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The Past, Present and Future of the Marital Presumption

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THE PAST, PRESENT AND FUTURE OF THE MARITAL PRESUMPTION

*June Carbone and Naomi Cahn**

Résumé

La présomption matrimoniale est profondément ancrée dans le droit anglo-américain: un mari et son épouse sont supposés être le père et la mère de l'enfant né pendant le mariage. Cependant, avec l'avènement de tests génétiques sophistiqués, le divorce sans faute et l'évolution des structures familiales, les États américains s'interrogent sur la validité de la présomption. La paternité peut désormais être déterminée avec certitude et la stigmatisation liée aux circonstances de la naissance d'un enfant a en grande partie disparu. Face à ces changements, la présomption a été présentée comme une sorte de fiction juridique sans signification, même si elle continue de conférer un statut parental: dans tous les États, les couples mariés, qu'ils soient hétérosexuels ou homosexuels, sont présumés être les parents légaux de l'enfant avec lequel ils sortent de l'hôpital. Cet article explore la manière dont les États s'efforcent de concilier les fortes politiques publiques en faveur du mariage avec de nouvelles connaissances relatives aux faits biologiques.

I INTRODUCTION

The marital presumption – children born within a marriage are children of the spouses – is deeply rooted in Anglo-American law. Marriage has historically served as a system designed to channel childrearing into two parent families and keep it there. Within this system, the marital presumption was virtually irrebuttable. Husbands who wished to leave their wives might be tempted to allege that the wife had been unfaithful, but such a charge, even if untrue, could destroy the wife's reputation and, if established, would make the child a 'bastard'. The courts closed the door to the entire inquiry by precluding testimony about the wife's adultery, keeping open the possibility of rebuttal only where the husband had been 'beyond the four seas' or proven to be impotent.

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With the advent of sophisticated genetic testing, no-fault divorce and changing family structures, American states are now questioning the continued validity of the presumption. Paternity can be determined with certainty and much of the stigma associated with the circumstances of a child's birth has disappeared. In the face of these changes, the presumption has been exposed as a legal fiction without a simple meaning, even as it continues to confer parenthood: in all states, married couples, gay or straight, who walk out of the hospital with a child are legal parents. What is in doubt is the role of the presumption in settling disputes where a challenge to parenthood occurs.

The uncertainty in the role of the marital presumption arises because of the lack of agreement on the purpose the presumption should serve. The presumption continues to establish parenthood without bureaucracy or genetic testing, but there is less agreement on whether the presumption can or should serve to channel parenthood into marriage. Indeed, the state decisions are deeply divided. The majority of states allow challenges, with many effectively saying that biology confers parenthood, and that an unmarried father has a right to a relationship with the child, particularly if he insists on doing so with a short time after the child's birth. Some states have reformed the marital presumption to recognise functional parenthood, using the presumption to establish legal parenthood where the husband has in fact assumed a parental role and the biological father has not. A number of these states, however, increasingly recognise functional parenthood whether or not the parents marry, so that the underlying principle may become protecting the child's extant relationships rather than marriage itself. A third group of states upholds the marital presumption because of these states' commitment to marriage, but without agreement on what that means.¹

In this chapter, we review the most recent decisions that govern the use of the marital presumption to establish parentage. Part II addresses the marital presumption, Part III analyses the use of estoppel to lock in parenthood upon divorce and finally, in Part IV we consider the areas where there is some agreement, and the likelihood of continuing disagreement in the allocation of responsibility for children.

II THE MARITAL PRESUMPTION: DETERMINING THE FACTS OF BIOLOGICAL PATERNITY

Common law has generally used the 'marital presumption' as a starting point to identify parents. That is, married parents are assumed to be the parents of any child born into the marriage. Before the advent of reliable blood and DNA tests, the only way to rebut the marital presumption involved testimony to the husband's absence or impotence or the wife's infidelity; maternity was

¹ See Naomi Cahn and June Carbone *Red Families v Blue Families: Legal Polarization and the Creation of Culture* (Oxford University Press, 2010) ch 4; June Carbone and Naomi Cahn 'Marriage, Parentage, and Child Support' (2011) 45 Fam LQ 219, 224.

