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The New Parenatge: Of Families, Sex and Asexual Choices

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A work in progress. Comments invited.

THE NEW PARENTAGE: OF FAMILIES, SEX, AND ASEXUAL CHOICES

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Table of Contents:

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Introduction:

Historically American law has emphasized the procreative role of the traditional marital family. "As long as marriage is limited to opposite-sex couples who can at least theoretically procreate, society is able to communicate a consistent message to its citizens that marriage is a (normatively) necessary part of their procreative endeavor.[1]

In its historic decision recognizing the right of a same-sex couple to enjoy common legal benefits as a married couple the Supreme Court of Vermont noted that the state has

[1] Goodridge v. Dept. of Public Health, 798 N.E.2d 941 at 1002 (Cordy, J., *dissenting*). "Nearly all United States Supreme Court decision declaring marriage to be a fundamental right expressly link marriage to fundamental rights of procreation, childbirth, abortion, and child rearing." Anderson v. Washington, 2006 Lexis 598 at 40 (Wash. 2006) (Madsen, J.).

benefited "by extending formal public sanction" of marriage to "those couples considered capable of having children, i.e. men and women."[2] The Vermont court rejected the state's argument that the child bearing and rearing function of the marital family was a reason for denying the benefits of marriage to same-sex couples, noting that "the reality today is that increasing number of same-sex couples are employing increasingly efficient assisted-reproductive techniques to conceive and raise children."[3] This reality and changing ideas about the meaning of parentage form the basis of the analysis in this article.

The new thinking about the meaning of parenthood is based on the reality of changing form of family life in the post-industrial world. In the not very distant past the law considered persons who did not have a biological or adoptive relationship with a child to be a legal stranger to that child even if he or she had exercised caregiver functions. A 1991 decision of the New York Court of Appeals rejected a visitation claim by a woman who had co-parented a child for over two years with her former female domestic partner. The child had been conceived by intrauterine insemination using donor sperm and was gestated by her the plaintiff's former partner after they had agreed on co-parenting. They gave the child the names of both women. The plaintiff payed a share of both birthing expenses and post-birth support, and the two women shared the duties of parenting after the child's birth. The adult relationship ended and the birth mother

[2] Baker v. State of Vermont, 744 A.2d 864, 881 (Vt. 1999).

[3] Id., at 882. See also, Baehr v. Miike, 1996 WL 694235 (Haw. Cir. Ct., Dec. 3, 1996) [finding that state could not justify denial of marriage licenses to same-sex couples based on parentage and parental responsibilities].

subsequently denied her former companion any contact with the child. The highest court in New York affirmed a lower court decision denying the plaintiff's claim that she should be allowed to visit with the child, following the traditional rule that parenthood is based on biological or adoptive parenthood and not on any social factors.[4] Even in the 21st Century we find examples of a narrow technical analysis of parenthood based on biology rather than social factors, as in the United States Supreme Court decision in the *Troxel* case in which the court refused to give consideration to a child's interest in contact with its extended family in the form of its grandparents.[5]

Less than a generation after the New York decision affirming traditional concepts of parenthood the legal landscape has changed radically. The reality of change in the modern family has forced a reconsideration of how we consider parenthood. Use of assisted reproduction technologies such as in vitro fertilization, intrauterine insemination, embryo transfer and gestational surrogacy has raised legal issues about parental rights and responsibility which can no longer be resolved by reference to traditional concepts. Social changes such as growing acceptance of same-sex partnerships, step-families, and single parenthood, and the birth of children out of traditional wedlock require new thinking. The ability to coceive children after death using cryopreserved gametes and embryos raises social and financial issues not previously considered. The need to reconsider and redefine parenthood is reflected in the American Law Institute's PRINCIPLES OF THE LAW OF FAMILY DISSOLUTION recognition of such non-

[4] Alison D. v. Virginia M., 572 N.E.2d 27 (N.Y. 1991) [rejecting concepts of parenthood by estoppel or de facto parenthood].
[5] Troxel v. Granville, 530 U.S. 57 (2000) [in dispute between surviving parent and paternal grandparents court upheld parent's decision to reduce visitation between child and extended family, basing decision on due process rights of biological parent].

traditional concepts as parenthood by estoppel or *de facto* parenthood.[6] This is not to suggest that traditional concepts of parenthood have become obsolete, but as I attempt to explain in this article it means that new family realities require an openness to the idea that the responsibilities of parenting will often require creative thinking and analysis by legal practitioners and judges.

The Traditional Family:

The traditional legal view of the American family is based on the marital family of husband, wife and child(ren). The origins of American family law were developed in part in the ecclesiastical law the Church of England [7] and made distinctions between children born in marriage and non-marital children.[8] Under English law children born

[6] American Law Institute, PRINCIPLES OF THE LAW OF FAMILY DISSOLUTION, § 2.03 (2002). See critiques of the ALI position in David D. Meyer, *Partners, Care Givers and Constitutional Substance of Parenthood* in RECONCEIVING THE FAMILY, 47 (Robin Fretwell Wilson, ed., 2006); Robin Fretwell Wilson, *Underserved Trust: Reflections on the ALI's Treatment of De Facto Parents, id. 9; Katherine T. Bartlett Custody Law and Trends in the Context of the ALI Principles of the Law of Family Dissolution,* 10 VA. J. SOC. POL'Y. & L. 5 (2002); Gregory A. Loken, *The New Extended Family-DeFacto Parenthood and Standing Under Chapter 2,* 2001 BYU. REV. 1045*;* Mary Ann Mason and Nicole Zayac, *Rethinking Stepparent Rights: Has the ALI Found a Better Definition?* 36 FAM. L.Q. 227 (2002).

[7] At the time of the formation of the American colonies English family law was governed by ecclesiastical law. 26 Geo. II, c. 33 (1753) required the publication of marital banns in three successive Sundays in Church, and it was not until 1857 that jurisdiction over marriage passed from the church courts to the civil courts in England.

[8] It has been suggested that the legal disabilities of illegitimate children was based in part on a moral expression that the parents had committed a wrong by having sex outside of marriage. See Joseph Cullen Aver, Jr., *Legitimacy and Marriage,* 16 Harv. L. Rev. 22, 37-38 (1902) (parents of illegitimate child were to be punished by the disabilities imposed on their child).

out of wedlock were bastards[9] and under early American law, they had few legal rights associated with children who were born into a marital family.[10] Even the procedure of bringing a child born out of wedlock into a legally recognized family was impossible since adoption was not available under English law[11] and was unknown in early American law until the 19th Century.[12] Of course, these children were all conceived by sexual coitus since this was long before medical science made it possible to conceive a child asexually.

So pervasive was the concept of the marital family that it was not until late in the 20th Century that unmarried same-sex couples were even permitted to petition for adoption of a child.[13] Until recent decades a same-sex couple, or even a married different-sex couple, could not have children by asexual means.[14] The availability of assisted reproductive

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[9] "A child is either a legitimate child or a bastard." 2 Frederick Pollock and Frederic W. Maitland, THE HISTORY OF ENGLISH LAW BEFORE THE TIME OF EDWARD 1, 397 (2nd Ed., 1899).

[10] Homer H. Clark, Jr., THE LAW OF DOMESTIC RELATIONS IN THE UNITED STATES, SECOND ED., Vol. 1, § 5.1 (1987) [noting legal disabilities of children born out of wedlock].

[11] The United Kingdom did not enact a statute authorizing a judicial decree of adoption until 1926, The Adoption of Child Act, 16 & 17 Geo. 5, c.29.

[12] Massachusetts was the first American state to allow adoption, Mass. St. 1851, c. 324. Today every American state has enacted a statute authorizing adoption; Clark, note 7, supra, Vol. II, § 21.1, n. 8.

[13] Adoption of B.L.V.B., 628 A.2d 1271 (Vt. 1993) [statutory rule that requires both spouses to join in petition for adoption does not bar same-sex unmarried couple from adopting]. Some states still do not allow unmarried same-sex couples to adopt.

[14] Until a few decades ago the only asexual means of reproduction was intrauterine insemination, which was used in the United States, although rarely, as early as the middle of the Nineteenth Century. Johnson v.

technology has now made asexual reproduction possible, even if expensive both for the parents and society.[15] In providing access to parenthood by asexual means the medical technology has created the potential for new forms of reproductive families which may co-exist along with traditional marital families.

In addition to the challenges posed by assisted reproductive technology changes in the social forms of family life has created new legal concepts which come into play in addressing issues of parentage. The traditional nuclear male-female family unit was intimately tied to the theory of biological (genetic) parenthood. In addition to the impact which reproductive science has on the theory of genetic parenthood, the social reality of newer forms of family life such as same-sex relationships calls into question weather parenthood should be premised on a biological connection between parent and child. The argument against treating genetics as the basis of parenthood is not that biology is irrelevant. Rather it is that other factors such as intent, de facto parenting and the

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Super. Ct., 101 Cal.App.4th 869, 881 (2002) [noting a report of intrauterine insemination in the U.S. in 1866]. However, it was not until the last half of the 20th Century that cryopreservation of gametes and embryos, in vitro fertilization, gestational surrogacy, gamete intrafallopian transfer, embryo transfer, intracytoplasamic sperm injection and other reproductive technologies became practical.

