

# WHO'S YOUR DADDY?: WHY THE PRESUMPTION OF LEGITIMACY SHOULD BE ABANDONED IN VERMONT

## INTRODUCTION

Procedure by presumption is always cheaper and easier than individualized determination. But when . . . the procedure forecloses the determinative issues of competence and care, when it explicitly disdains present realities in deference to past formalities, it needlessly risks running roughshod over the important interests of both parent and child.<sup>1</sup>

The presumption of legitimacy is often referred to as one of the oldest rules of law.<sup>2</sup> Under the presumption, the law presumes a child to be legitimate if he or she is born during a lawful marriage.<sup>3</sup> Courts generally apply the presumption of legitimacy in civil cases, in particular, paternity disputes.<sup>4</sup> Courts use “three principal ways to establish paternity: 1) conclusive legal presumption of paternity, 2) admission or acknowledgement of paternity by the father . . . or 3) by adjudication of paternity in a judicial proceeding.”<sup>5</sup> The first method used by courts to decide paternity is the presumption of legitimacy. The presumption of legitimacy has been used by courts in states like Vermont, Pennsylvania, and California to decide the paternity of a child.<sup>6</sup>

Courts created the presumption of legitimacy at a time when the only way to prove paternity was through circumstantial and testimonial evidence.<sup>7</sup> At that time, marriage was thought to be the most efficient and

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1. Stanley v. Illinois, 405 U.S. 645, 656–57 (1971).

2. LYNN D. WARDLE & LAURENCE C. NOLAN, FUNDAMENTAL PRINCIPLES OF FAMILY LAW 257 (2002).

3. BURR W. JONES, THE LAW OF EVIDENCE IN CIVIL CASES 119–20 & 119–20 n.14 (3d ed. 1924).

4. WARDLE & NOLAN, *supra* note 2.

5. *Id.* at 247.

6. See, e.g., Michael H. v. Gerald D., 491 U.S. 110, 119–20 (1989). This case explains that: “The conclusive presumption is actually a substantive rule of law based upon a determination by the Legislature as a matter of overriding social policy, that given a certain relationship between the husband and wife, the husband is to be held responsible for the child, and that the integrity of the family unit should not be impugned.”

*Id.* (quoting Michael H. v. Gerald D., 191 Cal. App. 3d 995, 1005 (1987)); Miscovich v. Miscovich, 688 A.2d 726, 732 (Pa. Super. Ct. 1997) (holding that “[w]here the husband has accepted his wife’s child and held it out as his own over a period of time, he is estopped from denying paternity”) (citing Commonwealth ex rel. Goldman v. Goldman, 184 A.2d 351, 355 (Pa. Super. Ct. 1962); Godin v. Godin, 168 Vt. 514, 521–24, 725 A.2d 904, 909–11 (1998) (holding that following divorce a man could not request genetic testing to refute paternity where prior to divorce he assumed full parental responsibilities for child.)).

7. WARDLE & NOLAN, *supra* note 2, at 264.

reliable way of determining paternity.<sup>8</sup> However, today genetic testing is widely available and would be feasible for courts to apply in paternity cases.<sup>9</sup> In light of DNA tests, artificial insemination, and the recognition of same-sex marriages and civil unions, the presumption of legitimacy should no longer apply to paternity cases.

Several problems arise when courts apply the presumption in paternity cases today. One problem is that in many states, courts reject biological evidence and blindly apply the presumption.<sup>10</sup> This creates a situation where a man who is not the biological father of a child is forced to continue to support the child.<sup>11</sup> Another problem is that in the interest of protecting the marriage, some courts deny a relationship between a biological father and his child if the mother of the child was married to another man at the time of the child's birth.<sup>12</sup> Courts can avoid these problems by using other methods to determine paternity that do not ignore biological evidence.

Part I of this Note discusses the history of the presumption, the reasons for the presumption, and how the Supreme Court has resolved cases concerning the presumption of legitimacy. This Part also examines cases where the presumption has been applied in the face of scientific evidence to the contrary. Part II looks at how and why courts in Vermont apply the presumption of legitimacy. This Part will specifically explore the presumption in the context of a same-sex parentage determination case as an example of why the presumption is an outdated rule. This Part will also consider the relevant Vermont statutes regarding parentage. Part III examines the fact that the presumption no longer serves the purposes it was created to serve. Part IV argues for abandoning the presumption in Vermont and adopting a system of parentage that recognizes the best interests of the child, the interests of the biological father, and the interests of society.

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8. *Id.* at 257.

9. ROSEMARIE SKAINE, *PATERNITY AND AMERICAN LAW* 43 (2003).

10. *Id.* “[T]he law has not caught up with the science of DNA testing. In states around the country, divorced men and single men, who have previously acknowledged paternity, are having their genetic evidence of nonpaternity rejected by the courts.” *Id.*

11. *E.g.*, *Miscovich*, 688 A.2d at 727, 733; *Godin*, 168 Vt. at 524, 725 A.2d at 911.

12. *See, e.g.*, *Michael H.*, 491 U.S. at 124 (1989) (holding that biological father does not have a constitutionally protected liberty interest in parental relationship with daughter born during mother's marriage to another man); *Randy A.J. v. Norma I.J.*, 677 N.W. 2d 630, 633 (Wis. 2004) (holding that absent a “substantial relationship” with child, husband is estopped from applying genetic testing results to rebut presumption).

## I. BACKGROUND

The presumption of legitimacy comes from the common law.<sup>13</sup> In 1777 Lord Mansfield announced the now-famous phrase that the presumption of legitimacy of a child born in wedlock could only be rebutted by evidence that the husband was not “within the four seas” during the time of conception.<sup>14</sup> The “within the four seas” standard was relaxed by the English courts in the *Banbury Peerage Case*.<sup>15</sup> In *Banbury*, Chief Justice Mansfield, speaking for a unanimous court, stated the new rule for the presumption of legitimacy. According to Justice Mansfield,

[I]n every case where a child is born in lawful wedlock, the husband not being separated from his wife by a sentence of divorce, sexual intercourse is presumed to have taken place between the husband and wife, until that presumption is encountered by such evidence as proves, to the satisfaction of those who are to decide the question, that such sexual intercourse did not take place at any time, when, by such intercourse, the husband could, according to the laws of nature, be the father of such child.<sup>16</sup>

The presumption could also be rebutted by evidence that the husband did not have access to his wife during the time the child was conceived (non-access) or by evidence that the husband was impotent.<sup>17</sup> Neither the husband nor the wife could testify or give evidence of non-access.<sup>18</sup> The legitimacy of a child could be challenged “only by the husband or wife, or the descendant of one or both of them.”<sup>19</sup> Courts also applied the

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13. HARRY D. KRAUSE, *ILLEGITIMACY: LAW AND SOCIAL POLICY* 15–16 (1971).

14. WARDLE & NOLAN, *supra* note 2, at 257 (quoting *Goodright v. Moss*, 2 Cowp. 591, 98 Eng. Rep. 1257 (1777)). This simply means that the husband was not in the state or country. ERNEST COCKLE, *LEADING CASES ON THE LAW OF EVIDENCE* 17 (1907) (using the word “kingdom” to mean Kingdom of England).

15. COCKLE, *supra* note 14, at 17.

16. *Banbury Peerage Case*, (1811) 1 Sim. & St. 153; 24 Rev. Rep. 159 (U.K.), *reprinted in* COCKLE, *supra* note 14, at 16–17.

17. 29 AM. JUR. 2D *Evidence* §§ 242, 245 (2008); 126 A.C. FREEMAN, *THE AMERICAN STATE REPORTS: CONTAINING THE CASES OF GENERAL VALUE AND AUTHORITY SUBSEQUENT TO THOSE CONTAINED IN THE “AMERICAN DECISIONS” AND THE “AMERICAN REPORTS,” DECIDED IN THE COURTS OF LAST RESORT OF THE SEVERAL STATES* 263–64 (1909) [hereinafter *AMERICAN STATE REPORTS*]; 1 JAMES SCHOULER & ARTHUR W. BLAKEMORE, *A TREATISE ON THE LAW OF MARRIAGE, DIVORCE, SEPARATION AND DOMESTIC RELATIONS* 722 (6th ed. 1921).

18. 29 AM. JUR. 2D *Evidence* § 245 (2008) (citing *Michael H. v. Gerald D.* 491 U.S. 110 (1989)); *AMERICAN STATE REPORTS*, *supra* note 17, at 261–62 (quoting *In re Estate of Mills*, 137 Cal. 298, 304 (1902)).

19. *Ex parte Madalina*, 164 P. 348, 349 (Cal. 1917) (quoting CAL. CIV. CODE § 195 (1872))

presumption to children conceived during a marriage but born after a divorce or the death of the husband, if the child was born “within such a period of time as to make it biologically possible that conception occurred during the marriage.”<sup>20</sup>

At common law, a child born out of wedlock was greatly disadvantaged.<sup>21</sup> He or she was considered “*filius nullius*, and was denied a name unless he acquired one by reputation; having no family recognized by the law, he was incapable of inheriting property.”<sup>22</sup> Illegitimate children were also denied civil rights and were treated as second-class citizens.<sup>23</sup> Blackstone provided five reasons why the law did not treat illegitimate children in the same way as it treated legitimate children: (1) the fact that the law sought to provide for the welfare of all children by “encouraging the marriage of their parents”; (2) the law preferred the marital state over single parenthood; (3) the law sought “to provide certainty in [the] law of paternity”; (4) the law sought “to avoid fraudulent claims of paternity”; (5) and the law sought to easily allocate property based on inheritance.<sup>24</sup> Although the presumption was created to remedy the problem of discrimination against illegitimate children,<sup>25</sup> courts and legislatures have since eliminated most of the discrimination associated with illegitimacy,<sup>26</sup> thus making the presumption unnecessary.