established by a woman's giving birth to a child. One of the most important parts of the marital presumption served to bar testimony as to infidelity, which would also have established grounds for divorce.² Today, paternity tests are easily available to anyone in contact with the child. Indeed, even though the Supreme Court in *Michael H* denied standing to Michael in his efforts to establish legal paternity, the parties had already undergone tests indicating that Michael was the probable father. Nonetheless, the opinion reinforced the California courts' finding that the marital presumption is substantive, expressing the legislative determination that, 'as a matter of overriding social policy ... the integrity of the family unit should not be impugned'.³

Most states today continue to combine the procedural issue of standing to seek paternity tests with the substantive issue of recognition of parenthood. In Pennsylvania, for example, the only way to rebut the marital presumption is by showing impotency, sterility or non-access to the wife during conception; blood tests can never be offered to rebut the presumption.⁴

In contrast, those states that place more emphasis on the biological tie also create greater opportunities for paternity tests to establish that tie.⁵ Disagreements about the marital presumption tend to be substantive ones that connect genetic knowledge of the facts of biological paternity to the legal assignment of parental roles.⁶

(a) The source of paternal rights

(i) US Constitutional law

Among the substantive disagreements between states about determinations of parenthood are disputes about the source of family identity.⁷ A majority of the justices have held that the US Constitution confers rights on legal parents, but the Court has never resolved the question of how free the states are to define who those rights-bearing parents are.⁸ Does the US Constitution or any of the

² See e.g. Mary Kay Kisthardt 'Of Fatherhood, Families and Fantasy: The Legacy of *Michael H v Gerald D*' (1991) 65 Tul L Rev 585.

³ *Michael H v Gerald D*, 491 US 110, 119–120 (1989) (citations omitted). Scalia stated further that: '[W]hat is at issue here is not entitlement to a state pronouncement that Victoria was begotten by Michael' at 127.

⁴ See *L Vargo v K Schwartz*, 940 A2d 459, 463 (Pa Super Ct 2007); see also *Pearson v Pearson*, 182 P3d 353, 355–356 (Utah 2008) (rejecting paternity tests during an ongoing marriage).

⁵ *Courtney v M Roggy*, 302 SW3d 141, 149 (Mo Ct App 2009) (emphasis in case).

⁶ Determining paternity, however, is a different issue than informing the child. Compare *Callender v Skiles*, 623 NW2d 852 (Iowa 2001) (ordering father not to inform child) with *Re Richard W*, 212 AD2d 89, 629 NYS2d 512, 514 (NY App Div 1995) (presumption of legitimacy should not be used to perpetuate a falsehood).

⁷ On the relationship between parenthood and identity, see June Carbone 'The Legal Definition of Parenthood: Uncertainty at the Core of Family Identity' (2005) 65 La L Rev 1295.

⁸ The Supreme Court's decision in *Troxel v Granville* grants those defined as 'parents' greater rights, making it more difficult for the states to choose to recognise 'step-parents' or grandparents, 530 US 57, 72–73 (2000). Compare Emily Buss "'Parental' Rights' (2002) 88 Va L Rev 635, 657–658 (arguing that *Troxel* depends on the legal definition of parenthood

states confer rights on adults as 'parents' on the basis of form (marriage or adoption), function (assumption of a parental role) or biology? In *Michael H v Gerald D*, Justice Scalia's plurality opinion privileged the marital family over other 'unitary families' that might receive constitutional protection⁹ and found that it was not unconstitutional for the state to give categorical preference to the former.¹⁰ Justice Brennan's dissent, in contrast, emphasised the need to recognise a variety of family forms and to protect the underlying father-daughter relationship that had been established in the case¹¹ while Justice White's dissent placed greater emphasis on biology.¹²

Michael H did not mandate that states use the marital presumption to determine paternity. Instead, the Court left the matter to the states, which in the absence of federal guidance have split in ways that echo the emphasis on marriage, function and biology from the differing Supreme Court opinions.