[15] See Debora L. Spar, *Where Babies Come From: Supply and Demand in an Infant Marketplace*, Harvard Business Review, February 2006, 1 (Reprint R0602H) (noting costs both to consumers and the health care system of legally unregulated assisted reproduction). The average cost of a single in vitro fertilization cycle is about $12,400 and the average amount spent per baby born by use of in vitro fertilization is $100,000; Elizabeth Weil, *Breeder Reaction: Does Everybody Have the Right to Have A Baby? And Who Should Pay When Nature Alone Doesn't Work?* Mother Jones, July/August 2006, 33 at 34 (summarizing average costs of in vitro fertilization).

function of the family are ultimately also important and parenthood should not be viewed exclusively through the lens of genetics.[16]

The New Parenthood:

Assisted reproductive technology has created the potential for non-traditional families to have children. This has become central in the debate over legal recognition of same-sex unions as well as other evolving forms of family life in America. The ability of non-traditional families such as same-sex unions, single-parent families or infertile couples to have children by assisted reproduction has created the need for legal categories which did not previously exist. As courts have struggled to resolve the problems created by the new reproductive technologies they have considered whether the traditional categories of "mother" and "father" can no longer be universally applied. Today the courts are confronted by the reality of "**the genetic parent**", **"the surrogate parent"** and "**the intended parent**." However, even these newly coined categories cannot be universally applied in determining all parentage issues arising from assisted reproduction. These

[16] See, for example, the following articles arguing for more emphasis on the parental function as a basis of determining parenthood than on genetics: Nancy D. Polikoff, *This Child Does Have Two Mothers: Redefining Parenthood to Meet the Needs of Children in Lesbian-Mother and Other Non-Traditional Families,* 78 Geo. L.J. 459 (1990); June Carbone and Nancy Cahn, *Which Ties Bind? Redefining the Parent-Child Relationship in an Age of Genetic Certainty,* 11 Wm. & Mary Bill. Rts. J. 1011 (2003); Julie Shapiro, *Creating Life? Examining the Legal, Ethical, and Medical Issues of Assisted Reproductive Technologies: A Lesbian Centered Critique of "Genetic Parenthood"* 9 J. Gender Race & Just. 591 (2006).

new legal theories related to parentage are themselves moving targets as reproductive technologies and familial societies continue to evolve in different directions.

The Genetic Parent Generally:

Except in the case of an adopted child a parent historically was also the genetic parent.[17] Modern reproductive science has that. Reproductive technology has enabled a person or couple who which to achieve parent to use the gametes of a donor to achieve parenthood, thus separating intended parenthood from genetic parenthood. In such a case the genetic parent is a **"gamete donor" who** provides either sperm or eggs so that another person or a couple can have a child.

Since the gamete donor is the genetic parent of the child conceived by collaborative reproduction some might think he or she is therefore a "parent." Indeed, there is some caselaw holding that a known gamete donor can be treated as a legal parent.[18] However,

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[17] An exception was a child conceived by the adultery of a married woman when the law presumed that her husband was presumed to be the father even if he was not in fact the genetic parent. Homer C. Clark, THE LAW OF DOMESTIC RELATIONS IN THE UNITED STATES, 341-344 (2nd ed. 1987). The presumption was developed centuries before the development of DNA testing enabled the establishment of the degree of probability of the husband's paternity.

[18] See, for example, In re Interest of R.C. 775 P.2d 27 (Colo. 1989) [known sperm donor's parentage recognized; dispute over intent]; Myers v. Moschella, 677 N.E.2d 1243 (Ohio Ct. App. 1996) [known sperm donor claimed paternity and mother could seek child support]; C.M. v. C.C., 377 A.2d 821 (N.J. Juv. & Dom. 1977) [woman used sperm provided by a known man to become pregnant; his claim of paternity recognized]; LaChapelle v. Mitten (In re L.M.K.O.), 607 N.W.2d 151 (Minn. 2000) [sperm donor who

if the intent of the gamete provider was to donate the gamete solely so that another could become a parent, the gamete-donor parent should be considered merely a donor and not a legal parent. The majority view as reflected in the Uniform Parentage Act now appears to be that a gamete donor is not a legal parent.[19]

The policy of excluding a gamete donor from parenthood appears to be straightforward, but its application is less than simple. If a man provides his own cryopreserved sperm to his wife so she can become pregnant then it is clear that he is not a donor and is treated as a legal parent. But if a man deposits sperm in a cryopreservation bank so that it can be anonymously sold and used as part of an infertility treatment of a patient whose identity is not known to the donor, then the sperm provider should be considered a mere gamete donor rather than a legal parent. But between these two examples there is a whole range of cases where the parental status of a gamete or embryo provider is less than clear.

The Anonymous Gamete Donor:

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provide gametes to for use by same-sex female couple awarded joint legal custody and visitation]; K.M. v. E.G., 33 Cal.Rptr.3d 61 (Cal. 2005) [woman who provided her eggs to her female companion so she could become pregnant was a legal mother; dispute over intent of the parties in donation].

[19] A donor is not a parent of a child conceived by means of assisted reproduction. Unif. Parentage Act § 702 (2000), 9B U.L.A. 355. An exception to this proposition exists when a husband "donates" sperm to his wife so she can become pregnant. Id., 102(8)(A).

Sometimes the intent of a gamete provider and a recipient is ambiguous. However, an anonymous gamete donation suggests an intent not to treat that person as a legal parent. The gamete donor is anonymous in the sense that his or her identity is not revealed to the recipient, although the identity is known to the reproductive medical provider and presumably could be discovered, especially by a person who is intent on locating a genetic parent or child by use of internet searches.[20] However, currently the law recognizes that a gamete recipient who accepts the gamete on the understanding that an anonymous donor made a biological contribution to the potential child but he or she has neither the legal rights[21] nor the obligations of parentage.[22]

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[20] There have been reports of children, genetic siblings or even mothers discovering the identity of anonymous sperm donors who gametes were used to conceive by sophisticated use of internet searches. For an example of a donor registry see http://donorsiblingregistry.com. As adopted children are increasingly identifying their biological parents by use of various search engines, so there is also reason to believe that children of assisted reproduction will do the same. This is not to say that courts will necessarily be sympathetic to discovery requests to find donors, except possibly in cases involving the need for access to health about a genetic parent who was a gamete donor. However, even aside from what courts will do the internet opens the possibility of getting information about donors. See Kim Nguyen, *Mothers Who Used Same Sperm Donor Meet,* Associated Press, http://www.winktv.com/x466.xml?URL=http://localhost/APWIREFEED/d8jeck8gO.xml (8/17/06) (mothers who each had a child showing signs of a disorder tied to autism and who became pregnant using sperm provided by a sperm bank located each other and discovered information about the common sperm donor).

[21] In re Adoption of Michael, 636 N.Y.S.2d 608 (N.Y. 1996) (anonymous sperm donor entitled to notice of adoption proceeding of his biological child).

[22] In re Interest of R.C., 775 P.2d 27 (Colo. 1989) (noting that policy of not imposing child support obligations on anonymous sperm donors is to encourage such donations).

Generally sperm donations are made by males to a fertility clinic which while making known certain characteristics of the donor to the recipient female (and her partner or spouse, if any) keeps confidential the identity of the donor. While most intrauterine inseminations are done using the sperm of an anonymous donors, a record of that identity exists and in rare cases legal access may be sought to discover identifiable information about the donor.[23]

The Egg Donor:

Female eggs are less susceptible to longterm cryopreservation than sperm. Eggs are therefore usually fertilized before cryopreservation, although research may someday make it more practical to preserve unfertilized eggs for long periods. The number of available eggs is also much smaller than sperm. Additionally, many potential parents seek direct contact with a young woman who is willing to be an ova donor, or at least have some knowledge regarding her intelligence, appearance, race or even her religion.

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[23] Johnson v. Superior Court., 80 Cal.App.4th 1050 (2000) (court allowed deposition of anonymous sperm donor when child of assisted insemination developed genetically transmissible Dominant Polycystic Kidney Disease, but with a provision that his identity be protected as far as possible); Stiver v. Parker, 975 F.2d 261 (6th Cir. 1992) (failure of clinic to screen gamete donors for sexually transmissible diseases causing cytomegalis disease was a failure of due care). See generally, H.S.W. Swanson, *Donor Anonymity in Artificial Insemination: Is It Still Necessary?* 27 Colum. J.L.& Soc. Probs. 151 (1993).

Egg donors are often sought by direct advertisements placed by the intended parent(s).[24] This means that the recipient may know the identity of the egg donor. However, even when if identity of the egg donor is known she will have no legal involvement in the life of any resulting child when the donation was not made and accepted with an intent to make her a parent.[25] Of course this does not preclude an egg donor and the recipient entering into a co-parenting arrangement, a situation which is not uncommon in a female same-sex relationship.

The Embryo Donor:

The word "embryo" is technically applied only to a fertilized egg which has been implanted and has developed about two weeks after implantation.[26] But in common legal usage fertilized eggs are often called embryos or pre-embryos in court decisions and

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[24] Mary Lyndon Shanley, *Collaboration and Co modification in Assisted Procreation: Reflections on an Open Market and Anonymous Donation in Human Sperm and Eggs*, 36 Law & Soc'y Rev. 257-58 (2002) [citing advertisement for compensated egg donors].

[25] Unif. Parentage Act, § 702 (2000), 9 U.L.A. 355 [providing a gamete donor is not a parent and making no distinction between sperm and egg donation, except as to a husband's sperm provided to his wife]. See also, Unif. Parentage Act, § 102(8)(C), 9B West Supp. 9 (2004-2005) as added in 2002, which by cross-referencing Articles 7 and 8 of the Act makes establishes that one who provides a gamete with the intent of becoming a parent rather than to help someone else not a spouse to have a child is not a donor.

