1-2002

Parenthood by Pure Intention: Assisted Reproduction and the Functional Approach to Parentage

Richard F. Storrow

Follow this and additional works at: https://repository.uchastings.edu/hastings_law_journal

Part of the [Law Commons](#)

Recommended Citation

Richard F. Storrow, *Parenthood by Pure Intention: Assisted Reproduction and the Functional Approach to Parentage*, 53 HASTINGS L.J. 597 (2002).

Available at: https://repository.uchastings.edu/hastings_law_journal/vol53/iss3/2

This Article is brought to you for free and open access by the Law Journals at UC Hastings Scholarship Repository. It has been accepted for inclusion in Hastings Law Journal by an authorized editor of UC Hastings Scholarship Repository. For more information, please contact wangangela@uchastings.edu.

Parenthood By Pure Intention: Assisted Reproduction and the Functional Approach to Parentage

by
RICHARD F. STORROW*

Introduction

Assisted reproduction is widely used in this country and around the world to help couples and single persons procreate where procreation by sexual intercourse has failed or is not desired.¹ Assisted reproduction refers to methods of achieving pregnancy other than coitus. Such methods include (1) intrauterine insemination; (2) donation of eggs; (3) donation of embryos; (4) in-vitro fertilization and transfer of embryos; and (5) intracytoplasmic sperm injection.² New techniques are constantly being developed in this highly unregulated area.³ Unlike coitus, which can be a nonprocreative act, assisted reproduction's sole aim is procreation, an activity highly

---

* Associate Professor, Texas Wesleyan University School of Law. J.D., Columbia Law School, 1993; M.A., Columbia University, 1989; B.A., Miami University, 1987. I am grateful to Carlos Ball, June Carbone and Susan Gary who provided valuable comments on previous drafts. I thank Texas Wesleyan University for providing me with the research support that made the preparation of this Article possible.

1. See LORI B. ANDREWS, *THE CLONE AGE: ADVENTURES IN THE NEW WORLD OF REPRODUCTIVE TECHNOLOGY* 220 (1999) (reporting that the reproductive technology industry, with an annual revenue of \$2 billion, results in tens of thousands of births yearly) [hereinafter ANDREWS, *CLONE AGE*].

2. See UNIF. PARENTAGE ACT § 102(4), 9B U.L.A. 303 (2001); RICHARD E. JONES, *HUMAN REPRODUCTIVE BIOLOGY* 324 (2d ed. 1997); Murray L. Manus, *The Proposed Model Surrogate Parenthood Act: A Legislative Response to the Challenges of Reproductive Technology*, 29 U. MICH. J.L. REFORM 671, 677-82 (1996). A detailed discussion of the various alternative reproductive techniques is beyond the scope of this Article.

3. See ANDREWS, *CLONE AGE*, *supra* note 1, at 219 ("This is truly the Wild West of medicine.").

valued in part "because it usually leads to child rearing."⁴ Despite the constitutional protection of both procreation and child rearing under family privacy doctrine,⁵ the law has not explicitly equated resort to assisted reproduction⁶—perhaps because the use of assisted reproduction challenges the traditional image of the marital couple bearing children via sexual intercourse⁷—with the image of the family most favored by family privacy doctrine.⁸ Even though this model is no longer the norm in society,⁹ the marital family model has assumed

---

4. JOHN A. ROBERTSON, CHILDREN OF CHOICE: FREEDOM AND THE NEW REPRODUCTIVE TECHNOLOGIES 22 (1993) (emphasis added) [hereinafter ROBERTSON, CHILDREN OF CHOICE].

5. See *Skinner v. Oklahoma*, 316 U.S. 535 (1942) (procreation); *Troxel v. Granville*, 530 U.S. 57 (2000) (child rearing).

6. See *Doe v. Kelly*, 307 N.W.2d 438, 441 (Mich Ct. App. 1981) (no constitutional right to effectation of terms of surrogacy contract); *accord In re Baby M*, 537 A.2d 1227, 1253 (N.J. 1988) ("The right to procreate very simply is the right to have natural children, whether through sexual intercourse or artificial insemination.").

7. See ROBERTSON, CHILDREN OF CHOICE, *supra* note 4, at 13 (1994) ("New reproductive technologies are also often seen as a further cause of the disintegration and breakdown of the nuclear family."); *id.* at 144; KATH WESTON, FAMILIES WE CHOOSE 169-70 (1997) ("In the United States, new reproductive technologies have collided with ideologies that picture a child as the 'natural' product of a woman and a man in an act of sexual intercourse."); Radhika Rao, *Assisted Reproductive Technology and the Threat to the Traditional Family*, 47 HASTINGS L.J. 951, 959 (1996); Helene S. Shapo, *Matters of Life and Death: Inheritance Consequences of Reproductive Technologies*, 25 HOFSTRA L. REV. 1091, 1101 (1996) ("[R]eproductive technologies have . . . been viewed as a threat to the traditional family.").

8. See Richard F. Storrow, *The Policy of Family Privacy: Uncovering the Bias in Favor of Nuclear Families in American Constitutional Law and Policy Reform*, 66 MO. L. REV. 527, 550, 582 (2001) (arguing that underlying constitutional family and individual privacy doctrine is a bias in favor of traditional nuclear families).

9. See Jason Fields and Lynee M. Casper, *America's Families and Living Arrangements: March 2000*, at 3 (2001) (reporting a drop in the percentage of married-couple households with never married children under eighteen years of age from forty percent of all households in 2000), available at <http://www.census.gov/prod/www/abs/popula.html#pop>. This report also indicates a rise in the number of families with their own children maintained by one parent, and a rise in the number of single parents who never have been married. *Id.* at 7. Other census data reveals that 27.7 percent of children under eighteen live with one parent, 40.3 percent of those with mothers who have never been married. See Terry A. Lugaila, U.S. Dep't of Commerce, *Current Population Reports, Marital Status and Living Arrangements: March 1988 (Update)*, at 1 (1988), available at <http://www.census.gov/prod/www/abs/marital.html>. Indeed, within the mother-child family groups, 42.2 percent of mothers have never been married, see Lynee M. Casper and Ken Bryson, U.S. Dep't of Commerce, *Current Population Reports, Household and Family Characteristics: March 1988 (Update)*, at 1 (1998), available at <http://www.census.gov/prod/www/abs/hh-fam.html>, and within this group, the majority of single mothers with children under six years of age have never been married, see Ken Bryson and Lynne M. Casper, U.S. Census Bureau, *Current Population Reports, Household and Family Characteristics: March 1997*, at 5 (1998), available at <http://www.census.gov/prod/3/98pubs/p20-509.pdf>. See also Shapo, *supra* note 7, at 1101-

an important role in shaping the law of parentage in assisted reproduction cases. Despite what might be assumed a stabilizing influence on this area of the law, parentage disputes arising from assisted reproduction create confusion over what body of law should control their outcome.¹⁰ Whereas some courts have treated the parentage issues that arise from the use of assisted reproduction as best addressed through the application of adoption law, marital presumptions of legitimacy or equitable estoppel,¹¹ legislatures addressing assisted reproduction have fashioned unique statutes to resolve these issues,¹² suggesting that well-established parentage principles do not adequately account for the policy ramifications of the use of these techniques. Unfortunately, these judicial and legislative efforts have done little to develop coherent and clear criteria for the determination of parentage in this area and appear even to be working somewhat at cross purposes. Despite this confusion, what appears to underlie the judicial and legislative responses made to date are policies that favor restriction instead of expansion of the legal definition of the family.¹³ The restrictive policies advanced by these efforts promise to widen the divide between the myriad forms of the family that exist in society today and the ability of the law to protect the integrity of those families.¹⁴

---

02 (describing traditional family as not one which is heavily represented among families today and attributing changing demographics to increase in divorce, as well as to greater social acceptance of cohabitation and single people raising children alone); D'Vera Cohn, *Census Shows Big Increase in Gay Households*, WASH. POST, June 20, 2001, at A1 (describing census figures as showing "huge increases in the number of same-sex couples sharing households"); Carey Goldberg, *Single Dads Wage Revolution, One Bedtime Story at a Time*, N.Y. TIMES, June 17, 2001, at 1 (reporting that the the number of households consisting of single fathers with primary custody of their children has risen about fifty percent since 1990); Betsy Hammond, *The 2000 Census; More Say "I Do" to Cohabitation*, PORTLAND OREGONIAN, June 6, 2001, at A1 (reporting that nine percent of all couples declared themselves "unmarried partners").

10. Janet L. Dolgin, *Choice, Tradition, and the New Genetics: The Fragmentation of the Ideology of Family*, 32 CONN. L. REV. 523, 540 (2000) (noting that assisted reproduction creates confusion about "the implications of biological parentage") [hereinafter Dolgin, *New Genetics*].

11. See *infra* Table 1; see also *infra* notes 57-59, 74-77, 169, 193-203 and accompanying text.

12. See *infra* Table 2; see also *infra* notes 145, 165-68, 171-92, 204-10, 294-301, 305-09 and accompanying text.

13. See ROBERTSON, CHILDREN OF CHOICE, *supra* note 7, at 145 (emphasizing that collaborative reproduction's emphasis on enabling married couples to have and rear biologic offspring supports the nuclear family); Rao, *supra* note 7, at 957 (commenting on the fundamental conservatism of assisted reproductive technologies in replicating traditional families).

14. See WESTON, *supra* note 7, at 6 ("In the United States the nuclear family

The deployment of a narrow understanding of the family assisted reproduction law has not been adequately addressed by commentators, either because they believe well-established principles of family law are sufficient to resolve the parentage issues arising from assisted reproduction,¹⁵ or because they believe recognizing assisted reproduction as a fundamental right will resolve these issues.¹⁶ Another group of commentators sees the recognition of intentional parenthood by assisted reproduction jurisprudence and specialized legislation (but not by traditional parentage principles) as an antidote to laws marginalizing nontraditional families.¹⁷ None of these approaches fully recognizes the potential for family law reformers to harness emerging legal responses to assisted reproduction to redefine the family to reflect more faithfully how families are constituted today.¹⁸ The notion of intentional parenthood, like the best interests of the child standard, is as yet too lacking in substance to expect coherent decisionmaking to emerge from its application. As has often happened with the open-ended, elastic best interests of the child standard, the hope that courts will use the concept of intention to make unbiased decisions about the

---

represents a privileged construct, rather than one among a number of family forms accorded equivalent status.”).

15. See Marsha Garrison, *Law Making for Baby Making: An Interpretive Approach to the Determination of Legal Parentage*, 113 HARV. L. REV. 835, 882 (2000) [hereinafter Garrison, *Interpretive Approach*].

16. See, e.g., ROBERTSON, CHILDREN OF CHOICE, *supra* note 4, at 4, 16.

17. See, e.g., Marjorie Maguire Shultz, *Reproductive Technology and Intent-based Parenthood: An Opportunity for Gender Neutrality*, 1990 WIS. L. REV. 297; John Lawrence Hill, *What Does It Mean To Be a “Parent”? The Claims of Biology as the Basis for Parental Rights*, 66 N.Y.U. L. REV. 353 (1991).

Scholars use the term “nontraditional families” or “alternative families” to denote families whose basis is not a marital unit. See, e.g., IRA MARK ELLMAN, ET AL., *FAMILY LAW: CASES, TEXT, PROBLEMS* 929 (3d ed. 1998) (“nontraditional families”); D. KELLY WEISBERG & SUSAN FRELICH APPLETON, *MODERN FAMILY LAW: CASES AND MATERIALS* 397 (1998) (“alternative families”). Professor Martha Fineman has coined the term “intimate entities” to refer to “family-like groups that do not conform to the traditional model.” See Martha Albertson Fineman, *Our Sacred Institution: The Ideal of the Family in American Law and Society*, 1993 UTAH L. REV. 387, 389 n.8. Professor Elvia Arriola objects to the term “nontraditional” as applied in this context because it creates the impression that the family in question is illegitimate. See Elvia R. Arriola, *Law and the Family of Choice and Need*, 35 U. LOUISVILLE J. FAM. L. 691, 694 (1997).

18. See MARGARET JANE RADIN, *CONTESTED COMMODITIES: THE TROUBLE WITH TRADE IN SEX, CHILDREN, BODY PARTS, AND OTHER THINGS* 150 (1996) (remarking that surrogacy may be capable of transforming the family); R. Alta Charo, *And Baby Makes Three—or Four, or Five, or Six: Redefining the Family after the Reprotech Revolution*, 15 WIS. WOMEN’S L.J. 231, 242 (2000) (remarking that the compartmentalization of reproduction through technology offers an “opportunity to re-examine” assumptions about the family).

status of families leaves too much to chance. In addition, recognizing that access to assisted reproduction is a constitutionally protected *individual* liberty bears no relationship to whether the *families* created via exercises of this freedom will be recognized as such.¹⁹ Traditional family law principles do not neatly resolve all parentage questions arising from assisted reproduction. The policies underlying these traditional principles, however, can be satisfactorily met even under a legal regime recognizing parentage by pure intention.

This Article discusses how the emerging law of assisted reproduction is capable of reshaping the legal definition of the family. Part I describes the models of the family deployed by jurisprudence and legislation governing parentage claims arising from surrogacy arrangements and artificial insemination. Concerning maternity, courts have yet to cope successfully with the fragmentation of maternity by surrogacy and have issued decisions inspiring more speculation than certainty. Moreover, very few contests between genetic, gestational and intending mothers have been resolved in the courts, leaving gaps in the law that render unclear the outcome of potential future disputes. The law is more complete with regard to paternity issues in artificial insemination cases, but different treatment of sperm donors and progenitors who sire children through coitus has raised important concerns. Nonetheless, this differential treatment is reflective of the need for the law to recognize that these carefully planned families that are not accounted for by the parentage rules of the past.

More important for the purposes of this Article, surrogacy and artificial insemination law provide fertile ground for a redefinition of the family. Although the fundamental indeterminacy of both maternity and paternity in assisted reproduction law is cause for concern among individuals hoping to employ this technology, it at the same time provides a unexpected basis for a new vision of the family. Part II articulates this new wisdom by, first, canvassing and synthesizing scholarly and legislative treatment of the concept of intentional parenthood and, second, challenging reservation of the privilege of intentional parenthood, under existing and proposed legislation, to married couples. Concluding that the role of marriage under such statutes is largely to secure support claims of children

---

19. See *Michael H. v. Gerald D.*, 491 U.S. 110 (1989); *In re Baby M.*, 537 A.2d 1227, 1253-54 (N.J. 1988); Garrison, *Interpretive Approach*, *supra* note 15, at 857, 920; Storrow, *supra* note 8 at 549 n.170 (pointing out state-sanctioned incursions into the parental autonomy of unwed parents).

born through assisted reproduction to the resources of identifiable private parties, this Part demonstrates how marriage is superfluous for this purpose. In order to bolster the claim of unmarried individuals to the privilege of parenthood by pure intention, Part II further argues that the law should understand intentional parenthood as subsumed by the notion of functional parenthood and discusses recent case law that supports this understanding. These arguments demonstrate that the privilege of intentional parenthood should be extended, as a matter of sound family law policy, to the unmarried. In this way, the law of assisted reproduction itself can contribute to a broad program of family redefinition that pays heed to the needs and realities of contemporary family life.

I. Assisted Reproduction and Parentage

The fragmentation of parentage by assisted reproduction creates the possibility that a child conceived by this means could have as many as eight parents: the egg donor, the sperm donor, their spouses, the surrogate and her husband, and the intending mother and father.²⁰ Although some courts have allowed a child simultaneously to have three parents,²¹ as a rule the law does not simultaneously recognize more than two individuals as the parents of an individual child.²² Faced with making a choice from among these various contenders,

---

20. See Naomi Cahn, *Children's Interests and Information Disclosure: Who Provided the Egg and Sperm? Or Mommy, Where (and Whom) Do I Come From?*, 2 GEO. J. GENDER & L. 1, 1 (2000); Janet L. Dolgin, *An Emerging Consensus: Reproductive Technology and the Law*, 23 VT. L. REV. 225, 236, 245 n.135 (1998) [hereinafter Dolgin, *Emerging Consensus*]; cf. Hill, *supra* note 17, at 355 ("We now live in an era where a child may have as many as five different 'parents.' These include a sperm donor, an egg donor, a surrogate or gestational host, and two nonbiologically related individuals who intend to raise the child.").

21. Kate Kendell, Director of the National Center for Lesbian Rights, reports that "several third-parent adoptions have been granted by trial courts here in the Bay Area." Letter from Kate Kendell (Feb. 6, 2001) (on file with author). Some scholars advocate for an even more expanded definition of parentage. See, e.g., Charo, *supra* note 18, at 234, 252-53 (advocating simultaneous recognition of genetic, gestational, and intentional parents).

22. See *Johnson v. Calvert*, 851 P.2d 776, 781 (Cal. 1993) ("[F]or any child California law recognizes only one natural mother . . ."); CARL E. SCHNEIDER & MARGARET F. BRINIG, AN INVITATION TO FAMILY LAW: PRINCIPLES, PROCESS AND PERSPECTIVES 926 (1995); Katharine Bartlett, *Rethinking Parenthood as an Exclusive Status: The Need for Legal Alternatives When the Premise of the Nuclear Family Has Failed*, 70 VA. L. REV. 879, 882 (1984) ("[A] stepfather and a natural father cannot simultaneously have a legal parenting relationship with a child; one must have all parental rights and duties and the other may have none.").

courts have called for more legislative guidance.²³ In response, some legislatures have promulgated guidelines for determining legal parentage in assisted reproduction cases.²⁴ Most have not, however, leaving courts to reach determinations based on existing parentage precedents and on parallels drawn to artificial insemination legislation. As the following discussion reveals, the outcomes of these disputes have been undeniably awkward and betray an indeterminacy of parentage in assisted reproduction cases that has yet to be fully addressed.

A. Maternity

The treatment of maternity in assisted reproduction law is a product of the struggle to designate one legal mother from among three possible contenders for motherhood. This struggle is best seen in the law of surrogacy, governing arrangements where a woman contracts to become pregnant by means of assisted reproduction with or without the use of an egg from her own body.²⁵ Whether or not the

---

23. See *Buzzanca v. Buzzanca*, 72 Cal. Rptr. 2d 280, 293 (Ct. App. 1998) ("Again we must call on the Legislature to sort out the parental rights and responsibilities of those involved in artificial reproduction."); *In re Moschetta*, 30 Cal. Rptr. 2d 893, 903 n.24 (Ct. App. 1994) (citing Katherine B. Lieber, Note, *Selling the Womb: Can the Feminist Critique of Surrogacy Be Answered?* 68 IND. L.J. 205, 210 (1992)); *In re adoption of Matthew B.*, 284 Cal. Rptr. 18, 37 (Ct. App. 1991) ("[W]e urge the Legislature to [act] expeditiously."); *Belsito v. Clark*, 67 Ohio Misc.2d 54, 65 n.3 (1994) ("[I]t would be beneficial to the law of surrogacy for the legislature to act and end this uncertainty."); JANET L. DOLGIN, *DEFINING THE FAMILY: LAW, TECHNOLOGY, AND REPRODUCTION IN AN UNEASY AGE* 62 (1997) [hereinafter DOLGIN, *DEFINING THE FAMILY*]; see also Garrison, *Interpretive Approach*, *supra* note 15, at 877 (describing legislation as "preferable to continued case-by-case adjudication"); Marsha Garrison, *The Technological Family, What's New and What's Not*, 33 FAM. L.Q. 691, 700 (1999) [hereinafter Garrison, *Technological Family*].

24. See, e.g., ARK. CODE ANN. § 9-10-201 (1998) (determining parentage of children born to surrogate mothers); FLA. STAT. ch. 63.212(1)(i)2 (articulating requirements for "preplanned adoption arrangement"), 742.15 (West 1997) (articulating requirements for gestational surrogacy contracts); N.H. REV. STAT. § 168-B:23 (1994) (detailing effect of a judicial order validating surrogacy arrangement); KY. REV. STAT. § 199.590 (Michie 1998) (declaring surrogacy contracts void); MICH. COMP. LAWS § 722.861 (West 1997) (declaring "surrogate parentage contract" void and unenforceable); N.Y. DOM. REL. LAW § 123 (McKinney 1999) (outlawing payment in connection with surrogate parenting contract); N.D. CENT. CODE § 14-18-05 (1997) (declaring surrogate agreements void); UTAH CODE ANN. § 76-7-204 (Michie 1995) (prohibiting surrogate parenthood agreements); WIS. STAT. § 69.14(1)(h) (West 1999) (prescribing registration of birth certificates of children born to a surrogate mother); MONTGOMERY CTY. (OHIO) COMM. PLEAS PROB. LOC. R. 83.1 (requiring pre-approval of all surrogate adoption contracts).

25. See N.H. REV. STAT. § 168-B:1(XII) (1997) ("Surrogacy" . . . means any arrangement by which a woman agrees to be impregnated using either the intended father's sperm, the intended mother's egg or their preembryo . . .").

surrogate employs her own egg determines the type of surrogacy employed. Where she does, the surrogacy is known as traditional.²⁶ Where she does not, the surrogacy is known as gestational.²⁷ As indicated below, in Table 1, surrogacy divides maternity into three components—gestational, genetic and intentional.²⁸ In traditional surrogacy cases, the gestational and genetic components of motherhood are embodied in one woman, and the intentional component resides in a second. In gestational surrogacy cases, each of these indicia of motherhood can be held by a different woman, with the surrogate embodying the gestational function and the intending mother or a donor providing the genetic contribution.²⁹ Thus, depending on what type of surrogacy is employed, the components of motherhood will be found in as few as two and as many as three women. Given that the law will recognize only one mother at the birth of each individual child,³⁰ at least until there has been an adoption of the child,³¹ identifying the legal mother in gestational surrogacy cases sometimes gives rise to legal disputes.

---

26. See *In re Moschetta*, 30 Cal. Rptr. 2d 893, 894 (Ct. App. 1994) ("By 'traditional' surrogacy we mean an arrangement where a woman is impregnated with the sperm of a married man with the prior understanding that the resulting child is to be legally the child of the married man and his infertile wife."); *R.R. v. M.H.*, 689 N.E.2d 790, 795 (Mass. 1998) (defining traditional surrogacy as an arrangement "in which the fertile member of an infertile couple is one of the child's biological parents"); Shoshana L. Gillers, Note, *A Labor Theory of Legal Parenthood*, 110 YALE L.J. 691, 697, 702 (2001).

27. See *R.R.*, 689 N.E.2d at 795 n.10 (Mass. 1998) (citing *Johnson v. Calvert*, 851 P.2d 776, 784 (Cal. 1993)); *A.H.W. v. G.H.B.*, 772 A.2d 948, 950 (N.J. Super. Ct. 2000); Gillers, *supra* note 26, at 697-98. But see *Jaycee B. v. Superior Court*, 49 Cal. Rptr. 2d 694, 695 (Ct. App. 1996); *Moschetta*, 30 Cal. Rptr.2d at 894 (defining gestational surrogacy as when a husband's sperm "is artificially united with the egg of his wife" to create an embryo for implantation in a surrogate who carries the child to term).

28. See Ilana Hurwitz, *Collaborative Reproduction: Finding the Child in the Maze of Legal Motherhood*, 33 CONN. L. REV. 127, 128 (2000); Anne Reichman Schiff, *Solomonic Decisions in Egg Donation: Unscrambling the Conundrum of Legal Maternity*, 80 IOWA L. REV. 265, 273 (1995).

29. See Charo, *supra* note 17, at 232 (commenting that gestational surrogacy calls into question the importance of genetics to legal maternity).

30. See Janet L. Dolgin, *Just a Gene: Judicial Assumptions About Parenthood*, 40 UCLA L. REV. 637 (1993). But see *In re C.C.*, No. A 19833, slip op. (Cal. Super. Ct. Sept. 12, 1997) (recognizing the simultaneous maternity of both the genetic and the gestation mothers).

31. See, e.g., *In re M.M.D.*, 662 A.2d 837, 862 (D.C. 1995) (finding no legal impediment to adoption of children by biological parents' same-sex partners); *In re Tammy*, 619 N.E.2d 315, 321 (Mass. 1993) (approving adoption of child by biological mother's same-sex partner); *In re H.N.R.*, 666 A.2d 535, 541 (N.J. Super. Ct. App. Div. 1995) (same); *In re Jacob*, 660 N.E.2d 397, 405 (N.Y. 1995) (declaring adoption statute not to be a "sword to prohibit otherwise beneficial intrafamily adoptions by second parents," whether of the same or the opposite sex as the biological parent); *In re B.L.V.B.*, 628 A.2d 1271, 1276 (Vt.

Professor Janet Dolgin, well known for her scholarship on family law, finds surrogacy jurisprudence consistent with the thesis she has been developing for many years that the law is beginning to "reflect demographic and ideological changes that have been altering the scope and meaning of family for decades."³² Dolgin argues that judicial responses to surrogacy disputes, in seeking to resolve the various claims to maternity they present,³³ reflect a willingness to revise the model of the traditional marital family to make it more malleable and complex.³⁴ This is not to say, Dolgin cautions, that the traditional family has been abandoned in surrogacy cases, but simply that it has been augmented to reflect judicial recognition of the evolution of the family from the family of biogenic unity to the family of choice.³⁵ Dolgin believes this development is a valuable template for much needed legislation in the surrogacy arena.³⁶ As evidence for her conclusion, Dolgin harmonizes a set of seemingly contradictory assisted reproduction cases from 1998, *Buzzanca v. Buzzanca*,³⁷ *R.R. v. M.H.*³⁸ and *Kass v. Kass*.³⁹

Buzzanca and *R.R.* explore the determination of maternity in assisted reproduction cases and have *Johnson v. Calvert*⁴⁰ and *In re Moschetta*⁴¹ as their antecedents. *Johnson* was a case in which Anna Johnson, pursuant to a contract, agreed to gestate an embryo created using the gametes of married couple Mark and Crispina Calvert.⁴² Upon reaching the seventh month of her pregnancy, Johnson demanded full payment for her services and threatened to keep the child.⁴³ In response, the Calverts, followed by Johnson, sued to establish their rights to the child.⁴⁴ At trial, the court declared the Calverts the parents of the child, given their genetic relationship, enforced the surrogacy contract, and terminated the visitation rights Johnson had been granted pending the outcome of the trial.⁴⁵

1993) (approving adoption of child by biological mother's same-sex partner).

32. DOLGIN, *DEFINING THE FAMILY*, *supra* note 23, at 34.

33. See Dolgin, *Emerging Consensus*, *supra* note 20, at 226, 233.

34. See *id.* at 226.

35. See *id.* at 226, 228-29.

36. See *id.* at 228.

37. 72 Cal. Rptr. 2d 280 (Ct. App. 1998).

38. 689 N.E.2d 790 (Mass. 1998).

39. 696 N.E.2d 174 (N.Y. 1998).

40. 851 P.2d 776 (1993).

41. 30 Cal. Rptr. 2d 893 (Ct. App. 1994).

42. See *Johnson*, 851 P.2d at 778.

43. See *id.*

44. See *id.*

45. See *id.*

Johnson appealed, first to the California Court of Appeals and then to the California Supreme Court, both of which affirmed the trial court's ruling. The supreme court asserted that either a genetic contribution *or* a gestational contribution could support a declaration of maternity under California law⁴⁶ and could find no legislative preference for either one.⁴⁷ Faced with two viable claims to maternity, the court, with the aid of scholarly opinion,⁴⁸ decided to render intention, as manifested in the surrogacy agreement, the dispositive factor.⁴⁹ Absent the Calverts' intent, declared the court, the child would never have existed.⁵⁰ Under this analysis, Johnson became a mere facilitator of the Calverts' intent; any intention she had had in asserting parentage was subordinate to theirs, it being clear that had she asserted these same intentions *before* entering into the agreement, the Calverts would most assuredly have withdrawn from the project.⁵¹

The lone dissenting justice in *Johnson* was of the view that gestation, while not decisive, was nonetheless a more significant factor than the majority was willing to admit.⁵² In particular, the dissent, believing it inappropriate to analyze a family law dispute with concepts borrowed from tort law, property law and contract law,⁵³ was concerned that this substantial contribution to procreation was devalued⁵⁴ by the court's analysis.⁵⁵ Instead, the dissent advocated applying, in the absence of clear legislative guidance, a best interests of the child standard to resolve maternity disputes in gestational surrogacy cases.⁵⁶

---

46. See *id.* at 780 (citing CAL. CIV. CODE § 7003(1)).

47. See *id.* at 781.

48. See *id.* at 782-83 (citing Hill, *supra* note 17; Shultz, *supra* note 17; Andrea E. Stumpf, Note, *Redefining Mother: A Legal Matrix for New Reproductive Technologies*, 96 YALE L.J. 187, 197-202 (1986)).

49. See *id.* at 781 n.10 ("[S]he who intended to bring about the birth of a child that she intended to raise as her own - - is the natural mother under California law.").

50. See *id.* at 782. This point was likewise made in *In re Moschetta*, 30 Cal. Rptr. 893, 903 (Ct. App. 1994), discussed *infra*, wherein the court nonetheless recognized the legal motherhood of a traditional surrogate.

