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### **Consideration of Genetic Connections in Child Custody Disputes Between Same-Sex Parents: Fair or Foul?**

*Jessica Feinberg*\*

#### ABSTRACT

*Historically, in child custody disputes involving same-sex couples who conceived their children through assisted reproductive technology, the law only recognized the relationship between the child and the member of the same-sex couple who was the child's genetic parent. Consequently, non-genetic parents in these situations were frequently denied standing to seek custody or visitation following the dissolution of their relationship with the child's genetic parent. Due to recent legal advancements, however, it is becoming far more common for both members of a same-sex couple to be legally recognized as the parents of a child conceived through assisted reproductive technology. Unfortunately, despite the increasing ability of non-genetic parents to obtain the status of legal parent, discrimination against non-genetic parents is likely to continue, just at a different stage in the child custody process. Discrimination against non-genetic parents in dissolving same-sex relationships will now likely begin to surface at the stage when judges apply the best interests of the child standard, which governs custody disputes between two legal parents. Genetic connections have traditionally played a primary role in determining parental rights, and case after case involving dissolving same-sex relationships has demonstrated that, in the heat of legal proceedings, genetic parents will use their genetic connections to the child to support their arguments for superior parental rights. Moreover, due to the long histo-*

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\* Associate Professor, Mercer University School of Law. I am extremely grateful to Susan Appleton, Melanie Jacobs, Dave Meyer, and Nancy Polikoff for reviewing earlier drafts of this Article and providing essential feedback. I am also grateful to Lindsay Feinberg for her helpful feedback and to Dean Daisy Floyd for her generous support. Thank you also to the participants in the International Society of Family Law 2016 North American Conference and the Feminist Legal Theory Collaborative Research Network Program at the 2016 Law and Society Conference for providing insightful suggestions and comments. Emily Evett provided invaluable research assistance throughout the drafting process. Finally, thank you to ABF for infusing such great joy into everyday life, I love you.

*ry linking genetic connections to parental rights and the significant discretion judges enjoy under the best interests of the child standard, there is a high likelihood that genetic connections will play a role in many judges' custody decisions. This Article argues that allowing judges to apply genetics-based preferences in custody disputes between same-sex legal parents who conceived their children through assisted reproductive technology would be ineffective and contrary to the furtherance of children's best interests and proposes legal reform to prohibit such discrimination.*

## I. INTRODUCTION

As social acceptance of same-sex relationships has grown at a rapid pace, it has become increasingly common for same-sex couples to welcome children into their families. As of 2010, approximately 115,000 same-sex couples in the United States were raising children in their households.<sup>1</sup> This number is only likely to rise as legal protections governing same-sex relationships continue to expand, social acceptance of same-sex relationships continues to grow, and lesbian, gay, bisexual, and transgender (“LGBT”) individuals become increasingly comfortable living openly and forming families.<sup>2</sup> When same-sex couples decide to bring new children into their families, they commonly take one of the two following approaches: they adopt a child, or they use assisted reproductive technology (“ART”) to conceive a child.<sup>3</sup> Advancements in ART in recent decades, and the removal of barriers to the use of ART by same-sex couples,<sup>4</sup> have resulted in a rising number of same-sex couples choosing to have children using ART.<sup>5</sup> Because it is not yet possible for same-sex couples to conceive children using the genetic materials of both

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1. Daphne Lofquist, *Same-Sex Couple Households*, *American Community Survey Briefs*, U.S. CENSUS BUREAU (2011), <https://www.census.gov/prod/2011pubs/acsbr10-03.pdf>.

2. According to data from the 2002 National Survey on Family Growth, forty-one percent of currently childless lesbians and fifty-two percent of currently childless gay men expressed a desire to have children. Rachel G. Riskind, *Sexual Orientation and Use of Assisted Reproductive Technology: Social and Psychological Issues*, in *ETHICAL DILEMMAS IN ASSISTED REPRODUCTIVE TECHNOLOGIES* 236 (Joseph G. Schenker ed. 2011).

3. See Sacha M. Coupet, “Ain’t I a Parent?”: *The Exclusion of Kinship Caregivers from the Debate Over Expansions of Parenthood*, 34 N.Y.U. REV. L. & SOC. CHANGE 595, 634 (2010). Although artificial insemination is excluded from some definitions of ART, it is encompassed within the definition of ART as used in this Article. See *Definitions*, FDA, [http://www.fda.gov/ohrms/dockets/ac/03/briefing/3985B1\\_03\\_Definitions.pdf](http://www.fda.gov/ohrms/dockets/ac/03/briefing/3985B1_03_Definitions.pdf) (last visited Feb. 27, 2016).

4. Although in the past same-sex couples often were denied access to ART, this has changed. JANELL L. CARROLL, *SEXUALITY NOW: EMBRACING DIVERSITY* 297 (5th ed. 2016). In 2006, the Ethics Committee of the Reproductive Society for American Medicine wrote an opinion urging expansion of ART to same-sex couples, and in recent years, same-sex couples have experienced significantly greater access to ART. *Id.*

5. 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.”).

members of the couple, children born to same-sex couples using ART generally are genetically related to only one member of the couple.<sup>6</sup>

Historically, in child custody disputes involving same-sex couples who conceived their children through ART, the law only recognized the parent-child relationship between the child and the member of the same-sex couple who was the child's genetic parent.<sup>7</sup> Consequently, non-genetic parents in these situations were frequently denied standing to seek custody or visitation following the dissolution of their relationship with the child's genetic parent, even though the couple had decided together to bring the child into their family.<sup>8</sup> Courts were generally extremely reluctant in the context of dissolv-

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6. J. Herbie DiFonzo & Ruth C. Stern, *Breaking the Mold and Picking Up the Pieces: Rights of Parenthood and Parentage in Nontraditional Families*, 51 FAM. CT. REV. 104, 112 (2013) (“[R]eproductive technology has not yet found a way to feasibly allow both same-sex partners to achieve genetic parenthood of the same child.”). Female same-sex couples who engage in co-maternity or reciprocal IVF (wherein one member provides genetic material and the other carries the pregnancy) will each have a biological connection to their children, though only one member of the couple will have a genetic connection to the child. 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).

7. See *infra* note 8. See also DiFonzo & Stern, *supra* note 6, at 105 (“When same-sex unions dissolve, the non-genetic parent risks the loss of contact with a son or daughter he or she has raised as his or her own. . . . Though these individuals may function as parents in all but name, they are traditionally biological strangers and nonparents in the eyes of the law.”).

8. See, e.g., *Kazmierczak v. Query*, 736 So. 2d 106, 110 (Fla. Dist. Ct. App. 1999) (“Without a status equivalent to the biological parent, the appellant [the genetic parent’s former partner], in the present case, lacks standing to seek custody or visitation of appellee’s biological child . . . .”); *Music v. Rachford*, 654 So. 2d 1234, 1235 (Fla. Dist. Ct. App. 1995) (affirming dismissal for failure to state a cause of action a complaint filed by same-sex partner of genetic parent seeking custody and visitation rights to a child born during the relationship via artificial insemination and raised by the couple for three years on the grounds that non-parents have no right to visitation over the wishes of a parent); *In re C.B.L.*, 723 N.E.2d 316, 321 (Ill. App. Ct. 1999) (denying standing to seek custody and visitation to former partner of genetic mother, where couple decided to have child via artificial insemination and partner had coparented the child from birth until the couples’ relationship dissolved); *Alison D. v. Virginia M.*, 572 N.E.2d 27, 28 (N.Y. 1991) (denying standing to seek visitation to former partner of genetic mother, where couple decided to have a child together via artificial insemination, and partner had co-parented the child since birth); *Liston v. Pyles*, No. 97APF01-137, 1997 WL 467327, at \*3 (Ohio Ct. App. 1997) (denying standing to seek visitation to former partner of genetic mother, where couple had decided together to have a child together and couple had jointly cared for child from birth until their separation three years later); *In re Thompson*, 11 S.W.3d 913, 915, 917 (Tenn. Ct. App. 1999) (denying standing to “[a] woman who, in the context of a long-term relationship, planned for, participated in the conception and birth of, provided financial assistance for, and until foreclosed from doing so by the biological mother, acted as a parent to the child ultimately borne by her partner”); *Jones v. Barlow*, 154 P.3d 808, 819 (Utah 2007) (denying standing to seek custody and visitation

ing same-sex relationships to grant custody or visitation rights to a non-genetic parent over the wishes of the genetic parent, whose relationship with the child was entitled to significant constitutional protection.<sup>9</sup> Over the years, as the LGBT rights movement gained momentum, a great deal of legal scholarship emerged urging judges and lawmakers to use various mechanisms to grant greater legal rights to non-genetic parents in same-sex relationships.<sup>10</sup>

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to former partner of biological mother, where couple had decided to have a child together via artificial insemination and partner had coparented child since birth); Carlos A. Ball, *Rendering Children Illegitimate in Former Partner Parenting Cases: Hiding Behind the Façade of Certainty*, 20 AM. U. J. GENDER SOC. POL'Y & L. 623, 623–28 (2012) (discussing various rationales used by courts to deny standing to non-genetic parents in custody disputes with the child's same-sex genetic parent); Deborah Zalesne, *The Contractual Family: The Role of the Market in Shaping Family Formations and Rights*, 36 CARDOZO L. REV. 1027, 1047 (2015) (“Third parties who have become ‘psychological’ parents are faced with an obstacle not faced by biological or adoptive parents: they may be precluded from even petitioning for custody of a child with whom they have had a parent-child relationship because of the difficulty of establishing their standing to do so.”).

9. See *supra* note 8. See also *In re Guardianship of Z.C.W.*, 84 Cal. Rptr.2d 48, 49–51 (Cal. Ct. App. 1999) (denying visitation rights to genetic mother's former same-sex partner despite the fact partner had been co-parenting one child for six years and the other child, who had been born during the relationship via artificial insemination, since his birth three years prior); *Nancy S. v. Michele G.*, 279 Cal. Rptr. 212, 213–14 (Cal. Ct. App. 1991) (determining that the genetic mother “is the only parent of the two minor children . . . conceived by artificial insemination during her relationship with [the non-genetic mother] . . . and that any further contact between [the non-genetic mother] and the children shall only be by [the genetic mother's] consent”).

10. See, e.g., Linda D. Elrod, *A Child's Perspective of Defining a Parent: The Case for Intended Parenthood*, 25 BYU J. PUB. L. 245, 249 (2011); Leslie Joan Harris, *Voluntary Acknowledgements of Parentage for Same-Sex Couples*, 20 AM. U. J. GENDER SOC. POL'Y & L. 467, 470 (2012); Debra Carrasquillo Hedges, Note, *The Forgotten Children: Same-Sex Partners, Their Children and Unequal Treatment*, 41 B.C. L. REV. 883, 885–86 (2000); Melanie B. Jacobs, *Micah Has One Mommy and One Legal Stranger: Adjudicating Maternity for Nonbiological Lesbian Coparents*, 50 BUFF. L. REV. 341, 343–44 (2002); Maggie Manternach, Note, *Where is my Other Mommy?: Applying the Presumed Father Provision of the Uniform parentage Act to Recognize the Rights of Lesbian Mothers and Their Children*, 9 J. GENDER RACE & JUST. 385, 387–88 (2005); Nancy D. Polikoff, *A Mother Should Not Have to Adopt Her Own Child: Parentage Laws for Children of Lesbian Couples in the Twenty-First Century*, 5 STAN. J. C.R. & C.L. 201, 206–07 (2009) [hereinafter Polikoff, *A Mother Should Not Have to Adopt Her Own Child*]; Nancy D. Polikoff, *This Child Does Have Two Mothers: Redefining Parenthood to Meet the Needs of Children in Lesbian-Mother and Other Nontraditional Families*, 78 GEO. L.J. 459, 464 (1990); Carmel B. Sella, *When a Mother is a Legal Stranger to her Child: The Law's Challenge to the Lesbian Nonbiological Mother*, 1 UCLA WOMEN'S L.J. 135, 139–40 (1991); Richard F. Storrow, *Parenthood by Pure Intention: Assisted Reproduction and the Functional Approach to Parentage*, 53 HASTINGS L.J. 597, 601–02 (2002); Marissa Wiley, Note, *Redefining the Legal Family: Protecting the Rights of Coparents and the Best Interests of Their Children*, 38 HOFSTRA L. REV. 319, 322 (2009).

Although non-genetic parents in same-sex relationships still face serious hurdles in seeking parental rights in many jurisdictions, the movement to provide greater rights for these parents has experienced notable and significant success.<sup>11</sup>

In recent years, it has become far more common for both members of a same-sex couple to be recognized by the law as the legal parents of a child conceived through ART during the couple's relationship, despite the fact that the child is genetically related to only one member of the couple.<sup>12</sup> This trend has occurred for a variety of reasons. As an initial matter, between 2004 and 2015, the legalization of same-sex marriage expanded rapidly throughout the United States,<sup>13</sup> culminating with a 2015 Supreme Court decision that struck down as unconstitutional all remaining state bans on same-sex marriage.<sup>14</sup> Importantly, a number of courts have applied marriage-based paternity provisions, in which a woman's spouse is considered or presumed by law to be the legal parent of a child conceived by that woman during the marriage, to same-sex couples, and this will likely become increasingly common as states adjust their laws to reflect the recent nationwide legalization of same-sex marriage.<sup>15</sup> Moreover, married same-sex couples who conceive children through

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11. See *infra* notes 12–21 and accompanying text.

12. See *infra* notes 13–21 and accompanying text.

13. *State-by-State History of Banning and Legalizing Gay Marriage, 1994–2015*, PROCON, <http://gaymarriage.procon.org/view.resource.php?resourceID=004857> (last updated Feb. 2, 2016 1:44 PM).

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

15. See, e.g., *Barse v. Pasternak*, No. HHBFA124030541S, 2015 WL 600973, at \*10 (Conn. Super. Ct. 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 the existing marital presumption statute was unconstitutional due to its language excluding married female same-sex couples and striking down the portion of the statute containing the exclusionary language); cf. *Miller-Jenkins v. Miller-Jenkins*, No. 454-11-03, 2004 WL 6040794 (Vt. Super. Ct. 2004) (holding that because civil unions granted same-sex couples all of the rights and obligations of marriage, the marital presumption of paternity applied to same-sex couples who had entered into civil unions). See also Kerry Abrams & R. Kent Piacenti, *Immigration’s Family Values*, 100 VA. L. REV. 629, 709 (2014) (“Most states that recognize same-sex marriages, for example, also extend the marital presumption of paternity to gay and lesbian couples, even though in many of these instances there is no chance that the marital parent is also the genetic parent.”). But see *In re Paczkowski v. Paczkowski*, 128 A.D.3d 968, 969 (N.Y. App. Div. 2015) (citations omitted) (holding that the statutory marital presumptions of paternity did not apply to the wife of 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 nongestational spouse in a same-sex marriage, there is no possibility that [the wife] is the child’s biological parent”). Marriage-based paternity provisions have most commonly been applied to female same-sex couples, and it is unclear whether courts and legislatures will be willing to extend such provisions to male same-sex

ART can use existing stepparent adoption procedures to ensure that the non-genetic parent obtains legal parent status.<sup>16</sup> Another reason for the greater legal recognition of same-sex parents is due to the increased availability in recent years of second-parent adoption, through which an individual can adopt his or her same-sex partner's child regardless of whether the couple is married.<sup>17</sup> Through this process, which is currently available in at least thirty-six states, the adopting partner becomes the child's other legal parent for all purposes under the law.<sup>18</sup> Finally, a number of courts and legislatures have adopted equitable parenthood theories, such as the *de facto* parent, psychological parent, and parent by estoppel doctrines, to provide visitation and custody rights to an individual who is involved in a same-sex relationship with a child's legal parent and who has acted in a parental role to that child.<sup>19</sup> While these doctrines vary significantly by state,<sup>20</sup> some of the states that have adopted such doctrines treat qualifying individuals as legal parents for purposes of child custody and visitation determinations.<sup>21</sup>

These advancements toward the increased recognition of both members of same-sex couples as the legal parents of their children and the decreased importance placed upon genetic connections in determining parental status are incredibly important, hard-won victories for LGBT individuals and their

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couples. See Susan Frelich Appleton, *Presuming Women: Revisiting the Presumption of Legitimacy in the Same-Sex Couples Era*, 86 B.U. L. REV. 227, 260–61 (2006); Alexandra Eisman, Note, *The Extension of the Presumption of Legitimacy to Same-Sex Couples in New York*, 19 CARDOZO J. L. & GENDER 579, 593–95 (2013).