[26] See Ann A. Kiessling, *What is an Embryo?* 36 U. Conn. L. Rev. 1051 (2004) [discussing different usages of the word "embryo."

legal publications.[27] For simplicity in this article I will refer to fertilized eggs as embryos.[28] In the case of an embryo here are two potential donors since both a male and female contributed gametes to produce the embryo. This can create potential issues as to who has the right of control and disposition of the embryos.

The situation of "**embryo donors"** differs from that of gamete donors in several respects. Embryo donation became possible because of the availability or cryopreserved embryos produced for in vitro fertilization but not used by the couple who produced them.[29] Hundreds of thousands of these surplus embryos are now cryopreserved.[30]

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[27] Other terms which are sometimes used to describe the early product of human conception include proto-embryo, pre-implantation embryo and zygote. The use of the terms embryos or frozen embryos are often used in court decisions and the literature "denoting cryogenically preserved preembryos." Roman v. Roman, 2006 WL 304922 (Tex. App., Hous., 1st Dist., Feb. 9, 2006), n, 1, citing and quoting Jennifer Marigliano Dehmel, *To Have or Not to Have: Whose Procreative Rights Prevail in Disputes over Dispositions of Frozen Embryos,* 27 Conn. L. Rev. 1377, n. 4 (1995).

[28] The word "embryo" as used in this article means a sperm-fertilized oocyte (fertilized egg) whether cryopreserved or intended for immediate implantation. This article does *not* deal with the philosophical and theological issues as to when human life begins, which has become entangled in the contentious debate over abortion.

[29] For the in vitro fertilization procedure a number of embryos are usually produced and those not implanted immediately are cryopreserved for potential use in the future. Those not used are surplus embryos if not used by the couple who produced them. Emily McAllister, *Defining the Parent-Child Relationship in an Age of Reproductive Technology: Implications for Inheritance,* 29 REAL PROP. PROB. & TR. J. 60-61 (1994) (explanation of in vitro fertilization).

[30] Melanie Blum, *Embryos and the New Reproductive Technologies,* at http:/www.surrogacy.com/legals/embryotech.html (noting that hundreds of thousands of embryos remain in

Initially some people decided to donate their surplus embryos and religious organizations came into existence to assist couples in making and accepting embryo donations.[31] These donations were premised on the analogy to adoption even though it is not possible legally in most states to "adopt" an embryo.[32] Of course given the demand for embryos by infertile couples or individuals who wished to have a child it was inevitable that a commercial enterprise would come into existence to produce and market embryos.[33]

The embryo donors are the biological parents of the embryo, but when the donated embryo is gestated by the intended mother to whom the embryo was provided who is the legal parent? Since the fetus *in utero* has not been legally adopted an argument could be

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storage). There is no way to accurately determine the exact number of cryopreserved embryos since there is no central registry, although efforts have been made to collect information. Sheryl Gay Stolberg, *Some See New Route to Adoption in Clinics Full of Frozen Embryos*, N.Y. TIMES, Feb. 25, 2001, at 1 (noting that the American Society for Reproductive Medicine is attempting to make a study of the number of cryopreserved embryos). See also, ***Liza Mundy, *Souls on Ice: America's Human Embryo Glut and the Unbearable Lightness of Almost Being*, Mother Jones, July/August 2006, p. 39 (discussing reasons for large number of cryopreserved embryos and difficult choices regarding their disposition).

[31] *A Tale of Two Families: Embryo Adoption Brings Them Together* (Aug. 26, 2002) at http://abcnews.go.com/sections/primetime/DailyNews/embryo_adoption_020822.html (recounting a religious agency bringing together embryos donors and recipients].

[32] Charles P. Kindregan, Jr. and Maureen McBrien, *Embryo Donation: Unresolved Legal Issues in the Transfer of Surplus Cryopreserved Embryos*, 49 Vill. L. Rev. 169, 174-177 (2004) [critical of the application of adoption theory to embryo donation].

[33] Debra J. Saunders, *Embryos Made to Order,* San Francisco Chronicle, August 8, 2006 at B-7 [recounting a Texas business offering embryos for sale].

made that the embryo progenitors are still the parents. On the other hand a good argument could be made that the gestational mother and her husband or partner ought to be the legal parents. To prevent any post-birth disputes a post-birth adoption decree by the gestational may be advisable to clearly establish the parenthood. Until a legal adoption takes place the issues of parental rights and parental responsibilities remains unclear in these embryo transfer cases. Suppose for example the gestating birth mother refuses to accept responsibility for a child born with serious health issues. In that case, who is responsible for the care and support of the child?

When a couple uses in vitro fertilization multiple embryos are produced and some are frozen by cryopreservation for potential future use. When the cryopreserved embryos are "excess" because they are no longer going to be used by the progenitors the consent of both of the living progenitors is necessary to donate the embryos to another woman or a couple. The need for joint consent can cause a proposed donation to fail when the progenitors do not agree,[34] at least in the absence of a controlling agreement which is recognized under state law.[35]

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[34] Davis v. Davis, 842 S.W.2d 588 (Tenn. 1992) (husband objected to wife's desire to donate cryopreserved embryos); Kass v. Kass, 696 N.E.2d 174 (N.Y. 1998) (when husband and wife disagreed over disposition of cryopreserved embryos court enforced their prior agreement to donate them for research); A.Z. v. B.Z., 725 N.E.2d 1051 (Mass. 2000) (husband and wife disagreed on disposition of their cryopreserved embryos; court ruled that contract could not determine the result); J.B. v. M.B. and C.C., 783 A.2d707 (N.J. 2001) (wife wanted cryopreserved embryos destroyed while husband wanted them either used or donated to infertile couples);.

[35] Kass v. Kass, 696 N.E.2d 174 (N.Y. 1998) (enforcing agreement to donate embryos for research).

In the absence of controlling law on the donation on embryos in order to confer parenthood of another person or couple the practice is somewhat in a state of legal limbo. To date only Louisiana has a statute expressly dealing with the legal issues arising from embryo transfer; a statute expressly authorizing the donation of an embryo it in order to allow adoption by the recipient couple.[36] While some religious groups promote the idea of embryo adoption this is not possible in the United States (other than in Louisiana) since a child must first be born before it can adopted.[37]

In practice embryo donation often involves traditional marital families as donors and donees. Of course, the methodology of producing a child by transfer of an embryo differs radically from the time-honored method of child creation by sexual intercourse of the husband and wife. But usually the donation of an embryo is made by a married couple who produced the embryo as part of their effort to have a family by in vitro fertilization. When the embryo is not needed the couple may seek another married couple who wish to have a child. This is economically efficient since the cost implanting

[36] La. Rev. Stat. Ann. § 9:130 (recognizing donation of a fertilized human ovum and notarial act of adoption).

[37] Unif. Adoption Act § 2-204, 9 U.L.A. 43 (1994) (effective consent to adoption must be given after birth of child); Kindregan and McBrien, supra, note 28 at 175 (adoption applies only to post-natal children).

an existing embryo is much less than undergoing in vitro fertilization.[38] Viewed in this way embryo donation may be seen as promoting traditional family values.

Non-traditional families can also benefit from the economy of using embryo transfer. There is no legal bar to use embryo transfer by a same-sex female couple so one could be the genetic mother and the other be the birth mother (although the embryo would have to be produced by donated male sperm). In many states a single person can legally adopt a child. Using the same logic there appears be no legal bar to the donation of an embryo to an unmarried woman. An embryo could even be provided to an unmarried man who has retained the services of a surrogate to gestate the embryo. Viewed in this light embryo donation appears to be a most flexible technology of parentage for both traditional marital families and for nontraditional families.

The Intended Parent:

The concept of the **"intended parent"**[39] evolved in response to the fact that persons who utilize assisted reproduction to have a child are not always the genetic parents.

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[38] As of 2006 one estimate was that in the United States people pay "$12,000 for an average cycle of in vitro fertilization." Debora L. Spar, *Where Babies Come From: Supply and Demand in an Infant Marketplace*, Harvard Business Review, February 2006, 4 (Reprint R0602H).

[39] Charles P. Kindregan, Jr. and Maureen McBrien, ASSISTED REPRODUCTIVE TECHNOLOGY: A LAWYER'S GUIDE TO THE EMERGING LAW AND SCIENCE, § 4.5 (2006). While not defined in the

Sometimes donated gametes are used[40] or if the intended parents provide one or both of their own gametes they retain the services of a surrogate to carry the child and give birth on their behalf.[41] In some cases one of the intended parents is also a genetic parent, as in the situation when a donated egg is fertilized with the sperm of the male partner and cryopreserved for potential implant in the female partner or in a surrogate. In other cases, both of the intended parents are also the genetic parents but the gestational surrogate serves as the birth mother.

Where there is a full genetic identity between both of the intended and the child this is obviously the closest model of parenthood to the traditional family when the intended mother is also the birthmother. But between this model and the other extreme when the gametes are donated by others and the child is to be carried for the intended parents by a

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Uniform Parentage Act the concept of the intended parent is recognized in the Act. See Unif. Parentage Act, § 801(a)(3), 9B U.L.A. (2005-2006 supp.) authorizing a gestational agreement which provides for the intended parents to become the parents of the child borne by a gestational mother. An early development of the intended parent theory was Lori B. Andrews, *Legal and Ethical Aspects of New Reproductive Technologies,* 29 Clinical Obstetrics & Gynecology 190, 199-200 (1986) (applying the intended parent theory in intrauterine insemination cases to preconception intent). But see, Marsha Garrison, *Law Making for Baby Making: An Interpretative Approach to the determination of Legal Parentage,* 113 Harv. L. Rev. 835 (2000) (parentage should be determined by traditional rules and not by application of an intent theory).