51. See *Johnson*, 851 P.2d at 782.

52. See *id.* at 795, 797-98 (Kennard, J., dissenting).

53. See *id.* at 795-97 (Kennard, J., dissenting).

54. See *id.* at 797 (Kennard, J., dissenting).

55. See *id.* at 795 (Kennard, J., dissenting).

56. See *id.* at 799, 801 (Kennard, J., dissenting); see also Hurwitz, *supra* note 28, at 169-79 (arguing that a best interests of the child standard should drive the determination of legal maternity in surrogacy cases). Responding, the *Johnson* majority opined that even if the best interests of the child were to be the applicable standard, Johnson arguably had shown they were not with her since she had agreed not to assert maternity in the first

The next year the California Court of Appeals decided *Moschetta*, in which another surrogate mother changed her mind during her pregnancy and decided to assert parental rights in conflict with the terms of the agreement.⁵⁷ In contrast to *Johnson*, though, *Moschetta* involved traditional surrogacy. Finding no doubt as to the identity of the biological mother in such cases, in short, "no 'tie' to break,"⁵⁸ the Court declined to enforce the surrogacy contract, deeming it incompatible with parentage and adoption principles.⁵⁹

With *Johnson* and *Moschetta* as its backdrop, the California Court of Appeals, in *Buzzanca*, again scrutinized parentage in the context of gestational surrogacy. In that case, married couple Luanne and John Buzzanca contracted with a surrogate to gestate an embryo they had acquired but to which neither had contributed genetic material.⁶⁰ The couple separated, and Luanne petitioned to be named baby Jaycee's mother.⁶¹ The identities of the genetic contributors were not known,⁶² and the surrogate made no claim to Jaycee.⁶³ Because of the absence of either genetic or gestational ties between either John, Luanne, the surrogate or her husband and Jaycee, the trial court ruled that she had no parent.⁶⁴ The appellate court, reversing, ruled that Luanne was Jaycee's mother, since the surrogate gave birth to her on Luanne's behalf.⁶⁵ Although the court found *Johnson* instructive, it could not find it dispositive, since in *Buzzanca* there was no tie for motherhood and thus no reason to use intention to break it.⁶⁶ Instead, the court found statutory authority for an intentional mother's claim to legal motherhood in California's statute governing the parentage ramifications of artificial insemination.⁶⁷ The statute, based on a provision of the Uniform Parentage Act (UPA), provides that a husband who consents to the artificial insemination of his wife is the father of the resulting child.⁶⁸ The sperm donor in such

---

instance. See *Johnson*, 851 P.2d at 782 n.10.

57. See *In re Moschetta*, 30 Cal. Rptr. 2d 893, 895 (Ct. App. 1994).

58. *Id.* at 896.

59. See *id.* at 894-95.

60. See *Buzzanca v. Buzzanca*, 72 Cal. Rptr. 2d 280, 282, 283 (Ct. App. 1998).

61. See *id.* at 282.

62. See *id.* at 284.

63. See *id.* at 282.

64. See *id.* at 282-83. But see Shultz, *supra* note 17, at 330 ("Social policy demands that someone be committed to rearing any child brought into the world.").

65. See *Buzzanca*, 72 Cal. Rptr. 2d at 282.

66. See *id.* at 288.

67. See *id.* at 286-88.

68. See *id.* at 285 & n.6.

a case has no legal claim to paternity.⁶⁹ The court saw a clear parallel between a husband in such a case and Luanne Buzzanca: like a husband who consents to his wife's artificial insemination, Luanne arranged for a medical procedure to be performed on the surrogate that resulted in her pregnancy and the eventual birth of a child.⁷⁰ In essence, Luanne's intentional act determined her legal motherhood just as a husband's act of consenting to artificial insemination of his wife determines his legal fatherhood.⁷¹ Compelled resort to adoption law in this context, the court found, would be "an exercise in circular reasoning, because it assumes the idea that it seeks to prove; namely, that a child who is born as the result of artificial reproduction is somebody else's child from the beginning."⁷² The court described this view of intentional parenthood as applicable "to any situation where a child would not have been born but for the efforts of the intended parents."⁷³

R.R. was a traditional surrogacy case and was thus more like *Moschetta* than like either *Johnson* or *Buzzanca*. In *R.R.*, a husband and his wife entered into a contract with a surrogate who agreed to be impregnated with the husband's sperm and to surrender custody of the child to him and his wife in exchange for \$10,000.⁷⁴ In the sixth month of her pregnancy, the surrogate decided she wanted to keep the child she was carrying.⁷⁵ In response to the husband's lawsuit, the trial court ordered the surrogate to surrender custody of the child to the husband after it was born and allowed her frequent visitation.⁷⁶ The trial court referred the question of the enforceability of the surrogacy contract to the appellate courts.⁷⁷

Distinguishing traditional from gestational surrogacy,⁷⁸ the Supreme Judicial Court of Massachusetts refused to apply the artificial insemination statute because a literal application of it would have rendered the surrogate's husband the legal father of the child, a

---

69. See *id.* at 285 n.7; see also *infra* notes 171-73, 181 and accompanying text.

70. *Buzzanca*, 72 Cal. Rptr. 2d at 288. In *Johnson*, Anna Johnson raised the artificial insemination statute, claiming Mark and Crispina Calvert were mere donors and thus could claim no legal parentage under the explicit terms of the statute. See *Johnson v. Calvert*, 851 P.2d 776, 787 (Cal. 1993). The court could find no evidence in the record supporting the conclusion that the Calverts intended to donate their gametes. See *id.*

71. See *Buzzanca*, 72 Cal. Rptr. 2d at 288.

72. *Id.* at 291.

73. See *id.* at 290 (internal quotation marks omitted).

74. See *R.R. v. M.H.*, 689 N.E.2d 790, 792 (Mass. 1998).

75. See *id.* at 791.

76. See *id.* at 793.

77. See *id.*

78. See *id.* at 795 n.10.

result the legislature could not have intended.⁷⁹ The court found the comparison between surrogate mothers and sperm donors unconvincing, "because surrogate motherhood is never anonymous and her commitment and contribution is unavoidably much greater than that of a sperm donor."⁸⁰ The court concluded that the artificial insemination statute was not meant to apply to children born of a married surrogate mother but was meant to apply only to a fertile mother whose infertile husband had consented to her artificial insemination.⁸¹ In this way, the court suggested the analogy between surrogacy and artificial insemination was inappropriate in both traditional and gestational surrogacy cases.

Dolgin explains the different outcomes of these cases as the product of the differences between traditional surrogacy and gestational surrogacy.⁸² She sees *R.R.*, on the one hand, as a case reflecting the opinion of several courts "that the biological mother is the natural, and thus, the legal mother, in cases of traditional surrogacy"⁸³ and that an adoption is required for the intending mother to have her maternity legally recognized.⁸⁴ In traditional surrogacy cases, courts allow the intending parents to adopt the child according to basic principles of adoption law. The agreement of the parties is thus not enforced per se,⁸⁵ but the intention of the parties, as reflected in these documents, can nonetheless be effectuated through adoption. At no time is the intending mother in a traditional surrogacy arrangement considered the natural mother of the child at the moment of the child's birth.⁸⁶ Dolgin sees *Buzzanca*, on the other hand, as a case in which the court extended intentional parentage

---

79. See *id.* at 795 ("It is doubtful . . . that the Legislature intended § 4B to apply to the child of a married surrogate mother.").

80. *Id.* at 795.

81. See *id.* at 795-96; cf. *In re adoption of Matthew B.*, 284 Cal. Rptr. 18 (Cal. Ct. App. 1991) (rejection of artificial insemination-surrogacy analogy on procedural grounds).

82. See Dolgin, *Emerging Consensus*, *supra* note 20, at 257 ("[I]t is reasonable to conclude that the differences between *R.R.* and *Buzzanca* reflect differences in the fact patterns, in particular in the technology employed in the two cases, rather than differences in the basic perspectives of the deciding courts.").

83. *Id.* at 254. Accord, Charo, *supra* note 18, at 248.

84. Dolgin, *Emerging Consensus*, *supra* note 20, at 254. Accord, Garrison, *Technological Family*, *supra* note 23, at 696; Garrison, *Interpretive Approach*, *supra* note 15, at 898.

85. See *R.R.*, 689 N.E.2d at 797 ("We simply decline, on public policy grounds, to apply to a surrogacy agreement of the type involved here the general principle that an agreement between informed, mature adults should be enforced absent proof of duress, fraud, or undue influence.").

86. See Dolgin, *Emerging Consensus*, *supra* note 20, at 254.

beyond the parameters set by *Johnson* to recognize, without the necessity of an adoption, the parentage of a couple biologically unrelated to the child.⁸⁷ She argues that, in gestational surrogacy cases, courts feel freer to reject an adoption default model than they do in traditional surrogacy cases where genetics and gestation are joined. Without this joining, courts can more freely grant legal weight to intention. Thus, Dolgin sees *Johnson* as a case in which "the identification and definition of mother... become matters of negotiable choice"⁸⁸ and *Buzzanca* as a case in which consent grounds parentage.⁸⁹ These characterizations lead her to conclude that the fact that the surrogate in *Buzzanca* did not assert her parentage was "less crucial" to the outcome of that case than was the fact that Luanne Buzzanca "[had] consented to the conception and birth of baby Jaycee."⁹⁰ In sum, while courts in traditional surrogacy cases consider the surrogate to be the natural mother, thus necessitating compliance with adoption law for the contract to be fully performed, courts in gestational surrogacy cases, faced with greater uncertainty about the child's natural parents, are more willing to apply an intentional-parent analysis.⁹¹ Dolgin thus sees two paradigms at work, a biological-parentage paradigm in traditional surrogacy cases and a presumptive-parentage paradigm in gestational surrogacy cases. This framework, she argues, allows for parentage to be determined completely apart from biological facts⁹² and can serve as the foundation for "a broad theory of familial relationships"⁹³ that will permit policymakers to formulate "a more complicated and more malleable ideological conception of the family than existed even a few decades ago."⁹⁴

The hope that the law will someday recognize nontraditional families as families has given rise to a large body of scholarship impressive for its depth of analysis and for its vision of a more just and inclusive society.⁹⁵ Dolgin's thesis is consistent with this vision

---

87. See *id.* at 274. Accord, Jonathan B. Pitt, *Fragmenting Procreation*, 108 YALE L.J. 1893, 1896 (1999) (citations omitted).

88. DOLGIN, *DEFINING THE FAMILY*, *supra*, note 23, at 194.

89. See Dolgin, *Emerging Consensus*, *supra*, note 20, at 249.

90. *Id.* at 246-47.

91. See *id.* at 258.

92. See *id.* at 259.

93. See *id.* at 227.

94. See *id.* at 226 (footnote omitted).

95. See Note, *Looking for a Family Resemblance: the Limits of the Functional Approach to the Legal Definition of Family*, 104 HARV. L. REV. 1640, 1650 n.64 (1991) (citing supporters of a functional approach to family definition) [hereinafter *Family*].

because it offers hope that courts and legislatures will eventually recognize the status of nontraditional families as equivalent to that of marital families.⁹⁶ This kind of revolutionary change, if it is in fact occurring in the area of assisted reproduction, will be gradual and will be susceptible to undermining by the backpedaling of policymakers, a phenomenon evident in other areas of the law.⁹⁷ Due to the paucity

---

Resemblance]. See, e.g., Carlos A. Bass and Janice Farrell Pen, *Warring with Wardale: Morality, Social Science, and Gay and Lesbian Parents*, 1998 U. ILL. L. REV. 253, 261-72; Kristine L. Burks, *Redefining Parenthood: Child Custody and Visitation When Nontraditional Families Dissolve*, 24 GOLDEN GATE U. L. REV. 223 (1994); Leslie Joan Harris, *Reconsidering the Criteria for Legal Fatherhood*, 1996 Utah L. Rev. 461, 480 ("Functioning as a parent should be the basis for parental rights and duties because this criterion is most congruent with current mores and because it would encourage and support people who do take responsibility for children."); Gilbert A. Holmes, *The Tie That Binds: The Constitutional Right of Children to Maintain Relationships with Parent-like Individuals*, 53 MD. L. REV. 358, 392-94 (1994) (proposing a child-centered approach to parentage that would recognize parent-like individuals); Gerald Korngold, *Single Family Use Covenants: For Achieving a Balance Between Traditional Family Life and Individual Autonomy*, 22 U.C. DAVIS L. REV. 951 (1989); Barbara Bennett Woodhouse, *It All Depends on What You Mean by "Home": Toward a Communitarian Theory of The "Nontraditional" Family*, 1996 UTAH L. REV. 569; Tsippi Wray, *Lesbian Relationships and Parenthood: Models for Legal Recognition of Nontraditional Families*, 21 HAMLINE L. REV. 127 (1997); Craig A. Bowman and Blake M. Cornish, Note, *A More Perfect Union: A Legal and Social Analysis of Domestic Partnership Ordinances*, 92 COLUM. L. REV. 1164 (1992); James D. Esseks, Recent Development, *Redefining The Family—Braschi v. Stahl Associates* 74 N.Y.2D 201, 543 N.E.2D 49, 544 N.Y.S.2D 784 (1989), 25 HARV. C.R.-C.L. L. REV. 183 (1990); Marissa J. Holob, Note, *Respecting Commitment: A Proposal to Prevent Legal Barriers From Obstructing the Effectuation of Intestate Goals*, 85 CORNELL L. REV. 1492 (2000); Kirsten Korn, Comment, *The Struggle for the Child: Preserving the Family in Adoption Disputes Between Biological Parents and Third Parties*, 72 N.C. L. REV. 1279 (1994); Note, *Another Mother?: The Courts' Denial of Legal Status to The Non-Biological Parent upon Dissolution of Lesbian Families*, 31 U. LOUISVILLE J. FAM. L. 981 (1992).

96. See Dolgin, *New Genetics*, *supra* note 10, at 540 (stating that reproductive technology compels courts "to seek alternative visions of the parent-child relationship as well as of relationships among adults within families.").

97. In an area of the law even more resistant to change than the legal definition of the family—the legal definition of sex—the idea that one's sex is determined not by chromosomes but by other factors appears to be emerging as a consensus in American and other common law courts. See, e.g., *Rosa v. Park West Bank & Trust Co.*, 214 F.3d 213 (1st Cir. 2000) (successful Equal Credit Opportunity Act action); *Schwenk v. Hartford*, 204 F.3d 1187 (9th Cir. 2000) (successful action under Gender Motivated Violence Act, federal civil remedies provision of which was nullified in *United States v. Morrison*, 529 U.S. 598, 627 (2000)); *Miles v. New York Univ.*, 979 F. Supp. 248 (S.D.N.Y. 1997) (successful Title IX action); *Vecchione v. Vecchione*, Civ. No. 96D003769 (Cal. Super. Ct. 1997), reported in L.A. DAILY J., Nov. 26, 1997, at 1; *In re Gardiner*, 22 P.3d 1086 (Kan. Ct. App. 2001); *M.T. v. J.T.*, 355 A.2d 204 (N.J. Super. Ct. App. Div. 1976) (marriage of post-operative transsexual valid); *M. v. M.* (unreported) 30 May 1991, S. Ct. N.Z. This consensus has suffered setbacks in recent cases. See, e.g., *Littleton v. Prange*, 9 S.W.3d 223, 230 (Tex. Ct. App. 1999) (following reasoning of 1970 English decision holding sex to be determined by chromosomes); *Bellinger v. Bellinger*, 3 F.C.R. 733 (2000) (same).

of assisted reproduction cases to date,⁹⁸ Dolgin's thesis warrants evaluating both on its own terms and in light of more recent developments. Regardless of the soundness of her thesis in the abstract, however, a substantive demonstration that assisted reproduction is capable of inspiring the law to grant equal legal status to nontraditional families is needed.⁹⁹

Table 1: Maternity and Assisted Reproduction

	Gametes-egg	Gametes-sperm	Gestation	Intention	Legal Mother	Remarks
Baby M. (N.J. 1988)	Surrogate	Husband	Surrogate	Wife	Surrogate	Surrogate was married.
Johnson (Cal. 1993)	Wife	Husband	Surrogate	Wife	Wife	Dissent protests devaluation of gestation. gestation is devalued.
Moschetta (Cal. 1994)	Surrogate	Husband	Surrogate	Wife	Surrogate	No "tie" to break. Intending mother made no claim.
Buzzanca (Cal. 1998)	Anonymous Donor	Anonymous Donor	Surrogate	Wife	Wife	AI statute applied. Surrogate made no claim to maternity.
R.R. (Mass. 1998)	Surrogate	Husband	Surrogate	Wife	Surrogate	Refusal to apply AI statute.
Uniform Parentage Act (2000)	Surrogate, Wife or Donor	Husband or Donor	Surrogate	Wife	Wife	No state has enacted surrogacy provisions.

---

98. See *In re Moschetta*, 30 Cal. Rptr. 2d 893, 898 n.13 (Ct. App. 1994) ("Surrogacy is one of those subjects where the law review articles easily outnumber the published decisions.").

99. See Part II, *infra* (providing a substantive demonstration of how assisted reproduction law can be used to attain legal recognition of nontraditional families).

A critical component of Dolgin's emerging-consensus thesis is the application of the spirit of artificial insemination provisions to gestational surrogacy arrangements. The justification for this application is that a wife's intent to raise a child gestated by a surrogate is comparable to the consent of a husband to be the father of a child gestated by his wife. This analogy breaks down when the surrogacy employed is traditional rather than gestational.¹⁰⁰ As *R.R.* noted, applying the artificial insemination statute in a traditional surrogacy case can lead to unintended parentage determinations.¹⁰¹ If the surrogate is married, her husband is the legal father of the child, since he consented to her artificial insemination. If she is not married, under some artificial insemination statutes, she is the sole parent, since the donor of semen who is not her husband has no claim to parentage.¹⁰² Thus, artificial insemination legislation cannot be used to achieve the results intended in traditional surrogacy arrangements.

Upon further examination, though, it would appear that artificial insemination legislation is no more applicable to gestational surrogacy than it is to traditional surrogacy. The type of assisted reproduction most like artificial insemination is, of course, egg donation, where a wife consents to the combination of her husband's sperm with the egg of another woman and gestates the resulting embryo.¹⁰³ This certainly sounds related to surrogacy, with the exception that both egg donation and artificial insemination, unlike surrogacy, do not contemplate gestation by anyone other than the wife and so "should not be confused with parental surrogacy."¹⁰⁴

---

100. See *In re Baby M.*, 537 A.2d 1227, 1254 (N.J. 1988) (describing artificial insemination to be unlike traditional surrogacy).

101. See *R.R. v. M.H.*, 689 N.E.2d 790, 795 (Mass. 1998).

102. See *infra* notes 175, 187-89 and accompanying text.

103. See, e.g., *McDonald v. McDonald*, 608 N.Y.S.2d 477, 478 (App. Div. 1994). In *McDonald*, when a husband attempted to argue that his wife, who had submitted to egg donation, was not the legal mother of the resulting child because she had no genetic relationship to the child, a New York court rejected the position that a wife's gestation of a fetus by egg donation was insufficient to render her the mother of the child. See *id.* at 480. See also *In re Baby M.*, 537 A.2d at 1254-55 (noting intending mother's claim would have been stronger had the case been one of egg donation).

104. JOHN J. SAMPSON & HARRY L. TINDALL ET AL., *SAMPSON & TINDALL'S TEXAS FAMILY CODE ANNOTATED* §§ 151.102-.103 cmt. (1998). Texas's former egg donation statute explicitly stated the requirement that the donated egg would be "placed in [the wife's] uterus." TEX. FAM. CODE § 151.102 (Vernon 1996) (repealed). Similarly, embryo donation statutes contemplate gestation by the intending mother, although *neither* spouse contributes genetic material. See, e.g., TEX. FAM. CODE § 151.103 (Vernon 1996) (repealed). These Texas statutes have been superseded by enactment of the Uniform Parentage Act in Texas. See TEX. FAM. CODE § 160.707 (Vernon 2001); JOHN J.

Indeed, even the *Johnson* court, which struggled to break the tie between genetic and gestational mothers in a gestational surrogacy case, made the clear statement that in an egg donation situation the gestational mother is the natural mother of the child.¹⁰⁵ Thus, there is no reason to distinguish between husband and wife under artificial insemination and ovum donation statutes, since both types of statutes allow one party to the marriage to consent to the combination of genetic material contributed by a third party with the genetic material of the other spouse and are arguably dependent upon this factor. In a case like *Buzzanca*, however, neither the husband nor the wife contributes genetic material, the wife does not gestate the embryo, and so, arguably, any resort to artificial insemination or egg donation provisions seems misguided.¹⁰⁶ Since both traditional and gestational surrogacy contemplate gestation by someone *other* than the wife, the appeal to artificial insemination is weak, unless on some level gestation truly plays less of a role in determining parentage under artificial insemination and egg donation statutes than the statutes themselves suggest.

The very history of the determination of parentage belies the notion that gestation is inessential enough to the determination of maternity that the law of assisted reproduction should make it give way to intention. The UPA itself embodies the age-old wisdom that a woman who gives birth to a child is presumed the mother of that child.¹⁰⁷ The Act admittedly creates an exception to this rule for both traditional and gestational surrogacy, but it sounds the caveat that in cases of traditional surrogacy

[t]he practice of having a woman perform both functions is generally strongly disfavored by the assisted reproduction community. Experience has shown that the gestational mother's genetic link to the child sometimes creates additional emotional and psychological problems in enforcing a gestational agreement.¹⁰⁸

The UPA's warning suggests that by severing the genetic and gestational functions of motherhood, intention will prevail over gestational motherhood as it did in *Johnson* and *Buzzanca*. Like

---

SAMPSON & HARRY L. TINDALL ET AL., SAMPSON & TINDALL'S TEXAS FAMILY CODE ANNOTATED § 460 (2001) (explaining that the superseding statutes carry "[t]he same basic legal effect" "formerly found in Chapter 15.").

105. See *Johnson v. Calvert*, 851 P.2d 776, 782 (Cal. 1993).

106. See Pitt, *supra* note 87, at 1898 (noting lack of light shed by artificial insemination statute on question of whether legislature deems intent or gestation primary in parentage determination).

107. See UNIF. PARENTAGE ACT § 201(a)(1), 9B U.L.A. 309 (2001).

108. UNIF. PARENTAGE ACT art. 8 cmt., 9B U.L.A. 361 (2001).

Dolgin, who believes the surrogate's failure to raise a maternity claim in *Buzzanca* was not the dominant factor in that case's outcome,¹⁰⁹ this caveat underestimates the importance of gestation in the determination of legal motherhood. The importance of gestation is salient in both paternity and abortion rights jurisprudence, both of which extol it. Paternity cases state that where the biological father of a child born out of wedlock wishes to block the adoption of his child by the new husband of the child's mother, he must have made efforts to "assume an actual relationship of parental responsibility."¹¹⁰ He cannot claim parental rights based solely on his biological connection to the child,¹¹¹ and mere intention to assume parental responsibility, without more, is likewise insufficient. This rule is based on the father's lacking the "clear parental relationship" that a mother has from her having carried and borne the child.¹¹² The rule is not applicable to married couples, for it is through the act of marriage that the father is deemed to have shown his parental responsibility.¹¹³ Similarly, in the context of abortion rights, a husband's lack of veto power over his wife's decision to abort her fetus rests on the greater physical impact the pregnancy has on the wife since she carries the fetus.¹¹⁴ It is not based on her genetic contribution to the fetus.

Abortion and paternity cases may seem readily distinguishable from surrogacy matters; however, a surrogate herself cannot be deprived of her right to obtain an abortion, even if she is a gestational surrogate and has contributed no genetic material to the developing fetus.¹¹⁵ This right remains in her purely by virtue of her gestative

---

109. See Dolgin, *Emerging Consensus*, *supra* note 20, at 246.

110. *Lehr v. Robertson*, 463 U.S. 248, 260 (1983).

111. See *id.* ("Parental rights do not spring full-blown from the biological connection between parent and child. They require relationships more enduring.") (quoting *Caban v. Mohammed*, 441 U.S. 380, 397 (1979) (Stewart, J., dissenting)); *Nguyen v. I.N.S.*, 121 S. Ct. 2053, 2062 (2001) (legally recognizable paternity does not result as a matter of biological inevitability).

112. *Lehr*, 463 U.S. at 260 n.16 ("The mother carries and bears the child, and in this sense her parental relationship is clear.") (quoting *Caban v. Mohammed*, 441 U.S. 380, 397 (1979) (Stewart, J., dissenting)); Dolgin, *DEFINING THE FAMILY*, *supra* note 23, at 108-09 n.36, 128.

113. See *Lehr*, 463 U.S. at 260; *Quilloin v. Walcott*, 434 U.S. 246, 256 (1978).

114. See *Planned Parenthood of Missouri v. Danforth*, 428 U.S. 52, 71 (1976). Ironically, the importance of the gestative role, if glorified to an extreme, can lead to burdensome restrictions on the right to an abortion. See *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833, 852 (1992).

115. See, e.g., FLA. STAT. § 63.212(1)(i)3(b) (West 1997) ("A preplanned adoption agreement shall not contain any provision . . . [r]equiring the termination of the volunteer mother's pregnancy."), § 742.15 (3)(a) (West 1997) ("The commissioning couple agrees that the gestational surrogate shall be the sole source of consent with respect to clinical

role; the genetic mother has no right to demand that she abort or not abort the fetus. In this way, a gestational surrogate enjoys the same rights as all gestating mothers, despite her lack of any genetic connection to the child. Not only does a surrogate have the right to abort her fetus, but she is usually permitted, under the law of adoption, "time after a child's birth to reflect on her wishes concerning the child,"¹¹⁶ even if the intending mother donated the ovum.¹¹⁷ This legislative judgment appears to have more to do with the significance of gestation than with genetic connection and may be one reason, along with concerns about baby selling,¹¹⁸ why so many states have shown no interest in enforcing the terms of surrogacy agreements, whether gestational or traditional.¹¹⁹ Both abortion and adoption law recognize that the gestating mother is not a mere carrier or host for the developing fetus.¹²⁰ Her gestative contribution alone entitles her to the privileges of legal motherhood, completely apart from concerns that surrogacy devalues and commodifies her.¹²¹

---

intervention and management of the pregnancy."); N.H. REV. STAT. § 168-B:6 (1997); VA. STAT. § 20-163A (Michie 2000) ("The surrogate shall be solely responsible for the clinical management of the pregnancy."); UPA § 801(f) ("A gestational agreement may not limit the right of the gestational mother to make decisions to safeguard her health or that of the embryo or fetus.").

116. *R.R. v. M.H.*, 689 N.E.2d 790, 796 (1998); *see also In re Moschetta*, 30 Cal. Rptr. 2d 893, 894 (Ct. App. 1994); *In re Baby M.* 537 A.2d 1227, 1244-46 (N.J. 1988); *cf. Belsito v. Clark*, 67 Ohio Misc.2d 54, 62 (1994) (disapproving of surrogacy agreements' circumvention of adoption law).

117. *See* N.H. REV. STAT. § 168-B:25 (IV) (1997) (requiring surrogacy contract to provide for "[t]he right of the surrogate to keep the child" if she executes and delivers a signed writing within seventy-two hours of the child's birth); MARTHA A. FIELD, *SURROGATE MOTHERHOOD: THE LEGAL AND HUMAN ISSUES* 78, 84, 88-9, 97 (1988). *But see Buzzanca v. Buzzanca*, 72 Cal. Rptr. 2d 280, 291 (Ct. App. 1998) (declaring compelled resort to adoption law in gestational surrogacy cases "an exercise in circular reasoning").

118. *See Doe v. Attorney General*, 487 N.W.2d 484, 486-87 (Mich. Ct. App. 1992); *In re Baby M.*, 537 A.2d 1227, 1240 (N.J. 1988).

119. *See* ALA. CODE § 26-10A-34 (1997); ARIZ. REV. STAT. ANN. § 25-218 (1996); D.C. CODE ANN. §§ 16- 401, 402 (1996); 750 ILCS 45/6(a) (West 1998); IND. CODE ANN. § 31-8-2.1 (Burns Supp. 1994); IOWA CODE ANN. § 710.11 (West 1997); KY. REV. STAT. ANN. § 199.590 (Michie/Bobbs-Merrill 1995); LA. REV. STAT. ANN. § 2713 (West 1991); MICH. COMP. LAWS ANN. § 722.853 (West 1997); NEB. REV. STAT. § 25-21, 200 (1989); N.Y. DOM. REL. LAW § 121 (McKinney 1997); N.D. CENT. CODE § 14-18-05 (1991); UTAH CODE ANN. § 76-7-204 (1997); WASH. REV. CODE ANN. § 26.26.210 (West 1997); W. VA. CODE § 48-4- 16 (1997); WIS. STAT. ANN. § 69.14 (West 1997); WYO. STAT. § 35-1-410 (1997).

120. *See Charo, supra* note 18, at 249 ("[P]regnancy is indisputably a biological fusing of fetal and maternal bodies, health, and well-being.").

