Missouri Law Review

Volume 64
Issue 3 *Summer 1999*

Article 1

Summer 1999

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MISSOURI
LAW REVIEW

VOLUME 64 SUMMER 1999 NUMBER 3

Switched at the Fertility Clinic: Determining Maternal Rights When a Child is Born from Stolen or Misdelivered Genetic Material

*Alice M. Noble-Allgire**

In the beginning, they were one of the happy statistics from a California fertility clinic. Among the twenty percent of infertile couples whose treatments resulted in a successful pregnancy,[1] they were doubly blessed, in fact, with twins.[2] Six years later, however, a letter in the mailbox turned their lives upside down. Although apologetic in tone, the letter suggested that the unthinkable had occurred and requested that the twins be submitted for genetic testing to determine whether they were born from another woman's eggs.[3]

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1. A recent government report of fertility clinics across the country found that 19.6% of all treatment cycles resulted in a live birth when using fresh embryos from nondonor eggs. NATIONAL CENTER FOR CHRONIC DISEASE PREVENTION AND HEALTH PROMOTION, U.S. DEP'T OF HEALTH AND HUMAN SERVS., 1995 ASSISTED REPRODUCTIVE TECHNOLOGY SUCCESS RATES — NATIONAL SUMMARY AND FERTILITY CLINIC REPORTS 35 (1997). "Often called the 'take-home baby rate,' this is the rate that most people are interested in when deciding whether or not to use [assisted reproductive technology]." *Id.* at 11.

2. Jill Smolowe & Tara Weingarten, *The Test-Tube Custody Fight—Victims of the Irvine Stolen-Egg Scandal Go After Twins*, TIME, Mar. 18, 1996, at 80, *available in* 1996 WL 8824986.

3. *Id.* The letter was reprinted in full in the *Orange County Register* with the names of the birth parents and the children deleted. Susan Kelleher & Kim Christensen, *Fertility Patients Fight Over Twins*, ORANGE COUNTY REG., Feb. 18, 1996, at A1, *available in* 1996 WL 7012307.

The letter was sent on behalf of another California couple, Loretta and Basilio Jorge, who had sought assistance from the same fertility clinic used by the birth parents.[4] Following up on reports of misconduct at the clinic, an attorney found evidence that Mrs. Jorge's eggs were implanted without her consent in the woman who gave birth to the twins.[5] The attorney sent the letter informing the birth parents that the Jorges "do not want to unduly disrupt your lives" but would like to begin establishing a relationship with the children.[6]

Unfortunately, theirs was not an isolated case. An investigation revealed that clinic physicians made a practice of taking their clients' eggs or embryos without permission.[7] More than one hundred civil suits have been filed against the clinic by patients who alleged their eggs or embryos were used to impregnate other women.[8] Officials believe at least fifteen children were born as a result of

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4. Kelleher & Christensen, *supra* note 3, at A1.

5. *Id.*

6. *Id.* The birth mother was understandably outraged, telling a reporter: "I don't want to talk about it. These were my eggs!" *Id.* Some members of the public were outraged as well, sending hate mail and making angry phone calls to both the Jorges and their attorneys. Valerie Godines, *Lawyers in UCI Egg Scandal Take Their Places*, RIVERSIDE (CAL.) PRESS-ENTERPRISE, March 25, 1996, at B1, *available in* 1996 WL 3272957; Smolowe & Weingarten, *supra* note 2, at 80.

7. Although many of the women, like Mrs. Jorge, had consented to the removal of their eggs for use in their own infertility treatment, they did not give permission for their eggs or embryos created from their eggs to be used to impregnate other patients. Kelleher & Christensen, *supra* note 3, at A1 (the Jorges signed a form directing that all of Mrs. Jorge's eggs be fertilized with Mr. Jorge's sperm and used by them to achieve pregnancy). In more egregious cases, the clinic physicians surreptitiously removed eggs from patients during diagnostic procedures. *See* Kim Christensen & Michelle Nicolosi, *Money Doesn't Buy Relief*, ORANGE COUNTY REG., Aug. 16, 1997, at B2, *available in* 1997 WL 7438488 (discussing lawsuit by woman who discovered that eggs were taken from her during a routine laparoscopy and implanted in another woman).

