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TWO LEGAL MOTHERS: CEMENTING PARENTAL RIGHTS FOR LESBIAN PARENTS IN COLORADO

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Two married couples decide to have a child via artificial reproduction. One parent in each couple will carry and give birth to the child. The other parent has no biological relationship with the child.

One is an opposite-sex couple. Because they are married, they know that the father will automatically be considered the legal father. But the other couple is a lesbian couple. Leading up to the birth, the lesbian couple seeks out a lawyer and expresses concern regarding the nonbiological parent's legal status. Because both are women, they know their relationship to their child will be constantly questioned. How can they ensure that the nonbiological mother has the same legal rights as the child's birth mother?

Colorado law provides many different vehicles for establishing this legal status, but none offer the same sense of security that opposite-sex parents enjoy. An attorney may advise the same-sex couple that the best option to protect their family is for the nonbiological mother to adopt the child. However, the couple is anxious about the amount of money and time adoption requires. After a deep legal analysis, the attorney may advise that the nonbiological mother is already presumed to be the child's legal parent under the Uniform Parentage Act (UPA). The mothers may also find a Voluntary Acknowledgment of Parentage form ("VAP"), on which they can declare the second parent's status. But the couple may not be sure that

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the VAP can be used in their situation or that it will protect their parentage status in all circumstances.

To remedy this confusion, Colorado must do two things. First, Colorado should connect existing VAPs to a court decree, such as an adoption order. Second, Colorado should adapt the UPA and VAPs to specifically apply to the lesbian couple's situation. Mothers should be able to have secure legal relationships to their children without adopting their own child or hiring an attorney to interpret the language of the UPA.

INTRODUCTION

After *Obergefell v. Hodges*[1] and *Pavan v. Smith*,[2] same-sex couples became constitutionally entitled to the same rights afforded to opposite-sex couples—including the parental rights and responsibilities that married opposite-sex parents enjoy.[3] Thus, Colorado should be granting lesbian married parents the same automatic recognition of parentage afforded to married opposite-sex couples. However, legislative guarantees of parental rights are not as clear as those granted by federal courts.[4] Parents should not need an attorney to interpret the laws and determine whether they are a legal parent of their own child. Yet many same-sex parents do just that in order to ensure their families are as legally secure as families with opposite-sex parents. Despite Colorado's existing laws and procedures, lesbian mothers must navigate a labyrinthine legal framework that would horrify most non-LGBTQ[5] families—all just to cement their parental rights.

Legal parenthood provides rights for the parents and benefits for the children.[6] When a child has two parents, both parents are able to seek custody, support, and maintenance to solidify their relationships to their child, even if their relationship with the other parent ends;[7] therefore, the child has stronger financial security and receives more benefits with two parents.[8] An

1. 135 S. Ct. 2584, 2604–05 (2015) (legalizing marriage for same-sex couples).

2. 137 S. Ct. 2075, 2079 (2017) (extending statutory presumptions of parentage to lesbian mothers).

3. *Id.* at 2077.

4. *See infra* Section II.C.

5. I use "LGBTQ" in this Comment because it is the term preferred by the Gay and Lesbian Alliance Against Defamation (GLAAD). *GLAAD Media Reference Guide – Lesbian/Gay/Bisexual Glossary of Terms*, GLAAD, https://www.glaad.org/reference/lgbtq (last visited Feb. 27, 2020) [https://perma.cc/D7F5-JC4F]. I do not mean to exclude any individuals from the community who have non-mainstream sexual or gender identities. LGBTQ stands for lesbian, gay, bisexual, transgender, and queer or questioning. There are many other people who belong in this community with identities that do not fit into these four identities; for example, people who identify as queer, intersex, asexual, aromantic, agender, or non-binary are also members of this community.

6. Melanie B. Jacobs, *Micah Has One Mommy and One Legal Stranger: Adjudicating Maternity for Nonbiological Lesbian Coparents*, 50 BUFF. L. REV. 341, 346 (2002).

7. *Id.* at 367.

8. *Id.* at 346. As Jacobs states:

individual who is not a legal parent of the child usually cannot provide such benefits, despite the parent-like relationship.[9] Furthermore, a functional, non-legal parent has no guaranteed right to participate in parental responsibilities, such as medical decision-making, and has no right to continue fostering the parent-child relationship after the termination of their relationship with the child's legal parent.[10] This framework for establishing parental rights negatively impacts same-sex couples who decide to raise children together, because only one parent can usually be biologically related to the child.[11]

While these issues are important to all parents in non-traditional families, I will be focusing on lesbian parents. The issues facing the broader LGBTQ community are numerous; each is deserving of its own analysis and proposed solution beyond the scope of my discussion. For example, I would like to explore the parental rights and responsibilities of men in same-sex couples as well, but their situations pose unique challenges. A man (unless he is transgender[12] and has not had sex-reassignment surgery) cannot give birth to a child. Therefore, gay men go through surrogates to have children who share their genetic material. The regulations and procedures surrounding surrogacy are specific and vary by jurisdiction, usually requiring detailed contracts meeting statutory requirements. Those

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> [A]n adjudication of legal parentage under the UPA entitles a child to receive child support, qualify as a dependent on her parent's health insurance, collect Social Security benefits from her parent, sustain an action for wrongful death, recover under a state worker's compensation law, and in many states, to inherit from her parent . . . (footnotes omitted).

9. *Id.* at 346–47.

10. *Id.*

11. 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 (2009).

12. I use this term broadly with the understanding that not all individuals in this situation would use the term "transgender" to describe themselves and may prefer pronouns other than "he." As I am not referencing a particular individual, I use the broader term most understood by individuals outside of the community. For a more detailed explanation of the proper terms used by individuals in the community, see *Transgender Identity Terms and Labels*, PLANNED PARENTHOOD, https://www.plannedparenthood.org/learn/sexual-orientation-gender/trans-and-gender-nonconforming-identities/transgender-identity-terms-and-labels (last visited Jan. 23, 2020) [https://perma.cc/3EBT-8TZL].

unique problems and inconsistencies merit a separate (or, indeed, many separate) article(s) for proper exploration.[13]

Colorado's lesbian mothers do have a few laws working in their favor. The Uniform Parentage Act (UPA)[14] suggests the methods for determining paternity may also be applied to determine *ma*ternity in the lesbian-mother context.[15] However, the statute is not easily interpreted on its face, and fully understanding its language requires professional legal analysis.[16] While, logically, the UPA applies equally to same-sex and opposite-sex spouses, the statute does not expressly guarantee that the nonbiological mother of a child will receive the same treatment as a nonbiological *father* of a child.[17] Colorado has relatively hospitable law and policy in place to support lesbian parents forming families, but the framework is still not clear enough for parents seeking answers. By adapting specific laws and agency procedures, lesbian mothers will face less mystery in recognizing and enforcing the nonbiological parent's status.

Additionally, such changes are necessary because not all countries are accepting of LGBTQ individuals and their families.[18] LGBTQ parents fear proving the legitimacy of their parentage to other nations.[19] LGBTQ parents tell stories of be-

13. For an overview of surrogacy, see *Overview of the Surrogacy Process*, HUMAN RIGHTS CAMPAIGN, https://www.hrc.org/resources/overview-of-the-surrogacy-process (last visited Jan. 23, 2020) [https://perma.cc/3W84-2JWT]; *Legal Aspects of Domestic Gestational Carrier Agreements*, RESOLVE, https://resolve.org/what-are-my-options/surrogacy/legal-aspects-of-domestic-gestational-carrier-agreements (last visited Jan. 23, 2020) [https://perma.cc/Y6L3-Q4HX].

14. COLO. REV. STAT. §§ 19-4-101 to -130 (2019).

15. *See* § 19-4-122 ("Insofar as practicable, the provisions of this article applicable to the father and child relationship apply [to a mother and child relationship].").

16. *See, e.g.*, § 19-4-105 (using language such as "father," "paternity," "husband," and "a man is presumed to be the natural father").

17. The UPA is not gender-neutral, *see* § 19-4-105, nor does a separate section describe the nonbiological mother (although the UPA does require applying the father statutes to mothers, *see* § 19-4-122).

18. *LGBTI Travel Information*, U.S. DEP'T STATE BUREAU CONSULAR AFF., https://travel.state.gov/content/travel/en/international-travel/before-you-go/travelers-with-special-considerations/lgbti.html (last visited Jan. 23, 2020) [https://perma.cc/VQ8H-CCXN].

19. *See* Kelsy Chauvin, *The U.S. State Department's Travel Tips for Same-Sex Couples and Families*, CONDÉ NAST TRAVELER (June 13, 2018), https://www.cntraveler.com/story/the-us-state-departments-travel-tips-for-same-sex-couples-and-families [https://perma.cc/L92H-CC8G]; Abbie Goldberg, *Traveling as a Gay Parent Comes With Extra Baggage*, PSYCHOL. TODAY (May 7, 2012), https://www.psychologytoday.com/us/blog/beyond-blood/201205/traveling-gay-parent-

ing stopped at customs because officials did not believe they were the parents of their child.[20] The U.S. Department of State even recommends carrying a birth certificate and a power of attorney authorizing nonbiological parents to travel with their own children.[21]

Regrettably, lesbian mothers still face challenges stateside as well. Parents worry about whether they will retain legal parenthood upon moving to or traveling through a new state.[22] Lawyers advise that adoption orders or similar judicial decrees are the strongest ways to protect the nonbiological mother's legal status.[23] States are required to recognize adoption orders from other jurisdictions, and a judicial order is more likely to be recognized in foreign countries.[24] But adoption is costly,[25] time-consuming,[26] and degrading to mothers who are already parents in every other sense of the word. Parents should not have to adopt their own children to protect their rights.[27]

This Comment will analyze the various methods for nonbiological mothers to protect their parentage rights in Colorado and propose legislative and procedural fixes to help demystify common concerns and questions confronting lesbian mothers. First, this Comment will review the U.S. Supreme Court's recent recognition of LGBTQ marriage equality in the United States to

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comes-extra-baggage [https://perma.cc/X3W9-DLSP]; Elizabeth A. Harris, *Same-Sex Parents Still Face Legal Complications*, N.Y. TIMES (June 20, 2017), https://www.nytimes.com/2017/06/20/us/gay-pride-lgbtq-same-sex-parents.html [https://perma.cc/4H84-QT3L].