(ii) *States equating biology with parenthood*

All states continue to recognise at least a rebuttable presumption that a child born within marriage is the child of the husband,¹³ and many limit the circumstances in which it can be rebutted.¹⁴ Several states, however, grant the biological father a right under the state constitution to rebut the presumption and establish a relationship with the child. Iowa and Texas provide notable examples. In *Callender v Skiles*, involving a non-marital father's claims against the married mother and her husband, the Iowa Supreme Court acknowledged that scientific advancements have 'made the identity of a biological parent a virtual certainty' and social stigmas against divorce and non-marital births have weakened.¹⁵ The court emphasised the importance of encouraging the

provided by the states and imposes no constitutional limits on how the states choose to define parenthood), with David D Meyer 'Constitutional Pragmatism for a Changing American Family' (2001) 32 Rutgers LJ 711, 714, 718 (asserting that the Troxel plurality's approach amounted 'to an implicit rejection of strict scrutiny,' but read in light of other Supreme Court decisions on parental rights, does not give the states unlimited discretion in defining parents).

⁹ Justice Scalia describes the rights of biological father v husband as a choice between ruling that 'Michael ... being unable to act as father of the child he has adulterously begotten, or Gerald ... being unable to preserve the integrity of the traditional family unit he and Victoria have established' *Michael H v Gerald D* at 130.

¹⁰ *Michael H v Gerald D* at 127.

¹¹ See e.g. his references to Scalia's 'pinched conception of "the family"' *Michael H v Gerald D* at 145, and 'rhapsody on the unitary family' as 'out of tune' with prior decisions.

¹² *Michael H v Gerald D* at 157-158.

¹³ See Leslie J Harris, June Carbone and Lee E Teitelbaum *Family Law* (New York: Aspen, 4th edn, 2010) 887.

¹⁴ UPA, s 204. For varying perspectives on the marital presumption, see e.g. Laura Morgan 'Child Support Fifty Years Later' (2008) 42 Fam LQ 365, 372-373; Mary Patricia Byrn and Jenni Vainik Ives 'Which Came First: The Parent or the Child?' (2010) 62 Rutgers L Rev 305, 337 (the presumption 'is not in the child's best interest and does not guarantee the child's fundamental right to legal parents at birth'); Jana Singer 'Marriage, Biology and Paternity, the Case for Revitalizing the Marital Presumption' (2006) 65 MD L Rev 246 (critiquing the recent changes to the marital presumption and arguing that the policy goals of the presumption continue to be valid).

¹⁵ *Callender v Skiles*, 591 NW2d 182, 190 (Iowa 1999).

truth about paternity¹⁶ and expressed concern that ‘denying a putative father standing to challenge paternity conflicts with our societal goal of encouraging fathers to take responsibility for their children’.¹⁷ Texas similarly recognises the biological father’s right to establish paternity despite the marital presumption.¹⁸ Like the Iowa courts, the Texas courts treat biology as determinative of parenthood and accord the biological father the constitutional rights of a parent.

Other states have statutorily limited the marital presumption.¹⁹ Missouri, for example, provides that ‘a man *alleging himself to be a father* ... may bring an action *at any time* for the purpose of declaring the *existence* or *nonexistence* of the father and child relationship’.²⁰ In *Courtney v M Roggy*, the court of appeals concluded that the alleged father’s right to contest paternity was not subject either to a best interest test or to limitations on the basis of waiver and estoppel and that once a man is recognised as a biological father, he is entitled to visitation unless ‘visitation would endanger the child’s physical health or impair his or her emotional development’.²¹

All of these approaches turn on the notion that parenthood is a biological fact and that state policy lies with encouraging a relationship between parents and their biological children.

(iii) *States continuing to recognise the marital presumption*

Other states continue to uphold the marital presumption by limiting the circumstances in which it can be rebutted.²² In an era in which biology can be determined with certainty, courts have articulated two rationales to support continued application of the marital presumption: the state interest in

¹⁶ Ibid at 191.

¹⁷ Ibid.

¹⁸ *In the Interest of JWT*, 872 SW2d 189, 198 (1994). The majority rejected the dissent’s argument for privileging the marital tie, objecting that, to the dissent, the relationship between the mother and the biological father, ‘is morally judged, rather than legally judged, being dismissed as a mere “dalliance”’.