8. Susan Kelleher & Kim Christensen, *Stone Says Partners Knew of Egg Thefts*, ORANGE COUNTY REG., Mar. 18, 1998, at A1, *available in* 1998 WL 2618519. The University of California at Irvine, which operated the now defunct Center for Reproductive Health, has paid out more than $21 million as a result of settlements so far. *Id.*

The settlements are being calculated through a formula, with the highest award of damages to claimants like Mrs. Jorge, who had failed to conceive children of their own but whose eggs were implanted in another woman who gave birth. Marcida Dodson, *21 More Claims Against UCI's Fertility Clinic Settled for $4.4 Million*, L.A. TIMES, Oct. 1, 1997, at B4, *available in* 1997 WL 13985501; Christensen & Nicolosi, *supra* note 7, at B2 (describing the formula in detail). The Jorges' settlement was reported at $650,000. *Couple Settles for $650,000 in Fertility Suit*, RIVERSIDE (CAL.) PRESS-ENTERPRISE, Sept. 28, 1997, at B3, *available in* 1997 WL 13966194.

Federal prosecutors, meanwhile, have filed charges against the clinic physicians. *See* Kim Christensen et al., *Dr. Asch Indicted in Egg Thefts*, ORANGE COUNTY REG., Nov. 19, 1997, at A1, *available in* 1997 WL 14885427 (26-count indictment alleges that clinic

improper transfers.[9] Three custody suits are pending, including the highly publicized claim of the Jorges.[10]

In many respects, the Jorges' case mirrors the legal drama presented by "switched at birth" cases such as *Twigg v. Mays*.[11] Ernest and Regina Twigg claimed that hospital staff switched their newborn daughter with a baby girl born to Barbara and Robert Mays on approximately the same date.[12] The switch went unnoticed until Arlena, the child raised by the Twiggs, died from a congenital heart condition approximately ten years later.[13] The Twiggs found Kimberly Mays through hospital records and filed a civil action seeking a declaration that she was their biological daughter.[14] A similar case was reported in Virginia in 1998, when paternity tests in a child support case suggested that two baby girls had gone home with the wrong mothers after their births three years earlier.[15]

One significant factor distinguishes the "switched at birth" cases from the Jorges' situation, however. The former cases occurred at the hospital after the children were born. In the Jorges' case, the switch occurred at the fertility clinic. Thus, unlike the Twiggs, the Jorges' battle is not over children that Loretta Jorge both conceived and carried to term. Instead, she is claiming parental rights to

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physician committed federal mail fraud when taking patients' eggs without their consent).

9. Kelleher & Christensen, *supra* note 8, at A1.

10. *Couple Settles for $650,000 in Fertility Suit*, RIVERSIDE (CAL.) PRESS-ENTERPRISE, Sept. 28, 1997, at B3, *available in* 1997 WL 13966194.

11. No. 88-4489-CA-01, 1993 WL 330624 (Fla. Cir. Ct. Aug. 18, 1993). The case was documented in a two-part television miniseries titled *Switched at Birth* (NBC television, April 28-29, 1991). The movie topped the Nielsen ratings for two weeks in a row, eclipsing the two-hour final chapter of the night-time soap opera *Dallas*. Deborah Hastings, *NBC Wins Second Sweeps Week*, AP, May 7, 1991, *available in* 1991 WL 6185051.

12. Mays v. Twigg, 543 So. 2d 241, 242 (Fla. Dist. Ct. App. 1989).

13. *Id.* Prior to Arlena's death, the Twiggs were informed that based upon Arlena's blood type, neither of them could have been her natural parents. *Id.*

14. *Id.* For a discussion of how the Twiggs's case was resolved, see *infra* notes 358-63 and accompanying text.