20. *See* Goldberg, *supra* note 19; *see also LGBTI Travel Information*, *supra* note 18 (recommending legal and health documents, parentage or custody documents, attorney contact information, and contact information for the U.S. Embassy or Consulate).

21. Chauvin, *supra* note 19.

22. *See* Harris, *supra* note 19.

23. Chauvin, *supra* note 19.

24. *Id.*

25. On average, second-parent adoptions cost from $2,000 to $3,000, although adoptions generally can cost up to $40,000. *How Much Does Adoption Cost?*, HUM. RTS. CAMPAIGN, https://www.hrc.org/resources/how-much-does-adoption-cost (last visited Jan. 23, 2020) [https://perma.cc/32LE-HFFV].

26. Many factors affect how long adoption may take. For example, adopting an infant can take two to seven years, whereas adopting a foster child can take six to eighteen months. *How Long Does It Take to Adopt a Child?*, NAT'L ADOPTION FOUND., https://www.fundyouradoption.org/resources/how-long-does-it-take-to-adopt-a-child (last visited Jan. 23, 2020) [https://perma.cc/WE6B-V5DK].

27. In fact, while the statute does not expressly prohibit a parent who is on the birth certificate from adopting the child, such an interpretation can be (and, according to some attorneys, has been) made. *See infra* Section II.A.

explain why states have an obligation to protect parental rights for same-sex couples. Second, the Comment will analyze the different statutes and procedures available to same-sex couples in Colorado to cement the legal status of their families. Finally, since none of these procedures are ultimately enough to assuage the concerns of LGBTQ parents, this Comment proposes legislative and procedural changes that would provide certainty and alleviate confusion. Given the expansion of LGBTQ rights and the continued fears of LGBTQ parents, Colorado law must expressly protect parental rights of the nonbiological mother and agencies must clarify the process of solidifying those rights. While current laws in Colorado support lesbian parents establishing families, the presumptions of parentage and the Voluntary Acknowledgment of Parentage ("VAP") must be adapted to be accessed more easily without an attorney.

I. HOW SAME-SEX PARENTS GAINED EQUAL RIGHTS

Questions about civil rights for same-sex couples have been debated for decades.[28] Attraction to the same sex was once treated as a mental illness, and homosexual activity was once illegal.[29] Without access to marriage, same-sex couples were de-

28. The movement for protection of LGBTQ individuals and their rights dates back to before the Stonewall riots in 1969. Gloria Teal, *The Spark that Lit the Gay Rights Movement, Four Decades Later*, PBS (June 30, 2010), http://www.pbs.org/wnet/need-to-know/culture/the-spark-that-lit-the-gay-rights-movement-four-decades-later/1873/ [https://perma.cc/B6HF-TUUE]. Even today, only eighteen states and the District of Columbia protect LGBTQ youth from conversion therapy; only thirteen states and the District of Columbia ban insurance exclusions for transgender healthcare and provide transgender-inclusive health benefits for state employees; and only twenty states and the District of Columbia prohibit discrimination based on sexual orientation and gender identity in public accommodations. *State Maps of Laws & Policies: Anti-Conversion Therapy*, HUM. RTS. CAMPAIGN, https://www.hrc.org/state-maps/anti-conversion%20therapy (last updated Oct. 31, 2019) [https://perma.cc/C8CR-Z3RB] (indicating the states which prevent conversion therapy); *State Maps of Laws & Policies*, HUM. RTS. CAMPAIGN, https://www.hrc.org/state-maps/transgender-healthcare (last updated Jan. 2, 2020) [https://perma.cc/766R-HWFY] (indicating which states ban insurance exclusions for transgender healthcare); *State Maps of Laws & Policies: Public Accommodations*, HUM. RTS. CAMPAIGN, https://www.hrc.org/state-maps/public-accomodations (last updated June 11, 2018) [https://perma.cc/DD7R-AXLL] (indicating which states prohibit discrimination based on sexual orientation).

29. *See* Teal, *supra* note 28 ("Gay people could be arrested for being gay, some were forced to have lobotomies, and even The Stonewall Inn was an unlicensed bar because in New York City it was illegal to serve alcohol to gay people.").

nied the other rights and benefits that come with marriage, such as tax and retirement benefits.[30] Similarly, same-sex couples had few ways of forming secure families where both parents were the legal parents of the children.[31] Usually, only the biological parent was recognized as the child's legal parent, even though a two-parent household is generally accepted as preferable for children.[32]

Even though two women are in a loving, committed relationship and plan to have a child together, only one of them is able to carry and give birth to the child.[33] Before same-sex couples were allowed to marry, the nonbiological mother could only gain legal parent status through adoption, which was only available to unmarried partners in a few states.[34] If the biological mother died or the relationship terminated in another way, the other woman had no standing to claim the child as hers or seek continued connection with the child. In fact, the child could end up with the legal parent's relatives or in the custody of the state instead of with the nonbiological parent.[35] Even though nonbiological lesbian mothers have a relationship with their children that is similar to that of fathers in opposite-sex couples, fathers have legal rights to continue to be part of their children's lives, while lesbian mothers do not necessarily have the same legal rights to continue that relationship.[36]

A. Obergefell v. Hodges*: Marriage as a Fundamental Right*

Although the Supreme Court held that laws criminalizing same-sex intercourse were unconstitutional in 2003,[37] same-sex couples were not granted the right to marry until *Obergefell v.*

30. Kate Ashford, *11 Things You Never Thought of When You Decided Not to Get Married*, FORBES (Sept. 26, 2014), https://www.forbes.com/sites/kateashford/2014/09/26/deciding-not-to-get-married/ [https://perma.cc/ZX8A-JJAE].

31. *See* Jacobs, *supra* note 6, at 344–45 (describing how some states were beginning to offer adoption as one way for the nonbiological mother to become a parent of the child, but otherwise such mothers did not have any legal mechanisms to establish parental rights).

32. *See id.* at 352.

33. *See* Polikoff, *supra* note 11, at 206.

34. Jacobs, *supra* note 6, at 345.

35. *Id.* at 341, 345–47.

36. *Id.*

37. Lawrence v. Texas, 539 U.S. 558, 578 (2003).

Hodges in 2015.[38] There, the Supreme Court held same-sex couples have as much of a right to the institution of marriage as opposite-sex couples.[39]

The *Obergefell* Court emphasized that the material benefits of marriage cause serious inequity between opposite-sex families and same-sex families.[40] The Court stated:

> [T]he right to marry is a fundamental right inherent in the liberty of the person, and under the Due Process and Equal Protection Clauses of the Fourteenth Amendment couples of the same-sex may not be deprived of that right and that liberty. The Court now holds that same-sex couples may exercise the fundamental right to marry. No longer may this liberty be denied to them.[41]

The Court expressly relied on the effect of marriage on children as grounds for its conclusion:

> Excluding same-sex couples from marriage thus conflicts with a central premise of the right to marry. Without the recognition, stability, and predictability marriage offers, their children suffer the stigma of knowing their families are somehow lesser. They also suffer the significant material costs of being raised by unmarried parents, relegated through no fault of their own to a more difficult and uncertain family life. The marriage laws at issue here thus harm and humiliate the children of same-sex couples.[42]

The Court stated that decisions about procreation and childrearing are "among the most intimate that an individual can make," along with "contraception, [and] family relationships . . . all of which are protected by the Constitution."[43] Marriage "safeguards children and families," not only by providing material protections but also by preserving the child's ability "to understand the integrity and closeness of their own family" and

38. 135 S. Ct. 2584, 2604–05 (2015).
39. *Id.*
40. *Id.* at 2600–01.
41. *Id.* at 2604–05.
42. *Id.* at 2600–01.
43. *Id.* at 2599.

ensuring "the permanency and stability important to children's best interests."[44]

The Court put the right to raise a family at the center of the right to marry, showing intent to extend the rights of married opposite-sex couples to married same-sex couples. Given the emphasis on the interests of children, the legal question remained whether parental rights and responsibilities must be extended to same-sex spouses with children.[45] Lower courts around the country thus continued to struggle with questions of which rights and responsibilities must be extended under *Obergefell* and which were left to the states to determine.

B. Pavan v. Smith*: Extending* Obergefell *to Parental Rights and Responsibilities*

After *Obergefell*, some lower courts declined to extend the Supreme Court's reasoning to other questions surrounding the rights of same-sex couples. For example, *Lake v. Putnam* involved the parental rights of a biological mother's former same-sex partner.[46] The former partner did not have standing to seek parenting time[47] with the child because she never married the biological mother, despite the illegality of same-sex marriage at the time of their relationship.[48] The *Lake* court held that the former partner, although a functional parent, had no rights after the relationship with the biological mother fell apart.[49] Although *Obergefell* dictates equal treatment of same-sex couples, it does not ensure parental rights for same-sex parents.[50]

The Court later partially explained which rights must be extended under *Obergefell* with its decision in *Pavan v. Smith*,[51]

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44. *Id.* at 2600 (citing United States v. Windsor, 570 U.S. 744, 772 (2013)).

45. *See* Leslie Joan Harris, Obergefell*'s Ambiguous Impact on Legal Parentage*, 92 CHI.-KENT L. REV. 55, 69 (2017) (describing how different jurisdictions have approached the question of legal parentage in the wake of *Obergefell*).

46. 894 N.W.2d 62, 64 (Mich. Ct. App. 2016).

