how to apply the marital presumption . . . . In the process, intent is likely to be a factor that acts together with the new understandings of marriage, rather than as an independent principle. That is, a same-sex spouse should be presumed to consent, on the basis of the marriage, to assume a parental role with respect to her spouse's children . . . .”); Carbone & Cahn, *Nonmarriage*, *supra* note 45, at 89; Grossman, *supra* note 41, at 739 (“So what does marriage stand for here? It seems, for some courts, to stand as a proxy for consent of the definite legal parent—the biological mother—to share parental rights.”).

proving a lack of intent on the part of the individual who gave birth and/or their spouse for the spouse to be the child's parent.<sup>81</sup>

A number of scholars have also advanced the idea that the marital presumption can be reconceptualized as providing legal parentage to the individual, besides the person who gives birth, who is most likely to function as the child's parent.<sup>82</sup> This conception of the marital presumption assumes that in most cases, the spouse of the individual who gives birth will take on the role of the child's second parent, providing the type of support and care for the child generally expected of individuals serving as parents.<sup>83</sup> Under this view of the marital presumption, marriage serves as a proxy for the willingness to undertake a parental role to any child conceived by or born to an individual's spouse during the marriage.<sup>84</sup> If a state identifies the purpose of the marital presumption as providing legal parentage to the person who is most likely to function as a child's second parent, rebutting the presumption would focus on proving that the spouse had not functioned in a parental role to the child in question.<sup>85</sup>

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81. See *Wendy G-M. v. Erin G-M.*, 985 N.Y.S.2d 845, 847 (Sup. Ct. 2014) ("The marital consent presumed in this case may be rebutted by either spouse in the same-sex marriage. The birthmother could produce evidence that she never intended her spouse to be the parent of the AID child. The unknowing spouse would be faced with a presumption of consent to parenthood by virtue of the marriage and would have ample opportunity to rebut the presumption with evidence that the birth mother failed to obtain *any* consent prior to the conception."); *Monopoli*, *supra* note 41, at 457 ("[T]he new presumption would be grounded in the concept that presumes every spouse consents to a child who is born during the marriage and intends that child to be his or hers, unless evidence is presented to rebut the presumption of consent.").

82. See, e.g., *Appleton*, *supra* note 8, at 285–86 ("Instead, the presumption today reflects the belief that someone legally connected to the woman bearing the child likely planned for the child, demonstrated a willingness to assume responsibility, or provided support (emotional and/or economic) during the pregnancy, in turn supporting the expected child. In other words, an adult legally connected to the mother is likely even before the child's birth to have played a functional role . . ."); *Harris*, *supra* note 41, at 73 ("To recognize the marital presumption for same-sex couples is equivalent to recognizing that the spouse of the person who bore the child is a legal parent because she is the intended parent, the functional parent, or both.").

83. See *Harris*, *supra* note 41, at 67 ("In the great majority of cases, the presumption also protects the functional parent-child relationship and the integrity of the marriage, since no effort is made to rebut the presumption.").

84. *Appleton*, *supra* note 8, at 285–86.

85. See *id.* at 291 ("I would leave open the possibility that the functional test which led to my default rule might allow rebuttal for a designated parent who never performed any parental functions for the child in question.").

Focusing on notions of intent and/or function in addressing questions relating to legal parentage and parental rights, particularly within the context of children conceived or born during existing marriages, is in line with a number of developments in parentage law that extend the focus of parentage determinations beyond biology.<sup>86</sup> As one scholar has aptly noted, “[a]lthough they may be stated in a variety of ways, there are essentially two alternative approaches to parentage apart from DNA. These approaches are intent-based parentage . . . and a functional family or de facto parent analysis.”<sup>87</sup> With regard to intent, across jurisdictions a husband who consents to his wife’s use of assisted reproduction to conceive a child with the intent to be the resulting child’s parent is deemed the child’s second legal parent regardless of whether the child is conceived using the husband’s sperm or donor sperm.<sup>88</sup> Pursuant to *Obergefell*, these laws should extend to a same-sex spouse who, with the intent to be the resulting child’s parent, consents to their spouse’s use of assisted reproduction to conceive a child.<sup>89</sup> Indeed, courts that have addressed the issue generally have ruled that assisted reproduction statutes that on their face apply only to married different-sex couples extend to married same-sex couples,<sup>90</sup> and a growing number of states are making their statutes governing spousal parentage in the assisted reproduction context gender neutral.<sup>91</sup>

Furthermore, intent is gaining an increasingly significant role in parentage determinations outside of the marriage context—twelve jurisdictions have statutes establishing parentage for unmarried men who consent to a partner’s use of assisted reproduction to conceive a child with the intent to be the resulting

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86. In 1990, Professor Marjorie Shultz proposed the intent-based approach to determine the parentage of children conceived using assisted reproduction. Shultz, *supra* note 32, at 322–25.

87. Julie Shapiro, *Counting from One: Replacing the Marital Presumption with a Presumption of Sole Parentage*, 20 AM. U. J. GENDER, SOC. POL’Y & L. 509, 516 (2012).

88. See JOSLIN ET AL., *supra* note 54, § 3:3. Some of these laws require that the assisted reproduction procedure occur under the supervision of a doctor and/or that the husband’s consent to the procedure be in writing. *Id.*

89. See *id.* (“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 . . . must be applied equally to same-sex couples who have children through assisted reproduction during their marriage.”).

90. See NeJaime, *supra* note 58, at 2294 & n.164.

91. See *id.* at 2294 & n.163.

child's parent,<sup>92</sup> and nine of those jurisdictions' statutes also extend to unmarried same-sex partners.<sup>93</sup> In addition, pursuant to federal law, all states must allow unmarried birth mothers and their male partners to establish the partner's legal paternity through the execution of a voluntary acknowledgement of paternity without requiring any proof that the partner is the child's biological father.<sup>94</sup> While some states' voluntary acknowledgement forms indicate that only biological fathers should sign and parties can attempt to challenge voluntary acknowledgements on the grounds of fraud or material mistake stemming from the partner's lack of biological tie to the child, a number of courts have denied such challenges on equitable grounds<sup>95</sup> and it is indisputable that an unchallenged voluntary acknowledgement allows for the establishment of parentage based only on the consent of the person who gives birth and their partner.<sup>96</sup> Finally, while surrogacy laws differ significantly across jurisdictions, a number of states recognize gestational surrogacy agreements and have adopted intent-based approaches to determining parentage in such situations.<sup>97</sup>

With regard to the role of function in determinations of parental rights, at least eighteen states have adopted equitable parenthood doctrines that grant child custody or visitation rights to individuals who are not formal legal parents, but who have

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92. See JOSLIN ET AL., *supra* note 54, § 3:3.

93. See *id.* These statutes do not require that the two individuals share a nonmarital partnership that is romantic in nature. See, e.g., VT. STAT. ANN. tit. 15C, § 703 (2018) ("A person who consents under section 704 of this title to assisted reproduction by another person with the intent to be a parent of a child conceived by the assisted reproduction is a parent of the child.").

94. Feinberg, *supra* note 8, at 118.

95. See *id.* ("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.").

96. Leslie Joan Harris, *Reforming Paternity Law to Eliminate Gender, Status, and Class Inequality*, 2013 MICH. ST. L. REV. 1295, 1296 (2013) ("Today in all states intent to assume the role of father is protected by rules regarding the establishment of legal paternity, since all states have a version of the marital presumption and, for nonmarital children, all states allow the mother and the intended father to establish paternity by signing and filing a voluntary acknowledgment of paternity (VAP).").

97. NeJaime, *supra* note 58, at 2346, app. E at 2376 (setting forth states' statutes and appellate case law governing parental establishment in the gestational surrogacy context).

functioned in a parental role to a child.<sup>98</sup> The most widely adopted test for determining whether an individual qualifies for relief under a state's equitable parenthood doctrine requires the petitioner to prove that: (1) the legal parent consented to and/or encouraged the formation of a parent-like relationship between the petitioner and child; (2) the petitioner lived in a household with the child; (3) the petitioner "assumed obligations of parenthood by taking significant responsibility for the child's care, education and development, including contributing towards the child's support, without expectation of financial compensation"; and (4) the petitioner served in the role of a parent for long enough to have established a parent-like bond and relationship with the child.<sup>99</sup> Additionally, while equitable parenthood doctrines often only provide certain parental rights relating to custody and visitation, "holding out" provisions can be used to establish full legal parentage for individuals who have behaved akin to parents in certain respects despite a lack of genetic connection to the child.<sup>100</sup> These provisions, rooted originally in the 1973 Uniform Parentage Act, generally create a presumption of parentage for a man who receives a child into his home and holds the child out as his own for a requisite amount of time.<sup>101</sup> Many states have adopted holding out or similar provisions, and courts in at least six states have held that such provisions also are applicable to women who are not genetically connected to the children in question, but who have received the child into their home and held the child out as their own.<sup>102</sup> In doing so, one court explained that "it is practicable for a woman to hold a child out as her own by, among other things, providing full-time emotional and financial support for the child."<sup>103</sup> Notably, the 2017 Uniform Parentage Act, which as of 2019 has been

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98. Jessica Feinberg, *Whither the Functional Parent? Revisiting Equitable Parenthood Doctrines in Light of Same-Sex Parents' Increased Access to Obtaining Formal Legal Parent Status*, 83 BROOK. L. REV. 55, 56 (2017) ("Common titles for such doctrines include 'de facto parentage, psychological parent, in loco parentis, [and] parent by estoppel.'" (citation omitted)).

99. *Id.* at 69, n.83.

100. *Id.* at 86.

101. JOSLIN ET AL., *supra* note 54, § 5:22.

102. *Id.*

103. *Chatterjee v. King*, 280 P.3d 283, 285–86 (N.M. 2012).

enacted in three states,<sup>104</sup> sets forth a holding out presumption that is written in gender neutral terms.<sup>105</sup>

Importantly, courts in a number of jurisdictions have already given function and/or intent a significant role in cases involving attempts to rebut the marital presumption of parentage. As discussed above, the law in a number of states permits courts to refuse to admit genetic testing evidence or to uphold the husband's parental status despite genetic testing evidence indicating that he is not the biological father in situations in which rebutting the presumption would be contrary to the child's best interests or run afoul of equitable principles.<sup>106</sup> A number of courts, in refusing to allow the presumption to be challenged or overcome on the basis that rebuttal would be contrary to the best interests of the child, have relied on the fact that the husband had functioned in the role of the child's parent and had formed a parental bond with the child.<sup>107</sup> Courts have also used equitable

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104. *Parentage Act*, UNIF. LAW COMM'N, <https://www.uniformlaws.org/committees/community-home?CommunityKey=c4f37d2d-4d20-4be0-8256-22dd73af068f> [<https://perma.cc/2BYJ-52V9>].

105. UNIF. PARENTAGE ACT § 204(a)(2) (UNIF. LAW COMM'N 2017) ("An individual is presumed to be a parent of a child if . . . the individual resided in the same household with the child for the first two years of the life of the child, including any period of temporary absence, and openly held out the child as the individual's child.")

106. See *supra* notes 42–45 and accompanying text.

107. See, e.g., *Williamson v. Williamson*, 690 S.E.2d 257, 258–59 (Ga. Ct. App. 2010) (refusing mother's request for genetic testing where the husband and child shared a "very strong" father/son relationship" on the grounds that the mother had failed to show that delegitimation would be in the child's best interests); *Evans v. Wilson*, 856 A.2d 679, 693 (Md. 2004) (refusing alleged biological father's request for genetic testing on the grounds that it would be contrary to the child's best interest where the mother's husband had bonded with the child and the child relied upon the husband to meet the child's "financial, emotional, and health needs"); *M.H.B. v. H.T.B.*, 498 A.2d 775, 779 (N.J. 1985) (refusing to allow the husband to rebut the marital presumption where his conduct resulted in him becoming the child's psychological father and reasoning that "[w]ere [the husband] permitted to disavow the parent-child relationship that he created and fostered and to repudiate the parental responsibility that flowed from that relationship, [the child] would suffer demonstrable harm fully commensurate with her dependent condition"); *In re Paternity of C.A.S.*, 468 N.W.2d 719, 721, 729 (Wis. 1991) (refusing alleged biological father's request for genetic testing on the grounds that it would be contrary to the children's best interests where the mother's husband had resided with the children since birth, alleged that he was their father, had "been responsible for their emotional and financial well-being[,] and shared a "strong emotional relationship" with the children); Wasserman, *supra* note 42, at 284 ("Courts are quite reluctant to undercut the marital presumption when the mother and her husband have co-

principles to prevent rebuttal by the birth mother in situations in which she had encouraged or demonstrated an intent that her spouse assume the role of the child's parent and the spouse, acting in reliance on the mother's actions, had in fact functioned in that role.<sup>108</sup> Similarly, courts have used equitable principles to prevent rebuttal by the birth mother's spouse in situations in which the spouse had functioned as the child's parent, had demonstrated through their words or actions an intent to serve as the child's parent, and the child and/or the child's birth mother had relied on those words or actions.<sup>109</sup>

In addition, the 2017 Uniform Parentage Act requires a judicial determination of lack of parental intent and/or function in order to proceed with challenges to the marital presumption in certain contexts. For example, the Act provides that in order for the spouse of a birth mother who conceived via assisted reproduction to challenge his or her own presumed parentage within two years of the child's birth, there must be a judicial determination relating to a lack of parental intent.<sup>110</sup> Specifically, the

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parented the child, the husband has provided financial and emotional support to the child, and the child has bonded with the husband.”)