15. The mothers, Paula Johnson and Whitney Rogers, gave birth one day apart at the University of Virginia Medical Center in June 1995. *Kin of Switched Babies Walk Emotional Tightrope*, CHI. TRIB., Aug. 9, 1998, at 1, *available in* 1998 WL 2883920. Johnson discovered the switch in July 1998, when paternity tests conducted as part of child support proceedings showed that neither Johnson nor her former boyfriend were the parents of Callie Marie, the child she had been raising. *Id.* Further investigation suggested a mixup at the hospital between Callie Marie and another fair-haired baby, Rebecca, who was being raised by Rogers and her partner, Kevin Chittum. *Id.* Ironically, Rogers and Chittum were both killed in an automobile accident the day after the error was discovered. *Id.* Lawsuits are pending to decide custody of the two children. Michael D. Shear, *Mother of Switched Baby Files Suit for $31 Million*, THE WASH. POST, May 25, 1999, at B01, *available in* 1999 WL 17094900.

children that are her genetic offspring—the product of Mrs. Jorge's eggs—but implanted in and gestated by the woman who ultimately gave birth to the twins.

The Jorges' lawsuit is the latest in a series of parental rights disputes spawned by new reproductive technology. Because this new technology goes beyond the natural means of procreation, it has strained the limits of traditional parentage laws built upon the laws of nature. Until recently, there was no question that the woman who gave birth to a child was the child's mother. That conclusion was indisputable because pregnancy occurred only after sexual intercourse in which the woman's egg was united, within her own body, with the father's sperm. Modern reproductive technology has altered this biological process, however, by allowing specialists to retrieve a woman's eggs and fertilize them in a laboratory instead of a womb. The embryo is then implanted immediately or frozen for implantation at a later date.

This bifurcation of the procreation process has created a troublesome legal dilemma: If one woman's eggs are implanted in another, which woman is the child's "natural" or legal mother and thereby entitled to the rights and responsibilities of parentage? Traditional parentage laws yield no easy answers because they were crafted in simpler times. The legal community, therefore, has struggled with this controversial question for more than a decade. Until the California fertility clinic scandal, however, the issue arose only in the context of surrogacy arrangements, such as the highly publicized *In re Baby M* case.[16]

An analysis of the surrogacy cases is helpful, but not dispositive, for parentage disputes in cases like the Jorges', where one woman's eggs or embryos are intentionally stolen or negligently misdelivered[17] to another woman. Although both types of cases require a choice between a genetic mother and a gestational mother, they are distinguishable on the basis of consent. In a voluntary surrogacy, the surrogate has expressly agreed to gestate a child that will be raised by another woman, a fact that has figured prominently in the legal analysis that some courts and scholars have applied to these types of cases. But such consent obviously is lacking in cases of theft or misdelivery of genetic material, and the legal standards applied to cases of this sort must be modified accordingly.

To determine the proper standard, this Article examines the evolution of parentage laws, beginning in Section I with a review of the traditional common law rules as applied to children conceived through natural sexual intercourse. Section II examines how the law has responded to new reproductive technology, focusing on disputes that have arisen from voluntary surrogacy arrangements.

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16. 537 A.2d 1227 (N.J. 1988). *See infra* at 85-94.

17. Misdelivery occurs when a bailee surrenders bailed property to someone other than the person entitled to it. BLACK'S LAW DICTIONARY 999 (6th ed. 1990). As noted below, some courts have found that a bailment exists when fertility clinics collect genetic material from their patients and store it for later implantation. *See infra* note 187 and accompanying text. The genetic material is therefore misdelivered when implanted in someone other than the genetic provider without the latter's consent.

Section III analyzes these traditional and modern legal theories as they relate to the special circumstances of stolen or misdelivered genetic material, and Section IV concludes that the best method for resolving such cases is one that considers both the intent of the prospective mothers and the best interests of the child.[18]

I. TRADITIONAL PARENTAGE LAWS BASED UPON NATURAL PROCREATION

Prior to new reproductive technology, laws determining parentage and parental rights flowed directly from the laws of nature. Although aided in part by presumptions and tempered in some states by social policy, the general focus of parentage laws was identification of a child's biological parent or parents.