47. The time visiting a child split between parents used to be referred to as "visitation." However, the terminology has changed to "parenting time" in order to avoid suggesting that the parent without physical custody is merely visiting their child.

48. *Lake*, 894 N.W.2d at 65–66.

49. *Id.* at 67–68.

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

51. 137 S. Ct. 2075 (2017).

which concerned suits filed by two same-sex married couples.[52] In that case, one spouse in each couple gave birth to a child using an anonymous sperm donor, and each listed the other spouse as a parent for the birth certificates.[53] However, the Arkansas Department of Health issued birth certificates listing only the birth mother's name.[54] The law at issue directed the Department to include the mother's male spouse on the birth certificate *even if* the child was conceived with the use of artificial insemination.[55] The Arkansas Supreme Court decided that the Department had made the right decision in refusing to add the mother's female spouse because the "statute center[ed] on the relationship of the biological mother and the biological father to the child, not on the marital relationship of husband and wife . . . ."[56]

Arkansas believed it had rational bases for refusing to put the mother's female spouse on the birth certificate.[57] The State argued that birth certificates were mainly biological records.[58] The State claimed to have a legitimate interest in preserving an accurate biological record of its citizens,[59] further arguing that the child may one day need access to information about his or her biological parents for health-related reasons.[60] Without having a record of the biological parents, the child would have no way of knowing if they were at risk for hereditary health problems.[61]

On the other hand, the mothers argued that allowing a female spouse to be listed on the birth certificate was beneficial for the child for legal and practical reasons.[62] A birth certificate is conferred by the government, recognized across the country, and readily accepted for establishing identity, parentage, and citizenship.[63] Beyond that, birth certificates are required in many

52. *Id.* at 2077.
53. *Id.*
54. *Id.*
55. *Id.*
56. *Id.* (quoting Smith v. Pavan, 505 S.W.3d 169, 178 (Ark. 2016)).
57. *Id.*
58. *Id.*
59. Brief for the Respondent in Opposition, *Pavan*, 137 S. Ct. 2075 (No. 16-992), 2017 WL 1397395 (hereinafter *Pavan* Respondent Brief).
60. *Id.*
61. *Id.*
62. Petition for a Writ of Certiorari, *Pavan*, 137 S. Ct. 2075 (No. 16-992), 2017 WL 587527 (hereinafter *Pavan* Cert Petition).
63. *Id.*

legal contexts, such as determining parental decision-making authority, verifying parental relationships, and obtaining passports for children.[64] The mothers argued that such a record is necessary to protect the legitimacy of the family, especially the relationships with nonbiological family members.[65] Refusing to list the mother's spouse on the birth certificate would contribute to a stigma that the family is somehow worth less than a family with opposite-sex parents,[66] just as the Court feared in *Obergefell*.[67] Despite the mothers' arguments, the Arkansas Supreme Court agreed with the State's reasoning.

The U.S. Supreme Court ultimately disagreed with the Arkansas Supreme Court's decision.[68] With regard to the State's biological records argument, the Court noted that when a mother gave birth to a child through the use of artificial insemination, her male spouse was listed as a parent, not the biological father. Therefore, the Supreme Court reasoned, keeping biological records was not the State's primary motivation for omitting the female spouse from the birth certificate.[69] Thus, the Arkansas statute in question denied married same-sex couples access to benefits that would otherwise be available to married opposite-sex couples.[70] In identical situations where the child was conceived using artificial insemination, the spouse of the mother in an opposite-sex relationship would be included on the birth certificate, but the spouse of the mother in a same-sex relationship would not be included.[71] Therefore, the Court expressly extended *Obergefell* to apply to such situations, because it had already stated in *Obergefell* that same-sex couples must be afforded the same rights as opposite-sex couples.[72] The Court placed the rights to marriage, procreation, and childrearing on a level playing field, affording each significant weight.[73]

By denying the mothers in *Pavan* rights given to opposite-sex parents in the same situation, the Arkansas officials were

64. *Id.*
65. *Id.*
66. *Id.*
67. Obergefell v. Hodges, 135 S. Ct. 2584, 2600–01 (2015).
68. Pavan v. Smith, 137 S. Ct. 2075, 2078 (2017).
69. *Id.*
70. *Id.*
71. *Id.*
72. *Id.* (citing *Obergefell*, 135 S. Ct. at 2605).
73. *Obergefell*, 135 S. Ct. at 2600–01.

violating a constitutional right clearly extended to same-sex couples in *Obergefell*.[74] *Pavan,* therefore, legitimizes same-sex families and reinforces *Obergefell*'s holding that all couples must be treated equally.

C. After Pavan*: Fear for Security and Legitimacy*

In *Pavan*, the Court made clear that same-sex couples and opposite-sex couples must be treated equally in terms of parental rights and responsibilities.[75] But as the makeup of the Supreme Court changes, many in the LGBTQ community have legitimate concerns that *Pavan* and its progeny may be overturned or distinguished in future cases to severely limit their application to future parents.[76] Furthermore, states can find ways to sidestep equal-treatment requirements to continue discriminating in subtle ways, such as by eliminating the paternity presumptions altogether rather than allow them to be extended to lesbian mothers.[77] While *Pavan* extends *Obergefell*'s reasoning for treating same-sex couples and opposite-sex couples equally at law, states may choose to circumvent this requirement by narrowing their laws concerning nontraditional

74. *Pavan*, 137 S. Ct. at 2078.

75. *Id.*

76. For example, *Vox* reported that a Court without Justice Kennedy would be more likely to "[r]ule in favor of religious challenges to anti-discrimination law, and perhaps, in an extreme case, reverse some past Supreme Court rulings on gay rights." Dylan Matthews, *America After Anthony Kennedy*, VOX (June 27, 2018), https://www.vox.com/policy-and-politics/2018/6/25/17461318/anthony-kennedy-ideology-retirement-supreme-court [https://perma.cc/5YM4-VBGZ]. Additionally, *USA Today* reported "some of the few protections we enjoy under the Constitution, for privacy and marriage equality, rest on rulings that Kennedy authored but that Kavanaugh has implicitly criticized." Notably, this article was titled "Brett Kavanaugh on Supreme Court could halt or reverse our progress toward gay equality." Hans Johnson, *Brett Kavanaugh on Supreme Court Could Halt or Reverse Our Progress Toward Gay Equality*, USA TODAY (Sept. 14, 2018), https://www.usatoday.com/story/opinion/voices/2018/09/14/brett-kavanaugh-could-threaten-gay-transgender-progress-toward-equality-column/1277425002/ [https://perma.cc/2X5Y-ZUY5]. While these are not the opinions of legal scholars, they reflect the feelings of the LGBTQ community.

77. One of the main reasons that *Pavan* held that the Arkansas statute was unconstitutional was because it treated nonbiological fathers and nonbiological mothers differently. 137 S. Ct. at 2078. Treating them equally could provide a constitutional route for Arkansas to continue refusing to place nonbiological mothers on the birth certificate.

families rather than broadening them.[78] This would limit *Pavan*'s effectiveness.

The Supreme Court is the highest court in the country, but the Court's composition in the future may change its decisions about the constitutionality of laws that discriminate against LGBTQ individuals. Further, courts are not the only state actors that need to know they cannot discriminate against same-sex parents. A state's laws, policies, and procedures must leave no room for doubt by state agencies and employees about how to treat nonbiological mothers. Therefore, the question of nonbiological lesbian mothers needs to be addressed by state legislatures to ensure the protection, recognition, and stability of the families of married lesbian couples.

Even after *Pavan* extended equal treatment to situations where one spouse in a lesbian marriage was the biological mother of the child, states like Colorado lack concrete protections for those families.[79] Where states have statutes giving a presumption of paternity to the biological mother's male spouse, courts must find that those statutes apply equally to a biological mother's female spouse[80]—but where statutes provide no such presumption, there may be no protections for a nonbiological parent.[81] Although same-sex couples must be treated equally to opposite-sex couples, many current statutes fail to contemplate nontraditional family structures, stigmatizing these families as somehow inferior.[82] Furthermore, the states that do have such

78. For example, in *Hawkins v. Grese*, the Court of Appeals of Virginia denied the biological mother's former same-sex partner standing for custody because of a general bar against third-party standing in custody disputes and the limited definition of a "parent" by statute to a relationship with a child involving either biological procreation or legal adoption. 809 S.E.2d 441 (Va. Ct. App. 2018). While no equal treatment issue was raised, the court denied a functional parent her parental rights because of the laws; only legislative action to provide for nontraditional families can remedy such a situation.

79. *See Pavan*, 137 S. Ct. at 2075.

80. *See, e.g.*, McLaughlin v. Jones, 401 P.3d 492, 498–99 (Ariz. 2017) (holding that the proper remedy for unconstitutional restriction of the marital presumption to opposite-sex couples was an extension of the presumption to same-sex spouses).

81. *See, e.g.*, Sheardown v. Gustella, 920 N.W.2d 172, 173–74 (Mich. Ct. App. 2018) (upholding as constitutional a statute narrowly defining "parent" because it applied equally to same-sex and opposite-sex couples, although it affected same-sex couples differently).

82. *See, e.g.*, *infra* Section II.C. for a discussion of how the Uniform Parentage Act in Colorado does not give explicit recognition to same-sex couples' families.

presumptions may require complex and expensive legal proceedings, such as second-parent or stepparent adoption.[83]

Legislatures must address the anxiety felt by same-sex couples who want to raise families—parents who fear that they may be challenged by the state or by individuals with biological connections to the child. Although federal constitutional law is trending towards LGBTQ equality—and practices in Colorado reflect this trend—lesbian mothers continue to be confused about what steps to take when forming their families. Mothers often seek out aid from lawyers, but they should be able to have families without needing expert legal advice.