#### A. Reasons for the Presumption of Legitimacy

Courts created the presumption of legitimacy for five primary reasons: (1) to “protect[] innocent children from the social burdens of illegitimacy”; (2) to “preserv[e] the stability of the family unit”; (3) to “ensure[] . . . [the]

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(current version at CAL. FAM. CODE § 7612 (West’s 2004 & Supp. 2010).

20. GERDA A. KLEJKAMP, FAMILY LIFE AND FAMILY INTERESTS: A COMPARITIVE STUDY ON THE INFLUENCE OF THE EUROPEAN CONVENTION OF HUMAN RIGHTS ON DUTCH FAMILY LAW AND THE INFLUENCE OF THE UNITED STATES CONSTITUTION ON AMERICAN FAMILY LAW 211 (1999).

21. Note, *Presumption of Legitimacy of a Child Born in Wedlock*, 33 HARV. L. REV 306, 306 (1920).

22. *Id.* at 307 (citation omitted).

23. WARDLE & NOLAN, *supra* note 2, at 264.

24. *Id.*

25. HARI DEV KOHLI, LAW AND ILLEGITIMATE CHILD: FROM SASTRIK LAW TO STATUTORY LAW 98 (2003).

26. See, e.g., ARIZ. REV. STAT. ANN. § 8-601 (1956) (granting illegitimate children the right to support and education); MASS. GEN. LAWS ch. 209C § 1 (2008) (defining child support rights as extending equally to children of parents who are and are not married to one another); 23 PA. CONS. STAT. ANN. § 5102(a) (Purdon’s 2001) (extending rights and privileges to illegitimate children); *Gomez v. Perez*, 409 U.S. 535, 538 (1973) (holding that states may not discriminate against illegitimate children); *Levy v. Louisiana*, 391 U.S. 68, 72 (1968) (concluding that denial of illegitimate children’s right to recover for wrongful death of mother constituted “invidious” discrimination).

financial and emotional security [of children]"; (4) to allow for summary child support determinations; and (5) to "prevent[] children from becoming wards of [the] state . . . ."<sup>27</sup> Courts primarily created the presumption to protect children from the social burdens of illegitimacy.<sup>28</sup> The plight of the bastard was so well known that Shakespeare referred to it in his play *The Two Gentlemen of Verona*, "bastard virtues, that indeed know not their fathers, and therefore have no names."<sup>29</sup> Children born out of wedlock were also discriminated against by society in ancient Israel.<sup>30</sup> The Bible states that, "[a] bastard shall not enter into the congregation of the Lord; even to his tenth generation he shall not enter into the congregation of the Lord."<sup>31</sup> In other words, society viewed the illegitimate child as an outcast and denied illegitimate children many of the protections of the law.

Secondly, courts created the presumption to preserve the stability of the family unit.<sup>32</sup> At the time the presumption was created, courts believed that it was better for a child to have two parents.<sup>33</sup> This legal presumption ensured that no child would be without a father. Furthermore, a child with a father can inherit property from him.<sup>34</sup> As a result of the presumption, the family unit was always intact. An outside party was not allowed to come in and break up the marriage by challenging the paternity of a child born during the marriage.<sup>35</sup> The third reason courts created the presumption of legitimacy was to protect the emotional security of children.<sup>36</sup> The argument here is that where both parents have raised a child for a number of years, it is against the best interests of the child to break up the only family the child has ever known.<sup>37</sup>

The last two reasons for the presumption deal with the interests of the state. The presumption of legitimacy exists to make it easy for courts to

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27. *Godin v. Godin*, 168 Vt. 514, 522, 725 A.2d 904, 909–10 (1998) (citations omitted).

28. William P. Hoffman, Jr., *California's Tangled Web: Blood Tests and the Conclusive Presumption of Legitimacy* 20 STAN. L. REV. 758–59 (1968).

29. WILLIAM SHAKESPEARE, *THE THIRD PART OF THE TWO GENTLEMEN OF VERONA* act 3, sc. 1.

30. WARDLE & NOLAN, *supra* note 2, at 264.

31. *Id.* (quoting *Deuteronomy* 23:2 (King James)).

32. Diane S. Kaplan, *Why Truth is Not a Defense in Paternity Actions*, 10 TEX. J. WOMEN & L. 69, 71 (2000).

33. See FREEMAN, *supra* note 17, at 263 ("This presumption of the legitimacy of such offspring is founded . . . also upon [the law's] supreme regard for those privileges of the married state . . . .") (quoting *Sergent v. North Cumberland Mfg. Co.*, 66 S.W. 1036, 1037 (1902)).

34. Harry D. Krause, *Equal Protection for the Illegitimate*, 65 MICH. L. REV. 477, 479 (1967).

35. *Michael H. v. Gerald D.*, 491 U.S. 110, 124–25 (1989).

36. *Godin v. Godin*, 168 Vt. 514, 522, 725 A.2d 904, 909–10 (1998) (citations omitted).

37. See *id.* ("[T]he State retains a strong and direct interest in ensuring that children born of a marriage do not suffer . . . psychologically merely because of a parent's belated and self-serving concern over a child's biological origins.").

determine parentage.<sup>38</sup> Courts also apply the presumption to prevent children from becoming wards of the state.<sup>39</sup> In other words, where a child has two parents, the child will not need financial support from the state. Clearly, our societal values have shifted since the 1800s when the presumption was first described by Lord Mansfield. The presumption of legitimacy no longer serves the above-discussed reasons.<sup>40</sup>

*B. “You are NOT the Father”—Fiction Over Biological Fact*

It is not difficult to find cases where courts applied the presumption to the detriment of the biological father.<sup>41</sup> The way courts apply the presumption in the following cases ignores the fact that the presumption was created by courts when the only reliable, if arbitrary, way to prove paternity was through marriage.<sup>42</sup> The most important of these cases is *Michael H. v. Gerald D.*, decided by the United States Supreme Court in 1989.<sup>43</sup> In *Michael H.*, Carole and Gerald were married.<sup>44</sup> During the marriage, Carole had an affair with Michael.<sup>45</sup> Carole’s daughter Victoria was born while Carole was married to Gerald and during her affair with Michael.<sup>46</sup> The hospital listed Gerald as the father on Victoria’s birth certificate.<sup>47</sup> When Carole and Gerald were having problems, Carole and Victoria would reside with Michael.<sup>48</sup> During one of the periods when Carole and Victoria lived with Michael, the three went to a hospital for a blood test to determine who was Victoria’s biological father.<sup>49</sup> The test revealed a 98.07% probability that Michael was Victoria’s father.<sup>50</sup> Carole subsequently moved back in with Gerald.<sup>51</sup> Unable to see Victoria, Michael

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38. See *Miller-Jenkins v. Miller-Jenkins*, 2006 VT 78, ¶ 44, 180 Vt. 441, 460, 912 A.2d 951, 966 (2006) (stating that the presumption makes collecting child support easier).

39. *Godin*, 168 Vt. at 522, 725 A.2d at 909.

40. See *infra* part III.

41. E.g., *Michael H. v. Gerald D.*, 491 U.S. 110, 124 (1989); *Ex parte Presse v. Koenemann*, 544 So.2d 406, 418 (Ala. 1989); *In re D.B.S. v. M.S.*, 888 P.2d 875, 875–88 (Kan. Ct. App. 1995); *Evans v. Wilson*, 856 A.2d 679, 696 (Md. 2004); *Girard v. Wagenmaker*, 470 N.W.2d 372, 381 (Mich. 1991); *Miscovich v. Miscovich*, 688 A.2d 726, 733 (Pa. Super. Ct. 1997); *Godin*, 168 Vt. at 524, 725 A.2d at 911; *Randy A.J. v. Norma I.J.*, 677 N.W.2d 630, 642 (Wis. 2004).

42. *WARDLE & NOLAN*, *supra* note 2, at 264–65.

43. *Michael H.*, 491 U.S. 110.

44. *Id.* at 113.

45. *Id.*

46. *Id.*

47. *Id.*

48. *Id.* at 113–14.

49. *Id.* at 114.

50. *Id.*

51. *Id.*

filed suit against Gerald wherein he asked the court to grant him the right to visit his daughter.<sup>52</sup> The issue the Supreme Court addressed was “whether the relationship between persons in the situation of Michael and Victoria has been treated as a protected family unit under the historic practices of our society, or whether on any other basis it has been accorded special protection.”<sup>53</sup>

The Court upheld the constitutionality of the California law that contained the presumption of legitimacy of a child born during wedlock.<sup>54</sup> In reaching its holding, the Court noted the fact that Gerald held Victoria out to be his child and was willing to raise her as his own.<sup>55</sup> The Court also took notice of the fact that the married state was traditionally protected by the law.<sup>56</sup> Further support for the Court’s decision was the absence of a tradition protecting Michael (an outsider to the marriage) in filing a suit for paternity.<sup>57</sup> The Court in this case strictly enforced the policy behind the presumption of “promoting the peace and tranquility of States and families . . . .”<sup>58</sup> *Michael H.* has not been overruled by the Supreme Court and has been positively cited by at least 31 cases from different states.<sup>59</sup> The case created the rule that the biological father of a child born to a woman

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52. *Id.* at 114–15.

53. *Id.* at 124.