16. *Legal Recognition of LGBT Families*, NAT'L CTR. FOR LESBIAN RTS., [http://www.nclrights.org/wp-content/uploads/2013/07/Legal\\_Recognition\\_of\\_LGBT\\_Families.pdf](http://www.nclrights.org/wp-content/uploads/2013/07/Legal_Recognition_of_LGBT_Families.pdf) (last updated June 2015).

17. *Adoption by LGBT Parents*, NAT'L CTR. FOR LESBIAN RTS., [http://www.nclrights.org/wp-content/uploads/2013/07/2PA\\_state\\_list.pdf](http://www.nclrights.org/wp-content/uploads/2013/07/2PA_state_list.pdf) (last updated June 2015).

18. *Id.*

19. Nicole Berner, *Child Custody Disputes Between Lesbians: Legal Strategies and Their Limitations*, 10 BERKELEY WOMEN'S L.J. 31, 32–35 (1995); Courtney G. Joslin, *Interstate Recognition of Parentage in a Time of Disharmony: Same-Sex Parent Families and Beyond*, 70 OHIO ST. L.J. 563, 579–80 (2009); Zalesne, *supra* note 8, at 1056 n.133 (“The states that recognize such doctrines include Arizona, Arkansas, California, Colorado, Indiana, Maine, Massachusetts, Minnesota, New Jersey, New Mexico, North Carolina, Rhode Island, Vermont, Washington, West Virginia, and Wisconsin.”).

20. Zalesne, *supra* note 8, at 1055 (“The doctrines of de facto parents, psychological parents, people who stand in loco parentis to the child, etc. vary in application from state to state.”).

21. See, e.g., *Pitts v. Moore*, 90 A.3d 1169, 1181 (Me. 2014) (“A determination that a person is a de facto parent means that he or she is a parent on equal footing with a biological or adoptive parent, that is to say, with the same opportunity for parental rights and responsibilities.”); *In re Parentage of L.B.*, 122 P.3d 161, 177 (Wa. 2005) (“We thus hold that henceforth in Washington, a de facto parent stands in legal parity with an otherwise legal parent, whether biological, adoptive, or otherwise.”).

families. Despite significant success, however, the battle to provide equal parental rights to non-genetic parents in same-sex relationships is far from over. While existing legal scholarship has focused on granting legal parent status to non-genetic parents in same-sex relationships,<sup>22</sup> this scholarship has yet to explore the essential question that will arise next. Namely, existing scholarship has yet to address whether a non-genetic parent within a same-sex relationship, although legally recognized as a parent, will nonetheless face discrimination under judicial application of the best interests of the child standard, which is the standard applicable to custody disputes between two legal parents.

In same-sex custody disputes in which both parties are recognized as legal parents, the genetic parent and non-genetic parent technically should be on equal legal footing.<sup>23</sup> Genetic connections, however, have traditionally been a primary method of determining whether society and the law view an individual as a child's parent, and case after case involving same-sex couples with children conceived via ART has demonstrated that, in the heat of a legal proceeding, genetic parents will use their genetic connections to the child to support their arguments for superior parental rights.<sup>24</sup> Moreover, due to the long history linking genetics to parental legal rights, there is a high likelihood that a significant number of judges will weigh genetic connections as a factor in favor of granting custody rights to the genetic parent.<sup>25</sup> Importantly, there is currently nothing prohibiting judges presiding over custody disputes from applying a preference in favor of genetic legal parents over non-genetic legal parents.<sup>26</sup> Judges exercise substantial discretion under the best interests of the child standard, and in most states, judges can weigh any factor they deem relevant in determining what custody arrangement will further the child's best interests.<sup>27</sup> As a result, despite the significant advancements that have al-

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22. See sources cited *supra* note 10.

23. See KY. REV. STAT. ANN. § 199.520(2) (West 2016) (“[F]rom and after the date of the filing of the [adoption] petition, the child shall be deemed the child of petitioners and shall be considered for purposes of inheritance and succession and for all other legal considerations, the natural child of the parents adopting it the same as if born of their bodies.”).

24. Julie Shapiro, *A Lesbian Centered Critique of “Genetic Parenthood,”* 9 J. GENDER RACE & JUST. 591, 601–02 (2006) (“More troubling is the frequency of intra-lesbian custody cases. These cases most commonly begin with the assertion by a genetically-related mother that she alone is the parent of the child.”).

25. See *infra* Part II.

26. 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, 1349 (2006) (“Many states also allow the judge discretion by including a ‘catch-all’ phrase, such as, ‘and any other factor deemed relevant by the court.’”).

27. Sarah Abramowicz, *Contractualizing Custody,* 83 FORDHAM L. REV. 67, 130–31 (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

lowed non-genetic parents within same-sex relationships to obtain the status of legal parent, discrimination against non-genetic parents is likely to continue.<sup>28</sup> Instead of surfacing at the stage in the legal process at which judges determine which individuals are the child's legal parents, however, discrimination against non-genetic parents within same-sex relationships will likely begin to surface at the stage in which judges determine which custody arrangement will further the child's best interests.<sup>29</sup>

This Article argues that child custody law must expressly address the potential judicial bias surrounding genetic connections in a timely manner so that non-genetic legal parents of children conceived via ART are not discriminated against in custody determinations. In addition, it offers a proposal regarding how the law should be reformed to mitigate discrimination against non-genetic legal parents in the child custody realm. Such discrimination would hurt not only the parents in question, but also their children, who often have incredibly strong bonds with their non-genetic parents. Social science research<sup>30</sup> demonstrates that genetic connections are an ineffective proxy for determining superior parental abilities and parent-child bonds, and children of same-sex parents, like all other children, deserve to have custody determinations made based upon their best interests. Therefore, judges presiding over custody disputes between parents who, by mutual agreement, conceived their children via ART must be prohibited from applying a preference in favor of one parent over the other parent on the basis of genetic connections to the child. This would ensure that in determining which custody arrangement furthers the best interests of the child, judges undertake the critical work of examining actual evidence of each parent's caretaking abilities and relationship with the child instead of relying on genetic connections as a shortcut or substitute for weighing these important factors.

The Article is organized in the following manner. Part II explores the history of the role genetic connections have played in making legal parenthood determinations in the United States. Part III first discusses mod-

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that it affords judges an enormous amount of discretion.”); Julie E. Artis, *Judging the Best Interests of the Child: Judges' Accounts of the Tender Years Doctrine*, 38 *LAW & SOC'Y REV.* 769, 774–75 (2004) (citations omitted) (“[M]any statutes include a ‘catch-all’ factor that allows judges to focus on ‘all relevant factors.’ Given this catch-all factor, and the nonspecific nature of the criteria, the best interests rule continues to be ambiguous and open to interpretation; this ambiguity has been widely criticized in legal scholarship.”).

28. See Shapiro, *supra* note 24, at 601 (claiming that “[e]ven after a second parent adoption is completed and a second woman’s claim as a parent is recognized, a preference for the mother who can claim genetic linkage remains”).

29. While it is arguably more important that a non-biological parent avoid discrimination at the parental status determination stage, since fit legal parents have a strong right to visitation with their children that nonparents lack, weighing genetic connections as a factor at the custody determination stage is an unfair, harmful form of discrimination that must be effectively addressed in the laws governing custody.

30. See *supra* notes 177–86 and accompanying text.

ern legal developments that have weakened the tie between genetic connections and parenthood determinations. It then analyzes the prominent role that genetic connections continue to play in determinations of legal parenthood despite the advancements that have occurred in recent years to provide non-genetic parents with greater legal rights and protections. Part IV examines current law governing child custody disputes between two legal parents. It argues that it is highly likely that, in custody disputes involving two legal parents who conceived their child via ART, the genetic parent will attempt to use evidence of her genetic connections to the child to convince the judge of her parental superiority, and that many judges will weigh such evidence in making custody determinations. Part V begins by examining social science research regarding the role of genetic connections in the formation of parent-child relationships. After considering this research, Part V proposes that state custody standards be reformed to prohibit the judicial application of a preference in favor of genetic parents in custody disputes involving two legal parents who, by mutual agreement, conceived a child via ART. The Article concludes by addressing the likely arguments that will be raised in opposition to the proposed legal reform.

## II. THE HISTORICAL TIE BETWEEN GENETIC CONNECTIONS AND PARENTHOOD DETERMINATIONS

In the United States, genetic connections have long provided a primary method of determining an individual's status as a child's legal parent<sup>31</sup> – a status that enjoys essential constitutional protections that do not apply to relationships between nonparents and children.<sup>32</sup> For women, giving birth to a child has long bestowed the legal status of parent “as a matter of course.”<sup>33</sup> Until recently, the provision of automatic legal parental status to women who gave birth remained largely unquestioned, as for most of the nation's history, women could only give birth to children with whom they had a genetic connection.<sup>34</sup> For men, because there was no simple method for determining a male's genetic connection in the nation's early years, the determination of legal parenthood was more complex but still relied in significant part upon actual or presumed genetic connections.<sup>35</sup> As legal scholar David Meyer has

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31. David D. Meyer, *Parenthood in a Time of Transition: Tensions Between Legal, Biological, and Social Conceptions of Parenthood*, 54 AM. J. COMP. L. 125, 127 (2006).

32. Note, *In the Child's Best Interests: Rights of the Natural Parents in Child Placement Proceedings*, 51 N.Y.U. L. REV. 446, 448 (1976) (“[T]he natural parent's right to custody, based on the biological tie between parent and child, is deemed to be superior to all others in the absence of a showing of unfitness.”).

33. Meyer, *supra* note 31.

34. *Id.*; *The History of Surrogacy*, MOD. FAM. SURROGACY CTR., [http://www.modernfamilysurrogacy.com/page/surrogacy\\_history](http://www.modernfamilysurrogacy.com/page/surrogacy_history) (last visited Feb. 28, 2016) (explaining that the first gestational surrogacy occurred in 1985).

35. Meyer, *supra* note 31.

explained, in determining who was a child's legal father, "the law did the best it could to infer biological paternity through a network of presumptions and defenses."<sup>36</sup>

More specifically, the marital presumption of paternity has been a longstanding legal presumption in the United States under which a husband is presumed by law to be the father of a child conceived by his wife during the marriage.<sup>37</sup> Although before scientific advancements allowed for definitive paternity determinations the marital presumption of paternity technically provided legal parentage status for men based upon marriage, as opposed to genetic connections, the presumption likely was based, at least in part, upon the belief that a woman's husband was the man most likely to be her child's genetic father.<sup>38</sup> At first, the marital presumption of paternity generally could be rebutted only if a husband's non-access to his wife during the time of conception could be proven.<sup>39</sup> Additional ways of rebutting the presumption were established in the early 1900s, all of which related to proving that the husband was not the child's genetic father, including proof of adultery on the part of the wife or impotence or sterility on the part of the husband.<sup>40</sup> While the historical purpose of the marital presumption of paternity has been described as promoting marital harmony and shielding children from the stigma and effects of illegitimacy,<sup>41</sup> the fact that the presumption could only be overcome by evidence that the husband could not be the genetic father of the child demonstrates the essential role that genetic connections played in the application of the presumption.<sup>42</sup>

As scientific advancements have made it possible to determine a child's genetic father with increasing certainty, states' marital presumptions have evolved. For example, while every state retains some form of the marital presumption of paternity,<sup>43</sup> most states' marital presumptions have been amended to allow genetic fathers standing to seek to rebut the presumption.<sup>44</sup>

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36. *Id.*

37. Theresa Glennon, *Somebody's Child: Evaluating the Erosion of the Marital Presumption of Paternity*, 102 W. VA. L. REV. 547, 562–64 (2000).

38. Meyer, *supra* note 31 ("By permitting rebuttal based on proof that the husband could not have been the biological father, the marital presumption was plainly grounded in assumptions about the husband's likely procreative role. Marriage supported the assignment of paternity to the husband because it supported an inference that he was the biological father . . .").

39. *Id.*

40. Glennon, *supra* note 37, at 565.

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

42. Meyer, *supra* note 31, at 127–28.

43. Veronica Sue Gunderson, *Personal Responsibility in Parentage: An Argument Against the Marital Presumption*, 11 U.C. DAVIS J. JUV. L. & POL'Y 335, 341 (2007).

44. Kerry Abrams & R. Kent Piacenti, *Immigration's Family Values*, 100 VA. L. REV. 629, 641–43 (2014) ("Many states have developed robust exceptions to the marital presumption of paternity, allowing genetic, nonmarital fathers to rebut the

The evidence most commonly used to rebut the marital presumption is genetic testing results.<sup>45</sup> Moreover, under the Uniform Parentage Act of 2002 (“UPA”), interested parties, such as the wife, husband, and alleged genetic father, are allowed the opportunity to rebut the marital presumption within two years of a child’s birth.<sup>46</sup> The only evidence that is admissible to rebut the marital presumption under the UPA is genetic testing results.<sup>47</sup> These legal developments demonstrate the significant role that genetics continue to play in establishing paternity, as these laws can result in the elevation of genetic connections above even the protection of marital family unity.

The establishment of paternity outside of the marriage context is also complex, although genetic connections again play a central role. While historically the law provided almost no protection to the relationship between a child born out of wedlock and his or her genetic father,<sup>48</sup> this changed after a series of Supreme Court decisions beginning in the 1970s.<sup>49</sup> These decisions established that the unmarried father’s genetic connection to his child “offers [him] an opportunity that no other male possesses to develop a relationship

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presumption and gain legal parent status, often resulting in custody or visitation of their nonmarital children. This change has occurred despite the U.S. Supreme Court’s refusal to mandate it.”); June Carbone & Naomi Cahn, *Marriage, Parentage, and Child Support*, 45 FAM. L.Q. 219, 240 n.26 (2011) (“Approximately two-thirds of the states similarly allow the nonmarital father to challenge the marital presumption through either statute or case law.”); Glennon, *supra* note 37, at 573–74; Melanie B. Jacobs, *Overcoming the Marital Presumption*, 50 FAM. CT. REV. 289, 293 (2012) (“In fact, the Supreme Court’s *Michael H.* decision has been rejected by the current UPA as well as the majority of U.S. jurisdictions, including California, which now allows a putative father to challenge the presumption.”). It is important to note, however, that “even states that allow genetic fathers to claim parenthood sometimes apply a best-interests-of-the-child standard to determine whether to allow such suits to go forward.” Abrams & Piacenti, *supra*, at 644. In addition, some states employ time limitations in which the lawsuit to establish paternity must be initiated. *See, e.g.*, CAL. FAM. CODE § 7541(b) (West 2016).

45. Niccol Kording, *Nature v. Nurture: Children Left Fatherless and Family-less When Nature Prevails in Paternity Actions*, 65 U. PITT. L. REV. 811, 819 (2004) (“By the end of the nineteenth century, biological assumptions, conjecture and pseudo-accuracy gave way to biological certainty when DNA test results became a generally-accepted truth that could be used by the father, mother, or other interested party to rebut the marital presumption . . .”).

46. UNIF. PARENTAGE ACT § 607 (amended 2002). Under the UPA approach, however, courts can deny a motion seeking an order for genetic testing if there is clear and convincing evidence that “the conduct of the mother or the presumed or acknowledged father estops that party from denying parentage; and . . . it would be inequitable to disprove the father-child relationship between the child and the presumed or acknowledged father.” *Id.* § 608.

47. *Id.* § 631.