[40] See Buzzanca v. Buzzanca, 72 Cal. Rptr. 2d 280 (Cal. Dist. Ct. App. 1998) [intended parents of child carried by surrogate mother were not the genetic parents, having used donated gametes].

[41] Calvert v. Johnson, 851 P.2d 776 (Cal. 1993), cert. denied, 510 U.S. 938 (1993) [intended parents of child born to surrogate were also the genetic parents].

gestational surrogate birthmother, there are different models which vary greatly from traditional concepts of parenthood.

The intended parent theory of parentage has the convenience of a simple test of who has parental rights and responsibilities for a child of assisted conception. However, intent is not always easy to establish. In a California case one woman provided her egg to her female partner, but when the adult relationship ended the genetic mother and the birth mother disagreed as to the intent of the transaction. Notwithstanding that the egg provider had executed documents renouncing parenthood the court ruled that both women were the legal mothers of the child.[42]

The intended parent theory can break down in cases where there are competing intended parents all of whom have some connection to the child. An example is found in the mis-implanted embryos cases. Clinics which provide in vitro fertilization services maintain numerous cryopreserved embryos and it sometimes embryos intended for use by one person or couple are mistakenly implanted in another woman who also wishes to achieve parenthood. In one case an embryo which had been produced for use of a married couple by the sperm of the husband and a donor egg was mistakenly been implanted in a single woman who also was a clinic patient seeking to become a mother with a donated embryo.[43] The mistake was discovered after the single woman gave birth

[42] Kristine H. v. Lisa R, 117 P.3d 690 (Cal. 2005) [when the two women were domestic partners the egg provider was not a mere donor and was an intended parent].

[43] Robert B. v. Susan B., 109 Cal.App.4th 1109 (2003).

and the married couple sought to obtain custody of the child. In this situation obviously all three parties (the husband, the wife and the single woman) were all intending to be become parents, and if the court applied the intended parent theory the result might have been that the parental interests of all three were recognized. However, the court chose instead to rely on the biological connections of the parties to the child. Since the husband had provided the sperm and the single woman gave birth the court treated them as the legal parents; since the wife had no genetic connection to the child she was not a legal mother.[44] The difficulty with this analysis is that the single woman did not have any more genetic connection to the child than did the wife, although she did have the status of the birth mother. Is it necessarily undesirable to recognize the child as having three parents in such a case?

In another case of mis-implanted embryos a clinic implanted the embryo produced by and stored for use by an African-American couple into a married Caucasian woman who then gave birth.[45] After attempts to resolve the questions about conflicting parental claims litigation, the court eventually resolved the issue in favor of the genetic parents and gave custody to the African-American couple whose embryo had been mis-implanted. However, the court claimed not to have decided this case solely on the basis of race or genetics but rather on the analogy to the situation of babies being switched at birth in a hospital.[46] Certainly a pure application of the intended parent theory in this

[44] Id., at 1115-1116.

[45] Perry-Rogers v. Faisano, 715 N.Y.S.2d 19 (2000). The birth mother gave birth to two children, one white and one black.

[46] Id. at 25.

case might have left the child in the situation of having two different sets of parents, but the result also left the birth mother and her husband who had cared for the child from birth without legal recognition of their contributions to the child's wellbeing.

Whatever the most desirable solution to the difficult issue of mis-implanted embryos, where there is a deliberate theft of an embryo and its implantation in the wrong woman the law should favor the claims of the intended parents. The shocking events at the University of California at Irvine in which a number of physicians were charged with intentional misappropriation of embryos stored by couples in order to implant them in other patients[47] created horrible choices as to how to resolve conflicting claims between genetic parents and birth parents, but I suspect the only solution to such conflicts is to recognize the superior claims of the persons whose embryos were stolen.

The Surrogate Mother-Generally:

*A **"surrogate mother"*** is a woman who agrees to carry a child in her uterus for another person or couple who is the intended parent.[48] Many states have enacted statutes

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[47] Kindregan and McBrien, supra note 29, at 199 and sources cited therein.

[48] The few reported cases and statutes in the early years of surrogacy as a form of assisted reproduction has produced an unusually large volume of commentary in legal publications and cutting across various fields of law. See, for example, Ardis L. Campbell, Annotation, *Determination of Status as Legal or Natural Parents in Contested Surrogacy Births,* 77 A.L.R.5th 567 (2003); Cynthia Fruchtman, *Considerations in Surrogacy Contracts,* 21 Whittier L. Rev. 429 (1999); Weldon E. Havins & James J. Dalessio, *Reproductive Surrogacy at the Millennium: Proposed Model Legislation Regulating "Non-Traditional"*

expressly dealing with various aspects of surrogacy, but they range from creating procedures to recognizing it, to distinguishing between compensated and non-compensated surrogacy, to outright bans or declarations of unenforceability.[49] A few

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Gestational Surrogacy Contracts, 31 McGeorge L. Rev. 673 (2000); Steve J. Jasper, *Congratulations! It's a Tort: Expanding the Scope of Duty in the Surrogacy Setting*, 67 Mo. L. Rev. 421 (2002); Amy M. Larkey, *Redefining Motherhood: Determining Legal Maternity in Gestational Surrogacy Arrangements*, 51 Drake L. Rev. 605 (2003).; Angie Godwin McEwen, Note, *So You're Having Another Women's Baby: Economics and Exploitation in Gestational Surrogacy*, 32 Vand. J. Transnat'l. L. 271 (1999); Alayna Ohs, Note, *The Power of Pregnancy: Constitutional Rights in a Gestational Surrogacy Contract*, 29 Hastings Const. L. Q. 339 (2002); Kevin Yamamoto & Shelby A.D. Moore, *A Trust Analysis of a Gestational Carrier's Right to Abortion*, 70 Fordham L. Rev. 93 (2001).

[49] Ariz, Rev. Stat. Ann. § 25-218 (surrogacy contracts contrary to public policy; surrogate birth mother is legal mother of child); Ark. Code Ann. § 9-10-201(b)-(c) (presumption that child born to surrogate is child of intended parents); D.C. Code § 16-402(a) (surrogacy contracts unenforceable against genetic-surrogate mother); Fla. Stat. ch. 742.15 (uncompensated surrogacy recognized under statutory procedures); Ill. Comp. Stat. ch. 750, §§ 47/5-47/50 (providing procedures for enforcing surrogacy agreements); Ind. Code Ann. §§ 31-20-1 & 31-20-2 (denying enforcement of surrogate agreements); Iowa Code § 710.11 (exempting surrogacy from the prohibition on child-selling); Ky. Rev. Stat. Ann. § 199.590(4) (denying enforcement of surrogacy involving compensation); La. Rev. Stat. § 9.2713 (denying enforcement of surrogacy involving compensation); Mich. Comp. Laws Ann. § 722.855 (criminalizing surrogacy contracts as contrary to public policy); R.R.S. Neb. § 25-21, 200 (surrogacy contracts unenforceable and void); Nev. Rev. Stat. Ann. §126.045(1) (uncompensated surrogacy contracts lawful if intended parents are married); N.H. Rev. Stat. Ann. § 168-B :16(b) (creating procedures for enforcement of non-commercial surrogacy arrangements); N.Y. Dom. Rel. Law § 122 (surrogacy contracts contrary to public policy and unenforceable); N.D. Cent. Code § 14-18-05 (surrogacy agreements unenforceable); Utah Code Ann. § 78-45g-801 (subject to conditions surrogacy permitted); Va. Code Ann. § 20-159 (subject to compliance with statutory requirements surrogacy agreements enforceable); Wash. Rev. Code § 26.26.240 (compensated

states have no statute dealing with the parentage of a child born to a surrogate mother, but do have court decisions recognized the reality of the procedure and giving it some legal status.[50] A few states have court decisions[51] or attorney general rulings[52] which have the effect of questioning the use of surrogacy arrangements to recognize maternity in the non-birth mother. A surprisingly large number of states appear to have no controlling

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surrogacy unenforceable); W. Va. Code § 48-4-16(e)(3) (surrogacy agreements exempted form child-selling statute); Wis. Stat. Ann. § 69.14(h) (providing for birth certificate of child born to surrogate clarifying parentage). The Arizona statute which was intended to prevent enforcement of surrogacy contracts against a surrogate's parental claims makes the birth mother the legal mother, but it was declared unconstitutional as applied against and intended mother in a parentage dispute with her husband; Soos v. Superior Court of the State of Arizona, 897 P.2d 1356 (Ariz. Ct. App. 1994) (statute failed to provide equal protection to intended mother in relation to her husband when both provided gametes used to produce embryo implanted in the gestational surrogate).

[50] California: Calvert v. Johnson, 851 P.2d 776 (Cal. 1993), cert. denied, 510 U.S. 938 (1993) (intended mother of child prevailed over parentage claim of gestational surrogate); Massachusetts: Culliton v. Beth Israel Deaconess Med. Ctr., 756 N.E.2d 1133 (Mass. 2001) (uncontested prebirth order of parentage requested by intended parents and gestational surrogate); Belsito v. Clark, 644 N.E.2d 760 (Ohio Misc. 1994) [genetic parent declared parents in uncontested case when surrogate was the sister of the intended mother); J.F. v. D.B., 848 N.E.2d 873 (Ohio App. 2006) (surrogacy contract did not violate public policy).

[51] Doe v. Doe, 710 A.2d 1297 (Conn. 1998) (maternity of intended mother not recognized as to child carried by genetic-birth mother surrogate, but recognized her right to seek custody); Matter of Baby M., 537 A.2d 1227 (N.J. 1988) [surrogacy contract unenforceable against genetic-birth mother surrogate); J.F. v. D.B., 897 A.2d 1261 (Pa. Super. Ct. 2006) (surrogacy contract contrary to public policy).