54. *Id.* at 129–30.

55. *Id.* at 113–15.

56. *Id.* at 124.

57. *Id.* at 125–26.

58. *Id.* at 125 (internal quotation and citation omitted).

59. *Hutchins v. District of Columbia*, 188 F.3d 531, 538 (D.C. Cir. 1999); *Doe v. Taylor Independent School Dist.*, 15 F.3d 443, 460 (5th Cir. 1994) (Higginbotham, J. and Politz, J., concurring); *P.O.P.S. v. Gardner*, 998 F.2d 764, 767 (9th Cir. 1993); *Davis v. Thornburgh*, 903 F.2d 212, 225 (3d Cir. 1990); *Ex parte Presse v. Koenemann*, 544 So. 2d 406, 414 (Ala. 1989); *Adoption of Kelsey S.*, 4 Cal. Rptr. 2d 615, 627 (Cal. 1992); *Lisa I. v. Superior Court*, 34 Cal. Rptr. 3d 927, 933 (Cal. Ct. App. 2005); *Brian C. v. Ginger K.*, 92 Cal. Rptr. 2d 294, 299 (Cal. Ct. App. 2000); *Anna J. v. Mark C.*, 286 Cal. Rptr. 369, 376 (Cal. Ct. App. 1991); *K.S. v. R.S.*, 669 N.E.2d 399, 403 (Ind. 1996); *K.S. v. R.S.*, 657 N.E.2d 157, 159 (Ind. Ct. App. 1995); *Callender v. Skiles*, 591 N.W.2d 182, 187 (Iowa 1999); *In re D.B.S. v. M.S.*, 888 P.2d 875, 881 (Kan. Ct. App. 1995); *T.D. v. M.M.M.*, 730 So. 2d 873, 875 (La. 1999); *C.C. v. A.B.*, 550 N.E.2d 365, 370 (Mass. 1990); *Evans v. Wilson*, 856 A.2d 679, 694 (Md. 2004); *Girard v. Wagenmaker*, 470 N.W.2d 372, 392 nn. 22, 24 (Mich. 1991) (Cavanagh, J., dissenting); *Hauser v. Reilly*, 536 N.W.2d 865, 867 (Mich. Ct. App. 1995); *Smith v. Malouf*, 722 So. 2d 490, 506 (Miss. 1998) (Smith, J., concurring in part, dissenting in part); *B.H. v. K.D.*, 506 N.W.2d 368, 372 (N.D. 1993); *Webster v. Ryan*, 729 N.Y.S.2d 315, 333 (N.Y. Fam. Ct. 2001); *Lorence v. Goeller*, No. 01CA007820, 2002 WL 347318, at \*5 (Ohio Ct. App. Mar. 6, 2002) (Carr, J., concurring in part, dissenting in part); *Merkel v. Doe*, 635 N.E.2d 70, 72 (Ohio Com. Pl. 1993); *Scott v. Mershon*, 576 A.2d 67, 69 (Pa. Super. Ct. 1990); *Rubano v. DiCenzo*, 759 A.2d 959, 973 (R.I. 2000); *Henderson v. Wietzikoski*, 841 S.W.2d 101, 105 (Tex. App. 1992) (Thomas, J., concurring and dissenting); *Jack v. Jack*, 796 S.W.2d 543, 548 (Tex. App. 1990); *Randy A.J. v. Norma I.J.*, 677 N.W.2d 630, 636 (Wis. 2004); *In re Paternity of C.A.S.*, 468 N.W.2d 719, 723 (Wis. 1991); *In re Paternity of C.A.S.*, 456 N.W.2d 899, 902 (Wis. Ct. App. 1990); *Augustin v. Augustin*, Fam. No. D194/94, 1996 WL 663975, at \*2 (V.I. Oct. 20, 1996).

married to another man has no substantive due process right to parent the child; he has no parental rights even if he has an existing relationship with the child.<sup>60</sup>

*C. Cases Following in the Footsteps of Michael H.*

The courts in the cases discussed below adopt the Supreme Court's reasoning in *Michael H.* In *Miscovich v. Miscovich*, following a divorce, Mr. Miscovich went to the hospital and requested that the hospital perform blood tests on him and a son that was born during his marriage to Ms. Miscovich.<sup>61</sup> The blood tests excluded him as the father of the child.<sup>62</sup> As a result of the test, he informed the child, who was then four years old, that he was not the child's father and no longer visited the child.<sup>63</sup> In a subsequent paternity action, Mr. Miscovich requested the admission of DNA evidence.<sup>64</sup> The court refused to admit the DNA evidence because Mr. Miscovich had not overcome the presumption of legitimacy by clear and convincing evidence of "non-access, sterility, or impotency."<sup>65</sup> The court also stated that even though Mr. Miscovich had informed the child that he was not his father "the relationship still exists at law."<sup>66</sup> The *Miscovich* court created the rule that courts can apply the presumption even where there is no longer an intact family to be preserved.<sup>67</sup>

In another case, where DNA evidence established with a 99.99% probability that a party outside the marriage (Brendan) was the father of a child, the court still applied the presumption of legitimacy.<sup>68</sup> In *Randy A.J. v. Norma I.J.*, the court applied the presumption because the party outside the marriage did not have a substantial relationship with the child.<sup>69</sup> The plaintiff, Randy, was married to Norma, and a child was born to the couple during the marriage.<sup>70</sup> During the marriage, Norma was having an adulterous relationship with Brendan.<sup>71</sup> While she was pregnant, she told

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60. *Michael H.*, 491 U.S. at 125–27.

61. *Miscovich v. Miscovich*, 688 A.2d 726, 727 (Pa. Super. Ct. 1997).

62. *Id.*

63. *Id.* at 728.

64. *Id.*

65. *Id.* at 733.

66. *Id.*

67. *Id.*

68. *Randy A.J. v. Norma I.J.*, 677 N.W.2d 630, 633 (Wis. 2004).

69. *Id.*

70. *Id.*

71. *Id.*

Brendan that he might be the father of the child, but did not inform Randy that he might not be the father of the child.<sup>72</sup>

After the child was born, Norma visited Brendan frequently and Brendan provided baby formula for the child on several occasions.<sup>73</sup> Shortly after the child's birth, Norma informed Randy that he might not be the father.<sup>74</sup> Randy subsequently filed for divorce, and Norma counterclaimed asking the court to declare that Randy was not the father of the child.<sup>75</sup> The court, citing *Michael H.*, held that Brendan had no constitutionally protected right to parent the child because he had not established a substantial relationship with the child.<sup>76</sup> The court applied the presumption of legitimacy and declared Randy to be the parent of the child.<sup>77</sup> This is another example of a court applying the presumption without considering the fact that the presumption was never intended to substitute for biological evidence of paternity.

In *Evans v. Wilson*, Trina Wilson was married to Askahie Harris and was involved in an adulterous affair with Brett Evans.<sup>78</sup> During the time of the affair, a child was born, and Wilson suggested to Evans he was the child's father.<sup>79</sup> Evans then instituted a paternity action against Wilson asking the court to order paternity testing and visitation.<sup>80</sup> The court refused Evans's request, stating that although there was a suspicion that Evans was the child's father, the family unit should not be destroyed "based on suspicion."<sup>81</sup> The court of appeals affirmed the trial court's decision holding that there was no error in denying Evans's request for a paternity test, and that under Maryland law the child is presumed to be the product of Wilson's marriage to Harris.<sup>82</sup>

The above cases illustrate the fact that the presumption of legitimacy is an outdated rule that leads to absurd results. In *Miscovich*, DNA evidence excluded Mr. Miscovich as the child's father.<sup>83</sup> He explicitly told the child

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72. *Id.* at 634.

73. *Id.* at 634, 636.

74. *Id.*

75. *Id.*

76. *Id.* at 636, 642.

77. *Id.* at 642.

78. *Evans v. Wilson*, 856 A.2d 679, 681 (Md. 2004). Following *Michael H.*, courts across the country have held that the presumption of legitimacy of a child born during a marriage cannot be challenged by a third party even if biological evidence shows that the third party is the child's father. *E.g.*, *Ex parte Presse v. Koenemann*, 544 So.2d 406, 414–18 (Ala. 1989); *In re D.B.S. v. M.S.*, 888 P.2d 875, 881–88 (Kan. Ct. App. 1995); *Girard v. Wagenmaker*, 470 N.W.2d 372, 381 (Mich. 1991).

79. *Evans*, 856 A.2d at 682.

80. *Id.* at 683.

81. *Id.* (internal quotation and citation omitted).

82. *Id.* at 681–84, 695–96.

83. *Miscovich v. Miscovich*, 688 A.2d 726, 727 (Pa. Super. Ct. 1997).

that he was not his father and thereafter “ceased all contact with the child.”<sup>84</sup> Is this the kind of forced relationship the law should encourage? The results of the *Randy A.J.* case leave a similar bitter taste. The court relied on the Supreme Court’s reasoning in *Michael H.* to deny Brendan the right to parent the child when DNA evidence showed to a 99.99% certainty that he was the father.<sup>85</sup> The court looked at the fact that people like Brendan had no constitutional protection,<sup>86</sup> meaning that outsiders to a marriage were not allowed at common law to challenge the legitimacy of a child born to the marriage.<sup>87</sup> The *Randy A.J.* court blindly relied on the presumption without considering whether there was a genuine need to recognize Brendan’s interest or the child’s interest in that case.<sup>88</sup> In his dissenting opinion in *Evans*, Justice Baker notes that the majority’s decision will lead to some unfortunate results.<sup>89</sup> He stated that the fact that *Evans* was not allowed to bring an action could affect the child in the future.<sup>90</sup> For example, if the child required a bone marrow transplant or needed to obtain critical genetic information, she will be unable to because of the majority’s decision.<sup>91</sup>

## II. PRESUMPTION OF LEGITIMACY IN VERMONT

### A. Vermont Cases on the Presumption of Legitimacy

In Vermont, the law of the presumption of legitimacy was first discussed in case law. One of the earliest cases discussing the presumption of legitimacy in Vermont was *Town of Pittsford v. Town of Chittenden*, decided in 1886.<sup>92</sup> In *Town of Pittsford*, a pauper appealed a court order authorizing the removal of her child from the town of Pittsford to the town of Chittenden.<sup>93</sup> The issue was whether the child was properly removed to Chittenden.<sup>94</sup> Under the law of settlement at that time, if a child was found

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84. *Id.* at 728.