48. Meyer, *supra* note 31, at 128.

49. Laura W. Morgan, *The Unwed Biological Father’s Right to Contest an Adoption: Further Reflections on Baby Richard Et Al.*, 10 NO. 1 DIVORCE LITIG. 1, 6–8 (1998).

with his offspring.”<sup>50</sup> If an unmarried genetic father “grasps that opportunity and accepts some measure of responsibility for his child’s future,” he can establish a constitutionally protected parent-child relationship,<sup>51</sup> at least in situations in which the child’s mother is not married to someone else.<sup>52</sup> Thus, under the existing “genetics plus” standard, genetic connections play an essential role in establishing a constitutionally protected parent-child relationship between an unmarried father and his genetic child.<sup>53</sup>

Currently, unmarried genetic fathers can formally establish a legally recognized parent-child relationship in two primary ways: through a legal proceeding brought by an interested party to establish the father’s paternity on the basis of genetic testing or through the execution of a document in which the father, with the consent of the mother, voluntarily declares his paternity.<sup>54</sup> In the context of a legal proceeding brought by an interested party to establish the father’s paternity, “[i]n most states, scientific evidence of [genetic] paternity creates a presumption of paternity,”<sup>55</sup> and the genetics plus standard, which requires more than a genetic connection, generally only applies in situations where a genetic father is seeking paternity against the wishes of another interested party.<sup>56</sup> Notably, under federal law, states are required to establish child support procedures that “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.”<sup>57</sup> In terms of voluntary declarations of paternity, which create a presumption of legal paternity and which federal law requires hospitals to offer upon the birth of a child, while a man who signs this type of document does not have to first offer proof of a genetic link to the child, a number of states have specified that only genetic fathers should sign voluntary

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50. *Lehr v. Robertson*, 463 U.S. 248, 262 (1983).

51. *Id.* See also Laura Oren, *Thwarted Fathers or Pop-up Pops?: How to Determine When Putative Fathers Can Block The Adoption of Their Newborn Children*, 40 FAM. L.Q. 153, 153 (2006) (“[W]hen a putative father seeks to protect his personal interests in his child, he only enjoys constitutional protection if he can meet a ‘biology ‘plus’” standard, which requires him to step forward and grasp the opportunity to develop a relationship with his child.”).

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

53. See *supra* note 51 and accompanying text.

54. Glennon, *supra* note 37, at 569.

55. *Id.* at 568.

56. See Michael J. Higdon, *Marginalized Fathers and Demonized Mothers: A Feminist Look at the Reproductive Freedom of Unmarried Men*, 66 ALA. L. REV. 507, 524 (2015) (“Typically, these cases [employing the biology plus doctrine] concern a biological father who is attempting to block the child’s adoption by another male. In contrast, when it is another party (or, most frequently, the state) who is attempting to adjudicate a man’s paternity—typically for purposes of ordering him to pay child support—a biological connection is all that is needed.”); see *Caban v. Mohammed*, 441 U.S. 380, 393 (1979).

57. 42 U.S.C. § 666(a)(5)(G) (2012).

declarations of paternity.<sup>58</sup> In addition, in a majority of states, either the child's mother or the man who signed the voluntary declaration of paternity may bring a legal action within a specified time period to rescind the declaration or to require genetic testing, and "if genetic evidence establishes that the man who signed the voluntary declaration is not the biological father of the child, the court may set aside the declaration."<sup>59</sup>

Other laws demonstrating the historical importance of genetic connections in determining legal parental status arise in the adoption context. In the mid-1800s, states began to enact adoption laws that allowed for genetic parents who could not or would not care for their children to relinquish their parental rights and for adoptive parents to become the children's legal parents.<sup>60</sup> As states started to enact adoption laws, most implemented standards that allowed genetic mothers to revoke their consent to the adoption under certain circumstances or within a specified time period after giving birth, with most states initially allowing for the revocation of consent any time before the final decree of adoption was granted.<sup>61</sup> Allowing a genetic mother who had agreed to place her child for adoption to revoke her consent at any time before the adoption decree became final was based upon the privileging of genetic parent-child relationships and the notion that genetic parents should have superior rights to their children.<sup>62</sup> Today, birth mothers retain the right to revoke consent to an adoption in many jurisdictions, with the time periods and circumstances under which consent may be revoked differing by state.<sup>63</sup>

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58. Jeffrey A. Parness & Zachary Townsend, *For Those Not John Edwards: More and Better Paternity Acknowledgements at Birth*, 40 U. BALT. L. REV. 53, 72–73 (2010).

59. Gunderson, *supra* note 43, at 346.

60. Chris Guthrie & Joanna L. Grossman, *Adoption in the Progressive Era: Preserving, Creating, and Re-Creating Families*, 43 AM. J. LEGAL HIST. 235, 237–38 (1999).

61. Catherine Sakach, Comment, *Withdrawal of Consent for Adoption: Allocating the Risk*, 18 WHITTIER L. REV. 879, 880–81 (1997).

62. *Id.*; Elizabeth E. Swire Falker, *The Disposition of Cryopreserved Embryos: Why Embryo Adoption is an Inappropriate Model for Application to Third-Party Assisted Reproduction*, 35 WM. MITCHELL L. REV. 489, 513 (2009) (quoting *People ex rel. Anonymous v. Anonymous*, 530 N.Y.S.2d 613, 615 (N.Y. App. Div. 1988)) (describing revocation period as "based on a 'common-law presumption favoring the biological parents' rights' to custody"); William E. Nelson, *Patriarchy or Equality: Family Values or Individuality*, 70 ST. JOHN'S L. REV. 435, 497 (1996) (quoting *In re Sanjivini K.*, 391 N.E.2d 1316, 1321 (N.Y. 1979)) (describing decisions allowing genetic parents to revoke their consent to adoption as being based upon the notion that it is "fundamental to our legal and social system, that it is in the best interest of a child to be raised by his parents").

63. Cynthia Ellen Szejner, Note, *Intercountry Adoptions: Are the Biological Parents' Rights Protected?*, 5 WASH. U. GLOBAL STUD. L. REV. 211, 214 n.24 (2006); David L. Thibodeaux, Note, *Whose Rights Should Prevail? Toward a Child-Centric Approach to Revocation of Birthparent Consent in Domestic Infant Adoption*, 1 BELMONT L. REV. 343, app. A (2014).

Moreover, while unmarried genetic fathers traditionally received far fewer rights than birth mothers and married genetic fathers in the adoption context, their rights have grown significantly over the years.<sup>64</sup> For example, historically, unmarried genetic fathers were not entitled to notice of the pending adoption of their child.<sup>65</sup> Beginning in the 1970s, however, states began to require that notice of pending adoptions be given to unmarried genetic fathers who had satisfied the genetics plus test by undertaking efforts to develop relationships with their children.<sup>66</sup> This notice allows genetic fathers the opportunity to assert their right to veto the adoption.<sup>67</sup> In addition, a number of states offer putative father registries through which unmarried genetic fathers, even those who have not yet been able to develop relationships with their children, can register to receive notice of pending adoptions;<sup>68</sup> failure to register, however, can result in the genetic father losing his right to receive notice of the adoption or to contest the adoption in some jurisdictions.<sup>69</sup> Overall, although unmarried genetic fathers generally receive fewer legal protections in the adoption context than birth mothers and married fathers, the importance of genetics is still immense, as an “[unmarried genetic] father’s parental rights are presumed superior to the parental rights of a third party.”<sup>70</sup>

Finally, the historical difficulty of terminating the rights of genetic parents against their will further demonstrates the fundamental importance of genetic connections in determinations of legal parental status. For genetic mothers and the categories of genetic fathers to whom parental rights initially attach, severing such rights has long been extremely difficult. In the early years of the United States, parental rights generally could be terminated only upon “a showing of acts so unequivocal as to bear one interpretation and one only, that the parents manifested an intention to abandon their child forever.”<sup>71</sup> Today, it remains extremely difficult to terminate the rights of genetic

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64. *See supra* notes 48–52 and accompanying text.

65. KERRY O’HALLORAN, *THE POLITICS OF ADOPTION: INTERNATIONAL PERSPECTIVES ON LAW, POLICY AND PRACTICE* 346 (3d ed. 2015).

66. Higdon, *supra* note 56, at 526.

67. *Id.* at 526–27.

68. *Id.*

69. Karen Greenberg et al., *A National Responsible Father Registry: Providing Constitutional Protections for Children, Mothers and Fathers*, 13 WHITTIER J. CHILD & FAM. ADVOC. 85, 101–02 (2014); Meyer, *supra* note 31, at 128.

70. Arielle Bardzell & Nicholas Bernard, *Adoption and Foster Care*, 16 GEO. J. GENDER & L. 3, 19 (2015).

71. *In re of Anonymous*, 351 N.E.2d 707, 709–10 (1976). *See also* 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, 763–64 (1992) (“State laws pertaining to termination of parental rights and adoption were historically aimed at parents who voluntarily abandoned their children and thereafter failed to play any part in their children’s lives.”); Heidi Rosenberg, Comment, *California’s Incarcerated Mothers: Legal Roadblocks to Reunification*, 30 GOLDEN GATE U. L.

parents against their wishes – a showing of clear and convincing evidence of parental unfitness, usually involving abuse or neglect, is generally required.<sup>72</sup> As one commentator has noted, “Judges and social workers are reluctant to be responsible for severing ‘biological ties,’ thus they tend to give innumerable second chances to parents who are not adequately fulfilling their duties to their children in the hope that they will become more adequate in the future.”<sup>73</sup> Moreover, even after the genetic parents’ rights are judicially terminated, if the child has not been adopted by another party, the federal government and some states continue to recognize the genetic parent-child relationship for certain purposes, such as Social Security benefits, inheritance rights, and visitation rights.<sup>74</sup> In addition, a number of states provide procedures through which parents can have their rights reinstated following termination.<sup>75</sup> Overall, genetic connections have long played a primary role in determining which individuals are recognized as a child’s legal parents.<sup>76</sup>

### III. MODERN LEGAL DEVELOPMENTS IN DETERMINING PARENTAL RIGHTS

As family structures have changed significantly and the individuals fulfilling parental roles have become more diverse,<sup>77</sup> there has been a greater willingness among courts and legislatures to provide legal rights and protec-

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REV. 285, 290–91 (2000) (“Historically, state laws pertaining to termination of parental rights were aimed at parents who voluntarily abandoned their children.”).

72. Genty, *supra* note 71, at 766, 769; Solangel Maldonado, *Permanency v. Biology: Making the Case for Post-Adoption Contact*, 37 CAP. U. L. REV. 321, 357–58 (2008).

73. Erika Lynn Kleiman, *Caring for Our Own: Why American Adoption Law and Policy Must Change*, 30 COLUM. J.L. & SOC. PROBS. 327, 342 (1997).

74. LaShanda Taylor Adams, *(Re-)Grasping the Opportunity Interest: Lehr v. Robertson and the Terminated Parent*, 25 KAN. J.L. & PUB. POL’Y 31, 37–40 (2015); *Effect of Termination of Parental Rights on Inheritance Rights and Social Security Benefits in Region V States*, SOC. SECURITY ADMIN. (Dec. 5, 2003) <https://secure.ssa.gov/poms.nsf/lnx/1501005026> (describing federal and state approaches to inheritance rights following the termination of parental rights).

75. Adams, *supra* note 74, at 41 (“Since 2005, 17 states have enacted reinstatement of parental rights statutes”); *Reinstatement of Parental Rights After Termination*, FINDLAW, <http://family.findlaw.com/parental-rights-and-liability/reinstatement-of-parental-rights-after-termination.html> (last visited Feb. 20, 2016).

76. James G. Dwyer, *The Child Protection Pretense: States’ Continued Consignment of Newborn Babies to Unfit Parents*, 93 MINN. L. REV. 407, 412 (2008) (“The state currently assigns children to adults for upbringing purposes almost exclusively on the basis of biological parentage.”).

77. DiFonzo & Stern, *supra* note 6, at 106 (quoting *N.A.H. v. S.L.S.*, 9 P.3d 354, 359 (Colo. 2000)) (“Parenthood in our complex society comprises much more than biological ties . . .”).

tions to non-genetic parents.<sup>78</sup> Despite the significant recent legal developments providing greater rights and protections to non-genetic parents, however, genetic connections continue to play a significant role in legal parenthood determinations, and the law in many ways continues to reflect the belief that “all else being equal, it is considered to be best for children to be raised by their biological parents.”<sup>79</sup> This Part first identifies the modern legal developments that have weakened the importance of genetic connections in legal parenthood determinations.<sup>80</sup> It then discusses the many significant ways in which the law continues to rely on genetic connections in determining parental rights.<sup>81</sup>

*A. Modern Legal Developments Weakening the Tie Between Genetic Connections and Parenthood Determinations*

Over the past few decades, courts and legislatures have started to reexamine the role of genetic ties in legal parenthood determinations.<sup>82</sup> One reason for this is that same-sex couples have begun to use, with increasing frequency, various ART methods to have children.<sup>83</sup> Common ART methods used by female same-sex couples include, for example, artificial insemination<sup>84</sup> and in vitro fertilization, in which a child is conceived using one member of the couple’s eggs and donor sperm.<sup>85</sup> Male same-sex couples can pur-

78. See *infra* Part III. See also DiFonzo & Stern, *supra* note 6, at 106 (quoting Charles P. Kindregan, Jr., *Collaborative Reproduction and Rethinking Parentage*, 21 J. AM. ACAD. MATRIM. LAW. 43, 45 (2008)) (“Many judges have recognized that ‘[t]he changing realities of modern family life, and the increasing use of collaborative reproductive technology to procreate children by asexual means, has forced a reconsideration of the meaning of parenthood’ . . . [and] courts often formulate or adapt equitable remedies to resolve the family dispute fairly for the parties and their children. . .”).

79. Dwyer, *supra* note 76, at 413.

80. See *infra* Part III.A.

81. See *infra* Part III.B.

82. See *infra* notes 95–107 and accompanying text.

83. See *supra* note 5 and accompanying text.

84. Female same-sex couples often utilize artificial insemination, in which one member of the couple is inseminated with donor sperm. Harvey L. Fiser & Paula K. Garrett, *It Takes Three, Baby: The Lack of Standard, Legal Definitions of “Best Interest of the Child” And The Right To Contract for Lesbian Potential Parents*, 15 CARDOZO J.L. & GENDER 1, 1–4 (2008).

85. In vitro fertilization, or IVF, is another relatively common method of conception for female same-sex couples. *In Vitro Fertilization, IVF – Advantages Compared to Other Fertility Treatments such as Artificial Insemination, IUI*, ADVANCED FERTILITY CTR. CHI., <http://www.advancedfertility.com/ivfchanges.htm> (last visited Feb. 20, 2016). One method of IVF involves extracting the eggs of one member of the couple, fertilizing the eggs with donor sperm, and then placing the resulting embryo or embryos back into that individual’s womb. Susan L. Pollet, *In Vitro Fertilization Options Lead to the Question: “Who Gets the Pre-embryos After Divorce?”*

sue surrogacy arrangements to have a child via ART, in which case the child is conceived using sperm from one member of the couple and eggs from the surrogate or another donor.<sup>86</sup> Importantly, children born to same-sex couples who have utilized ART are only genetically related to one of their intended parents.<sup>87</sup> Since rights relating to the ability of an individual in a same-sex relationship to adopt his or her partner's genetic child or to marry his or her partner have only recently arisen in many jurisdictions, when the first wave of relationships in which ART had been used to create children dissolved, the non-genetic parents often were left to make claims for parental rights based upon equitable considerations.<sup>88</sup>

Early on, courts routinely rejected claims to parental rights by non-genetic parents in dissolving same-sex relationships wherein children were born to the relationship through ART.<sup>89</sup> Non-genetic parents often were treated by these courts as legal strangers to the children they had raised since birth, and they frequently were denied standing to assert parental rights.<sup>90</sup> Due to the constitutional protections afforded exclusively to the parent-child relationship between the genetic parent and his or her child in these cases, non-genetic parental figures usually faced a losing battle in seeking to obtain custody or visitation rights against the wishes of genetic parents.<sup>91</sup> The results of these cases were deeply troubling to many people within and outside of the legal community, as individuals who had functioned as parents from the time of their children's births and who had developed incredibly close parent-child relationships were often denied the right to maintain any type of relationship with their children.<sup>92</sup> Consequently, some courts and legislatures

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76-FEB N.Y. ST. B.J. 33 (2004). Female same-sex couples also have the option of utilizing the “[c]o-maternity” method of IVF, wherein one partner’s egg is fertilized using donor sperm and the fertilized embryo is implanted in the other partner’s womb, allowing “both parties to participate in the . . . process of procreation.” Paulk, *supra* note 6.