121. *See Johnson v. Calvert*, 851 P.2d 776, 792 (Cal. 1993) (Kennard, J., dissenting) (canvassing arguments); *Doe*, 487 N.W.2d at 487 (declaring that the state has a compelling interest in preventing surrogacy from "reducing [women] to the status of 'breeding

Not all courts agree that the gestative role is of such great significance. Indeed, some courts believe that the gestational presumption of maternity merely embodies the legal recognition of gestation as the best evidence of a genetic tie in a world where, until the very recent past, it was medically impossible to separate the components of gestation and genetics.¹²² *Belsito v. Clark*¹²³ is an example. In that case, Carol Clark agreed to become pregnant with an embryo produced using the gametes of Shelly and Anthony Belsito, the intending parents of the child.¹²⁴ The Belsitos discovered that the hospital where the baby would be born would not name Shelly the mother of the child on the birth certificate and, since Carol was unmarried, that the child would thus be considered illegitimate.¹²⁵ Shelly and Anthony asked the court to declare them the legal and natural parents of the child and to compel the preparer of the birth certificate to produce a birth certificate reflecting that fact.¹²⁶ In ruling for Belsitos's, the court, using paternity cases as precedent,¹²⁷ declared gestation "subordinate and secondary to genetics."¹²⁸

---

machines"); cf. RADIN, *supra* note 18, at 141-42, 144-45, 148-50 (1996); BARBARA KATZ ROTHMAN, RECREATING MOTHERHOOD: IDEOLOGY AND TECHNOLOGY IN A PATRIARCHAL SOCIETY 44 (1989) (arguing that governments should refrain from endorsing surrogate motherhood in part because of its commodification of human life). But see Christine L. Kerian, *Surrogacy: A Last Resort Alternative for Infertile Women or a Commodification of Women's Bodies and Children?*, 12 WIS. WOMEN'S L.J. 113, 163-64 (2001) (arguing that surrogacy does not commodify or exploit women in the way some feminists and ethicists claim); Shultz, *supra* note 17, at 336-37, 384 (refuting argument that surrogacy exploits and enslaves women and explaining that judicial refusal to enforce surrogacy contracts "reinforces stereotypes of women as unstable, as unable to make decisions and stick to them, and as necessarily vulnerable to their hormones and emotions").

122. See *Soos v. Superior Court*, 897 P.2d 1356, 1360, 1361 (Ariz. Ct. App. 1994) (declaring unconstitutional, on equal protection grounds, surrogacy statute which did not recognize the maternity of genetic mothers); *Arredondo by Arredondo v. Nodelman*, 622 N.Y.S.2d 181, 182 (NY Sup. Ct. 1994) (maintaining that genetic mother was legal mother in gestational surrogacy case where surrogate consented to naming the genetic parents the legal parents); *Andres A. v. Judith N.*, 591 N.Y.S.2d 946, 948 (NY Fam. Ct. 1992) ("In the past courts were safe in assuming that the woman who gave birth to a child was that child's biological mother. However, today due to scientific advances in the area of in-vitro fertilization the woman who gives life to a child through the birthing process and by providing the child with sustenance to grow while inside the womb may not in fact be the biological/genetic mother of that child."); *Belsito v. Clark*, 644 N.E.2d 760, 762-63 (1994).

123. 644 N.E.2d 760.

124. See *id.* at 761.

125. See *id.* at 762.

126. See *id.*

127. *Id.* at 762, 763 (citing *Owens v. Bell*, 451 N.E.2d 241 (Ohio 1983); *Domigan v. Gillette*, 479 N.E.2d 291 (Ohio Ct. App. 1984)).

128. *Id.* at 767.

Natural parents, according to the court, were those individuals who had contributed the genetic material necessary to create the child.¹²⁹ The court believed this to be true because, due to their common heritage, a genetic mother is better able to guide and advise her child.¹³⁰ In thus elevating genetics over gestation, the court described gestation as a mere filtering system that in no way affects the genetic imprint of the fetus.¹³¹ Most significantly, the *Belsito* court adamantly rejected the intentional-parent approach of *Johnson*, even though application of that test would have resulted in the same outcome.¹³² The court did so on the grounds that "[i]ntent can be difficult to prove,"¹³³ an intent-based approach to parenthood inappropriately circumvents adoption law, and proscriptions on selling parental rights,¹³⁴ and, finally, the intent test does not adequately protect the legally recognized procreative rights of the genetic contributor and her attendant interest in raising any child resulting from her decision to procreate.¹³⁵ The end result of *Belsito* was a test for natural parentage driven solely by genetic contribution. The application of such a test renders gestational surrogates no contenders at all for parenthood, since they contribute no genetic material to the creation of the child.

Rendering genetics the determinant of maternity in surrogacy cases is unsurprisingly appealing, because it makes motherhood itself scientifically verifiable. This emphasis on the meaning of genetic markers is part of a contemporary sense of and faith in the power of genetics to alter the face of humanity in very beneficial ways.¹³⁶

---

129. *See id.* at 762.

130. *See id.* at 766 ("For the best interest of the child and society, there are strong arguments to recognize the genetic parent as the natural parent. The genetic parent can guide the child from experience through the strengths and weaknesses of a common ancestry of genetic traits."); cf. Shultz, *supra* note 17, at 331 ("The genetic parent decisively influences both the physical and psychological makeup of the individual.") (citation omitted); Hill, *supra* note 17, at 389-90.

131. *See Belsito*, 644 N.E.2d at 761-62. But see Shultz, *supra* note 17, at 331 ("Because both mothers have a significant 'flesh and blood' relationship to the child, both would presumably have the felt connection to the child that we associate with biological ties.").

132. *See Belsito*, 644 N.E.2d at 766.

133. *Id.* at 764.

134. *Id.* at 765.

135. *Id.* at 766.

136. *See* Shelley Day Sclater et al., *Introduction*, in *WHAT IS A PARENT? A SOCIO-LEGAL ANALYSIS* 15 (Andrew Bainham et al., eds. 1999); Charo, *supra* note 18, at 232; Allison Morse, *Searching for the Holy Grail: the Human Genome Project and its Implications*, 13 J.L. & HEALTH 219, 220-21, 230-31 (1999) (reporting belief of scientists that mapping of the human genome "will lead to major advances in medicine and biotechnology, as well as uncover the essential 'text' of what it means to be human")

Employing genetics to make parentage determinations reflects other contexts where genetics are already primary, for example, in adoption policy and in the law governing the determination of one's sex. For decades, adoption law policy was and continues to be influenced by "biologism," a focus on creating adoptive families that appear genetically related,¹³⁷ and some believe the trend toward open adoption is likewise reflective of this genetic bias.¹³⁸ In the determination of sex, some courts have rejected the primacy of chromosomes¹³⁹ relied on by early cases,¹⁴⁰ only to return to the position, at least in cases where the issue is whether a marriage is valid, that genetics are definitive.¹⁴¹ This view of the primacy of genetics is only fed by attempts to render natural gestation fungible through the development of alternative means of gestation, namely artificial wombs,¹⁴² or to minimize its importance by pointing to the capacity of incubators to perform it in part.¹⁴³

The treatment of genetics as determinative of our very destiny has not been without its critics.¹⁴⁴ An adoptive father of a child from China recently asserted, "We live at a time when we have made a fetish of genetics . . . a time when the 'traditional family' has been turned into an ideological club used to bludgeon those who don't conform to its narrow definition."¹⁴⁵ In line with this criticism is the fact that not all surrogacy cases, *Belsito* notwithstanding, contemplate

---

(citing HEALTH AND ENVIRONMENTAL RESEARCH ADVISORY COMMITTEE, U.S. DEPARTMENT OF ENERGY, REPORT ON THE HUMAN GENOME INITIATIVE 9 (Apr. 1987)).

137. ELIZABETH BARTHOLET, FAMILY BONDS: ADOPTION, INFERTILITY, AND THE NEW WORLD OF CHILD PRODUCTION 48, 93, 170 (1999) (noting that the law structures adoption in imitation of biology).

138. See, e.g., Storrow, *supra* note 8 at 611; Joan Heifetz Hollinger, *Authenticity and Identity in Contemporary Adoptive Families*, J. GENDER-SPECIFIC MEDICINE, Nov. 2000, at 23-24 ("[T]he asserted-equivalence model of adoption attempt[s] to reinscribe the biogenetic family by creating a legal framework within which the personal and emotional ties of the 'natural' family [are] to be replicated.").

139. See, e.g., M.T. v. J.T., 355 A.2d 204, 210-11 (N.J. Super. Ct. App. Div. 1976)

140. See, e.g., Corbett v. Corbett, 2 W.L.R. 1306, 1325, 1327-28 (1970).

141. See, e.g., Bellinger v. Bellinger, (2000) 3 F.C.R. 733; Littleton v. Prange, 9 S.W.3d 223, 230 (Tex. Ct. App. 1999). *But see In re Gardiner*, 22 P.3d 1086, 1110 (Kan. Ct. App. 2001) (rejecting the reasoning of *Littleton*).

142. See Andrews, CLONE AGE, *supra* note 1, at 73-74.

143. See Garrison, *Technological Family*, *supra* note 23, at 700 n.21; Garrison, *Interpretive Approach*, *supra* note 15, at 915.

144. See, e.g., Charo, *supra* note 18, at 235 ("[I]t is easy to place too much mystical importance on genetic connections.").

145. Steven Conn, *Special Club Welcomes a Happy Recruit*, CHI. TRIB., Sept. 24, 2000, at 2; see also Hill, *supra* note 17, at 418 (arguing that genetics is the least compelling basis for a parentage claim).

a diminished level of importance for gestation in the determination of maternity. In particular, both *Baby M.* and *R.R.* describe gestation as a time-consuming non-anonymous commitment that defies comparison with sperm—and perhaps even egg donation.¹⁴⁶ The contrast with “surrogate fatherhood,” is striking: the donor of sperm is often anonymous and natural fatherhood is transferred through the simple medium of consent.¹⁴⁷ Further, the UPA, as well as some state statutes, while perhaps not directly extolling gestation, nonetheless prohibits access to surrogacy by intending mothers capable of gestating a fetus on their own.¹⁴⁸ In contrast, neither the UPA nor the applicable state statutes similarly prohibit an intending mother’s use of surrogacy where she is capable of providing her own genetic material but wishes nonetheless to arrange for someone else to do so. These perspectives, more indicative of how maternity is viewed in assisted reproduction law than either paternity cases or artificial insemination statutes, treat gestation as far from fungible and genetics very nearly so.

Adding to the foregoing considerations is the fact that in neither *Buzzanca* nor in *Belsito* did the surrogate make any claim to maternity. It is thus uncertain how those courts would have decided had she done so. Since *Belsito* specifically rejected *Johnson*, however, it is reasonable to speculate that that court would not have found a tie in the first instance, given its emphasis on the importance of genetics. Similarly, reading *Buzzanca* in light of *R.R.* suggests that had the gestational surrogate in *Buzzanca* asserted her interest in parenting Jaycee, the outcome would not have hinged, as it did in the end,

---

146. See *R.R. v. M.H.*, 689 N.E.2d 790, 795 (Mass. 1998); *In re Baby M.*, 537 A.2d 1227, 1254-55 (N.J. 1988); see also HOMER H. CLARK, JR., & ANN LAQUER ESTIN, *CASES AND PROBLEMS ON DOMESTIC RELATIONS* 456 (6th ed. 2000) (“Obviously, in the case of a surrogate mother, the biological tie includes pregnancy and childbirth and is thus a far more substantial connection than that of a sperm donor.”); Ruth Colker, *Pregnant Men Revisited or Sperm Is Cheap, Eggs Are Not*, 47 HASTINGS L.J. 1063, 1071 (1996); Shultz, *supra* note 17, at 331 (“[T]he gestational mother has ‘done the work’ of nine months of pregnancy, suffering its attendant physical invasion, the curtailment of behavioral freedom and the physical pain, risk and economic costs of childbirth.”).

147. See Dolgin, *Emerging Consensus*, *supra* note 20, at 273.

148. See FLA. STAT. § 742.15 (2)(a)-(c); N.H. REV. STAT. § 168-B:17 (II) (1994) (“The intended mother shall be medically determined to be physiologically unable to bear a child without risk to her health or to the child’s health.”); VA. STAT. § 20-160.B.8 (Michie 2000) (“The intended mother is infertile, is unable to bear a child, or is unable to do so without unreasonable risk to the unborn child or to the physical or mental health of the intended mother or the child.”); UNIF. PARENTAGE ACT § 803(b)(2), 9B U.L.A. 364 (2001) (listing requirement for valid surrogacy agreement that “medical evidence shows that the intended mother is unable to bear a child or is unable to do so without unreasonable risk to her physical or mental health or to the unborn child”).

merely on who had intended to raise her.¹⁴⁹ In *Buzzanca*, which followed but expanded on *Johnson*, had the surrogate raised a claim to maternity, she would have been the sole claimant to a biological component of motherhood, rendering intention irrelevant under the dictates of *Johnson*. Thus, while intention plus genetic contribution outweigh the gestational contribution in *Johnson*, intention without donation arguably would not in *Buzzanca*, since intention alone is not "acceptable proof of maternity"¹⁵⁰ and no tie-breaker would be necessary.¹⁵¹ In contrast to Dolgin's conclusion, then, the surrogate's choice to assert no parental claim was likely *quite* crucial to the outcome of *Buzzanca*. No one but the intending mother in that case made any claim to Jaycee. Given that no other parents were available, *Buzzanca* is hardly a good test of the primacy of intentional parentage in such a case. Further, subsequent courts hearing assisted reproduction disputes will not fail to note that, in *Johnson*, intention was relevant to break a "tie" between female genetic and gestational contributors who *both* claimed maternity and who each had a valid claim to maternity under the California parentage statute.¹⁵² The *Buzzanca* court, however, emphasized that "no bona fide attempt has been made to establish the surrogate as the lawful mother,"¹⁵³ suggesting the potential for a different outcome if it had. In contrast to *Johnson*, in neither *Buzzanca* nor *Moschetta* was there the need to break a tie.¹⁵⁴ That Luanne Buzzanca's intended motherhood would place her on a par with gestational and genetic contributors in a battle for motherhood is certainly one possible reading of these cases, but it is not the only one, nor is it the most convincing.¹⁵⁵

The model of motherhood in assisted reproduction law is still one that gravitates towards some biological connection. The strained analogy drawn by the *Buzzanca* court between artificial insemination and gestational surrogacy is unlikely to be overlooked by subsequent

---

149. See, e.g., *In re Moschetta*, 30 Cal. Rptr. 2d 893, 894 (Ct. App. 1994), in which the California court declined to apply an intentional parentage standard to a case involving a traditional surrogate characterized by the court as "without doubt, the 'natural' parent of the child."

150. *Johnson v. Calvert*, 851 P.2d 776, 782 (Cal. 1993); see also Garrison, *Technological Family*, *supra* note 23, at 700 ("[N]o one is a parent based on intention.").

151. See also Charo, *supra* note 18, at 243 (describing other reasons why gestation might prevail over genetics).

152. See CAL. CIV. CODE § 7003(1) (parent and child relationship may be established . . . [b]etween a child and natural mother by proof of her having given birth to the child).

153. Dolgin, *Emerging Consensus*, *supra* note 20, at 228.

154. See *Moschetta*, 30 Cal. Rptr. 2d at 896 ("There is no 'tie' to break."), cited in *Buzzanca v. Buzzanca*, 72 Cal. Rptr. 2d 280, 289 (Ct. App. 1998).

155. See Dolgin, *Emerging Consensus*, *supra* note 20, at 228.

courts faced with disputes arising from gestational surrogacy agreements. The court's equation of artificial insemination and surrogacy stretches beyond recognition the factual basis upon which artificial insemination and ovum donation statutes are grounded beyond recognition. This is because gestation is simply not analogous to donation. As seen in artificial insemination and oocyte donation statutes, the law, despite its fetishism of genetics, is plainly more comfortable with voiding any claims to parentage of donors of gametic material than it is with voiding the claims of gestational surrogates. Moreover, artificial insemination statutes, by themselves, do not contemplate the wide range of potential parents in a case like *Buzzanca* but instead are drawn with a husband, his wife, and, in most cases, an anonymous sperm donor in mind. Another reason *Buzzanca* fails to inspire confidence in an emerging consensus theory is that it is not a case of a tie between contributors of the biological components of maternity, and so intention cannot be employed to resolve the case in the same way it was in *Johnson*. *Buzzanca's* reliance on intention as an acceptable *unitary* basis for maternity not only establishes intention as relevant "when the two means [of biological maternity] do not coincide in one woman"¹⁵⁶ but effectively renders intention dispositive when genetic and gestational contributors assert no claim to a child. On these terms, it is not possible to conclude, as Dolgin does, that intention is "legally equivalent to a genetic or gestational link between putative mothers and children."¹⁵⁷ The outcome in a case where a gestational surrogate disputes the claim of the intending mother alone is left unanswered by *Buzzanca*.¹⁵⁸ In fact, the surrogacy cases on the whole leave important questions about maternity unresolved,¹⁵⁹ questions whose answers are critical to the determination of whether a consensus is emerging that demonstrates a readiness on the part of either courts or legislatures to replace "biogenetic links with links of choice and intention."¹⁶⁰

---

156. See *id.*; *Johnson v. Calvert*, 851 P.2d 776, 782 (Cal. 1993).

157. Dolgin, *Emerging Consensus*, *supra* note 20, at 250.

158. See *id.* at 253.

159. See *id.* at 257 ("Whether a future California court or the state legislature will premise the parentage of an intending, non-biological mother on adoption in a traditional surrogacy case remains to be seen.").

160. *Id.* at 239.

B. Paternity

The law has historically treated paternity differently from maternity. Although maternity is considered established by the fact of giving birth,¹⁶¹ paternity is much less certain.¹⁶² In the context of assisted reproduction, however, paternity is not as potentially fragmented as is maternity. Although maternity can be severed into three components,¹⁶³ paternity, as it does not involve gestation, can be severed into only two—genetic and intentional.¹⁶⁴ The determination of paternity by the law of assisted reproduction can best be seen in the context of artificial insemination by donor (or heterologous insemination¹⁶⁵), where a man donates his sperm to a woman who is not his wife so that she may conceive.¹⁶⁶ The question that arises in such cases is whether the woman's husband or the donor or neither is the child's legal father.¹⁶⁷

Under all statutes that define the paternity ramifications of artificial insemination by donor, the husband of an artificially inseminated woman is the father of the resulting child if he consented to the insemination.¹⁶⁸ Public policy favoring legitimacy and support

---

161. See *Nguyen v. I.N.S.*, 121 S. Ct. 2053, 2060 (2001) (commenting that a woman's maternity "is verifiable from the birth itself").

162. See *id.* at 2059-65 (reasoning that differences in proof of biological parenthood between mothers and fathers justify different citizenship rules for children born abroad and out of wedlock).

163. See *supra* notes 42-51, 60-73 and accompanying text.

164. See Charo, *supra* note 18, at 249 (noting that a man's sole biological link to his child is genetic).

165. See *People v. Sorenson*, 437 P.2d 495, 498 n.2 (Cal. 1968); *Dunkin v. Boskey*, 98 Cal. Rptr. 2d 44, 53 n.7 (Ct. App. 2000) (explaining difference between homologous and heterologous insemination); *In re Anonymous*, 345 N.Y.S.2d 430, 430-31 (N.Y. Sur. Ct. 1973).

166. See *Sorenson*, 437 P.2d at 498 n.2 (commenting that only heterologous insemination "raises legal problems of fatherhood").

167. See Bridget R. Penick, Note, *Give the Child a Legal Father: A Plea for Iowa To Adopt a Statute Regulating Artificial Insemination by Donor*, 83 IOWA L. REV. 633, 638 (1998). A woman's "domestic partner" would not be a contender for legal fatherhood, even if he consented to her insemination with the sperm of an anonymous donor. See *Dunkin*, 98 Cal. Rptr. 2d at 52 (holding that a former cohabitant who did not sire the child "does not qualify as either a 'presumed' or 'natural' father of the child").

168. See ALA. CODE § 26-17-21(a) (1992); ALASKA STAT. § 25.20.045 (Michie 2000); ARK. CODE ANN. § 9-10-201 (Michie 1998); CAL. FAM. CODE § 7613 (West 1994); COLO. REV. STAT. ANN. § 19-4-106 (West 1999); CONN. GEN. STAT. § 45a-774 (2001); FLA. STAT. Ch. 742.11(1) (Harrison 2001); GA. CODE ANN. § 19-7-21 (1999); IDAHO CODE § 39-5405(3) (Michie 1998); 750 ILL. COMP. STAT. 40/2 (2001); KAN. STAT. ANN. § 23-129 (1995); MD. CODE ANN., EST. & TRUSTS § 1-206 (2001); MASS. GEN. LAWS ch. 46, § 4B (2001); MICH. COMP. LAWS ANN. § 333.2824(6) (West 1997); MO. REV. STAT. § 210.824 (2000); MONT. CODE ANN. § 40-6-106(1) (2001); NEB. REV. STAT. § 126.061(1) (1989); N.H. REV. STAT. ANN. § 168-B:3(II) (1994); N.J. STAT. ANN. § 9:17-44(a) (West 1993);

for children creates a strong presumption that a husband consented to his wife's insemination.¹⁶⁹ The typical method of demonstrating consent is through a signed writing,¹⁷⁰ but consent can also be established orally.¹⁷¹ Where a husband gives no written or oral consent, even in states with no governing statute, he may nonetheless be liable for support under contract theories or equitable principles.¹⁷²

N.M. STAT. ANN. § 40-11-6(A) (Michie 2001); N.Y. DOM. REL. LAW § 73 (McKinney 1999); N.C. GEN. STAT. § 49A-1 (1999); N.D. CENT. CODE § 14-18-03 (1997); OHIO REV. CODE ANN. § 3111.95(A) (Anderson 1994); OKLA. STAT. tit. 10, § 552 (1998); OR. REV. STAT. § 109.243 (1990); TENN. CODE ANN. § 68-3-306 (1996); TEX. FAM. CODE ANN. § 151.101(a) (Vernon 2000); VA. CODE ANN. § 20-158(2) (Michie 2000); WASH. REV. CODE § 26.26.050(1) (2001); WIS. STAT. § 891.40(1) (2000); WYO. STAT. ANN. § 14-2-103(a) (Michie 2001); *In re adoption of Reams*, 557 N.E.2d 159, 163-64 (Ohio Ct. App. 1989) (conclusive presumption of paternity). *But see Welborn v. Commonwealth*, 394 S.E.2d 732 (Va. 1990) (statute merely created presumption of husband's paternity; adoption was more certain way of establishing paternity).

169. *See* K.S. v. G.S., 440 A.2d 64, 65, 68 (N.J. Super. Ct. 1981); *see also* Brooks v. Fair, 532 N.E.2d 208, 212-13 (Ohio Ct. App. 1988) (same policies militate against wife's disavowal of her husband's paternity).

170. *See In re Witbeck-Wildhagen*, 667 N.E.2d 122, 125 (Ill. Ct. App. 1996) (written consent is mandatory); *Lane v. Lane*, 912 P.2d 290, 296 (N.M. Ct. App. 1996) (there was substantial compliance with writing requirement through pleadings in divorce proceeding); K.S., 440 A.2d at 68; *Anonymous v. Anonymous*, 1991 WL 57753, at *6, 10 (N.Y. Sup. Ct., Jan. 18, 1991) (unpublished opinion) (insufficient compliance with writing requirement; no grounds for imposition of equitable estoppel); *Anonymous v. Anonymous*, 246 N.Y.S.2d 835, 837 (N.Y. Sup. Ct. 1964) (establishing support obligation on implied contract theory); *Gursky v. Gursky*, 242 N.Y.S.2d 406, 412 (N.Y. Sup. Ct. 1963) (same).

171. *See* R.S. v. R.S., 670 P.2d 923, 928 (Kan. 1983) (oral consent created estoppel to deny paternity); K.S. v. G.S., 440 A.2d 65, 68-69 (N.J. Super. Ct. 1981) (verbal consent). *But see* K.B. v. N.B., 811 S.W.2d 634, 637 (Tex. Ct. App. 1991) (oral consent is insufficient).

172. *See* *People v. Sorenson*, 437 P.2d 495, 497-500 (Cal. 1968); *In re Marriage of Adams*, 551 N.E.2d 635, 638 (Ill. 1990) (writing requirement might not be so strict as to preclude finding of parent-child relationship or support obligation on other grounds); *Levin v. Levin*, 645 N.E.2d 601, 604, 605 (Ind. 1994) (estoppel to deny support obligation when consented orally and in writing; state has no artificial insemination statute); *In re Baby Doe*, 353 S.E.2d 877, 879 (S.C. 1987) (consent implied from conduct establishes paternity); K.B. v. N.B., 811 S.W.2d 634, 639 (Tex. Ct. App. 1991) (full knowledge and willing participation constituted ratification of parent-child relationship); *L.M.S. v. S.L.S.*, 312 N.W.2d 853, 855 (Wis. Ct. App. 1981) (adopting moral obligation theory); *cf. Buzzanca v. Buzzanca*, 72 Cal. Rptr. 2d 280, 282, 288 (Ct. App. 1998) (estoppel precluded denial of support obligation to child resulting from consent to gestational surrogacy); *Karin T. v. Michael T.*, 484 N.Y.S.2d 780, 784 (N.Y. Fam. Ct. 1985) ("The contract and the equitable estoppel which prevail in this case prevent the respondent from asserting her lack of responsibility by reason of lack of parenthood."). *But see* *Shin v. Kong*, 95 Cal. Rptr. 2d 304, 310 (Ct. App. 2000) (where consent was not obtained for procedure, husband could not have parental liability imposed upon him even via equity).

Such principles may also estop a wife from denying the paternity of her husband, *see, e.g.,* *State ex rel. H v. P.*, 457 N.Y.S.2d 488, 492 (N.Y. App. Div. 1982); *In re Adoption of Anonymous*, 345 N.Y.S.2d 430, 435-36 (N.Y. Sur. Ct. 1973); *People ex rel. Abajian v. Dennett*, 184 N.Y.S.2d 178, 182 (N.Y. Sup. Ct. 1958) (wife's conduct estopped her from

Other cases do not reach a final determination of these issues on procedural grounds.¹⁷³

The National Conference of Commissioners on Uniform State Laws has addressed paternity and assisted reproduction in at least three of its uniform acts. The UPA was first promulgated in 1973 and at that time contained a section addressing paternity in the context of the use of artificial insemination by married women.¹⁷⁴ The Act provided that if, under the supervision of a physician, a wife were artificially inseminated with a donor's semen and with the consent of her husband, the husband would be the father of the resulting child.¹⁷⁵ The UPA further provided that a donor of semen to a licensed physician was not the father of a resulting child unless the woman artificially inseminated was his wife.¹⁷⁶ The Uniform Putative and Unknown Fathers Act, promulgated in 1988, defined an unknown semen donor as not the father of the resulting child.¹⁷⁷ The Uniform Status of Children of Assisted Conception Act, also promulgated in 1988, categorically defined sperm donors as non-parents.¹⁷⁸ Portions of these latter two uniform acts were incorporated into the UPA when it was revised in 2000,¹⁷⁹ and the new UPA repeals them,¹⁸⁰

---

denying ex-husband's paternal rights); *Brooks v. Fair*, 532 N.E.2d 208, 212-13 (Ohio Ct. App. 1988), a surrogate from raising the artificial insemination statute to negate the claim of the intending father, *see, e.g., In re Matthew B.*, 284 Cal. Rptr. 18, 34 (Ct. App. 1991) (surrogate stipulated to the paternity of the intending father); *cf. R.R. v. M.H.*, 689 N.E.2d 790, 795-96 (Mass. 1998) (stating artificial insemination statute inapplicable to surrogacy arrangements), or even a known donor from asserting paternity, *see Leckie v. Voorhies*, 875 P.2d 521, 522 (Or. Ct. App. 1994) (donor's signed agreement not to assert paternity constituted effective contractual waiver).

173. *See, e.g., Alexandria S. v. Pacific Fertility Med. Ctr., Inc.*, 64 Cal. Rptr. 2d 23, 25, 33 (Ct. App. 1997) (failure to appeal issue); *Kerns v. Schmidt*, 641 N.E.2d 280, 284 (Ohio Ct. App. 1994) (failure to raise issue in lower court); *Hill v. Hulet*, 881 P.2d 460, 462 (Colo. Ct. App. 1994) (collateral estoppel).

174. *See* UNIF. PARENTAGE ACT § 5 (repealed 2000), 9B U.L.A. 407 (2001).

175. *See* UNIF. PARENTAGE ACT § 5(a) (repealed 2000), 9B U.L.A. 407 (2001).

176. *See* UNIF. PARENTAGE ACT § 5(b) (repealed 2000), 9B U.L.A. 408 (2001).