108. See, e.g., *In re Marriage of K.E.V.*, 883 P.2d 1246, 1252 (Mont. 1994) (refusing on equitable grounds to allow the mother to rebut the marital presumption where the husband assumed the role of the child's parent after the mother led him to believe that he was the child's father and encouraged him to act on that belief); *Pettinato v. Pettinato*, 582 A.2d 909, 912–13 (R.I. 1990) (same). Equitable grounds to preclude rebuttal have also been raised in marital presumption cases involving same-sex spouses. See, e.g., *Barse v. Pasternak*, No. HHBFA1240305415, 2015 WL 600973, at \*14 (Conn. Super. Ct. Jan. 16, 2015) (“[T]he court finds that the plaintiff in this case may rely upon equitable principles in an effort to preclude the defendant from rebutting the marital presumption and asserting that the plaintiff is not the minor child's legal parent. Whether the plaintiff can sustain her burden of proof is a fact-based inquiry. Consequently, an evidentiary hearing would have to be held to determine whether the plaintiff has met her burden of establishing that the defendant should be precluded from rebutting the marital presumption on equitable grounds.”).

109. See, e.g., *M.H.B.*, 498 A.2d at 778 (refusing on the grounds of equitable estoppel to allow the husband to rebut the marital presumption where he “[b]y both deed and word, [] repeatedly and consistently recognized and confirmed the parent-child relationship between himself and K.B. [and] acted in every way like a father toward his own child”); *Manze v. Manze*, 523 A.2d 821, 825 (Pa. Super. Ct. 1987) (refusing on the grounds of equitable estoppel to allow the husband to rebut the marital presumption where he “acknowledged [the child] as his daughter and assumed the responsibilities of parenthood throughout a ten-year marriage”).

110. UNIF. PARENTAGE ACT § 705.

court must determine that the spouse “did not consent to the assisted reproduction, before, on, or after birth of the child . . . .”<sup>111</sup> In addition, in order to commence a challenge to the presumed parentage of the spouse of a woman who conceived via assisted reproduction after two years have passed since the child’s birth, there must be a judicial determination relating to, *inter alia*, a lack of both parental intent and function.<sup>112</sup> Namely, the court must determine that “(1) the spouse neither provided a gamete for, nor consented to, the assisted reproduction; (2) the spouse and the woman who gave birth to the child have not cohabited since the probable time of assisted reproduction; and (3) the spouse never openly held out the child as the spouse’s child.”<sup>113</sup> Even outside of the assisted reproduction context, if a challenge is commenced after two years have passed since the child’s birth and the child does not have more than one presumed parent, the marital presumption cannot be overcome absent a judicial determination relating to, *inter alia*, a lack of parental function.<sup>114</sup> Specifically, the court must determine that “the presumed parent is not a genetic parent, never resided with the child, and never held out the child as the presumed parent’s child.”<sup>115</sup> Finally, at least one jurisdiction has adopted a rebuttal ground that is based purely upon function. Under the law of the District of Columbia, one of the grounds for rebuttal of the marital presumption is that the spouse “did not hold herself out as a parent of the child;”<sup>116</sup> this ground, however, only applies to actions involving same-sex spouses.<sup>117</sup>

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111. *Id.* This standard can also be satisfied if the spouse validly withdrew his or her consent. *Id.*

112. *Id.*

113. *Id.*

114. *Id.* § 608.

115. *Id.* § 608(b).

116. D.C. CODE § 16-909(b)(2) (2018). The parentage presumption also applies to domestic partners. *Id.* §§ (a)(1)–(2).

117. *Id.* While the District of Columbia’s marital presumption statute also recognizes the spouse’s lack of genetic connection to the child as a ground for rebuttal (applicable to both different- and same-sex couples), the statute instructs that courts

may determine that the presumed parent is the child’s parent, notwithstanding evidence that the presumed parent is not the child’s genetic parent, after giving due consideration to: (A) Whether the conduct of the mother or the presumed parent should preclude that party from denying parentage; (B) The child’s interests; and (C) The duration and

B. PROTECTION OF THE MARITAL FAMILY UNIT FROM OUTSIDE INTRUSION, PROMOTION OF MARRIAGE AS THE PREFERRED SITE OF PARENTAGE ESTABLISHMENT, AND FURTHERANCE OF CHILDREN'S BEST INTERESTS

Either along with or instead of identifying as the primary purpose of the marital presumption providing parentage to the person most likely to be the child's second intended or functional parent, states may seek to further the objectives of protecting the marital family unit from outside intrusion, promoting marriage as the preferred site for parentage establishment, and/or furthering children's best interests. Identifying the protection of the marital family unit from outside intrusion as a core purpose of the marital presumption would, for some states, represent less of a reconceptualization of the marital presumption. If a state identifies the protection of the marital family from outside intrusion as a primary purpose of the presumption, the state may structure the presumption such that third parties, including an individual who alleges that he is the child's biological father, do not have standing to rebut the presumption; instead, only the parties to the marriage would have standing. The blanket denial of standing to an individual claiming to be the biological father of a child born to a person who was married to someone else was at one point the approach taken by at least ten states,<sup>118</sup> and at least six states continue through statute to exclude alleged biological fathers from the class of individuals granted standing to rebut the marital presumption.<sup>119</sup>

Methods of furthering the purpose of protecting marital families from outside intrusion that are less extreme than a blanket denial of standing to third parties would involve narrowly defining the class of third parties granted standing, adopting rules that disallow or reject third-party challenges where rebuttal would be contrary to the best interests of the child or the

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stability of the relationship between the child, the presumed parent, and the genetic parent.

*Id.* §§ (b)(1)–(2).

118. UNIF. PARENTAGE ACT § 607 cmt. (amended 2017) (“Ten states have denied standing to a man claiming to be the father when the mother was married to another at the time of the child’s birth. In some of these states, even though a presumed father may seek to rebut his presumed paternity, a third-party male will be denied standing to raise that same issue.”).

119. ALA. CODE § 26-17-607(a) (2018); CAL. FAM. CODE §§ 7540–41 (West 2018); COLO. REV. STAT. § 19-4-107(1) (2018); IOWA CODE § 600B.41A(3)(A) (2018); OR. REV. STAT. § 109.070(2) (2018); UTAH CODE ANN. § 78B-15-607(1) (West 2018).

marital family unit, and adopting time limitations for bringing third-party challenges. As discussed above, the law in some states currently allows courts to deny challenges to the presumption in situations where, although the base requirement for rebuttal (currently the lack of genetic tie between the spouse and child) is satisfied, rebuttal would be contrary to the best interests of the child.<sup>120</sup> In addition, a number of states have adopted time limitations on the ability to challenge the marital presumption.<sup>121</sup>

If the primary objectives that a state seeks to further through the marital presumption include the promotion of marriage as the preferred site of parentage establishment, then the state may seek to prevent challenges not only from parties outside of the marriage, but also from the parties within the marriage. The most direct way to do this would be to adopt a marital presumption that is wholly irrefutable. Under this approach, the state would deny standing to challenge the presumption to all interested parties, including, *inter alia*, the individual who gave birth, the spouse, the alleged biological father, and the child. This type of approach would harken back to the earliest forms of the marital presumption, although even then rebuttal was technically possible (though extremely difficult).<sup>122</sup>

There are, of course, less extreme methods of promoting marriage as the preferred site of parentage establishment that, while not altogether precluding challenges to the parentage of the spouse of the individual who gave birth, would limit such challenges by making them more difficult to bring or succeed on. Just as potential methods of protecting marital family units from outside intrusion include limiting the class of individuals granted standing to challenge the presumption,<sup>123</sup> adopting time limitations for making challenges,<sup>124</sup> and precluding rebuttal where, despite satisfaction of the base requirement, it would be contrary to the best interests of the child or marital family unit,<sup>125</sup> these are also methods of promoting marriage as the preferred site for the establishment of parentage. Using equitable

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120. See *supra* notes 43–46 and accompanying text.

121. See *supra* note 48 and accompanying text.

122. See *supra* notes 13–17 and accompanying text.

123. See *supra* note 119 and accompanying text.

124. See *supra* note 48 and accompanying text.

125. See *supra* notes 42, 107.

doctrines to deny rebuttal despite satisfaction of the base requirement, which courts in some states already do, is another method of limiting parties' ability to succeed on challenges.<sup>126</sup>

Finally, the state may identify the furtherance of children's best interests as a primary purpose of the marital presumption. At the extreme, the state could structure the marital presumption such that it focused solely on the furtherance of children's best interests, meaning that rebuttal could occur, regardless of the parties' intent or parental functioning, any time that it was viewed as furthering the best interests of the child. The 2017 Uniform Parentage Act follows a form of this type of approach in certain contexts.<sup>127</sup> More specifically, with limited exceptions that arise in the assisted reproduction context,<sup>128</sup> if the presumed parentage of a birth mother's spouse who is not the child's genetic parent is challenged within two years of the child's birth, the court proceeds to a best interests of the child analysis to adjudicate parentage without any requirement that the court first make a determination regarding a lack of parental intent or function.<sup>129</sup> Other potential methods of advancing the purpose of furthering children's best interests may involve structuring the marital presumption with the intent- or function-based focuses described above that require for rebuttal, at a minimum, lack of mutual intent on the part of the individual who gave birth and/or their spouse for the spouse to be the child's legal parent or lack of parental functioning on the part of the spouse.<sup>130</sup> This would be based on the notion that providing parentage to a spouse who is the child's second intended or functional parent generally serves to further children's best interests.

Adopting the practice of courts in a number of states, in which rebuttal is denied despite satisfaction of the base requirement when it would be contrary to the best interests of the child,

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126. *See supra* notes 108–09.

127. UNIF. PARENTAGE ACT §§ 608, 613 (UNIF. LAW COMM'N 2017).

128. For example, there is a different standard governing situations in which the spouse of a woman who conceives a child via assisted reproduction seeks to challenge his or her presumed parentage within two years after the child's birth. *See id.* § 705.

129. *Id.* § 608. Different standards govern rebuttal actions commenced after the child reaches two years of age. *See supra* notes 113–15 and accompanying text.

130. *See supra* Part II.A.

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is another method states could use to advance the purpose of furthering children's best interests.<sup>131</sup> Similarly, the approach that some states have adopted to minimize disruption to children and their established families by placing time limitations on challenges to the presumption represents another potential method states could use to advance the purpose of furthering the best interests of children.<sup>132</sup> If the state believes that children's best interests generally are furthered through the establishment of parentage within marriage and the protection of the marital family unit from outside intrusion, it could adopt the other methods discussed above for furthering those objectives, such as restricting standing to bring challenges to the marital presumption or using equitable principles to deny such challenges.<sup>133</sup>

### III. STRUCTURING THE MODERN MARITAL PRESUMPTION OF PARENTAGE: AN ANALYSIS OF THE REBUTTAL OPTIONS

This Part will provide an analysis of a number of the options available to states for structuring the rebuttal grounds for modern marital presumptions of parentage. It will first evaluate approaches to structuring rebuttal of the marital presumption that focus on identifying the individual most likely to be the child's second intended or functional parent. It will next assess the various options available to states for structuring rebuttal of the marital presumption in a manner that promotes objectives such as protecting the marital family unit from outside intrusion, promoting marriage as the preferred site for parentage establishment, and furthering the best interests of children. Finally, it will identify the approach to rebuttal that is likely to be the most effective in promoting the primary objectives that states will seek to further through a modern marital presumption.