86. For male same-sex couples, surrogacy is the only method through which the couple can have a child that is the genetic offspring of one member of the couple. When male same-sex couples utilize surrogacy, IVF or artificial insemination is used to fertilize a donor egg or the surrogate’s egg with sperm from one member of the couple and the surrogate carries the couple’s child. *See Eisman, supra* note 15, at 593.

87. *See supra* note 6 and accompanying text.

88. DiFonzo & Stern, *supra* note 6, at 104–05 (“Lacking the determinants of biological parentage, ART’s patrons turned to courts and legislatures to devise a legal means with which to link them with their non-genetic offspring.”).

89. *See supra* notes 7–9 and accompanying text.

90. *See supra* note 8 and accompanying text.

91. *See cases cited supra* note 9 and accompanying text.

92. *See supra* notes 7–9 and accompanying text. *See also* DiFonzo & Stern, *supra* note 6, at 105 (“When same-sex unions dissolve, the non-genetic parent risks the loss of contact with a son or daughter he or she has raised as his or her own. . . . Though these individuals may function as parents in all but name, they are traditionally biological strangers and nonparents in the eyes of the law.”).

sought to move beyond genetic considerations<sup>93</sup> to provide non-genetic parents with parental rights using equitable parenthood doctrines.<sup>94</sup>

Over the years, some courts and legislatures have adopted equitable remedies such as the *de facto* parent, equitable parent, and psychological parent doctrines to provide non-genetic parental figures in same-sex relationships with custody and visitation rights to the children to whom they have served as parental figures.<sup>95</sup> While the specific details differ by state, these doctrines generally seek to provide parental rights to individuals who had been allowed and encouraged by the child's legal parent to serve in a parental role during the time the parties lived together with the child as a family, had served in this parental role for a sufficient period of time without any expectation of compensation, and had developed a parent-child relationship with the child.<sup>96</sup> In jurisdictions that have adopted these doctrines, individuals who meet the criteria generally are provided with standing to seek child custody or visitation, and in some jurisdictions, these individuals are placed on equal legal footing to the genetic parent for purposes of custody or visitation determinations.<sup>97</sup> Although often discussed in the context of same-sex cou-

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93. DiFonzo & Stern, *supra* note 6 (“[T]he reign of biological determinism as the legal gold standard for parentage is coming to an end.”).

94. *Id.* at 104 (quoting Ayelet Blecher-Prigat, *Rethinking Visitation: From A Parental to A Relational Right*, 16 DUKE J. GENDER L. & POL’Y 1, 34 (2009)) (“To prevent harm to children and preserve nontraditional parent-child attachments, courts [began to search] for ways to ‘confer rights considered parental upon those who are not legally recognized as parents.’”).

95. *Id.* at 113. The American Law Institute’s Principles of the Law of Family Dissolution (“ALI Principles”) recognize two categories of equitable parents: parents by estoppel and *de facto* parents. AM. LAW. INST., PRINCIPLES OF THE LAW OF FAMILY DISSOLUTION: ANALYSIS AND RECOMMENDATIONS § 2.03(1) (2002) [hereinafter ALI PRINCIPLES] (providing definitions of parents by estoppel and *de facto* parents).

96. *Id.* For example, the standard established in Wisconsin for determining the existence of a parent-child relationship based on equitable considerations has been adopted by a number of courts. Zalesne, *supra* note 8, at 1054. Under this standard, courts examine:

- 1) whether the legal parent consented to or fostered the relationship between the *de facto* parent and the child; 2) whether the *de facto* parent lived with the child; 3) whether the *de facto* parent assumed the 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) whether a parent-child bond was formed.

*Id.* (quoting COURTNEY G. JOSLIN ET AL., *Judicial Protections for De Facto Parents, Psychological Parents, Persons in Loco Parentis, Equitable Parents, and Parents by Estoppel*, in LESBIAN, GAY, BISEXUAL AND TRANSGENDER FAMILY LAW § 7:5 (2014)).

97. *Pitts v. Moore*, 90 A.3d 1169, 1181 (Me. 2014) (“A determination that a person is a *de facto* parent means that he or she is a parent on equal footing with a biological or adoptive parent, that is to say, with the same opportunity for parental rights and responsibilities.”); *In re Parentage of L.B.*, 122 P.3d 161, 177 (Wa. 2005)

ples, these equitable doctrines also have been applied in custody disputes involving different-sex couples.<sup>98</sup>

Other legal advancements in the ART context that have weakened the tie between genetics and legal parenthood also have relevance to both same-sex and different-sex couples. For example, since its promulgation in 1973, the UPA has set forth the rule that a husband who consents to his wife's use of artificial insemination is the legal parent of the resulting child, even if the sperm utilized in the process is from a man other than the husband.<sup>99</sup> The 2002 UPA extended this provision beyond married couples, identifying as a legal parent a man who, with the intent to be the parent of the resulting child, consents to a woman's use of assisted reproduction.<sup>100</sup> Most states have adopted approaches similar to the UPA with regard to married different-sex couples who use ART,<sup>101</sup> and a handful of states have followed the lead of the 2002 UPA and extended the approach to unmarried different-sex couples wherein the male partner consents to the use of assisted reproduction by his female significant other.<sup>102</sup> Importantly, the willingness of a number of courts to apply these types of marriage-based paternity provisions to married same-sex couples who utilize ART, wherein there is no possibility that a child is genetically related to each member of the married couple, likewise represents a significant step away from genetics as determinative of legal parental status.<sup>103</sup>

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("We thus hold that henceforth in Washington, a *de facto* parent stands in legal parity with an otherwise legal parent, whether biological, adoptive, or otherwise."); Pamela Laufer-Ukeles & Ayelet Blecher-Prigat, *Between Function and Form: Towards a Differential Model of Functional Parenthood*, 20 GEO. MASON L. REV. 419, 444–46 (2013). Under the ALI Principles, parents by estoppel, but not *de facto* parents, have custody rights equal to those of legal parents. See *infra* note 118 (discussing the differing treatment of parents by estoppel and *de facto* parents under the ALI Principles). Even in jurisdictions that treat equitable, psychological, or *de facto* parents on equal footing to the other legal parent for custody and visitation purposes, however, it does not necessarily mean that the person is considered a legal parent for purposes outside of the custody or visitation context. Katherine M. Swift, *Parenting Agreements, the Potential Power of Contract, And the Limits of Family Law*, 34 FLA. ST. U. L. REV. 913, 932 (2007). See also Polikoff, *A Mother Should Not Have to Adopt Her Own Child*, *supra* note 10, at 220–25.

98. DiFonzo & Stern, *supra* note 6, at 108–10.

99. COURTNEY G. JOSLIN ET AL., *Assisted Reproduction, Excluding Surrogacy, in LESBIAN, GAY, BISEXUAL AND TRANSGENDER FAMILY LAW*, *supra* note 96, at § 3:3.

100. UNIF. PARENTAGE ACT § 703 (amended 2002).

101. Joslin, *supra* note 99.

102. *Id.* Three states have adopted statutory approaches "that are explicitly both marital-status and gender-neutral." *Id.*

103. See, e.g., *Della Corte v. Ramirez*, N.E.2d 601 (Mass. App. Ct. 2012); *Wendy G-M. v. Erin G-M.*, 985 N.Y.S.2d 845 (N.Y. Sup. Ct. 2014).

Also relevant to both same-sex and different-sex couples, the UPA follows a similar intent-based approach in the gestational surrogacy<sup>104</sup> context. Under this approach, the intended parents are considered to be the legal parents of the child carried by the surrogate as long as all of the necessary consents are obtained, regardless of whether both, one, or neither of the intended parents have a genetic connection to the child.<sup>105</sup> While surrogacy laws differ dramatically by state, a number of states allow gestational surrogacy agreements and have adopted intent or contract-based approaches to determining parenthood in such situations, though some of these states require that at least one of the intended parents has a genetic tie to the child or distinguish between same-sex and different-sex couples.<sup>106</sup> Moreover, egg and sperm donation have become robust markets in the United States, and an individual who donates genetic materials in compliance with the relevant laws is not considered to be the legal parent of any resulting children.<sup>107</sup> Overall, modern developments have, in a number of important ways, weakened the tie between genetics and the determination of legal parenthood. Genetic connections, however, still retain a great deal of importance in legal determinations involving parent-child relationships.

### *B. The Continuing Importance of Genetics in Parenthood Determinations*

Despite the significant movement toward decreasing reliance on genetic considerations in determining parental status, genetics and biology continue to play a significant role in modern parenthood determinations. As discussed in Part II, while the marital presumption of paternity remains in existence, it likely is based in part upon the notion that a woman's husband is the man

104. In gestational surrogacy, the surrogate does not use her own eggs and thus lacks a genetic tie to the child she is carrying. Mark Strasser, *Traditional Surrogacy Contracts, Partial Enforcement, and the Challenge for Family Law*, 18 J. HEALTH CARE L. & POL'Y 85, 87–88 (2015).

105. UNIF. PARENTAGE ACT §§ 807–09 (amended 2002).

106. June Carbone, *The Role of Adoption in Winning Public Recognition for Adult Partnerships*, 35 CAP. U. L. REV. 341, 366 n.167 (2006); Martha A. Field, *Compensated Surrogacy*, 89 WASH. L. REV. 1155, 1160–67 (2014); Amanda M. Herman, *The Regulation of Gestation: A Call for More Complete State Statutory Regulation of Gestational Surrogacy Contracts*, 18 CHAP. L. REV. 553, 557 (2015); Diane S. Hinson, *State-By-State Surrogacy Law Across the US*, 37-WTR FAM. ADVOC. 6, 7 (2015); Yehezkel Margalit et al., *The New Frontier of Advanced Reproductive Technology: Reevaluating Modern Legal Parenthood*, 37 HARV. J. L. & GENDER 107, 115 (2014); *Gestational Surrogacy Law Across the United States – Married Same Sex Couples*, CREATIVE FAM. CONNECTIONS, LLC, <http://www.creativefamilyconnections.com/#!same-sex-couples/bwgd1> (last visited Feb. 20, 2016) [hereinafter *Gestational Surrogacy Law Across the United States*]; U.S. Surrogacy Law By State, SURROGACY EXPERIENCE, <http://www.thesurrogacyexperience.com/surrogate-mothers/the-law/u-s-surrogacy-law-by-state/> (last visited Feb. 20, 2016).

107. Shapiro, *supra* note 24, at 605.

most likely to be the genetic father of a child conceived during their marriage, and most states have amended their laws to allow genetic fathers to rebut the presumption.<sup>108</sup> Notably, since the 1970s, unmarried genetic fathers have been provided with increasing legal rights relating to their children.<sup>109</sup> Moreover, although the law has continued its default practice of recognizing birth mothers as legal parents despite ART advancements that have made it possible for women to give birth to children to whom they are not genetically related, there is a strong argument that this practice remains in place because giving birth is still an accurate proxy for genetic connection in the vast majority of cases.<sup>110</sup> In addition, many current adoption laws allow genetic parents to revoke their previously provided consent to an adoption, and terminating a genetic parent's status as a legal parent remains very difficult, further demonstrating the continuing importance placed on genetic connections in parenthood determinations.<sup>111</sup>

Even in contexts where modern law has come to place less emphasis on genetic connections in determining parental rights, genetic connections still retain a significant role. For example, while many courts are willing to uphold gestational surrogacy agreements, which involve a surrogate who is not genetically related to the child she is carrying, traditional surrogacy arrangements, which involve a surrogate whose genetic materials are used to conceive the child, are significantly less likely to be legally recognized.<sup>112</sup> That the law is less likely to recognize and enforce a surrogacy agreement that purports to sever a relationship between the surrogate and resulting child when a genetic relationship is involved demonstrates the continuing emphasis on genetic connections in determining legal parenthood status.<sup>113</sup> In addition, some states even more explicitly prioritize genetics as determinative of legal

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108. See *supra* notes 37–47 and accompanying text.

109. See *supra* notes 48–59 and accompanying text.

110. See *supra* notes 33–34 and accompanying text.

111. See *supra* notes 60–73 and accompanying text.

112. Abramowicz, *supra* note 27, at 99 (“Courts have been more receptive toward gestational surrogacy agreements [than traditional surrogacy agreements]”); Sara L. Ainsworth, *Bearing Children, Bearing Risks: Feminist Leadership for Progressive Regulation of Compensated Surrogacy in the United States*, 89 WASH. L. REV. 1077, 1094 (2014) (“Traditional surrogacy . . . is less common now—in part because it is not legally supported in some of the jurisdictions that allow surrogacy contracts.”); Julie Shapiro, *For a Feminist Considering Surrogacy, is Compensation Really the Key Question?*, 89 WASH. L. REV. 1345, 1356–57, 1360 (2014) (footnotes omitted) (“[I]n those states where the law supports surrogacy, the law typically reflects a strong preference for gestational surrogacy as opposed to traditional surrogacy. . . . The primary justification seems to rest on assumptions about the importance of genetic connection in the construction of parenthood.”); Strasser, *supra* note 104, at 86 (“Up until recently, courts enforced gestational, but not traditional surrogacy contracts.”).

113. See *supra* note 112 and accompanying text.

parenthood in the surrogacy context by only enforcing surrogacy contracts in which the genetic material of at least one of the intended parents is utilized.<sup>114</sup>

Moreover, although some courts have been willing to use equitable parenthood doctrines to provide child custody and visitation rights to non-genetic, non-adoptive parents who have raised children in same-sex relationships,<sup>115</sup> many courts have not, and recent cases demonstrate that courts across the country often still refuse to provide non-genetic parents in such situations with any rights relating to the children for whom they have functioned as parents.<sup>116</sup> In addition, in some, but not all, of the jurisdictions that have adopted equitable parenthood doctrines,<sup>117</sup> a qualifying non-genetic parent is still considered legally inferior to the genetic parent.<sup>118</sup> For exam-

114. See FLA. STAT. ANN. § 742.13(2) (West 2016); N.H. REV. STAT. ANN. § 168-B:1(XII) (West 2016); UTAH CODE ANN. § 78B-15-801(5) (West 2016); VA. CODE ANN. §§ 20-156 to 20-160(B)(9) (West 2016) (providing that the parties may not enter into a gestational agreement if “neither intended parent is a donor”); COURTNEY G. JOSLIN ET AL., *Statutory Provisions Regarding the Permissibility and Enforceability of Surrogacy Agreements*, LESBIAN, GAY, BISEXUAL AND TRANSGENDER FAMILY LAW, *supra* note 96, at § 4:2 (explaining that in the context of surrogacy agreements, “some states . . . require at least one of the intended parents to be genetically connected to the resulting child.”); *Gestational Surrogacy Law Across the United States*, *supra* note 106.