85. *Randy A.J. v. Norma I.J.*, 677 N.W.2d 630, 636 (Wis. 2004).

86. *Id.* at 642.

87. 29 AM. JUR. 2D *Evidence* § 244 (2008).

88. *Randy A.J.*, 677 N.W.2d at 642.

89. *Evans v. Wilson*, 856 A.2d 679, 703 (Md. 2004).

90. *Id.*

91. *Id.*

92. *Town of Pittsford v. Town of Chittenden*, 58 Vt. 49, 3 A. 323 (1886).

93. *Id.* at 52, 3 A. at 323–24. In 1867, the General Assembly of the state of Vermont enacted “An Act to Prevent Paupers from Becoming Chargeable to Towns Where They Have No Legal Settlement.” The relevant part of the act provided that “no person shall come into any town in this State, with intent to become a pauper, except such person has a legal settlement therein.” 1867 Vt. Acts & Resolves 51.

94. *Town of Pittsford*, 58 Vt. at 53, 3 A. at 325 (1886).

to be illegitimate he or she could reside in the settlement or town of the mother.<sup>95</sup> The mother in the case was settled in Chittenden.<sup>96</sup> She was married to a man who left her and moved to California.<sup>97</sup> He left in 1860 and the child was conceived in 1864.<sup>98</sup> In discussing the presumption of legitimacy, the court stated that “illegitimacy of a child born of a married woman is established by evidence of her husband’s residing in another part of the kingdom during the time the child must have been begotten, as access was impossible . . . .”<sup>99</sup> The court affirmed the lower court’s decision to remove the child to Chittenden.<sup>100</sup> The court held that the child was illegitimate and as a result could only follow the settlement of his mother.<sup>101</sup> In *In re Estate of Henry Jones*, decided in 1939, the Vermont Supreme Court fully addressed the parameters of the presumption of legitimacy as it exists in Vermont.<sup>102</sup> In *Jones*, the issue was “[w]hen a person is born in wedlock and it is claimed that he is illegitimate, who has the burden of proving the facts establishing such illegitimacy and what is the degree of proof required?”<sup>103</sup> The plaintiff in the case claimed that he was the son of the deceased, Henry Jones, and was entitled to a share of the deceased’s estate.<sup>104</sup> The plaintiff’s claim was opposed by three of the deceased’s children.<sup>105</sup> There was a jury trial and the jury found that the plaintiff was not the son of the deceased and the plaintiff appealed.<sup>106</sup> On appeal he claimed that: the lower court erred by denying his motion for a directed verdict; the court failed to charge the jury that the burden of proof is on the defendants to prove that the deceased did not have sexual intercourse with his wife at such a time as would create the plaintiff; the court failed to charge the jury that proof of non-access must be clear and to the satisfaction of the jury; and the court erred in denying his motion to set aside the verdict.<sup>107</sup>

In reaching its decision, the court explained how the presumption of legitimacy could be overcome. According to the court, the presumption may be removed by evidence showing that the husband was: (1) impotent,

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95. *Id.* at 52–53, 3 A. at 325.

96. *Id.* at 53, 3 A. at 325.

97. *Id.* at 51–52, 3 A. at 325.

98. *Id.* at 52, 3 A. at 325.

99. *Id.*

100. *Id.* at 55, 3 A. at 328.

101. *Id.*

102. *In re Estate of Henry Jones*, 110 Vt. 438, 8 A.2d 631 (1939).

103. *Id.* at 442, 8 A.2d at 632.

104. *Id.* at 441, 8 A.2d at 631.

105. *Id.*

106. *Id.* at 441, 8 A.2d at 632.

107. *Id.* at 441–42, 8 A.2d at 632.

(2) completely absent and had no contact or communication with the wife, (3) absent during the period the child could have been conceived, or (4) only present under circumstances that clearly showed that no sexual intercourse could have taken place.<sup>108</sup> The court stated that “the plaintiff has the burden of establishing his case by a fair balance of the evidence[,]” and the defendant has the burden of proof on the issue of non-access.<sup>109</sup> The issue of non-access must be proved beyond a reasonable doubt.<sup>110</sup> The plaintiff was unable to satisfy the burden of proof, therefore the court reversed the lower court’s decision and remanded the case.<sup>111</sup>

Vermont case law defined the presumption of legitimacy until the Vermont legislature adopted the parentage statute in 1989.<sup>112</sup> Under the statute, a person is presumed to be the natural parent of the child if one of four conditions is satisfied: (1) the alleged parent does not submit to genetic testing without good cause; (2) the alleged parent voluntarily accepts that he is the parent under Vermont law or another state law; (3) the possibility that the alleged parent is the biological parent is more than 98% as established by a DNA test; (4) “the child is born while the husband and wife are legally married to each other.”<sup>113</sup> The final category under the statute is the common law presumption of legitimacy.<sup>114</sup> A court can choose to use any of the methods listed in the statute to determine the parentage of a child.<sup>115</sup>

The most recent discussion of the presumption of legitimacy in a heterosexual marriage in Vermont is the Vermont Supreme Court case of *Godin v. Godin*.<sup>116</sup> The court applied the presumption of legitimacy and the result, to say the least, was inequitable. In *Godin*, the court held that a former husband could not reopen a divorce decree to contest a paternity determination.<sup>117</sup> In *Godin*, six years after a court issued a divorce decree, Mr. Godin began to hear rumors that the daughter born to the dissolved marriage was not his.<sup>118</sup> As a result of these rumors, Mr. Godin filed a motion for genetic testing with the court.<sup>119</sup> The court rejected Mr. Godin’s motion for genetic testing.<sup>120</sup> At a hearing, Mr. Godin’s ex-wife admitted

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108. *Id.* at 444, 8 A.2d at 633.

109. *Id.* at 447, 8 A.2d. at 634.

110. *Id.*

111. *Id.* at 452, 8 A.2d at 637.

112. VT. STAT. ANN. tit. 15, § 308 (2002).

113. *Id.*

114. *Id.*

115. *See id.* (using the conjunction “or”).

116. *Godin v. Godin*, 168 Vt. 514, 523, 725 A.2d 904, 910 (1998).

117. *Id.*

118. *Id.* at 516, 725 A.2d at 906.

119. *Id.*

120. *Id.*

that she was in a sexual relationship with someone else while her former husband was away in the military.<sup>121</sup> She also admitted that when she told her former husband she was pregnant, she never said who the father was.<sup>122</sup> The court held that “[w]here the [husband] holds himself out as the child’s parent, and engage[s] in an ongoing parent-child relationship for a period of years, he may not disavow that relationship and destroy a child’s long-held assumptions, solely for his own self-interest.”<sup>123</sup>

In reaching its holding, the court discussed the reasons why Vermont courts apply the presumption.<sup>124</sup> According to the court, the presumption exists to: “protect[] innocent children from the social burdens of illegitimacy, [to ensure] their financial and emotional security, and ultimately preserve[] the stability of the family unit . . . .”<sup>125</sup> The best interests of the child were also a factor for the court when it decided to dismiss Mr. Godin’s complaint.<sup>126</sup>

Justice Dooley’s dissenting opinion is particularly instructive as to why the presumption of legitimacy should be abandoned in Vermont.<sup>127</sup> Mr. Godin, upon suspicion that the child born to the marriage was not his, instituted an action to determine paternity.<sup>128</sup> Mr. Godin was away in the military when his wife was having an affair.<sup>129</sup> He no longer wanted to be known as the child’s father.<sup>130</sup> The *Godin* court stated that it was in the best interests of the child for the relationship to continue.<sup>131</sup> Thus, like the court in *Miscovich*, the Vermont Supreme Court in *Godin* succeeded in creating another forced parent–child relationship.

### *B. The Presumption of Legitimacy and Civil Unions in Vermont*

This section discusses civil unions in Vermont as an example of how

121. *Id.* at 516, 725 A.2d at 907.

122. *Id.*

123. *Id.* at 523, 725 A.2d at 910.

124. *Id.* at 522, 725 A.2d at 909.

125. *Id.*

126. *Id.* at 523, 725 A.2d at 910. The court stated,

[w]e believe that the best interests of this child, and all children whose rights will be implicated by the Court’s decision today, must prevail over any unfairness that may result to this [former husband] by denying his challenge of paternity raised nine years after entry of his judgment of divorce.

*Id.* (quoting *Hackley v. Hackley*, 395 N.W.2d 906, 913 (Mich. 1986)) (alteration by court).

127. *Id.* at 526, 725 A.2d at 912. See *infra* Part III for a more in-depth discussion of Justice Dooley’s dissenting opinion.