#### A. IDENTIFYING THE INDIVIDUAL MOST LIKELY TO BE THE CHILD'S SECOND INTENDED OR FUNCTIONAL PARENT

##### 1. The Intent-Based Approach

As discussed above, for states that identify granting parentage to the individual most likely to be the child's second intended parent as the primary purpose of the marital presumption,

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131. See *supra* note 44.

132. See *supra* notes 48, 119 and accompanying text.

133. See *supra* notes 118–26 and accompanying text.

which posits marriage as a proxy for the spouses' mutual intent to serve as the parents to any children conceived by one of the spouses during the marriage, then the grounds for rebuttal would focus on proving a lack of mutual intent for the spouse to be the child's legal parent. There are a number of positive attributes to an intent-based focus for rebuttal of the modern marital presumption. As an initial matter, intent-based approaches can be "relatively easy to administer and understand."<sup>134</sup> It requires analysis of only one question: at the critical point in time, did the individual who gave birth and their spouse mutually intend for the spouse to be a parent to the child? This is a yes or no question, as the intent either did or did not exist at the relevant time.<sup>135</sup> Furthermore, there are relatively simple steps that the parties can take, such as executing a clearly worded written declaration, to create a record of their intentions.

There is also a strong fairness-based argument that supports an intent-based approach. Importantly, an intent-based approach protects the reliance interests and expectations of the spouses stemming from their mutual agreement to become co-parents.<sup>136</sup> In addition, advocates of intent-based approaches have maintained that providing parentage to individuals who intended to serve as parents generally promotes children's best interests.<sup>137</sup> This is based on the notion that a person's demonstrated intent to become a child's parent has "great importance as indic[ia] of desirable parenting behavior."<sup>138</sup> In this vein, Professor Marjorie Shultz has argued that "[h]onoring the plans and expectations of adults who will be responsible for a child's welfare is likely to correlate significantly with positive outcomes for parents and children alike."<sup>139</sup>

Moreover, there are some advantages to using an intent-based approach to rebuttal over a function-based approach. By looking at the parties' intent, as opposed to the degree to which

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134. Shapiro, *supra* note 87, at 517–18.

135. *Id.*

136. Shultz, *supra* note 32, at 302–03 ("Accordingly, I propose that legal rules governing modern procreative arrangements and parental status should recognize the importance and the legitimacy of individual efforts to project intentions and decisions into the future. Where such intentions are deliberate, explicit and bargained for, where they are the catalyst for reliance and expectations, as is the case in technologically-assisted reproductive arrangements, they should be honored.")

137. *Id.* at 343.

138. *Id.*

139. *Id.* at 397.

the spouse functioned as a parent, the intent-based approach may be less likely to be marred by differing gender-based standards and stereotypes, which may be more likely to factor into analyses of what it means to “function” as a parent.<sup>140</sup> Furthermore, intent can be gauged at a much earlier point than function, which generally “requires the passage of time during which the adult performs a parental role.”<sup>141</sup> As a result, “intentional parenthood doctrine[s] permit[] at-birth parentage determinations, whereas functional parenthood requires an analysis at some point after a child’s birth.”<sup>142</sup> For states whose objectives require a strong marital presumption, intent-focused rebuttal grounds generally will provide for a significantly stronger marital presumption than function-focused rebuttal grounds in situations in which challenges occur at or shortly after the child’s birth.

There are, however, some significant drawbacks to an intent-based approach to rebuttal of the marital presumption, and there are a number of important questions states would need to answer in adopting such an approach. Specifically, “a number of contested cases have demonstrated [that] intent can be an elusive, imprecise, and mutating variable.”<sup>143</sup> Intent is not always neatly set forth in a written document, and there may still be disputes about the meaning of written documents even when they do exist.<sup>144</sup> Where parties are not in agreement regarding the issue of intent, courts may be left to engage in a messy fact-based analysis to determine whether there was mutual intent for the spouse to be the child’s legal parent.<sup>145</sup> Moreover, intent

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140. See Baker, *supra* note 71, at 138 (“Cases to date make clear that when using functional approaches to parenthood . . . judges import gendered, dyadic and often genetic understandings of what family is and what families do.”).

141. Appleton, *supra* note 8, at 274.

142. Jacobs, *supra* note 32, at 466.

143. Appleton, *supra* note 8, at 282.

144. K.M. v. E.G., 117 P.3d 673, 682 (Cal. 2005); Jason P. v. Danielle S., 171 Cal. Rptr. 3d 789, 797–98 (Ct. App. 2014); D.M.T. v. T.M.H., 129 So. 3d 320, 345–47 (Fla. 2013); *In re* Adoption of Sebastian, 879 N.Y.S.2d 677, 689 n.44 (N.Y. Sur. Ct. 2009).

145. See, e.g., K.M., 117 P.3d at 676 (discussing how one of the parties “testified that she and [her former partner] planned to raise the child together, while [the partner] insisted that . . . [she] made it clear that her intention was to become ‘a single parent’”); V.C. v. M.J.B., 748 A.2d 539, 542 (N.J. 2000) (noting that one party claimed that “she made the final decision to become pregnant independently and before beginning her relationship with” her partner, while her partner “claimed that the parties jointly decided to have children”); Belsito v. Clark, 644 N.E.2d 760, 764 (Ohio Ct. C.P. 1994) (“Intent can be difficult to

is not a fixed concept; rather, parties' intentions can change significantly over time.<sup>146</sup> In addition, intent-based approaches, which may be satisfied by the mere execution of a document, may not be as closely tied to the promotion of children's best interests as function-based approaches, which focus on whether the individual actually supported and formed a parental relationship with the child. As a result, some scholars argue that function is a more deserving ground for parentage establishment.<sup>147</sup>

The factual scenario presented in *K.M. v. E.G.* demonstrates some of the significant difficulties that can arise in an intent-based approach to parentage determinations.<sup>148</sup> There, after the parties' relationship ended, K.M. sought to establish parental rights to the children to whom her former partner, E.G., had given birth via *in vitro* fertilization using K.M.'s ova.<sup>149</sup> Although the trial court found that the parties had raised the children, who were five years old at the time of trial, together in their joint home from birth, K.M. had "treated the twins in all regards as though they were her own," and there was "no question . . . that [the children were] fully bonded to her as such," the issue of the

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prove. Even when the parties have a written agreement, disagreements as to intent can arise."); Dara E. Purvis, *Intended Parents and the Problem of Perspective*, 24 YALE J.L. & FEMINISM 210, 249 (2012) ("One of the chief problems with potential use of intent as a parentage regime is that intent to be a parent is difficult to express.").

146. For example, there are numerous cases demonstrating this in the context of a same-sex couple wherein the partners mutually plan for and intend to co-parent the child conceived by one of the partners through assisted reproduction, but the partner who is the child's biological parent later changes her mind. See, e.g., *In re C.B.L.*, 723 N.E.2d 316 (Ill. App. Ct. 1999); *A.H. v. M.P.*, 857 N.E.2d 1061 (Mass. 2006); *Alison D. v. Virginia M.*, 572 N.E.2d 27 (N.Y. 1991); *Liston v. Pyles*, No. 97APF01-137, 1997 WL 467327, at \*3 (Ohio Ct. App. Aug. 12, 1997); *In re Thompson*, 11 S.W.3d 913 (Tenn. Ct. App. 1999); *Jones v. Barlow*, 154 P.3d 808 (Utah 2007); *In re Custody of H.S.H.-K.*, 533 N.W.2d 419 (Wis. 1995). Of course, intentions change in situations involving different-sex couples as well. See, e.g., *Jason P.*, 171 Cal. Rptr. 3d at 797-98; *Patton v. Vanterpool*, 806 S.E.2d 493 (Ga. 2017).

147. See generally Appleton, *supra* note 8, at 284 ("In sum, I reject both genetics and intent alone to determine parentage in favor of a functional test."); Nancy E. Dowd, *From Genes, Marriage and Money to Nurture: Redefining Fatherhood*, 10 CARDOZO WOMEN'S L.J. 132, 134 (2003) ("Specifically, I argue that fatherhood should be defined by doing (action) instead of being (status), with the critical component being acts of nurturing." (emphasis omitted)); Shapiro, *supra* note 87, at 520 ("Mere intention cannot outweigh performance, or the lack thereof.").

148. 117 P.3d at 673.

149. *Id.* at 675.

parties' intent at the time of conception was hotly contested.<sup>150</sup> E.G. claimed that she had planned to become a parent before meeting K.M., and that although K.M. had been supportive and had accompanied E.G. to most of her appointments at the fertility clinic, E.G. had made it clear that "her intention was to become a 'single parent.'"<sup>151</sup> K.M., however, testified that the parties intended to raise any child resulting from E.G.'s fertility treatments together.<sup>152</sup> After the parties began living together and registered as domestic partners, E.G.'s doctor suggested that E.G. use K.M.'s ova to conceive since E.G. was unable to produce sufficient ova.<sup>153</sup> E.G. claimed that she told K.M. she would only accept K.M.'s ova if K.M. was truly willing to be a donor and would not even consider allowing K.M. to adopt the child until five years had passed.<sup>154</sup> K.M., on the other hand, claimed that she only provided her ova because she and E.G. had agreed to raise any resulting child together.<sup>155</sup> Although K.M. signed a Donor Consent Form in which she waived any rights to the children resulting from her ova, she testified that she did not believe certain parts of the form pertained to her, did not intend to relinquish her parental rights, and thought she was going to be a parent.<sup>156</sup> The parties informed K.M.'s father of the pregnancy by "announcing that he was going to be a grandfather."<sup>157</sup>

The trial court held that K.M. did not qualify as a parent, finding that the parties had agreed prior to conception that E.G. would be the sole parent of the children and that K.M. had "knowingly, voluntarily and intelligently executed the ovum donor form, thereby . . . relinquishing and waiving all rights to claim legal parentage."<sup>158</sup> Accordingly, K.M.'s position was akin to that of a sperm donor.<sup>159</sup> The appellate court affirmed, holding that "substantial evidence supports the trial court's factual finding that only E.G. intended to bring about the birth of a child whom she intended to raise as her own."<sup>160</sup> The Supreme Court

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150. *Id.* at 675–77 (emphasis omitted).

151. *Id.* at 676.

152. *Id.*

153. *Id.* at 675–76.

154. *Id.* at 676.

155. *Id.*

156. *Id.*

157. *Id.*

158. *Id.* at 677.

159. *Id.*

160. *Id.* (emphasis omitted).

of California reversed, determining that the state's gamete donation statute did not apply to situations in which a woman donates ova to her partner in order to produce children to be raised in their joint home.<sup>161</sup> The court further determined that because K.M. was seeking to be named the child's parent in addition to, as opposed to instead of, E.G., the court did not need to use an intent-based standard to determine which party was the legal parent.<sup>162</sup> Instead, each party could establish her legal parentage on a basis other than intent: K.M. could establish parentage based on her genetic connection to the children and E.G. could establish parentage based on the act of giving birth.<sup>163</sup> The court noted that the conflicting testimony presented in the case made it a good example of why basing "the determination of parentage upon a later judicial determination of intent made years after the birth of the child" would be problematic in terms of the promotion of predictability.<sup>164</sup> This case demonstrates the difficulty in determining the parties' intent when there is conflicting testimony. It also highlights the risk that an intent-based approach to rebuttal of the marital presumption may result in the denial of parentage to a spouse who has functioned as a child's parent and has formed a deeply bonded parental relationship with the child, since, unlike in *K.M.*, in most cases involving same-sex couples the spouse of the individual who gave birth will not share a genetic connection with the child.<sup>165</sup>

Another potential concern regarding the intent-based approach is that it may result in the disestablishment of parentage for the spouse of the individual who gave birth, even in situations where the spouse is the child's biological parent. This could result in fewer children having two legal parents from whom to receive support, something which is contrary to the goals of state and federal parentage laws.<sup>166</sup> In most cases involving different-sex couples, the birth mother's spouse is also the child's biological father.<sup>167</sup> The notion that the marital presumption could be overcome in this situation through proof that the individual who gave birth or their spouse did not actually intend for the spouse

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161. *Id.* at 680.

162. *Id.* at 681.

163. *Id.*

164. *Id.* at 682.

165. *See, e.g., V.C. v. M.J.B.*, 748 A.2d 539, 542 (N.J. 2000).

