children. Because the restrictions on access to artificial insemination depend solely on the woman's marital status, gay men in every state can legally father children by donating semen to artificially inseminate married women. \footnote{In states with fornication statutes, sexual intercourse to produce the child is illegal if the man is not married to the child's mother. See supra note 148 and accompanying text.} However, a man wishing to raise the child he sires wants more than a role in conception. Such a man must, like all men who want to raise their natural children, find a woman willing to bear the child for him and allow him to share in parenting responsibilities. Defining both of their legal rights and responsibilities poses the major obstacle to parenting by gay men.

2. Legally Defining Rights and Responsibilities. — Gay men and lesbians who do have children may face difficulties in legally defining two relationships with the child. First, they may be unable to control the extent of the other biological parent's rights and responsibilities. Some lesbian and gay parents want the second biological parent to have no contact with the child, while others may wish to share custody and responsibility. \footnote{See J. SCHULENBURG, supra note 101, at 90.} Second, they may be unable to ensure that the parent's same-sex partner, or "co-parent," has the legal rights of a parent, including the rights to give consent on behalf of the child or to custody or visitation if the couple separates or the biological parent dies.

\(a\) Rights of the Other Biological Parent. — Unless a child is adopted, his or her natural mother is a legal parent. Whether the father is a legal parent is more complicated and depends on the mother's marital status, the reproductive technique used, and applicable statutes. \footnote{The following discussion assumes that the parents are not married to each other. However, sometimes a lesbian and a gay man who choose to have a child together will marry each other to simplify the legal relationships. See, e.g., J. SCHULENBURG, supra note 101, at 98 (discussing a gay man and a lesbian who are married to each other and raising three adopted children).} Both natural parents' rights can be terminated by adoption and can sometimes be limited or terminated by an agreement between the parents.

Assuming the mother is unmarried, if the child is conceived through sexual intercourse and paternity is established, the father generally has equal rights and responsibilities. \footnote{See A. HABALMAB, supra note 3, ¶ 2.07, at 15. If the mother is married, there is a presumption that her husband is the father. See, e.g., CAL. CIV. CODE § 7002(a)(1) (West 1981); MD. EST. & TRUSTS CODE ANN. § 1-206 (1974). This presumption may be effectively irrebuttable when challenged by a putative father seeking parental rights due to provisions permitting only the mother or her husband to bring an action to determine paternity. See, e.g., CAL. EVID. CODE § 621(c), (d) (West 1986 & Supp. 1988).} If the child is conceived through artificial insemination, the donor's status depends on whether the state has a statute that regulates artificial insemination
of unmarried women. Of the twenty-eight states with artificial insemination statutes, only seven have statutes that facially apply to the paternity of an unmarried woman’s child. In five of these states, a donor of semen for physician-performed insemination will not be the legal father, but these statutes do not cover at-home inseminations. The other two states eliminate donor paternity regardless of a physician’s participation.

If the state has no applicable statute, it is unclear whether the legal status of the natural father of a child born to an unmarried woman differs depending on the method of conception. Only two reported cases have decided whether a sperm donor is a legal parent when the woman is unmarried; both treated the child conceived via at-home insemination as the natural child of the donor. In both cases, however, the donor was known and he expected to play a role in the child’s life. If the donor is eager to be a father to the child and the court believes it is important for the child to have a legal father, or if there is a statute that denies donors’ parent rights in other situations but is silent as to the particular situation at issue, courts may be more likely to consider the donor the legal father. On the other hand, if attempts were made to make the donation anony-


The other 21 statutes refer only to married women. See, e.g., ALA. CODE § 26-17-23 (1986); ALASKA STAT. §§ 25.20.045 (1987); MINN. STAT. § 257.55(2) (1988); MONT. CODE ANN. § 40-6-106(1) (1987); VA. CODE ANN. § 64.1-7.1 (1987).
165 See CAL. CIV. CODE § 7005(b) (West 1983); COLO. REV. STAT. § 15-4-106(2) (Supp. 1988); N.J. REV. STAT. § 9:17-44 (Supp. 1988); WASH. REV. CODE § 62.26.050(2) (1985); WYO. STAT. § 14-1-203(b) (1986). By making the donor’s legal status hinge on a doctor’s participation, these statutes give the medical profession an unjustifiable power to determine who will and will not have access to artificial insemination without the threat of paternity claims.
166 See OR. REV. STAT. ANN. § 109.230 (1987); TEX. FAM. CODE ANN. § 12.03(b) (Vernon 1986).
167 See Donovan, supra note 156, at 220.
170 See C.M., 152 N.J. Super. at 101, 377 A.2d at 824-25. If the mother intends to raise the child with her same-sex partner or another adult, the fact that "[i]t is in a child’s best interests to have two parents whenever possible," id., 377 A.2d at 825, should not affect whether the donor is the legal father.
171 For example, in Jhordan C., the statute denied the donor paternity rights if the donation was "provided to a licensed physician." See Jhordan C., 179 Cal. App. 3d at 389, 224 Cal. Rptr. at 531 (quoting CAL. CIT. CODE § 7005(b) (West 1983)).
mous or if the donor should not have expected that he would have contact with the child, courts may be more likely to follow cases holding that, in the insemination of a married woman, the donor "is no more responsible for the use made of his sperm than is the donor of blood or a kidney."\textsuperscript{174}