[52] Md. 85 Op. Att'n. Gen. (Dec. 19, 2000) (surrogacy promising compensation to surrogate may be illegal); Or. Att'n. Gen. Op. No. 8282 (Apr. 19, 1989) (a male's promise in a surrogacy agreement to acknowledge a child who was not yet conceived at the time is unenforceable).

decisional or statutory law and at this point no controlling standards to determine the parentage of the surrogate or the intended mother.[53]

The Traditional Surrogate Mother:

If the fetus was created using the birth mother's own egg[54] then the woman is called a ***"traditional surrogate mother."***[55] A traditional surrogate is in every respect a mother of the child since she is both the birth mother and the genetic mother and her pre-conception contractual waiver of her maternal rights in favor of the intended parents will be invalid and unenforceable.[56] Because of this potential complication to the claims of the intended parents traditional surrogacy arrangements are rare today.[57]

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[53] Alabama, Alaska, Colorado, Connecticut, Delaware, Georgia, Hawaii, Idaho, Iowa, Kansas, Maine, Maryland, Minnesota, Mississippi, Missouri, Montana, New Mexico, North Carolina, Oklahoma, Oregon, Rhode Island, South Carolina, South Dakota, Tennessee, Texas, Vermont, Wisconsin, Wyoming. New Jersey has no statute governing surrogacy, but the Supreme Court ruled that when the surrogate is the genetic mother the agreement is unenforceable, Matter of Baby M., 537 A.2d 1227 (N.J. 1988); non-compensated gestational surrogacy may be allowed in New Jersey but a court refused a prebirth order to place the intended parents name on the birth certificate in A.H.W. v. G.H.B., 772 A.2d 948 (N.J. Super. Ct. Ch. Div. 2000).

[54] Usually the woman becomes pregnant by intrauterine insemination. See Matter of Baby M., 537 A.2d 1227 (N.J. 1988) (surrogate became pregnant after several artificial inseminations).

[55] Kindregan and McBrien, note 36, supra, § 5.2 (explaining traditional surrogacy).

[56] Surrender of parental rights is effective only after the birth of the child, and in most jurisdictions an additional waiting period after birth applies. The Uniform Adoption Act, § 2-204, 9 U.L.A. __ recognizes

The Gestational Surrogate Mother:

Most surrogacy arrangements today involve a ***"gestational mother"*** who provides her uterus to carry a fetus to birth but has no genetic connection to the child she delivers. Such a woman is sometimes also called a **"gestational surrogate"** or **"gestational carrier"**.[58] At common law a birth mother was assumed to be the legal mother of the child she delivered[59] but the development of in vitro fertilization made gestational surrogacy a practical reality. Once sperm and eggs could be fertilized *in vitro* and the

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parental consent only if surrender of the child for adoption takes place after birth. See R.R. v. M.H., 689 N.E.2d 790 (Mass. 1998) (while a traditional surrogacy arrangement is not illegal in Massachusetts a consent to waiver of maternal rights given before the statutory post-birth consent provided for in the adoption statute is invalid); Moschetta v. Moschetta, 25 Cal. App.4th 1218 (1994) (woman who was both a surrogate birth mother and the genetic mother was also the legal mother of child).

[57] Traditional surrogacy is no longer promoted by medical providers, and for the most part is confined to use by couples who ask a relative or friend to carry a child for them.

[58] Other terms for a woman who carries a child for someone else found in court decisions, statutes and literature include "surrogate" and "carrier." The Uniform Parentage Act proposes to abandon the popular term "surrogate" which "has acquired a negative connotation in American society, which confuses rather than enlightens the discussion." Unif. Parentage Act, Art. 8, Comment, 9B ULA ____ (2005-2006 supp.). While "carrier" might not convey the same negative connotations sometimes attached to "surrogate" this author's opinion is that it lacks dignity and context as a description of the woman's birthing role.

[59] This doctrine was based on the proposition that if the child was conceived by the woman's engaging in sexual intercourse, of necessity it was her biological offspring.

resulting pre-embryo cryopreserved for future implantation it became possible to separate birth motherhood from genetic motherhood, and gestational surrogacy was practicable.

The advent of gestational surrogacy has now made it possible for intended mothers to have their own genetic child but not have to bear the burden of pregnancy. This has produced what might be called the "outsourcing" of pregnancy. Indeed, there already reports that women are hiring other women to carry their child. For example, there have been media reports that payments to an Indian surrogate who agrees to carry a child for another woman by utilizing in vitro fertilization and implantation of the intended mother's egg range from $2,800 to $5,600 per pregnancy.[60] In a country in which per capita income can be substantially less that $1,000 a year these payments are extremely attractive to many potential surrogates, although they are much lower than a gestational surrogate could expect in the United States.

The separation of birth mothering from genetic mothering is so radical in its implications for traditional concepts of parenting and family life that it could best be described as revolutionary. For example, the courts have increasingly been confronted with novel disputes over maternity of a kind previously unknown when the law simply assumed that a woman who gave birth was the legal mother. Gestational surrogacy has made it possible for a birth mother to carry a child which has no genetic connection to her. It has also made it possible for a mother-to-be to avoid the burdens of pregnancy by

[60] Henry Chu, *Infertile Westerners Outsourcing Childbearing to India*, reprinted in The Boston Globe, April 23, 2006.

hiring another woman to carry her child to term, and even to "out source" the pregnancy to a woman in another country. It has made it possible for couple to have a child which has no biological connection to the intended parents either by birth or genetics, when donated sperm is used to fertilize a donated egg which is then implanted in a surrogate.

Gestational surrogacy also makes it possible for a man to have a child by hiring a surrogate to carry a child for him (and his female companion, if he has one). In one case where a man hired a gestational surrogate and an egg donor to have a child for him, and triplets were conceived using his sperm and the donated egg.[61] The potential for disagreement over parental rights in such an arrangement if apparent, and indeed the case developed into a custody dispute in the courts of two different states involving the claims of the genetic father, the intended mother (girlfriend of the genetic father), the egg donor and the gestational mother.[62] It is obvious that these and other examples of gestational surrogacy hold the potential to modify or even radically change how society perceives the parent-child relationship.

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[61] J.F. v. D.B., 897 A.2d 1261 (Pa. Super. Ct., 2006) and J.F. v. D.B., 848 N.E.2d 873 (Ohio App. 2006) (man, intended father, provided his sperm agreed to pay a woman and her husband if the woman would serve as a gestational mother and another woman provided her egg; after surrogate delivered triplets the genetic father and his female companion, along with the egg donor, became embroiled in multistate litigation when the surrogate mother decided to keep the triplets).

[62] Id. In the Pennsylvania Superior Court decision the genetic father-intended parent was awarded full legal and physical custody of the triplets and the trial court decision to terminate the egg donor's parental rights was reversed. In the Ohio decision the court ruled that the surrogacy agreement was enforceable and as provided in the agreement the father was to be indemnified for his expenditures.

Considering the lack of uniform law governing surrogacy an Ohio judge commented on the need for legislative action to protect the interests of the various persons involved in these arrangements, especially the children:

> The majority points out that there are only a few states that have even begun to address the issue of determining who he parents of a surrogate child may be. Even the few states that have begun to address the issues involved have approached the issues from four different directions. Unless the state legislatures begin to address the multiple issues involved, it will be the children that will be caught in a continual tug of war between the egg donor or donors, the sperm donor or donors, the surrogate parent or parents, and those that simply want to adopt a child from what they perceive as the ideal parents.[63]

The Birth Mother:

The gestational surrogacy cases which have come into the courts in a variety of different contexts in recent years illustrate the fact that reproductive science has enabled us to separate genetic motherhood from birth motherhood. The first significant surrogacy case did not involve such a separation since the surrogate mother was also the genetic

[63] J.F. v. D.B., 848 N.E.2d 873, 881 (Ohio App., 2006) [Slaby, P.J., concurring].

mother.[64] In such a case the legal parents (the intended father whose sperm was used and the surrogate mother) were also the genetic parents.[65] But such arrangements are relatively rare today since the intended parents so not wish to share parenting arrangement with the surrogate mother. Hiring a gestational surrogate to carry the child eliminates the genetic connection between the birth mother and child, but as the caselaw shows creates other potential problems. Basically, what these cases ask is does birth motherhood in absence of a genetic connection create any legal rights or obligations?

When in vitro fertilization created the potential for separating genetic mothering and gestation the question naturally occurs as the parental status of a ***"birth mother."*** Historically, he woman who gave birth was always considered the legal mother of the child.[66] The historic identification of maternity with birth worked well until the development of assisted reproductive technology became a reality. But birth cannot be entirely abandoned as a significant factor in evaluating material contribution to a child's well being, even if another woman has provided the genetic contribution.[67]

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[64] Matter of Baby M., 537 A.2d 1227 (N.J. 1988) (surrogate's own egg was inseminated with the intended father's sperm by intrauterine insemination).

[65] Id. (intended father awarded custody, surrogate had visitation rights).

[66] A common definition of "mother" "mothered" or "mothering" is "to give birth." Merriam Webster's Collegiate Dictionary, Tenth Edition, p. 759 (1993).