115. See *supra* notes 95–97 and accompanying text.

116. See, e.g., *Wakeman v. Dixon*, 921 So. 2d 669, 673 (Fla. Dist. Ct. App. 2006) (holding that former lesbian partner of genetic mother was a non-parent who was not entitled to seek custody or visitation despite the fact that parties agreed to have children via artificial insemination during the relationship, executed co-parenting agreements, partner had co-parented the children); *Black v. Simms*, 12 So. 3d 1140, 1145 (La. Ct. App. 2009) (denying former lesbian partner of biological mother custody rights to children born during the relationship whom partner had co-parented because non-parents could not be awarded custody absent a showing of substantial harm to the child if genetic parent received custody); *White v. White*, 293 S.W.3d 1 (Mo. Ct. App. 2009) (declining to adopt equitable parenthood doctrines and denying former lesbian partner of a child’s genetic mother standing to seek custody and visitation of said child despite the fact that each woman had given birth to a child during the relationship via artificial insemination with sperm from the same donor and had co-parented the children together since they were born); *Jones v. Barlow*, 154 P.3d 808, 819 (Utah 2007) (refusing to adopt any of the equitable parenthood doctrines and denying standing to seek custody and visitation to former partner of biological mother where couple had decided to have a child together via artificial insemination and partner had co-parented child since birth).

117. See *supra* note 21.

118. See *infra* notes 120–21 and accompanying text. The ALI Principles recognize parents by estoppel, but not *de facto* parents, as standing on equal footing to legal parents in the custody context. See ALI PRINCIPLES § 2.03(1) (2002) (providing definitions for parents by estoppel and *de facto* parents). The ALI Principles state that a *de facto* parent should not receive the majority of custodial responsibility over the wishes of a child’s fit legal parent or parent by estoppel unless “the legal parent or parent by estoppel has not been performing a reasonable share of parenting functions

ple, under one jurisdiction's approach, although psychological parents "stand[] in parity" with genetic parents, if all else is equal in applying the best interests of the child standard, custody should be given to the genetic parent because "eventually, in the search for self-knowledge, the child's interest in his or her roots will emerge."<sup>119</sup> Other jurisdictions have adopted even stronger presumptions in favor of a genetic parent's right to custody over a person who falls within one of the equitable parenthood doctrines.<sup>120</sup> These presumptions are based upon the notion that constitutional protections only attach to the legal parent's relationship with the child and not to the relationship between a child and an individual entitled to recognition under one of the equitable parenthood doctrines.<sup>121</sup>

Overall, despite the recent legal advancements in certain areas toward determining parental rights based upon considerations besides genetics, "[t]he perception that genetically related family trumps any other version of family [remains] deeply engrained in American society."<sup>122</sup> This reality will likely continue to have a significant impact on individuals in same-sex relationships who are seeking parental rights, though the precise way that it will impact these individuals is about to change. With the nationwide legalization of same-sex marriage and the increasingly widespread availability of second parent adoption, courts will less frequently be faced with custody disputes between a genetic legal parent and a former significant other whose only option is to make an equitable claim for custody and visitation rights.<sup>123</sup> In-

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or the available alternatives would cause harm to the child." COURTNEY G. JOSLIN ET AL., *Terminology used in ALI Principles*, in LESBIAN, GAY, BISEXUAL AND TRANSGENDER FAMILY LAW, *supra* note 96, at § 7:6 (citing ALI PRINCIPLES § 2.18(1)(a)). In addition, under the ALI Principles, legal parents and parents by estoppel, but not *de facto* parents, are entitled to a presumption of joint decisionmaking responsibility. ALI PRINCIPLES § 2.09(2).

119. *V.C. v. M.J.B.*, 748 A.2d 539, 554 (N.J. 2000).

120. *Egan v. Fridlund-Horne*, 211 P.3d 1213 (Ariz. Ct. App. 2009) ("Moreover, we sharply disagree with the bold pronouncement of the Washington Supreme Court that, if a person can establish standing as a *de facto* parent, then that person has a fundamental liberty interest in the care, custody, and control of the child, to the same extent as the legal parent."); *In re E.L.M.C.*, 100 P.3d 546 (Colo. 2004) (explaining that the genetic parent and psychological parent were not on equal footing in seeking custody due to the constitutional protections afforded the genetic parent's relationship with the child); *McAllister v. McAllister*, 779 N.W.2d 652 (N.D. 2010) ("When a psychological parent and a natural parent each seek a court-ordered award of custody, the natural parent's paramount right to custody prevails unless the court finds it in the child's best interests to award custody to the psychological parent to prevent serious harm or detriment to the welfare of the child."); *Middleton v. Johnson*, 633 S.E.2d 162, 172 (S.C. 2006) ("The limited right of the psychological parent cannot usually overcome the legal parent's right to control the upbringing of his or her child.").

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

122. Ashley Jacoby, *The New Kinship: Constructing Donor-Conceived Families*, 31 SYRACUSE J. SCI. & TECH. L. REP. 251, 260 (2015).

123. *See supra* notes 12–18 and accompanying text.

stead, courts increasingly will be faced with custody disputes involving two legally recognized same-sex parents, one of whom is genetically related to the child and one of whom is not. As a technical matter, how a person is determined to be a legal parent, whether as a result of genetic connections to the child, being married to the child's genetic parent, or adopting the child, is immaterial once a person is designated a legal parent<sup>124</sup> – all legal parents enjoy the same constitutional protections relating to their parent-child relationships.<sup>125</sup> However, based upon the longstanding prioritization of genetic connections in determining parental rights, it seems highly likely that genetic connections nonetheless will play a role in same-sex custody disputes involving two legal parents.<sup>126</sup> Importantly, under the best interests of the child standard, which in every state is the standard applicable to custody disputes between two legal parents, judges are not prohibited from favoring one parent over the other parent on the basis of genetic connections to the child.<sup>127</sup>

#### IV. THE POTENTIAL CONSIDERATION OF GENETIC CONNECTIONS IN CUSTODY DISPUTES BETWEEN TWO LEGAL PARENTS OF THE SAME SEX

##### *A. Current Legal Standards Governing Child Custody Disputes Between Two Legal Parents*

Unlike custody disputes involving a legal parent and a non-parent, in custody disputes between two legal parents, the constitutional protections attaching to each parent's relationship with the child cancel each other out, and the court makes its custody determination based solely upon the best interests of the child.<sup>128</sup> Every state has adopted some form of the best interests of the child standard to govern disputes involving two fit legal parents.<sup>129</sup> The vast majority of jurisdictions employ a list of factors for courts to consider in making the determination of what custody arrangement will further the

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124. *See supra* note 23.

125. *See supra* note 23. *See also infra* note 129 and accompanying text.

126. *See supra* Parts II and III (discussing the historical and modern ties between genetic connections and legal parental status).

127. *See infra* Part IV.A.

128. *See McDermott v. Dougherty*, 869 A.2d 751, 770 (Md. 2005) (citations omitted) (“In a situation in which both parents seek custody, each parent proceeds in possession, so to speak, of a constitutionally-protected fundamental parental right. Neither parent has a superior claim to the exercise of this right to provide ‘care, custody, and control’ of the children. Effectively, then, each fit parent’s constitutional right neutralizes the other parent’s constitutional right, leaving, generally, the best interests of the child as the sole standard to apply to these types of custody decisions.”).

129. Matthew Knez, Note, *Best Interest of the Child: The Quarterback Parent Who Goes the Distance and Maintains the Ties*, 36 U. LA VERNE L. REV. 75, 78 (2014).

best interests of the child.<sup>130</sup> Factors that courts commonly weigh include the bond between each parent and the child, the needs of the child and the ability and disposition of each parent to meet the child's needs, past caretaking responsibilities, the child's need for continuity, the wishes of the parents, the wishes of the child provided he or she is of sufficient age, the mental and physical health of each parent and the child, the willingness of each parent to facilitate a close and continuing relationship between the child and the other parent, and any history of violence, abuse, or neglect on the part of either parent.<sup>131</sup> Moreover, in most jurisdictions, the best interests of the child standard also contains a catch-all factor that directs the court to weigh "any other factor deemed relevant by the court."<sup>132</sup>

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 in determining which custody arrangement will further the child's best interests.<sup>133</sup> As an initial matter, there is generally no direction given to judges regarding how to weigh each of the many factors set forth within the best interests of the child standard.<sup>134</sup> This means that one or more of the factors may be given disproportionate weight based upon the biases and beliefs of a particular judge.<sup>135</sup> Moreover, the commonly included

130. Maria P. Cagnetti & Nadya J. Chmil, *Shared Parenting – Have We Really Closed the Gap?: A Comment on AFCC'S Think Tank Report*, 52 FAM. CT. REV. 181, 185 (2014).

131. Gargi Sen & Tiffanie Tam, *Child Custody, Visitation, & Termination of Parental Rights*, 16 GEO. J. GENDER & L. 41, 47–49 (2015).

132. Dewart, *supra* note 26.

133. Abramowicz, *supra* note 27, at 130–31 ("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."); Dewart, *supra* note 26, at 1350 ("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.").

134. 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.").

135. Joanna L. Grossman, *Family Law's Loose Canon*, 93 TEX. L. REV. 681, 686 (2015) (reviewing JILL ELAINE HASDAY, *FAMILY LAW REIMAGINED* (2014)) ("While it is true that custody disputes between two fit parents are resolved by that formal standard, [BIC], the standard embodies tremendous judicial discretion that can be deeply infused with bias"); McGlothlin, *supra* note 134 ("Judges have broad discretion to award custody as they deem best for the child, often deciding cases according to their own values."); Cynthia Lee Starnes, *Lovers, Parents, and Partners: Disentangling Spousal and Co-parenting Commitments*, 54 ARIZ. L. REV. 197, 220–21 (2012)

catch-all factor, which allows a judge to consider literally any factor that she or he deems relevant, further expands the substantial breadth of power judges are able to exercise under the best interests of the child standard.<sup>136</sup> As a result of the tremendous discretion enjoyed by trial judges in the custody context, not only are custody determinations often criticized as unfair and unpredictable,<sup>137</sup> but it is also extremely difficult for a party to prevail in having a trial judge's decision overturned on appeal.<sup>138</sup>

While the best interests of the child standard provides judges with a tremendous degree of discretion, in some jurisdictions, judges are prohibited by statute or case law from considering certain factors when applying the standard. The most prominent restriction involves the ability of judges to consider classifications that receive heightened constitutional protection such as sex, religion, and race.<sup>139</sup> For example, most states prohibit judges from applying a preference in favor of either parent on the basis of his or her sex.<sup>140</sup> There is also general agreement that judges cannot weigh a parent's

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("Commentators have long charged that this custody model fosters indeterminacy and unpredictability, costly and protracted litigation, and reliance on a judge's personal moral code. One critic suggests coin-flipping might be a better alternative.").

136. Artis, *supra* note 27 (citations omitted) ("Given this catch-all factor, and the nonspecific nature of the criteria, the best interests rule continues to be ambiguous and open to interpretation; this ambiguity has been widely criticized in legal scholarship.").

137. Naomi R. Cahn, *Reframing Child Custody Decisionmaking*, 58 OHIO ST. L.J. 1, 59 (1997) ("[T]he best interest standard . . . is indeterminate and biased in administration."); Jon Elster, *Solomonic Judgments: Against the Best Interest of the Child*, 54 U. CHI. L. REV. 1, 7 (1987) ("[T]he [best interest] principle is indeterminate, unjust, [and] self-defeating . . .").

138. LINDA D. ELROD, *Appeals, in CHILD CUSTODY PRACTICE & PROCEDURE* § 14:1 ("Child custody cases are particularly difficult to win on appeal, however, because of the broad discretion given the trial judge to award custody in a child's best interests.").

139. See *infra* notes 141–48 and accompanying text.

140. See, e.g., ARK. CODE ANN. § 9-13-101(a) (West 2016) ("[T]he award of custody of the children of the marriage shall be made without regard to the sex of a parent . . ."); CAL. FAM. CODE § 3040(a)(1) (West 2016) (stating that in custody determinations a court "shall not prefer a parent as custodian because of that parent's sex"); COLO. REV. STAT. ANN. § 14-10-124(3) (West 2016) ("In determining parenting time or decision-making responsibilities, the court shall not presume that any person is better able to serve the best interests of the child because of that person's sex."); DEL. CODE ANN. tit. 13, § 722(b) (West 2016) ("The [c]ourt shall not presume that a parent, because of his or her sex, is better qualified than the other parent to act as joint or sole legal custodian for a child or as the child's primary residential parent."); ME. REV. STAT. ANN. tit. 19-A, § 1653(4) (2000) ("The court may not apply a preference for one parent over the other . . . because of the parent's gender or the child's age or gender."); MO. REV. STAT. § 452.375(8) (Cum. Supp. 2013) ("No preference may be given to either parent . . . because of that parent's . . . sex . . . nor because of the . . . sex of the child."); NEB. REV. STAT. ANN. § 42-364(2) (LexisNexis 2016) ("[T]he court shall not give preference to either parent based on the sex of the

religious practices or beliefs against him or her in the custody context unless such beliefs or practices can be shown to harm the child.<sup>141</sup> With regard to

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parent and no presumption shall exist that either parent is more fit or suitable than the other.”); OKLA. STAT. ANN. tit. 43, § 112(C)(3)(b) (West 2016) (“[The] court . . . shall not prefer a parent as a custodian . . . because of the gender of that parent.”); OR. REV. STAT. ANN. § 107.137(5) (West 2016) (“No preference in custody shall be given to the mother over the father for the sole reason that she is the mother, nor shall any preference be given to the father over the mother for the sole reason that he is the father.”); TENN. CODE ANN. § 36-6-101(d) (West 2016) (“It is the legislative intent that the gender of the party seeking custody shall not give rise to a presumption of parental fitness or cause a presumption or constitute a factor in favor or against the award of custody to such party.”); TEX. FAM. CODE ANN. § 153.003 (West 2016) (“The court shall consider the qualifications of the parties without regard . . . to the sex of the party or the child . . . .”); VT. STAT. ANN. tit. 15, § 665(c) (West 2016) (“The court shall not apply a preference for one parent over the other because of the sex of the child, the sex of a parent . . . .”); WIS. STAT. ANN. § 767.41(5) (West 2016) (“The court may not prefer one parent or potential custodian over the other on the basis of the sex . . . of the custodian.”). *See also Criteria for Parenting Plan – Prohibited Factors*, PRINCIPLES OF THE LAW OF FAMILY DISSOLUTION § 2.12 (2002) (“About two-thirds of the states have statutes that specifically rule out preferences based on the sex of the parent or that of the child.”); Rebecca E. Hatch & Leann Michael, *Gender Bias as Factor in Child Custody Cases*, 131 AM. JUR. 3D *Proof of Facts* § 457, § 7 (2013) (“Many state statutes have adopted the policy that male and female parents are to be treated alike when determining custody of the child, and the courts are required to apply a gender-neutral analysis.”); Sen & Tam, *supra* note 131, at 44 (“Today, legal custody and visitation determinations must be gender-neutral . . .”).

141. *Harrison v. Tauheed*, 44 Kan. App. 2d 235 (2010), *aff’d*, 256 P.3d 861 (Kan. 2011) (“[A] parent’s religious beliefs and practices may not be considered by the trial court as a basis to deprive that parent of custody unless there is a showing of actual harm to the health or welfare of the child caused by those religious beliefs and practices.”); *Criteria for Parenting Plan – Prohibited Factors*, *supra* note 140 (“In respect of First Amendment concerns, courts generally have declined to decide which religion would provide the greatest benefits to the child, or to compare the advantages of a religious upbringing to a nonreligious one . . . . While the substance and strength of a parent’s religious beliefs and practices are generally impermissible factors in a custody case, some religious practices have been deemed sufficiently adverse to a child’s interests that courts have taken them into account in deciding who should have primary custody of a child.”); Rebecca E. Hatch, *Religion as Factor in Child Custody Cases*, 122 AM. JUR. 3D *Proof of Facts* § 401, § 3 (last updated Feb. 2016) (“Although courts are not allowed to weigh the merits of the religious tenets of the various faiths, courts may examine into the beliefs of the parties who are seeking custody of the child in order to insure that such beliefs do not endanger the child in applying the best-interest-of-the-child standard.”); D. KELLY WEISBERG & SUSAN FRELICH APPLETON, *MODERN FAMILY LAW: CASES AND MATERIALS* 740–41 (3d ed. 2013) (“Under the Establishment Clause . . . a court may not weigh the relative merits of parents’ religions or favor an observant over a nonreligious one. . . . Although courts cannot favor one parent’s religion, courts nonetheless may examine the effect of a religious belief or practice on the child. Most courts permit interference with a parent’s religious beliefs or practices only when there is evidence of harm to the child.”).

racial considerations, in *Palmore v. Sidoti*, the Supreme Court addressed the consideration of race in custody determinations.<sup>142</sup> In *Palmore*, the child's genetic father sought a change in custody on the grounds that because the child's Caucasian mother had married an African-American man, the child would face stigma if raised in the home of her mother and stepfather.<sup>143</sup> The lower court ordered that custody be given to the genetic father.<sup>144</sup> The Supreme Court, applying strict scrutiny, overturned the lower court's ruling, holding that private racial biases and the potential injury to the child from such biases are not permissible considerations in custody determinations.<sup>145</sup> While courts and legal commentators have reached varying conclusions regarding the extent to which *Palmore* prohibits race-based considerations in the custody context,<sup>146</sup> it clearly limits, to some extent, the permissible scope of judicial reliance on such considerations.<sup>147</sup>

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142. 466 U.S. 429 (1984).