128. *Godin*, 168 Vt. at 516, 725 A.2d at 906.

129. *Id.* at 515, 725 A.2d at 906.

130. *Id.* at 516, 725 A.2d at 906.

131. *Id.* at 523, 725 A.2d at 910.

the presumption is an outdated rule that has no place in Vermont. Vermont is one of the most progressive states in the country<sup>132</sup> and the existence of a law like the presumption is contrary to that reputation. Vermont was one of the first states to recognize same-sex unions.<sup>133</sup> In 1999, the Vermont Supreme Court decided the landmark case of *Baker v. State*, in which the court held that denying same-sex couples the benefits and protections that stem from a marriage violates the Common Benefits Clause of the Vermont State Constitution.<sup>134</sup> Subsequently, in 2009, the Vermont Legislature enacted the civil marriage statute commonly known as “An Act to Protect Religious Freedom and Recognize Equality in Civil Marriage.”<sup>135</sup> The Act changes the definition of marriage from the legally recognized union of one man and one woman, to the legally recognized union of two people.<sup>136</sup> Same-sex couples in Vermont now have the choice between getting a civil union or a civil marriage.

The presumption of legitimacy in a civil union is incorporated under sections (a) and (f) of the Vermont statute defining the benefits, protections, and responsibilities of parties to a civil union. These sections respectively provide that the “[p]arties to a civil union shall have all the same benefits, protections, and responsibilities under law, whether they derive from statute, administrative or court rule, policy, *common law*, or any other source of civil law, as are granted to spouses in a civil marriage[.]”<sup>137</sup> and that

[t]he rights of parties to a civil union, with respect to a child of whom either becomes the natural parent during the term of the civil union, shall be the same as those of a married couple, with respect to a child of whom either spouse becomes the natural parent during the marriage.<sup>138</sup>

A plain reading of the statute shows that the “protections” of the presumption of legitimacy extend to civil unions. Under section (a), the parties to a civil marriage receive the same protections and responsibilities

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132. See Tom Slayton, *Foreword* in THE VERMONT ENCYCLOPEDIA xi, xii–xiii (John J. Duffy et al. eds., 2003) (“Thriftiness in economics combined with a generosity of spirit has characterized Vermonters down through the years, and those values can be seen . . . in the State House, where some of the nation’s most progressive legislation has been passed.”).

133. Greg Johnson, *We’ve Heard This Before: The Legacy of Interracial Marriage Bans and the Implications for Today’s Marriage Equality Debates*, 34 VT. L. REV. 277, 278 (2009).

134. *Baker v. State*, 170 Vt. 194, 224, 744 A.2d 864, 886 (1999).

135. *An Act Relating to Civil Marriage*, 2009 Vt. Acts & Resolves 33.

136. *Id.*

137. VT. STAT. ANN. tit. 15, § 1204(a) (2002 & Supp. 2009) (emphasis added).

138. *Id.* § 1204(f).

under the common law or statute as are granted to spouses in a heterosexual marriage.<sup>139</sup> Because the presumption of legitimacy is a common law doctrine that applies to marriages, should it not also apply to civil unions? The Vermont Supreme Court, in the case of *Miller-Jenkins v. Miller-Jenkins* had the opportunity to address this question.<sup>140</sup>

The *Miller-Jenkins* case involved two women who were parties to a Vermont civil union.<sup>141</sup> During the union, they both agreed that Lisa, one of the partners, should be artificially inseminated.<sup>142</sup> After three years, the parties requested that the court dissolve the civil union.<sup>143</sup> Lisa then asked the court to award her full custody of the child and to grant Janet parent-child contact.<sup>144</sup> Shortly after the dissolution of the civil union, Lisa moved with the child to Virginia where she again went to court and requested that she be named the child's only parent.<sup>145</sup>

Lisa began to deny Janet the right to visit the child.<sup>146</sup> The Vermont Supreme Court found that Janet did indeed have visitation rights: "Where the presumption cannot apply, it does not mean the individual is not a parent; it simply means we must look to see whether parentage exists without the use of the presumption—the same way we would have determined parentage before the adoption of § 308(4)."<sup>147</sup> The court then determined that Janet was the parent of the child because she acted *in loco parentis*.<sup>148</sup> *In loco parentis* means "[i]n the place of a parent: . . . charged, factiously, with a parent's rights, duties, and responsibilities."<sup>149</sup> Whether a person has acted *in loco parentis* in relation to a child "depends upon the intent [of the person], 'to be determined in the light of the circumstances peculiar to each case.'"<sup>150</sup>

According to the court in *Miller-Jenkins*, there are cases where the presumption is not necessary. The court considered the following factors in reaching its decision that Janet was a parent: she took part in the decision to

139. *Id.* § 1204(a).

140. See *Miller-Jenkins v. Miller-Jenkins*, 2006 VT 78, ¶ 4, 180 Vt. 441, 460 912 A.2d 951, 966 (2006) (explaining that petition for dissolution of civil union described child in dispute as "biological or adoptive child[] of the civil union") (internal citations and quotation marks omitted).

141. *Id.* ¶ 3.

142. *Id.*

143. *Id.* ¶ 4.

144. *Id.*

145. *Id.* ¶ 5.

146. *Id.*

147. *Id.* ¶ 53.

148. *Id.* ¶ 47.

149. Jill Jourdan, *The Effects of Civil Marriages on Vermont Children*, 28 VT. B.J. 32, 33 (2002) (quoting *Paquette v. Paquette*, 146 Vt. 83, 88, 499 A.2d 23, 27 (1985)) (alteration in original).

150. *Id.*

artificially inseminate Lisa; there was a valid civil union between Lisa and Janet; and Lisa identified Janet as a parent.<sup>151</sup> The court also looked at the fact that Janet intended to be the parent of the child.<sup>152</sup> In sum, the court reached its decision by looking at Janet's intent and her behavior towards the child.<sup>153</sup> The court's decision shows that the presumption of legitimacy is not necessary for parentage determinations in Vermont because there are cases where the presumption simply cannot apply, in this case because the presumption of legitimacy was created at a time when same-sex unions were not recognized.

### III. THE PRESUMPTION NO LONGER SERVES ITS ORIGINAL PURPOSES

Justice Dooley's dissenting opinion in *Godin* provides the framework for this section.<sup>154</sup> Justice Dooley eloquently explained what he perceived to be the error of the majority's decision in that case.<sup>155</sup> According to Justice Dooley, "the Vermont presumption of paternity never operates to determine paternity contrary to the evidence . . . . By adopting a rebuttable presumption, the Legislature has refused to make a man a father based on a legal fiction, rather than on his action."<sup>156</sup> Justice Dooley further stated that the policy reasons cited by the majority, including the stigma of illegitimacy and legal protection for keeping families intact, are no longer applicable in today's society.<sup>157</sup> Justice Dooley argued that the majority's reasoning should no longer apply because society has changed so much since the presumption was first created in the 1800s: there has been an increase in the number of children born in Vermont to single parents; the United States Supreme Court has greatly eliminated the disadvantages associated with illegitimacy; "the rights of putative fathers have expanded"; and "[s]ocietal attitudes about the obligation of biological parents to support their offspring have changed."<sup>158</sup>

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151. *Miller-Jenkins*, 2006 VT 78, ¶ 56.

152. *Id.*

153. *Id.*

154. *Godin v. Godin*, 168 Vt. 514, 526–33, 725 A.2d 904, 912–16 (1998) (Dooley, J., dissenting).

155. *Id.*

156. *Id.* at 531, 725 A.2d at 915.

157. *Id.* at 530, 725 A.2d at 914. The majority in *Godin* stated the following reasons for applying the presumption: "because of the stigma and legal disability of illegitimacy, the law should avoid placing children in this status; and . . . the law should protect intact families." *Id.* at 531, 725 A.2d at 915.

158. *Id.* at 525, 531, 725 A.2d at 911, 915.

A. *Protecting Innocent Children from the Social Burdens of Illegitimacy*

The courts and legislatures have eliminated most of the social stigmas associated with illegitimacy.<sup>159</sup> Illegitimacy is largely no longer a legal classification.<sup>160</sup> “The term ‘bastard’ has evolved over the years to ‘softer’ terms: illegitimate children, children born out of wedlock, [or] nonmarital children.”<sup>161</sup> The Supreme Court and many states have gone a long way in eliminating the social burdens that once existed as a result of illegitimacy. For example, the Supreme Court has held that denying illegitimate children the right to recover for the wrongful death of their mother was invidious discrimination by the state against the children.<sup>162</sup> The Court has also held that a state violates the Equal Protection Clause of the United States Constitution if it denies illegitimate children the same benefits it provides for legitimate children.<sup>163</sup> In the Supreme Court case *Gomez v. Perez*, a man was the biological father of a child born out of wedlock, but the state of Texas held that because the child was illegitimate “there [was] no legal obligation [on the part of the father] to support the child . . . .”<sup>164</sup> In reversing the decision of the Texas court, the Supreme Court noted that “once a State posits a judicially enforceable right on behalf of children to needed support from their natural fathers there is no constitutionally sufficient justification for denying such an essential right to a child simply because its natural father has not married its mother.”<sup>165</sup>

Courts have not been the only trendsetters in the move away from treating illegitimate children unequally compared to legitimate children. Some state legislatures have adopted statutes that provide full and equal rights to children born out of wedlock. In Massachusetts, for example, “[c]hildren born to parents who are not married to each other [are] entitled to the same rights and protections of the law as all other children.”<sup>166</sup> In Pennsylvania, “[a]ll children shall be legitimate irrespective of the marital status of their parents, and, in every case where children are born out of

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159. *Presumption of Legitimacy of a Child Born in Wedlock*, *supra* note 21, at 306–07; *see also* statutes and cases cited *supra* note 26.