177. *See* UNIF. PUTATIVE & UNKNOWN FATHERS ACT § 1(2)(ii) (repealed 2000), 9B U.L.A. 160 (2001) (excluding unknown semen donors and known donors "whose semen was donated under circumstances indicating that the donor did not anticipate having an interest in the resulting child" from definition of putative father). Despite the implication that even a known donor of semen who anticipates having no interest in the resulting child is included within the scope of this provision, the Comment makes clear that this provision is meant to apply to unknown semen donors only. *See* UNIF. PUTATIVE & UNKNOWN FATHERS ACT § 1 cmt. (repealed 2000), 9B U.L.A. 161 (2001) ("[I]t is left to other law, such as a 'new biology' Act, to deal with the known donor of sperm used in artificial insemination.").

178. *See* UNIF. STATUS OF CHILDREN OF ASSISTED CONCEPTION ACT § 4(a) (repealed 2000), 9B U.L.A. 265 (2001).

179. *See* National Conference of Commissioners on Uniform State Laws, *Summary*:

leaving the UPA as the sole act promulgated by NCCUSL dealing with parentage.¹⁸¹

Under the language of the former UPA, which some states adopted without revision, if the recipient is married, the donor's paternity is severed, even if the recipient's husband did not consent.¹⁸² Other statutes alter this provision of the former UPA and sever the paternity of the donor only where the recipient is married and her husband consented to the insemination.¹⁸³ The balance of the states, whether they have adopted the language of the former UPA or not, sever the paternity of the donor in all cases where the recipient was not the donor's wife.¹⁸⁴ In this respect, these statutes mirror the language of the new UPA, which provides likewise.¹⁸⁵

Some statutory enactments also mirror the former UPA's requirement that a physician supervise the insemination.¹⁸⁶ Where a

---

<i>Uniform</i>	<i>Parantage</i>	[sic]	<i>Act,</i>
http://www.nccusl.org/nccusl/uniformact_summaries/uniformacts-s-upa.asp ("The two 1988 acts are, also, incorporated into [the new UPA] and lose their separate existence.").			

180. See UNIF. PARENTAGE ACT § 904, 9B U.L.A. 371 (2001).

181. See UNIF. PARENTAGE ACT pref. n., 9B U.L.A. 297 (2001).

182. See ALA. CODE § 26-17-21 (1992); MINN. STAT. § 257.56 (2000); MO. REV. STAT. § 210.824 (2000); MONT. CODE ANN. § 40-6-106(2) (2001); NEB. REV. STAT. § 126.061(2) (1989); VA. CODE ANN. § 20-158(3) (Michie 2000); VA. CODE ANN. § 32.1-257(D) (Michie 2000). A married woman is, of course, not required to obtain the consent of her husband to be artificially inseminated. See *Shin v. Kong*, 95 Cal. Rptr. 2d 304, 310 (Ct. App. 2000).

183. See ALASKA STAT. § 25.20.045 (Michie 2000); ARK. CODE ANN. § 9-10-201 (Michie 1998); FLA. STAT. ch. 742.11 (1) (Harrison 2001); GA. CODE ANN. § 19-7-21 (1999); 750 ILL. COMP. STAT. 40/2 (2001); MD. CODE ANN., EST. & TRUSTS § 1-206 (2001); MASS. GEN. LAWS ch. 46, § 4B (2001); MICH. COMP. LAWS ANN. § 333.2824(6) (West 1997); N.H. REV. STAT ANN. § 168-B:3(II) (1994); N.M. STAT. ANN. § 40-11-6(A) (Michie 2001); N.Y. DOM. REL. LAW § 73(1) (McKinney 1999); N.C. GEN. STAT. § 49A-1 (1999); N.D. CENT. CODE § 14-18-03 (1997); OKLA. STAT. tit. 10, § 552 (1998); TENN. CODE ANN. § 68-3-306 (1996).

184. See CAL. FAM. CODE § 7613(b) (West 1994); COLO. REV. STAT. ANN. § 19-4-106(2) (West 1999); CONN. GEN. STAT. § 45a-775 (2001); IDAHO CODE § 39-5405(1) (Michie 1998); KAN. STAT. ANN. § 38-1114(f) (1995); N.J. STAT. ANN. § 9:17-44(b) (West 1993); OHIO REV. CODE ANN. § 3111.95(B) (Anderson 1994); OR. REV. STAT. § 109.239(1) (1990); WASH. REV. CODE § 26.26.050(2) (2001); WIS. STAT. § 891.40(2) (2000); WYO. STAT. ANN. § 14-2-103(b) (Michie 2001). But see *Shin*, 95 Cal. Rptr. 2d at 310 (concluding statute does not apply where husband's consent not obtained) (citing *Jhordan C. v. Mark K.*, 224 Cal. Rptr. 530, 537-38 (Ct. App. 1986)).

185. See UNIF. PARENTAGE ACT §§ 702, 703, 9B U.L.A. 355, 356 (2001).

186. See ALA. CODE § 26-17-21(a) (1992); ALASKA STAT. § 25.20.045 (Michie 2000); CAL. FAM. CODE § 7613 (West 1994); COLO. REV. STAT. ANN. § 19-4-106 (West 1999); CONN. GEN. STAT. § 45a-772(a) (2001); GA. CODE ANN. § 43-34-42 (1999); IDAHO CODE § 39-5402 (Michie 1998); 750 ILL. COMP. STAT. 40/3 (2001); MINN. STAT. § 257.56 (2000); MO. REV. STAT. § 210.824 (2000); MONT. CODE ANN. § 40-6-106 (2001); NEB. REV. STAT. § 126.061 (1989); N.J. STAT. ANN. § 9:17-44 (West 1993); N.M. STAT. ANN. § 40-11-

physician is not employed in this capacity, it has been ruled that the paternity of the donor can be recognized.¹⁸⁷ Finally, like the former UPA,¹⁸⁸ the language of some state statutes applies only to married couples who employ the procedure.¹⁸⁹ It has been suggested, though, that to deny unmarried women the same privilege granted married women under these statutes might be unconstitutional.¹⁹⁰ Notably, the language of the new UPA, unlike that of the former UPA, is inclusive of unmarried women;¹⁹¹ the restriction in favor of married couples was discarded in order to "provide[ ] certainty of nonparentage for prospective donors."¹⁹² In addition, the new UPA, which has been enacted by only one state,¹⁹³ disposes of the physician requirement¹⁹⁴

---

6 (Michie 2001); N.Y. DOM. REL. LAW § 73 (McKinney 1999); OHIO REV. CODE ANN. § 3111.90 (Anderson 1994); OKLA. STAT. tit. 10, § 551 (1998); OKLA. STAT. tit. 10, § 553 (1998); OR. REV. STAT. § 677.360 (1990); WASH. REV. CODE § 26.26.050 (2001); WIS. STAT. § 891.40 (2000); WYO. STAT. ANN. § 14-2-103 (Michie 2001).

187. See Michael J. Yaworsky, Annotation, *Rights and Obligations Resulting from Human Artificial Insemination*, 83 A.L.R. 4th 295, 323 (1991) (citing *Jhordan C. v. Mark K.*, 224 Cal. Rptr. 530 (Ct. App. 1986)). But see *McIntyre v. Crouch*, 780 P.2d 239, 243 (Or. 1989) (holding that failure to adhere to physician requirement did not entitle donor to assert paternity).

188. See UNIF. PARENTAGE ACT § 5(a) (repealed 2000), 9B U.L.A. 407 (2001).

189. ALA. CODE § 26-17-21 (1992); ALASKA STAT. § 25.20.045 (Michie 2000); FLA. STAT. ch. 742.11(1) (Harrison 2001); GA. CODE ANN. § 19-7-21 (1999); MD. CODE ANN., EST. & TRUSTS § 1-206 (2001); MASS. GEN. LAWS ch. 46 § 4B; MICH. COMP. LAWS ANN. § 333.2824(6) (West 1997); MINN. STAT. § 257.56 (2000); MO. REV. STAT. § 210.824 (2000); MONT. CODE ANN. § 40-6-106 (2001); NEB. REV. STAT. § 126.061 (1989); N.Y. DOM. REL. LAW § 73 (McKinney 1999); N.C. GEN. STAT. § 49A-1 (1999); N.D. CENT. CODE § 14-18-03 (1997); OKLA. STAT. tit. 10, § 551-53 (1998); TENN. CODE ANN. § 68-3-306 (1996). But see *In re Adoption of Michael*, 636 N.Y.S.2d 608, 609 (N.Y. Sur. Ct. 1996) (statute applied to woman unmarried at time of birth who later married).

190. See *Adoption of Michael*, 636 N.Y.S.2d at 609 ("[T]he court [is unaware] of any distinction, based upon marital status, being mandated by law with regard to a woman's right to be artificially inseminated. It might very well be unconstitutional for the law to try to make such a distinction.") (citing *Matter of Jacob*, 660 N.E.2d 397 (N.Y. 1995)); Note, *Reproductive Technology and the Procreation Rights of the Unmarried*, 98 HARV. L. REV. 669, 682, 683-84 (1985).

191. See UNIF. PARENTAGE ACT § 702 cmt., 9B U.L.A. 355 (2001) ("UPA (2000) further opts not to limit nonparenthood of a donor to situations in which the donor provides sperm for assisted reproduction by a married woman.").

192. UNIF. PARENTAGE ACT § 702 cmt., 9B U.L.A. 355 (2001).

193. Enactment of the new UPA was considered recently by the legislatures of Maryland, Minnesota, Texas, and West Virginia. See National Conference of Commissioners on Uniform State Laws, *A Few Facts About . . . The Uniform Parentage Act (2000)*, available at http://www.nccusl.org/uniformact_factsheets/uniformacts-fs-upa.htm. Of these four states, the Act, save for article 8 relating to gestational agreements, was adopted only in Texas. See *id.*; Tex. Fam. Code §§ 160.101 - .707 (Vernon 1997).

194. See UNIF. PARENTAGE ACT § 702 cmt., 9B U.L.A. 355 (2001).

and in this way reflects the enactments of many states that have no such requirement.¹⁹⁵

Courts construing the various statutes described above have afforded married couples more protection against intrusion by genetic fathers than they have afforded single women and lesbian couples.¹⁹⁶ Of course, sperm donation is very often made anonymously,¹⁹⁷ without the expectation of any contact between the donor and the donee and her child or even knowledge of their identities.¹⁹⁸ As such, paternal responsibility is not assumed by anonymous sperm donors.¹⁹⁹ But single women and lesbian couples face private discrimination in access to artificial insemination services²⁰⁰ and thus may elect to self-inseminate with the sperm of known donors.²⁰¹ Where they do, the sperm donors have often been successful in asserting paternity, a

---

195. See ARK. CODE ANN. § 9-10-201 (Michie 1998); FLA. STAT. ch. 742.11(1) (Harrison 2001); KAN. STAT. ANN. § 23-129 (1995); MD. CODE ANN., EST. & TRUSTS § 1-206 (2001); MASS. GEN. LAWS ch. 46, § 4B (2001); MICH. COMP. LAWS ANN. § 333.2824(6) (West 1997); N.H. REV. STAT. ANN. § 168-B:3(II) (1994); N.C. GEN. STAT. § 49A-1 (1999); N.D. CENT. CODE § 14-18-03 (1997); TENN. CODE ANN. § 68-3-306 (1996); VA. CODE ANN. § 20-158(2) (Michie 2000).

196. See Charo, *supra* note 18, at 240.

197. See *C.M. v. C.C.*, 377 A.2d 821, 822 (N.J. Juv. & Dom. Rel. 1977) ("In most cases the donor is unknown").

198. Even in the recent case of a sperm donor who was compelled to submit to a deposition, the court ruled that his identity should remain undisclosed to the extent possible. See *Johnson v. Superior Court*, 95 Cal. Rptr. 2d 864, 879 (Ct. App. 2000) ("John Doe's identity is to be protected to the fullest extent possible . . .").

199. See, e.g., *C.M.*, 377 A.2d at 823 (commenting that anonymous donors cannot be responsible for the use made of their sperm) (citing *People v. Sorenson*, 437 P.2d 495, 498 (1968)); *In re Michael*, 636 N.Y.S.2d 608, 609 (N.Y. Sur. Ct. 1996) ("[W]here a man donates his sperm to a medical facility to be used for the purpose of artificial insemination, and all parties agree from the outset that they are forever to remain anonymous from each other, there is no reason why the forfeiture of the man's parental rights without further notice should depend upon 'the luck of the draw' because his sperm was utilized to impregnate a married woman instead of one who was not.").

200. See Charo, *supra* note 18, at 241; Catherine DeLair, *Ethical, Moral, Economic and Legal Barriers to Assisted Reproductive Technologies Employed by Gay Men and Lesbian Women*, 4 DEPAUL J. HEALTH CARE L. 147, 150-51 (2000); Holly J. Harlow, *Paternalism Without Paternity: Discrimination Against Single Women Seeking Artificial Insemination by Donor*, 6 S. CAL. REV. L. & WOMEN'S STUD. 173, 175 (1996); Derek J. Jones, *Family Law, Health Law & Bioethics: Towards Equal Access to Donor Insemination Services*, Abstract for the International Society of Family Law Conference 2001, Kingston, Canada, 14-16 June 2001; Audra Elizabeth Laabs, *Lesbian ART*, 19 LAW & INEQ. 65, 82 (2001); see also Joan C. Callahan & Dorothy E. Roberts, *A Feminist Social Justice Approach to Reproduction-Assisting Technologies: A Case Study on the Limits of Liberal Theory*, 84 KY. L.J. 1197, 1217 (1995-96) (noting disparities based on race in the provision of fertility services); Dorothy E. Roberts, *Race and the New Reproduction*, 47 HASTINGS L.J. 935, 940-42 (1996) (suggesting underlying causes of racial disparity in fertility treatment).

201. See DeLair, *supra* note 200, at 163.

result these women wish to avoid in order to safeguard the integrity of their families.²⁰² The most curious aspect of such decisions is that they disregard the plain language of the applicable legislative enactments²⁰³ or, in the more egregious cases, the existence of family units of long standing.²⁰⁴ Just as in cases involving married couples, the justifications these decisions advance are the policies favoring avoidance of both illegitimacy and the risk that a child will become a public charge.²⁰⁵ It is not known whether the claims of known donors could have a similarly harmful impact on a traditional nuclear family.²⁰⁶

The risk that children will be deemed illegitimate is largely eliminated where the child is born to a married couple, and the risk that a child will become a public charge is lessened where the child has two parents from whom to claim support. Under the new UPA, the first of these concerns is addressed by a presumption of paternity that prevents the husband from disclaiming paternity if he fails to

---

202. See Charo, *supra* note 18, at 241-42, 247. See, e.g., *Thomas S. v. Robin Y.*, 618 N.Y.S.2d 356, 357, 362 (N.Y. App. Div. 1994); *In re R.C.*, 775 P.2d 27, 35 (Colo. 1989) (statutory protection of recipient does not apply where parties had an agreement that donor's parental rights would be preserved); *C.O. v. W.S.*, 64 Ohio Misc.2d 9,11 (1994) (same); *In Circuit Court*, CHI. DAILY L. BULL., Aug. 5, 1997, at 3 (reporting ruling that "the act does not intend to bar a known donor from trying to assert his parental rights"). But see *McIntyre v. Crouch*, 780 P.2d 239, 243 (Or. 1989) (holding statute applies even where physician does not perform insemination, donor is not anonymous, and recipient is unmarried); *Leckie v. Voorhies*, 875 P.2d 521, 522 (Or. Ct. App. 1994) (known donor not entitled to legal recognition of paternity because he agreed not to assert paternity); *In re Matthew B.*, 284 Cal. Rptr. 18, 34 (Cal. Ct. App. 1991) (surrogate stipulated to the paternity of the intending father).

203. See, e.g., *In Circuit Court*, CHI. DAILY L. BULL., Aug. 5, 1997, at 3 (reporting ruling that act barring paternity claim by donor who is not the wife of the recipient did not apply to bar a known donor from trying to assert his parental rights); see Garrison, *Interpretive Approach*, *supra* note 15, at 904 ("[A]lthough facially neutral, the law discriminates in practice between sperm donors who give directly to users and those who give to sperm banks.").

204. See, e.g., *Thomas S. v. Robin Y.*, 618 N.Y.S.2d 356, 357-58 (N.Y. App. Div. 1994); *id.* at 364 (Ellerin, J., dissenting) (noting that the sperm donor did not seek to establish his paternity of a child who lived with her two mothers and her sister until the child was nearly ten years of age).

205. See Penick, *supra* note 167, at 657 (citing *Brooks v. Fair*, 532 N.E.2d 208, 212-13 (Ohio Ct. App. 1988)).

206. See *id.* at 649 n.125 (noting the absence of such cases). The new UPA implies that a known donor who donates his semen for the use of a married couple would have no claim to paternity. See UNIF. PARENTAGE ACT §§ 702 cmt., 9B U.L.A. 355 (2001) ("If a married woman bears a child of assisted reproduction using a donor's sperm, the donor will not be the father in any event."), § 705 cmt., 9B U.L.A. 357 (2001) (providing that if "the husband's lack of consent is demonstrated, the child will be without a legally-recognized father because the sperm donor is not the father under § 702 . . .").

bring a lawsuit within two years of his discovery of the child's birth.²⁰⁷ This provision, unlike the former UPA, limits the husband's power to disclaim paternity and, in this way, more effectively promotes legitimacy. The second of these concerns is less directly addressed by the new UPA. The Act defines the term donor broadly to mean "an individual who produces sperm used for assisted reproduction"²⁰⁸ and categorically denies semen donors any claim to paternity,²⁰⁹ presenting the possibility that a single woman electing to undergo artificial insemination will be the resulting child's sole parent.²¹⁰ At the same time, though, the new UPA inexplicably makes no mention of the distinction between known and anonymous donors that has been so salient in the case law.²¹¹ Instead, the new UPA describes donors generally as "shielded from parenthood in all situations in which either a married woman or a single woman conceives a child through assisted reproduction."²¹² The use of the word shielded here is striking; it suggests the group of donors who desire "certainty of nonparentage"²¹³ and who, given this motivation, would actively seek anonymity. Read in this light, the new UPA does not address the group of donors who at the time of their donation have not decided whether they wish to be fathers or who, between the time of conception and birth, change their minds.²¹⁴ The new UPA, then, very nearly invites courts to continue drawing the distinction between known and unknown donors that they have drawn in several cases to date.²¹⁵

---

207. See UNIF. PARENTAGE ACT § 705(a)(1), 9B U.L.A. 357 (2001). If the husband and wife have not lived together since her insemination, and if the husband never held the child out as his own, his lawsuit may be brought at any time. See UNIF. PARENTAGE ACT § 705(b), 9B U.L.A. 357 (2001).

208. UNIF. PARENTAGE ACT § 102(8), 9B U.L.A. 304 (2001). Of course, this definition does not include "a husband who provides sperm . . . to be used for assisted reproduction by the wife . . . ." UNIF. PARENTAGE ACT § 102(8)(A), 9B U.L.A. 304 (2001).

209. See UNIF. PARENTAGE ACT § 702 cmt., 9B U.L.A. 355 (2001) ("The donor can neither sue to establish parental rights, nor be sued and required to support the resulting child. In sum, donors are eliminated from the parental equation.").

210. See UNIF. PARENTAGE ACT § 702 cmt., 9B U.L.A. 355 (2001) ("[T]he child would have no legally recognized father.") (quoting UNIF. STATUS OF CHILDREN OF ASSISTED CONCEPTION ACT § 4 cmt. (repealed 2000), 9B U.L.A. 265 (2001)).

211. See *supra* notes 199-202 and accompanying text.

212. UNIF. PARENTAGE ACT § 702 cmt., 9B U.L.A. 355 (2001).

213. UNIF. PARENTAGE ACT § 702 cmt., 9B U.L.A. 355 (2001).

214. See Fred A. Bernstein, *This Child Does Have Two Mothers . . . and a Sperm Donor with Visitation*, 22 N.Y.U. REV. L. & SOC. CHANGE 1, 46 (1996); Garrison, *Interpretive Approach*, *supra* note 15, at 904.

215. Professor John Sampson, who served as the reporter for the new UPA, has commented that a donor who intends to be a father "can be found not to be a 'donor' [,

No matter how large the question of a known sperm donor's status looms under the new UPA,²¹⁶ more important as a driving force behind the model legislation is the presumed intent of anonymous sperm donors and husbands. On the one hand, anonymous sperm donors are presumed to have no interest in the rights and obligations of paternity.²¹⁷ Their parental rights are severed in all cases.²¹⁸ On the other hand, husbands are presumed to consent to parenthood and must take affirmative steps if they wish not to do so.²¹⁹ In essence, the UPA frees a sperm donor from the obligation of supporting his child, a privilege a father who has sired a child through coitus, even if the father is not married to the child's mother, cannot claim.²²⁰ The statute thus creates a striking contrast between the paternity of children created via assisted reproduction and those created via coitus. This different treatment of biological fathers based on the mechanics of how their children were conceived has heretofore been unknown in the law, a fact of great concern to Professor Marsha Garrison.²²¹ Garrison believes creating different parentage rules for assisted reproduction cases is a bad idea in general and, more specifically, that any emphasis on intention in determining parentage in such cases is unnecessary and even dangerous.²²² According to Garrison, the danger lies in ignoring important facts: the law has

---

since] if the understanding between him and the mother was that they intended him to have parental rights, . . . " he would resemble a husband who contributes his own sperm to be used by his wife for assisted reproduction. See Uniform Parentage Act (2000) (with Unofficial Annotations by John J. Sampson, Reporter), 35 FAM. L. Q. 83, 162 n. 73 (2001).

216. See Garrison, *Interpretive Approach*, *supra* note 15, at 848 (noting failure of artificial insemination legislation to define a "donor's rights to a relationship with his biological child").

217. See *C.M. v. C.C.*, 377 A.2d 821, 824 (N.J. JUV. & DOM. REL. 1977) ("By donating his semen anonymously, the donor impliedly gives it without taking on [the responsibilities of fatherhood].").

218. See UNIF. PARENTAGE ACT § 702 cmt., 9B U.L.A. 355 (2001) ("[D]onors are eliminated from the parental equation.").

219. See UNIF. PARENTAGE ACT § 703 cmt., 9B U.L.A. 356 (2001) (noting "[t]he presumptive paternity of the husband of a married woman who bears a child through assisted reproduction").

220. See *Marsh v. Clay*, No. D-225561, 2000 WL 1900333, at *4 (Ohio Ct. App. Dec. 28, 2000) (unpublished opinion); *Piatt v. Schultz*, No. 03-97-00142-CV, 1998 WL 476725, at *3 (Tex. Ct. App. Aug. 13, 1998) (unpublished opinion) (noting that the Texas constitution does not forbid treating sperm donors differently from men who impregnate their partners via coitus).

221. See Garrison, *Interpretive Approach*, *supra* note 15, at 921; Garrison, *Technological Family*, *supra* note 23, at 700.

222. See Garrison, *Interpretive Approach*, *supra* note 15, at 859-63, 919; Garrison, *Technological Family*, *supra* note 23, at 700.

never recognized intentional parenthood,²²³ and technological reproduction does not create genuinely new or different family forms.²²⁴ Since naming a husband the father of a child born to his wife via artificial insemination by donor is essentially a result required under marital presumption and paternity estoppel principles,²²⁵ and since single women who become single mothers through heterologous insemination are not in any way a new kind of family,²²⁶ Garrison urges courts to apply well-established, traditional methods of determining parentage in these cases and, in the interest of fairness, to reject special theories applicable only to technological families.²²⁷ Not to employ this "interpretive" approach, she believes, will unsettle parentage law with inconsistent and unpredictable outcomes.²²⁸

An approach to legal parentage that is faithful to time-honored legal traditions has much to recommend it, but Garrison's conviction about the efficacy of the interpretive approach seems to arise from certain premises that are not as fixed as she describes them. First, although it is true that families created through assisted reproduction look very much like families created through coitus, this fact alone does not address the question of whether the parentage of children created through assisted reproduction should be defined using different legal principles. The law defines relationships as familial not simply based on their appearance but upon the events that have forged them. Similarity of appearance, standing alone, is not compelling, even to an interpretive approach, unless the similarity is sufficiently substantial as well to counsel pursuit of similar policy goals. Even presumptions themselves may require inquiry into "mechanics," appropriately defined as ways of creating linkages between family members. Marital presumptions of paternity, for example, do not apply unless there *is* a marriage; likewise, gestational

---

223. See Garrison, *Technological Family*, *supra* note 23, at 700.

224. See Garrison, *Interpretive Approach*, *supra* note 15, at 874, 880, 881; Garrison, *Technological Family*, *supra* note 23, at 691, 697 (explaining that there is no evidence "that the families that arise from technological conception are markedly different from those that arise from sexual conception, adoptions, or . . . from shared family life").

225. See Garrison, *Interpretive Approach*, *supra* note 15, at 896; Garrison, *Technological Family*, *supra* note 23, at 695, 701; see also Garrison, *Interpretive Approach*, *supra* note 15, at 897 (arguing that under equal protection wives should benefit from a marital presumption in egg donation cases); Garrison, *Technological Family*, *supra* note 23, at 698.

226. See Garrison, *Interpretive Approach*, *supra* note 15, at 881, 903; Garrison, *Technological Family*, *supra* note 23, at 694.

227. See Garrison, *Interpretive Approach*, *supra* note 15, at 843, 873, 879, 882; Garrison, *Technological Family*, *supra* note 23, at 700.

228. See Garrison, *Interpretive Approach*, *supra* note 15, at 842; Garrison, *Technological Family*, *supra* note 23, at 700.

presumptions of maternity have no force unless it is known who gave birth to the child.²²⁹ These points are simple, but they emphasize that the law's focus on "the *formation* of family relationships"²³⁰ must scrutinize mechanics to a certain extent if the process of defining families is to work, for the mechanics are themselves what forge the relationships the law will or will not recognize as familial. Technological conception has severed these linkages into several components, leaving indeterminacy of legal parentage in its wake.²³¹ Once the law resolves this indeterminacy in any given case, it is true that the resulting "technological" family looks in many ways the same as a non-technological family. But this fact does not itself answer legal questions about the relationships between the members of a family. What the interpretive approach should recognize is that technological family relationships are sometimes formed in such a way that the indicia for defining traditional family relationships are missing. Thus, although technological families may simply be traditional-family look-alikes, the means of achieving these analogues may require modifications to well-established approaches to parentage.

Second, Garrison mischaracterizes at least some of the traditional law of parentage.²³² Although "mother" has traditionally meant the mother by blood,²³³ it does not follow that genetic maternity traditionally prevails over gestational maternity.²³⁴

---

229. See UNIF. PARENTAGE ACT § 201, 9B U.L.A. 309 (2001).

230. See Garrison, *Interpretive Approach*, *supra* note 15, at 880 (emphasis added, emphasis in original withdrawn).

231. See Garrison, *Interpretive Approach*, *supra* note 15, at 912 (noting this phenomenon in the context of gestational surrogacy); Garrison, *Technological Family*, *supra* note 23, at 699.

232. See Garrison, *Interpretive Approach*, *supra* note 15, at 913 (gestational mother's claim should be rejected because policy favors genetic parentage); *id.* at 917 (genetic tie should take precedence over gestation); Garrison, *Technological Family*, *supra* note 23, at 695-696 (characterizing women who gestate other women's eggs as not biologically related to the resulting children); *id.* at 699 (same).

233. 59 AM. JUR. 2D *Parent and Child* § 2 (1987); see also 67A C.J.S. *Parent* (1978); *Arredondo by Arredondo v. Nodelman*, 622 N.Y.S.2d 181, 182 (N.Y. Sup. Ct. 1994) (maintaining that genetic mother was legal mother in gestational surrogacy case where surrogate consented to naming the genetic parents the legal parents).

234. See *Andres A. v. Judith N.*, 591 N.Y.S.2d 946, 950 (N.Y. Fam. Ct. 1992) (acknowledging that assisted reproduction raises possibility of two mothers); *Thomas C. v. Physicians Ins. Co. of Wisconsin*, 509 N.W.2d 81, 83 (Wis. Ct. App. 1993) ("Our review of the case law and statutory authority leads us to conclude that a parent is not to be defined solely as a biological mother or father."); ROBERTSON, *CHILDREN OF CHOICE*, *supra* note 4, at 135 n.48 ("The assumption is that the courts would recognize both genetic and gestational mothers as parents within the family code . . ."); Charo, *supra* note 18, at 250 (listing countries where gestation defines motherhood); Rylah Lilith, *The G.I.F.T. of Two*

"Mother" is more accurately defined as "one who generates a child."²³⁵ As noted above, assisted reproduction has severed a woman's role in generating a child into three components and a man's role into two. Before the advent of parentage disputes occasioned by assisted conception, the law had little need to resolve disputes over maternity and, as a result, the question of legal maternity remains largely untheorized.²³⁶ Not surprisingly, family law treatises often contain no discussion of legal maternity.²³⁷ Casebooks likewise often contain no discussion of ascertaining maternity outside of materials on assisted reproduction and, in this context, present *Johnson and Buzzanca* as authoritative texts.²³⁸ Where maternity is defined, it is said to be presumed from gestational maternity.²³⁹ Gestational maternity is in this way analogous to marital-presumption paternity.²⁴⁰ In neither the case of presumptive maternity nor the case of presumptive paternity, however, is it sufficient to locate the genetic parent in order to trump the presumption.²⁴¹ Allowing genetic contribution to override presumptive maternity but not presumptive

---

Biological and Legal Mothers, 9 AM. U. J. GENDER SOC. POL'Y & L. 207, 216 (2001) (describing case where both genetic and gestational mothers were named legal mothers). But see Dr. Chaim Povarsky, *Regulating Advanced Reproductive Technologies: A Comparative Analysis of Jewish and American Law*, 29 U. TOL. L. REV. 409, 482 (1998) (opining that Jewish law probably prefers the definitude of genetic motherhood); cf. Charo, *supra* note 18, at 250 (noting that Israel "has adopted a genetic definition of motherhood").