[67] "A pregnant woman's commitment to the unborn child she carries is just not physical; it is psychological and emotional as well…. A pregnant woman intending to bring a child into the world is more than a mere container or breeding animal; she is a conscious agent of creation no less than the genetic mother, and her humanity is implicated on a deep level. Her role should not be devalued." Johnson v. Calvert, 851 P.2d 776, 797 (Cal. 1993) [Kennard, J., dissenting]. See also, Amy Larkey, Note, *Defining Motherhood:*

When there are conflicting maternal claims between the surrogate who served as birth mother and the woman designated as the intended mother in the gestational parenting context the law should favor the intended parent(s) who set the arrangement in process is order to have the child.[68] However in the absence of controlling decisions or statutes issues of maternity will continue to ambiguous and the birth mother may be accorded deference on the basis of traditional family law concepts of parentage.[69]

Determining Legal Maternity in Gestational Surrogacy Arrangements, 51 Drake L. Rev. 605, 622 (2003) (identifying four different methods of determining maternity in gestational surrogacy cases, one of which is birth). J.F. v. D.B., 66 Pa. D. & C. 4th 1, 32 (Pa., Erie Cty. Com. Pl., Apr. 2, 2004) (arguing that since the surrogacy contract did not designate an intended mother the gestational surrogate should be considered the legal mother).

[68] Kindregan and McBrien, note 36, supra, §§ 4.5 & 5.4 (use of intended parent theory to determine parentage).

[69] In a custody/visitation dispute between a birth mother and her from civil union partner where the birth mother argued that the biological connection between the mother and child, the Supreme Court of Vermont listed several factors to be considered in upholding the parental interests of the non-biological mother. First and foremost was the traditional presumption that a husband is the parent of a child born in a legal union, and the fact that when the child was born the women were living in a legal civil union under Vermont law which equality of treatment of civil union partners to traditional marriage would entitle them to be treated as like husband and wife. But in addition the Vermont court cited the mutual intent of the parties to become parents by intrauterine insemination and that denying the non-biological parents claims would result in the child having only one legal parent. Miller-Jenkins v. Miller-Jenkins, 2006 Vt. LEXIS 159 (Vt. August 4, 2006) (since Vermont court had continuing jurisdiction over divorce ending civil union and associated custody dispute it would decline to give full faith and credit to a Virginia ruling denying visitation to the non-biological parent).

The Posthumous parent:

Cryopreservation of gametes and embryos has created the potential for post-death parenting. The law long recognized that a child who was conceived before the death of its father but born after his death was the deceased man's legal child.[70] This of course refers to child conceived by sexual intercourse, and does not fit the situation of a deceased person's gametes or embryo being used to conceive a child by assisted reproduction.

The potential for posthumously becoming a parent was first recognized in the early nineteen sixties when publicity was given to the practice of having the sperm of astronauts frozen and preserved. An early article at this time theorized about a "fertile decedent" and how the rule against perpetuities might apply in the case of a post-death conception of a child.[71] In the intervening decades there have been various reports of incidents in which a widow seeks to have sperm retrieval from the body of a recently deceased husband in order to attempt a pregnancy by intrauterine insemination.[72] But

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[70] Unif. Probate Code, § 2-108 (a person surviving after birth for 120 hours or more when it was in gestation at time of the parent's death is treated as being alive at that time).

[71] W. Barton Leach, *Perpetuities in the Atomic Age: The Sperm Bank and the Fertile Decedent,* 48 A.B.A.J. 942 (1962).

[72] Susan Kerr, *Post-Mortem Sperm Procurement: Is it Legal?* 3 DePaul J. Health Care L. 39 (1999); Robert Salladay, *Child's Rights Are Focus of Case Involving Sperm From Accident Victim,* Boston Globe (May

reported caselaw focuses on situations in which a now-deceased person arranged during life for cryopreservation of gametes to be used after his death.

The most famous of these cases involved a divorced man who before killing himself deposited his sperm in a cryopreservation bank and designated his girlfriend as the person entitled to use the sperm by a deed of gift and by will; the man's marital children and the former wife contested the girlfriend's access to the sperm.[73] Among the arguments considered in this case was whether the state should adopt a policy against posthumous reproduction, and the court declined to do this.[74] Subsequently, California enacted a statute popularly called a "dead dads" bill.[75]

A few courts have confronted claims by posthumously conceived children under the Social Security Act. The Supreme Judicial Court of Massachusetts ruled that under state law the two children conceived by a widow using her late husband's cryopreserved sperm and born two years after his death were the legal heirs of the deceased father.[76] But the court noted that a balancing test must be applied in determining the status of posthumous children with due consideration given to the interest of the state in having an orderly and

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23, 2004): Ike Flores, *Newlywed Dies in Cash, But for Children Live in Extracted Sperm, L.A.* Times (July 3, 1994).

[73] Hecht v. Kane, 20 Cal. Rptr.2d 275 (Cal. App. 2nd Dist. 1993).

[74] Id., 20 Cal. Rptr. 275, at ___.

[75] Cal. Assembly Bill 1910, approved Sept. 24, 2004, amending various sections of the Cal. Family Code, the Cal. Health and Safety Code, the Cal. Insurance Code, and the Cal. Probate Code.

[76] Woodward v. Comm'r. of Soc. Sec., 760 N.E.2d 257 (Mass. 2002)

timely administration of estates, the interests of other children who claims might be affected by the birth of posthumous children and the need for proof that the decedent expressed an intent to have and support posthumous children.[77]

The Ninth Circuit also recognized the social security claims of twin children conceived by a widow with her husband's sperm ten months after his death. In this case the court ruled that since under Arizona the twins were the legitimate and dependent children of the deceased wage-earner they were entitled to coverage under Social Security even though conceived and born after his death.[78]

The Presumed Parent:

At common law when a married woman gave birth to a child her husband was presumed to be the father except in the rare case when it was established that it was impossible to for him to have sexual access to her during the time of conception.[79] In recent decades the courts have liberalized this rule in accord with scientific developments such as the use genetic marker testing to determine paternity, but for reasons related to

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[77] Id. at 269-272.

[78] Gillett-Netting v. Barnhart, 371 F.3d 593 (9th Cir., Ariz. 2004).

[79] Homer C. Clark, 1 The Law of Domestic Relations in the United States (2nd ed.) 341-344 (1987). See Commonwealth v. Kitchen, 11 N.E.2d 482 (1937) (presumption of husband's paternity permitted when husband did not have access to the wife in the 305 days preceding birth of child).

the integrity of the family and the best interests of children the presumption of paternity continues to enjoy recognition by either common law or statute.[80]

The husband of a married woman who conceives a child by sexual intercourse will likely be the imputed father unless he promptly acts to show that he is not the father after learning of the wife's adultery.[81] However, the use of intrauterine insemination to produce a pregnancy has complicated the issue of parentage in some states by imposing a consent or a ratification requirement before the husband of a married women who uses

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[80] Michael H. v. Gerald D., 491 U.S. 110 (1989) (upholding California statutory presumption which allowed only a two-year window to challenge the husband's paternity, even though genetic marker testing showed another man to be the genetic father). A few states have by court decision abolished the strict common law presumption of paternity. See C.C. v. A.B., 550 N.E.2d 365 (Mass. 1990) (based on showing of best interests of child court can after preliminary showing permit a non-husband claimant to show his paternity of child born to a married woman); Weidenbacher v. Duclos, 661 A.2d 988 (Conn. 1995) (in habeas corpus action a non-husband allowed to present evidence of his paternity]. However, by statute continue to apply the presumption in parentage cases; see Mass. Gen. Laws, ch. 209C, § 6; Weidenbacher v. Duclos, supra, 661 A.2d 988 at 996 (Conn. 1995) and C.C. v. A.B., 550 N.E.2d 365 (Mass. 1990).

[81] Prompt action here means to challenge paternity either within a time-period imposed by statute or at the first opportunity in a legal action. As to a statutory period see Michael H. v. Gerald D., note 68, supra (two year limitation period under California statute after birth of child to challenge presumption). Examples of men being estopped to deny paternity because of failure to promptly raise the issue are found in Anderson v. Anderson, 552 N.E.2d 546 (Mass. 1990) (ex-husband who learned he was infertile only years after the divorce in which he had been ordered to pay child support precluded from raising paternity issue; court stated this was general rule); In re Paternity of Cheryl, 746 N.E.2d 488 (Mass. 2001) (unmarried man who acknowledged paternity later barred from opportunity to relitigate the issue when he learned he was not the father).

assisted reproduction will be the legal father. These statutes are several decades old and were enacted at a time when "artificial insemination" was the only form of practical assisted reproduction. In most states with such statutes the law contains an express requirement that the husband consent to the procedure, usually in writing.[82] However, if the husband does consent but not in compliance with a statutory requirement of a writing

[82] Ala. Code 1975 § 26-17-21 (husband and wife must sign consent form); Alaska Stat. § 25.20.045 (written consent by both spouses required); Ariz. Rev. Stat. § 25-501B (husband must support if he agreed in writing to wife's insemination either before or after the procedure); Ark. Code Ann § 9-10-201[husband's written consent]; Cal. Fam. Code, § 7613 [written consent of husband and wife]; Colo. Rev. Stat. Ann.§ 19-4-106 (husband's consent); Conn. Gen. Stat. Ann. § 45a-774 (husband and wife consenting to and requesting procedure); West's Fla. Stat. Ann., § 742.11(1) (husband and wife consent in writing); Idaho Code Ann., § 39-5403 (prior written consent of husband and wife); 750 Ill. Comp. Stat. § 40/3 (husband and wife consent in writing); Kan. Stat. Ann. § 23-128 (written consent of husband and wife); La. Rev. Stat. Ann. (husband's consent); Mass. Gen. Laws c. 46, § 4b (husband's consent); Mich. Comp. Laws Ann. § 333.2824(6) (husband's consent); Minn. Stat. Ann., § 257.56(1) (husband's written consent and wife's signature); Mo. Rev. Stat. § 210.824.1(husband's written consent and his and wife's signature); Mont. Code Ann. § 40-6-106(1) (husband's written consent and his and wife's signature); Nev. Rev. Stat. Ann. § 126.061.1 (husband's written consent signed by him and his wife); N.H. Rev. Stat. Ann. § 168-B-3.II (husband is presumed father but allowed to dispute paternity); N.J. Stat. Ann.§ 9:17-44a (husband's written consent signed by him and wife); N.M. Stat. § 40-11-6 (written consent of husband signed by him and wife); N.Y. Dom. Rel. § 73 (McKinney) (written consent of husband); N.C. Gen. Stat. Ann. § 49A-1 (husband and wife consenting in writing); Okla. Stat. tit. 10, Ch. 24, § 553 (written consent of husband and wife); Ore. Rev. Stat. Ann. § 109.243 (husband's written consent); Tenn. Code Ann. § 68-3-306 (husband's consent).