Under the traditional common law, maternity was readily established by the biological fact that pregnancy occurred only through natural sexual intercourse between a man and a woman, resulting in a fetus carried by the woman. Thus, maternity was established from the moment the woman gave birth, as recognized by the ancient maxim *mater est quam gestation demonstrat* (by gestation the mother is demonstrated).[19]

Paternity was less easily confirmed, however, and courts were forced to rely upon certain presumptions or social policy. The child's biological father obviously was the man whose sperm fertilized the woman's egg, but prior to this century, this biological fact was difficult to prove by objective means. Paternity, therefore, was determined largely by the man's relationship with the woman who gave birth, as recognized by the traditional English common law rule of *pater est quem nuptiae demonstrant* (the father is he whom the marriage points out).[20] Thus, when a married woman gave birth, the law presumed that her husband was the father unless the husband could show that he was *extra quatuor maria* (beyond the four seas or outside the kingdom of England) or that he otherwise

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18. This Article focuses only on parentage issues that arise between two women who have shared the biological functions necessary to produce a child—one providing the egg and the other nurturing the egg through pregnancy. Some of the legal issues discussed in this context may be applicable to other, related parentage questions, such as the rights of a man whose sperm is used to produce the child. *See* Stephen Nohlgren, *Unusual Fight for Parental Rights Could Shape Law*, ST. PETERSBURG TIMES, at 1A, *available in* 1998 WL 4265742 (discussing custody battle between a child's mother and a male acquaintance who provided sperm for the woman's artificial insemination at home with turkey baster). Because those scenarios raise issues that are beyond the scope of this Article, the author has not attempted to address those scenarios.

19. 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, 370 (1991).

20. 1 WILLIAM BLACKSTONE, COMMENTARIES *446 ("A legitimate child is he that is born in lawful wedlock, or within a competent time afterwards. '*Pater est quem nuptiae demonstrant*' is the rule of the civil law.").

did not have access to his wife for the preceding nine months.[21] This marital presumption served to protect the integrity and stability of the family but also ensured legitimacy for the child in a time when illegitimacy was disfavored.

Determining parentage of children born outside wedlock was another matter. The traditional English law labeled such children *fillius nullius* (children of no one) and denied them most of the legal rights granted to other children.[22] Yet, the child's parents owed a duty of maintenance.[23] To identify the man liable for such support, the court traditionally relied upon the sworn testimony of the mother as conclusive evidence of paternity.[24] More recently, however, states began allowing the reputed father to attack the mother's claims by introducing evidence that the mother had multiple sex partners during the relevant period.[25]

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21. *Id.* at *457. Lord Mansfield recognized this presumption as irrebuttable, thus prohibiting either spouse from testifying that the child born during the marriage was illegitimate. Goodright v. Moss, 98 Eng. Rep. 1257, 1257-58 (1777) ("[I]t is a rule founded in decency, morality, and policy, that they shall not be permitted to say after marriage, that they have had no connection, and therefore that the offspring is spurious . . . .").

22. 1 WILLIAM BLACKSTONE, COMMENTARIES *458-59 (stating that the rights of an illegitimate child "are very few, being only such as he can *acquire*; for he can *inherit* nothing, being looked upon as the son of nobody").

23. *Id.* at *457. Blackstone described this as a principle of natural law—"that there is an obligation on every man to provide for those descended from his loins." *Id.* at *448. It was codified in "An Act for the Setting of the Poor on Work and for the Avoiding of Idleness" which provides:

> [C]oncerning Bastards begotten and born out of lawful Matrimony, (an Offence against God's Law and Man's Law) the said Bastards being now left to be kept at the Charges of the Parish where they be born, to the great Burden of the same Parish, and in defrauding of the Relief of the impotent and aged true Poor of the same Parish, and to the evil Example and Encouragement of lewd Life: It is ordained and enacted by the Authority aforesaid, That two Justices of the Peace, whereof one to be of the Quorum, in or next unto the Limits where the Parish Church is, within which Parish such Bastard shall be born, (upon Examination of the Cause and Circumstance,) shall and may by their Discretion take Order as well for the Punishment of the Mother and reputed Father of such Bastard Child, as also for the better Relief of every such Parish in Part or in all; and shall and may likewise by such Discretion take Order for the Keeping of every such Bastard Child, by charging such Mother or reputed Father with the Payment of Money weekly or other Sustentation for the Relief of such Child, in such wise as they shall think meet and convenient . . . .