¹⁹ Approximately two-thirds of the states similarly allow the non-marital father to challenge the marital presumption through either statute or case-law. See e.g. Uniform Parentage Act (UPA), Comment at s 607; see also *Fisher v Tucker*, 388 SC 388, 697 SE2d 548 (SC 2010) (South Carolina’s statutory presumption of paternity within marriage can be rebutted by blood tests); *Watermeier v Moss*, 2009 Tenn App LEXIS 718 (2009) (Tennessee requires that, for the marital presumption to preclude paternity for biological father, the married couple needed to have lived together at the time of conception, remained together through the filing of the petition, and the husband needed to sign an affidavit attesting to biological paternity). The UPA limits challenges to within 2 years of the child’s birth. See s 607: Limitation: child having presumed father.

²⁰ Missouri Revised Statutes (RSMo) (2010), § 210.826(1), cited in *Courtney v M Roggy*, 302 SW3d 141, 146 (Mo Ct App 2009) (emphasis added in opinion).

²¹ Ibid at 151.

²² RSMo (2010), § 210.826(1), cited in *Courtney v M Roggy*, 302 SW3d 141, 146 (Mo Ct App 2009) (emphasis added in opinion).

²² See e.g. UPA, s 608 (limiting circumstances in which the court will allow blood tests to rebut the presumption of paternity).

upholding the sanctity of marriage and a preference for function over biology. The two rationales overlap to a degree, but the difference in emphasis varies from state to state and from case to case. For example, courts in Pennsylvania have reaffirmed the strength of the presumption when the marital family remains intact and the husband has assumed parental responsibilities, but handled cases at or after divorce on an estoppel basis that, as discussed later, depends on the husband's continuing assumption of a parental role.²³

Michigan, in contrast, protects the marital presumption even after the marriage ends and even if the husband does not have an ongoing relationship with the child.²⁴ The courts there have interpreted state law to deny standing to the biological father to contest paternity of a child conceived within marriage and held that the law applies in cases where the mother had divorced the father by the time of the child's birth and the divorce decree indicated that there were no children born to the marriage or where the biological father had lived with mother and child for several years and the husband had died.²⁵

The most fascinating defence of marriage has come from Louisiana. The marital presumption has historically been so strong there that the state Supreme Court observed in 1972 that the court had never allowed a husband to disavow paternity.²⁶ Under pressure, however, to recognise the facts of biological paternity,²⁷ the Louisiana courts responded with a notion of dual paternity that granted legal recognition to both the husband and the biological father. The issue first arose in context of inheritance,²⁸ but in a subsequent action, the Louisiana Supreme Court further held that where the child had lived for several years with his mother and biological father, he could seek child support from the father notwithstanding his status as the child of the mother's marriage to another man.²⁹ In 2004, however, the Louisiana legislature also amended the underlying statute to require that an unmarried father bring suit within one year of the child's birth to gain parental recognition, limiting the significance of dual paternity.³⁰

In contrast to the relatively strong promotion of marriage in Michigan, Pennsylvania, and Louisiana, a large number of other states continue to apply the marital presumption in a manner that is far more dependent on context.

²³ *Vargo v Schwartz*, 940 A2d 459, 463 (Pa Super 2007); see also *Brinkley v King*, 701 A2d 176, 180 (Pa 1997). Cf *Pearson v Pearson*, 182 P3d 353 (Utah 2008) (protecting the husband's ongoing relationship with the child even though mother had the biological father); see also *Pecoraro v Rostagno-Wallat*, 2011 WL 148784, *1 (Mich App 18 January 2011).

²⁴ *Barnes v Jeudevine*, 718 NW2d 311 (Mich 2006).

²⁵ *Ibid.* See also *Mattei v Ott*, 2012 WL 1449118 (Mich App).

²⁶ *Tannehill v Tannehill*, 261 So2d 619, 621 (La 1972).

²⁷ State laws addressing inheritance from unmarried fathers had been declared unconstitutional in *Levy v Louisiana*, 391 US 68 (1968).

²⁸ *Warren v Richard*, 296 So2d 813 (La 1974).

²⁹ *Smith v Cole*, 553 So2d 847, 855 (La 1989).