it is still likely that a court will require him to pay child support because the alternative would be to leave the child without paternal support.[83]

When a married man who is sterile encourages his wife to have sexual intercourse with another man so they can have a child the law will impute paternity to him even though he is not the biological father of the resulting child.[84] Such a result might be justified based on the premise that application of the presumption of paternity is socially desirable given that the couple's decision to achieve parenthood by adultery was premised on the decision to bring a child into the family.[85]

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[83] See R.S. v. R.S., 670 P.2d 923 (Kan. App. 1983) in which a husband who orally consented to wife's insemination with donor sperm was estopped to deny paternity even though the state specified that husband's consent had to be in writing. See also, Brown v. Brown, 125 S.W.3d 840 at 844 (Ark. Ct. App. 2003) holding that when the husband knew his wife was seeking to become pregnant by intrauterine insemination with donor sperm he is the legal father and obligated to pay child support.

[84] L.M.S. v. S.L.S., 312 N.W.2d 853 (Wis. Ct. App. 1981) (husband who encouraged wife to become pregnant by another man will be treated as the legal father of the child).

[85] See, for example, the analysis in Michael H. v. Gerald D., 491 U.S. 110 (1989) (wife had relations with different men, one of whom was shown by genetic marker testing to be the biological father, but Supreme Court upheld application of the presumption that husband was the father under California law where husband, wife and child continued to form family unit).

Paternity is not usually imputed to an unmarried man who consents to his female companion's becoming pregnant with donated gametes.[86] However with changes in society which reflect greater acceptance of unmarried cohabitation subtle rethinking of non-marital paternity is taking place. The drafters of the Uniform Parentage Act (UPA) reflect this changing recognition that even unmarried couples use assisted reproduction. Section 704 of the UPA permits an unmarried man and woman to consent in writing and thereby become the parents of a child by assisted reproduction even though one or both are not genetically the parents.[87] The UPA also permits a post-birth ratification by unmarried persons which allows imputation of parenthood when a man cohabits with the mother and child for two years after birth and they hold out the child as their own.[88]

Parenthood by Estoppel:

The American Law Institute has proposed recognition of four different types of parenthood by estoppel. The simplest form of estoppel is a person who while not a legal

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[86] Mitchell v. Banary, 759 N.E.2d 121 (Ill. App. Ct. 2001) (Illlinois statute imputing parenthood to a husband who consents to his wife insemination with donor sperm does not apply to the mother's long-time boyfriend even if he did consent).

[87] Unif. Parentage Act, § 704(a) (2003 West Supp. 33). The writing is referred to a "record signed by the woman and the man."

[88] Unif. Parentage Act § 704(b) (2003 West Supp. 33).

[91] American Law Institute, PRINCIPLES OF THE LAW OF FAMILY DISSOLUTION, § 2.03(1)(b)(i) (2002).

parent is obligated to pay child support.[91] Another form is when a man lives with a child for at least two years, had a reasonable and good faith belief that he was the father (based on his marriage to the mother or on her representations), fully accepted parental responsibilities and when that belief no longer existed continued to make reasonable good faith efforts to accept responsibility as the father of the child.[92] Still another form of parenthood by estoppel is when a person lived with the child since its birth and as part of a co-parenting agreement with the legal parent accepted full land permanent responsibilities as a parent and a court finds it is in the child's best interests to recognize that person as a parent.[93] Estoppel could also apply when a person lived with a child for at least two years and held out a accepted full and permanent responsibility as a parent pursuant to an agreement with the child's parent when the court finds that recognition of his or her parenthood is in the best interests of the child.[94]

Estoppel to Deny Parentage:

If parentage has been adjudicated or acknowledged the law may continue to recognize that determination and continue to impute parentage even if it is later established that the judgment or registered acknowledgement of parentage was mistaken.[95] This is a form of parenthood by estoppel, i.e. preclusion denying an opportunity to rebut his parenthood

[92] Id., §2.03(1)(b)(ii).

[93] Id., §2.03(1)(b)(iii).

[94] Id., §2.03(1)(b)(iv).

even by a person who can establish that he is not the parent. This policy is based both on the desirability of stability in parent-child relationships, the need for finality in judgments and on the best interests of children. [96]

The use of estoppel to prevent a person from proving he is not a parent is not without dispute. This is especially true when the mother has concealed or fraudulently misrepresented paternity when in fact someone other than the putative father was the real father. A few courts have entertained requests for or results from paternity testing notwithstanding prior parentage judgments based on acknowledgement.[97] A few states

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[95] Ex parte State *ex rel.* J.Z. 668 So.2d 566 (Ala. 1995) (relief from default paternity judgment entered years earlier denied); Wade v. Wade, 536 So.2d 1158 (Fla. Dist. Ct. App. 1988) (denying request to vacate paternity judgment); In re Paternity of Cheryl, 746 N.E.2d 488 (Mass. 2001) (court denied motion to set aside judgment of paternity which had been based on acknowledgement even though subsequent genetic marker testing showed movant was not the father); Betty L.W. v. William E.W., 569 S.E.2d 77 (W. Va. 2002) (court would not entertain ex-husband's effort to show his non-paternity of an eleven year old gir1).

[96] See Melanie B. Jacobs, *When Daddy Doesn't Want to be Daddy Anymore: An Argument Against Paternity Fraud Claims,* 16 Yale J.L. & Feminism 193 (2004) (arguing against open-ended challenges to paternity and in favor of a functional rather than a biological basis of parentage); Katherine K. Baker, *Bargaining or Biology? The History and Future of Paternity Law and Parental Status*, 14 Cornell J. L & Pub. Pol'y. 1 (2004) (arguing that a trend away from genetic and toward a contractual basis of parenthood is a positive development).

[97] Langston v. Riffe, 754 A.2d 389 (Md.. 2000) [fathers entitled to have paternity testing done]; M.A.S. v. Mississippi Dept. of Human Services, 842 So.2d 527 (Miss. 2003) [when genetic marker testing shows that man who previously signed an acknowledgement was not the father court could set aside the prior judgment].

have enacted statutes permitting challenges to paternity judgments based on subsequent testing.[98] Some commentary argues that paternity fraud has become even more common today than in the past, and is driven by federal and state efforts to reduce welfare and to compel child support payments even against non-genetic fathers.[99]

A birth mother might in some instances be estopped to deny the paternity of her husband. An Ohio case illustrates this; a wife-birth mother was estopped to deny her husband's paternity. She had falsely told her husband that the child she bore was the product of intrauterine insemination by donor when in fact the child was conceived in an adulterous relationship. In their divorce the husband sought visitation, and an appellate court ruled that the trial judge should allow evidence on which the wife could be

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[98] Ark. Code. Ann. § 9-10-115 (adjudicated or acknowledging father is entitled to seek paternity testing if not done earlier); Ga. Code Ann. §19-7-54(a) (male who is paying child support may move to set aside prior paternity judgment based on testing showing a zero percent probability of his paternity); Iowa Code § 600B.41A(3)(a) (action to disestablish paternity permitted if brought during minority of child); Md. Code Ann., Fam. Law § 5-1038 (testing allowed unless man acknowledged paternity when he knew he was not the father); Ohio Rev. Code Ann § 3119.961 (if paternity test shows zero probability of parentage court may grant relief from judgment unless man knew he was not father when acknowledgment took place or other specified events occurred).

[99] See Ronald K. Henry, *The Innocent Third Party: Victims of Paternity Fraud*, 40 Fam. L.Q. 51 (2006) (claiming that government efforts to reduce welfare has resulted in the resulting holding of many low-income minority males liable for child support and that this cannot be justified today when DNA testing enables the establishment of actual paternity).

estopped from denying the husband's paternity.[100] However, a husband should not be estopped from showing his non-paternity when his wife allegedly attributed her child's conception to intrauterine insemination by donor when the child was actually conceived by her concealed adultery.[101]

A decision by the Supreme Court of California used an estoppel theory to preclude a birth mother from denying the maternity of her former co-parenting same-sex partner who was named as a mother on the birth certificate with the birth mother's consent.[102] The lesson of such a decision is that while parenthood might not be conferred on a legal stranger by a co-parenting agreement, a legal parent might subsequently be estopped to deny that status based on former conduct consistent with parenthood.

The *De Facto* Parent:

An early version of what later came in a more detailed form to be called a *"de facto"* parent was developed in a much noted book published in 1973, and was called the psychological parent.[103] In essence the book called for a reevaluation of the traditional

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[100] Cameron v. Cameron, 795 N.E.2d 707 (Ohio App. 2003). See also, Brooks v. Fair, 532 N.E.2d 208, 212-213 (Ohio App. l988) precluding a married woman from denying her husband's paternity of a child conceived by assisted insemination by donor when the husband and wife had both consented to the procedure.