166. Feinberg, *supra* note 8, at 104.

167. Baker, *supra* note 49, at 1659 ("The best estimates suggest that the presumed father is not the biological father in 10–15% of [marital] births.").

to serve as a legal parent will seem deeply problematic to many people at first glance given that genetic parents generally have parental duties<sup>168</sup> and rights<sup>169</sup> with regard to the children they produce regardless of intent in situations in which the genetic parent is not a gamete donor and the individual who gives birth is not married to someone else. There is, however, a relatively straightforward solution to this potential problem. All states already have laws and procedures governing the establishment of parentage for biological parents who are not gamete donors in situations in which the marital presumption does not govern.<sup>170</sup> As a result, even if the marital presumption is rebutted on intent-based grounds, in the same legal proceeding the spouse's legal parentage could be established on an independent basis through the existing (or similar) standards and procedures for establishing legal parentage for genetic parents who are not gamete donors.

However, there are still a number of important questions that will need to be answered by states that adopt intent-based approaches to the marital presumption. Because intent can change over time, it will be necessary to designate the critical time when intent should be gauged. Under the existing intent-based approaches that govern the parentage of children conceived through assisted reproduction, generally the key time at which the requisite intent must exist is at the time that the assisted reproduction procedure is undertaken.<sup>171</sup> The idea is that

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168. See Feinberg, *supra* note 8, at 117–18 (“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 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.’” (quoting 42 U.S.C. § 666(a)(5)(G) (2012))).

169. With regard to parental rights when the marital presumption does not govern, under current Supreme Court precedent, “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.” *Id.* at 117. However, this precedent refers to unmarried biological fathers, and it is possible that courts will determine that the biological parent of a child born into his or her existing marriage has a constitutionally protected relationship with the child without regard to whether he or she has demonstrated a sufficient commitment to parenthood.

170. *Id.* at 117–18.

171. See, e.g., CONN. GEN. STAT. § 45a-774 (2018) (“Any child or children

the inquiry should focus on whether the parties engaged in a joint enterprise that led to the child's conception.<sup>172</sup> Under this type of approach, subsequent to the designated point in time, "intent is fixed and variation in the actual intentions of the parties may fluctuate without legal consequence attaching."<sup>173</sup> This, however, begs an important question: in situations where the spouses' mutual intent for the spouse to be the child's legal parent forms at a later point, such as during the pregnancy, at the time of the child's birth, or after the child's birth, why is that intent less important to establishing parentage than the intent

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born as a result of A.I.D. shall be deemed to acquire, in all respects, the status of a naturally conceived legitimate child of the husband and wife who consented to and requested the use of A.I.D."); GA. CODE ANN. § 19-7-21 (2018) ("All children born within wedlock or within the usual period of gestation thereafter who have been conceived by means of artificial insemination are irrebuttably presumed legitimate if both spouses have consented in writing to the use and administration of artificial insemination."); KAN. STAT. ANN. § 23-2302 (2018) ("Any child or children heretofore or hereafter born as the result of heterologous artificial insemination shall be considered at law in all respects the same as a naturally conceived child of the husband and wife so requesting and consenting to the use of such technique."); N.Y. DOM. REL. LAW § 73(1) (McKinney 2018) ("Any child born to a married woman by means of artificial insemination performed by persons duly authorized to practice medicine and with the consent in writing of the woman and her husband, shall be deemed the legitimate, birth child of the husband and his wife for all purposes."); N.C. GEN. STAT. § 49A-1 (2018) ("Any child or children born as the result of heterologous artificial insemination shall be considered at law in all respects the same as a naturally conceived legitimate child of the husband and wife requesting and consenting in writing to the use of such technique."); OKLA. STAT. ANN. tit. 10, § 552 (2018) ("Any child or children born as the result thereof shall be considered at law in all respects the same as a naturally conceived legitimate child of the husband and wife so requesting and consenting to the use of such technique."); Purvis, *supra* note 145, at 229–30 ("Most scholars discussing intent as a parentage regime have focused on the moment of conception as the determinative point. Statutes establishing that the husband of a married woman who undergoes artificial insemination is the legal father of any resulting child so long as he consented to the AI procedure also take this conception-centered view.").

172. Appleton, *supra* note 8, at 277 (explaining that "intentions loom large in [the assisted reproduction] context because they constitute a but-for cause of the existence of the very child in question"); Purvis, *supra* note 145, at 227 ("The [intent] theory is straightforward: the law grants parental rights and responsibilities to those who caused a child to come into being with the intent of parenting that child once it was born." (internal quotations omitted)); Shapiro, *supra* note 87, at 517 ("The joint enterprise approach is premised upon an intent-based test, where intent is manifested by signing up for the enterprise. This is the critical moment at which intent is or is not established. Once manifested, intent creates legally recognized interests in parenthood." (footnote omitted)).

173. Shapiro, *supra* note 87, at 517.

that existed at or before the time of conception? After all, in the context of VAPs, it is the parties' mutual intent at the time of the child's birth that establishes parentage for the child's second parent.<sup>174</sup> Perhaps, as some scholars have suggested, the expression of mutual intent for the spouse to be the child's legal parent at any point should be sufficient to prevent rebuttal of the presumption.<sup>175</sup> From the perspective of a child who views the spouse as his or her second parent, it is likely irrelevant whether the intent formed prior to or after conception.<sup>176</sup> Consequently, while some states may follow the approach taken in the assisted reproduction context and require that the requisite intent exist at an earlier point, other states may adopt an approach that recognizes post-conception intent. Recognizing post-conception intent may be particularly attractive to states that are interested in creating a marital presumption that is more difficult to rebut in order to further objectives such as promoting the establishment of parentage within marriage and the protection of marriage from outside intrusion.<sup>177</sup>

Another important question that will arise in the context of intent-based approaches is whether the common grounds for vitiating consent in the contracts context, such as duress, fraud, and material mistake of fact, will be available for proving lack of intent for purposes of rebutting the marital presumption.<sup>178</sup> In the context of VAPs, following the 60-day rescission period, challenges may be made only on the grounds of duress, fraud, and

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174. See *supra* notes 94–96 and accompanying text.

175. See, e.g., Carlos A. Ball, *Rendering Children Illegitimate in Former Partner Parenting Cases: Hiding Behind the Facade of Certainty*, 20 AM. U.J. GENDER, SOC. POL'Y & L. 623, 661 (2012) ("In fact, it is unclear why the intent to become a parent should be legally relevant only if it takes place before the child's conception. Whether that intent existed, and whether it was demonstrated through particular understandings and conduct, would seem to be more important than its precise timing . . . ." (emphasis omitted)).

176. *Id.* at 660–61.

177. This would be somewhat similar to the approach adopted by the 2017 Uniform Parentage Act in the context of consent to assisted reproduction, which prohibits a spouse from challenging his or her parentage if the consent occurred on, after, or before the child's birth. UNIF. PARENTAGE ACT § 705 (UNIF. LAW COMM'N 2017). Moreover, the Uniform Parentage Act establishes parentage for anyone who consents *in writing* to a woman's use of assisted reproduction with the intent to be a parent to any resulting children before, on, or after the birth of the child. *Id.* § 704.

178. Shultz, *supra* note 32, at 346–69 (suggesting the use of contract law protections in assessing claims of intentional parenthood).

material mistake of fact.<sup>179</sup> Notably, the most common challenges to VAPs are based upon claims of fraud or material mistake of fact stemming from a lack of genetic connection between the putative father and child.<sup>180</sup> One major concern in allowing these grounds to demonstrate a lack of intent would be that they could bring back as a central aspect of the rebuttal analysis the issue of the spouse's genetic ties to the child, which would render the presumption problematic when applied to same-sex couples. This is not a major concern, however, as in the context of a same-sex parent who lacks genetic connections to the child conceived by her partner, both members of the couple generally would be aware of the spouse's lack of genetic connection to the child from the outset. As a result, generally neither party would be able to use arguments for fraud or material mistake of fact stemming from the spouse's lack of genetic ties to the child to prove a lack of intent.

## 2. The Function-Based Approach

As discussed above, for states that identify granting parentage to the individual most likely to function as the child's second parent as the primary purpose of the marital presumption, which posits marriage as a proxy for the willingness to undertake a parental role to any child conceived by or born to one's spouse during the marriage, rebutting the presumption would focus on proving that the spouse of the individual who gave birth had not functioned in a parental role to the child. There are a number of positive attributes to a function-based focus for rebuttal of the modern marital presumption. Perhaps the most important attribute of a functional approach relates to its focus on the relationship between the child and adult in question and the role that the adult plays in the child's life, providing a clear, direct tie to the promotion of children's best interests. For children, attachment relationships develop from an adult's "provision of physical and emotional care, continuity or consistency in the child's life and emotional investment in the child."<sup>181</sup> There is

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179. OFFICE OF INSPECTOR GEN., DEP'T OF HEALTH & HUMAN SERV., OEI-06-98-00053, PATERNITY ESTABLISHMENT, USE OF VOLUNTARY PATERNITY ACKNOWLEDGMENTS 1 (2000), <https://oig.hhs.gov/oei/reports/oei-06-98-00053.pdf> [<https://perma.cc/E65G-ECQ6>].

180. Harris, *supra* note 71, at 479.

181. Linda D. Elrod, *A Child's Perspective of Defining a Parent: The Case for Intended Parenthood*, 25 BYU J. PUB. L. 245, 249 (2011).

extensive research demonstrating that disruption of the attachment relationships formed between children and the individuals who function as their parents can lead to significant short- and long-term harm to children.<sup>182</sup> Notably, “[o]nce an adult has lived with and cared for a child for an extended period of time and become that child’s psychological parent, removing that ‘parent’ from the child’s life results in emotional distress in the child and a setback of ongoing development.”<sup>183</sup> The effects of this disruption can be significant enough that they may even follow the child into adulthood.<sup>184</sup> Overall, the tie to the promotion of children’s best interests is arguably significantly more direct in functional, as compared to intent-based, approaches to parentage determinations.

There are also fairness arguments that support a function-based analysis. Notably, the equitable parenthood doctrines discussed above generally require not only the existence of a bonded, parent-like relationship between the petitioner and the child, the assumption of the obligations of parenthood on behalf of the petitioner, and the sharing of a household between the petitioner and child, but also that the child’s legal parent consented to and/or encouraged the formation of the parent-like relationship between the child and the petitioner.<sup>185</sup> Providing parentage based upon this type of functional analysis therefore protects the reasonable expectations and reliance interests of an individual who, with the legal parent’s consent and/or encouragement, took on the role of the child’s parent. Furthermore, these strict

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182. Frank J. Dyer, *Termination of Parental Rights in Light of Attachment Theory: The Case of Kaylee*, 10 PSYCHOL. PUB. POL’Y & L. 5, 11 (2004) (“In sum, there are numerous empirical findings that provide a solid research basis for predictions of long-term harm associated with disrupted attachment and loss of a child’s central parental love objects.”); Elrod, *supra* note 181, at 250–51 (“Continuity of the parent-child relationship is essential to the child’s overall well-being. When an attachment relationship is severed by one parent dropping out of a child’s life, the child suffers emotional and psychological harm. Disrupting attachments can turn a securely attached child into an insecure one.”); Rebecca L. Scharf, *Psychological Parentage, Troxel, and the Best Interests of the Child*, 13 GEO. J. GENDER & L. 615, 634 (2012) (“Studies confirm that the loss of—or sudden, long-term separation from—an attachment figure creates significant psychological harm in children and can ‘seriously injure and fragment an individual’s sense of self.’” (footnotes omitted)).

183. Scharf, *supra* note 182, at 634.

184. See JOSEPH GOLDSTEIN ET AL., BEYOND THE BEST INTERESTS OF THE CHILD 33–34 (1973).

185. See *supra* note 99 and accompanying text.

requirements for satisfying equitable parenthood doctrines ensure that satisfaction of such doctrines occurs in only truly compelling circumstances.

There is also the benefit of conceptual parity in a system that focuses on function in determining the parentage of the spouse of the individual who gave birth. Traditionally, the law has bestowed parentage to individuals who give birth as “a matter of course.”<sup>186</sup> With the advancements in gamete donation and assisted reproduction, however, the justification for this can no longer be that there is necessarily a genetic connection between the individual who gives birth and the child. However, the automatic bestowment of parentage to individuals who give birth can still be justified on the grounds that this individual will have satisfied a functional analysis by carrying and giving birth to the child.<sup>187</sup> Consequently, focusing on function for purposes of rebutting the marital presumption establishes a degree of parity between the parentage analyses for individuals who give birth and their spouses.<sup>188</sup>

There are, however, some significant drawbacks to a function-based approach to rebuttal of the marital presumption, and there are a number of important questions states would need to answer in adopting such an approach. Arguments against approaches to parentage determinations that focus on function, such as equitable parenthood doctrines, are based upon claims that the standards employed in such analyses, which in essence ask whether someone has performed in a role and formed a relationship with the child that is sufficiently “parent-like,” are complicated, fact-intensive, nonobjective, and lead to unpredictable results.<sup>189</sup> Critics of equitable parenthood doctrines have argued

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186. Meyer, *supra* note 14, at 127.