II. THE OPTIONS AVAILABLE TO SAME-SEX COUPLES IN COLORADO SEEKING TO ESTABLISH THE LEGITIMACY OF THEIR FAMILIES

Colorado has multiple procedures for establishing legal parent-child relationships. Colorado law allows (1) for nonbiological parents to adopt their child through stepparent or second-parent adoption, (2) for the birth mother to name a second parent on a Voluntary Acknowledgment of Parentage ("VAP"), or (3) for the nonbiological mother to be recognized as the legal parent through one of the presumptions of parentage. Adoption provides legal certainty but is usually time-consuming and expensive.[84] A VAP also provides some certainty, but the form and process are unclear with regard to whom it applies. Finally, the presumptions of parentage have no legal certainty until they are raised in court and the court finds that one applies.[85]

A. Stepparent Adoption

Adoption creates a new parent-child relationship that is equal to that of a biological parent-child relationship.[86] A couple may pursue stepparent adoption when the parent of the child marries a person who is not biologically related to the child and

83. *See infra* Sections II.A and II.B.

84. Polikoff, *supra* note 11, at 206.

85. Barbara Johnson-Stern, *Securing the Nonparent's Place in a Child's Life Through Adoption and Adoption Alternatives*, 37 COLO. LAW. 27, 30–31 (2008).

86. *Id.* at 27.

who wants to adopt the child.[87] In order for any adoption to occur, however, the child in question must be available for adoption.[88] In a stepparent adoption, where parent A is married to the stepparent, parent B might still have legal parental rights. If so, parent B must consent to the adoption by relinquishing their rights, or a court must terminate their rights.[89] If the child is over twelve years old, the child's consent is also necessary to complete the adoption.[90] The adopter must provide the court with a fingerprint-based background check, and an application for a new birth certificate must be filed; a new birth certificate will be processed after the adoption decree is finalized.[91] The key standard for the court to finalize the adoption at the subsequent hearing is the child's best interests.[92]

Stepparent adoptions are faster and easier than other adoptions (with decrees being entered after the first hearing) because the parents must have already been married for one year, there is no home study requirement,[93] and the parental rights of the other parent may be terminated with consent.[94] First, stepparent adoptions are faster than other forms of adoption.[95] In most adoptions, placement of a child can take anywhere from a few months to several years, and then there are waiting periods for observation of the potential family.[96] In stepparent adoption, the child is usually already living with the stepparent, and the adoption is approved by the biological parents, allowing most of the usual process to be bypassed.[97] Further, stepparent adoption does not require a home study, which adds substantial cost to

87. COLO. REV. STAT. § 19-5-203(1)(d) (2019); Johnson-Stern, *supra* note 85, at 29. This also applies to partners in a civil union.

88. *See* COLO. REV. STAT. § 19-5-203.

89. Pamela A. Gordon, *Difficult Issues in Adoption—Part I*, 23 COLO. LAW. 851, 851 (1994).

90. COLO. REV. STAT. § 19-5-203(2); Johnson-Stern, *supra* note 85, at 29.

91. Johnson-Stern, *supra* note 85, at 29.

92. *Id.* at 30.

93. A "home study" is the process by which the state determines that the home of the adoptive parent is stable and safe for the child. It involves a social worker meeting with the adoptive parent and observing the home. A home study is conducted in accordance with title 19, section 5-207.5 of the Colorado Code. COLO. REV. STAT. § 19-5-207.5.

94. Gordon, *supra* note 89, at 851.

95. *FAQs*, ADOPTION CTR., http://www.adopt.org/faqs (last visited Jan. 25, 2020) [https://perma.cc/MLA3-SFGJ].

96. *Id.*

97. Johnson-Stern, *supra* note 85, at 28–29.

other adoptions.[98] Furthermore, adoption decrees are difficult to challenge because they are court orders replacing an existing, biological parent-child relationship with a new, nonbiological relationship.[99] There are few ways to challenge an established parent-child relationship[100]: dependency and neglect proceedings; relinquishment at the court's discretion; annulment, if sought within two years and upon a finding of good cause; and invalidation upon a finding of fraud or duress.[101] In a world where lesbian parents are uncertain about the security and legitimacy of their parental rights, stepparent adoption provides legal certainty, especially because only the biological mother needs to provide consent—the sperm donor has no parental rights and cannot, therefore, challenge the adoption.[102]

Yet stepparent adoptions can also disadvantage lesbian couples. First, while costs may be less here than for other forms of adoption, they are still significant.[103] There are legal documents to complete, fees for courts and attorneys, costs for background checks, and costs for processing the application for a new birth certificate.[104]

Second, even though there should be no consent issues with unknown sperm donors,[105] consent issues may arise if the sperm donor is known to the couple. When the couple obtains sperm through a physician, the donors are usually kept anonymous.[106] By keeping the transaction anonymous, the donor cannot peti-

98. Home study expenses are usually between $1,000 and $2,000. *How Much Does Adoption Cost?*, *supra* note 25.

99. *See* COLO. REV. STAT. § 19-5-203(1) (2019).

100. *See, e.g.*, Troxel v. Granville, 530 U.S. 57, 68–69 (2000) (holding that fit parents are presumed to make appropriate decisions in the best interests of their children without interference from third parties, such as nonparent relatives or courts).

101. Pamela A. Gordon, *Difficult Issues in Adoption—Part II*, 23 COLO. LAW. 1083, 1084 (1994).

102. COLO. REV. STAT. § 19-4-106(2).

103. Without the home visit costs, they would still average around $1,000 in legal and court fees. And of course, home study expenses are usually between $1,000 and $2,000. *How Much Does Adoption Cost?*, *supra* note 25.

104. *See* § 19-5-203(1).

105. *See* § 19-4-106(2) ("A donor is not a parent of a child conceived by means of assisted reproduction.").

106. *Known Donor Agreement*, HUM. RTS. CAMPAIGN, https://www.hrc.org/resources/known-donor-agreement (last visited Oct. 19, 2019) [https://perma.cc/68WP-M643].

tion for paternity under the statute.[107] Further, by going through a third-party physician, the couple ensures that there is evidence of the parties' intent to enter an arrangement where the donor is not a parent, even if the couple knows the donor. However, if the couple uses a known donor and bypasses a physician, the termination of the donor's parental rights is uncertain without a clear contract.[108] Colorado law does not expressly distinguish between anonymous donors and known donors,[109] so courts might preserve the donor's ability to petition for parental rights as the biological father.[110]

Finally, parents should not be forced to adopt their own child. In fact, someone considered a legal parent under another form of proof (such as being named on the birth certificate) may not even be *allowed* to adopt their own child.[111] A court that presumes the nonbiological mother is already a legal parent under the parentage statutes may prohibit her from obtaining an adoption decree. While the list of who may adopt expressly includes foster parents, the mention of legal parents is conspicuously missing.[112] Therefore, courts may be reluctant to grant an adoption decree where, as the law sees it, one is unnecessary and even inappropriate.

> A step-family forms after a child already exists. . . . A lesbian couple, on the other hand, plans for a child together. From before birth, the child-to-be has two parents. The nonbiological mother is not a step-parent. The closest analogy to her situation is that of an infertile husband whose wife, with

107. *See* § 19-4-106(2) ("A donor is not a parent of a child conceived by means of assisted reproduction.").

108. However, the court will most likely determine that *any* donor lacks rights under the statute. *See* § 19-4-106(2).

109. Deborah L. Forman, Esq., *Using a Known Sperm Donor: Understanding the Legal Risks and Challenges*, PATH2PARENTHOOD (May 9, 2011), http://www.path2parenthood.org/article/using-a-known-sperm-donor-understanding-the-legal-risks-and-challenges [https://perma.cc/T2Y5-LKLN]; *see also* § 19-4-106 (stating the rules on assisted reproduction and lacking any legal distinction between known and anonymous sperm donors).

110. *See* § 19-4-106; *see, e.g.*, § 19-4-106(6) ("If there is no signed consent form, the nonexistence of the father-child relationship shall be determined pursuant to section 19-4-107(1)(b).").

111. *See* § 19-5-202 (describing who may adopt).

112. "Any person twenty-one years of age or older, *including a foster parent*, may petition the court to decree an adoption." § 19-5-202(1) (emphasis added).

> his consent, conceives using donor semen. *That husband does not have to adopt his child.*[113]

Adopting one's own child is legally inappropriate and emotionally harmful for everyone involved.

B. Second-Parent Adoption

Although second-parent adoption is available in Colorado, it too is inadequate. Second-parent adoption occurs where a child has only one legal parent and that parent wants a second adult to adopt the child.[114] Because the child only has one legal parent (as long as there are no donor-consent concerns), Colorado courts only require that parent to consent to the adoption; therefore, the only other party that would have to give consent would be the child if they are over the age of twelve.[115]

The theory behind second-parent adoption for lesbian parents assumes the nonbiological mother is not considered a legal parent under state law. As the child has only one legal parent prior to the adoption petition, there are no concerns about another biological parent challenging the second parent's standing.[116] The process for a second-parent adoption is similar to that for stepparent adoption (a background check and an application for a new birth certificate), but there is an additional requirement that the government complete a home study for the second parent.[117] County departments of social services conduct the home study to determine (a) the physical and emotional fitness of the second parent, (b) whether the second parent has completed adoption counseling, (c) the health of the child, (d) the child's family background, (e) the suitability of the second parent, (f) the child's feelings about the situation, and (g) how long the second parent has cared for and had custody of the child.[118]

Second-parent adoption was specifically created for pre-*Obergefell* same-sex couples who wanted to raise children together.[119] The parents need not be married, and there does not

113. Polikoff, *supra* note 11, at 205–06 (emphasis added).
114. § 19-5-203(1)(d.5)(I); Johnson-Stern, *supra* note 85, at 29.
115. § 19-5-203(2).
116. § 19-5-203(1)(d.5).
117. *Id.*; Johnson-Stern, *supra* note 85, at 29.
118. § 19-5-207(2).
119. Polikoff, *supra* note 11, at 204–05.

need to be any established connection between the child and the second adult for the adoption to take place.[120] As long as the legal parent wants the other person to be a second parent to their child, the adoption can proceed.[121] Second-parent adoption is as secure as other forms of adoption.[122] There are very few ways to challenge the decree, and the standard of proof is very high.[123] Therefore, second-parent adoption provides as much legal certainty to same-sex parents as stepparent adoption.