143. *Id.* at 430–31.

144. *Id.* at 431.

145. *Id.* at 433.

146. Mary Anne Case, *Feminist Fundamentalism on the Frontier Between Government and Family Responsibility for Children*, 2009 UTAH L. REV. 381, 390 (2009) (citing *Palmore*, 466 U.S. at 433–34) (“[T]he 1984 Supreme Court case of *Palmore v. Sidoti* prohibited any racial discrimination in custody decisions, even when the best interests of an individual child might call for it.”); Katie Eyer, *Constitutional Colorblindness and the Family*, 162 U. PA. L. REV. 537, 542 (2014) (“Thus, although the Court in *Palmore v. Sidoti* did take up one contemporary instantiation of the use of race in family law (the practice of depriving a parent of custody based on a post-divorce interracial marriage), it acted carefully in crafting its opinion to ensure that it would not inhibit other continuing uses of race in the family . . . .”); Shani King, *The Family Law Canon in a (Post?) Racial Era*, 72 OHIO ST. L.J. 575, 587–88 (2011) (alteration in original) (“Many commentators have cited *Palmore* as an example of race not being a permissible factor in child custody determinations because the state is prohibited from ‘insist[ing] that race count as a factor in the ordering of people’s most private lives.’”); David D. Meyer, *Palmore Comes of Age: The Place of Race in the Placement of Children*, 18 U. FLA. J.L. & PUB. POL’Y 183, 185 (2007) (“*Palmore*’s intervention, however, plainly did not end the debate over whether race may be considered in matters of custody and adoption. In the more than two decades since *Palmore*, courts . . . have continued to struggle, often heatedly, to define the appropriate role for race in the placement of children.”); Colin Schlueter, *Color Conscious: The Unconstitutionality of Adoptive Parents’ Expression of Racial Preferences in the Adoption Process*, 19 WM. & MARY BILL RTS. J. 263, 273 (2010) (alteration in original) (footnotes omitted) (“Although the language in *Palmore* seemed to be clear enough with respect to its stance on the consideration of race in child custody decisions by citing *Strauder v. West Virginia* for the proposition that ‘[a] core purpose of the Fourteenth Amendment was to do away with governmentally imposed discrimination based on race,’ some lower courts have nonetheless adopted a questionably narrow reading of *Palmore*.”). One custody area in which the appropriateness of racial considerations has been debated involves disputes over bi-racial children. Following *Palmore*, some courts “permitted the use of race as a dispositive factor in interracial custody disputes (on the grounds that the minority parent would be better situated to

Another common limitation with regard to factors courts can consider in applying the best interests of the child standard involves the adoption of the “nexus test” by many jurisdictions.<sup>148</sup> Generally, under the nexus test, a court is directed not to consider a party’s allegedly immoral conduct unless a nexus between the behavior and harm to the child can be demonstrated.<sup>149</sup> Many jurisdictions also apply the nexus test when issues are raised relating to a parent’s sexual orientation, meaning that the court will only weigh a parent’s sexual orientation against him or her if it can be shown to harm the child.<sup>150</sup> With regard to other factors that some jurisdictions bar from consideration under the best interests of the child standard, a few states prohibit consideration of a parent’s economic status or limit consideration to situations in which

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meet a biracial child’s emotional needs), most often without any meaningful constitutional scrutiny.” Eyer, *supra*, at 581. Today, “[g]enerally speaking courts [that consider] race in determining the custody of a biracial child look less to the race of the parent, per se, than to the abilities of each parent to meet the child’s need to understand and accept his or her racial identity.” *Criteria for Parenting Plan – Prohibited Factors*, *supra* note 140.

147. *Palmore*, 466 U.S. at 434 (holding that that private racial biases and the potential injury to the child from such biases are not permissible considerations in custody determinations). See also Eyer, *supra* note 146, at 574 (noting that following *Palmore* courts generally do not weigh a parent’s subsequent relationship with an individual of a different race in making custody determinations); Belinda Luscombe, *Should Race Play a Role in Custody Decisions?*, TIME MAG. (Feb. 15, 2011), <http://healthland.time.com/2011/02/15/should-race-play-a-role-in-custody-decisions/> (“Race can play some role [in custody determinations], but mostly in terms of which parent can best foster a healthy sense of racial identity.”); ROY T. STUCKEY, *Custody Disputes Between Biological Parents*, in MARITAL LITIGATION IN SOUTH CAROLINA § 10(E)(3)(b) (4th ed. supp. 2012) (stating that *Palmore* “does not say that race cannot be considered at all in deciding custody cases, but it is likely that some nexus between a person’s race and the best interest of the child would have to be proven before it would be relevant”).

148. See DOUGLAS E. ABRAMS ET AL., CONTEMPORARY FAMILY LAW 707 (3d ed. 2012).

149. *Id.* at 707, 731; Courtney G. Joslin, *The Perils of Family Law Localism*, 48 U.C. DAVIS L. REV. 623, 643 (2014). See also OR. REV. STAT. ANN. § 107.137(4) (West 2016) (“In determining custody of a minor child under ORS 107.105 or 107.135, the court shall consider the conduct, marital status, income, social environment or lifestyle of either party only if it is shown that any of these factors are causing or may cause emotional or physical damage to the child.”).

150. Sarah Abramowicz, *The Legal Regulation of Gay and Lesbian Families as Interstate Immigration Law*, 65 VAND. L. REV. EN BANC 11, 18 n.35 (2012) (“[M]ost states require a showing of at least potential harm to the child before they will take sexual orientation into account in determining custody”); COURTNEY G. JOSLIN ET AL., *Nexus test, generally*, in LESBIAN, GAY, BISEXUAL AND TRANSGENDER FAMILY LAW, *supra* note 96, at § 1:8 (footnotes omitted) (“Today, the vast majority of states at least purport to apply what is commonly referred to as the ‘nexus’ or ‘adverse impact’ test. Under the nexus test, a parent’s sexual orientation cannot be relied upon by the court in making a custody or visitation determination unless there is evidence that the parent’s sexual orientation has caused actual harm to the child.”).

it can be shown that the parent's financial status is harmful to the child.<sup>151</sup> Weighing a party's marital status against him or her is also prohibited in a few jurisdictions,<sup>152</sup> as is weighing a parent's facilitation of the child's relationship with the other parent in situations involving domestic abuse.<sup>153</sup> Other restrictions with regard to what factors courts may consider in applying the best interests standard are few and far between. For example, Missouri prohibits courts from preferring one party over the other based upon age,<sup>154</sup> and Arizona prohibits the denial of custody based upon a party's use of medical marijuana unless it can be demonstrated that "the person's behavior creates an unreasonable danger to the safety of the minor as established by clear and convincing evidence."<sup>155</sup>

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151. *See, e.g.*, OR. REV. STAT. ANN. § 107.137 (West 2016) ("In determining custody of a minor child under ORS 107.105 or 107.135, the court shall consider the . . . income . . . of either party only if it is shown that . . . [it is] causing or may cause emotional or physical damage to the child."); R.I. GEN. LAWS ANN. § 15-5-16 (West 2016) ("In regulating the custody and determining the best interests of children, the fact that a parent is receiving public assistance shall not be a factor in awarding custody."); VT. STAT. ANN. tit. 15, § 665 (West 2016) ("The court shall not apply a preference for one parent over the other because of . . . the financial resources of a parent."). *See also* Burchard v. Garay, 724 P.2d 486, 491 (Cal. 1986) (in bank) ("[I]ncome or economic advantage is not a permissible basis for a custody award."); Brooks v. Brooks, 466 A.2d 152, 156 (Pa. Super. Ct. 1983) (stating that a party's income should not be considered in determining custody "unless the income of one party is so inadequate as to preclude raising the children in a decent manner"); *Criteria for Parenting Plan – Prohibited Factors*, *supra* note 140 ("A few jurisdictions prohibit consideration of the economic circumstances of the parties.").

152. OR. REV. STAT. ANN. § 107.137 ("In determining custody of a minor child under ORS 107.105 or 107.135, the court shall consider the . . . marital status . . . of either party only if it is shown that any of these factors are causing or may cause emotional or physical damage to the child."); TEX. FAM. CODE ANN. § 153.003 (West 2016) ("The court shall consider the qualifications of the parties without regard to their marital status . . .").

153. ALASKA STAT. ANN. § 25.24.150(c)(6) (West 2016) ("[T]he court may not consider this willingness and ability if one parent shows that the other parent has sexually assaulted or engaged in domestic violence against the parent or a child, and that a continuing relationship with the other parent will endanger the health or safety of either the parent or the child."); HAW. REV. STAT. § 571-46 (West 2016) (stating that parental cooperation "shall not be considered in any case where the court has determined that family violence has been committed by a parent"); OR. REV. STAT. ANN. § 107.137(1)(f) ("[T]he court may not consider such willingness and ability if one parent shows that the other parent has sexually assaulted or engaged in a pattern of behavior of abuse against the parent or a child and that a continuing relationship with the other parent will endanger the health or safety of either parent or the child.").

154. MO. REV. STAT. § 452.375(8) (Cum. Supp. 2013) ("[N]o preference may be given to either parent . . . because of that parent's age . . . nor because of the age . . . of the child.").

155. ARIZ. REV. STAT. ANN. § 36-2813(D) (2016).

Even though many jurisdictions have implemented a few specific restrictions on what factors judges may weigh under the best interests of the child standard, the fact that judges can weigh the many factors listed under the standard in any way they deem appropriate, and also can, with few exceptions, consider any unlisted factor they deem relevant, means there remains a great amount of judicial discretion in the custody context.<sup>156</sup> Moreover, even among the few common limitations currently placed on judges in applying the best interests of the child standard, most do not completely prohibit the judge from considering the factor in question, instead leaving it to the judge's discretion to determine whether consideration is appropriate.<sup>157</sup> More specifically, outside of the contexts of sex and race, the judge's ability to weigh other commonly restricted factors such as religion, sexual orientation, and alleged immoral conduct often is dependent on the judge applying the nexus test to determine whether the factor in question can be linked to actual or potential harm to the child.<sup>158</sup> Thus, if a judge, using his or her discretion, determines that the factor is tied to harm to the child, the judge is not prohibited from weighing that factor.<sup>159</sup> Overall, there are very few meaningful restrictions placed upon judges with regard to what types of factors they may consider in applying the best interests of the child standard.

*B. The High Likelihood That Genetic Connections Will Play a Role in Future Custody Disputes Between Two Legal Parents of the Same Sex*

The vast majority of parents whose relationships dissolve are able to reach an agreement regarding custody arrangements for their children.<sup>160</sup> Approximately ten percent of divorcing parents, however, end up litigating their child custody claims.<sup>161</sup> The decisions reached in these cases affect not only the parties involved, but also the greater population of parents whose relationships will dissolve, as “private bargaining takes place in the shadow of the participants’ predictions about the resolution the courts would likely otherwise impose.”<sup>162</sup> Child custody disputes that reach the litigation stage are often hotly contested and, due to the high stakes involved, are extremely emotional events for the parties.<sup>163</sup> A parent involved in a custody dispute generally will go to great lengths to convince the court that the child's best

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156. See *supra* notes 133–38 and accompanying text.

157. See McGlothlin, *supra* note 134, at 81.

158. See *supra* notes 141, 148–55 and accompanying text.

159. See *supra* notes 141, 148–55 and accompanying text.

160. Sandi S. Varnado, *Inappropriate Parental Influence: A New App for Tort Law and Upgraded Relief for Alienated Parents*, 61 DEPAUL L. REV. 113, 116 (2011).

161. *Id.*

162. ABRAMS ET AL., *supra* note 148, at 658–59.

163. See, e.g., *id.* at 667–69; Thad F. Woody, *Get Clients Actively Engaged in Cost Containment by Focusing Their Efforts on Fact Gathering and the Future*, 36-FALL FAM. ADVOC. 14, 15 (“Custody cases are among the most emotional and expensive litigation for family law attorneys and their clients.”).

interests will be served if he or she receives primary custody.<sup>164</sup> Because, in most jurisdictions, judges presiding over custody disputes may consider any factor they deem relevant, each party usually will present the judge with a wide variety of information aimed at demonstrating why he or she is the superior parent, and why the other party is an inferior parent, in hopes that the court will find some or all of the information relevant in its determination of what custody arrangement will further the child's best interests.<sup>165</sup>

Due to the great discretion judges have to consider any factor they deem relevant in applying the best interests of the child standard, it is highly likely that in custody disputes involving two legal parents of the same-sex who had children via ART, the genetic parent will attempt to use evidence of his or her genetic connection to the child, and the other party's lack thereof, to convince the judge of the genetic parent's superiority.<sup>166</sup> Prior custody and visitation cases involving same-sex couples who conceived children during their relationship via ART demonstrate that genetic connections have been central to the arguments set forth by genetic parents in such disputes.<sup>167</sup> Because same-sex marriage and second parent adoption are relatively new developments, past cases concerning individuals in dissolving same-sex relationships often involved a non-genetic parent who did not have the status of legal parent making equitable claims for parental rights.<sup>168</sup> In case after case, the parent with genetic connections to the child argued that he or she was the child's sole legal parent, and that his or her former partner should not be legally recognized as a parent or receive parental rights due to that individual's lack of genetic or adoptive ties to the child.<sup>169</sup> In fact, this genetics-based argument continues to be employed frequently in custody cases that arise between a genetic parent and a former same-sex partner who has functioned as a parent to a child the parties mutually agreed to conceive via ART, but who cannot or has not obtained legal parent status through adoption or the marital presumption of paternity.<sup>170</sup>

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164. See, e.g., ABRAMS ET AL., *supra* note 148, at 667–69.

165. See *supra* note 132 and accompanying text.

166. See *infra* notes 167–71 and accompanying text.

167. See *infra* notes 169–70 and accompanying text.

168. See *supra* notes 93–97 and accompanying text.

169. See, e.g., *In re C.B.L.*, 723 N.E.2d 316, 318 (Ill. App. Ct. 1999) (“[Genetic mother] argued that [former partner] lacked standing under section 607 of the Marriage Act in that she was neither a parent, grandparent, great-grandparent nor sibling of [the child]”; *In re Alison D.*, 77 N.Y.2d at 651, 652 (N.Y. 1991); *In re Thompson*, 11 S.W.3d at 913, 915 (Tenn. Ct. App. 1999); *In re Custody of H.S.H.-K.*, 533 N.W.2d 419, 434 (Wis. 1995) (“Knott argues that, as the biological parent, she has a constitutional right to determine who shall visit her child and that this right supercedes rights asserted by her child or Holtzman [former partner].”). See also Shapiro, *supra* note 24 (“More troubling is the frequency of intra-lesbian custody cases. These cases most commonly begin with the assertion by a genetically-related mother that she alone is the parent of the child.”).