18 Eliz. 1, ch. 3, Section 2 (1576).

24. 1 WILLIAM BLACKSTONE, COMMENTARIES *458.

25. Stephen L. Sass, *The Defense of Multiple Access (Exceptio Plurium Concubentium) in Paternity Suits: A Comparative Analysis*, 51 TUL. L. REV. 468, 502 (1977). As Professor Sass explains, the mother's multiple sexual relations initially were considered irrelevant because "they did not exclude the defendant's paternity." *Id.* The

Advances in medical technology have allowed courts to replace these forms of proof with scientific evidence establishing a biological connection between father and child. Blood testing was developed shortly after the turn of the century,[26] allowing courts to establish non-paternity, i.e., to exclude a person whose blood type indicated that he could not be the father.[27] During the 1950s, the rise of human leukocyte antigen (HLA) tests[28] allowed experts to opine as to the statistical probability that a particular male was the child's biological father.[29] In more recent years, courts have been accepting deoxyribonucleic acid (DNA) testing[30] as an important tool for proving paternity.[31] DNA tests, when combined

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law later developed to recognize multiple access as relevant. If the mother admitted to having intercourse with more than one man during the period of conception, her paternity suit against only one of her partners would be dismissed as a matter of law. *Id.* at 502-03, 505. If she denied having multiple partners, however, the trier of fact resolved the factual dispute based upon the credibility of the witnesses and available corroborative evidence *Id.* at 505.

26. The earliest forms of blood testing were based upon the "blood group" of the parent and child. The scientific principle behind this type of testing has been explained as follows:

> [B]lood can be distinguished because it contains different antigens. These antigens may be detected by performing a series of chemical tests. Once these antigens are detected, the blood may be classified into different groups. For example, in the commonly known ABO blood grouping system, blood containing antigen A is Group A, blood containing antigen B is Group B, blood containing both antigens is Group AB, and blood which does not contain any antigens is Group O.
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> . . . The science of genetics states that a child's blood group is a hereditary trait acquired from either or both parents. Thus, a Group O mother and a Group O father can only produce a Group O child because neither the A nor B antigen is present in either parent. Moreover, a Group A mother and a Group O father could only produce either a Group O or a Group A child, because all other groups would require the presence of the B antigen in one of the parents. If a Group B child were born to a Group A mother, it would be impossible for a Group O man to be the father because he would be lacking the B antigen, and such a paternity action should be dismissed by the court.

E. Donald Shapiro et al., *The DNA Paternity Test: Legislating The Future Paternity Action*, 7 J.L. & HEALTH 1, 20-21 (1993).

27. Jean E. Maess, Annotation, *Admissibility, Weight and Sufficiency of Human Leukocyte Antigen (HLA) Tissue Typing Tests in Paternity Cases*, 37 A.L.R.4TH 167, 170 (1981).

28. The HLA test focuses on white blood cells, as compared to all other blood group tests which test for antigens found in the red blood cells. Shapiro, *supra* note 26, at 24. "While the different red blood cell tests can identify a small number of antigens, HLA testing can identify twenty-one genetic markers. This makes the HLA test far superior when compared to all the other blood grouping tests." *Id.*

29. *Id.*

30. While blood group testing focuses on certain properties of the blood cells themselves, DNA testing delves directly into the person's genetic code. For a description

with other genetic marking tests such as standard blood grouping tests and HLA tests, can produce a statistical probability of paternity purportedly in excess of 99.99 percent.[32]

In short, biology has been one of the major factors underlying most traditional parentage laws. Indeed, the United States Supreme Court has found that this biological connection gives rise to a constitutionally protected interest "in the companionship, care, custody, and management of his or her children . . . ."[33] The Court first recognized this interest in *Stanley v. Illinois*,[34] which involved an unwed father whose children were taken by the state after the death of the children's natural mother. The Court noted that its previous decisions had frequently emphasized the importance of the family:

> The rights to conceive and to raise one's children have been deemed 'essential,' 'basic civil rights of man,' and '(r)ights far more precious than property rights,' 'It is cardinal with us that the custody, care and

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of how DNA evidence works, see Thomas M. Fleming, Annotation, *Admissibility of DNA Identification Evidence*, 84 A.L.R.4th 313, 319 (1991).