However, second-parent adoption is an imperfect remedy. After *Obergefell* and *Pavan*,[124] the nonbiological mother should be considered a legal parent without further intervention from a court; therefore, how a court can terminate and grant parental rights to the same person is unclear. Further, second-parent adoption shares many of the same disadvantages as stepparent adoption. Second-parent adoption can cost more than stepparent adoption.[125] In addition to filing fees, court and attorney fees, the cost of background checks, and the costs for processing the application for a new birth certificate, the petitioners in a second-parent adoption must consider the cost of completing a home study, which can be several thousand dollars.[126] The added costs of a home study alone—not to mention the invasiveness of such study—might be enough to deter couples from seeking such a decree. Questions around known sperm donors also remain since a second-parent adoption cannot commence if the child has more than the one legal parent.[127] Not only should parents not have to adopt their own children, they should not have to pay the state for the privilege of inspecting and sanctioning their family.[128]

Though adoption decrees do offer security, the legitimization of the families of same-sex couples should not be so costly and disruptive. When a lesbian couple decides to raise a child together, the same rights and responsibilities that apply to op-

120. § 19-5-207(2); Johnson-Stern, *supra* note 85, at 29.
121. § 19-5-207(2); Johnson-Stern, *supra* note 85, at 29.
122. *See supra* discussion accompanying notes 99–102.
123. Gordon, *supra* note 101, at 1084.
124. *See supra* Part I.
125. *See supra* discussion accompanying notes 103–104.
126. *How Much Does Adoption Cost*, *supra* note 25. The Human Rights Campaign estimates the cost of second-parent adoption to be up to $5,000.
127. *See* discussion *supra* notes 89, 109–110.
128. *See* discussion *supra* notes 111–113.

posite-sex couples should apply. Due to the legalization of same-sex marriage, recognizing the families of same-sex couples has become even more important to legitimize those relationships and encourage stable families to raise children. Stepparent and second-parent adoptions both provide some security for lesbian families, but mothers should not be required to adopt their own children to gain stability when opposite-sex couples do not.

C. Presumption of Parentage

The third option in Colorado for determining the legal status of the nonbiological mother is the presumptions of parentage, which are used mainly in paternity actions to determine the father of the child. Because of these presumptions, opposite-sex couples need not go through complex and sometimes costly methods to establish their status as legal parents. Married, opposite-sex couples never have to prove their status as legal parents of their children. The mother who gives birth to the child is always the legal parent of the child,[129] absent situations involving surrogacy. When married opposite-sex couples use assisted reproduction techniques to have a child, the wife's husband is statutorily considered one of the child's legal parents.[130]

Presumption questions arise when the parents are the same sex because of the uncertainty of whether these laws will apply equally to those parents. Same-sex parents should be entitled to the same automatic presumption of parentage as opposite-sex parents.

1. The Uniform Parentage Act

Colorado has adopted the Uniform Parentage Act (UPA), which presumes paternity in certain situations.[131] Under the UPA, in a married opposite-sex couple, the husband of the mother is presumed to be the father of the child.[132] A man can also be legally presumed to be the father of a child in other situations, such as when a minor child lives with him and he holds

129. COLO. REV. STAT. § 19-4-104 (2019).
130. § 19-4-105(1)(a).
131. § 19-4-105.
132. § 19-4-105(1)(a).

out the child as his own.[133] In a legal action calling for a determination of parentage, the court will refer to these presumptions in making its decision; these presumptions are not often referenced otherwise.[134] Presumptions are rebuttable only by clear and convincing evidence, and if there are multiple conflicting presumptions, the court will choose the presumption that is founded on stronger policy and logic considerations.[135] The court will consider a variety of factors in making this choice,[136] and its decision is final, only to be challenged in limited situations.[137]

The marital presumption of paternity has roots in common law. While it arises from the assumption that the husband is the biological father, the presumption also protects the parent-child relationship and the integrity of the marriage.[138] The practical effect of the marital presumption is that married, opposite-sex couples do not need to worry about proving paternity for the children conceived and born during their marriage. Even in situations where an opposite-sex couple uses artificial insemination to conceive a child, the law presumes the intended parents are the legal parents. Individuals donating sperm or eggs for a couple's use in assisted reproduction are not able to claim parentage over the resulting child.[139] When a couple is married, there should be no reason to take any action to ensure that the nonbiological parent is the legal parent. This presumption

133. § 19-4-105(1)(d).

134. *See* People *ex rel.* C.L.S., 313 P.3d 662, 671 (Colo. App. 2011) (holding that neither presumption of biology nor presumption of legitimacy was conclusive).

135. § 19-4-105(2)(a); *see also C.L.S.*, 313 P.3d at 670 (holding that the trial court should resolve competing presumptions of paternity by considering policy and logic).

136. Including, but not limited to: (a) the time that the presumed father was on notice that he might not be the genetic father; (b) the time the presumed father spent in the role as the father; (c) the facts surrounding discovery of possible nonpaternity; (d) the nature of the father-child relationship; (e) the age of the child; (f) any other existing father-child relationships; (g) how the passage of time affects the chances of establishing paternity and a child support obligation; and (h) any other factors addressing the disruption of the father-child relationship. § 19-4-105(2)(a)(I)–(VIII).

137. A legal finding of paternity can only be challenged on the basis of fraud, duress, or mistake of material fact. § 19-4-105(2)(c). The burden of proof is on the challenger. *Id.*

138. Harris, *supra* note 45, at 67.

139. § 19-4-106(2) (a donor is not a parent of a child conceived with assisted reproduction); § 19-1-103(44.5) (a donor is an individual who produces eggs or sperm used for assisted reproduction, not including a husband or wife providing an egg or sperm for their own assisted reproduction).

should be the same for both same-sex married couples and opposite-sex married couples.

The problems with assuming the marital presumption extends to lesbian parents justify the parents' need to cement their status through adoption. Extending a presumption of parentage to lesbian couples is not enough to provide certainty to families that have felt insecure about their legitimacy in the recent past. Same-sex couples only recently received legal validation when the Supreme Court determined that bans on same-sex marriage were unconstitutional.[140]

A presumption of parentage is merely a presumption.[141] A presumption does not automatically provide a nonbiological mother with a court decree affirming her parental rights. Courts have broad discretion to make the decision that one presumptive parent or another has a greater claim to the child's life. Same-sex couples who want to raise children face continuous anxieties about the security of their claims to family relationships. With presumptions of parentage, a nonbiological mother's status as a legal parent must still be challenged and brought to court before she can receive a court decree of parentage. Since adoption decrees carry finality and certainty, the reliance of same-sex couples on adoption should be no surprise. A nonbiological mother would prefer to obtain an adoption decree before her parental rights are challenged rather than wait for a determination of parentage.

Married same-sex couples deserve to have the same family security as married opposite-sex couples. The language of the UPA is clear that the presumptions of parentage apply to same-sex couples as well as opposite-sex couples.[142] But a parent would be forgiven if they missed this point from the language of the text. Colorado's statute does not use gender-neutral language, discussing presumptions of *paternity*, not parentage.[143] The statute also uses gendered language to describe presumptions and the situations when they apply.[144]

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140. Obergefell v. Hodges, 135 S. Ct. 2584, 2604–05 (2015); *see supra* Section I.A.

141. § 19-4-105(2)(a).

142. *See* § 19-4-105.

143. *See, e.g.*, § 19-4-105(1)(c)(I) (titled "Presumption of *paternity*") (emphasis added).

144. *See* § 19-4-105 (using language such as "father," "paternity," "husband," and "a man is presumed to be the natural father").

Yet the UPA also includes sections that allow *paternity* actions to be used to establish *maternity*. Parties with standing to establish paternity[145] can also bring an action to establish a mother-child relationship.[146] The statute includes a section that states the word "father" as used in the statute can mean "mother" in the context of a maternity suit.[147] The UPA also makes it clear that biology is not dispositive to determining parentage.[148] The express inclusion of sections that cause the UPA to apply equally to fathers and mothers, as well as the absence of language limiting the UPA to opposite-sex couples, suggests that the statute extends to same-sex parents.

Specific sections of the statute suggest that the UPA can be equally applied to establishing mother-child and father-child relationships.[149] A birth mother would have no need to establish

145. An action to declare or determine a father-child relationship may be brought by "[a] child, his or her natural mother, or a man presumed to be his or her father." § 19-4-107(1). An action may be brought at any time to declare the existence of a presumed father-child relationship, or to declare the nonexistence of such a relationship only if brought within a reasonable time of discovering the nonexistence of the relationship (no later than five years after the child's birth). Such a parent-child relationship is defined in section 19-4-102 as "the legal relationship existing between a child and his natural or adoptive parents incident to which the law confers or imposes rights, privileges, duties, and obligations," including mother-child relationships and father-child relationships.

146. § 19-4-122 ("Insofar as practicable, the provisions of this article applicable to the father and child relationship apply to mother and child relationships.").

147. § 19-4-125 ("In case of a maternity suit against a purported mother, where appropriate in the context, the word 'father' shall mean 'mother.'"). For example, in a case decided in 2011, the birth mother of the child sought allocation of parental responsibilities. In the Interest of S.N.V., 284 P.3d 147, 148 (Colo. App. 2011). In response, the father's wife filed a maternity action to establish herself as the legal mother. *Id.* The court determined she had standing to bring such a claim, even though she was not the biological mother of the child, and she could successfully raise a presumption of marital maternity. *Id.*

148. § 19-4-105(1)(f). Biological relationship is another presumption, but no presumption carries more inherent weight than another. The court must consider many factors in choosing which of competing presumptions makes the most sense in the situation under logic and policy considerations. § 19-4-105(2)(a).