170. See cases cited *supra* note 116.

While, as a result of the proliferation of same-sex marriage and second parent adoption, it will become increasingly common for same-sex custody disputes to involve two legal parents as opposed to one legal parent and one individual making an equitable parenthood claim, parties will not abandon the use of genetic connections to support their parental rights arguments. Genetic connections long have served as an incredibly important tool in determining who the law and society perceive as a “true” parent.<sup>171</sup> The parties involved in heated custody disputes will not hesitate to continue using this evidence that has had such a strong historical role in determining parental legal rights.<sup>172</sup> While as a result of recent legal developments significantly fewer genetic parents will be able to use their genetic connections to the child to deny non-genetic parents the status of legal parent, genetic parents likely will now use their genetic connections to support an argument for why the child’s best interests will be served by awarding them primary custody.

Moreover, it is highly probable that in custody disputes between two legal parents of the same sex, a significant number of judges will, whether consciously or not, give weight to one parent’s genetic connections to the child in determining which custody arrangement will further the child’s best interests. As discussed in depth above, genetics have long played a central role in judicial determinations of parenthood.<sup>173</sup> Despite a number of recent legal advancements that have weakened the tie between genetics and parenthood determinations, for many judges it likely will remain difficult to avoid giving any weight to genetic connections in determining important rights relating to the parent-child relationship, such as custody and visitation, even where both parties involved in the dispute are legally recognized as parents. As one scholar has noted, “Even in the postmodern family era, ‘society . . . typically defines kinship in genetic terms and perceives other types of families as inauthentic or inferior.’”<sup>174</sup> Unless the law steps in to guide judicial decision-making away from this consideration in the context of custody determinations between two fit, legally recognized parents, judges, like the greater society in which they exist, likely will place weight on genetic connections in determining which custody arrangement will further the child’s best interests.

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171. *See supra* Parts II and III.

172. *See* Joanne Ross Wilder, *Religion and Best Interests in Custody Cases*, 18 J. AM. ACAD. MATRIMONIAL L. 211, 214 (2002) (“Every custody litigator knows that the judge is the most important witness in any custody case and strives hard to . . . address the biases which the judge brings to the decision-making process.”).

173. *See supra* Parts II and III.

174. Annette R. Appell, *Controlling for Kin: Ghosts in the Postmodern Family*, 25 WIS. J.L. GENDER & SOC’Y 73, 110 (2010) (citation omitted).

## V. REFORMING CUSTODY LAW TO BETTER PROTECT NON-GENETIC LEGAL PARENTS

### A. *The Need for Legal Reform*

There is no doubt that if custody law is not reformed, genetic parents in same-sex custody disputes involving children created by mutual agreement with the other parent via ART will attempt to use genetics-based arguments in their favor, and that many judges will weigh each party's genetic connection to the child – or lack thereof – in determining custody under the best interests of the child standard. This Part argues that it is essential that the law be reformed to prevent judges presiding over these custody disputes from applying a preference for one parent over the other based upon that parent's genetic connection to the child. The underlying goal of the best interests of the child standard is to determine the custody arrangement that will most effectively promote the emotional, physical, and mental well-being of children involved in custody disputes.<sup>175</sup> Judges who choose to weigh genetic connections in same-sex custody disputes likely will do so based upon the belief that genetic connections serve a helpful function in identifying which parent is better situated with regard to important existing factors under the best interests of the child standard, such as the bond between the child and each parent and the disposition and ability of each parent to meet the child's needs and to provide a healthy environment for the child. The belief, however, that genetic connection is an effective proxy for these important factors is mistaken and harmful, and the use of genetic connections in this manner not only would be ineffective, but also would run afoul of the ultimate goal of furthering the child's best interests.

There is a substantial body of social science research examining the formation of relationships and bonds between children and the adults in their lives who function in parental roles. Legal scholars in particular have utilized this social science research in arguing for more expansive legal definitions of parents and for greater legal rights and protections for the relationships between children and individuals who function in parental roles.<sup>176</sup> While it is beyond the scope of this Article to detail the vast body of social science research that has been conducted examining the relationships between children and parental figures, a brief review of the existing research is necessary to

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175. See *Focusing on the "Best Interests" of the Child*, FINDLAW, <http://family.findlaw.com/child-custody/focusing-on-the-best-interests-of-the-child.html> (last visited) ("In the context of child custody cases, focusing on the child's 'best interests' means that all custody and visitation discussions and decisions are made with the ultimate goal of fostering and encouraging the child's happiness, security, mental health, and emotional development into young adulthood.").

176. See, e.g., Elrod, *supra* note 10, at 248–49 (describing and utilizing attachment research to support an argument for an intended parenthood model for determining legal parental status).

understand why it would be improper for judges to apply a preference in favor of genetic parents in same-sex custody disputes involving children who, by the mutual agreement of the parties, were conceived via ART.

Existing social science research indicates that children form strong attachments to parental figures regardless of whether the parent and child in question share genetic connections.<sup>177</sup> Attachment relationships develop not through genetics, but “through the provision of physical and emotional care, continuity or consistency in the child’s life and emotional investment in the child.”<sup>178</sup> A genetic parent does not automatically enjoy an attachment relationship with his or her child by virtue of their genetic connection; rather, it is physical and emotional care on the part of both genetic and non-genetic parental figures that creates attachment relationships.<sup>179</sup> In fact, “[u]nlike adults, children have no psychological conception of relationship by blood tie until quite late in their development.”<sup>180</sup> Studies of children born to same-sex couples through ART “reinforce the finding of children’s non-genetic sense of kinship[,] [as] . . . for these children, parentage is determined not so much by biological connection but by the way they were raised, and especially, the fact that they were planned and wanted all along.”<sup>181</sup>

The attachment relationships that children form to parental figures early in their lives are critical in a variety of ways to their development and well-being.<sup>182</sup> For children, the existence of secure attachments leads to emotional growth as well as the formation of their conscience and social competence.<sup>183</sup> Moreover, attachment relationships “serve to protect the child’s development, forming the building blocks for the emerging sense of emotional security, the ability to cope with stress, and an increased self awareness.”<sup>184</sup> The disrupt-

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177. Martha L. Minow, *Redefining Families: Who’s in and Who’s Out?*, 62 U. COLO. L. REV. 269, 284 (1991) (“From the child’s point of view, the marital status, biological or nonbiological connection, and also the sexual orientation of such adults is irrelevant. Children form strong attachments without asking about such things; indeed, children form strong attachments before they even know what it is to ask about such things.”).

178. Elrod, *supra* note 10. Children can form attachment relationships with more than one parental figure. *Id.* at 250.

179. Rebecca L. Scharf, *Psychological Parentage, Troxel, and the Best Interests of the Child*, 13 GEO. J. GENDER & L. 615, 632–33 (2012) (“It is clear from these criteria that even biological parents do not automatically become attachment figures simply because they are a child’s biological parents. Instead, emotional attachment to any adult is the result of daily attention to emotional and physical care, such that comes from consoling, comforting, feeding, and stimulating through play. Yet it is also clear that non-biological parents can, and often do, become attachment figures in children’s lives.”).

180. Elrod, *supra* note 10 (emphasis omitted).

181. Maya Sabatello, *Disclosure of Gamete Donation in the United States*, 11 IND. HEALTH L. REV. 29, 63 (2014).

182. Elrod, *supra* note 10.

183. *Id.* at 250.

184. *Id.*

tion of attachment relationships can be very detrimental to the overall well-being of children, and it can cause significant short-term and long-term psychological and emotional harm.<sup>185</sup> Importantly, “Once 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>186</sup>

Thus, while genetic connections may provide a tempting shortcut in determining which parent should receive custody under the best interests of the child standard, allowing judges to favor one parent over the other on the basis of genetic connections in situations involving a child conceived by mutual agreement via ART would be detrimental to both children and their parents. In addition to the substantial body of social science research indicating that it is a parent’s actions, not his or her genetic connections, that create attachment relationships that are critical to children’s well-being, a quick perusal of parental termination cases should convince even the strongest skeptic that genetic connections do not serve as an effective proxy for superior parental abilities or parent-child bonds.<sup>187</sup> It is therefore essential to reform current law to prevent judges from utilizing the vast discretion they have under the best interests of the child standard to bring biases and preferences based upon genetic connections into the custody analysis.

*B. Proposal to Prohibit Genetics-Based Preferences in Custody Disputes Between Parents Who Conceived Their Child Via ART*

States’ existing best interests of the child standards should be reformed to set forth the rule that, in situations where the legal parents conceived a child during their relationship by mutual agreement via ART, judges making custody determinations cannot apply a preference for one parent over the other on the basis of that parent’s genetic connections to the child.<sup>188</sup> Instead of allowing judges to use genetic connections as a shortcut for determining which parent has the strongest bonds with the child and is able to best meet the child’s needs, judges must be required to do the important work of exam-

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185. 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 10, 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.”); Scharf, *supra* note 179, at 634–35.

186. Scharf, *supra* note 179, at 634 (internal citations omitted).

187. See, e.g., *In re T.M.E.*, 169 S.W. 3d 581 (Mo. Ct. App. 2005).

188. For a proposal advocating for the equal treatment of genetic and non-genetic parents when the parties have entered into a co-parenting agreement prior to using ART, see Swift, *supra* note 97, at 913.

ining actual evidence of each parent’s bond with the child and each parent’s ability to meet the child’s needs. Such evidence often includes testimony and records from child psychologists, psychiatrists, social workers, guardians ad litem, medical professionals, caretakers, educators, the parties and their children, and other relevant experts and individuals or entities involved in the child’s life.<sup>189</sup> Requiring judges to focus upon actual evidence relating to these important factors and prohibiting the use of a tempting, but faulty, proxy will result in judicial decisions that are significantly more effective in furthering children’s best interests. While this limitation on judicial discretion with regard to genetic connections likely will be implicated most often in the context of same-sex couples, the same reasoning for prohibiting consideration of genetic connections also applies in the context of custody disputes between different-sex couples wherein the couple mutually decided during the relationship to conceive children via ART. Consequently, a reform to the best interests of the child standard that prohibits the preference of one parent over the other on the basis of genetic connections should apply equally to same- and different-sex legal parents who, by mutual agreement, utilized ART to conceive their children.

Limiting judicial discretion of specific factors that are prone to misuse under the best interests standard is not a new concept; rather, it has already occurred in most jurisdictions through statute or case law.<sup>190</sup> Importantly, it was similar concerns about the use of sex as an ineffective, but tempting, proxy for important factors such as which parent has a stronger bond with the child or better capacity to meet the child’s needs – in addition to constitutional concerns – that led most jurisdictions to strike down the tender years doctrine and its custodial presumption in favor of mothers and to prohibit judges from preferring either parent on the basis of his or her sex in applying the best

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189. See *Travis v. Murray*, 977 N.Y.S.2d 621, 630 (2013) (“A court needs a tremendous amount of information upon which to make a best interests finding. This almost always necessitates the appointment of an attorney for the children; the appointment of a forensic psychiatrist or psychologist to evaluate the children and the parties as well as to conduct collateral interviews with teachers, child care providers, pediatricians and the like; the taking of extended testimony, both from lay and expert witnesses; and the court hearing from the children themselves in an *in camera* proceeding.”); Lynn Hecht Schafran, *Evaluating the Evaluators: Problems with “Outside Neutrals,”* 42 NO. 1 JUDGES’ J. 10 (2003) (stating that judges in custody disputes “rely heavily on outsourced custody evaluations and recommendations from psychologists, psychiatrists, therapists, social workers, guardians ad litem, and others”); Jason Scott, Note, *One State, Two State; Red State, Blue State: An Analysis of LGBT Equal Rights*, 77 UMKC L. REV. 513, 523 (2008) (“Many times in custody disputes courts will call psychologists, social workers, guardians ad litem, teachers, and other professionals to testify to the well being of the child at issue.”); *The Use of Expert Witnesses in Child Custody Cases*, FREE ADVICE, [http://family-law.freeadvice.com/family-law/child\\_custody/expert\\_cutody\\_battles.htm](http://family-law.freeadvice.com/family-law/child_custody/expert_cutody_battles.htm) (last visited Feb. 21, 2016).

190. See *supra* notes 139–55 and accompanying text.

interests of the child standard.<sup>191</sup> Moreover, legal reform to prohibit sex-based preferences seems to have been effective in reducing some of the sex-based bias within judicial application of the best interests of the child standard, with research indicating that the percentage of fathers who obtain sole or joint custody in litigated custody disputes has increased significantly since states began prohibiting sex-based preferences in the 1970s.<sup>192</sup> While amending best interests standards to prohibit consideration of a specific factor does not guarantee that all judges will avoid allowing their personal biases with regard to that factor to affect their custody determinations – there is no doubt that sex-based judicial bias against both men and women still remains in the custody context<sup>193</sup> – legal reform that serves to mitigate such bias is nonethe-

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191. See *In re Marriage of Bowen*, 219 N.W.2d 683, 688 (Iowa 1974) (abandoning the tender years doctrine and stating that “[t]he real issue is not the sex of the parent but which parent will do better in raising the children. Resolution of that issue depends upon what the evidence actually reveals in each case, not upon what someone predicts it will show in many cases”); *State ex rel. Watts v. Watts*, 350 N.Y.S.2d 285, 289 (1973) (rejecting the tender years doctrine, and stating that “[t]he simple fact of being a mother does not, by itself, indicate a capacity or willingness to render a quality of care different from that which the father can provide”); *Criteria for Parenting Plan – Prohibited Factors*, *supra* note 140 (“Decisions invalidating the tender-years presumption have done so either on constitutional grounds or because it is not an accurate proxy for the child’s best interests.”).

192. ABRAMS ET AL., *supra* note 148, at 673–74 (“Beginning in the 1970s and accelerating during the 1980s, state courts held that the tender years doctrine violated emerging constitutional law concerning gender equality.”); Herma Hill Kay, *No-fault Divorce and Child Custody: Chilling Out the Gender Wars*, 36 FAM. L.Q. 27, 28–29 (2002) (describing a study of appellate court custody decisions which found “that in 1960 mothers won 50 percent of the cases, fathers won 35 percent of the cases,” and in 1995 “mothers won 45 percent of the cases, fathers won 42 percent of the cases”); Solangel Maldonado, *Beyond Economic Fatherhood: Encouraging Divorced Fathers to Parent*, 153 U. PA. L. REV. 921, 973–74 (2005) (“In the relatively small number of cases where parents litigate custody, fathers are awarded sole or joint custody in fifty to sixty-five percent of cases even where the mother was the child’s primary caretaker.”); Richard J. Podell, *Divorce Cases: How to Communicate with Clients, Get the Information You Need, Manage the Case, and Get Paid*, 18 NO. 7 GPSOLO 16, 21 (2001) (“Thirty-two years ago, mothers were awarded custody of minor children in 95 percent or more of cases. In most states today, fathers are awarded joint legal custody, and the physical placement issues often serve as the battleground. Fathers are seeking and obtaining sole, shared, or joint physical custody in at least 50 percent of all cases.”); William C. Smith, *Dads Want Their Day: Fathers Charge Legal Bias Toward Moms Hamstrings Them as Full-Time Parents*, 89-FEB. A.B.A. J. 38, 41 (2003) (“A 1992 study of California cases showed that fathers were awarded primary or joint custody in about half of contested custody matters.”).