³⁰ Louisiana Civil Code (2010), arts 187, 189; see Rachel L Kovach 'Comment, Sorry Daddy – Your Time is Up: Rebutting the Presumption of Paternity in Louisiana' (2010) 56 Loy L Rev 651.

California courts, for example, often use the marital presumption not to promote the importance of marriage per se, but to protect a child's ongoing relationship with adults who have played a parental role.³¹

In order to protect these functional relationships, whether they exist inside or outside of marriage,³² the California courts have done what *Michael H* did not; they have modernised family understandings to channel family relationships into a two-parent model, but one that relies less directly on marriage.³³

Other courts make application of the marital presumption dependent on a best interest analysis; that is, they will not allow the presumption to be rebutted unless it is in the child's interests.³⁴ These rulings, while they often result in decisions upholding application of the marital presumption, defy any simple equation of parental function with either marriage or biology. Ultimately, disagreement on the purpose of the presumption and the complexity of the facts makes legal consistency and predictability difficult and often undesirable.³⁵

(iv) *The marital presumption and assisted reproductive technology*

Technological advances have also enabled the use of surrogacy, donor eggs and donor sperm. Gaps in existing state regulations are vast; while virtually all states have addressed sperm donation to some degree, many states have yet to decide whether the same laws apply to donor eggs and embryos.³⁶

³¹ For a more complete explanation of California parentage law, see June Carbone 'From Partners to Parents Revisited: How Will Ideas of Partnership Include the Emerging Definition of California Parenthood?' (2007) 7 Whittier J Child & Fam Advoc 3.

³² *Gabriel P v Suedi D*, 141 Cal App 4th 850, 865–866 (Cal App 2d Dist 2006).

³³ See *Re Jesusa V*, 85 P3d at 13, 15 (stating that biological paternity does not necessarily rebut another man's presumption, depending instead on all the circumstances of the case); *Re Nicholas H*, 46 P3d at 933–934 (finding that the ex-husband, who was not the biological father, still established parental rights over the child because he received the child into his home and held the child out as his own). The California legislature also updated the marital presumption statute to permit the mother greater latitude in rebutting the presumption of paternity. See California Family Code, s 7541(c).

³⁴ See eg *Hardy v Hardy*, 2011 Ark 82 (2011) (applying res judicata where the trial court in the initial divorce proceeding refused to permit paternity tests because they were not in the child's best interest); *Chanthoan v David F*, 907 NYS2d 436 (Fam Ct 2009) (allowing blood tests to establish paternity of unmarried father where court concludes it would not disrupt marital relationship and husband and wife both approved of them); *Kamp v Dep't of Human Servs*, 980 A2d 448 (Md Ct App 2009) (holding that trial court should apply a threshold best interest determination before ordering blood tests that would rebut marital presumption); *Williamson v Williamson*, 690 SE2d 257 (Ga App 2010) (applying best interest of the child standard).

³⁵ See Ruth Padawer 'Who Knew I Was Not the Father?' NY Times Mag, 17 November 2009, available at www.nytimes.com/2009/11/22/magazine/22Paternity-t.html (accessed May 2013) (emphasising the intertwined nature of the lives of the people involved in paternity disputes).

³⁶ See Naomi Cahn 'The New Kinship' (2012) 100 Geo LJ 367, 388.

No uniformity exists among states concerning the legal relationships established through collaborative reproduction,³⁷ although the Uniform Law Commission has twice attempted to develop comprehensive model parenthood legislation: the 1973 and the 2002 Uniform Parentage Acts (UPAs).³⁸ The 1973 UPA, still followed by many states, addressed artificial insemination.³⁹ It applied only to married couples, providing that if (1) the husband's consent was given in writing; and (2) the insemination was done under the supervision of a licensed physician, then the husband would be the legal father.⁴⁰

Consequently, the 1973 UPA, as originally drafted, was limited to parentage determinations for children conceived through donor insemination by married women. The 2002 Act clarifies that an egg or sperm donor is not a parent when a child is conceived through 'assisted reproduction', meaning reproduction not involving sexual intercourse,⁴¹ regardless of whether a physician is involved.⁴² However, uniformity remains elusive. Relatively few states have adopted the 2002 UPA, and many which have done so have amended or deleted the provision dealing with assisted reproduction.⁴³