149. *See* § 19-4-102 (defining a parent and child relationship as "the legal relationship existing between a child and his natural or adoptive parents incident to which the law confers or imposes rights, privileges, duties, and obligations" including mother-child relationships and father-child relationships); § 19-4-107(1) (allowing a child, her natural mother, or a presumed father to bring a parentage action at any time); § 19-4-122 ("Insofar as practicable, the provisions of this article applicable to the father and child relationship apply [to mother and child relationships]."); § 19-4-125 ("In case of a maternity suit against a purported mother, where appropriate in the context, the word 'father' shall mean 'mother.'").

the mother-child relationship,[150] so a mother would need to establish her legal relationship with her child only when the mother is the female spouse of the child's birth mother. Because *Obergefell* and *Pavan* require that same-sex couples and opposite-sex couples be treated equally,[151] the UPA as adopted by Colorado logically applies to same-sex couples as it would to opposite-sex couples. However, the problem with the marital presumption is that it is merely a rebuttable presumption.[152] Any parent may be established and subsequently challenged by any interested party with clear and convincing evidence.[153]

2. *In re Parental Responsibilities of A.R.L.*: How the Colorado Court of Appeals Has Applied the UPA to Lesbian Parents

Not only does the text of the Colorado UPA suggest equal application to fathers and nonbiological mothers, but at least one Colorado court has already extended the UPA to the ex-wife of a child's biological mother in *In re Parental Responsibilities of A.R.L.*[154] With this precedent already in place, other courts can easily apply *A.R.L.*'s logic to other cases involving parentage presumptions and lesbian partners.

The two mothers in *A.R.L.* were in a long-term, committed relationship when they decided to have a child.[155] The biological mother ultimately conceived with the help of a friend (a known donor), not through a doctor.[156] After the child's birth, both mothers lived with and parented the child in the nonbiological mother's home.[157] The child was given the nonbiological mother's last name, the biological mother was identified on the birth certificate, and no father was identified on the birth certificate.[158]

150. This is because the woman giving birth to the child is automatically recognized by the law as the mother of the child. § 19-4-104 (stating that "[t]he parent and child relationship may be established between a child and the natural mother by proof of her having given birth to the child").
151. *See supra* Part I.
152. § 19-4-105(2)(a).
153. *Id.*
154. 318 P.3d 581, 582 (Colo. App. 2013).
155. *Id.*
156. *Id.*
157. *Id.* at 583.
158. *Id.*

After the couple began going through a series of separations and reconciliations, the nonbiological mother petitioned for a second-parent adoption, which was ultimately denied.[159] Eventually, the mothers separated, and, after a time of co-parenting, the biological mother terminated all contact between the child and the nonbiological mother.[160] The nonbiological mother then filed for allocation of parental rights to regain contact with the child.[161] In response, the biological mother joined the known donor as a party.[162] After the known donor responded, he filed a petition to relinquish his parental rights, given he was not—nor had any desire to be—part of the child's life.[163]

At this point, the nonbiological mother filed a petition for maternity under the UPA, based on the presumption of parentage that arises when an individual receives the child into her home and holds the child out as her own.[164] The trial court saw the known donor as a presumptive parent and dismissed the maternity petition because the child would have had three parents.[165] The court ultimately awarded all parental responsibilities to the biological mother.[166] Several weeks later, the known donor's petition to relinquish parental rights was granted, leaving the child with only one legal parent.[167] The nonbiological mother then appealed.[168]

On appeal, the biological mother argued that the child could not have two legal mothers under the UPA nor three legal parents. She also claimed that the court could not substitute a second legal mother in the place of the legal father because the known donor's rights had not been terminated when the court dismissed the maternity petition.[169] The nonbiological mother, on the other hand, argued that because she had taken in the child and held the child out as her own, the presumption of parentage under the UPA should apply to her.[170] She argued that

159. *Id.*
160. *Id.*
161. *Id.*
162. *Id.*
163. *Id.*
164. *Id.*
165. *Id.*
166. *Id.*
167. *Id.*
168. *Id.*
169. *Id.* at 585.
170. *Id.* at 584.

the known donor had no parental rights for multiple reasons, including his confirmation that he was not and did not intend to be the legal parent of the child.[171]

The Colorado Court of Appeals ultimately decided in favor of the nonbiological mother.[172] It first emphasized that "[t]he purpose of the UPA is to establish and protect the parent-child relationship," and all children have a right to that relationship, regardless of the marital status of their parents.[173] After examining the language of the UPA, the court determined that it "reflects the legislature's intent to allow a man or woman to prove paternity or maternity based on considerations other than biology or adoption."[174] The court extended this logic to the specific statutory presumption in question, stating that it "applies with equal force to women seeking to demonstrate presumptive mother status."[175]

The court rejected the biological mother's assertion that granting the nonbiological mother's petition would leave the child with three legal parents.[176] The known donor was, at most, an *alleged* father and would only be a legal parent through a presumption of biology.[177] His status as the biological father of the child was never proven nor was evidence ever presented that supported such a claim.[178] Even if he were the biological father, the presumption that a biological parent is a legal parent is rebuttable, and the alleged father presented such a rebuttal in his petition to relinquish his parental rights.[179] Even if the known donor did want to establish legal parentage and was biologically related to the child, the presumption for biological parents does not outweigh the holding-out presumption presented by the non-

171. *Id.* at 583:

> Attached to her petition was Bolt's sworn "admission of nonpaternity," in which he confirmed that he (1) is not A.R.L.'s legal parent; (2) never intended to be A.R.L.'s legal parent; (3) only acted as a sperm donor; (4) did not wish to claim any legal rights to A.R.L.; (5) always understood that [the nonbiological mother] and [the biological mother] would be A.R.L.'s natural parents; and (6) did not object to an adjudication of [the nonbiological mother] as A.R.L.'s mother.

172. *Id.* at 588–89.
173. *Id.* at 584.
174. *Id.*
175. *Id.*
176. *Id.* at 585.
177. *Id.*
178. *Id.*
179. *Id.*

biological mother.[180] None of that mattered in this case because the known donor never claimed parental rights.[181] At no time were three people vying for parental rights over this child.[182] The court rejected the biological mother's assertion that a second mother could not be substituted for a child's legal father for the same reasons.[183] The nonbiological mother was not trying to substitute herself for a legal father—no such father even existed.[184] Therefore, the lower court was not asked to substitute a presumptive parent for a legal parent.[185]

The court also disagreed with the contention that a child could not have two legal mothers.[186] First, rather than prohibiting two same-sex parents, "the UPA is gender-neutral and specifically allows the terms 'father' and 'mother' to be used interchangeably."[187] For that and other policy reasons, the court decided that a child *can* have two mothers.[188] Second, the court rejected the argument that where a biological mother exists, another woman cannot petition for presumptive maternity.[189] More than one man can seek presumptive-father status, as seen in precedent;[190] therefore, constructing the UPA by the gender of each parent treats presumptive parents differently based on gender.[191] Third, the court decided that the holding-out pre-

180. *Id.* at 586.
181. *Id.*
182. *Id.*
183. *Id.*
184. *Id.*
185. *Id.*
186. *Id.*
187. *Id.*; *see infra* Section III.A. The court emphasized the "compelling interest children have in the love, care, and support of two parents" as the policy reason for its interpretation of the UPA. "The prerogative of a child to claim the love and support of two parents does not evaporate simply because the parents are the same sex. It applies to all children, regardless of whether they were conceived during a heterosexual or same-sex relationship." *A.R.L.*, 318 P.3d at 587.
188. *A.R.L.*, 318 P.3d at 586–87.
189. *Id.*
190. *See, e.g.*, People *ex rel.* of N.S., 413 P.3d 172 (Colo. App. 2017) (considering competing presumptions of paternity where the court presumed the mother's boyfriend was the father because he had received the child into his home and openly held the child out as his own, and the court presumed another man was the father because of genetic testing); *In re* Marriage of Ohr, 97 P.3d 354 (Colo. App. 2004) (considering competing presumptions where the court presumed the mother's husband was the father because he was married to the mother at the time of birth, and the court presumed another man was the father based on genetic testing).
191. This would raise equal protection concerns. *See Ohr*, 97 P.3d at 354.

sumption[192] does not consider the method of conception.[193] The holding-out provision of the UPA does not use the method of conception to limit the presumption's application.[194] Therefore, the court ruled that as long as the nonbiological mother satisfies the criteria for the holding-out presumption, there is no reason that the lower court should not find her to be the presumptive parent of the child.[195] The Colorado Court of Appeals thereby decided that the language of the UPA encourages a broad interpretation that allows for the nonbiological parent in a same-sex couple that decides to raise children to be presumed a legal parent of the child.[196]

While the UPA and *A.R.L.* both show that Colorado should already extend parentage presumptions to same-sex parents, attorneys in Colorado continue to advise lesbian mothers to obtain adoption decrees. Even if the applicability of the presumptions to lesbian mothers were well known, they would still fail to assuage lesbian mothers' concerns. These mothers and their lawyers seek adoption decrees to solidify and provide proof of their legal status. But adoption, as discussed, is not a perfect solution either.

D. Voluntary Acknowledgment of Parentage

The final option in Colorado, the VAP, provides an efficient and secure process for confirming the legal status of nonbiological mothers. As adoptions are inefficient and expensive, and presumptions do not provide proof of parentage a mother can show to an official, a VAP brings the plight of lesbian mothers a step closer to resolution.

A VAP is a form that is completed at the hospital, and subsequently executed, in several situations when a second parent can be listed on the birth certificate.[197] Although the form does

192. "Holding-out presumption" refers to the presumption outlined in COLO. REV. STAT. § 19-4-105(1)(d) (2019), where a man can establish paternity by a showing that after the birth of the child he took them into his home and held them out as his own child.