235. 59 AM. JUR. 2D *Parent and Child* § 2 (1987); see also 60 C.J.S. *Mother* (1969) ("Ordinarily the term means a woman who has borne a child."). "The term mother . . . is customarily applied to one who is an adoptive mother . . ." *Id.*; see also *Burlington County Welfare Bd. v. McClain*, 458 A.2d 1348, 1349 (N.J. Dist. Ct. 1983) ("[Mother] is defined either as one gives birth to a child, or a female who adopts a child.") (citations omitted).

236. See *Arredondo*, 622 N.Y.S.2d at 181 (remarking that statutory grant of jurisdiction to Family Court contained no provision for a declaration of maternity); *Andres A.*, 591 N.Y.S.2d at 949 (same); Garrison, *Interpretive Approach*, *supra* note 15, at 912 ("[T]he law has rarely confronted the question of legal motherhood at all.").

237. See, e.g., HOMER H. CLARK, JR., *THE LAW OF DOMESTIC RELATIONS IN THE UNITED STATES* (2d ed. 1988).

238. See, e.g., CLARK & ESTIN, *supra* note 146, at 442-43, 445; HARRY D. KRAUSE, ET AL., *FAMILY LAW: CASES, COMMENTS, AND QUESTIONS* 50-56, 390-97, (4th ed. 1999 & Supp. 2000); SCHNEIDER & BRINIG, *supra* note 22, at 897-926.

239. See UNIF. PARENTAGE ACT § 201(a)(1), 9B U.L.A. 309 (2001); *Nguyen v. I.N.S.*, 533 U.S. 53 (2001) ("In the case of the mother, [maternity] is verifiable from the birth itself.").

240. See UNIF. PARENTAGE ACT §§ 201(b)(1), 204, 9B U.L.A. 309, 311 (2001).

241. See *Michael H. v. Gerald D.*, 491 U.S. 110, 129-30 (1989) (upholding statutory denial of standing to genetic father to challenge marital-presumption paternity); *Johnson v. Calvert*, 851 P.2d 776, 782 (Cal. 1993) (privileging intent when biological means of establishing maternity "do not coincide in one woman").

paternity, would, according to Garrison, be of doubtful constitutionality²⁴² and would thus offend the interpretive approach's commitment to consistency and neutrality.²⁴³ Nevertheless, differences between maternity and paternity have many times been marshalled as justifiable and substantial grounds for differential treatment of motherhood and fatherhood, particularly based on mothers' gestative role in childbearing.²⁴⁴ This differential treatment appears most assuredly to rely on "traditional stereotypes of female nurturance,"²⁴⁵ but this is a well-established approach in equal protection law generally and in family law in particular and continues to be so.²⁴⁶ That this should not be the case and that the law instead should make genetics the focal point of every parentage determination is a position not encompassed by the interpretive approach.²⁴⁷

There is no doubt that the interpretive approach applies neatly to resolve many parentage issues arising from the use of assisted reproduction.²⁴⁸ But like the top-down methodologies Garrison criticizes,²⁴⁹ the interpretive approach cannot resolve all of these issues.²⁵⁰ In particular, although the interpretive approach nicely addresses disputes between husbands and wives and even between

---

242. See Garrison, *Interpretive Approach*, *supra* note 15, at 882 (citing *Soos v. Superior Court*, 897 P.2d 1356 (Ariz. Ct. App. 1994)); *id.* at 914, 917; Garrison, *Technological Family*, *supra* note 23, at 698.

243. See Garrison *Interpretive Approach*, *supra* note 15, at 878-82, 920.

244. See *supra* notes 110-13 and accompanying text; *infra* notes 385-422 and accompanying text. Despite this evidence, Garrison claims "the unwed father cases in fact convey no message about gestation." Garrison, *Interpretive Approach*, *supra* note 15, at 913 n.349 (contradicting DOLGIN, *DEFINING THE FAMILY*, *supra* note 23, at 128 (claiming the unwed-father cases carry a "message about the importance of gestation")).

245. See Garrison, *Interpretive Approach*, *supra* note 15, at 914.

246. See *e.g.*, *Nguyen v. I.N.S.*, 533 U.S. 53 (2001) ("Fathers and mothers are not similarly situated with regard to the proof of biological parenthood. The imposition of a different set of rules for making that legal determination with respect to fathers and mothers is neither surprising nor troublesome from a constitutional perspective."); *United States v. Virginia*, 518 U.S. 515, 533 (1996) (commenting that "[p]hysical differences between men and women . . . are enduring" and can justify gender-based classifications substantially related to important governmental objectives).

247. See Garrison, *Interpretive Approach*, *supra* note 15, at 920-21 (describing the neutrality of the interpretive approach).

248. See *id.* at 896-98 (discussing "easy" cases).

249. See *id.* at 853-68 (criticizing rights-based, contracts-based, and anticommodification approaches to assisted reproduction issues).

250. See *id.* at 896 ("[The interpretive approach] will not resolve every question related to the parentage of technologically conceived children."). But see *id.* at 920 ("[T]he interpretive approach can be applied to all of the parental status issues arising from technological conception.").

single women and known sperm donors, the approach seems ill-equipped to resolve potential cases involving the children of single women who have been artificially inseminated with the sperm of anonymous donors. If a woman gives birth to a child with the aid of anonymous insemination, her relationship with her child looks very much like that of a woman who became pregnant through a casual encounter.²⁵¹ The interpretive approach would counsel that these two scenarios be treated similarly²⁵² and in line with the law's preference for two-parent families, naming the biological father the legal father of the child.²⁵³ But when the mechanics involved in these two situations are scrutinized, any substantial similarity between them vanishes. True, anonymous lovers do not always remain conveniently anonymous after a child has been conceived and may come forward to assert a paternity claim. Likewise, anonymous sperm donors may not remain steadfast in their resolution not to assert paternity.²⁵⁴ Their ability to discover the children they have sired would be difficult but by no means impossible.²⁵⁵ More significantly, whatever contract they may have signed with a sperm bank would not by itself undermine a paternity claim.²⁵⁶ In essence then, through this strained comparison, the fathers in these two scenarios can be made to appear similar. And yet both the artificially inseminated mother, and the anonymous sperm donor, by following the dictates of the relevant statute (or their own common sense), have taken more definitive steps towards ensuring the donor will not become a part of the mother's family. These steps to ensure anonymity suggest a basis upon which the parental prerogatives of the mother alone, at least

---

251. See Garrison, *Technological Family*, *supra* note 23, at 694.

252. See Garrison, *Interpretive Approach*, *supra* note 15, at 910 ("There is simply no logical basis for a one-parent policy applicable only to single AID users.").

253. See *id.* at 906-07, 911 (raising the law's preference for two-parent, marital families).

254. See Cahn, *supra* note 20.

255. See CLARK & ESTIN, *supra* note 146, at 453 (remarking that use of sperm banks by anonymous donors entails "little risk that the donor will later seek to assert parental rights"); Garrison, *Interpretive Approach*, *supra* note 15, at 904 ("Because sperm banks provide anonymity to both donors and recipients, paternity litigation is effectively foreclosed."); *But see* Cahn, *supra* note 20.

256. Garrison, *Technological Family*, *supra* note 23, at 698 ("It is black letter family law that contracts between parents that determine parental status, child custody, and child support are voidable . . ."); *see also* Garrison, *Interpretive Approach*, *supra* note 15, at 860 (citing UNIF. PARENTAGE ACT § 6(d), 9B U.L.A. 303 (1973)), 861-62, 896. *But see In re R.C.*, 775 P.2d 27, 35 (Colo. 1989) (remanding for determination of whether recipient agreed donor would have parental rights); *C.O. v. W.S.*, 64 Ohio Misc.2d 9, 11 (1994) (holding paternity adjudication was not statutorily barred where unmarried woman agreed donor and child would have relationship); *Leckie v. Voorhies*, 875 P.2d 521, 522 (Or. Ct. App. 1994) (contract signed with birth mother undermined paternity claim).

insofar as the policy of support for children is concerned, could be respected, in contrast to the casual sexual encounter where anonymity, no matter how resolute the intentions of the participants, is harder to control.²⁵⁷

Similarly, the interpretive approach appears ill-suited to address the facts of *Buzzanca*, a “five-parent case.”²⁵⁸ On the one hand, Garrison argues that the case is analogous to a prenatal “adoption”²⁵⁹ and that simple estoppel principles would apply in such a case to name both Luanne and John Buzzanca the parents of Jaycee.²⁶⁰ Although the *Buzzanca* court did invoke estoppel, its brand of estoppel does not meet the rigorous standards of the interpretive approach. It relies not on any recognized legal parent, marital presumption, or established relationship to which estoppel traditionally attaches in the parentage context.²⁶¹ Instead, it relies solely on the intentions of the Buzzancas.²⁶² This understanding of estoppel is less faithful to the interpretive approach than it is to Professors Shultz’s and Hill’s intentional parenthood theory, which Garrison refutes.²⁶³ Notably, in later treatment of *Buzzanca*, Garrison eschews any estoppel analysis of that case and admits that gestational surrogacy is distinct from sexual conception.²⁶⁴ She then explains that

---

257. See Garrison, *Interpretive Approach*, *supra* note 15, at 860 (noting that “even unmarried persons who engage in sexual intercourse have been presumed to consent to the risk of procreation”).

258. Garrison, *Technological Family*, *supra* note 23, at 698.

259. See *id.* at 696.

260. See *id.* at 698 (“[B]oth parties, by consenting to the birth of the child, should logically incur the legal status and responsibilities of parenthood.”).

261. See *Nancy S. v. Michele G.*, 279 Cal. Rptr. 212, 218 (Ct. App. 1991) (holding equitable estoppel not available in favor of nonparent); *In re M.J.* 759 N.E.2d 121, 123, 127 (Ill. Ct. App. 2001) (refusing to impose support obligation, on grounds of promissory estoppel, on boyfriend who helped pay for and allegedly encouraged artificial insemination, supported the resulting offspring and allegedly acknowledged the children as his own and promised to support them), *Van v. Zahorik*, 597 N.W.2d 15, 23 (Mich. 1999) (holding doctrine of parenthood by equitable estoppel not applicable outside of marriage); *Simmons v. Comer*, 438 S.E.2d 530, 537 (W. Va. 1993) (observing “common pattern” of application of estoppel where putative father married biological mother); CLARK, *supra* note 237, § 4.4 at 192, § 4.5 at 200-01; AMERICAN LAW INSTITUTE, PRINCIPLES OF THE LAW OF FAMILY DISSOLUTION: ANALYSIS AND RECOMMENDATIONS § 2.03(1)(b) (Tentative Draft No. 4, Apr. 10, 2000) (requiring co-parenting agreement with legally recognized parent and residing with child) [hereinafter PRINCIPLES]; UNIF. PARENTAGE ACT § 608 cmt., 9B U.L.A. 343 (2001) (noting that doctrine of paternity by estoppel “is limited in its application to married persons”).

262. See *Buzzanca v. Buzzanca*, 72 Cal. Rptr. 2d 280, 286 (Ct. App. 1998) (estoppel applies in artificial insemination context to fix parental status and responsibility).

263. See Garrison, *Interpretive Approach*, *supra* note 15, at 859-63.

264. See *id.* at 912 (“[T]here is no sexual analog to this particular form of technological conception.”).

the law's preference for genetic motherhood the mere gestational mother in a surrogacy case should not qualify for a declaration of maternity.²⁶⁵ But, again, the law is only beginning to wrestle with contests between gestational and genetic contenders for motherhood. Whether priority should be given to one or the other or to neither is still a matter of serious debate. The interpretative approach does not satisfactorily resolve this debate. As such, Garrison's analysis of *Bussanca* is, at the very least, not supported by the interpretive approach and is very likely inconsistent with it.²⁶⁶

The interpretive approach to legal parentage, based as it is on valued legal traditions, has much to offer in resolving parentage disputes arising in assisted reproduction cases. It is neither anemic nor necessarily overly conservative in its respect for consistency, neutrality and integrity in legal decisionmaking. It may even be preferable to globalizing theories that provide no reasoned basis upon which to discard time-honored policies and principles. But like the globalizing theories it rejects, the interpretive approach *also* leaves indeterminacy in its wake. It seems particularly ill-suited to resolve important questions triggered by cases where single women seek anonymous donations of sperm and in five-parent surrogacy cases. Since resort to these arrangements will only increase in frequency over time, the law should do more than attempt to make them conform to obviously inapplicable principles or invoke restrictive policies of doubtful vintage. The clumsiness of such attempts underscores that even traditional approaches to the family at times need reexamining.²⁶⁷ This reexamination might begin with an acknowledgment that it is not so much that technological families resemble traditional families as that traditional families resemble technological ones. In other words, the law's difficulty with technological families reveals what is lacking in its treatment of traditional families. In part, this acknowledgment demonstrates that the law continues to place undue emphasis on marriage in the context

---

265. See Garrison, *Interpretive Approach*, *supra* note 15, at 913 (concluding that a gestational surrogate's maternity claim is subordinate to a genetic mother's claim); Garrison, *Technological Family*, *supra* note 23, at 699 ("[T]he simplest—and, I would argue—best approach in these cases is to say that the genetic mother is the legal mother because she is the one biologically related to the child."). But see Shultz, *supra* note 17, at 332 ("I would argue that there is no persuasive basis for a categorical preference for either a gestational or a genetic contributor to receive exclusive recognition as 'mother.'").

266. See *supra* notes 238-41 and accompanying text.

267. See Garrison, *Interpretive Approach*, *supra* note 15, at 921 ("The approach I have suggested does not assume that contemporary standards are ideal, or that they should not be debated and revised.").

of parentage determinations. By failing to scrutinize this position, beyond describing it as a preference for two-parent families, the interpretive approach does little to address the degree to which technological families call it into question. Nonetheless, the attempt to articulate an interpretive approach to parentage determinations in the context of assisted reproduction does emphasize that, given the inevitability of parenthood by pure intention, a principled and evenly applied approach to this type of parentage needs to be identified. Any remaining indeterminacy is but a cost of the benefits which would flow from such a regime.²⁶⁸

II. Parenthood by Pure Intention

Although the interpretive approach should caution courts and legislatures against creating wholly new bases upon which to ground parentage, it has not succeeded in persuading them to reject purely intentional parenthood as an appropriate basis for defining parentage in assisted reproduction cases.²⁶⁹ Unfortunately, the existing law and proposed legislation defining the parentage of children born through the use of assisted reproduction treats married couples who wish to employ these techniques differently from unmarried couples and singles who wish to do likewise.²⁷⁰ Although married couples who choose to pursue assisted reproduction may define themselves as the legal parents of a child through the sole medium of their intent to rear the child, the unmarried are, in the main, denied this privilege.²⁷¹ This development in the law of parentage is unfortunate, as it perpetuates

---

268. See Harris, *supra* note 95, at 481 (commenting on the value of a functionality test for paternity); Shultz, *supra* note 17, at 398 (stating that assigning and enforcing parental responsibility is so fraught with problems that a new approach could not be any worse).

269. See, e.g., Buzzanca v. Buzzanca, 72 Cal. Rptr. 2d 280, 289-90 (Ct. App. 1998).

270. See UNIF. PARENTAGE ACT § 801(b), 9B U.L.A. 362 (2001) ("The intended parents must be married . . .").

271. For example, although the vast majority of statutes relating to surrogacy simply outlaw it, see ALA. CODE § 26-10A-34 (1997); ARIZ. REV. STAT. § 25-218 (1996); D.C. CODE ANN. §§ 16-401, 16-402 (1996); 750 ILL. COMP. STAT. 45/6(a) (2001); IND. CODE ANN. § 31-8-2.1 (Michie 1994); IOWA CODE ANN. § 710.11 (West 1997); KY. REV. STAT. ANN. § 199.590 (Michie 1995); LA. REV. STAT. § 2713 (West 1991); MICH. COMP. LAWS ANN. § 722.853 (West 1997); NEB. REV. STAT. § 25-21, 200 (1989); N.Y. DOM. REL. LAW § 121 (McKinney 1997); N.D. CENT. CODE § 14-18-05 (1991); UTAH CODE ANN. § 76-7-204 (1997); WASH. REV. CODE § 26.26.210 (2001); W. VA. CODE § 48-4-16 (1997); WIS. STAT. § 69.14 (2000); WYO. STAT. § 35-1-410 (1997), the others, with one exception, limit the legal recognition of intentional parenthood status to married couples. See Table 2, *infra*.

the law's failure to recognize the many nontraditional forms of the family that exist in society today.²⁷²

Fortunately, within the law of assisted reproduction itself lies the potential to redefine the family by granting unmarried individuals the privilege of becoming parents by pure intention. For some time now, courts and commentators have developed the concept of functional parenthood as a way to recognize the important relationships children often forge with individuals who function as their parents but who do not have that legal status.²⁷³ The concept focuses on the actions taken by the functional parent after the child is born. By contrast, the doctrine of intentional parenthood allows married couples to be declared parents at the moment of their child's birth though absent any evidence that they have "functioned" as parents through genetic or gestational contributions to the child.²⁷⁴ In such cases, it could be argued that marriage acts as a proxy for parental functioning much in the way it does in the Supreme Court's rights-of-unwed-fathers decisions.²⁷⁵ Since the concept of functional parenthood focuses on the time period *after* the child's birth, however, the doctrine of intentional parenthood appears devoid of any solid basis to justify its departure from established parentage doctrine.²⁷⁶ It would be reasonable, though, to read the doctrine of intentional parenthood as included within the scope of functional parenthood. This reading would allow the definition of the family to expand from within the law of assisted reproduction itself. To effect this reading will require an understanding of the concept of functional parenthood as inclusive of expressions of intention made before the child's birth. The result of this understanding will make intentional parenthood, even for the married, a less radical departure from parentage law generally and, more specifically, will undergird the argument for extending the privilege of intentional parenthood to the unmarried.

---

272. See *supra* note 9 and accompanying text.

273. See *infra* notes 465-544 and accompanying text.

274. See UNIF. PARENTAGE ACT art. 8, 9B U.L.A. 360-70 (2001).

275. See Shultz, *supra* note 17, at 342 ("Entry into legal marriage . . . signal[s] commitment sufficient to ground parenting responsibilities."), *but cf.* June Carbone, FROM PARTNERS TO PARENTS 126 (2000) (noting that "marriage implies no particular organization for meeting the needs of children").

276. See Garrison, *Interpretive Approach*, *supra* note 15, at 913.

A. The Theory And Statutory Recognition Of Intentional Parenthood

Although the law of assisted reproduction concerns itself with multiple issues arising from its use,²⁷⁷ it in large measure is concerned with defining the parentage of children born using assisted reproduction techniques.²⁷⁸ As was discussed in Part I, intentional parenthood is not just one of the pieces into which assisted reproduction fragments parentage. It can also serve as a tie-breaker between contending holders of the more traditional indicia of parenthood, namely, genetic and gestational contribution.²⁷⁹ What new realms will open through the use of this new theory of parenthood are as yet unknown. Certainly, the theory of intentional parenthood appears to hold out the promise of breaking free of the traditional definition of the family and recognizing alternative family forms.²⁸⁰ Its treatment to date in statutes and case law has, however, not pursued this direction.

Some commentators believe that developing the theory that parentage should vest in those who intended to raise the child will ameliorate the ideological conservatism of assisted reproduction law.²⁸¹ Perhaps the most significant articulations of this theory are those of Professors Marjorie Maguire Shultz and John Lawrence Hill, the two legal academics whose theories were cited favorably in *Johnson v. Calvert*.²⁸² In *Reproductive Technology and Intent-based Parenthood: An Opportunity for Gender Neutrality*,²⁸³ Shultz

---

277. See ROBERTSON, CHILDREN OF CHOICE, *supra* note 4, at 99-118 (listing "the scope and meaning of procreative liberty," "the status of preimplantation embryos," consumer protection, and funding and access); Lori B. Andrews & Nanette Elster, *Regulating Reproductive Technologies*, 21 J. LEGAL MED. 35, 36-45 (2000); Garrison, *Interpretive Approach*, *supra* note 15, at 843 n.29 (listing "commercialism, user/donor qualifications, and requirements for or bans on particular practices such as postmortem conception, sex selection, genetic manipulation, cloning, surrogacy, etc.").

278. See HARRY D. KRAUSE, FAMILY LAW IN A NUTSHELL 213 (1995).

279. See *Johnson v. Calvert*, 851 P.2d 776, 781 (Cal. 1993).

280. See *infra* notes 483-578 and accompanying text.

281. See DOLGIN, DEFINING THE FAMILY, *supra* note 23, at 94; WESTON, *supra* note 7, at 33 (noting that most scholarly studies "enthroned human procreation as kinship's ultimate referent"); *id.* at 210 (envisioning procreative kinship "as one subset of a larger kinship universe"); John A. Robertson, *Procreative Liberty and the Control of Conception, Pregnancy, and Childbirth*, 69 VA. L. REV. 405, 436 (1983) ("The right to noncoital, collaborative reproduction also includes the right of the parties to agree how they should allocate their obligations and entitlements with respect to the child. Legal presumptions of paternity and maternity would be overridden by this agreement of the parties."); Shultz, *supra* note 17, at 398 (advocating determining legal parenthood on the basis of intentional agreements).

282. See *Johnson*, 851 P.2d at 782-83.

283. See Shultz, *supra* note 16.

describes the new choices assisted reproduction has created and the enhanced role of intention in making procreative decisions.²⁸⁴ Given the importance of intention in assisted conception, Shultz believes that contracts will become significant devices in carrying out these arrangements.²⁸⁵ She defines intention as the direct, specific, purposeful and unambiguous link between voluntary behavior and outcome in the context of a set of alternatives from which to choose²⁸⁶ and proposes that the law of assisted conception, particularly as it relates to parentage determinations, strive to recognize "the legitimacy of individual efforts to project intentions . . . into the future."²⁸⁷ To best achieve this goal, Shultz proposes to make "bargained-for intentions determinative of legal parenthood"²⁸⁸ when assisted reproduction is used²⁸⁹ and to police these intentions through contract law's special protections against choices procured through overreaching or contrary to reasoned public policy.²⁹⁰ She sees the opportunity for the creation of nontraditional families increasing by these means "[b]ecause procreation and sexual-interpersonal intimacy are no longer tied together . . . ."²⁹¹ She also notes the gender neutrality of intention as a way for courts to determine parentage outside the constraints of gender stereotypes and biases.²⁹²

In addressing the question "who should be considered the parent in collaborative-reproduction arrangements," Professor John Lawrence Hill brings parental autonomy and procreational liberty to bear in his argument that intentional parents should prevail over biological or gestational contributors.²⁹³ He defines intentional parents as those "who initially intended to raise the child."²⁹⁴ To satisfy this definition, the intended parents must have planned to have a child before the conception of the child, must not have strayed from "morally permissible measures" for bringing the child into the world,

---

284. *See id.* at 300.

285. *See id.* at 325.

286. *See id.* at 307-310 ("The purpose of those who invoke new reproductive procedures is clear, specifically targetted and unambiguous."); *id.* at 396.

287. *Id.* at 302.

288. *Id.* at 323.

289. *See id.* at 324.

290. *See id.* at 346-69.

291. *Id.* at 315; *see also id.* at 344 ("If society were to recognize intention as a basis for claiming parenthood in circumstances of artificial reproductive techniques, intention-based variations in family form would likely be better tolerated and less problematic.").

292. *See id.* at 378-95 (discussing outcome of *Baby M.* case as a "missed opportunity for gender-neutral access to children").

293. Hill, *supra* note 17, at 357-58.

294. *Id.* at 356 n.12.

and must have acquired the "constructive consent of the child" by having met "minimally adequate conditions to be able to raise and care for the child."²⁹⁵ Hill supports his argument by positing that "[w]hat is essential to parenthood is not the biological tie between parent and child but the preconception *intention* to have a child, accompanied by the undertaking of whatever action is necessary to bring a child into the world,"²⁹⁶ "the preconception commitment of others" not to claim parental rights,²⁹⁷ and the need for certainty of parentage from the moment the child is conceived.²⁹⁸ In the course of his argument, Hill refutes several positions against elevating the importance of intention in parentage determinations.²⁹⁹

By and large, legislatures have not adopted Shultz's and Hill's theories. Although the majority of legislative enactments governing surrogacy simply outlaw the practice,³⁰⁰ a few states have passed statutes in the surrogacy context that recognize the parenthood of intending parents under certain circumstances.³⁰¹ But existing state statutes are unprepared to recognize parenthood by intention alone. As noted in Table 2, below, Florida, Nevada, New Hampshire and Virginia's statutes all contain provisions requiring at least one of the intending parents to be a genetic parent of the child.³⁰² In addition, these statutes require that the intending parents be married to each other.³⁰³ As such, these statutes suggest a basis fully apart from intention—marriage—for overriding the presumed parenthood of the gestational mother. Under New Hampshire's and Virginia's statutes, if traditional surrogacy is employed, then the intending father's sperm

---

295. *Id.*

296. *Id.* at 414.

297. *See id.* at 415.

298. *See id.* at 417-18 ("[T]he identity of the parents should be determinate *ab initio* from the time of conception.").

299. *See id.* at 388 (considering and rejecting a number of arguments that could be made for the priority of genetic donors or the gestational host over the claims of the intentional parents).

300. *See* Garrison, *Interpretive Approach*, *supra* note 15, at 851; Garrison, *Technological Family*, *supra* note 23, at 702.

301. *See* ARK. CODE ANN. § 9-10-201 (Michie 1998); FLA. STAT. ch. 742.13(2) (Harrison 2001); NEV. REV. STAT. 126.045(4)(a) (2001); N.H. REV. STAT. ANN. §§ 168-B:1(XII), 168-B:17(III) (1994); VA. CODE ANN. § 20-160(B)(9) (Michie 2000).

302. *See* FLA. STAT. ch. 742.13(2) (Harrison 2001); NEV. REV. STAT. 126.045(4)(a) (2001); N.H. REV. STAT. ANN. §§ 168-B:1(XII), 168-B:17(III) (1994); VA. CODE ANN. § 20-160(B)(9) (Michie 2000).

303. *See* FLA. STAT. ch. 742.15(1) (Harrison 2001); NEV. REV. STAT. 126.045(1) (2001); N.H. REV. STAT. ANN. §§ 168-B:1(VII), 168-B:21(II)(b) (1994); VA. CODE ANN. § 20-156 (Michie 2000). Arkansas's unusual statute contains no marriage requirement. *See* ARK. CODE ANN. § 9-10.201 (Michie 1998).

must be used.³⁰⁴ In Florida, any traditional surrogacy arrangement must follow the pattern for the adoption of a child and be judicially pre-approved.³⁰⁵ In addition, unlike the other state statutes, New Hampshire's statute employs an adoption model for *all* surrogacy cases, allowing the surrogate to keep the child if she so chooses within seventy-two hours after the birth of the child.³⁰⁶ These exceptions suggest a special concern for problems that may arise in the use of traditional surrogacy, problems that may not be adequately dealt with by the fact that the married couple may have made a genetic contribution to the child and that the couple is married.³⁰⁷

These statutes fail to provide an opportunity for parenthood by pure intention and instead seem to respond to the fragmentation of parenthood by forcing a tie between gestational and genetic parenthood and breaking the tie by locating intentional parenthood in a genetic contributor, one of the spouses of a married couple. In this way, the statutes validate the outcome of *Johnson v. Calvert*. In that case, though, a genetic contribution was made by *both* spouses.³⁰⁸ Genetic contribution by both spouses is not required under the statutes in question, although marriage of the intending parents *is* required. For the spouse who has contributed no genetics, then, it is her intention plus the fact of her marriage to a genetic contributor that secures her parenthood. If the purpose of the marriage requirement is to secure the parenthood of the non-contributor, the marriage of the intending parents would seem not to be an important factor in the outcome of cases like *Johnson*. In support of this reading of *Johnson*, developments in California whereby gay male or lesbian couples employing surrogate mothers may obtain pre-birth judgments of parentage regardless of their genetic contribution or marital status suggest that these indicia of parenthood are not particularly important to the courts of that state where there are

---

304. See N.H. REV. STAT. ANN. § 168-B:1(XII)(1994) ("Surrogacy" . . . means any arrangement by which a woman agrees to be impregnated using either the intended father's sperm, the intended mother's egg, or their preembryo with the intent that the intended parents are to become the parents of the resulting child after the child's birth."); VA. CODE ANN. § 20-160(B)(9)(Michie 2000) (requiring court to find that "[a]t least one of the intended parents is expected to be the genetic parent of any child resulting from the [surrogacy] agreement").