III BEYOND THE PRESUMPTION: ESTOPPEL AND MULTIPLE PARENTS

If the marital presumption protects intact marriages, it might, perhaps, be easier to challenge as the relationship dissolves. As we have argued elsewhere,⁴⁴ couples who want a relationship to last have an incentive not to inquire too closely into paternity. In contrast, couples who are parting must decide how hard they are going to work to share a relationship with the child. If they have

³⁷ Eg Lori B Andrews and Nanette Elster 'Regulating Reproductive Technologies' (2000) 21 J Legal Med 35, 49; Courtney G Joslin 'Protecting Children(?): Marriage, Gender, and Assisted Reproductive Technology' (2010) 83 S Cal L Rev 1177, 1184–1188; Kira Horstmeyer 'Note, Putting Your Eggs in Someone Else's Basket: Inserting Uniformity into the Uniform Parentage Act's Treatment of Assisted Reproduction' 64 Wash & Lee L Rev (2007) 671, 684–690.

³⁸ See John J Sampson 'Amendments to the Uniform Parentage Act as Last Amended in 2002 with Prefatory Notes and Comments' (2003) 37 Fam LQ 5; see UPA, Prefatory Note (2002), available at www.uniformlaws.org/shared/docs/parentage/upa_final_2002.pdf (accessed June 2013).

³⁹ UPA (1973), s 5.

⁴⁰ The states vary substantially even among those states adopting a version of the uniform act. As of 2009, 21 states adopted a version of the UPA terminating the parental status of the donor with use of a physician, 13 states had statutes that terminated the parental status of the donor without reference to the marital status of the recipient, and 16 states had no legislation on the subject. See Leslie J Harris, June Carbone, and Lee E Teitelbaum *Family Law* (New York : Aspen, 4th edn, 2010).

⁴¹ UPA (1973) at art 1, s 102(4), art 7, s 702.

⁴² UPA (2002), s 702 Comment, available at www.uniformlaws.org/shared/docs/parentage/upa_final_2002.pdf at b63 (accessed June 2013).

⁴³ See National Conference of Commissioners on Uniform State Laws, Uniform Law Commissioners, A Few Facts About the Uniform Parentage Act, www.nccusl.org/Update/uniformact_factsheets/uniformacts-fs-upa.asp.

⁴⁴ June Carbone and Naomi Cahn 'Which Ties Bind? Redefining the Parent-Child Relationship in an Age of Genetic Certainty' (2003) 11 Wm & Mary Bill Rts J 1011.

doubts about paternity, men may choose to resolve those doubts, and women may use those doubts to exclude their ex-mates from their lives. The significance of the marital presumption accordingly changes and even those states that view it as close to absolute during an ongoing relationship may not apply it at all when the parties divorce. Instead, the states may use the husband's assumption of the parental role to estop either the husband or the wife from denying the husband's paternity, but the states no more agree on the meaning or use of estoppel than they did on application of the marital presumption.

The relationship between estoppel and the marital presumption thus further confuses determination of paternity. As we have observed above, some states use a best interest test to determine whether to permit paternity tests at all. In these states, if the courts preclude the tests, the marital presumption cannot be rebutted and the husband is treated as the child's legal and biological father.⁴⁵ In other states, however, the courts may readily allow paternity testing or other testimony that rebuts the marital presumption, and then frame the question at divorce in terms of use of equitable principles to estop the 'step-parent' from denying paternity.⁴⁶ For all intents and purposes these cases may be indistinguishable, but the courts that preclude testing often go to great lengths to preserve the fiction that the husband may be the child's biological father while the estoppel cases more directly address the circumstances in which a functional parent may be treated as legal father without a biological tie.⁴⁷ In an era of increasingly unstable relationships, therefore, estoppel is often the doctrine that cleans up messy relationships and imposes family obligations.

(a) Equitable estoppel at divorce

While all states recognise use of estoppel to some degree, not all, however, embrace the same policies determining when its use is appropriate. Although Pennsylvania views the marital presumption as virtually irrefutable during an intact relationship, it does not apply at divorce. Instead, the courts use estoppel to determine paternity.⁴⁸ As a practical matter this means that a husband whose wife has misled him may be able to escape liability for child support if he discontinues his relationship with the child, but will continue to be financially responsible if he 'does the right thing' and continues to act as a parent after he learns the truth.⁴⁹ The case-by-case adjudication of these disputes after the relationship ends simply introduces greater uncertainty into children's lives.