[101] Dews v. Dews, 632 A.2d 1160 (D.C. 1993).

[102] Kristine H. v. Lisa R., 117 P.3d 690 (Cal. 2005) [legal and birth mother estopped to deny parenthood of former same-sex partner when she initially support recognition of that person's motherhood].

[103] Joseph Goldstein, Anna Freud and Albert Solnit, BEYOND THE BEST INTERSTS OF THE CHILD

biological basis for determining parenthood and application of the best interests test, and urged instead that law deal with custody disputes based on a child's need for stability and minimizing disruption of a child's relationship to an adult caregiver even if that person was not a biological or adoptive legal parent.

In its current version the *de facto* parent doctrine is reflected in the American Law Institute's definition:

> A *de facto parent* is an individual other than a legal parent or a parent by estoppel who, for a significant period of time not less than two years,
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> (i) lived with the child and,
>
> (ii) for reasons primarily other than financial compensation, and with the agreement of a legal parent to form a parent-child relationship, or as a result of a complete failure or inability of any legal parent to perform caretaking functions,
>
> (A) regularly performed a majority of the casretaking functions for the child, or
>
> (B) regularly performed a share of caretaking functions at least as great as that of the parent with whom the child primarily lived.[104]

(1973).

[104] American Law Institute, PRINCIPLES OF THE LAW OF FAMILY DISSOLUTION, § 2.03(1)(c) (2002).

The Supreme Judicial Court of Massachusetts cited the ALI proposal on *de facto* parenthood in allowing a former same-sex partner of the biological mother to visit with her former companion's child. The two women had cohabited for 13 years and made a coparenting agreement under which the mother would try to become pregnant by intruauterine insemination with donor sperm, and after the birth of the child both women coparented the child for four years before the adult relationship ended and the mother restricted her former companion's access to the child. The court invoked the equity jurisdiction of the Probate and Family Court to rule in favor of allowing visitation by the *de facto* parent.[105]

Unlike the original "psychological parent" theory which was so much discussed in the 1970's the *de facto* parent concept is likely to have its strongest application in visitation cases rather than custody or other parental claims by a person claiming that status, at least when a legal parent objects to that person's involvement with the child. . However, there is a possibility that a person who has asserted the status of a *de facto* parent could be held liable to contribute to the support of the child, essentially on an estoppel argument.[106] But where their has been no actual parenting by an alleged *de facto* parent and no visitation claim by that person child support would probably be denied.[107]

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[105] E,N.O. v. L.M.M., 711 N.E.2d 886, 881 (Mass. 1998), citing favorably A.L.I. PRINCIPLES OF THE LAW OF FAMILY DISSOLUTION, § 2.03(1) (Tent. Draft No. 3, Part 1) (1998) [recognizing *de facto* parent doctrine]. See also, Youmans v. Ramos, 711 N.E.2d 165, 167, n. 3 (Mass. 1998) [distinguishing gal parent from *de facto* parent, allowing visitation to an aunt over father's objection when aunt had cared for the child during the mother's final illness]. Rhode Island also cited the ALI principles favorably in Rubano v. DiCenzo, 759 A.2d 959 974-975 (R.I. 2000).

[106] See Ellissa B . v. Superior Ct. of El Dorado County, 117 P.3d 660 (Cal. 2005) [woman who

Parenthood by Sexual Coitus*:*

The law distinguishes a pregnancy brought about by sexual intercourse from one caused by assisted reproduction using anonymously donated gametes.[108] Where a child is conceived by sexual intercourse rather than by assisted conception the issue of parenthood is usually more straightforward. In such cases genetic parenthood is normally the controlling factor and the intent of the parties in entering the sexual relationship is irrelevant. If a child results from the sexual relationship the parties are the parents. Regardless of the intent of the parties engaged in sexual intercourse the traditional law governing parentage applies. For example, in a case where an unmarried woman asks a male friend to have sex so she can become pregnant the fact that he has no intent to become a parent is irrelevant and he cannot successfully argue that he should be treated

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encouraged her partner to have a child by intrauterine insemination could be liable for child support]. In Chambers v. Chambers, No. CN00-09493, 2002 WL1940145, p. 11 (Del. Fam. Ct. 2002) the court ordered the mother's former same-sex companion who encouraged the mother to become pregnant by in vitro ferterlization and then helped co-parent the child after its birth to pay child support.

[107] T.F. v. B.L., 813 N.E.2d 1244 (Mass, 2004) [although the defendant encourage her former domestic partner to have a child by assisted reproduction and agreed to co-parent any child born by this process, she is not obligated to pay child support when she never actually functioned as a parent; court declined to impose support based on a parenthood by contract theory].

[108] Unif. Parentage Act, § 101(4), 9 U.L.A. 355 (2002) defines assisted reproduction as a "method of causing pregnancy other than sexual intercourse."

as a mere sperm donor on the basis that he was only doing the woman a "favor" by having sexual coitus which caused her to become pregnant.[109]

Even if the man and woman enter into a formal agreement that the man will not have any paternal responsibilities for a child to be conceived by sexual intercourse, the law will not exempt him from support liability.[110] If the couple have sex even when the woman falsely claims to be infertile or to be using contraceptives and pregnancy results the man will still be held liable for support of the child.[111]

If a man who makes a woman pregnant asks her have an abortion and she refuses the issue of his parental responsibility is sometimes raised. Does the man in such a situation have an interest analogous to the woman's right to avoid parenthood by terminating the pregnancy? This argument is that a man has a right to avoid becoming a parent based on an analogy to the woman's right to terminate a pregnancy by abortion.[112] This argument is unlikely to succeed since the facts of reproductive biology distinguish the situation of

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[109] Kesler v. Weniger, 744 A.2d 794 (Pa. Super. Ct. 2000) (declining to recognize a theory of artificial insemination by intercourse).

[110] Budnick v. Silverman, 805 So.2d 1112 (Fla. Dist. Ct. App. 2002) (written agreement that man would not be liable for child resulting from sexual union would not bar child support, rejecting man's argument that he should be treated as a sperm donor).

[111] L. Pamela P. v. Frank S., 449 N.E.2d 713 (N.Y. 1983) (woman claimed to be using contraception before sex; man's claim of contraceptive fraud argued to resist child support rejected).

[112] See Judith Graham, Chicago Tribune, March 10, 2006 (noting the filing of a lawsuit by a man claiming a right to avoid parenthood after a girlfriend became pregnant and had a child).

the man and the woman once pregnancy commences. Once the male consents to sexual intercourse and engages in it the potential for pregnancy is out of his control.[113] The woman's right to terminate her pregnancy has been constitutionally held to not give the male a veto over her choice,[114] and it is unrealistic to suggest that the law should enable him to escape responsibility for a child who results from his conduct.

Parenthood might be based on sexual contact which does not involve intercourse. In a Louisiana case a man who claimed that a woman used his sperm which had been in a condom used during oral sex without his permission to impregnate herself was held to be the father of the child so conceived; the fact of the sexual contact between the parties even in the absence of actual intercourse was sufficient to justify a finding of paternity.[115]

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[113] The man may choose to use contraception which reflects his intent not to become a parent, but if contraception fails the law will treat him as the father.

[114] Planned Parenthood of Central Missouri v. Danforth, 428 U.S. 52 (1976) (husband's consent cannot be required for woman's choice of abortion); Planned Parenthood of Southeastern Pennsylvania. v. Casey, 505 U.S. 833 (1992) (statute cannot compel spousal notification of wife's abortion choice since husband has no enforceable right to require wife to consult with him about her choice); Doe v. Doe, 314 N.E.2d 128 (Mass. 1974) (husband not entitled to injunction to prevent his wife from having an abortion); Coe v. Cook County, 162 F.3d 491(7th Cir. 1998) (boyfriend not entitled to notice of his girlfriend's choice to have an abortion). See also, Note, Spousal Consent to Abortion, IX Suffolk U.L. Rev. 841 (1975).

[115] State v. Frisard, 694 So.2d 1032 (La. Ct. App. 1997) (even if it was true that the sperm was produced in oral sex rather than by intercourse the male is still the legal father).

The same result would apply to a conception which occurs from a splash pregnancy without actual penetration and sexual intercourse.[116]

Conclusion:

The law will continue to rely on traditional concepts of parental rights and responsibility when conception occurs in sexual relations between a man and a woman. But in cases involving asexual collaborative conception the law is confronted by new and difficult choices. The science of assisted reproduction has created new challenges for the law. These challenges have been augmented by changes in the concept of the family itself and by evolving forms of family life which do not fit the mold of the traditional nuclear family. Biology will always have relevance to the resolution of disputes over parentage, and the availability of DNA genetic marker testing has made it easier to prove a genetic connection between a child and a parent. But a biological can no longer be an exclusive basis for solving every parentage issue except as to children conceived by sexual coitus. The social and contractual basis of parenthood is likely to play an expanding basis for addressing parentage issues. It is a positive that the evolution of legal thought has been marked by greater reliance on concepts of intended parenthood and responsibility for the life choices which people make. However a child is conceived he or she has a right to have the law hold the persons responsible for that child's existence to the obligations of parentage.

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[116] In T. v. M., 242 A.2d 670 (N.J. Super. Ct. Ch. Div. 1968) the court granted an annulment of the marriage which was never consummated although the wife had become pregnant by a splash pregnancy which ended by miscarriage; if the child had been born there is no reason to doubt that the husband would be treated as the legal father.