Regardless of the technique used or the state statutory scheme, a natural parent's rights and responsibilities under certain circumstances may be terminated or limited by agreement. A parent can consent to termination of his or her rights by consenting to adoption of the child\textsuperscript{175} or, in some states, by agreeing to relinquish parental rights independent of an adoption.\textsuperscript{176} However, such agreements are always revocable before the birth of the child.\textsuperscript{177} Although parents cannot apportion custody and visitation rights to the detriment of the child's best interests, agreements as to custody and visitation may affect future court decisions.\textsuperscript{178}

Denying a woman the ability to eliminate contractually a man's parental rights and responsibilities burdens her right to procreate. Otherwise, women who wish to procreate are forced to find a man willing to risk being legally obligated to support a child financially.\textsuperscript{179} The state has no countervailing interest that justifies this burden on a woman's right to procreate. As long as the woman is willing to accept full responsibility for financially supporting the child, eliminating the burden on the woman's procreation right will not force the state to support additional children. The state might defend schemes that do not permit unmarried women to agree with potential fathers to eliminate their parental rights and responsibilities as necessary to ensure that the child has a legally-established father. However, this justification is insufficiently related to the state action. Most men who

\textsuperscript{174} People v. Soremon, 68 Cal. 2d 280, 284, 437 P.2d 495, 498, 66 Cal. Rptr. 7, 10 (1968).
\textsuperscript{175} See A. Haralambie, supra note 3, \S 13:17, at 210. Termination of parental rights via adoption can also occur without consent under specified circumstances. See, e.g., HAW. REV. STAT. \S 578-2(c) (1988) (stating that consent is not required from a parent who, although able to do so, has failed to communicate with or to provide support and care for the child for at least one year); IND. CODE \S 31-31-6-5(b) (1976) (stating that consent is not required from a parent who abandoned the child for the preceding six months).
\textsuperscript{178} See M. Field, SURROGATE MOTHERHOOD 84 (1988).
\textsuperscript{179} See, e.g., Raddish v. Raddish, 552 S.W.2d 668, 670 (Ky. Ct. App. 1976) (stating that "free and voluntary agreements" between parents may impact child custody orders); Msaitto v. Musitio, 21 Ohio. St. 3d 63, 67, 488 N.E.2d 857, 861 (1986) (holding that voluntary relinquishment can be the basis for a custody award to a nonparent).
\textsuperscript{180} See Donovan, supra note 156, at 226-27; Robertson, PROCREATIVE LIBERTY AND THE CONTROL OF CONCEPTION, PREGNANCY AND CHILD-BIRTH, 69 VA. L. REV. 405, 436 (1983) (arguing that "[t]he right to noncoital, collaborative reproduction . . . includes the right of the parties to agree how they should allocate their obligations and entitlements with respect to the child").
would agree to terminate their paternal rights would not want to help raise a child. Because of the possibility of financial obligation, however, if pre-conception contracts to terminate parental rights are unenforceable, these men may be unwilling to father children.

Surrogacy arrangements — in which a man or a couple pays a woman to bear the man’s child and terminate her parental rights — raise additional issues about the validity of contracts to terminate parental rights.\textsuperscript{180} Some states have enacted legislation making compensated surrogacy arrangements unenforceable or illegal;\textsuperscript{181} in other states, courts have refused to enforce surrogacy contracts, holding that they violate baby-selling laws.\textsuperscript{182}

$(b)$ Rights of the Co-Parent. — When a gay or lesbian couple chooses to have a child, only the biological parent is automatically the child’s legal parent. If that parent dies, the surviving partner, or “co-parent,” may lose custody to either the child’s other biological parent or other relatives of the child. In addition, if the couple breaks up, the legal parent may be able to prohibit any contact between the co-parent and the child.