187. Appleton, *supra* note 8, at 275 (“[T]he woman gestating the pregnancy . . . will always have met the [functional] test, given the unique parental functions she has performed during pregnancy, including prenatal shelter, nurture, sustenance, and protection of the child-to-be.”).

188. See Shapiro, *supra* note 87, at 523 (“Finally, the attraction of a single theory of parenthood governing all domains is not only grounded in an appeal to uniformity or consistency, but it is grounded in the observation that all legal parents have something in common—that there are reasons we bestow on them the rights and obligations that we do. That commonality is the relationship between adult and child that is the core of the functional model.”).

189. See Baker, *supra* note 71, at 165 (“Functional parent claims are almost always bitter, fact-bound contests that leave the parties emotionally and financially depleted. Regardless of whether courts focus on A, B, or C, when courts look to the past behavior of the parties, in light of what is inevitably conflicting

that the standards employed lead to protracted, contentious, and costly litigation.<sup>190</sup> Moreover, because of the complex, fact-intensive nature of the analysis, it generally will be quite difficult for someone to pinpoint the moment when they have satisfied a function-based standard, meaning that spouses who rely on the marital presumption as the source of their parentage may experience insecurity with regard to their legal status in relation to the child.<sup>191</sup> Additionally, as noted above, there is a significant risk that gender-based stereotypes will factor into judicial analyses of what it means to “function” as a parent.<sup>192</sup>

There also are fairness related issues with a function-based approach to rebuttal. Significant concerns regarding the protection of reasonable expectations and reliance interests arise in situations in which the spouses engaged in a joint endeavor to bring the child into the world with the mutual intent and understanding that they would be the child’s legal parents, but one party later changes his or her mind. In that situation, if it was the individual who gave birth who changed their mind, that individual could succeed in creating grounds for rebuttal of the marital presumption if they prevented their spouse from functioning as the child’s parent. If instead it was the spouse of the individual who gave birth who changed his or her mind, he or she could succeed in creating grounds for rebuttal by refusing to engage in parental functions.

The factual scenario presented in *T.F. v. B.L.* demonstrates some of the significant limitations of a function-based approach to parentage determinations.<sup>193</sup> There, T.F. sought an order to require her former partner, B.L., to pay child support.<sup>194</sup> The couple had begun living together in 1996 and held a commitment

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testimony from the parties about their previous intentions, devotions and actions, what courts get are protracted, ugly court battles with children at the center.”); Shapiro, *supra* note 87, at 518 (“[T]he issue that must be resolved [in functional parenthood approaches]—whether a person acted like a parent for a long enough period of time—is difficult and brings with it layers of complication and uncertainty.”).

190. See, e.g., *Debra H. v. Janice R.*, 930 N.E.2d 184, 192 (N.Y. 2010) (stating that equitable parenthood determinations “are likely often to be contentious, costly, and lengthy”).

191. Shapiro, *supra* note 87, at 518 (“You do not know when you have attained functional parenthood.”).

192. See *supra* note 140 and accompanying text.

193. *T.F. v. B.L.*, 813 N.E.2d 1244 (Mass. 2004).

194. *Id.* at 1246.

ceremony in 1999<sup>195</sup> (same-sex marriage had not yet been legalized).<sup>196</sup> A month or two after the couple's commitment ceremony, B.L., who had previously expressed reluctance about becoming a parent, called T.F. and stated that she had changed her mind about having a child with T.F.<sup>197</sup> The parties then together attended T.F.'s appointments at a fertility clinic, chose a sperm donor, and used joint funds for the expenses arising from T.F.'s fertility treatments and prenatal care.<sup>198</sup> During T.F.'s pregnancy, however, the parties separated.<sup>199</sup> Although B.L. visited T.F. and the child a few times while they were in the hospital, approximately four months after the child's birth B.L. sent T.F. a letter stating that she did not wish to have further contact with T.F. or the child.<sup>200</sup> The Massachusetts Supreme Court held that the evidence warranted the trial court's finding that the parties, by their words and conduct, had entered into an implied contract under which B.L. agreed to "undertake the responsibilities of a parent in consideration of [T.F.'s] conceiving and bearing a child."<sup>201</sup> However, if the parties in this case had been married and a function-based approach to rebuttal of the marital presumption had been in place, B.L., who refused to interact with the child to any significant extent (let alone engage in parental functioning),<sup>202</sup> almost certainly could have avoided being deemed a legal parent despite the credible evidence of the parties' mutual intent at the time of conception to serve as the parents of any resulting child. While if the spouse shares a genetic tie to the child his or her parentage could be established on separate genetics-based grounds even if the marital presumption was successfully rebutted,<sup>203</sup> this would not eliminate the problem where the spouse is not a genetic parent and parentage could not be established through the state's laws governing spousal consent to assisted reproduction procedures.<sup>204</sup>

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195. *Id.* at 1246–47.

196. *See Goodridge v. Dep't of Pub. Health*, 798 N.E.2d 941, 969 (Mass. 2003) (legalizing same-sex marriage in Massachusetts).

197. *T.F.*, 813 N.E.2d at 1247.

198. *Id.*

199. *Id.* at 1247–48.

200. *Id.* at 1248.

201. *Id.* at 1249. The court ultimately refused to enforce the contract on public policy grounds. *Id.* at 1249–52.

202. *Id.* at 1248.

203. *See supra* notes 166–70 and accompanying text.

204. *See JOSLIN ET AL.*, *supra* note 54, § 3:6 ("Courts have reached different conclusions with regard to whether the person is a legal parent of a child born

In addition, establishing functional parentage usually requires post-birth conduct.<sup>205</sup> As a result, a party seeking to rebut the marital presumption may be able to do so merely by initiating an action immediately following the child's birth. Although some scholars have argued that a spouse could potentially satisfy a functional test based solely upon actions taken prior to birth, even if that were allowed under the state's law, satisfying this type of test would undoubtedly be much more difficult in situations in which the rebuttal action was brought shortly after the child's birth.<sup>206</sup> This leads to an important question that must be answered by states that adopt a function-based approach to rebuttal of the marital presumption: can an individual be considered to have functioned as a parent based solely upon pre-birth conduct?<sup>207</sup> On the one hand, allowing pre-birth conduct alone to establish functional parentage would be a significant departure from the existing function-based approaches to parental rights. The function-based doctrines that states have adopted, such as equitable parenthood doctrines and holding out presumptions, explicitly require post-birth conduct on the part of the individual whose parentage is being determined.<sup>208</sup> While conduct that occurs prior to birth, such as supporting the person carrying the child during the pregnancy, can further children's best interests, protection of the relationship between the child and an individual who has established an actual parental bond with the child and who has provided support and caretaking directly to the child is arguably more directly tied to the promotion of children's best interests.

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to the woman through alternative insemination where the parties failed to comply strictly with the . . . statutory requirements.”).

205. See *supra* notes 141–42 and accompanying text.

206. See Appleton, *supra* note 8, at 273–74 (“[T]he focus on function typically requires the passage of time during which the adult performs a parental role.”).

207. Compare Shapiro, *supra* note 87, at 521 (“Can anyone else function as parent, or in whatever analogous capacity there might be for a child while in utero? Though I have not fully worked this through, it seems to me it may be hard to say yes. No matter how diligently one attends the Lamaze classes, one is not fully going to meet the functional test. Thus, consistent application of a functional test will mean that children have but one parent at birth.”), with Appleton, *supra* note 8, at 276 (stating that a functional standard could be satisfied by an individual's actions of “supporting the woman (financially and emotionally) during her pregnancy, assisting her with prenatal care, and otherwise acting as [a] fully involved [parent] of the fetus”).

208. See *supra* notes 98–103 and accompanying text.

On the other hand, allowing pre-birth conduct alone to establish functional parentage would mean that a party would not be able to ensure rebuttal success simply by bringing an action shortly after the child's birth.<sup>209</sup> Moreover, while protecting the relationship between the child and someone who has engaged only in pre-birth parental conduct is arguably less directly tied to the furtherance of children's best interests than protecting the relationship between the child and someone who has functioned as a parent post-birth, providing parentage to an individual who has demonstrated, through their pre-birth conduct, a strong commitment to supporting the child and assuming a parental role may still be very beneficial to the promotion of children's best interests. In terms of fairness, allowing pre-birth conduct alone to satisfy the functional parentage analysis would protect the reliance interests of an individual who engages in a joint venture with his or her spouse to become parents and who, prior to the child's birth, has acted in a manner consistent with his or her reasonable expectations regarding that joint venture. Finally, because it makes rebuttal more difficult, states that wish to create strong marital presumptions in order to protect marriages from intrusion and/or promote the establishment of parentage within marriage may opt for an approach that recognizes that pre-birth conduct alone may establish a spouse's functional parentage.

### 3. Combined Intent- and Function-Based Approach

As the previous discussion indicates, there are pros and cons to choosing an intent-based approach to parentage determinations over a function-based approach and vice versa. In many cases, the approaches will lead to the same result because "[f]unction will confirm previously stated intention."<sup>210</sup> However,

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209. See *supra* notes 205–06 and accompanying text.

210. Shapiro, *supra* note 87, at 518–19 (“In many, if not most cases, intent and function will work together.”). There is certainly some overlap between the considerations inherent in intent- and function-based approaches to parentage. As Professor Katharine Baker has explained, “[s]ome inquiry into intent to share parenting is embedded in how courts evaluate function, perhaps because unless there is intent to share parenting rights and obligations, it is hard for two people to function as if they actually are sharing those rights and obligations.” Baker, *supra* note 71, at 136. However, mutual intent for the individual in question to form a parent-like relationship with the child or perform a parent-like role is not necessarily the same as mutual intent for the individual to be the child's legal parent.

this, of course, will not always be the case.<sup>211</sup> There will undoubtedly be situations in which either a spouse has functioned as a child's parent despite the lack of mutual intention at the relevant time for the spouse to be the child's legal parent, as demonstrated in *K.M. v. E.G.*,<sup>212</sup> or a spouse has not functioned as a child's parent despite the existence of mutual intent at the relevant time for the spouse to be the child's legal parent, as demonstrated in *T.F. v. B.L.*<sup>213</sup> If a state decides that the intent- and function-based standards both further desirable objectives, it might adopt an approach to the marital presumption that combines them.<sup>214</sup>

Specifically, another option for structuring the marital presumption would be to require the party seeking to rebut the presumption to prove both that there was no mutual intent at the critical time between the parties for the spouse to be the child's legal parent and that the spouse had not functioned as the child's parent as defined by the common standard utilized in equitable parenthood doctrines.<sup>215</sup> This approach would alleviate a number of the problems discussed above that may arise under approaches based solely on intent or function.<sup>216</sup> For example, in terms of alleviating some of the problems inherent in a function-based approach, under the combination approach, if the spouses engaged in a joint endeavor to bring the child into the world with the mutual intent and understanding that they would be the child's parents but one of the parties later changed his or her mind, the party who gave birth would not be able to create rebuttal grounds simply by denying their spouse the opportunity to function as parent and the spouse would not be able to create rebuttal grounds simply by refusing to function as parent. Simi-

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211. See Shapiro, *supra* note 87, at 519.

212. See *supra* notes 148–64 and accompanying text.

213. See *supra* notes 193–201 and accompanying text.

214. One of the approaches to rebuttal of the marital presumption set forth in the 2017 Uniform Parentage Act is a combined intent- and function-based approach, but this approach applies only in limited circumstances. See *supra* notes 112–13 and accompanying text.

215. See *supra* note 99 and accompanying text (describing the standard as requiring the satisfaction of four elements, including that the petitioner resided with the child, assumed the responsibilities of parenthood, and formed a parent-like relationship with the child, and that the child's legal parent consented to or encouraged the formation of the parent-like relationship between the petitioner and child).

216. See *supra* Part III.A.

larly, it would ensure that an individual could not create rebuttal grounds merely by bringing the action immediately after the child's birth, when it would be difficult or impossible for the spouse to have sufficiently functioned as a parent. It would also decrease the risk that gender-based stereotypes about what it means to function as a mother or father would play a determinative role in court decisions involving challenges to the marital presumption.