305. See FLA. STAT. ch. 63.212 (Harrison 2001).

306. See N.H. REV. STAT. ANN. § 168-B:25 (IV) (1994).

307. See UNIF. PARENTAGE ACT art. 8 cmt., 9B U.L.A. 361 (2001) (expressing special concern about traditional surrogacy).

308. See *Johnson v. Calvert*, 851 P.2d 776, 778 (Cal. 1993).

identifiable intentional parents.³⁰⁹ At this point in time, however, such an outcome under existing surrogacy statutes that recognize the parenthood of intending parents would be impermissible.

It is likewise unlikely that these statutes contemplate a scenario like that arising in *Buzzanca v. Buzzanca*.³¹⁰ Perhaps if the statutory language were construed broadly, then genetic contributions from third-party donors might be deemed sufficient to satisfy the requirement that at least one of the spouses contribute genetic material. The language of these statutes has yet to be construed either broadly or narrowly, but a broad construction appears unlikely, since the statutes already explicitly permit a married couple to obtain gametes from, at most, one third party. If, for instance, the wife is the sole genetic contributor, then plainly a third-party sperm donor is needed. These statutes, then, appear not to contemplate that both sets of gametes be obtained through third-party donors and thus that parenthood by pure intention, as validated in *Buzzanca*, be unavailable.

The new UPA reflects some aspects of these statutes but departs from others. Most remarkable is that the UPA explicitly validates the outcome in a case like *Buzzanca*³¹¹ if the surrogacy contract is judicially validated.³¹² Moreover, it allows for both traditional and gestational surrogacy but does not require that at least one intending parent be the genetic parent.³¹³ The UPA does require, however, that the intending parents be married.³¹⁴ The rationale for this is said to be that, given the controversial nature of surrogacy contracts, "the most worthy fact circumstances meriting legal recognition is the plight of

---

309. See Milena D. O'Hara & Andrew W. Vorzimer, *In re Marriage of Buzzanca: Charting a New Destiny*, 26 W. ST. U. L. REV. 25, 37 (1999) ("It should be noted that *Buzzanca* involved a married couple, but the court contemplated its future application to non-married couples, and, thus, potentially same-sex couples.") (citing *Buzzanca v. Buzzanca*, 72 Cal. Rptr. 2d 280, 287 n.11 (Ct. App. 1998)); Andrew W. Vorzimer, *The Egg Donor and Surrogacy Controversy: Legal Issues Surrounding Representation of Parties to an Egg Donor and Surrogacy Contract*, 21 WHITTIER L. REV. 415, 426 (1999) (reporting that attorneys in California "can obtain a birth certificate issued in the names of the intended parents, even if none of them are genetically related to the child.").

310. 72 Cal. Rptr. 2d 280 (Ct. App. 1998).

311. See UNIF. PARENTAGE ACT art. 8 cmt., 9B U.L.A. 360 (2001) ("An egg donor or a sperm donor, or both, may be involved [in a gestational agreement] . . .").

312. UNIF. PARENTAGE ACT § 801(c), 9B U.L.A. 362 (2001)

313. See UNIF. PARENTAGE ACT art. 8 cmt., 9B U.L.A. 361 (2001) ("[T]he restriction . . . that at least one of the intended parents would be genetically related to the child born of the gestational agreement has been eliminated.").

314. See UNIF. PARENTAGE ACT § 801(b), 9B U.L.A. 362 (2001).

childless married couples.”³¹⁵ Therefore, whereas it is possible under both the Arkansas and Florida statutes for an unmarried individual to become a parent via surrogacy even if that individual’s gametes are not used,³¹⁶ and whereas the UPA *removes* the requirement that one of the intending parents contribute gametes, it nonetheless *retains* the requirement that the intending parents be married.³¹⁷ This approach to surrogacy can be understood in one of two ways: (a) the arrangement of the intending parents for genetic contributions by third-party donors is considered the intending parents constructive genetic contribution; or (b) the fact of the intending parents’ marriage acts as a suitable substitute for any genetic contribution. Either of these readings is plausible.

First, consistent with *Buzzanca*, it is arguable that the UPA is not so concerned that there be a biological connection between the child and the intending parents as long as there is a tie between genetic and gestational contenders for parenthood that is then broken by intention.³¹⁸ The UPA, in contrast to surrogacy statutes but consistently with *Buzzanca*, considers that tie to be established not necessarily by direct genetic contribution by the intending parents themselves but by their arranging for third-party contributions of genetic material. This approach would allow a couple, both of whom are infertile, to have children by assisted conception, an opportunity unavailable under the terms of existing state statutes. Under the second reading, the UPA may merely be extending the notion, embodied in the state statutes—and in at least one state court

---

315. UNIF. PARENTAGE ACT § 801 cmt., 9B U.L.A. 363 (2001).

316. Under Florida law, this is possible only pursuant to a pre-planned adoption arrangement which allows the gestational mother to revoke her consent to place the child for adoption within seven days of the birth of the child. *See* FLA. STAT. ch. 63.212(i)(1)(b) (Harrison 2001). Arkansas appears to permit a single woman to become a mother via surrogacy without contributing her own egg, but the language of the statute makes this difficult to verify. *See* ARK. CODE ANN. § 9-10-201(b)(3) (Michie 1998) (“[T]he child shall be that of . . . [t]he woman intended to be the mother in cases of a surrogate mother when an anonymous donor’s sperm was utilized for artificial insemination.”).

317. Like some surrogacy statutes, the new UPA permits intending parents to enter enforceable surrogacy arrangements only where the wife is incapable of gestating a child. *See* UNIF. PARENTAGE ACT § 803(b)(2), 9B U.L.A. 364 (2001); *see also* Table 2, *infra*. The policy behind this requirement is to prevent a couple from choosing surrogacy merely “to avoid the inconvenience of a pregnancy.” UNIF. PARENTAGE ACT § 803 cmt., 9B U.L.A. 365 (2001).

318. *See* UNIF. PARENTAGE ACT art. 8 cmt., 9B U.L.A. 361 (2001) (“The practice of having a woman perform both functions is generally strongly disfavored by the assisted reproduction community. Experience has shown that the gestational mother’s link to the child sometimes creates additional emotional and psychological problems in enforcing a gestational agreement.”).

decision³¹⁹—that parenthood by pure intention is appropriate only where marriage can serve as a proxy for genetic contribution. Under this reading, parenthood by pure intention is a significant enough departure from traditional parentage principles that the source of the intending parents' genetic contribution is irrelevant as long as they are married to each other and can achieve pre-conception judicial validation of their surrogacy agreement.

A review of the statutes and proposed legislation leads to questions about the rights of unmarried individuals and single people to resort to assisted reproduction without the necessity of having to make a direct genetic contribution to the arrangement. While assuredly compelling, Shultz's and Hill's proposals to recognize intentional parenthood offer insufficient bases from which to launch a reform effort to expand existing regimes restricting the privilege of parenthood by pure intention to married couples. Most important, these proposals, although they mention the promise of legal recognition for nontraditional families,³²⁰ focus more squarely on the question of which parent should be chosen from among various contenders rather than on whether unmarried persons should be able to avail themselves of the status of parents by pure intention.³²¹ In raising the claims of nontraditional parents merely as a means of underscoring the importance of intentional parenthood generally,³²² these proposals give the legal system, committed as it is to the idea that rational distinctions drawn between married couples and unmarried individuals do not offend equal protection guarantees,³²³ little footing upon which to extend the privilege of parenthood by pure intention to nontraditional families.

---

319. See *Doe v. Doe*, 710 A.2d 1297, 1337 (Conn. 1998) (Katz, J., concurring in part and dissenting in part) (suggesting that the privilege of intentional parenthood ought not be operative outside the context of marriage).

320. See Shultz, *supra* note 17, at 346, 396.

321. See Hill, *supra* note 17, at 414-18 (arguing that intending parents "should trump the relatively weaker claims of either the gestational host or the biological progenitors"); Schultz, *supra* note 16, at 323 ("I argue for a new meta-rule that makes bargained-for intentions determinative of legal parenthood.").

322. See *id.* at 341-46 (examining how intentional parenthood would function in both marital and nonmarital families).

323. See Storrow, *supra* note 8.

Table 2: Statutory Regulation of Surrogacy

	Intending parents must be married.	Surrogate must be married.	Intending mother must lack capacity to gestate.	One intending parent must be genetic parent.	Surrogacy model contemplated	Judicial preapproval required.
Arkansas	No (only if there is only one intending parent)	No	No	No (for single woman or couple); Yes (for single man)	Traditional	No
Florida	Yes (unless pursuing pre- planned adoption K)	No	Yes	Yes	Gestational (pre- planned adoption K model is traditional)	No (yes for pre-adoption K)
Nevada	Yes	No	No	Yes	Gestational	No
New Hampshire	Yes	No	Yes	Yes	Gestational or Traditional	Yes
Virginia	Yes	Yes	Yes	Yes	Gestational or Traditional	Yes
Uniform Parentage Act (2000)	Yes	No	Yes	No	Gestational or Traditional	Yes

B. Unwed Fathers And Functional Families

In some respects, the struggle of unmarried persons to become parents by pure intention recalls the obstacles faced by unwed biological fathers who claim a right to a declaration of their paternity. The United States Supreme Court visited this question in several cases during the 1970s and '80s.³²⁴ Like the hypothetical case of

324. See *Stanley v. Illinois*, 405 U.S. 645 (1972); *Quilloin v. Walcott*, 434 U.S. 246 (1978); *Caban v. Mohammed*, 441 U.S. 380 (1979); *Lehr v. Robertson*, 463 U.S. 248 (1983);

unwed intentional parents, these cases pose the question whether a biological but unwed father has a right to recognition of his paternity for the purposes of blocking an adoption consented to by the mother.³²⁵ In general, the court held that if such a father does not marry the mother of his children, he must function as a parent toward them if he is to be entitled to an adjudication of his claim.³²⁶ An examination of these cases underscores the role that marriage plays in statutes that allow for the assignment of parenthood based on intention alone.

In *Stanley v. Illinois*,³²⁷ the first of these cases, Joan and Peter Stanley, although they never married, lived together with their children. When Joan died, the State of Illinois, enforcing a statute providing that "the children of unwed fathers become wards of the State upon the death of the mother,"³²⁸ removed the children from Peter and placed them in foster care. No such provision applied to unwed mothers or married fathers; they were presumed fit to raise their children³²⁹ and could not be deprived of them absent a showing, in a neglect proceeding, of their unfitness. Peter appealed from the dependency proceeding, claiming a violation of equal protection.³³⁰ Having achieved no success in the state courts, he brought his case to the United States Supreme Court. The Court reversed the adverse state court decisions, concluding that Peter had been deprived of due process, since "all Illinois parents are constitutionally entitled to a hearing on their fitness before their children are removed from their custody."³³¹ In addition, the Court found a clear equal protection violation in this case: denying Peter a hearing simply on the basis of his status as an unwed father was impermissible differential treatment from "other parents whose custody of their children is challenged . . . ."³³²

In the course of its analysis, the Court extolled the importance of the family whether or not legitimized by marriage,³³³ and described as one of its components "the interest of a parent in the companionship,

---

Michael H. v. Gerald D., 491 U.S. 110 (1989).

325. See DOLGIN, *DEFINING THE FAMILY*, *supra* note 23, at 98; KRAUSE ET AL., *supra* note 238, at 319.

326. See DOLGIN, *DEFINING THE FAMILY*, *supra* note 23, at 99, 119.

327. 405 U.S. 645 (1972).

328. *Id.* at 646.

329. See *id.* at 647.

330. See *id.*

331. *Id.* at 658.

332. *Id.*

333. See *id.* at 651.

care, custody, and management of his or her children.”³³⁴ Criticizing the state’s categorical definition of *all* unwed fathers as unfit parents, the Court declared Illinois’ summary dependency procedure insufficiently narrowly tailored to achieve what they felt without question was a compelling goal.³³⁵ To ensure the best interests of the child in every case, the Court declared it was not necessary categorically to define all unwed fathers as unfit parents.³³⁶

The dissent, using language later adopted in decisions that followed *Stanley*, looked at the case from a different angle. Deciding that the jurisdiction of the Court was limited to evaluating the equal protection claim, the dissent explained how on that basis the Illinois dependency proceeding scheme passed constitutional muster. It was perfectly reasonable, according to the dissent, for Illinois to accord unwed fathers differential treatment: having not entered into the marriage contract, a sign of willingness “to work together towards the common end of child rearing”³³⁷ and to assume “legally enforceable rights and duties”³³⁸ towards their children, and, moreover, not being “identifiable as the mother”³³⁹ but instead very often being absent from the birth and uninterested in child rearing,³⁴⁰ an unwed father could be required by the State to “ask for custody.”³⁴¹ In this way, the dissent believed the Illinois statutory scheme permissibly restricted an unwed father from achieving the status of a parent only if he failed to submit to “a formal proceeding comparable to the marriage ceremony.”³⁴²

The majority and the dissent were clearly at cross purposes in *Stanley*. The dissent focused most forcefully on the lack of legal proof of Peter’s paternity and how, without a legal adjudication of this paternity, there was no way for the State to verify that there was a “living adult with . . . legally enforceable obligation[s] for the care and support of the infant children.”³⁴³ The majority, on the other hand, implicitly found this emphasis on advance assurances that unwed fathers have assumed legally enforceable obligations with respect to their children irrelevant given that there was no issue of Peter’s

---

334. *Id.*

335. *See id.* at 652, 654-55, 657-58.

336. *See id.* at 656-57.

337. *Id.* at 661 n.1 (Burger, J., dissenting).

338. *Id.* at 663 (Burger, J., dissenting).

339. *Id.* at 663, 665 (Burger, J., dissenting).

340. *See id.* at 665-66 (Burger, J., dissenting).

341. *Id.* at 661 n.1 (Burger, J., dissenting).

342. *Id.*

343. *Id.* at 662 n.2 (Burger, J., dissenting).

paternity in the case and that, in fact, as even the dissent freely admitted, Peter had fully acknowledged his paternity and had assumed responsibility for his children.³⁴⁴

The *Stanley* dissent's characterization of unwed fathers as largely uninterested in the welfare of their children influenced the later unwed-father cases that came before the Court. In *Quilloin v. Walcott*,³⁴⁵ Leon Quilloin opposed the petition for adoption of his eleven-year-old child Darrell by Darrell's mother Ardell Walcott and her new husband Randall.³⁴⁶ Quilloin and Walcott had never married or lived together.³⁴⁷ In his response to the Walcotts's petition, Quilloin, who was subject to a child support obligation during the years leading up to the adoption proceeding,³⁴⁸ sought not only to block the adoption but to legitimate the child for inheritance purposes and to secure visitation rights.³⁴⁹

Under Georgia law, a child born out of wedlock could be adopted with the consent of the mother alone.³⁵⁰ For the unwed father to have any standing to object to the adoption, Georgia law required that he take affirmative steps to legitimate child.³⁵¹ In contrast, a child born in wedlock could not be adopted without the consent of both parents.³⁵² Applying these statutes, the trial court denied Quilloin standing to object to the adoption and also rejected his constitutional claims.³⁵³ The court likewise decided that it was in the best interest of Darrell to be adopted by Mr. Walcott and for Quilloin not to be allowed to legitimate Darrell or to have visitation rights.³⁵⁴ The trial court based this decision primarily on Quilloin's mere sporadic support of Darrell,³⁵⁵ his having had a "disruptive effect" on Ardell Walcott's new family,³⁵⁶ and Walcott's having married and having assumed custody of Darrell since his birth.³⁵⁷

Quilloin appealed his challenge of the statutes on constitutional grounds, but the Georgia Supreme Court affirmed, noting the state's

---

344. *See id.* at 662. (Burger, J., dissenting).

345. 434 U.S. 246 (1978).

346. *See id.* at 248.

347. *See id.*

348. *See id.* at 251 n.9, 256.

349. *See id.* at 247.

350. *See id.* at 248.

351. *See id.* at 249.

352. *See id.*

353. *See id.* at 251-52.

354. *See id.*

355. *See id.* at 251.

356. *Id.*

357. *See id.*

"policy of rearing children in a family setting"³⁵⁸ and emphasizing that Quilloin had never been a part of Darrell's family unit, defined by Walcott's marriage to Randall.³⁵⁹ On appeal to the United States Supreme Court, Quilloin launched equal protection and due process claims arguing "he was entitled to an absolute veto over adoption of his child, absent a finding of his unfitness as a parent"³⁶⁰ and that Georgia's statutory scheme treated him differently from married fathers.³⁶¹

Praising parenthood and "natural families,"³⁶² the Court distinguished Quilloin from the attentive father in *Stanley* and decided that the state's interest in validating the Walcott family by allowing the adoption of Darrell to take place significantly outweighed Quilloin's interest in being recognized as Darrell's father for the purpose of objecting to his adoption by Randall Walcott.³⁶³ Absent a showing that an unwed father ever had custody, as was shown in *Stanley*, or that "the proposed adoption would place the child with a new set of parents with whom the child had never before lived," the court found it untenable that someone in Quilloin's position had to be guaranteed an inquiry into his unfitness for parenthood before the adoption would be permitted.³⁶⁴ To make such a demand, the Court implied, was the height of selfishness: after all, everyone but Quilloin, including Darrell, wanted the adoption to proceed.³⁶⁵

With regard to Quilloin's equal protection challenge, the Court readily found compelling distinctions between Quilloin and married fathers, even fathers separated or divorced from their children's mothers, to justify affording him "less veto authority."³⁶⁶ Although Quilloin was under a child support obligation for the years prior to the adoption proceeding, he never did perform the duties incident to assuming actual or legal custody of a child, namely, duties regarding "daily supervision, education, protection, or care of the child."³⁶⁷ This contrasted significantly, in the Court's mind, with a married father

---

358. *Id.* at 252.

359. *See id.* at 252-53.

360. *Id.* at 253.

361. *See id.*

362. *Id.* at 255.

363. *See id.*

364. *See id.*

365. *See id.*

366. *Id.* at 256.

367. *Id.*

who had, by virtue of his marriage, "borne full responsibility for the rearing of his children," even if the marriage ultimately failed.³⁶⁸

Quilloin is a curious decision on many counts, including its seeming inattention to rigorous constitutional analysis. Particularly blatant is the Court's distinction of married fathers from unwed fathers based on unsupported presumptions about the relationship of marriage to childrearing. Citing no authority, the Court presumed that married fathers, even ones who later divorce the mothers of their children, have shouldered not only the responsibility of supporting their children financially but of performing daily supervision and care during the period of the marriage.³⁶⁹ This presumption recalls the presumption underlying the statute struck down in *Stanley* that *unwed* fathers have assumed *no* responsibility for their children, a presumption which was expressly disapproved by the Court in that case as any basis for establishing a regime of differential treatment for fathers based on their marital status.³⁷⁰ In *Quilloin*, though, *Stanley* was but briefly mentioned and quickly distinguished.³⁷¹ Instead of following *Stanley*, *Quilloin* echoed and expanded upon the dissent in *Stanley* in stating that "centuries of human experience" reveal the weak bonds between unwed fathers and the children produced as a result of their casual sexual encounters.³⁷² But even though it attempted not to align itself too completely with an analysis replete with empty generalizations, the Court in *Quilloin* succeeded only in sounding a shrill tone of arbitrariness.

Following *Quilloin*, the Supreme Court attempted to compensate for its unconvincing reasoning in *Caban v. Mohammed*.³⁷³ In that case, Abdiel Caban and Maria Mohammed never married but lived together as a family unit for seven years.³⁷⁴ During this time, Maria gave birth to two children, David and Denise.³⁷⁵ Caban and Mohammed then separated, and Mohammed retained custody of the children.³⁷⁶ Both parties subsequently married others,³⁷⁷ but Caban

---

368. *Id.*

369. *See id.*

370. *See Stanley v. Illinois*, 405 U.S. 645, 658 (1972).

371. *See Quilloin*, 434 U.S. at 247-48; CLARK, *supra* note 237, § 20.2, at 858 (commenting that *Quilloin*'s ignoring *Stanley* is "inexplicable").

372. *See Stanley*, 405 U.S. at 665.

373. 441 U.S. 380 (1979).

374. *See id.* at 382.

375. *See id.*

376. *See id.*

377. *See id.*

kept in close contact with his children.³⁷⁸ In a dispute over custody of the children, Mohammed and her husband Kazim were awarded custody, and Caban and his wife were allowed visitation.³⁷⁹ Subsequent to these events, the Mohammeds petitioned to adopt the children. The Cabans cross-petitioned to adopt them, but Mohammed withheld her consent.³⁸⁰ Under New York law, this effectively blocked the Caban's adoption petition.³⁸¹ Based on this law, and on its assessment that the Mohammeds were qualified to be parents and that adoption by them was in the children's best interests, the family court approved the Mohammeds' adoption petition.³⁸²

In the Supreme Court, Caban challenged the New York law on constitutional grounds, claiming that its differential treatment of unmarried mothers and unmarried fathers violated equal protection principles.³⁸³ Echoing one of Leon Quilloin's claims, Caban also challenged the law's denial of his due process right to "maintain a parental relationship with [his] children absent a finding that [he was] unfit as [a parent]."³⁸⁴

Emphasizing the law's grant of veto power to the mother of a nonmarital child but its denial of similar power to the father of such a child,³⁸⁵ the Court applied the substantial relationship test required of gender-based distinctions,³⁸⁶ and concluded that, although there might be significant differences between the relationship a child has with his mother and that which he has with his father when the child is an infant, there was no support either in the record or generally to suggest that as a child matures the maternal relationship remains of greater importance than the paternal.³⁸⁷ Thus disapproving of the notion that "some universal difference between maternal and paternal relations [exists] at every phase of a child's development," the Court rejected as irrelevant the state's argument that it could more efficiently promote adoptions of nonmarital children if the

---

378. *See id.* at 383.

379. *See id.*

380. *See id.* at 383-84.

381. *See id.* at 384.

382. *See id.*

383. *See id.* at 385.

384. *Id.*

385. *See id.* at 386-87.

386. *See id.* (citing *Craig v. Boren*, 429 U.S. 190, 197 (1976)).

387. *See id.* at 400. Notably, the Court did not analyze the question whether the distinction made in the statute between married and unmarried fathers was also unconstitutional. *See id.* at 394 n.16.

objections of unwed fathers did not have to be considered.³⁸⁸ According to the Court, the state could more appropriately encourage adoptions of nonmarital children by more carefully distinguishing between a father who “never has come forward to participate in the rearing of his child”³⁸⁹ and a father who has significant involvement with his child.³⁹⁰ The unacceptable arbitrariness of the law thus lay in its grounding in “‘overbroad generalizations,’”³⁹¹ the bane of gender-based classifications when viewed through the lens of equal protection.³⁹²

Four justices dissented in *Caban*, their remarks focusing most directly on “promoting the welfare of illegitimate children”³⁹³ by making them “legitimate” through adoption. Granting veto power to only one biological parent in such cases, the dissent felt, would promote such adoptions.³⁹⁴ By thus emphasizing the best interests of children, it was easy for the dissenting justices to see their way to depriving unwed fathers of rights guaranteed to married fathers and unwed mothers. According to the dissent, even unwed fathers like *Caban* who have ongoing relationships with their children are due only standing to be heard during the best interests phase of the adoption hearing.³⁹⁵ For the dissent, “the absence of a legal tie with the mother” was determinative of the entitlement of unwed fathers to fewer constitutional protections in this context:

Parental rights do not spring full-blown from the biological connection between parent and child. They require relationships more enduring. The mother carries and bears the child, and in this sense her parental relationship is clear. The validity of the father’s parental claims must be gauged by other measures. By tradition, the primary measure has been the legitimate familial relationship he creates with the child by marriage with the mother.³⁹⁶

---

388. *Id.* at 389-90. New York likewise argued that marriage would be thwarted by granting the unwed father a veto power, since the mothers’ new husbands would think twice about marrying them if they discovered they could not adopt the mothers’ children. *See id.* at 390-91.

389. *Id.* at 392.

390. *See id.* at 393.

391. *Id.* at 394 (quoting *Califano v. Goldfarb*, 430 U.S. 199, 211 (1977); *Stanton v. Stanton*, 421 U.S. 7, 14-15 (1975)).

392. *See United States v. Virginia*, 518 U.S. 515, 533 (1996).

393. *Caban*, 441 U.S. at 395 (Stewart, J., dissenting).

394. *See id.* at 400 (Stewart, J., dissenting) (“If the consent of both unwed parents were required, and one withheld that consent, the illegitimate child would remain illegitimate.”).

395. *See id.* at 396 (Stewart, J., dissenting).

396. *Id.* at 397 (Stewart, J., dissenting).

The dissent in *Caban* sought to establish more of a bright-line rule in the rights-of-unwed-father cases than did the majority. In contrast to the result reached by the majority (in which searching analyses of the facts would be required in every case), the *Caban* dissent would offer equivalent constitutional protection only to fathers who marry the mothers of their children: "[b]y definition, the question before us can arise only when no such marriage has taken place."³⁹⁷ Although the dissent approved of *Stanley* only insofar as the stark presumption of unfitness in that case afforded an unwed father *no* right to be heard before his children were removed from him, it nonetheless felt that *Caban*'s failure to marry Mohammed cast him amongst the majority of unwed fathers who are "simply uninterested" in their children.³⁹⁸ Additionally, since most adoptions are of infants or very young children³⁹⁹ and thus since their mothers are likely to be caring for them at the time of their adoption,⁴⁰⁰ "a rule that gives the mother of the newborn infant the exclusive right to consent to its adoption" is justified.⁴⁰¹ These factors rendered the dissent unprepared to define whatever differential treatment *Caban* received in this case as constitutionally infirm.⁴⁰²

Though, having made up for its unsatisfactory analysis in *Quilloin*, the Supreme Court nonetheless granted certiorari to hear the fourth in this line of cases. In *Lehr v. Robertson*,⁴⁰³ Lorraine Robertson married Richard Robertson eight months after giving birth to Jonathan Lehr's child Jessica.⁴⁰⁴ Although Lorraine never denied that Lehr was Jessica's father,⁴⁰⁵ and in fact represented that he was,⁴⁰⁶ Lehr was not the presumed father of the child, had not been adjudicated the father, and did not enter his name in the state's putative father registry.⁴⁰⁷ Given these circumstances, and although Lehr had made efforts to visit Jessica and to support her financially,⁴⁰⁸ when Jessica was over two years old and Lorraine and her new husband petitioned to adopt her, Lehr did not receive notice of their

---

397. *Id.*

398. *Id.* at 398 (Stewart, J., dissenting).

399. *See id.* at 404 (Stevens, J., dissenting).

400. *See id.* at 405 (Stevens, J., dissenting).

401. *Id.* at 407 (Stevens, J., dissenting).

402. *See id.* at 394-95 (Stevens, J., dissenting).

403. 463 U.S. 248 (1983).

404. *See id.* at 250.

405. *See id.* at 268 n.1 (White, J., dissenting).

406. *See id.* at 269 (White, J., dissenting).

407. *See id.* at 251.

408. *See id.* at 269 (White, J., dissenting).

petition.⁴⁰⁹ One month later, Lehr filed a paternity petition in another county.⁴¹⁰ When he attempted to stay the adoption proceeding pending the determination of the paternity petition, he was informed that the adoption had already been finalized.⁴¹¹ He then petitioned to vacate the order of adoption "on the ground that it was obtained by fraud and in violation of his constitutional rights."⁴¹² This petition was denied, and both the Appellate Division and the New York Court of Appeals affirmed.⁴¹³

Lehr's constitutional challenge to the New York statutory scheme claimed that its failure to guarantee him proper notice of the adoption proceeding deprived him of his liberty interest, without due process of law, in a relationship with his child.⁴¹⁴ Lehr also brought an equal protection claim, charging differential treatment based on gender.⁴¹⁵ In a lengthy opinion, the Supreme Court affirmed the lower courts' decisions. In assessing Lehr's due process claim, the Court considered *Stanley*, *Quilloin*, and *Caban*.⁴¹⁶ The Court, relying heavily on Justice Stewart's dissent in *Caban*, declared that the existence of an unwed father's liberty interest in maintaining a relationship with his biological child depends on his assumption of an "actual relationship of parental responsibility."⁴¹⁷ The Court observed that, although marriage to the child's mother guarantees an unwed father the liberty "to maintain his or her parental relationship,"⁴¹⁸ in the absence of marriage, such a liberty exists only in the context of "the father's actual relationship with the children."⁴¹⁹ Having neither married Mildred nor maintained a relationship with his daughter Jessica, and having not taken advantage of New York's comprehensive statutory scheme established to protect his interests,⁴²⁰ the Court considered Lehr, as distinguished from Peter Stanley and Caban,⁴²¹ to possess no substantive due process right to maintain a parental relationship with his child.⁴²² This was especially true in light

---

409. *See id.* at 250-51.