⁴⁵ See e.g. *Hardy v Hardy*, 2011 Ark 82 (2011) (trial court denied paternity testing on a best interest basis where boy was 8 at the time of the divorce and the husband was the only child the father had known).

⁴⁶ See e.g. *Wiese v Wiese*, 699 P2d 700, 701 (Utah 1985).

⁴⁷ Some states, however, distinguish between parenthood by estoppel, which estops a legal parent from denying the other parent's visitation or custody rights, and equitable estoppel, which estops a person who had held himself out as a parent from denying the obligation to pay child support. See *Janice M v Margaret K*, 948 A2d 73, n 14 (Md 2008).

⁴⁸ *Warfield v Warfield*, 815 A2d 1073, 1077 (Pa Super 2003).

⁴⁹ Compare *Duran v Duran*, 820 A2d 1279 (Pa Super 2003) (husband not liable for child support

In Kentucky, the court estopped a former husband from denying paternity who had waited until 6 years after the divorce to have the child tested. In concluding equitable estoppel barred the ex-husband's claim, the Court of Appeals recognised that 'the relationship of father and child is too sacred to be thrown off like an old cloak, used and unwanted'.⁵⁰ Two facts were particularly critical to the outcome: the child did not know the truth about paternity and because the husband had assumed the parental role, 'he has prevented [the child] from having a relationship, financial or otherwise, with her natural father'.⁵¹

Similarly, most states will equitably estop a husband from denying paternity when he fails to raise the issue before the divorce decree becomes final.⁵² In Florida, for example, the state Supreme Court emphasised the child's need for finality in holding that a mother's failure to disclose the possibility that the husband was not the father of the child was intrinsic, not extrinsic, fraud and therefore could not be a basis for challenging a child support award more than a year after the divorce.⁵³ Utah, unlike most other states, however, permits fathers to escape support liability if they claim paternity fraud.⁵⁴

(b) Multiple parents

In principle, the relaxation of the marital presumption and the use of estoppel could produce more than two adults with parental rights or responsibilities, but the courts rarely entertain the possibility.⁵⁵ Louisiana, as noted above, is the only state to recognise dual paternity, although other jurisdictions, including DC, have the possibility of recognising multiple parents.⁵⁶

where he removed himself 'as gently as possible' from the child's life) with *JC v JS*, 826 A2d 1 (Pa Super 2003) (husband who was 'justly proud' of the fact that he continued to treat child as his son in every way held liable for support).

⁵⁰ *SRD v TLB*, 174 SW3d 502, 510 (KyApp 2005). In a later case, however, a Kentucky appellate court refused to apply estoppel where the effect would be to establish a step-parent as a father. *JRA v GDA*, 314 SW3d 764 (Ky Ct App 2010).

⁵¹ *SRD v TLB* at 510. Courts have also used the doctrines of *res judicata* and collateral estoppel to prevent relitigation of custody issues where a man had an opportunity to challenge paternity and failed to do so. See e.g. *Godsoe v Godsoe*, 995 A2d 232 (Me 2010).

⁵² See e.g. *Martin v Pierce*, 370 Ark 53, 257 SW3d 82 (Ark 2007); *Hardy v Hardy*, 2011 Ark 82 (2011); *Re Marriage/Children of Betty LW v William EW*, 212 W Va 1, 10, 569 SE2d 77, 86 (W Va 2002). See also Maegan Padgett 'The Plight of a Putative Father: Public Policy v Paternity Fraud' (2005) 107 W Va L Rev 867, 889.

⁵³ *Parker v Parker*, 950 So 2d 388 (Fla 2007); see also *Walker v Walker*, 280 SW3d 634 (Mo App 2009) (refusing to grant husband post-dissolution relief in the absence of extrinsic fraud).

⁵⁴ *Masters v Worsley*, 777 P2d 499 (Utah 1989).