160. WARDLE & NOLAN, *supra* note 2, at 272.

161. *Id.* at 273 (internal citation and quotation marks omitted).

162. *See* *Levy v. Louisiana*, 391 U.S. 68, 72 (1968) (“[I]t is invidious to discriminate against [illegitimate children] when no action, conduct, or demeanor of theirs is possibly relevant to the harm that was done the mother.”) (internal citations omitted).

163. *Gomez v. Perez*, 409 U.S. 535, 538 (1973).

164. *Id.* at 536.

165. *Id.* at 538.

166. MASS. GEN. LAWS ch. 209C § 1 (2008).

wedlock, they shall enjoy all the rights and privileges as if they had been born during the wedlock of their parents . . . .”<sup>167</sup> Finally, in Arizona, “[e]very child is the legitimate child of its natural parents and is entitled to support and education as if born in lawful wedlock.”<sup>168</sup> These state statutes eliminate the social burdens associated with illegitimacy by making all children equal before the law regardless of the marital status of their parents.

The Vermont legislature has also enacted a statute that attempts to eliminate any of the social stigmas associated with illegitimacy.<sup>169</sup> Under the statute, the legislature announces that “[i]t is the policy of this state that the legal rights, privileges, duties, and obligations of parents be established for the benefit of all children, *regardless of whether the child is born during civil marriage or out of wedlock.*”<sup>170</sup> As these statutes depict, the policy of protecting children from the social burdens of illegitimacy as a result of the above discussion should no longer persuade courts to apply the presumption of legitimacy.

### *B. Ensuring the Financial and Emotional Security of Children*

The presumption of legitimacy was created to ensure the financial and emotional security of children, but as the cases of *Godin*, *Miscovich*, *Randy A.J.* and *Evans* demonstrate, the presumption is being applied by courts in a way that creates the opposite result. There are multiple ways to ensure a child’s financial security in the absence of the presumption of legitimacy. Courts can adjudicate parentage by looking at the intent of the parties to parent the child.<sup>171</sup> The Vermont parentage statute provides three alternative ways to establish parentage without resorting to the presumption.<sup>172</sup> The state, or a party of interest, can initiate a support action against the biological father on behalf of the child.<sup>173</sup> Courts can ensure the financial

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167. 23 PA. CONS. STAT. ANN. § 5102(a) (Purdon’s 2001).

168. ARIZ. REV. STAT. ANN. § 8-601 (1956).

169. VT. STAT. ANN. tit. 15, § 301 (2002 & Supp. 2009).

170. *Id.* (emphasis added).

171. *Miller-Jenkins v. Miller-Jenkins*, 2006 VT 78, ¶ 56, 180 Vt. 441, 460, 912 A.2d 951, 966 (2006).

172. *See supra* Part II.

173. The Vermont statutes state:

[T]he party entitled by the terms of the judgment or order to payment thereunder, or the office of child support in all cases in which the party or dependent children of the parties are the recipients of financial assistance from the department for children and families, may file a motion in the family court asking for a determination of the amount due.

VT. STAT. ANN. tit. 15, § 606(a) (2002 & Supp. 2009).

security of children in other ways that do not involve applying an outdated common law doctrine whose validity has been continuously questioned.<sup>174</sup>

Another policy basis for the presumption is to ensure the emotional security of a child. The argument is that where both parents have raised a child for a number of years, it is against the best interests of the child to break up the only family that the child has ever known.<sup>175</sup> Courts apply this argument even when the biological father of the child wants to take on the responsibility of raising the child and assume the parental role once occupied by the wife's husband.<sup>176</sup> In some cases, the husband no longer wants to continue to raise the child when he discovers that there is no biological connection.<sup>177</sup> Even in the face of the former husband's disinterest in raising the child, courts still force him to continue to assume a parental role.<sup>178</sup>

In the above instance, how can it be in the emotional interest of the child to force a relationship with a person who no longer wants to be his or her parent? There have been several studies on how a parent's attitude towards their child influences the child's emotional and psychological development.<sup>179</sup> David Nelson and Sarah Coyne conducted a study on how

174. See, e.g., Mindy Halpern, *Father Knows Best—But Which Father? California's Presumption of Legitimacy Looses Its Conclusiveness: Michael H. v. Gerald D. and its Aftermath*, 25 LOY. L.A. L. REV. 275, 319 (1991) (stating that because of changing needs, the presumption “has been losing its conclusiveness”); Kaplan, *supra* note 32 (explaining New York model applies best interests factors when competing presumptions arise in paternity disputes); Krause, *supra* note 34, at 478 (explaining that support for an illegitimate child is in the court's discretion in most jurisdictions); Katherine Shaw Spaht & William Marshall Shaw, Jr., *The Strongest Presumption Challenged: Speculations on Warren v. Richard and Succession of Mitchell*, 37 LA. L. REV. 59, 71 (1976) (discussing how the Equal Protection Clause is used to protect the rights of illegitimate children); Jacinta M. Testa, *Finishing off Forced Fatherhood: Does It Really Matter if Blood or DNA Evidence Can Rebut the Presumption of Paternity?*, 108 PENN ST. L. REV. 1295, 1297 (2004) (discussing the harm associated with Pennsylvania courts' past problematic definition and application of the presumption of paternity and doctrine of paternity by estoppel); Jacquelyn A. West, *Maintaining the Legal Fiction: Application of the Presumption of Paternity and Paternity by Estoppel in Pennsylvania*, 42 DUQ. L. REV. 577, 587 (2004) (stating that legal fictions prevent biological fathers from assuming parental responsibility).

175. See *Godin v. Godin*, 168 Vt. 514, 523, 725 A.2d 904, 910 (1998) (“Whatever the interests of the presumed father in ascertaining the genetic ‘truth’ of a child's origins, they remain subsidiary to the interests of the . . . child in maintaining the . . . psychological security of an established parent-child relationship.”).

176. See *supra* Part I.B–C (discussing cases where the biological father has been denied the right to raise his child in the interest of preserving the financial and emotional security of the child).

177. *Miscovich v. Miscovich*, 688 A.2d 726, 727–28 (Pa. Super. Ct. 1997).

178. *Id.* at 733.

179. See Paul R. Amato & Fernando Rivera, *Paternal Involvement and Children's Behavioral Problems*, 61 J. MARRIAGE & FAM., 375, 377 (1999) (finding that “paternal engagement was related to a variety of positive outcomes among children, including fewer behavior problems”); Laura R. Bickett et al., *Attributional Styles of Aggressive Boys and Their Mothers*, 24 J. ABNORMAL CHILD PSYCHOL. 457,

different styles of parenting can be associated with a child's hostile intent attribution and emotional distress in response to ambiguous provocation scenarios.<sup>180</sup> The results of their study suggest that dimensions of aversive forms of parenting by a child's father (e.g., corporal punishment or psychological control) were directly linked to a greater tendency in the child to assume hostile intent in the child's interaction with his or her peers.<sup>181</sup> The results also indicate that "the tone of the father-son relationship, in particular, may help set the tone for how boys interpret their social world."<sup>182</sup> The authors also state that the nature of a child's relationship with his parents serves as a model of "basic relationship functioning."<sup>183</sup> For example, they find that "[a] child who encounters aversive parenting is accordingly hampered in the development of appropriate social skills whereas a positive parent-child relationship allows the child to learn positive behaviors which enhance the development of peer relationships."<sup>184</sup>

The child's emotional security is actually threatened when the law forces people to parent against their will. In the *Miscovich* case, Mr. Miscovich explicitly told the child that he no longer wanted to be his father.<sup>185</sup> In *Godin*, Mr. Godin expressed to the court that he no longer wanted to be responsible for raising a child that was not biologically his.<sup>186</sup> The results of the above study by Nelson and Coyne indicate that a child's emotional security is harmed when the court applies the presumption to force someone to parent a child. Additionally, a study of children raised in single-parent households suggests that these children fare just as well as, if not better than, children who are raised by two parents in a conflict-ridden household.<sup>187</sup> The presumption of legitimacy is no longer necessary to

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457 (1996) (reporting that mothers of aggressive boys "share the propensity to infer hostility in ambiguous situations and may . . . model a hostile attributional bias"); Juan F. Casas et al., *Early Parenting and Children's Relational and Physical Aggression in the Preschool and Home Contexts*, 27 APPLIED DEV. PSYCHOL. 209, 210 (2006) (discussing parents' well-researched and generally accepted role in influencing child behavior and aggression).

180. David A. Nelson & Sarah M. Coyne, *Children's Intent Attribution and Feelings of Distress: Associations with Maternal and Paternal Parenting Practices*, 37 J. ABNORMAL CHILD PSYCHOL. 223, 223 (2009). "Aggression is often a reaction to provocation, but provocative cues may be ambiguous. In such situations, one hallmark of the physically aggressive child is that he tends to assume hostile intent when a peer's motives are unclear." *Id.* (citations omitted).

181. *Id.*

182. *Id.*

183. *Id.* at 224.

184. *Id.*

185. *Miscovich v. Miscovich*, 688 A.2d 726, 727-28 (Pa. Super. Ct. 1997).

186. *Godin v. Godin*, 168 Vt. 514, 516, 725 A.2d 904, 906 (1998).