At the same time, in terms of alleviating some of the problems inherent in an intent-based approach, under the combination approach the absence of mutual intent for the spouse to be the child's legal parent at some specific point in time would not result in the denial of parentage to a spouse who had, with the encouragement of the individual who gave birth, formed a parental bond with the child, the disruption of which could lead to short- and long-term harm to the child. Moreover, since there are arguments that both intent- and function-based approaches to parentage promote children's best interests, adopting a standard that precludes rebuttal unless it can be shown that the spouse was neither an intentional nor functional parent would arguably go further in promoting the best interests of children than choosing one approach to the exclusion of the other. In addition, depending on the facts involved in a given situation, there will likely be times when application of one of the approaches to rebuttal (intent or function) would lead to a complex, messy analysis from the court, while the other would not. In situations in which it is clear that rebuttal will be precluded under one of the approaches, but application of the other would be a complex undertaking, providing courts with the ability to deny rebuttal based solely on one of the approaches would allow the court in such situations to engage in a more straightforward analysis that may result in fewer instances of costly and protracted parentage proceedings. Finally, for states whose chosen objectives support the adoption of a stronger marital presumption, requiring proof of both lack of mutual intent and lack of function may be a desirable option since it makes rebuttal significantly more difficult and unlikely.

There are, however, potential downsides to adopting an approach to rebuttal that requires proof of both a lack of mutual intent on behalf of the parties for the spouse to be the child's parent and a lack of parental functioning on behalf of the spouse. To the extent that either an intent- or function-based standard

is over-inclusive in that it sometimes allows for parentage establishment in what a jurisdiction deems as undesirable circumstances, precluding rebuttal on the basis that either one of the two standards is satisfied would only exacerbate the problem. Furthermore, this approach may be viewed as undesirable in jurisdictions that have provided increasing protections to the rights of biological fathers who are not married to the individual who gave birth. This is because if rebuttal requires proving both that the individual who gave birth and their spouse did not intend for the spouse to be the child's parent and that the spouse has not functioned as the child's parent, biological fathers of children born to married individuals will face a steep uphill battle in rebutting the marital presumption and establishing parentage.

B. PROTECTING THE MARITAL FAMILY UNIT FROM OUTSIDE INTRUSION, PROMOTING PARENTAGE ESTABLISHMENT WITHIN MARRIAGE, AND FURTHERING THE BEST INTERESTS OF CHILDREN

Either along with or instead of identifying the purpose of the marital presumption as providing parentage to the person most likely to be the child's second intended or functional parent, states may seek to further the objectives of protecting the marital family unit from outside intrusion, promoting marriage as the preferred site for parentage establishment, and/or furthering the best interests of children.

1. Protection of the Marital Family Unit from Outside Intrusion

As discussed above, the most direct method of furthering the objective of protecting the marital family unit from outside intrusion would be to place a blanket ban on third-party challenges to the marital presumption, including challenges from biological fathers.<sup>217</sup> This may be an appealing option for some states, especially those that do not currently grant standing to biological fathers to rebut the marital presumption.<sup>218</sup> The majority of states, however, have determined that biological fathers should have standing to seek to rebut the marital presumption despite the significant potential harm to the marital family unit.<sup>219</sup> It is important to note, though, that the decision of most states to

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217. See *supra* Part II.B.

218. See *supra* notes 118–19 and accompanying text.

219. See *supra* note 40 and accompanying text.

grant biological fathers standing to rebut the marital presumption reflects the increasing willingness of states to provide men with parental rights and duties based upon their biological connection to a child.<sup>220</sup> Since the extension of marriage equality to same-sex couples likely means that biology can no longer be the basis for rebutting the marital presumption, perhaps some of the states who currently grant standing to biological fathers will reevaluate their approach to this issue.

It is likely, however, that a number of states that currently grant standing to unmarried biological fathers to rebut the marital presumption will choose to continue to do so despite the fact that the lack of biological connection between the child and the spouse of the individual who gave birth will no longer be the basis for rebuttal. Genetic connections have long played an important role in parentage determinations,<sup>221</sup> and some states likely will be more resistant than others to denying biological parents their day in court. States that continue to grant biological parents standing to rebut the presumption, but whose objectives also include protecting the marital family unit from outside intrusion, may utilize a number of other measures to further this objective. For example, such states could make rebuttal more difficult by requiring the party seeking rebuttal to prove both a lack of mutual intent on behalf of the married couple for the spouse of the individual who gave birth to be the child's parent and a lack of functioning as a parent on behalf of the spouse.<sup>222</sup> Additionally, states could adopt standards under which standing for third parties would be denied or third-party claims would be rejected in situations in which rebuttal would be contrary to the best interests of the child or, more broadly, contrary to the best interests of the marital family unit. The objective of protecting the marital family unit from outside intrusion could also be furthered by adopting time limitations for third-party challenges to the marital presumption and limiting the categories of third parties granted standing to rebut the presumption. While these methods arguably would not further the purpose of protecting the marital family unit from outside intrusion to the same extent as an outright ban on third-party challenges, each of these methods would nonetheless be effective in reducing the number of successful third-party challenges to the marital presumption.

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220. Feinberg, *supra* note 8, at 116–17.

221. *Id.* at 115–23.

222. *See supra* Part III.A.3.

However, one significant concern with granting biological parents standing to rebut the presumption, even though biology will no longer form the basis for rebuttal, is that considerations of biological connections for any purpose under marital presumption standards will disproportionately and unjustly harm same-sex couples. This is because while different-sex couples also may utilize third-party genetic materials to conceive, for same-sex couples there generally will *necessarily* be an individual outside of the relationship whose genetic materials were used to conceive the child.<sup>223</sup> This is a significant concern. Even though third-party actions to rebut the marital presumption would be unsuccessful absent proof of lack of mutual intent and/or parental function under the proposed standards discussed above, the ability of the biological parent to bring the rebuttal action in and of itself would result in significant disruption and harm to families who have conceived children using donor gametes. Furthermore, even if the relevant laws allowed judges to deny standing where rebuttal would not be in the best interests of the child, this is not sufficient protection for couples who conceive using gamete donors, as best interests standards are incredibly broad and subjective.<sup>224</sup> To address this problem, states that include biological parents in the category of individuals granted standing to rebut the marital presumption must explicitly exclude gamete donors from qualifying for such standing. Gamete donors do not have any parental rights or obligations under state law to the children conceived using their genetic materials and thus it is only logical (and fair) that their biological connection to the child could not serve as a basis for granting them standing to rebut the marital presumption.<sup>225</sup>

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223. The exception to this would be for same-sex couples wherein one member of the couple is transgender. *See* Coleman, *supra* note 7.

224. *See infra* notes 235–37 and accompanying text.

225. Feinberg, *supra* note 8, at 121–22. This, however, unfortunately will not solve every aspect of the problem. Some states' donor non-paternity laws require that the procedure through which the child is conceived be performed under the supervision of a licensed physician. *Id.* For purposes of the state's marital presumption, a gamete provider should be denied standing if it is proven that the gametes were provided for use in assisted reproduction with the understanding that the donor would have no legal rights or obligations to the child, regardless of whether the formal requirements of the state's donor non-paternity law have been satisfied.

## 2. Promotion of Marriage as the Preferred Site of Parentage Establishment

With regard to the objective of promoting marriage as the preferred site of parentage establishment, the most direct way to further this objective would be to adopt a marital presumption that is wholly irrefutable. This approach, which Professor Susan Appleton has aptly referred to as the “assumption-of-the-risk approach” to marriage,<sup>226</sup> is unlikely to be adopted by any significant number of states, as the vast majority of states have long rejected it.<sup>227</sup> Under this type of approach, the spouse of the individual who gave birth would be deemed the child’s legal parent against the wishes of the individual who gave birth, the spouse, and/or the child even if there was no intent on behalf of the parties for the spouse to be the child’s parent, the spouse never functioned as the child’s parent, and the spouse was not genetically connected to the child. The spouse’s marriage to the individual who gave birth alone would establish his or her legal parentage, and no other considerations would come into play. It is likely that many states would find such a singularly-focused approach to something as important as the establishment of legal parentage to be undesirable.

States that do not want to go so far as to make the marital presumption wholly irrefutable, but whose objectives include promoting marriage as the preferred site of parentage establishment, may utilize a number of less direct methods, many of which are similar to those that states may utilize to further the objective of protecting marriages from outside intrusion. For example, making the grounds for rebuttal significantly more difficult by requiring the party seeking rebuttal to prove both a lack of requisite intent and lack of requisite function would have the effect of promoting marriage as the preferred site for parentage establishment.<sup>228</sup> States also could make rebuttal challenges more difficult to bring or succeed upon by limiting the categories of individuals granted standing to bring rebuttal actions, establishing time limitations for such actions, and precluding rebuttal where it would be contrary to the best interests of the child or

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226. Appleton, *supra* note 8, at 286 (internal quotations omitted).

227. Harris, *supra* note 26, at 622 (“[T]he conclusive presumption that a woman’s husband is the father of her children is all but dead . . . .”); Monopoli, *supra* note 41, at 437 (“Every state has a version of the marital presumption . . . although it is no longer irrefutable in the vast majority of states . . . .”).

228. See *supra* Part III.A.3.

marital family unit.<sup>229</sup> In addition, allowing courts to utilize equitable doctrines to deny rebuttal would also make succeeding on such challenges more difficult, particularly for challenges initiated by one of the spouses, thereby furthering the promotion of marriage as the preferred site for parentage establishment.<sup>230</sup>

### 3. Furthering Children's Best Interests

The most drastic method that states could use to further the objective of promoting children's best interests would be to structure the marital presumption such that the only consideration in rebuttal actions would be the best interests of the child. There are, however, a number of significant issues with adopting this approach to rebuttal. Under current law, the best interests of the child standard is used mainly for determinations of physical and legal custody between two individuals who are already entitled to recognition as the child's legal parents; importantly, this standard generally has not been used as a basis for denying legal parent status to individuals who the law presumes to be parents.<sup>231</sup> It also is not the standard used to involuntarily terminate a legal parent's rights. Instead, such actions are subject to a much higher standard of proof by clear and convincing evidence of parental unfitness.<sup>232</sup> The best interests analysis does not come into play in involuntary termination actions unless the parental unfitness standard is satisfied, and even then it serves only as a safety net to prevent termination of parental rights where it would be contrary to the child's best interests despite the parent's unfitness.<sup>233</sup>

Moreover, as it presently stands, most states that consider the best interests of the child in marital presumption challenges do so only for limited purposes. More specifically, in most states that consider the best interests of the child in marital presumption challenges, analysis of the child's best interests is used only

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229. See *supra* Part II.B.

230. See *supra* notes 108–09 and accompanying text.

231. Jessica Feinberg, *Consideration of Genetic Connections in Child Custody Disputes Between Same-Sex Parents: Fair or Foul?*, 81 MO. L. REV. 331, 355 (2016) (“Every state has adopted some form of the best interests of the child standard to govern disputes involving two fit legal parents . . .”).

232. Phillip M. Genty, *Procedural Due Process Rights of Incarcerated Parents in Termination of Parental Rights Proceedings: A Fifty State Analysis*, 30 J. FAM. L. 757, 766, 769 (1992).

233. 2 ANN M. HARALAMBIE, HANDLING CHILD CUSTODY, ABUSE AND ADOPTION CASES §§ 13:3, 13:7 (2018); Feinberg, *supra* note 231, at 345–46.

to preclude rebuttal of the presumption and thereby maintain the spouse's legal parentage (either by denying the admission of genetic testing evidence or rejecting rebuttal actions despite genetic testing evidence indicating that the spouse is not the child's genetic parent).<sup>234</sup> If rebuttal of the marital presumption could occur based solely on a judicial determination that it was in the best interests of the child, it would result in a situation in which neither the parties to the marriage nor the child could be secure in the marital presumption's provision of legal parentage to the spouse who did not give birth. Legal scholars and commentators have long criticized the best interests of the child standard as unjust and unpredictable due to the largely unfettered discretion it provides judges.<sup>235</sup> The law generally does not provide judges with any direction with regard to how to weigh each of the many factors set forth within the best interests of the child standard.<sup>236</sup> Moreover, best interests standards generally allow judges to weigh, in addition to the factors provided, any factor that the judge deems relevant.<sup>237</sup> Overall, a rebuttal standard that focused only on the judge's determination of the best interests of the child would result in a very weak marital presumption that would leave marital families in a state of uncertainty. This, in and of itself, seems contrary to the best interests of children. It also seems like an undesirable result for states whose marital

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234. See *supra* notes 42–45 and accompanying text.