193. *A.R.L.*, 318 P.3d at 588.

194. *Id.*

195. *Id.*

196. *Id.*

197. *Id.* § 19-4-105. The following general situations are listed on the VAP form: first, when the mother is unmarried; second, when the mother is married, but the spouse is not the parent (spouse must consent to the second parent); and third,

not specifically comprehend a situation where the mother is married to a female spouse, there is no reason for the VAP not to allow a female spouse to acknowledge parentage. In fact, the section where the second parent fills out their information specifically includes the ability to choose a parental role other than father (i.e. "Mother," "Co-parent," or "Other"). The form also instructs parents to fill out the form in three situations, including if the birth mother were married but the spouse is not the biological parent.[198] Colorado also took a step forward by changing the acknowledgment from one of paternity to one of parentage.[199] By employing gender-neutral language, the VAP can be used by married lesbian couples where one partner is the biological mother of the child.

States must require hospitals and agencies to provide VAPs after a child is born.[200] Originally intended to help natural fathers voluntarily come forward and claim paternity of their children,[201] Colorado's UPA addresses VAPs in two locations: first, in the section on presumptions of paternity, and second, in the section on jurisdiction. The section on jurisdiction makes a simple statement that voluntary acknowledgments from other states will be enforced in Colorado.[202] The section on paternity presumptions makes a

> duly executed voluntary acknowledgment of paternity . . . a legal finding of paternity on the earlier of: (I) Sixty days after execution of such acknowledgment; or (II) On the date of any administrative or judicial proceeding pursuant to this article

when the mother is married, but is refusing to list her spouse as the second parent. *See* COLO. DEP'T OF PUB. HEALTH & ENV'T, VOLUNTARY ACKNOWLEDGMENT OF PARENTAGE (2018), https://drive.google.com/file/d/1xRcwKTTcT-VB-cjpywvXIcuSoUak4ye/view (last visited Feb. 3, 2020) [hereinafter VOLUNTARY ACKNOWLEDGMENT FORM] [https://perma.cc/FY5Q-8LNN].

198. VOLUNTARY ACKNOWLEDGMENT FORM, *supra* note 197.

199. *Id.*

200. 45 C.F.R. § 303.5(g) (2019).

201. *See id.* § 303.5(g).

202. COLO. REV. STAT. § 19-4-109(1.5) (2018) ("A paternity determination made by another state, whether established through voluntary acknowledgment, administrative processes, or judicial processes, shall be enforced and otherwise treated in the same manner as a judgment of this state.").

> or . . . concerning the support of a child to which the signatory is a party.[203]

Under Colorado law, a VAP carries legal weight after sixty days or in the case of any action concerning paternity (or maternity) of a child. At first glance, this seems like an elegant solution. However, the mothers do not seem to receive any official court decree or documentation that their VAP is a final legal finding of parentage, nor does this statute grant the use of a VAP to lesbian mothers. That is where the crux of the problem lies.

The availability of the VAP in Colorado for use by same-sex couples is a positive step toward recognizing same-sex families. The form is cheap and efficient: the hospital is required to provide the form, offer assistance on how to use it, and file it with the appropriate birth registry agencies.[204] The couple does not have to deal with lawyers or the courts directly unless a paternity action or another custody action challenging the parental rights and responsibilities of the second parent is filed. If hospitals and registry agencies are doing their jobs, the second parent should be listed on the child's birth certificate. In Colorado, the VAP becomes legally binding sixty days after it is executed or on the date that any proceeding concerning custody, paternity, or child support to which the signatory is a party is filed.[205] States are required to recognize VAPs that are legally executed in other states to receive certain federal funding for child welfare programs.[206]

Yet, if the VAP presents the solution, why is that answer not immediately available to parents uncertain about their parental rights? Lesbian mothers in Colorado are still seeking legal advice from lawyers to ensure their legal rights will be recognized not only by the state of Colorado but also by other states and countries.[207]

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203. *Id.* § 19-4-105(2)(b).

204. 45 C.F.R. § 303.5(g)(2)(iv) (2019).

205. COLO. REV. STAT. § 19-4-105(2)(b)(II) (2019); Leslie Joan Harris, *Voluntary Acknowledgments of Parentage for Same-Sex Couples*, 20 AM. U. J. GENDER SOC. POL'Y & L. 467, 476 (2012) (stating that a VAP that complies with the state and federal requirements has the legal effect of a judicial determination).

206. Harris, *supra* note 205, at 475–76.

207. NAT'L CTR. FOR LESBIAN RTS., VOLUNTARY ACKNOWLEDGMENTS OF PARENTAGE (2019), http://www.nclrights.org/wp-content/uploads/2019/01/VAP-fact-sheet.pdf [hereinafter NAT'L CTR. FOR LESBIAN RTS., VOLUNTARY ACKNOWLEDGMENTS] [https://perma.cc/BLB6-JZWA] (stating that same-sex

One reason may be that the VAP does not provide clear instructions that a nonbiological mother can recognize as pertaining to her situation.[208] On the Department of Public Health website, the link for the VAP is under the heading "Add a father/second parent to a birth certificate."[209] The form instructs the parents how to fill it out in three situations: (1) if the mother was not married at the time of conception or birth or anytime in-between; (2) if the mother was married, but the spouse is not the biological parent; or (3) if the mother was married but now refuses to list a spouse.[210] Although the second option may clearly apply to lesbian mothers (because the gender or sex of the spouse that is not the biological parent is irrelevant), the mothers may not believe that it applies.

Another, more concerning reason that same-sex parents have concerns about the stability of their families, despite the option of a VAP, is that most guidance for same-sex parents recommends adoption decrees or other court orders establishing parentage. Resources for LGBTQ families in Colorado often include advice that the parents "ALWAYS get an adoption decree or other court order."[211] The first resource displayed on a Google search states, "Regardless of whether you are married or in a civil union or comprehensive domestic partnership, [National Center for Lesbian Rights] always encourages non-biological and non-adoptive parents to get an adoption or parentage judgment, *even if you are named on your child's birth certificate*."[212] Even if a parent is aware of the VAP option, internet searches still advise that "all non-birth parents get an adoption or judgment from a court recognizing that they are a legal parent, *even if they are married, and even if they are listed as a parent on the*

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parents should *always* get an adoption decree, *even if* they are named on the birth certificate and have a legally binding VAP).

208. VOLUNTARY ACKNOWLEDGMENT FORM, *supra* note 197.

209. *Parentage*, COLO. DEP'T OF PUB. HEALTH & ENV'T (last visited Jan. 26, 2020), https://www.colorado.gov/pacific/cdphe/parentage [https://perma.cc/Y78X-9BMS].

210. VOLUNTARY ACKNOWLEDGMENT FORM, *supra* note 197.

211. FAMILY EQUAL. COUNCIL, COLORADO LGBTQ FAMILY LAW: A RESOURCE GUIDE FOR LGBTQ-HEADED FAMILIES LIVING IN COLORADO 9 (2017), https://www.familyequality.org/wp-content/uploads/2018/06/CO-LGBTQ-Family-Law-Guide-WEB.pdf [https://perma.cc/J6GZ-KAQU].

212. NAT'L CTR. FOR LESBIAN RTS., LEGAL RECOGNITION OF LGBT FAMILIES 1–2 (2019), http://www.nclrights.org/wp-content/uploads/2013/07/Legal_ Recognition _of_LGBT_Families.pdf [https://perma.cc/K2PW-3DS6] (emphasis added).

birth certificate and have a signed VAP."[213] If legal and advocacy groups still advise that adoption is the only truly secure way to verify parental rights, the concerns of same-sex parents about the security of their families clearly remain valid.

The Colorado VAP alone has failed to assuage mothers' concerns as to whether their rights will be protected. But VAPs may still be a useful tool for protecting these rights. As VAPs are considered legally binding, same-sex couples should be encouraged to complete a VAP and file it with the appropriate agency. An administrative procedure should be created by statute for parents to obtain a court decree naming them as the legal parents, using their binding VAP as proof. Colorado law does not do enough to ensure legal security for the same-sex families: the format of the form and the language of the law is vague on its application to same-sex families,[214] which means that it is equally open to the interpretation that the VAP would not apply. Since the current VAP is too ambiguous to solve the concerns of lesbian mothers, the law must be reformed to offer a clear vehicle for securing parental rights for those mothers.

III. HOW WE PROTECT OUR FAMILIES

As *Obergefell*, *Pavan*, and *A.R.L.* suggest, same-sex couples are as deserving of simple,[215] efficient processes to establish parentage as opposite-sex couples. While the law in Colorado reflects that right to some extent, the current options for ensuring the security of the families of lesbian mothers are expensive, costly, vague, or ambiguous.[216] Even the best option, the VAP, has still failed to reassure the LGBTQ community that the rights of lesbian mothers will be protected. The legislature has thus failed to validate relationships between children and their functional, if not biological, parents. Without validation and security, these families fear that they may lose their legal status at any time. Two solutions may solve the problem of security for

213. NAT'L CTR. FOR LESBIAN RTS., VOLUNTARY ACKNOWLEDGMENTS, *supra* note 207 (emphasis added).

214. *See* COLO. REV. STAT. § 19-4-105 (2019); VOLUNTARY ACKNOWLEDGMENT FORM, *supra* note 197.

215. *See* Pavan v. Smith, 137 S. Ct. 2075 (2017); Obergefell v. Hodges, 135 S. Ct. 2584 (2015); *In re* Parental Responsibilities of A.R.L., 318 P.3d 581 (Colo. App. 2013).

216. *See supra* Part II.

the families of lesbian mothers: (1) connecting a court decree to the VAP, akin to an adoption decree, and (2) legislating more specific guarantees of protection for families of same-sex parents.