187. Sinikka Elliott & Debra Umberson, *Recent Demographic Trends in the US and Implications for Well-Being*, in THE BLACKWELL COMPANION TO THE SOCIOLOGY OF FAMILIES 34, 46

preserve the emotional security of children.

### C. Preserving Stability of the Family Unit

In his dissenting opinion in *Godin*, Justice Dooley points out that the rationale of preserving the stability of the family unit is no longer necessary because “[t]hrough no fault divorce laws, [society has] accepted the break-up of family units that no longer seek to stay together.”<sup>188</sup> The presumption of legitimacy emerged at a time when there was no such thing as a legal divorce.<sup>189</sup> However, today it is common for family units to be divided through divorce. Consider the following statistics: In a 12-month period ending in January 2008, the national marriage rate in the United States was 7.3 per 1,000 people, whereas the divorce rate during this same time period was 3.6 per 1,000 people.<sup>190</sup> The divorce rate in Vermont in 2005 was 3.6 per 1,000 people.<sup>191</sup> In January 2008 alone, there were 261 marriages in the state of Vermont and 292 divorces.<sup>192</sup> In 2005, there were 452 civil unions established in the state and 34 dissolutions.<sup>193</sup> In 2007, the number of children born to unmarried women nationally was estimated at 1,714,643.<sup>194</sup> These statistics indicate that preserving the family unit is no longer a viable reason for the presumption because divorces have become more commonplace and thus more socially acceptable. Lest the reader forget, the presumption was created at a time when divorces did not exist.

“The United States has the highest percentage of single-parent families . . . among developed countries . . . .”<sup>195</sup> “Today, only half of US children live in a traditional nuclear family, defined by the US Census Bureau as a

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(Jacqueline Scott et al. eds., 2004).

188. *Godin*, 168 Vt. at 532, 725 A.2d at 916 (Dooley, J., dissenting).

189. *Id.* “[The presumption of legitimacy] was formulated when families were required to stay together, and divorce was unavailable. Through no-fault divorce laws, we have accepted the break-up of family units that no longer seek to stay together.” *Id.*

190. CTR. FOR DISEASE CONTROL & PREVENTION, *Births, Marriages, Divorces, and Deaths: Provisional Data for January 2008*, in 57 NATIONAL VITAL STATISTICS REPORTS 1, 1 tbl.A (2008), available at [http://www.cdc.gov/nchs/data/nvsr/nvsr57/nvsr57\\_03.pdf](http://www.cdc.gov/nchs/data/nvsr/nvsr57/nvsr57_03.pdf) [hereinafter CTR. FOR DISEASE CONTROL]. These statistics do not include data for California, Georgia, Hawaii, Indiana, Louisiana, and Minnesota. *Id.*

191. [Healthvermont.gov](http://healthvermont.gov), Vital Statistics Summary of Vermont 1857-2005, [http://healthvermont.gov/research/stats/2005/documents/TABA1\\_05.PDF](http://healthvermont.gov/research/stats/2005/documents/TABA1_05.PDF) (last visited Mar. 29, 2010).

192. CTR. FOR DISEASE CONTROL, *supra* note 190, at 5 tbl.2.

193. [Healthvermont.gov](http://healthvermont.gov), Civil Unions and Dissolutions for 2005, <http://healthvermont.gov/research/stats/2005/documents/CU05.PDF> (last visited Mar. 15, 2010).

194. *Unmarried Childbirths in U.S. Reach Record Levels*, U.S. NEWS AND WORLD REPORT, Mar. 18, 2009, <http://www.usnews.com/health/family-health/womens-health/articles/2009/03/18/unmarried-childbirths-in-us-reach-record-levels.html>.

195. Single-Parent Families—Demographic Trends, <http://family.jrank.org/pages/1574/Single-Parent-Families-Demographic-Trends.html> (last visited Mar. 29, 2010).

married couple living with their biological children and no one else.”<sup>196</sup> Additionally, more women are having children “outside of conventional marriage.”<sup>197</sup> Factors contributing to this increase in single-parent homes in the United States include: “[C]hanging social and cultural trends, increased rates of divorce and nonmarital childbearing, increased employment opportunities for women, decreased employment opportunities for men . . . and the availability of welfare benefits that enable women to set up their own households.”<sup>198</sup> The above statistics support the idea that the presumption is no longer necessary to preserve the family unit because the number of single-parent households is increasing. Furthermore, children raised in single-parent homes enjoy the same benefits and legal protections as children raised in homes with two parents.<sup>199</sup>

*D. The Presumption Was Created to Make It  
Easy for Courts to Determine Parentage*

The presumption of legitimacy further exists to allow for summary support actions, and it eases the burden on the courts when they make child support decisions.<sup>200</sup> Judicial efficiency is not a necessary predicate to determining the best interests of the child. As was quoted in the beginning of this Note, “[p]rocedure by presumption is always cheaper and easier than individualized determination.”<sup>201</sup> It might be “cheaper and easier” for courts to mechanically apply the presumption, but there are other, arguably more important, factors that the court should consider. Courts should consider such factors as the child’s interest in knowing his or her biological parents and the biological parents’ right to have a role in their child’s life. These factors should be considered especially in instances where the biological parent wants to assume parental responsibilities. Courts should encourage rather than discourage people who are willing to parent a child. The courts’ blind application of the presumption in scenarios where the biological father is willing to take over the role of parent is inequitable.

*E. Preventing Children from Becoming Wards of the State*

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196. Elliott & Umberson, *supra* note 187, at 40 (citation omitted).

197. *Id.*

198. Single-Parent Families—Demographic Trends, *supra* note 195 (citation omitted).

199. Gomez v. Perez, 409 U.S. 535, 538 (1973).

200. See Godin v. Godin, 168 Vt. 514, 523–24, 725 A.2d 909–10 (1998) (“[A]bsent a clear and convincing showing that it would serve the best interests of the child, a prior adjudication of paternity is conclusive.”) (citing A.K. v. S.K., 264 N.J. Super. 79, 85–90 (App. Div. 1993)).

201. Stanley v. Illinois, 405 U.S. 645, 656–57 (1971).

Courts apply the presumption to prevent children from becoming wards of the state.<sup>202</sup> This policy assumes that the child's mother will be financially unable to take care of the child without the help of the father or state welfare benefits.<sup>203</sup> This argument for the presumption is sexist. Although this argument might be true in a few specific instances, the increasing number of single-parent households with women as the head of such households, coupled with the increasing employment opportunities for women in today's work force, indicates that the presumption is both outdated and unjust. The presumption of legitimacy is not necessary to prevent children from becoming wards of the state. The mother of the child in many instances is more than capable of taking care of the child without the financial or emotional support of the father or the state. Also, courts do not need to apply the presumption in the interest of preventing children from becoming wards of the state because there are sufficient legal mechanisms in place to obtain child support.<sup>204</sup>

The above-discussed policy reasons for the creation of the presumption of legitimacy have been significantly weakened, and courts should reevaluate the continued viability of the presumption in this day and age. First, the law has eradicated the social burdens associated with illegitimacy. Illegitimate children can now inherit property and sue for the wrongful death of their parents,<sup>205</sup> and these children are entitled to the equal protection of the law.<sup>206</sup> Furthermore, divorce has become commonplace, so the stability of the family unit is no longer served by the presumption. Also, the presumption is no longer necessary to ensure the emotional and financial security of children, and judicial efficiency can be promoted by other ways of determining parentage in the absence of the presumption. The rationale of preventing children from becoming wards of the state does not justify a system of "forced parenthood." Additionally, the Vermont Supreme Court has recognized that there are cases where the presumption simply does not apply.<sup>207</sup>

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202. *Godin*, 168 Vt. at 522, 725 A.2d at 909.

203. *See id.* (discussing cases that address feared financial burdens that would be placed on children without the presumption).

204. *See* VT. STAT. ANN. tit. 15, § 606(a) (2002 & Supp. 2009) (stating that where a prior judicial determination has been made regarding financial obligations, parties may seek an order mandating payment).

205. *See* *Levy v. Louisiana*, 391 U.S. 68, 72 (1968) (reversing a decision of the lower court that prevented illegitimate children from recovering for the wrongful death of their mother).

206. *Gomez v. Perez*, 409 U.S. 535, 538 (1973).

207. *See, e.g., Miller-Jenkins v. Miller-Jenkins*, 2006 VT 78, ¶¶ 53–55, 180 Vt. 441, 463–64, 912 A.2d 951, 966–69 (2006) (noting that in that particular case, a statutory presumption of legitimacy was irrelevant).

#### IV. A MODERN METHOD OF DETERMINING PARENTAGE FOR A MODERN AGE

“The dogmas of the quiet past are inadequate to the stormy present. The occasion is piled high with difficulty and we must rise with the occasion. As our case is new, so we must think anew and act anew.”<sup>208</sup> The above quotation by Abraham Lincoln summarizes the argument that the law should change and evolve with the times. The *Miller-Jenkins* court in deciding parentage in the context of a dissolved civil union did exactly what Abraham Lincoln suggested in the above quotation: the court refused to apply the presumption of legitimacy to a parentage determination in a dissolved civil union. Abandoning the presumption of legitimacy and using a system of parentage that recognizes the intent of the parties to parent the child, biological relations, and the best interests of the child, is necessary and will better serve the interests of all.