Same-sex couples can attempt to avoid these difficulties in several ways. First, adoption of the child by the co-parent, if permitted without extinguishing the legal parent’s rights, ensures that both partners will have equal legal rights and responsibilities with respect to the child.\textsuperscript{183} Second, the natural parent can appoint the co-parent as testamentary guardian in case of death. Finally, if the couple separates or the natural parent dies, the co-parent can claim custody or visitation rights under a “psychological parent” theory.\textsuperscript{184}

\textsuperscript{180} For a comprehensive treatment of all the statutory, constitutional, and policy issues raised by surrogacy, see M. Field, cited above in note 177, and Surrogate Motherhood, 16 Law, Med. & Health Care 3 (1988), which presents a collection of articles on surrogacy.


\textsuperscript{183} See generally Note, Second Parent Adoption: When Crossing the Marital Barrier Is in a Child’s Best Interests, 3 Berkeley Women’s L.J. 96 (1982) [hereinafter, Note, Crossing the Barrier]; Note, Private Ordering, supra note 152; Comment, Second Parent Adoption for Lesbian-Parented Families: Legal Recognition of the Other Mother, 19 U.C. Davis L. Rev. 729 (1986).

Joint guardianship of the child by the parent and his or her partner, if state law permits two unmarried persons to be joint guardians, will achieve a similar result with less permanence. See, e.g., Conn. Gen. Stat. § 45-45 (1980) (permitting appointment of “co-guardians”).

\textsuperscript{184} A psychological parent is an adult who, regardless of biological relationship to the child, on a continuing day-to-day basis... fulfills the child’s psychological needs for a parent, as
In at least three states, courts have permitted a parent’s same-sex partner to adopt a child without terminating the parent's rights. This type of adoption is effectively identical to a stepparent adoption in which a child is adopted by the new spouse of a remarried parent without affecting the latter's parental rights. Stepparent adoptions, however, are often covered by special statutory provisions that do not provide for adoption by partners in a nonmarital relationship. Whether courts will permit co-parent adoptions therefore depends on the requirements of the rest of the state adoption statute and on the court's analysis of the child's best interests.

Depending on the state, there are at least two potential statutory roadblocks to co-parent adoptions. First, statutes provide that adoption terminates both natural parents’ rights and obligations. In states without explicit exceptions for stepparent adoptions, however, couples can argue that such provisions are not meant to apply to situations in which a natural parent plans to raise the child jointly with the adoptive parent. In other states, couples can argue that the court should waive the termination provision, or they can attempt to present the adoption as a joint adoption between the parent and co-parent.

well as the child’s physical needs.” J. Goldstein, A. Freda & A. Solnit, supra note 127, at 98.

See Note, Crossing the Barrier, supra note 13, at 98 (citing In re Adoption Petition of N., No. 120880 (Cal. Super. Ct., San Francisco County, filed Mar. 11, 1980); In re Adoption of a Minor Child, No. 1-JU-86-73 (Alaska Super. Ct. Feb. 6, 1987); and In re Adoption of M.M.S.A., No. D-8501-630 (Or. Cir. Ct., Multnomah County, Sept. 4, 1985)). The Lesbian Rights Project, 1370 Mission Street, Fourth Floor, San Francisco, CA 94103, has additional information on co-parent adoptions.

See H. Clark, supra note 4, § 20.10, at 928 (stating that stepparent adoptions are an exception to the general rule of termination of both parents’ rights).


Florida and New Hampshire both prohibit adoption by homosexuals. See FLA. STAT. ANN. § 63.022(3) (West 1985); N.H. REV. STAT. ANN. § 170-B:4 (Supp. 1988). The co-parent will probably be unable to adopt the child in these states.


There are two potential difficulties with the latter approach. First, statutes in many states that specify who is eligible to adopt could be interpreted to bar adoptions by two persons not married to each other because the statute does not explicitly authorize such adoptions. See, e.g., HAW. REV. STAT. ANN. § 578-1 (1988) (permitting any unmarried adult, any spouse of a legal parent, or a husband and wife to petition to adopt); N.D. CENT. CODE § 14-15-03 (1981); VT. STAT. ANN. tit. 15, § 431 (1974) (permitting "a person or husband and wife (together) to adopt). Second, some states may not permit a parent to adopt his or her own child, particularly if the effect of the adoption is to terminate the other biological parent’s rights. See H. Clark, supra note 4, § 20.7, at 920.