410. *See id.* at 252.

411. *See id.* at 253.

412. *Id.*

413. *See id.* at 253-54.

414. *See id.* at 255.

415. *See id.*

416. *See id.* at 258-61.

417. *Id.* at 260.

418. *Id.*

419. *Id.* at 260 n.16.

420. *See id.* at 263.

421. *See id.* at 261.

422. *See id.* at 263.

of the fact that, as did Darrell's adoption in *Quilloin*, Jessica's adoption by the Robertsons had the effect of giving "full recognition to a family unit already in existence . . . ." ⁴²³

The Court asserted Lehr's equal protection claim could only succeed where there is true similarity of situation between the classes receiving differential treatment.⁴²⁴ The Court felt this could not be said to be the case where one of the parents, Quilloin or Lehr for instance, "has either abandoned or never established a relationship"⁴²⁵ with his child. Although the *Caban* court visited this very same issue, the *Lehr* court implied that *Caban* was not retroactive.⁴²⁶ Nonetheless, the *Lehr* court distinguished *Caban* in its evaluation of Lehr's equal protection claim.⁴²⁷

Three justices dissented in *Lehr*, finding a due process violation in the state's failure to notify Lehr where it had "actual notice of his existence, whereabouts, and interest in the child."⁴²⁸ The dissent objected strenuously to the majority's selective use of facts and, on the basis of these facts, its assessment that Lehr had no liberty interest in a relationship with his child; moreover, the dissent objected to the majority's failure to recognize that Lehr's biological parenthood per se entitled him to notice, regardless of the quality of his relationship with Jessica.⁴²⁹ Finally, the dissent decried the sheer formalism of presuming Lehr to have abandoned Jessica when he had unequivocally made his claim to paternity known by filing a paternity action.⁴³⁰

Professor Dolgin sees a development in the position the Court assumed in the unwed father cases from one grounded in the notion that "fathers become fathers because they establish relationships with their children" and one based on the ideologically more conservative notion that "fathers become fathers because they are connected to the mothers of their children."⁴³¹ Dolgin writes: "the fathers in

---

423. *Id.* at 263 n.19 (quoting *Quilloin v. Walcott*, 434 U.S. 246, 255 (1978)).

424. *See id.* at 267.

425. *Id.* at 267-68 (citations omitted).

426. *See id.* at 254, 255 n.8.

427. *See id.* at 267.

428. *Id.* at 268.

429. *See id.* at 272.

430. *See id.* at 275.

431. *See* DOLGIN, *DEFINING THE FAMILY*, *supra* note 23, at 98. Professor Carbone describes these two positions as presenting "the two faces of responsible fathering: either the ability to create, in one form or another, a 'unitary family' that unites mom and dad in complementary roles or a father's ability to perform the essential attributes of mothering and fathering himself." Carbone, *supra* note 275, at 175.

Stanley and *Caban* effected relations that adequately resembled families with the children's mothers and the fathers in *Quilloin* and *Lehr* did not."⁴³² Dolgin's examination of the United States Supreme Court's unwed father cases has direct bearing on the question of whether the privilege of parenthood by pure intention should be extended to the unmarried. While the issue undeniably has a constitutional dimension, that topic has been ably discussed by others.⁴³³ The following discussion instead focuses on the parallels between the unwed-father decisions and determinations of parentage made in the context of assisted reproduction.

One salient parallel is between *Stanley* and *Buzzanca*. Peter Stanley objected to being compelled by the state to adopt his own children or to petition for legal custody of them after their mother's death.⁴³⁴ This recalls Luanne Buzzanca's claim that her maternity should be recognized simply by virtue of her having set in motion the events which brought about the birth of the child and without resort to an adoption proceeding initiated *after* the child's birth in which Luanne's parental fitness would be assessed.⁴³⁵ The lower courts in both cases were remarkably resistant to any expansion of the definition of presumed legal parenthood to include unwed fathers or intentional mothers and, as a result of this resistance, approved, in *Buzzanca*, of labelling the child a legal orphan⁴³⁶ and, in *Stanley*, of summarily removing the children from the father they had known and placing them in the custody of others.⁴³⁷ To these courts, neither Buzzanca nor Stanley qualified for parenthood without formalized adjudication because neither possessed acceptable factual indicia of that status.

Without being distracted by the circularity of this argument, it is important to recognize the emphasis it places on the relationship between marriage and biological connection in the assignment of parentage. For the lower courts, despite his genetic relationship with his children, Stanley had no entitlement to parentage because he was unmarried.⁴³⁸ Similarly, Buzzanca had no entitlement to parentage because, though married, she had no biological connection with

---

432. *Id.* at 110.

433. See generally ROBERTSON, CHILDREN OF CHOICE, *supra* note 4, at 143-44.

434. See *Stanley v. Illinois*, 405 U.S. 645, 647-49 (1972).

435. See *Buzzanca v. Buzzanca*, 72 Cal. Rptr. 2d 280, 289 (Cal. Ct. App. 1998) (criticizing adoption model of surrogacy).

436. See *id.* at 282.

437. See *Stanley*, 405 U.S. at 646.

438. See *id.* at 646-47.

Jaycee.⁴³⁹ Had Stanley been married, the presumption of his paternity would have attached fully apart from his genetic relationship with his children.⁴⁴⁰ Had Buzzanca been Jaycee's genetic or gestational mother, she would have had a cognizable claim to motherhood fully apart from the fact of her marriage.⁴⁴¹ In neither case would *both* a genetic tie and marriage have been required. And yet, this is precisely the scheme that the state statutes embody.⁴⁴² Seen in this light, intended parenthood under existing statutes seems less like a new type of parenthood than like a codification of the traditional biological-connection and marital-presumption indicia of parentage, leaving intention little role to play if either spouse lacks both of these indicia.

The UPA, discarding the genetic relatedness factor,⁴⁴³ nonetheless requires intentional parents to be married.⁴⁴⁴ This would suggest that marriage is essential as a prerequisite to claiming the privilege of parenthood by pure intention but that genetic relatedness is not. This departure from the terms of existing statutes can be understood in one of two ways. First, the arrangement of the intending parents for the genetic contribution by third-party donors may be considered the intending parents' constructive genetic contribution. To pursue this legal fiction a little further would be to consider the surrogate the wife's agent for gestation. The resulting child would be a child of the marriage, and the wife's husband would thus benefit from the marital presumption of paternity. In short, the lack of a genetic contribution requirement in the UPA might simply be a recognition of the fact that, looked at in just the right way, a surrogacy arrangement to which neither member of a married couple contributes genetic material is very similar to the case of a married couple who creates a child via coitus. Read in these terms, the UPA resembles existing statutes in that it does not create a truly new type of parenthood.⁴⁴⁵ Unlike the statutes, however, the UPA achieves the

---

439. See *Buzzanca*, 72 Cal. Rptr. 2d at 282 ("[Luanne] could not be the mother because she had neither contributed the egg nor given birth.").

440. See CLARK, *supra* note 237, § 4.4 at 191 (discussing presumption of legitimacy of child born to married woman).

441. See *Johnson v. Calvert*, 851 P.2d 776, 779 (Cal 1993) ("[W]e conclude that presentation of blood test evidence is one means of establishing maternity, as is proof of having given birth . . .").

442. See *supra* notes 294-300 and accompanying text.

443. See UNIF. PARENTAGE ACT art. 8 cmt., 9B U.L.A. 361 (2001).

444. See UNIF. PARENTAGE ACT § 801(b), 9B U.L.A. 362 (2001).

445. See Garrison, *Interpretive Approach*, *supra* note 15, at 874, 880-81; Garrison, *Technological Family*, *supra* note 23, at 691.

particularly humane result of allowing a couple, both of whom are infertile, to become parents via a judicially validated expression of their intentions.

The second possible reading of the UPA is that it simply discards the genetic relatedness requirement and makes marriage a prerequisite to intentional parentage because marriage is a suitable substitute for any genetic relationship a married couple might have with their child. In this way, marriage serves as a proxy for parental responsibility fully apart from any genetic connection. This reading presents intentional parentage as a type of parentage that has *not* been recognized before.⁴⁴⁶ Recognizing that intentional parenthood is

---

446. The closest analogy is adoption. *See* Garrison, *Interpretive Approach*, *supra* note 15, at 907 (explaining that adoption agencies favor married couples and “allow[] single-parent adoptions only in the case of hard-to-place children . . .”); Shultz, *supra* note 17, at 319-21. *But see* Garrison, *Interpretive Approach*, *supra* note 15, at 861 (“Even in cases of adoption . . . intentions are insufficient to effect a rights transfer; a showing of compliance with other state requirements designed to protect the child’s and parties’ interests must also be made.”).

Although the requirement that a surrogacy agreement be judicially validated pre-conception appears to force the parties into an adoption-like posture in order to effect the terms of the agreement, it should be noted that the process is only “roughly analogous to adoption procedures,” UNIF. PARENTAGE ACT § 803 cmt., 9B U.L.A. 364 (2001), in requiring “the intended parents [to] meet the standards of fitness applicable to adoptive parents,” UNIF. PARENTAGE ACT § 803(b)(3), 9B U.L.A. 364 (2001). Unlike adoption provisions, if this requirement is waived, no evaluation of the intending parent takes place. *Cf.* UNIF. ADOPTION ACT § 2-201(b), 9 U.L.A. 40 (1999) (“A court may excuse the absence of a preplacement evaluation for good cause shown, but the prospective adoptive parent so excused must be evaluated during the pendency of the proceeding for adoption.”). This gestational agreement can nonetheless be validated, and, if it is, “the court *must* declare that the intended parents will be the parents of any child born pursuant to, and during the term of, the agreement.” UNIF. PARENTAGE ACT § 803 cmt., 9B U.L.A. 365 (2001) (emphasis added). This declaration vests parentage in the intended parents, and, after the birth of the child, the court merely “confirm[s] that the intended parents are the parents of the child.” UNIF. PARENTAGE ACT § 807(a)(1) CMT., 9B U.L.A. 368 (2001). These provisions contrast sharply with adoption provisions which allow a parent to revoke her consent to the adoption of her child or her relinquishment of her child to an agency for the purposes of adoption within a certain amount of time after the birth of the child, *see* UNIF. ADOPTION ACT §§ 2-408(a)(1), 2-409(a)(1), 9 U.L.A. 60, 62 (1999), and make the parent and child relationship of the adoptive parent and the adoptee contingent upon termination, after the child’s birth, of the parent and child relationship of the consenting or relinquishing parent and her child, *see* UNIF. ADOPTION ACT §§ 1-104, 3-505(1), 9 U.L.A. 23, 89-90 (2001). Only if a gestational agreement is not validated by the court does full resort to adoption provisions become necessary to carry out its terms. *See* UNIF. PARENTAGE ACT § 809 cmt., 9B U.L.A. 369 (2001). These salient differences between gestational agreements and adoption are underscored by Commissioner Harry Tindall’s comment during the floor debate on the UPA’s limitation of gestational agreements to married couples that “[w]e’re not into adoption law in this act.” Uniform Parentage Act (2000) (with Unofficial Annotations by John J. Sampson, Reporter), 35 FAM. L. Q. 83, 204 (2001).

a significant departure from traditional parentage principles, this reading takes the position that for this reason intentional parenthood *should* be reserved to married couples.⁴⁴⁷

No matter which reading of the UPA is undertaken, under its terms, unmarried couples and singles cannot choose to become parents by intention alone. In the search for an analytical framework that would suggest an entitlement on the part of unmarried individuals to the privileges of intentional parenthood, it bears noting that, with intention having replaced genetics as the indicium of parentage, the role of marriage in the second reading of the UPA provisions remains unclear. It is true that surrogacy agreements are "controversial" and that "the plight of childless married couples" is disconcerting.⁴⁴⁸ But the childlessness of those who wish to have children, married or not, is uniformly disconcerting.⁴⁴⁹ Perhaps the marriage requirement is meant to ensure that the intending parents are very serious about their intentions and will be responsible for the child.⁴⁵⁰ It is not, however, clear that unmarried parents are *not* serious about their offspring, although the fact that they are unmarried may make their commitment a little more difficult to discern.⁴⁵¹ Statements to this effect in the unwed-father cases, if applied in this context, suggest that unmarried couples may labor under a presumption that they will shirk their responsibility to provide for their intended child.⁴⁵²

There are at least two arguments to be made in favor of recognizing the parentage of unmarried intending parents. One is that if marriage is a requirement so as to guarantee a support obligation, then the unmarried are on equal footing with the married, because they are similarly legally obligated to support their children. Second, intent to rear a child constitutes an element of parental functioning that entitles unmarried intending parents to recognition of their parentage.

---

447. See UNIF. PARENTAGE ACT § 801 cmt., 9B U.L.A. 362-63 (2001) (noting the "controversial nature of these agreements").

448. UNIF. PARENTAGE ACT § 801 cmt., 9B U.L.A. 363 (2001).

449. See Garrison, *Interpretive Approach*, *supra* note 15, at 910 (acknowledging with pathos single women "who deeply want a child").

450. See Shultz, *supra* note 17, at 342 ("Entry into legal marriage...signal[s] commitment sufficient to ground parenting responsibilities").

451. See *Stanley v. Illinois*, 405 U.S. 645, 661 n.1 (1972). (Burger, C.J., dissenting) (noting "no legally cognizable signification of willingness" from unwed parents to accept responsibility for child).

452. See *id.*; *Quilloin v. Walcott*, 434 U.S. 246, 256 (1978); *Caban v. Mohammed*, 441 U.S. 380, 397 (1979) (Stewart, J., dissenting).

The concern that unmarried intending parents will not be fully bound to support the child they wish to rear is unfounded, because intentional parenthood guarantees a support obligation. To qualify at all for intentional parenthood, intending parents must embody their intentions in a written document, and, under the UPA and in some states, must submit this document to the court for judicial pre-approval.⁴⁵³ If they fail to do so, the document is enforceable according to traditional parentage and adoption principles⁴⁵⁴ or is unenforceable.⁴⁵⁵ Nonetheless, the intending parents may still be liable for support if they refuse to adopt the child.⁴⁵⁶ Moreover, if the intending parents fail to comply with the terms of the agreement, their obligation to support the child is unaffected.⁴⁵⁷ Thus, even if an individual intending parent's intentions toward the child changed, he would not be relieved of his support obligation. Similar obligation attaches if the marriage of the intending parents ends in separation or divorce.⁴⁵⁸ In short, both married and unmarried intending parents have "borne full [parental] responsibility"⁴⁵⁹ in "an actual relationship of parental responsibility,"⁴⁶⁰ entitling them to recognition of their parentage. The concern that a child might be left without a claim to the resources of a private individual, as was threatened by the trial court's decision in *Buzzanca*, is non-existent in the context of parenthood by pure intention, and so an intending parent, even an unmarried one, cannot be likened to with a parent who presumptively

---

453. See UNIF. PARENTAGE ACT § 801(a), 9B U.L.A. 362 (2001) (providing that agreement must be in writing); UNIF. PARENTAGE ACT § 803, 9B U.L.A. 364 (2001) (explaining requirements for judicial pre-approval of gestational agreement); FLA. STAT. ANN. ch. 63.212(1)(i) (West Supp. 2001) (providing for review by the court of pre-planned adoption arrangements and requiring filing of petition in connection with pre-planned adoption agreement); FLA. STAT. ANN. ch. 63.212(1)(i)(2) (West Supp. 2001) (outlining required terms of pre-planned adoption agreement); N.H. REV. STAT. ANN. § 168-B:21, § 168-B:25 (1994) (laying out judicial preauthorization provisions and mandatory signed surrogacy contract terms); VA. CODE ANN. § 20-159 (Michie 2000) (providing for validity of written surrogacy contracts); VA. CODE ANN. § 20-160 (Michie 2000) (judicial preauthorization provision).

454. See VA. CODE ANN. § 20-158(E), § 20-162 (Michie 2000).

455. See UNIF. PARENTAGE ACT § 809(a), 9B U.L.A. 369 (2001).

456. See UNIF. PARENTAGE ACT art. 8 cmt., 9B U.L.A. 361 (2001) ("[I]ndividuals who enter into nonvalidated gestational agreements and later refuse to adopt the resulting child may be liable for support of the child."); UNIF. PARENTAGE ACT § 809(c), 9B U.L.A. 369 (2001).

457. See N.H. REV. STAT. ANN. § 168-B:8(IV) (1994) ("A breach of a surrogacy contract by the intended parents shall not affect their support obligation.").

458. See VA. CODE ANN. § 20-158(C) (Michie 2000).

459. *Quilloin v. Walcott*, 434 U.S. 246, 256 (1978).

460. *Lehr v. Robertson*, 463 U.S. 248, 260 (1983).

shirks responsibility for her child.⁴⁶¹ If marriage is a suitable proxy for one's willingness to assume responsibility for a child,⁴⁶² certainly the pursuit of intentional parenthood status is no less suitable. In light of these principles, marriage has no critical role to play in solidifying support obligations under the UPA. While marriage does appear to have an important role to play under traditional rules of parentage, any role it might play in the intentional parenthood context seems little more than redundant.

C. Reading Intent As Function

An analogy drawn by Shultz is relevant to the second argument in favor of recognizing the intentional parenthood of unmarried couples. Shultz compares the nature of the intention expressed by an intending parent in a surrogacy agreement with the functional aspects of fatherhood discussed in Supreme Court unwed-father cases.⁴⁶³ Shultz highlights the analogy, without developing it in any detail, in order to emphasize an aspect of the *Baby M.* case that could have inspired the court to pursue greater gender parity in rendering that decision.⁴⁶⁴ The development of this analogy has important ramifications for the second argument favoring intentional parenthood for the unmarried, for it suggests a basis upon which an intending parent might be recognized as a child's parent at the moment of a child's birth, regardless of that parent's marital status.

What the unwed-father cases conclude, through their insistence that marriage is a suitable proxy for "real, everyday ties that provide a connection" between a child and his parents,⁴⁶⁵ is that marriage acts as a substitute for functional parenting.⁴⁶⁶ The rule that a child born to a marriage is the child of the spouses certainly has some appeal in that a child born to a marriage is the responsibility of the spouses.⁴⁶⁷ This

---

461. See Shultz, *supra* note 17, at 376, 390 (contrasting fathers commissioning surrogate births with unwed fathers who are uninterested in their children).

462. See *Quilloin*, 434 U.S. at 256.

463. See Shultz, *supra* note 17, at 391 (analogizing intentions embodied in surrogacy agreements with "developed relationship" described in unwed-father cases); *id.* at 323 (commenting that an intent to parent enhances the functional aspects of parenting). See also Hurwitz, *supra* note 28, at 129 (defining intent to rear a child as a component of functional motherhood).

464. See Shultz, *supra* note 17, at 392 (describing *Baby M.* as "lock[ing] in fathers' sex-based lack of access to children" and "reinforc[ing] separate gendered spheres in the world").

465. See *Nguyen v. I.N.S.*, 533 U.S. 53 (2001).

466. See *Quilloin v. Walcott*, 434 U.S. 246, 256 (1978).

467. See *Levin v. Levin*, 645 N.E.2d 601, 605 (Ind. 1994) (holding spouses have obligation to support child of the marriage).

doctrine seems particularly appealing where there may be some doubt about the child's lineage, since it requires even non-biological fathers to provide support for the child.⁴⁶⁸ The same policy ends would seem to be met in the assisted reproduction context by merely altering the bases upon which a child may be considered a child of the marriage, that is, by requiring neither genetic nor gestational contribution to the child but merely intent to raise her.⁴⁶⁹ Although the state statutes are not yet prepared to take a step in this direction,⁴⁷⁰ perhaps because it is such a radical departure from traditional parentage law, the UPA is.⁴⁷¹

The thrust of the second argument is that intent should be an element of parental functioning so as to entitle unmarried persons to pursue parenthood by pure intention. The concept of functional parenthood has been gaining increasing currency in American legal scholarship and in the courts.⁴⁷² Scholars and jurists have developed this concept under various headings,⁴⁷³ among them functional parent,⁴⁷⁴ de facto parent,⁴⁷⁵ *in loco parentis*,⁴⁷⁶ equitable estoppel,⁴⁷⁷

---

468. See *id.* (holding child conceived by heterologous artificial insemination a child of the marriage).

469. See *id.* (child was child of the marriage where both spouses "were fully informed and consented" to heterologous artificial insemination of wife).

470. See Table 2, *supra*.

471. See UNIF. PARENTAGE ACT art. 8 cmt., 9B U.L.A. 361 (2001) ("[T]he restriction . . . that at least one of the intended parents would be genetically related to the child born of the gestational agreement has been eliminated.").

472. See, e.g., *In re J.W.F.*, 799 P.2d 710, 715 n.4 (Utah 1990) (commenting that one's relationship with a child may warrant standing to seek custody); see also OR. REV. STAT. § 109.119 (1989) (permitting award of custody, guardianship or visitation to one who has "ongoing personal relationship" with a child).

473. See *V.C. v. M.J.B.*, 725 A.2d 13, 32 n.14 (N.J. Super. App. Div. 1999) (Braithwaite, J., concurring in part and dissenting in part) (listing the terms that are often used in this context as including psychological parent, *in loco parentis*, de facto parenthood, equitable parenthood and functional parent), *aff'd*, 748 A.2d 539, 546 n.3 (N.J. 2000).

474. See Nancy D. Polikoff, *The Deliberate Construction of Families Without Fathers: Is It an Option for Lesbian and Heterosexual Mothers?* 36 SANTA CLARA L. REV. 375, 387-88 (1996) (quoting Amicus Brief of the American Civil Liberties Union, *Thomas S. v. Robin Y.*, 618 N.Y.S.2d 356 (N.Y. App. Div. 1994) (No. P3884/91)) (defining functional parent) [hereinafter Polikoff, *Deliberate Construction*].

475. See *Stitham v. Henderson*, 768 A.2d 598, 605-06 (Me. 2001) (citing *E.N.O. v. L.M.M.*, 711 N.E.2d 886, 891 (Mass. 1999) (Saufley, J., concurring); AMERICAN LAW INST., PRINCIPLES OF THE LAW OF FAMILY DISSOLUTION: ANALYSIS AND RECOMMENDATIONS § 2.03(1)(c) (Tentative Draft No. 4, Apr. 10, 2000, adopted May 16, 2000) [hereinafter PRINCIPLES]); *Burks*, *supra* note 95, at 245.

476. See *Burks*, *supra* note 95, at 247.

477. See PRINCIPLES, *supra* note 475, at § 2.03(1)(b); *Simmons v. Comer*, 438 S.E.2d 530, 537 (W. Va. 1993); *Thomas S.*, 618 N.Y.S.2d at 362 ("Having initiated and

emotional or psychological parent,⁴⁷⁸ equitable parenthood,⁴⁷⁹ and nonexclusive parenthood.⁴⁸⁰ All of these terms relate in some way or another to the profile of the psychological parent described in Goldstein, Freud and Solnit's *Beyond the Best Interests of the Child*:

A psychological parent is one who, on a continuing, day-to-day basis, through interaction, companionship, interplay, and mutuality, fulfills the child's psychological needs for a parent, as well as the child's physical needs. The psychological parent may be a biological, . . . adoptive, foster, or common-law . . . parent, or any other person.

There is no presumption in favor of any of these after the initial assignment at birth . . . .⁴⁸¹

In a series of writings, Professor Nancy Polikoff has examined numerous bases for expanding legal recognition of the family beyond "a rigid definition of parenthood that often fails to recognize the reality of children's actual relationships with parenting figures."⁴⁸² In *This Child Does Have Two Mothers: Redefining Parenthood To Meet the Needs of Children in Lesbian-Mother and Other Non-traditional Families*, Polikoff argues that "[a] new definition of parenthood is necessary to adapt to the complexities of modern families."⁴⁸³ In particular, Polikoff disapproves of legal rules that withhold recognition from families not created by marriage, procreation or adoption and that thus compromise the best interests of many children whose families have been formed in other ways.⁴⁸⁴ In the

---

encouraged, over a substantial period of time, the relationship between petitioner and his daughter, respondent is estopped to deny his right to legal recognition of that relationship."); Burks, *supra* note 95, at 247.

478. See *LaChapelle v. Mitten*, 607 N.W.2d 151, 164 (Minn. Ct. App. 2000); *Ettore I. v. Angela D.*, 513 N.Y.S.2d 733, 739 (N.Y. App. Div. 1987); *V.C. v. M.J.B.*, 748 A.2d 539, 546 n.3 (N.J. 2000) ("The terms psychological parent, *de facto* parent, and functional parent are used interchangeably . . . . Psychological parent is the preferred term.").

479. See *Atkinson v. Atkinson*, 408 N.W.2d 516, 519, 520 (Mich. Ct. App. 1987) (holding willingness of nonbiological father, among other things, entitled him to recognition of his equitable parenthood); Burks, *supra* note 95, at 252.

480. See Burks, *supra* note 94, at 254.

481. JOSEPH GOLDSTEIN, ANNA FREUD & ALBERT J. SOLNIT, *BEYOND THE BEST INTERESTS OF THE CHILD* 98 (2d ed. 1979). See Harris, *supra* note 95, at 461 n.1 (remarking that many functional parenthood theories are based on the definition of a psychological parent).

482. David L. Chambers & Nancy D. Polikoff, *Family Law and Gay and Lesbian Family Issues in the Twentieth Century*, 33 FAM. L.Q. 523, 538 (1999).

483. Nancy D. Polikoff, *This Child Does Have Two Mothers: Redefining Parenthood To Meet the Needs of Children in Lesbian-Mother and Other Nontraditional Families*, 78 GEO. L.J. 459, 471 (1990) [hereinafter Polikoff, *Two Mothers*].

484. See *id.* at 469, 482.

course of her analysis, Polikoff defines a functional parent as "anyone who maintains a relationship with a child when a legally recognized parent fostered that relationship with the intent that the relationship be parental in nature."⁴⁸⁵ Expanding on these concepts, Polikoff has in her more recent scholarship worked through the legal details of creating families headed by same-sex couples through the use of contracts and theories of equitable parenthood.⁴⁸⁶ In forthcoming work, she will advocate using contracts to fortify the rights of intentional parents as against gamete donors or surrogates.

Polikoff's approach to achieving legal recognition for functional parents differs from Professor Katharine Bartlett's. Bartlett advocates use of the best interests of the child standard to allow non-parents to gain certain rights with respect to children with whom they have important relationships.⁴⁸⁷ The reason why Bartlett is in favor of legal recognition of functional parents is due to the high incidence of caretaking that occurs outside the confines of the nuclear families model.⁴⁸⁸ She theorizes that the failure of the law to recognize functional parenthood is rooted in "the premise that parenthood is exclusive."⁴⁸⁹ This premise is most damaging, she writes, for its failure to recognize a "child's need for continuity in intimate relationships."⁴⁹⁰ Although neither makes the point directly, both Polikoff's and Bartlett's accounts of functional parenthood are helpful in addressing the concept that functional parenthood status may arise before legal parents are identified, that is, prior to a child's birth, and that it thus may serve as a basis for articulating a theory of parenthood by pure intention.

Cases addressing functional parenthood illustrate that the idea that an individual can achieve certain rights associated with parenthood based on that individual's having functioned in a parent-like role is common not only in cases of unwed fatherhood but in cases in which a lesbian couple, one of whom is recognized as the legal parent of a child either through blood or adoption, dissolve their relationship. In such a case, the non-parent partner may seek either

---

485. *Id.* at 464.

486. See Polikoff, *Deliberate Construction*, *supra* note 474; Nancy D. Polikoff, *The Social Construction of Parenthood in One Planned Lesbian Family*, 22 N.Y.U. REV. L. & SOC. CHANGE 203 (1996).

487. See Bartlett, *supra* note 22, at 944-61, *cited in* Polikoff, *Two Mothers*, *supra* note 483, at 473 n.51. Cf. Hurwitz, *supra* note 28, at 168-79 (arguing that a best interests of the child standard should drive the determination of legal maternity in surrogacy cases).