##### *A. Determining Parenthood Based on Intent*

Courts can look to the intent of the parties in deciding who the parent of a child is. “[I]ntentions that are voluntarily chosen, deliberate, express and bargained-for ought presumptively to determine legal parenthood.”<sup>209</sup> In *Miller-Jenkins*, it was important to the court that but for the decision of the parties to have the child, the child would never have been born.<sup>210</sup> In the context of a civil union, the importance of the intent of the parties is obvious. By determining parenthood based on intent, the courts will avoid the problems associated with forced parenthood. This method also reflects that the law is keeping up with the changing times instead of ignoring DNA evidence to the contrary. A parent who intends to take care of a child will also better provide for the emotional security of a child.<sup>211</sup> Courts should encourage instead of discourage people who are willing to be a parents.

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208. JOEL PARKER, *THE THREE POWERS OF GOVERNMENT. THE ORIGIN OF THE UNITED STATES; AND THE STATUS OF THE SOUTHERN STATES, ON THE SUPPRESSION OF THE REBELLION. THE THREE DANGERS OF THE REPUBLIC* 32 (1869) (quoting Abraham Lincoln).

209. Susan Frelich Appleton, *Presuming Women: Revisiting the Presumption of Legitimacy in the Same-Sex Couples Era*, 86 B.U. L. REV. 227, 276–77 (2006) (citation omitted).

210. See *Miller-Jenkins*, 2006 VT 78, ¶ 56 (including in its holding descriptions about the parental process which led to the court indentifying each woman as a parent).

211. Marsha Garrison, *Why Terminate Parental Rights?*, 35 STAN. L. REV. 423, 447 (1983).

*B. Determining Parenthood Based on DNA*

Vermont's presumption of parentage statute already incorporates DNA evidence as a method of determining parentage.<sup>212</sup> Subsection 3 of the parentage statute provides that a person is presumed to be the parent of the child where the possibility that the person is the biological parent is more than 98% as established by a "scientifically reliable genetic test . . . ."<sup>213</sup> When the presumption of legitimacy was created, marriage served as the most reliable factor for deciding the legitimacy of the child.<sup>214</sup> The fact that a married couple lived together led to the presumption that a child born during the marriage was the husband's child.<sup>215</sup> Although DNA evidence is not without flaws,<sup>216</sup> it serves as a more reliable way of determining parentage as a matter of fact, not fiction.<sup>217</sup> The problem in Vermont and many other states is that courts apply the presumption in cases where there is DNA evidence indicating that the husband is not the father.<sup>218</sup>

DNA is an "important source[] of very influential evidence in paternity suits."<sup>219</sup> The science of DNA analysis is complicated, but it can be reduced to the following basics: deoxyribonucleic acid (DNA) is found in all human beings and most other organisms.<sup>220</sup> Scientists perform paternity tests by taking DNA sequences from a child and comparing them with those of an alleged parent.<sup>221</sup> This is done to discover the likelihood that the two individuals are related.<sup>222</sup> DNA testing can lead to three legitimate conclusions.<sup>223</sup> First, the alleged parent is not the source of the evidentiary sample.<sup>224</sup> Second, the alleged parent cannot be eliminated as the source of

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212. VT. STAT. ANN. tit. 15, § 308(3) (2002).

213. *Id.*

214. WARDLE & NOLAN, *supra* note 2, at 264–65.

215. Banbury Peerage Case, (1811) 1 Sim. & St. 153; 24 Rev. Rep. 159 (U.K.), *reprinted in* COCKLE, *supra* note 14, at 16.

216. See Jonathan J. Koehler, Audrey Chia, & Samuel Lindsey, *The Random Match Probability in DNA Evidence: Irrelevant and Prejudicial?*, 35 JURIMETRICS J. 201, 216 (1995) (concluding that laboratory error may lead to false positive errors in DNA test results).

217. WARDLE & NOLAN, *supra* note 2, at 260.

218. See, e.g., *Randy A.J. v. Norma I.J.*, 677 N.W. 2d 630, 633 (Wis. 2004) (applying presumption despite DNA evidence because biological father did not have a substantial relationship with child).

219. WARDLE & NOLAN, *supra* note 2, at 257.

220. U.S. National Library of Medicine, What Is DNA?, <http://ghr.nlm.nih.gov/handbook/basics/dna> (last visited Jan. 25, 2010).

221. U.S. National Library of Medicine, Parentage Testing, <http://ghr.nlm.nih.gov/glossary=parentagetesting> (last visited Jan. 25, 2010).

222. *Id.*

223. WARDLE & NOLAN, *supra* note 2, at 259 (citation omitted).

224. *Id.*

the evidentiary sample (meaning he may or may not be the father).<sup>225</sup> Third, the test produced no results, meaning “the analysis cannot be performed.”<sup>226</sup> A handful of states, including Vermont, have incorporated the use of DNA evidence into their parentage statutes.<sup>227</sup> DNA evidence combined with other methods of determining parentage will better serve the interests of the child and society. DNA evidence presents a sure way of determining parentage, so there is no need to rely on the legal fiction of the presumption.<sup>228</sup>

### *C. Determining Parenthood Based on the In Loco Parentis Standard*

As previously mentioned, courts can determine that a person is the parent of the child by looking at the nature of the person’s relationship with the child. This standard is similar to the intent standard. However, it does not focus solely on a party’s subjective desire to be a parent, but also on the party’s objective manifestation of that desire. Under this method, a person is considered a parent once he or she assumes the responsibilities and duties of a parent,<sup>229</sup> including financial and emotional support of the child.<sup>230</sup> Courts can determine parentage by the *in loco parentis* standard in order to keep the law up to date with the times. This standard can account for the fact that a person is not the biological parent, but instead a parent under the law. The Vermont Supreme Court applied this standard in the *Miller-Jenkins* case in deciding whether Janet was the parent of the child.<sup>231</sup>

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225. *Id.*

226. *Id.* (citation omitted).

227. Alabama, Iowa, Ohio, Minnesota, and California have addressed DNA’s role in determining legal paternity. Minnesota Department of Administration, Office of Geographic and Demographic Analysis, *More States Pass Laws Allowing DNA to Disprove Paternity*, Sept. 1, 2002, <http://www.gda.state.mn.us/resource.html?Id=2773>.

228. See Kaplan, *supra* note 32, at 73 (stating that the introduction of DNA evidence into paternity determinations has created a conflict between scientific truth and legal truth). “The incongruity between law and science invites conflict rather than constancy as the presumption obscures rather than answers the questions it was created to resolve . . .” *Id.*

229. See *Miller-Jenkins v. Miller-Jenkins*, 2006 VT 78, ¶ 56, 180 Vt. 441, 465, 912 A.2d 951, 970 (2006) (finding a same-sex partner to be the legal parent where she had undertaken the role of parent).

230. See *id.* ¶ 61 (citing case law from different jurisdictions that have granted parental rights to same-gender partners who served as either a “psychological parent,” de facto parent, or otherwise stood *in loco parentis*).

231. *Id.* ¶ 47.

*D. Determining Parenthood Based on the Best Interests of the Child*

The best interests of the child standard is a subjective standard whereby courts are required to consider all relevant factors in deciding parentage.<sup>232</sup> Under this standard, courts are required to consider factors such as: “the parents’ and the child’s wishes, siblings, environmental stability, violence or the threat of violence, mental and physical health of parents and children, lifestyle, and various other factors related to cultural background, religious practices, racial circumstances, wealth and effectiveness of parents.”<sup>233</sup> The best interests of the child standard is a multi-factor test that requires the courts to perform a case-by-case determination of parentage.<sup>234</sup>

In Vermont, courts use the best interests standard in assigning parental rights and responsibilities.<sup>235</sup> Under this standard, courts are required to consider at least the following factors:

- (1) the relationship of the child with each parent and the ability and disposition of each parent to provide the child with love, affection and guidance;
- (2) the ability and disposition of each parent to assure that the child receives adequate food, clothing, medical care, other material needs and a safe environment;
- (3) the ability and disposition of each parent to meet the child’s present and future developmental needs;
- (4) the quality of the child’s adjustment to the child’s present housing, school and community and the potential effect of any change;
- (5) the ability and disposition of each parent to foster a positive relationship and frequent and continuing contact with the other parent, including physical contact, except where contact will result in harm to the child or to a parent;
- (6) the quality of the child’s relationship with the primary care provider, if appropriate given the child’s age and development;
- (7) the relationship of the child with any other person who may significantly affect the child;
- (8) the ability and disposition of the parents to communicate, cooperate with each other and make joint decisions concerning the children where parental rights and responsibilities are to be shared or divided;
- and (9) evidence of abuse, as defined in section 1101 of this title, and the impact of the abuse on the child and on the relationship between the child and the abusing parent.<sup>236</sup>

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232. SKAINE, *supra* note 9, at 58.

233. *Id.* (citation omitted).

234. *Id.*

235. VT. STAT. ANN. tit. 15, § 665 (2002).

236. *Id.* § 6651(b).

This standard can easily be applied by courts in lieu of applying the presumption of legitimacy and forcing people to be parents.

#### CONCLUSION

The presumption of legitimacy in Vermont should be abandoned because it no longer serves the purposes for which it was created. Abandoning the presumption will not negatively impact parentage determinations. Instead, by abandoning the presumption, courts will ensure the best interests of the child, the biological parent, and the interest of the courts in judicial efficiency. As Oliver Wendell Holmes stated:

It is revolting to have no better reason for a rule of law than that so it was laid down in the time of Henry IV. *It is still more revolting if the grounds upon which it was laid down have vanished long since*, and the rule simply persists from blind imitation of the past.<sup>237</sup>

—*Munonyedi Ugbode*\*

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237. Oliver Wendell Holmes, *The Path of the Law*, 10 HARV. L. REV. 457, 469 (1897) (emphasis added).

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