193. *Criteria for Parenting Plan – Prohibited Factors*, *supra* note 140 (“The assumption that mothers do, and should, provide most of the care of children leads to a custody bias against fathers in favor of mothers. At the same time, an implicit maternal bias also gives rise to expectations about mothers that, when disappointed, may cause women to be judged more negatively than fathers for the same conduct, and fathers to be overly rewarded for parenting conduct that exceeds the rather modest

less a positive development in furthering results that promote children's best interests. It is safe to assume that many judges will attempt to abide by the law and will avoid the application of explicitly prohibited preferences. In addition, legal reform that explicitly prohibits the application of preferences based upon a specific factor provides appellate courts with greater power to overturn ill-informed trial court decisions.<sup>194</sup>

In addition to furthering the best interests of children, the prohibition of preferences based upon genetic connections in the context of parents who mutually agree to conceive children via ART will result in same-sex couples making decisions about how they will employ ART based upon what is best for their particular families, as opposed to fear or anxiety about future legal rights. The law should avoid sending a message to individuals in same-sex relationships that allowing a significant other to be the one to use his or her genetic materials to conceive a child means that these individuals are setting themselves up for weaker claims to custody rights should the relationship dissolve. Such a message would promote assisted reproductive decisions based upon reasons far removed from the child's well-being and likely would have the equally harmful result of promoting feelings of parental inferiority in non-genetic parents.<sup>195</sup> Similarly, the law should not encourage a situation in which members of female same-sex couples feel that the only potential way to ensure equal footing in custody disputes is to conceive a child to whom they both have some type of biological connection, which can only be achieved through a costly, complicated procedure wherein one partner's egg is combined with donor sperm to create an embryo that is placed in the other partner's womb.<sup>196</sup> It is best for same-sex couples, their families, and society if decisions relating to ART are made based upon considerations relating to the health and well-being of each parent and the child as opposed to fear about future parental rights.

### C. Likely Pushback to the Proposed Legal Reform

Individuals opposed to a rule that prohibits judges from applying preferences based upon genetic connections in custody disputes between two legal parents who, by mutual agreement, conceived a child via ART, will likely make a variety of arguments focused upon the superiority of genetic parent-child relationships. For example, research conducted in the adoption context

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expectations set for them.”); Lynne Marie Kohm, *Tracing the Foundations of the Best Interests of the Child Standard in American Jurisprudence*, 10 J.L. & FAM. STUD. 337, 371 (2008) (quoting Julie E. Artis, *Judging the Best Interests of the Child: Judges' Accounts of the Tender Years Doctrine*, 38 LAW & SOC'Y REV. 769, 785 (2004)) (“[E]ven though the child custody law is gender-neutral, some judges maintain a firm belief in biologically driven gender differences in parenting abilities and openly admit that this belief may affect their decisions.”).

194. See *supra* notes 136–37 and accompanying text.

195. See *supra* notes 114–17 and accompanying text.

196. Paulk, *supra* note 6, at 788.

indicating that many adoptees at some point in their lives wish to locate their genetic parents, has been used to support arguments regarding the superior importance of genetic-parent child relationships.<sup>197</sup> Related research indicating that for some adopted children, having knowledge about, or a relationship with, their genetic parents may help them to more effectively develop a sense of self-identity,<sup>198</sup> might be used to make similar arguments about the superiority of genetic parent-child relationships.<sup>199</sup> As an initial matter, it is important to note that the fact that some adopted children wish to identify or connect with their genetic parents, and may potentially benefit in some way by doing so, does not lead to the conclusion that genetic parents are superior parents or that the bonds between genetic parents and their children are uniformly stronger than those between non-genetic parents and their children.

Moreover, this adoption research is largely irrelevant to the issues involved in custody disputes between two legally recognized parents who, by mutual agreement, conceived a child via ART. Unlike a closed adoption, a custody determination between fit legal parents does not involve the severance of a legally recognized relationship between the child and the existing genetic legal parent and does not result in a child being denied access to the genetic parent or knowledge of the identity of the genetic parent.<sup>200</sup> In a custody dispute between two fit legal parents who conceived a child via ART, both the genetic and non-genetic parent would remain legal parents regardless of what custody arrangement the court ordered.<sup>201</sup> Courts in custody disputes

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197. Lindsay J. Rohlf, *The Psychological-Parent and De Facto-Parent Doctrines: How Should the Uniform Parentage Act Define "Parent"?*, 94 IOWA L. REV. 691, 722 (2009).

198. See Alison Fleisher, Note, *The Decline of Domestic Adoption: Intercountry Adoption as a Response to Local Adoption Laws and Proposals to Foster Domestic Adoption*, 13 S. CAL. REV. L. & WOMEN'S STUD. 171, 182 (2003) (footnotes omitted) ("Advocates of open adoption hold, '[p]sychology recognizes that an individual cannot have a healthy sense of self-esteem without complete identity formation.' They believe that open adoptions and reunions with birth parents enable adoptees to formulate an identity."); Randy Frances Kandel, *Which Came First: The Mother or the Egg? A Kinship Solution to Gestational Surrogacy*, 47 RUTGERS L. REV. 165, 198–99 (1994) (footnotes omitted) ("Genealogical bewilderment may inhibit the development of an adoptee's healthy and secure self-identity, and impair the ability to form close and trusting relationships with adoptive parents and significant others in adult life. Open adoption does not eliminate these difficulties entirely, but clinical experience suggests that it alleviates them.").

199. See *V.C. v. M.J.B.*, 748 A.2d 539, 554 (N.J. 2000) (stating that although psychological parents "stand[] in parity" with genetic parents, if all else is equal in applying the best interests of the child standard, custody should be given to the genetic parent "because eventually, in the search for self-knowledge, the child's interest in his or her roots will emerge").

200. 2 C.J.S. *Adoption of Persons* § 135 (2015).

201. See Irene Hansen Saba, *Parental Immunity from Liability in Tort: Evolution of a Doctrine in Tennessee*, 36 U. MEM. L. REV. 829, 892 (2006) ("[T]he award of

between two fit legal parents must determine the portion of time for which the child resides with each parent (physical custody), and the rights of each parent to make major decisions relating to the child's upbringing (legal custody).<sup>202</sup> The court may award physical custody to each parent in equal proportion, may award one parent primary physical custody and the other parent visitation, or may order an arrangement that falls somewhere in between those alternatives.<sup>203</sup> Similarly, legal custody can be awarded solely to one parent or awarded jointly to both parents.<sup>204</sup> Importantly, unlike a genetic legal parent who places his or her child for adoption, a fit genetic legal parent who does not receive primary physical or legal custody is not stripped of a legally recognized and protected relationship with the child, and the child will not be denied access to that parent's identity.<sup>205</sup> To the contrary, fit non-custodial parents have a strong right to maintain a relationship with their children through liberal contact and visitation.<sup>206</sup> Thus, children in these situations will have access to, and a protected relationship with, their genetic legal parent regardless of the custody arrangement ordered by the court.

Another strain of argument regarding the superiority of genetic parent-child relationships stems from evolutionary biologists, who theorize that genetic parents tend to be more strongly invested than anyone else in the well-being of their children due to a desire to ensure the survival of their genes.<sup>207</sup> As an initial matter, there is significant disagreement regarding the research

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legal custody to one parent does not terminate the constitutionally protected parental rights of the non-custodial parent.”).

202. ROBERT E. OLIPHANT & NANCY VER STEEGH, *FAMILY LAW EXAMPLES AND EXPLANATIONS* 105 (3d ed. 2010). During the time a parent has physical custody, he or she has the right to make routine decisions about the child's care. *Id.*

203. *Id.*

204. *Id.*

205. *See supra* note 200 and accompanying text; *infra* note 206 and accompanying text.

206. DOUGLAS E. ABRAMS ET AL., *CONTEMPORARY FAMILY LAW* 803 (2d ed. 2009) (“Visitation is generally thought to be the right of any fit non-custodial parent.”); THOMAS R. YOUNG, 1 *LEG. RTS. CHILD. REV. 2D* § 3:2 (3d ed. 2014) (footnotes omitted) (“As a general rule, it is recognized that a noncustodial separated parent has a liberty interest in communicating with and visiting his or her child where custody of the child has been granted to the State or to the other custodial parent. . . . In other words, most courts subscribe to the view, subject to the best interests of the child rule, that the noncustodial parent should be awarded liberal visitation rights in order to afford the children of the marriage the opportunity to have continued physical and emotional contacts with both parents.”); Daniel Pollack & Susan Mason, *Mandatory Visitation, In the Best Interest of the Child*, 42 *FAM. CT. REV.* 74, 74 (2004) (“Excluding circumstances in which visitation would be injurious to minor children, a noncustodial parent is given liberal visitation rights.”). Moreover, in recent years many jurisdictions have enacted some form of a preference for joint custody arrangements in order to ensure that children are able to maintain meaningful relationships with both of their legal parents. ABRAMS ET AL., *supra*, at 782.

207. DiFonzo & Stern, *supra* note 6, at 109; Swift, *supra* note 97, at 948.

used to support this theory, some of which is based upon animal behavior.<sup>208</sup> Moreover, prominent research relating to this theory involving human behavior has focused on the relationships between children and their stepparents or children and the non-marital partners of their genetic parents.<sup>209</sup> It is important to note at the outset that the relationships between the children and the stepparents and other non-genetic parental figures examined in these studies differ in critical ways from the parent-child relationships involving a non-genetic parent who mutually agreed with the genetic parent to conceive their child via ART.<sup>210</sup> Critically, non-genetic parents in the ART context, unlike the stepparents and other parental figures involved in these studies, participated in the decision to create the child and were involved in the child's life from the beginning. Nonetheless, it is likely that those who oppose prohibiting judicial preferences in favor of genetic parents in custody disputes between two legal parents who conceived their child via ART will attempt to use research in the evolutionary biology area to support their position, and thus it is helpful to briefly address this research.

Some of the research that has been used to support evolutionary biology theories regarding genetic parents' superior investment in their children's well-being involves studies finding higher rates of child abuse among stepparents as compared to genetic parents.<sup>211</sup> This research has failed to demonstrate, however, that it is the lack of genetic connections, and not other factors, such as the fact that stepparents generally enter a child's life at a later point and under different circumstances than genetic parents, that accounts for higher rates of abuse.<sup>212</sup> Indeed, existing research demonstrating that there is no increased risk of abuse by adoptive parents as compared to genetic parents indicates that something other than genetic connections is responsible for the increased risk of abuse by stepparents.<sup>213</sup>

Another notable study relating to evolutionary biology theories on parent-child relationships indicates that the degree to which residential father figures tend to invest in biological versus non-biological children differs depending on family structure, with stepfathers living in blended marital households consisting of both biological and non-biological children tending to invest and be involved equally in both categories of children.<sup>214</sup> Moreover,

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208. June Carbone & Naomi Cahn, *Which Ties Bind? Redefining the Parent-Child Relationship in an Age of Genetic Certainty*, 11 WM. & MARY BILL RTS. J. 1011, 1029 (2003).

209. See *infra* notes 210–18 and accompanying text.

210. See *supra* note 181 and accompanying text.

211. Carbone & Cahn, *supra* note 208, at 1029–30.

212. *Id.* at 1031.

213. *Id.*

214. Sandra L. Hofferth & Kermyt G. Anderson, *Are All Dads Equal? Biology Versus Marriage as a Basis for Paternal Investment*, 65 J. MARRIAGE & FAM. 213, 224, 228, 230 (2003) (“A comparison of average levels of involvement in blended families suggests that the differences between stepfathers and biological fathers disappear.”).

while the same study found that some categories of residential fathers tend to invest more in biological children than a spouse or cohabitating non-marital partner's children from a former relationship,<sup>215</sup> the research did not indicate that genetic connections, as opposed to other factors,<sup>216</sup> were the primary reason for this behavior.<sup>217</sup> In fact, the study concluded that "marriage [to the other residential parent] per se confers advantage in terms of father involvement above and beyond the characteristics of the fathers themselves, whereas biology does not."<sup>218</sup> Furthermore, a subsequent study of residential fathers found that "married and cohabiting social [non-genetic] fathers are reported by mothers to exhibit parenting practices that are equal to or of higher quality than those of their biological counterparts on most of our measures."<sup>219</sup> Notably, research involving adoptive families indicates that there is no difference in the level of parental investment between adoptive and genetic parents, further demonstrating that genetic connections are not an effective proxy for superior parental investment.<sup>220</sup>

Finally, even if the research regarding genetic parent-child relationships made a more compelling argument for the general superiority of genetic parent-child bonds or genetic parents' childrearing abilities, allowing judges to prefer one parent over the other on the basis of genetic connections still would not be the most effective way to further the best interests of children. As discussed above, there is no reasonable argument that genetic connections ensure a superior parent-child bond or superior parenting abilities in every case.<sup>221</sup> There is no doubt that there are many genetic parents who have poor

215. *Id.* at 224, 228 ("[T]he difference in father involvement between biological and nonbiological resident children across all families disappears in married blended families.").

216. *Id.* at 221–22.

217. *Id.* at 229 ("The fact that they are more likely to support nonresidential children and that they move into families with older children are the major reasons why stepfathers are not investing as much in children as biological fathers.").

218. *Id.* at 230. The authors also state that their study indicates that "biology is not as important as posited by the evolutionary model" and "[b]iology explains less of father involvement than anticipated once differences between fathers are controlled." *Id.* at 230, 213. In addition, the authors further state that their findings, while not definitive, "support[] the argument that marriage is more important than the biological relationship between father and child." *Id.* at 228.

219. Lawrence M. Berger et al., *Parenting Practices of Resident Fathers: The Role of Marital and Biological Ties*, J. MARRIAGE & FAM. 70:625-39, 10 (2008), <http://www.ncbi.nlm.nih.gov/pmc/articles/PMC3169424/pdf/nihms315497.pdf>. The authors of the study also found "some (marginally significant) evidence that married social fathers are more engaged with children and take on more shared responsibility in parenting than married biological fathers." *Id.*

220. Robin Fretwell Wilson, *Trusting Mothers: A Critique of the American Law Institute's Treatment of De Facto Parents*, 38 HOFSTRA L. REV. 1103, 1134 n.169 ("Multiple studies of adoptive parents report that they invest as heavily in children as biological parents.").

221. See *supra* note 187 and accompanying text.

parental abilities and little or no bond to their children.<sup>222</sup> Genetic connections simply are not an effective proxy for superior parent-child bonds or parental abilities. It follows, therefore, that the most effective way for judges to reach a determination that furthers a child's best interests is to examine the actual bonds between the child and each parent and the actual ability and disposition of each parent to care for the child instead of relying on genetic connections as a shortcut or proxy for analyzing these important considerations. For custody law to be successful in furthering children's best interests, it is essential that judges are required to do the difficult work involved in comprehensive examinations of the parent-child relationships in question.

## VI. CONCLUSION

Due to the hard-won victories of the LGBT rights movement in the areas of marriage equality and second parent adoption, it is now more common than ever before for both members of same-sex couples to be considered the legal parents of children conceived within their relationships via ART. The importance of developments that have allowed both the genetic parent and the non-genetic parent in these situations to be recognized as a child's legal parents cannot be overstated. Legal parenthood bestows essential protections on parent-child relationships and, importantly, places the two parents on equal constitutional footing in seeking rights to custody and visitation in the event that their relationship dissolves. Despite these significant advancements with regard to the ability of non-genetic parents of children conceived via ART to obtain the status of legal parent, however, the battle to provide equal parental rights to non-genetic parents is far from over.

Under the best interests of the child standard, which governs custody disputes between two legal parents, judges maintain a great amount of discretion with regard to what factors they consider and how these factors are weighed.<sup>223</sup> Due to the long history in the United States of tying legal parenthood rights to genetic connections, it is likely both that genetic parents in custody disputes involving a child conceived via ART will attempt to use their genetic connections, and the other parent's lack thereof, in their favor, and that many judges will apply a preference in favor of genetic parents when applying the best interests of the child standard. Allowing judges to rely on genetic connections as a proxy, shortcut, or substitute for consideration of important factors relating to parental abilities and parent-child bonds would be contrary to the best interests of children, as social science research demonstrates that genetic connections are not an effective proxy for superior parent-child bonds or superior parenting abilities.<sup>224</sup> In order to reach custody determinations that most effectively further children's best interests, judges must be required to do the important work of examining actual evidence of each parent's caretak-

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222. See *supra* note 187 and accompanying text.

223. See *supra* note 27 and accompanying text.

224. See *supra* Part V.A.

ing abilities and each parent's bond with the child. It is therefore essential that states reform their best interests of the child standards to prohibit judicial application of preferences in favor of one parent over the other parent on the basis of genetic connections in custody disputes involving two legal parents who, by mutual agreement, conceived their child via ART.