488. Bartlett, *supra* note 22, at 881.

489. *Id.*

490. *Id.*

custody or visitation based on her having served as a functional or psychological parent to the child.⁴⁹¹ In addressing this type of claim, courts in California, Florida, Illinois, and New York have rejected the concept of functional parenthood.⁴⁹² Massachusetts and Rhode Island, by contrast, have recognized functional parenthood in this context.⁴⁹³

In both *Nancy S.* and *Alison D.*, a lesbian couple were raising children who were biologically related to only one of the members of the couple.⁴⁹⁴ In each of these cases, the couple's relationship had lasted a number of years,⁴⁹⁵ and during it they had planned for and carried out having children via artificial insemination.⁴⁹⁶ In each case, one of the women was impregnated and bore the children.⁴⁹⁷ In *Nancy S.*, the children bore their non-biological mother's last name, and she was listed on their birth certificates as their father.⁴⁹⁸ In *Alison D.*, the child bore his non-biological mother's name as his middle name.⁴⁹⁹ In both cases, the women shared the responsibilities of raising the children.⁵⁰⁰ Not long after the unions dissolved, the biological mother in each case asserted a right of parental autonomy entitling her to bar her former partner from visiting the children.⁵⁰¹ In *Nancy S.*, the girl was at that time seven and one-half years of age and the boy three and one-half.⁵⁰² In *Alison D.*, the boy was already six years old.⁵⁰³ The California court rejected Nancy S.'s theory that she

---

491. See, e.g., *E.N.O. v. L.M.M.*, 711 N.E.2d 886, 893 (Mass. 1999) (partner granted visitation based on status as *de facto* parent); *V.C. v. M.J.B.*, 748 A.2d 539, 555 (N.J. 2000) (former partner satisfied psychological parent test entitling her not to custody but to visitation); *A.F. v. D.L.P.*, 771 A.2d 692, 699 (N.J. Super. Ct. App. Div. 2001) (former partner could not meet test of psychological parenthood); see also Ruthann Robson, *Making Mothers: Lesbian Legal Theory & the Judicial Construction of Lesbian Mothers*, 22 WOMEN'S RTS. L. REP. 15, 23-24 (2000) (surveying jurisdictions).

492. See, e.g., *Nancy S. v. Michele G.*, 279 Cal. Rptr. 212 (Cal. Ct. App. 1991); *Curiale v. Reagan*, 272 Cal. Rptr. 520 (Cal. Ct. App. 1990); *Kazmierczak v. Query*, 736 So. 2d 106 (Fla. Dist. Ct. App. 1999); *In re C.B.L.*, 723 N.E.2d 316 (Ill. App. Ct. 1999); *Alison D. v. Virginia M.*, 572 N.E.2d 27 (N.Y. 1991).

493. See, e.g., *E.N.O. v. L.M.M.*, 711 N.E.2d 886 (Mass. 1999); *Rubano v. DiCenzo*, 759 A.2d 959 (R.I. 2000).

494. See *Nancy S.*, 279 Cal. Rptr. at 214; *Alison D.*, 572 N.E.2d at 28.

495. See *Nancy S.*, 279 Cal. Rptr. at 214 (commenced 1969, dissolved 1985); *Alison D.*, 572 N.E.2d at 28. (commenced 1977, dissolved 1983).

496. See *Nancy S.*, 279 Cal. Rptr. at 214; *Alison D.*, 572 N.E.2d at 28.

497. See *Nancy S.*, 279 Cal. Rptr. at 214; *Alison D.*, 572 N.E.2d at 28.

498. See *Nancy S.*, 279 Cal. Rptr. at 214.

499. See *Alison D.*, 572 N.E. 2d at 28.

500. See *Nancy S.*, 279 Cal. Rptr. at 214; *Alison D.*, 572 N.E.2d at 28.

501. See *Nancy S.*, 279 Cal. Rptr. at 214; *Alison D.*, 572 N.E.2d at 28.

502. See *Nancy S.*, 279 Cal. Rptr. at 214.

503. See *Alison D.*, 572 N.E.2d at 28.

had parental rights arising from her de facto parenthood.⁵⁰⁴ The New York court dismissed Alison D.'s petition for visitation, because she was not the boy's parent, and Virginia M. was not unfit.⁵⁰⁵

On appeal, both non-biological mothers were said to lack standing to contest custody or to request visitation because they did not meet the definition of a parent under the relevant statutes.⁵⁰⁶ Although in *Nancy S.* the court discussed theories upon which non-biological and non-adoptive parents obtain legal recognition as parents,⁵⁰⁷ the court in *Alison D.* merely mentioned these theories without explaining their substance.⁵⁰⁸ Ultimately, these theories were rejected by both courts as incapable of investing the petitioners in these cases with the same rights as natural or adoptive parents.⁵⁰⁹

More recently, courts have responded more favorably to the theories raised but not adopted in *Nancy S.* and *Alison D.* In *E.N.O. v. L.M.M.*,⁵¹⁰ factually similar to *Nancy S.* and *Alison D.*, a committed lesbian couple planned and prepared to have a child through artificial insemination.⁵¹¹ The boy born to the couple bore both of their last names.⁵¹² At the time of their separation, the boy was three years old.⁵¹³ At that time, the boy's biological mother prevented E.N.O. from seeing him.⁵¹⁴ E.N.O. then sued for visitation and was granted temporary visitation pending trial.⁵¹⁵ The trial court found it significant that the parties had jointly planned and prepared for the birth of the child and that E.N.O. had acted as his parent, with the result that the boy viewed her as such.⁵¹⁶ The trial court's order of temporary visitation was reversed on appeal by the intermediate appellate court, but the Supreme Judicial Court of Massachusetts reinstated the trial court's order.⁵¹⁷

The Supreme Judicial Court was of the opinion that, though no specific statutory authority existed for the trial court's order, the

---

504. See *Nancy S.*, 279 Cal. Rptr. at 214.

505. See *Alison D.*, 572 N.E.2d at 29.

506. See *Nancy S.*, 279 Cal. Rptr. at 214; *Alison D.*, 572 N.E.2d at 29.

507. See *Nancy S.*, 279 Cal. Rptr. at 216-19 (de facto parenthood, in loco parentis, parenthood by equitable estoppel, functional parenthood).

508. See *Alison D.*, 572 N.E.2d at 29 (de facto parenthood, parenthood by estoppel).

509. See *Nancy S.*, 279 Cal. Rptr. at 216, 217; *Alison D.*, 572 N.E.2d at 29.

510. *E.N.O. v. L.M.M.*, 711 N.E.2d 886 (Mass. 1999).

511. See *id.* at 888.

512. See *id.* at 889.

513. See *id.* at 888-89.

514. See *id.* at 889.

515. *Id.*

516. *Id.*

517. See *id.* at 888.

order was proper as an exercise of that court's broad equity powers to protect the best interests of children.⁵¹⁸ In particular, the court approved of considering "the child's nontraditional family"⁵¹⁹ and, in support, cited sections of the American Law Institute's *Principles on the Law of Family Dissolution* defining a de facto parent as "one who has no biological relation to the child, but has participated in the child's life as a member of the child's family. The de facto parent resides with the child and, with the consent and encouragement of the legal parent, performs a share of caretaking functions at least as great as the legal parent."⁵²⁰ In the course of its decision, the court distinguished a precedent involving a failed claim of equitable parenthood on the ground that that case did not involve a "decision to create a family by bringing [a] child into the world."⁵²¹

*Rubano v. DiCenzo*⁵²² was a case of similar magnitude. In that case, Maureen Rubano and Concetta DiCenzo were a committed couple who planned and prepared to have a child via artificial insemination.⁵²³ Eventually, DiCenzo gave birth to a baby boy whose last name was listed on his birth certificate as "Rubano-DiCenzo."⁵²⁴ The couple then separated, and DiCenzo moved with the boy to another state.⁵²⁵ Although Rubano initially enjoyed visitation with DiCenzo's consent, eventually tensions mounted to the point where DiCenzo resisted Rubano's visits.⁵²⁶ At that time, the boy was approximately five years old.⁵²⁷

Rubano sued to establish her de facto parenthood and court-ordered visitation, and the parties reached a compromise permitting Rubano to have visitation but requiring her to waive any claim to parentage.⁵²⁸ In spite of the compromise, DiCenzo continued to undermine Rubano's attempts to exercise her visitation rights. When Rubano returned to court for relief, DiCenzo argued the court had never possessed the jurisdiction necessary to issue the visitation order

---

518. *See id.* at 889-90.

519. *Id.* at 891.

520. *Id.* (citing AMERICAN LAW INSTITUTE, PRINCIPLES OF THE LAW OF FAMILY DISSOLUTION § 2.03(1)(b) (Tentative Draft No. 3 Part I, 1998)).

521. *Id.* at 891 (citing *C.M. v. P.R.*, 649 N.E.2d 154 (Mass. 1995)).

522. *Rubano v. DiCenzo*, 759 A.2d 959 (R.I. 2000).

523. *See id.* at 961.

524. *Id.*

525. *See id.*

526. *See id.*

527. *See id.*

528. *See id.* at 962.

in the first instance.⁵²⁹ The trial court certified the issues in the case to the Rhode Island Supreme Court for resolution.⁵³⁰

The Rhode Island Supreme Court decided Rubano's visitation claim was cognizable for three reasons. Although the committed relationship Rubano and DiCenzo had shared did not qualify as a "family relationship" regarding which the court had jurisdiction to decide questions of equity,⁵³¹ Rubano qualified as an "interested party" under a Rhode Island provision vesting the family court with jurisdiction to determine "the existence or nonexistence of a mother and child relationship."⁵³² In addition, Rubano could seek redress in equity for DiCenzo's violation of the visitation ordered by the family court.⁵³³ Finally, Rubano could petition the superior court given its "original jurisdiction [to hear] suits and proceedings of an equitable character."⁵³⁴ Turning to DiCenzo's parental autonomy claims, the court was of the opinion that a biological parent's autonomy, while entitled to "special weight," may be insufficient to "prevent others from acquiring parental rights vis-a-vis the child"⁵³⁵ and that, when this happens, "the household of unmarried parents and their children"⁵³⁶ deserves recognition.

Like *E.N.O.*, Rubano relied on the American Law Institute's (ALI) *Principles of the Law of Family Dissolution*.⁵³⁷ Chapter Two of the *Principles*, for which Bartlett was a reporter, deals with child custody.⁵³⁸ The *Principles* seek to accommodate today's wider diversity of family norms and, while perhaps not explicitly adopting Polikoff's proposal, nonetheless contain its spirit. In brief, the *Principles* recognize not only legal parents but also parents by estoppel and de facto parents—both species of functional parents. Like Polikoff, the *Principles* give due regard to the autonomy of legal parents, but prevent them, under certain circumstances, from raising

---

529. See *id.* at 962-63.

530. See *id.* at 963.

531. See *id.* at 964. The court found the family court's jurisdiction limited to such matters of equity as arose from "petitions for divorce, bed and board and separate maintenance." See *id.* at 965.

532. *Id.* at 966 (quoting R.I. GEN. LAWS § 15-8-26 (1956)).

533. See *id.* (citing R.I. GEN. LAWS § 8-10-3(a) (1956)).

534. *Id.* at 972 (quoting R.I. GEN. LAWS § 8-2-13 (1956)).

535. *Id.* at 974 (citing *Troxel v. Granville*, 530 U.S. 57, 68 (2000)).

536. *Id.* at 973 (quoting *Michael H. v. Gerald D.*, 491 U.S. 110, 123 n.3 (1989)).

537. See *id.* at 974-75 (citing *PRINCIPLES*, *supra* note 475); see also *E.N.O. v. L.M.M.*, 711 N.E.2d 886, 891 (Mass. 1999) (citing *AMERICAN LAW INSTITUTE, PRINCIPLES OF THE LAW OF FAMILY DISSOLUTION: ANALYSIS AND RECOMMENDATIONS* (Tentative Draft No. 3, May 1998)).

538. See *PRINCIPLES*, *supra* note 475, at § 2.03, § 2.21.

the evidentiary hurdle of proving unfitness against non-legal parents' requests for custody or visitation. A parent by estoppel under the *Principles* is not a legal parent but is someone who has "acted as a parent under certain specified circumstances which serve to estop the legal parent from denying the person's status as a parent."⁵³⁹ The specified circumstances under which one achieves this status include

A person who has lived with the child since birth, holding out and accepting full and permanent responsibilities as a parent, as part of a prior co-parenting agreement with the child's parent (or, if there are two legal parents, both parents) to raise the child together with full parental rights and responsibilities, when the court finds that recognition is in the child's best interests . . . .⁵⁴⁰

This particular method of achieving parent by estoppel status "contemplates a situation in which two cohabiting adults—whether of the same-sex or different-sex—set out to raise a child together fully and permanently, and then perform those parenting functions."⁵⁴¹ An example would be a lesbian couple who jointly decide to raise a child together and arrange for one of them to conceive through artificial insemination.⁵⁴² These are the facts of *Nancy S., Alison D., E.N.O. and Rubano*.

A de facto parent under the *Principles* is one who is neither a legal parent nor a parent by estoppel.⁵⁴³ This parental status requires the individual to have lived with the child for at least two years⁵⁴⁴ and to have been allowed to co-parent by the child's legal parent⁵⁴⁵ or to have responded to the "complete failure or inability of any legal parent to perform caretaking functions."⁵⁴⁶ The de facto parent must also have undertaken an equal or greater share of caretaking than did the child's legal parent.⁵⁴⁷ Caretaking functions encompass parenting functions and also include "tasks that involve interactions with the child or that direct, arrange, and supervise the interaction and care

539. See *id.* at § 2.03(1)(a) cmt. b-i.

540. See *id.* at § 2.03(1)(b)(iii).

541. See *id.* at § 2.03(1)(b)(iii) cmt. b-iii. "Parenting functions" encompasses providing economic support and maintaining the household. See *id.* at § 2.03(6).

542. See *id.* at § 2.03(1)(b)(iii) illus.

543. See *id.* at § 2.03(1)(c).

544. See *id.* at § 2.03(1)(c)(i).

545. This agreement requires "an affirmative act or acts by the legal parent that demonstrates a willingness and an expectation of shared parenting responsibilities." See *id.* at § 2.03(1)(c) cmt. c-iii.

546. See *id.* at § 2.03(1)(c)(ii).

547. See *id.* at § 2.03(1)(c)(ii)(A)-(B).

provided by others.”⁵⁴⁸ These responsibilities cannot have been undertaken primarily for financial compensation.⁵⁴⁹

As in other cases where parental unfitness has been confirmed or is irrelevant, the *Principles* take the position that where a de facto parent has been identified, a best interests standard should apply in a contest between the de facto and the natural or adoptive parent. These developments have not been without their critics. At a recent symposium on the *Principles*, several voices decried the de facto parent and parenthood by estoppel provisions of Chapter Two, Section Three, finding these provisions a subversion of the traditional family.⁵⁵⁰ Other critiques of functional parenthood have more generally focused on the inherent incapacity of the case-by-case approach required to assess it to achieve “parity between traditional and non-traditional relationships . . . .”⁵⁵¹

The importance of the ALI’s *Principles* lies in the opportunity it affords to consider the legal basis for extending the privilege of parenthood by pure intention to the unmarried. The most promising avenue to pursue is to attempt to define intent as subsumed within the concept of functional parenthood that the *Principles*, *E.N.O.* and *Rubano* advance. If intention can be read as function, then marriage is arguably as unnecessary to intentional parenthood as it is to functional parenthood. The emerging doctrine of functional parenthood lends support to this position. Notably, under the *Principles*, the fact that *E.N.O.* and *Rubano* had both participated in planning and preparing for the conception of their children would, standing alone, be of little significance. For both parenthood by estoppel and de facto parenthood status, the *Principles* require the agreement of a legal parent to allow either co-parenting⁵⁵² or the formation of a parent-child relationship.⁵⁵³ Moreover, both statuses require that the parent have lived with the child.⁵⁵⁴ Before the conception of a child there is no identifiable legal parent and no opportunity to live with the child, and so no basis for the recognition

---

548. See *id.* at § 2.03(5).

549. See *id.* at § 2.03(1)(c)(ii).

550. See, e.g., Carolyn Graglia, *A Non-Feminist’s Perspectives of Mothers and Homemakers under Chapter 2*, 2001 BYU L. REV. 993, 995, 996, 1002.

551. *Family Resemblance*, *supra* note 95, at 1641; see also Martha Minow, *Redefining Families: Who’s in and Who’s Out?* 62 U. COLO. L. REV. 269, 276-84 (1991) (discussing problems with the functional approach).

552. See *PRINCIPLES*, *supra* note 475, at § 2.03(1)(b)(iii).

553. See *id.* at § 2.03(1)(c)(ii).

554. See *id.* at § 2.03(1)(b)(iii) (“since birth”); *id.* at § 2.03(1)(c)(i) (“for a significant period of time not less than two years”).

of parenthood by estoppel or of de facto parental rights exists. Thus, since the *Principles* do not recognize non-biologically-linked parentage rights arising solely from events occurring before the birth of a child, they provide rather infertile ground upon which to extend the privilege of intentional parenthood to the unmarried.⁵⁵⁵

Courts have looked at the concept of functional parenthood a little more expansively than the ALI, and these developments *are* supportive of reading intent as function. In particular, the argument made by Nancy S. that she qualified for de facto parenthood because she had helped facilitate the conception and birth of the couple's two children,⁵⁵⁶ rejected by the court in her case,⁵⁵⁷ was compelling to the court in both *E.N.O.* and *Rubano*. In *Rubano*, this fact solidified Rubano's status as an adult "involved with paternity of children born out of wedlock."⁵⁵⁸ The court opined:

Allegedly, Rubano was "involved with" the child's paternity in that DiCenzo's artificial insemination occurred only pursuant to her "joint decision [with Rubano] to bear a child and to raise said child together." Moreover, Rubano not only allegedly helped to plan and arrange for DiCenzo's conception of the child via artificial insemination from an anonymous donor, she also averred that she was primarily responsible for the financial costs associated with this procedure.⁵⁵⁹

In *E.N.O.*, this fact not only bolstered E.N.O.'s claim, but enabled it to survive in light of a Massachusetts precedent disfavoring an individual who failed to achieve de facto parenthood status largely *because* "he had not been part of the decision to create a family by bringing the child into the world."⁵⁶⁰ In contrast, wrote the court, "the plaintiff before us was intimately involved in the decision to bring the child into the world."⁵⁶¹

---

555. Parents by pure intention could be deemed legal parents under the *Principles* if they were "defined as a parent under other state law." See *id.* at § 2.03(1)(a). At the present time, such recognition appears possible only for single women in Arkansas. See ARK. CODE ANN. § 9-10-201(b)(3), § 9-10-201(c)(1)(C) (Michie 1987).

556. See *Nancy S. v. Michele G.*, 279 Cal. Rptr. 212, 216 (Cal. Ct. App. 1991)

557. See *id.*

558. *Rubano v. DiCenzo*, 759 A.2d 959, 971 (R.I. 2000) (quoting R.I. GEN. LAWS § 8-10-3(a) (1956)).

559. *Id.* at 971.

560. *E.N.O. v. L.M.M.*, 711 N.E.2d 886, 891 (Mass. 1999) (citing *C.M. v. P.R.*, 649 N.E.2d 154, 154 (Mass. 1995)); see also ROBERTSON, CHILDREN OF CHOICE, *supra* note 4, at 135 n.46 (commenting that "her role in making conception and birth possible . . ." among other things, "may independently be worth protecting").

561. *Id.*

It was clear in both *E.N.O.* and *Rubano* that the planning for and preparation to conceive a child by artificial insemination was very significant—and in *E.N.O.* virtually determinative—to convince the court to bestow functional parenthood status upon the non-biological mother of the child.⁵⁶² These cases illustrate that functional parenthood can encompass the realm of pure intention in which a child is not yet conceived. At that point in time, the requirement of an agreement to co-parent by an otherwise legally recognized parent would not be operative. Indeed, both intending parents would occupy equivalent legal positions. Naturally, this fact alone does not answer all of the questions that would be relevant in this context. For example, the quality of the intention that would carry legal weight would have to be clarified. In particular, courts would likely demand that the quality of the intention be at least equivalent to what married couples are assumed to possess. Significantly, what intentional parenthood plainly demonstrates that marriage cannot is a dimension of functional parenthood that the law should demand of all parent-child relationships. In the unwed-father cases, marriage is said to guarantee parental functioning.⁵⁶³ But the obligation of spouses toward children of the marriage is essentially a financial one.⁵⁶⁴ Marital status, by itself, does not require parents to function in other appropriate ways as parents. By contrast, to clear the hurdle of not having married his children's mother, an unwed father must show that he has not only accepted responsibility for his children but that he has functioned as a parent in other appropriate ways.⁵⁶⁵ A functioning father not only provides financial support for his children but also "initiates positive, consensual interactions with [his children] on a regular basis."⁵⁶⁶ Since intended parents can make a strong showing of functioning whether they are married or not, they possess a promising legal basis for claiming the privilege of parenthood by pure intention.

The decision of the *E.N.O.* majority to bestow de facto parental status on *E.N.O.* based in part on her having helped plan for the birth

---

562. Notably, in *A.C. v. M.J.B.*, 748 A.2d 539 (N.J. 2000), the Court found it irrelevant to the qualification of the non-biological mother as the children's psychological parent that she did not participate in the decision to conceive the children. See *id.* at 545.

563. See, e.g., *Quilloin v. Walcott*, 434 U.S. 246, 256 (1978).

564. See 59 AM. JUR. 2D *Parent and Child* § 41 (1987); 67A C.J.S. *Parent & Child* § 49 (1978).

565. See *Quilloin*, 434 U.S. at 256.

566. Jill Hantley Anderson, *The Functioning Father: A Unified Approach to Paternity Determinations*, 30 J. FAM. L. 847, 865-67 (1992).

of her son was not lost on the dissent, which characterized the majority's reliance on this fact as bordering on the facetious:

[S]urely events occurring during the child's life are more relevant to the child's well-being than decisions or arrangements concluded between the mother and her partner before the child's birth. By giving weight to this factor, the court makes evident that it is not the child's interests that motivates this decision, but a desire to acknowledge and give status to the arrangements made between the plaintiff and the mother before the child was even conceived.⁵⁶⁷

The dissent suggested it would be better to grant judicial recognition to same-sex unions and to regulate E.N.O.'s parentage claim with that of a divorcing spouse.⁵⁶⁸ This approach "would at least place quite distinct limits, analogous to those now familiar to the law, on the otherwise utterly amorphous authority the court seems to bestow today."⁵⁶⁹ The dissent appears not to have appreciated that in the gestational surrogacy context, even where a married couple has contributed no genetic material but has arranged for such contribution through third parties, events that take place before the child's birth and even before the child's *conception* are determinative of the child's legal parentage.⁵⁷⁰ At first blush, cases like *E.N.O.* and *Rubano*, where one party contributes genetic material and gestates the child, would appear to bear little resemblance to cases where married couples resort to gestational surrogacy. Nonetheless, had E.N.O. and L.M.M. and *Rubano* and DiCenzo elected to pursue gestational surrogacy instead of artificial insemination, their claim to parenthood by pure intention would have been no less substantial than it was in those cases.⁵⁷¹ Their claim would be made on the basis of pure intention, as nothing else about the arrangement, not even marriage, would operate to secure it.⁵⁷² Before the conception of the child, neither spouse is the legal parent. After conception, having contributed no genetic material, neither has a claim to biological

---

567. *E.N.O. v. L.M.M.*, 711 N.E.2d 886, 896 (Mass. 1999) (Fried, J., dissenting).

568. *See id.* at 898 (Fried, J., dissenting).

569. *Id.*

570. *See, e.g., Buzzanca v. Buzzanca*, 72 Cal. Rptr. 2d 280, 291 (Cal. Ct. App. 1998) (holding that "consenting to an act which brings a child into being" determines parentage).

571. *See* UNIF. PARENTAGE ACT. § 202, 9B U.L.A. 309 (2001) ("A child born to parents who are not married to each other has the same rights under the law as a child born to parents who are married to each other."); *Rubano v. DiCenzo*, 759 A.2d 959, 973, 974 (R.I. 2000) (citing *Michael H. v. Gerald D.*, 491 U.S. 110, 123 n.3 (1989)) (construing "unmarried parents" as inclusive of same-sex couples).

572. *See* O'Hara & Vorzimer, *supra* note 309, at 37 (remarking that the result in *Buzzanca* did not rest on the marital status of the couple).

parenthood.⁵⁷³ Marriage does nothing to enlarge whatever parentage claims are held after conception, because no marital presumption or "child of the marriage" designation would apply on these facts.⁵⁷⁴ Intention alone qualifies this couple to be considered the child's parents and, in some jurisdictions, would entitle them to a pre-birth determination of parentage.⁵⁷⁵ In short, investing legal significance in pre-birth events is at the root of intentional parentage. Parenthood by intention in this context is equivalent to parenthood by genetics, gestation or marital presumption. Under the UPA in particular, it is equivalent to these methods and in no way dependent on them.

As we have seen, intentional parenthood, unlike functional parenthood, is a type of parenthood that does not depend on the permission of a legally recognized parent. In fact, intentional parenthood is a substitute for genetic, gestational or marital-presumption parenthood. It is used to assign legal parenthood in derogation of established norms, from the moment of the child's birth or even before it and is not, as are the ALI's doctrines of parentage by estoppel and de facto parentage, a theory that allows parenthood only based on the permission of a parent already legally recognized. As *E.N.O.* makes clear, the definition of functional parenthood encompasses the realm of pure intention in which a child is not yet conceived. At that point in time, a requirement of an agreement to co-parent by an otherwise legally recognized parent would be unnecessary because both intending parents would be in the same legal position. Their intentions may reflect mere willingness to be a parent⁵⁷⁶ or they may be unambiguous manifestations of their choice and purposefulness.⁵⁷⁷ However intention should best be defined, the law is beginning to recognize that intentions matter. Given that the marriage of intending parents in no way affects the quality of their intentions or of their characterization as an aspect of functional

---

573. See *Johnson v. Calvert*, 851 P.2d 776, 782 (Cal. 1993) (recognizing "genetic consanguinity and giving birth as means of establishing" parentage).

574. See TEX. FAM. CODE ANN. § 151.002(a)(1) (Vernon 1996) (providing that the presumption of paternity attaches when man is married to biological mother when she gives birth); *Doe v. Doe*, 710 A.2d 1297, 1316 (Conn. 1998) (defining "child of the marriage" as limited to a child conceived by both parties, a child adopted by both parties, a child born to the wife and adopted by the husband, a child conceived by the husband and adopted by the wife, and a child born to the wife and conceived through artificial insemination by a donor).

575. See Vorzimer, *supra* note 309, at 426 ("Parental rights can be finalized [in California] through a pre-birth judgment process.").

576. See Shultz, *supra* note 17, at 378.

577. See *id.* at 310.

parenthood, the reservation of the privilege of parenthood by pure intention to the married is unjustified.⁵⁷⁸

Conclusion

The severance of parenthood into genetic, gestational and intentional components creates indeterminacy of legal parentage. Judicial responses to this indeterminacy, concerned with adhering to the demands of *stare decisis*, have undertaken a futile search for bodies of precedent that would lead to reasoned outcomes in all cases and have reverted to old forms of defining parentage with awkward results. Legislation, both proposed and enacted, allows married couples alone to depart from age-old ways of defining parentage and to expand their families through assisted reproduction via the sole medium of their intention to rear the resulting child.

With the advent of familial arrangements and of reproductive technology that well-established methods of determining parentage address unsatisfactorily, the law has responded by recognizing functional and intentional parents as parents in some cases. Although the debate over the legal status of functional parents has not been without controversy, it can nonetheless inform a theory about who intentional parents are or should be. To date, intentional parenthood has been a status accorded only to married couples who are incapable of bearing children by traditional means. This approach to intentional parenthood is perpetuated in the revised UPA, leaving large segments of society, who have important procreative choices to make, excluded from recognition as intentional parents. Despite calls to acknowledge and undo this injustice, it will likely continue without a framework strongly suggesting the need for its reversal.

I have argued that parental intent is in essence an aspect of parental function supporting recognition of parentage wholly apart

---

578. California courts are beginning to recognize this simple truth. Same-sex couples in increasing numbers are obtaining the services of gestational surrogates to gestate pre-embryos created through the union of a donated egg and sperm and, between the conception of the child and its birth, are obtaining judicial decrees of parentage naming both intended parents the parents of the child. See Letter from Andrew W. Vorzimer, Esq. (on file with author) (June 1, 2001) (“[W]e have been successful in finalizing parental rights for several dozen same-sex couples. The process allows both individuals to have their name added to the birth certificate.”). As these are instances of parentage by pure intention without marriage, this type of case suggests that the marriage of the parties in *Buzzanca* was in fact irrelevant to its outcome. See O’Hara & Vorzimer, *supra* note 309, at 37. Whether a court in California would grant a similar decree to a single person is as yet unknown. Single women in Arkansas, though, may be entitled to such a decree. See ARK. CODE ANN. § 9-10-201(b)(3) § 9-10-201(c)(1)(C) (Michie 1987).

from genetic or gestational contributions or marital presumptions. Emerging theories of parentage provide a useful background for this discussion. In particular, the ALI's *Principles* and recent cases exploring the applicability of its provisions related to parentage by estoppel and de facto parentage suggest ways in which the privilege of parenthood by pure intention might be expanded to allow unmarried persons and singles also to become parents by intention alone. In this light, the requirement of marriage under the UPA needs reconsideration. While the realities of setting policy may have convinced the drafters of the UPA that it was unenactable without the exclusionary eligibility criteria,⁵⁷⁹ a more judicious analysis recognizes that in the context of the creation of children by pure intention, marriage is not an essential criterion.

---

579. Uniform Parentage Act (2000) (with Unofficial Annotations by John J. Sampson, Reporter), 35 Fam. L. Q. 81, 171 n. 82 (2001).

***