235. Sarah Abramowicz, *Contractualizing Custody*, 83 *FORDHAM L. REV.* 67, 130 (2014) (“The family law literature, in the areas of both custody and parentage, has widely rehearsed the problems with the best-interests-of-the-child standard. The best-interests standard is at once deeply subjective and open-ended, with the result that it affords judges an enormous amount of discretion.”); Katherine C. Dewart, Note, *A Privilege for “Mommy Dearest”? Criticizing Virginia’s Mental Health Records Privilege in Custody Disputes and the Court’s Application in Schwartz v. Schwartz*, 13 *GEO. MASON L. REV.* 1341, 1350 (2006) (“While the best interests of the child standard is the standard determining custody in most jurisdictions, critics often call the standard ‘vague’ and ‘ill-defined.’ It is also difficult to predict the outcome of a custody dispute under the best interests of the child standard because trial judges are often granted wide discretion in determining the weight of each of the statutory factors.” (footnote omitted)).

236. Sandra K. McGlothlin, *No More “Rag Dolls in the Corner”: A Proposal to Give Children in Custody Disputes a Voice, Respect, Dignity, and Hope*, 11 *J.L. & FAM. STUD.* 67, 81 (2008) (“Under the ‘best interests’ standard, courts have broad discretion in determining which factors to consider in a particular case and how much weight to give each factor.”).

237. Feinberg, *supra* note 231, at 356–57.

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presumption objectives include protecting marriages from outside intrusion or promoting marriage as the preferred site for parentage establishment. Furthermore, under a pure best interests approach to rebuttal, judges would not be required to provide any deference to the decision-making autonomy of the spouses with regard to the structure of their family or to consider any spousal expectations or reliance interests.

An approach that bases rebuttal solely on a best interests analysis, rendering the marital presumption significantly weaker, would be especially problematic for same-sex couples, since the spouse who did not give birth generally would not be entitled to parentage on separate genetics-based grounds if the marital presumption was rebutted.<sup>238</sup> Application of a pure best interests standard for rebuttal of the marital presumption would open the door for judicial bias against “non-traditional” families. Longstanding biases about what it means to be a parent (biological connections) or what a family should look like (two different-sex parents and their children) could factor into judicial analyses of whether rebuttal of the marital presumption is in the child’s best interests. Extending the marital presumption to same-sex couples, while at the same time adopting a standard that allows judicial bias and subjectivity to play a central role in its application, is both illogical and unjust.

Fortunately, there are other methods of structuring the marital presumption that would effectively advance the objective of furthering the best interests of children. As discussed above, there are strong arguments that providing parentage to the spouse of the individual who gave birth when the couple mutually intended for the spouse to be the child’s second parent or when the spouse has functioned as a parent to the child generally serves to further children’s best interests.<sup>239</sup> Consequently, states could weigh the pros and cons of each approach and determine whether an intent-based, function-based, or combination approach to rebuttal would most effectively advance the objective of furthering children’s best interests. If a state adheres to the view that children’s best interests generally are furthered through the establishment of parentage within marriage and/or

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238. Exceptions to this proposition include same-sex couples in which one member is transgender as well as female same-sex couples who utilize reciprocal *in vitro* fertilization to conceive (wherein one member of the couple provides genetic materials and the other member of the couple carries the pregnancy). See *supra* note 73 and accompanying text.

239. See *supra* notes 138–39, 181–84 and accompanying text.

the protection of the marital family unit from outside intrusion, it may be more inclined to adopt the combination intent- and function-based approach, which would make rebuttal more difficult. Additionally, states could adopt a standard under which rebuttal was precluded, regardless of satisfaction of the base requirement (lack of intent, function, or both), when it would be contrary to the best interests of the child or inequitable. Using the best interests standard as a safety net to protect the relationship between the child and the spouse of the individual who gave birth in appropriate circumstances where rebuttal would otherwise occur, as opposed to as a method for denying parentage to an individual presumed under the law to be the child's parent, would alleviate many of the concerns regarding the potential misuse of the best interests standard described above. States also could significantly minimize disruption to children and their established families by placing strict time limitations on challenges to the marital presumption and limiting the class of people granted standing to bring such challenges.

### C. THE OPTIMAL APPROACH TO REBUTTAL

Along with bestowing legal parent status to spouses who have shown a commitment to parentage through intent or function, most states will likely identify the furtherance of children's best interests and the protection and promotion of the marital family unit and its members as primary objectives of the marital presumption. If a state does not seek to promote objectives relating to protecting and promoting the well-being of marriages and marital children through its modern marital presumption, then there would seem to be little reason for the state to maintain the presumption at all. Consequently, for most states that choose to maintain the marital presumption, the combination intent- and function-based approach to rebuttal, which requires proof of both a lack of mutual intent for the spouse of the individual who gave birth to be the child's legal parent and a lack of parental functioning on behalf of the spouse, will be the most effective choice. The combination approach will be more effective both in advancing the best interests of children and in promoting and protecting the marital family unit than approaches that focus on intent or function alone.

In terms of children's best interests, by limiting rebuttal to truly compelling situations where both the requisite intent and function are lacking, the combination approach errs on the side

of ensuring that, from the time of birth, the vast majority of marital children will be provided with two legal parents from whom to receive care and support. Importantly, there exist significant gaps in approaches that focus solely on intent or function. These gaps are problematic in terms of the promotion of children's best interests because they may result in the denial of parentage to a spouse who has demonstrated a significant parental commitment to the child in question. A combination approach, however, fills in many of these problematic gaps. For example, under the combination approach, a spouse who has functioned as a child's parent and has formed a parental bond with the child will not be denied parentage solely because the requisite mutual intent did not exist at the designated point in time. Similarly, in situations in which the individual who gave birth and their spouse mutually intended for the spouse to be the child's legal parent, the spouse will not be denied parentage solely because he or she did not yet have the opportunity to function in a parental role to the child. Overall, the combination approach promotes children's best interests by providing marital children with a second legal parent when the spouse of the individual who gave birth has, in any significant way, demonstrated a commitment to parentage.

In addition, approaches that focus on intent or function alone can encourage behavior from married individuals that is contrary to children's best interests and can lead to unfair results. The combination approach alleviates many of these concerns as well. For example, under the combination approach, spouses of individuals who give birth cannot avoid being deemed legal parents by simply refusing to conduct themselves in a parental role and individuals who give birth cannot prevent their spouses from receiving legal parentage by simply refusing to allow the spouse to function as the child's parent. Moreover, individuals who have given birth to a child and who have encouraged their spouse to form a parental relationship with the child cannot sever that relationship, which can be of great importance to the child's well-being, simply by demonstrating a lack of mutual intent for the spouse to be the child's legal parent at a designated moment in time. Similarly, under the combination approach, a spouse who has assumed the responsibilities of parenthood and has formed a parent-like bond with the child could not sever his or her legal relationship with the child simply by proving a lack of mutual intent for the spouse to be the child's legal parent at some designated point in time.

The combination approach also goes further than approaches that focus solely on intent or function in protecting and promoting marital family units. The significantly higher bar for rebuttal established by the combination approach likely will discourage the initiation of challenges to the marital presumption, either by the parties to the marriage or third parties, when compelling circumstances for rebuttal do not exist. Even when challenges to the marital presumption are initiated, the combination approach makes rebuttal highly unlikely in situations in which the parties to the marriage do not wish for rebuttal to occur. It would be extremely difficult for a third party to successfully prove both a lack of the requisite intent on the part of the married couple and a lack of the requisite functioning on behalf of the spouse, without the cooperation of at least one of the members of the marriage. Even in situations in which one of the parties to the marriage initiated the challenge to the marital presumption, rebuttal under a standard requiring proof of both lack of intent and lack of function would be unlikely in all but the most compelling circumstances. Successful rebuttal actions likely would be limited, for the most part, to situations involving married couples whose marriages were, during the relevant period of time, in name only.

In addition to adopting the combination intent- and function-based approach to rebuttal, states should further reduce the likelihood of disruption to marriages and marital children by limiting the circumstances under which individuals can bring actions to challenge the marital presumption. Adopting bright-line time limitations on challenges to the marital presumption, an approach already undertaken by many states,<sup>240</sup> is undoubtedly an effective method of significantly reducing the likelihood of disruption to marriages and the lives of marital children. Narrowly defining the class of individuals granted standing to challenge the presumption will also decrease disruption to marriages and marital children. If standing is granted to biological fathers, states should amend their standing provisions to expressly exclude from standing individuals who are gamete donors. This will be an important component of a modern marital presumption that seeks to protect *all* marital family units regardless of the sex of the spouses, as same-sex couples generally must use donor gametes in order to conceive children. Finally, states

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240. See *supra* notes 47–48 and accompanying text.

should continue to employ principles relating to equity and children's best interests in appropriate situations to maintain legal parentage in the spouse of the individual who gave birth despite satisfaction of the rebuttal grounds.

#### IV. THE POSSIBILITY OF SEPARATE MARITAL PRESUMPTIONS BASED UPON THE METHOD OF CONCEPTION

Another potential option would be for states to apply one of the new marital presumption standards discussed above to situations in which conception occurred through nonsexual means, but to continue to apply their current marital presumption standards to situations in which conception occurred through sexual means. This would mean that the state would have two separate marital presumption standards, the applicability of which would depend on the category of conception. A new marital presumption standard that focuses on non-genetics related considerations for rebuttal, such as intent and/or function, is absolutely essential for same- and different-sex married couples who utilize assisted reproduction to conceive children who are not genetically related to the member of the couple who did not give birth. Although laws in every state establish parentage for a birth mother's husband who consents to his wife's use of assisted reproduction with the intent to be the resulting child's parent, and under *Obergefell* these laws should apply equally to same-sex spouses,<sup>241</sup> there are varying formal requirements for compliance with such laws, including that the spouse provide written consent to the procedure,<sup>242</sup> that the procedure be performed under the supervision of a physician,<sup>243</sup> or that a specific type of assisted reproduction procedure be performed.<sup>244</sup> Importantly, a marital presumption that requires proving lack of mutual intent and/or parental function for rebuttal serves as an

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241. JOSLIN ET AL., *supra* note 54, § 3.3.

242. *Id.* § 3:7.

243. *Id.* § 3:9.

244. *Patton v. Vanterpool*, 806 S.E.2d 493, 495–97 (Ga. 2017) (holding that the state's assisted reproduction statute, which creates an "irrebuttable presumption of legitimacy" with respect to "[a]ll children born within wedlock or within the usual period of gestation thereafter who have been conceived by means of *artificial insemination*" when both spouses consented to the procedure in writing, did not apply in situations in which the child had been conceived via *in vitro fertilization* (emphasis added) (citations omitted)).

essential safety net in situations where a married couple conceives via assisted reproduction, and the couple mutually intended for the spouse to be the child's parent or the spouse functioned as the child's parent, but the spouse's parentage cannot be established through the state's assisted reproduction statute due to a failure to comply with its formal requirements.<sup>245</sup> This is especially important for the protection of married same-sex couples, who are increasingly utilizing assisted reproduction to bring children into their families and generally cannot conceive children using the genetic materials of both spouses.<sup>246</sup>

It is likely that some states, particularly those that are more resistant to disentangling biology from parentage determinations, will determine that their existing marital presumption standards should continue to govern situations in which conception occurs via sexual intercourse. The law has been much more resistant to disentangling biological and legal parentage for biological fathers in situations of sexual conception as compared to nonsexual conception. Even as gamete donation non-paternity laws have allowed for the voluntary, non-judicial severance of biological and legal parentage, these laws have been restricted

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245. See, e.g., *Wendy G-M. v. Erin G-M.*, 985 N.Y.S.2d 845, 853–55 (N.Y. Sup. Ct. 2014) (holding that although the parties had not complied with the formal requirements of the spousal consent to assisted reproduction statute, the marital presumption provided a separate means for establishing the spouse's parentage).