A. VAPs and Court Decrees

The VAP provides an elegant solution to most of the problems faced by lesbian mothers, but VAPs can be improved. First, the UPA does not guarantee that VAPs can be applied to lesbian couples.[217] While the form's language applies to their situation, the statute does not discuss who may use a VAP.[218] Therefore, if the Department of Public Health and Environment chose to change its VAP and exclude lesbian mothers from using it to solidify their parental rights, there would be little legal recourse. Second, VAPs only offer binding, legal evidence of parentage in litigation, not in everyday life.[219] While the UPA claims that VAPs become legal findings after sixty days, lesbian couples still need compelling evidence of their parentage to navigate the world. VAPs are fillable forms, not adoption decrees and so might not be viewed as binding legal documents. In other states and around the world, there is no telling how the VAP form alone would be received. But if a same-sex couple were given a physical court order, the couple's situation would be much less precarious.

This problem is fixable. First, the UPA needs to be updated to solidify the legal standing of lesbian mothers who use VAPs to determine parentage of their children. The Colorado legislature should either create a new section of the UPA explaining the VAP and how it should be used or update the current options on the VAPs. With laws in place stating that a VAP can be used in the situation of two mothers, where one is the biological mother and the other is not, the ability of those mothers to rely on the VAP now and in the future will be exponentially more secure.

Second, courts should issue adoption-like decrees based on a legally binding VAP. Sixty days after the execution of a VAP, a lesbian couple should be able to file the form with the appro-

217. *See supra* Section II.D.
218. *See* § 19-4-105 (making no mention of who can use a VAP).
219. *See supra* Section II.D.

priate court and receive a court order in response, declaring the mothers to be the child's legal parents. Creating this additional layer of protection in Colorado would help assuage the fears of lesbian mothers and advocates that the VAP is insufficiently secure proof of legal parentage. Parents need an administrative process by which mothers may take their VAPs to a court and receive a decree, reflecting the same format as an adoption decree and stating that they are the legal parents of the child. The court could produce a final order that has the same level of protection as an adoption decree, which would allow lesbian mothers to avoid parentage hearings or adoption proceedings. Updated VAPs would resolve questions surrounding what to do to solidify parental rights, but they do not solve the non-inclusive language and treatment of individuals in the UPA. Therefore, Colorado's legislature has a bit more work to do on behalf of its lesbian families.

B. The UPA and Lesbian Parents

Colorado's legislature must also improve the language of its UPA statutes to reflect the legitimacy of same-sex families. Clear and concise language must be used to establish a straightforward method for same-sex couples establishing the legal status of their families. Gender-neutral and inclusive language must replace the current gendered language, rather than adding a single provision allowing the statutes to be interpreted to apply to men as well as women. To validate families that have only recently been legally recognized, the law should address their situations specifically.

The UPA and *A.R.L.* indicate that the presumptions of parentage must also be interpreted broadly to extend to same-sex couples, including lesbian mothers.[220] Changing the UPA to solidify the rights and responsibilities of same-sex parents and provide protections for same-sex parents will only further secure family connections for children.[221] Even though *A.R.L.* shows that the law can already be interpreted to provide such protections for families of same-sex couples,[222] it is not enough to assuage the concerns of the community that these relationships

220. *See supra* Section II.D.
221. *See* §§ 19-4-101 to -130.
222. *See In re* Parental Responsibilities of A.R.L., 318 P.3d 581 (Colo. App. 2013).

will be undermined by the ignorance of others. Therefore, Colorado's UPA needs to adopt specific language that secures the rights and responsibilities of same-sex couples for their families.

The first step in achieving an inclusive statute is replacing gendered phrases such as "father" and "paternity" with gender-neutral, inclusive language like "parent," "parentage," or "parenthood." The law does not appear at first glance to apply to all people who have children. Not every father identifies as a "father," and not every parent fills one of the binary roles traditionally assigned in Western society. For example, the section of the UPA addressing presumptions of paternity could be updated along these lines:

> § 19-4-105. Presumption of ~~paternity~~ [parentage]
>
> (1) ~~A man~~[A second parent] is presumed to be the natural [parent] of a child if:
>
> (a) [They] and the child's natural mother are or have been married to each other and the child is born during the marriage, within three hundred days after the marriage is terminated by death, annulment, declaration of invalidity of marriage, dissolution of marriage, or divorce or after a decree of legal separation is entered by a court;
>
> (b) Before the child's birth, [the second parent] and the child's natural mother have attempted to marry each other by a marriage solemnized in apparent compliance with law, although the attempted marriage is or could be declared invalid . . . .[223]

Although these changes are minor, they drastically improve the legal certainty of a second parent's legal status. By making these changes, the Colorado legislature would acknowledge that individuals who do not align themselves with traditional understandings of a nuclear family are still valid. Rather than including a provision at the end of the statute applying the same paternity provisions to maternity, the statute should be updated

223. § 19-4-105(1)(a), (b). Note that strike-throughs and bracketed language are my suggested edits.

to reflect a more inclusive understanding of who can fill the role of the second parent.

The second step to achieving an inclusive statute is creating sections that apply specifically to same-sex couples starting families. Too much uncertainty about the legality of certain types of families remains—the public needs a direct answer. This goes hand in hand with the suggested improvements to the VAP statute above. A mother would be able to find answers much more quickly if she could locate a section in the statute stating: "A nonbiological mother of a child conceived through artificial reproductive technology is presumed to be the natural mother of the child in the following ways." Requiring her to read the entire UPA to understand how it applies to her situation is unnecessary, costly, and unfair. This problem can be solved by updating the statute with inclusive language and adding a section on VAPs, or by creating statutes designed specifically to address the lesbian mothers' situation.

Same-sex couples should not have to go through complex and challenging processes to protect their parent-child relationships when similarly situated opposite-sex couples do not face such hurdles. Married opposite-sex couples do not have to worry about their parental status being challenged, even when using assisted reproduction, because the law recognizes that the intended parents are the legal parents of the child.[224] The same should hold true for same-sex couples seeking to raise children.

C. Outreach and Advocates

Even if the laws are updated and the VAP becomes the standard for lesbian mothers, the final way to cure uncertainty and confusion is to educate the individuals involved in the process. Attorneys should begin altering their practices to reflect the evolving law. Rather than limit themselves to the fear that adoption is the only option, attorneys should begin advocating for VAPs to be treated as the secure, final, binding legal document that they are by law. These advocates should advise their clients to use the VAP option, and, in advocating for their clients, attorneys should refer the court and other parties to *A.R.L.* and

224. Harris, *supra* note 45.

the UPA to show that adoption is not the only evidence of legal parentage.

Attorneys are not the only ones whose practices need updating. Advocacy organizations should publish advice and resources directing lesbian mothers toward the VAP as a valid option for protecting their parental rights. More light should be shed on the ability to forgo the expense and intensity of an adoption proceeding by filing a VAP. VAPs need to be commonly accepted and widely understood so that adoption is no longer a necessary step for same-sex couples to secure their parental rights.

Hospital staff and doctors should also be trained on how to approach lesbian mothers when walking them through their experience. A mother's medical team may be her sole guide through the difficult process of bringing a child into the world. If hospital staff help lesbian mothers complete their VAP forms as well as their birth certificate forms, parents would have much less anxiety in an already nerve-racking time of their lives.

Even if Colorado's legislature takes the necessary steps to improve and solidify the place of lesbian mothers in the legal system, those steps will be useless if adoption continues to be considered the only way to secure valid legal parentage for these families.

CONCLUSION

The best solution for protecting nonbiological lesbian mothers is to bolster the UPA and VAP statutes with language that expressly addresses their situation. Such a solution could take multiple forms, but the main idea must center on protecting parent-child relationships between *nonbiological* mothers and their children just as strongly as the relationships between *biological* mothers and their children.

To be successful, the solution must be more efficient and less costly than adoption procedures and more specific with its protections of same-sex parents than the current VAP. Yet the solution must still carry the finality and certainty of adoption decrees and birth certificates. Colorado law must be adapted to guarantee protections to same-sex parents across Colorado and promote recognition of those parent-child relationships.

If courts were the only ones deciding how to apply the law to mothers, legislative action would not be needed. However, the

courts are not the only entities that play a part in determining legal parentage of children. To ensure the rights of same-sex parents and the stability of their families, procedure and policy must require that government agencies across the state cannot violate those rights. Such solutions will not pose undue burdens to Colorado because similar procedures are already in place for opposite-sex couples. Only a handful of specific tweaks are needed to extend these rights to same-sex couples.

Protecting lesbian couples' rights is still a relatively new field of law. *Obergefell* was only decided in 2015, and *Pavan* two years later in 2017. Courts still struggle with conflicts over the legal parents of children of same-sex couples when only one partner is the biological parent. Until laws began to change and states were required to treat both same-sex couples and opposite-sex couples equally, jurisdictions varied widely on how to treat the nonbiological parent who had a parental relationship with the child but was *legally* a mere stranger. Even though public policy in most jurisdictions deems two-parent households to be in the best interests of a child, many jurisdictions also once maintained policies against same-sex couples and their families, especially in subtle forms that prevented second parents from being recognized as legal parents.

In the future, lesbian couples should face no hurdles when deciding to start a family using artificial reproduction. One partner will be the biological mother, likely both providing her genetic material and carrying the child. The other partner may not be biologically related to the child but is their mother nonetheless.

The mothers speak with an advocate and *know* that the nonbiological mother is the second legal parent of their child. They do not have to prove that relationship to anyone. They do not have to spend hours researching the process for legal parentage. They do not have to pay thousands of dollars before obtaining an adoption decree. They do not need a lawyer. The mothers simply complete a form declaring them their child's legal parents. After sixty days, they send the form to the appropriate office, most likely a clerk of the county court. Soon, a court decree issues declaring the child's legal parents. And that decree is as binding and final as obtaining an adoption decree.

The child's two legal parents are their mothers.