⁵⁵ For more discussion of the issue, see Susan Frelich Appleton 'Parents by the Numbers' (2008) 37 Hofstra L Rev 11; Nancy E Dowd 'Multiple Parents/Multiple Fathers' (2007) 9 JL & Fam Stud 231; Melanie B Jacobs 'Why Just Two? Disaggregating Traditional Parental Rights and Responsibilities to Recognize Multiple Parents' (2007) 9 JL & Fam Stud 209; see also *CL v YB (In re DL)*, 938 NE2d 1221, 1225 (2010) (finding that although putative father had waived ability to contest judgment establishing paternity, establishing paternity in another man through paternity tests automatically disestablished his parental standing).

⁵⁶ See Nancy D Polikoff 'A Mother Should Not Have to Adopt Her Own Child: Parentage Laws for Children of Lesbian Couples in the Twenty-First Century' (2009) 2 Stan J CR & CL 201, 208–210.

Pennsylvania, in the first reported case of its kind, recognised multiple parents where a lesbian couple, who had entered into a civil union in Vermont, were jointly raising four children and the biological father of two of the children, who had acted as a sperm donor but never sought to sever his parental standing, provided support and saw the children on a regular basis.⁵⁷ New Jersey, has also ordered two men – the husband and the biological father – to pay support.⁵⁸

IV SAME-SEX MARRIAGES

With the increasing number of children raised by same-sex parents, American states have struggled with issues involving the recognition of second parents. As more states allow their residents to enter into same-sex marriages and accept same-sex marriages from other jurisdictions, they have expanded the marital presumption. A 2012 Massachusetts case held that parents who had entered into a domestic partnership in California were entitled to rights analogous to those of a Massachusetts same-sex marriage, including parenthood recognition.⁵⁹ Some states have agreed to issue birth certificates with the names of both spouses,⁶⁰ although the road has been bumpy.

Iowa, for example, which recognises same-sex marriage as the result of a 2009 court case, had initially refused to issue a birth certificate to recognise Heather Martin Gartner and Melissa Gartner as the parents of their daughter, MacKenzie, born into their marriage.⁶¹ While Iowa requires that both spouses be listed as the child's parents on the child's birth certificate, regardless of the child's genetic relationship to them, the state's Department of Public Health refused to apply this law to the Gartners unless they went through an adoption proceeding. A trial court judge cited earlier state court cases reinforcing the utility of the presumption in protecting the integrity of the marital unit, and ordered the state to place both women's names on the birth certificate. Although the Department of Public Health appealed the decision, the state's principles of non-discrimination between same-sex and heterosexual marriages suggest that the trial court's approach was appropriate.

V CONCLUSION

As these cases indicate, the law governing parentage is undergoing substantial revision based on changes in American marital and sexual behaviours. Courts

⁵⁷ *Jacob v Shultz-Jacob*, 923 A2d 473 (Pa Super 2007).

⁵⁸ *JR v LR*, 902 A2d 261 (NJ Super 2006).

⁵⁹ *Hunter v Rose*, 975 NE2d 857 (Mass 2012).

⁶⁰ See Movement Advancement Project, Family Equality Council, and Center for American Progress *Securing Legal Ties for Children Living in LGBT Families: A State Strategy and Policy Guide* App 2 (2012), www.lgbtmap.org/file/securing-legal-ties.pdf (accessed May 2013).

⁶¹ *Gartner v Iowa Dept of Public Health* (D Ct Iowa 2012), www.desmoinesregister.com/assets/pdf/0104rulingonpetitionforjudicialreview.pdf (now on appeal) (accessed May 2013).

struggle to reconcile the strong public policies supporting marriage with new knowledge about biological facts. The marital presumption is a legal fiction that protects the parents of children born into same-sex marriages. In heterosexual marriages, however, it simply protects the state's image of the marital relationship, and, as some states have become more flexible in their approaches to non-marital relationships, so too does the marital presumption. We suspect that, if the states were to create greater incentives to determine the truth when children are young, stronger and longer lasting bonds would result.⁶²

⁶² See June Carbone & Naomi Cahn 'Which Ties Bind? Redefining the Parent-Child Relationship in an Age of Genetic Certainty' (2003) 11 Wm & Mary Bill Rts J 1011 (2003).