246. Dorothy A. Greenfeld & Emre Seli, *Assisted Reproduction in Same Sex Couples*, in *PRINCIPLES OF OOCYTE AND EMBRYO DONATION* 289, 289 (M.V. Sauer ed., 2013) ("Lesbians often achieve parenthood through intrauterine insemination or IVF, sometimes with donor egg as well as donor sperm ('donor embryo'), and through 'reciprocal IVF' a process where one partner donates eggs to the other. Increasing numbers of gay men seek fatherhood through IVF using an egg donor and a gestational carrier surrogate."); Meredith Larson, *Don't Know Much About Biology: Courts and the Rights of Non-Biological Parents in Same-Sex Partnerships*, 11 *GEO. J. GENDER & L.* 869, 872 (2010) ("In what some have termed a 'gayby boom,' LGBT couples and individuals are taking advantage of these [ART] options to have children at an increasing rate."); Scott Titshaw, *A Modest Proposal to Deport the Children of Gay Citizens, & Etc.: Immigration Law, The Defense of Marriage Act and the Children of Same-Sex Couples*, 25 *GEO. IMMIGR. L.J.* 407, 412 (2011) ("Assisted reproductive technology ('ART') and surrogacy arrangements have become more and more common and legally accepted as methods for building families by different-sex and same-sex couples."); *FAM. EQUALITY COUNCIL, LGBTQ FAMILY FACT SHEET 1–2* (2017), <https://www2.census.gov/cac/nac/meetings/2017-11/LGBTQ-families-factsheet.pdf> [<https://perma.cc/R8KT-SBBW>] ("Today . . . an increasing number of same-sex couples are planning and creating their families through assisted reproductive technology (ART) and surrogacy . . .").

to situations in which conception occurs without sexual intercourse. An individual who creates a child via sexual intercourse is, by definition, not encompassed within state donor non-paternity laws.<sup>247</sup> As Professor Susan Appleton has explained, “[n]ot only are sexually conceiving parents unable to bargain away the rights of their children, but sexual contracts have traditionally been deemed void as against public policy.”<sup>248</sup> Stated another way, “sexual conception makes a genetic father a legal parent. By contrast, nonsexual conception . . . offers opportunities for a genetic father to be simply a donor with no parental rights or obligations . . . .”<sup>249</sup> A number of courts have emphasized the dramatically differing legal consequences that may arise for biological parents depending on the method of conception, emphasizing that biological fathers who conceive children via sexual intercourse cannot waive their legal parentage regardless of the intent or agreement of the parties engaging in intercourse.<sup>250</sup> The resistance to severing biological and legal parentage in the context of sexual conception reflects the “personal responsibility”

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247. See, e.g., D.C. CODE § 16-909(e)(2) (2019) (“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 . . . .” (emphasis added)); 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.” (emphasis added)).

248. Susan Frelich Appleton, *Between the Binaries: Exploring the Legal Boundaries of Nonanonymous Sperm Donation*, 49 FAM. L.Q. 93, 109 (2015).

249. *Id.* at 93–94.

250. See, e.g., *Straub v. B.M.T.*, 645 N.E.2d 597, 601 (Ind. 1994) (refusing to recognize donor nonpaternity agreement and stating that “there is no such thing as ‘artificial insemination by intercourse’”); *In re the Matter of Paternity of M.F. and C.F.*, 938 N.E.2d 1256, 1260 (Ind. Ct. App. 2010) (“[I]f insemination occurred via intercourse, the Donor Agreement would be unenforceable as against public policy.”); *Ferguson v. McKiernan*, 940 A.2d 1236, 1246 (Pa. 2007) (distinguishing between sexual and nonsexual conception, and stating that “[i]n the case of traditional sexual reproduction, there simply is no question that the parties to any resultant conception and birth may not contract between themselves to deny the child the support he or she requires”); *Kesler v. Weniger*, 744 A.2d 794, 796 (Pa. Super. Ct. 2000) (“[W]e decline to recognize a category of ‘artificial insemination by intercourse.’”).

approach to sexual conduct and the fear that something as important as the waiver of parental rights could occur too casually if allowed in the context of sexual intercourse.<sup>251</sup>

Applying differing marital presumptions based upon the method of conception likely would mean that the state would simply continue to apply its existing marital presumption, without any significant changes, in situations involving sexual conception without regard to whether the spouses are of the same- or different-sex. Consequently, genetics-based considerations would continue to play a core role in rebuttal of the marital presumption in situations where the individual who gave birth to the child conceived the child via sexual intercourse with someone other than their spouse, regardless of the sex of the spouse. If a state chose to continue using its existing marital presumption standard for situations in which conception occurred via sexual intercourse, the state's existing rules regarding the ability to preclude rebuttal despite the spouse's lack of genetic ties to the child based upon the child's best interests or equitable principles would also continue to govern, as would the existing rules regarding standing and time limitations for challenges.

The adoption of differing rules governing the presumption of parentage for the spouse of the individual who gave birth based upon whether conception occurred through sexual or nonsexual means would not be unprecedented.<sup>252</sup> Under Quebec's parentage law, for example, when a married couple has engaged in a "parental project" to conceive a child through assisted procreation using third-party donor gametes, the spouse of the person who gives birth to the child is presumed to be the child's legal parent.<sup>253</sup> Although for purposes of this presumption assisted procreation using third-party donor gametes can occur via sexual or nonsexual means,<sup>254</sup> when assisted procreation occurs via nonsexual means rebuttal of the presumption cannot be based

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251. Appleton, *supra* note 248, at 109; Deborah L. Forman, *Exploring the Boundaries of Families Created with Known Sperm Providers: Who's In and Who's Out?*, 19 U. PA. J.L. & SOC. CHANGE 41, 92 n.329 (2016).

252. The 2017 Uniform Parentage Act deviates from its general rules for rebuttal of the marital presumption in certain circumstances involving conceptions that occur via assisted reproduction. For example, the Act provides a separate standard for rebuttal of the marital presumption for situations in which conception occurs via assisted reproduction and the birth mother's spouse seeks to rebut his or her own presumed parentage. UNIF. PARENTAGE ACT § 705 (UNIF. LAW COMM'N 2017).

253. Civil Code of Québec, R.S.Q., c CCQ-1991, art. 538.3 (Can.).

254. *Id.* arts. 538.2, 538.3.

upon the gamete provider's genetic tie to the child.<sup>255</sup> Instead, rebuttal in the context of nonsexual assisted procreation can occur only if "there was no mutual parental project or if it is established that the child was not born of the assisted procreation."<sup>256</sup> When assisted procreation occurs via sexual means, however, the gamete provider may establish legal parentage during the first year of the child's life based upon his genetic tie to the child.<sup>257</sup> The establishment of legal parentage in the gamete provider results in the denial of legal parentage to the spouse of the individual who gave birth.<sup>258</sup>

There are a number of considerations to weigh in determining whether to adopt an approach that applies differing marital presumptions to sexual and nonsexual conceptions. Those who believe that to promote fairness and children's well-being, parentage law should move away from its focus on biology and toward intent- and/or function-based focuses, would likely lament the failure to take advantage of a key opportunity to disentangle legal and biological parentage.<sup>259</sup> After all, many people would argue that "the particular means of conception has no inherent connection to a child's affective ties or need for support—or, for that matter, to an adult's intent or family bonds."<sup>260</sup> In states that have moved or wish to move toward parentage establishment standards that place primary importance on intent or function as opposed to biology, a singular marital presumption standard that is based on non-genetic considerations will be the most desirable. This is not to say, however, that having separate marital presumptions would not also contribute to the further legal

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255. *Id.* arts. 538.2, 539.

256. *Id.* art. 539.

257. *Id.* art. 538.2.

258. *Id.*; Nancy D. Polikoff, *A Mother Should Not Have to Adopt Her Own Child: Parentage Laws for Children of Lesbian Couples in the Twenty-First Century*, 5 STAN. J. CIV. RTS. & CIV. LIBERTIES 201, 228 (2009) (stating that under Quebec's parentage law, when assisted procreation occurs via sexual means, "[t]he biological mother's same-sex partner can declare herself a parent when the child is born, but if the biological father seeks parentage during the child's first year he will simultaneously eliminate the partner's legal bond to the child. The statute does not permit three persons—the mother, her partner, and the biological father—to be recognized as a child's parents." (footnotes omitted)).

259. NeJaime, *supra* note 74, at 1249 ("Family law developments over the past several decades, culminating in many ways in the Court's recognition of marriage equality in *Obergefell*, point toward results in both the same-sex and different-sex contexts that value functional and intentional parenthood over biological and genetic connections.").

260. Appleton, *supra* note 248, at 111.

disentanglement of biological and legal parentage—a marital presumption that removes genetics-based considerations from rebuttal, even if it only applied when conception occurred via nonsexual means, would also contribute to this goal—it would just do so to a lesser degree. It is also important to note that adopting separate marital presumptions based upon the method of conception will seem like a much less drastic step for states that, even as they have increasingly recognized the rights of non-genetic parents in the assisted reproduction context, have otherwise maintained genetics as the core consideration for parentage determinations.

Another consideration is whether removing genetics-based considerations from application of the marital presumption only in situations of nonsexual conception would work an injustice on same-sex couples. The argument that such an injustice would occur is based on the notion that married same-sex couples disproportionately need to obtain genetic materials from someone outside of the marriage in order to conceive. Because some forms of assisted reproduction can be very expensive, while sexual intercourse is not, requiring conception using an outsider's gametes to occur via nonsexual means in order to enjoy a marital presumption that does not base rebuttal on genetic ties is unfair and harmful to same-sex couples, especially those who are low-income.<sup>261</sup> There is no doubt that the inaccessibility of assisted reproductive technology for low-income individuals is a serious problem in the United States.<sup>262</sup> However, the distinction between the two marital presumption standards would be based on sexual versus nonsexual conception as opposed to the use of specified assisted reproduction technologies or lack thereof, and there are methods of non-sexual conception that are not costly and do not require medical expertise.<sup>263</sup>

It is possible that having separate marital presumptions may actually be beneficial to same-sex couples in some states. As

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261. Alexandra Sifferlin, *Millions of Women Don't Have Access to Fertility Treatments in the U.S.*, TIME (Mar. 14, 2017) <http://time.com/4701023/fertility-treatments-ivf/> [<https://perma.cc/QB9W-R8B8>] (stating that the average cost of one IVF cycle is around \$12,000).

262. Alicia Armstrong & Torie C Plowden, *Ethnicity and Assisted Reproductive Technologies*, 9 CLINICAL PRACTICE 651 (2012), <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC3595611/> [<https://perma.cc/G7J2-QAWS>]; Sifferlin, *supra* note 261.

263. Appleton, *supra* note 248, at 109 (“Yet, collecting sperm and performing nonsexual insemination do not require professional expertise, and feminists have long written about DIY ‘turkey baster babies.’”).

discussed above, if a single marital presumption was used, it is likely that some states that currently grant biological fathers standing to challenge the presumption would continue to do so, even though the grounds for rebuttal would no longer be based on genetic ties. However, if a state in this category adopted a separate marital presumption standard for conceptions by non-sexual means, it may be significantly more likely to structure that standard to exclude biological fathers from the category of individuals granted standing or to place on such individuals the burden of proving that they were not gamete donors in order to obtain standing. From the state's perspective, in the context of nonsexual conception involving an individual married to someone other than the sperm provider, it may be significantly more likely that the sperm was obtained with the mutual understanding that the provider would have no rights and obligations to the child, and that the individual to whom the sperm was provided and their spouse would be the child's parents. Also, the personal responsibility approach to sexual intercourse and the fear that parental rights could be waived too casually in the context of sexual intercourse would not be considerations in the context of non-sexual conceptions.

Overall, the decision regarding whether to create one uniform marital presumption or two distinct marital presumptions based upon the method of conception will likely hinge on the state's willingness, or lack thereof, to move beyond genetics-related considerations in parentage determinations. States that choose to adopt differing marital presumptions based upon the method of conception and maintain genetic connections as a core consideration in rebuttal for conceptions that occur through sexual means should, if they have not already, adopt standards that permit courts to reject genetics-based rebuttal in situations in which the child's best interests or equitable considerations support maintaining the spouse's legal parentage and place time limitations on rebuttal actions. This will help to ensure that, although genetic connections will continue to be an important consideration in rebuttal actions involving conceptions by sexual means, genetic connections will not automatically trump other important considerations, such as the best interests of the child.

#### CONCLUSION

In the near future, many states will address the question of how to restructure the marital presumption of parentage to log-

ically and effectively encompass same-sex couples. As this Article has detailed, states will have a number of options to choose from in structuring the details of their new marital presumptions of parentage. Each approach has strengths and weaknesses, and the approach that each state will ultimately choose to adopt will depend on the objectives that the state seeks to further through the marital presumption. Importantly, the extension of the marital presumption of parentage to same-sex couples will have the powerful effect of requiring states to reconceive the purpose of the presumption as something beyond identifying the individual most likely to be the child's second genetic parent. This reconceptualization will occur during a time when the wisdom of the law's historical reliance on genetics-related considerations in determining parentage is being called into question and states increasingly are placing importance on considerations such as intent and function in making parentage determinations. The restructuring of states' marital presumptions of parentage, which will require every state to undertake a reevaluation of what considerations are most important in identifying the individuals entitled to recognition as a child's legal parents, likely will play a critical role in the modern development of the law governing the establishment of parentage.