31. *See* Fleming, *supra* note 30, at 329 n.45 (listing cases). Some courts have refused to allow DNA evidence either because their paternity statutes do not expressly provide for such testing or because of questions about the reliability of the tests in a particular case. *See* Alaska *ex rel.* Mattox v. Alaska *ex rel.* Neeson, 875 P.2d 763, 764 (Alaska 1994) (holding that trial court erred in admitting improperly authenticated DNA test reports and in failing to determine whether DNA testing was scientifically accepted or that procedures required to make tests valid had been followed); Franson v. Micelli, 645 N.E.2d 404 (Ill. App. Ct. 1994) (holding that trial court in paternity proceeding erred in admitting evidence of DNA testing to prove paternity, where court, having found that underlying analytical techniques of DNA testing were generally accepted scientifically, court did not make similar inquiry into far more controversial techniques of drawing statistical probability conclusions from DNA testing), *vacated for lack of jurisdiction*, 666 N.E.2d 1188 (Ill. 1996); Estate of Sanders, 3 Cal. Rptr. 2d 536, 540 (Cal. Ct. App. 1992) (holding that trial court properly refused to allow DNA testing to determine paternity in a probate proceeding because the Probate Code did not authorize the use of DNA tests).

Some caution is warranted, however, because there is potential for error in gathering, storing, and testing evidence. *See* Christopher L. Blakesley, *Scientific Testing and Proof of Paternity: Some Controversy and Key Issues for Family Law Counsel*, 57 LA. L. REV. 379, 389, 397-416 (1997). Moreover, scientists and scholars are not in full agreement regarding some of the genetic theories utilized in the probability calculations. *Id.*

32. Shapiro, *supra* note 26, at 29; *see also* A.B. v. C.D., 690 N.E.2d 839, 843 (Mass. App. Ct. 1998) (blood and genetic marker test shows defendant's probability of paternity was 99.62% using blood tests and 99.99% using DNA analysis); Turner v. Mosca, 703 A.2d 1114, 1114 (R.I. 1997) (court-ordered genetic blood tests indicated a 99.99% probability of paternity).

33. Stanley v. Illinois, 405 U.S. 645, 651 (1972).

34. *Id.*

> nurture of the child reside first in the parents, whose primary function and freedom include preparations for obligations the state can neither supply nor hinder.'[35]

As a matter of equal protection, the Court concluded that the State of Illinois could not deprive Stanley of his parental rights absent a hearing finding him unfit as a parent.[36]

Several subsequent Supreme Court cases have affirmed this constitutional interest[37] with qualifications. In *Lehr v. Robertson*,[38] the Court emphasized a distinction between "a mere biological relationship and an actual relationship of parental responsibility."[39] The Court stated that an unwed father's interest in his child acquires substantial protection under the Due Process Clause when he "demonstrates a full commitment to the responsibilities of parenthood . . . ."[40] The "mere existence of a biological link," on the other hand, "does not merit equivalent constitutional protection."[41] Accordingly, the Court held that a

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35. *Id.* (citations omitted).

36. Under Illinois dependency proceedings at the time, children were declared wards of the state if they had no surviving parent or guardian. *Id.* at 649. The dependency statute defined the term "parent" to mean "the father and mother of a legitimate child, or the survivor of them, or the natural mother of an illegitimate child, and includes any adoptive parent." *Id.* at 650. Accordingly, the father of an illegitimate child was not considered a parent and his children automatically would be declared wards of the state. *Id.* at 649-50. Where a child had living parents, by contrast, the state could take custody of those children only after a hearing in which the parent(s) or guardian is shown to be unfit. *Id.* at 649, 658. The Supreme Court concluded that "denying such a hearing to Stanley and those like him while granting it to other Illinois parents is inescapably contrary to the Equal Protection Clause." *Id.* at 658.

37. *See, e.g.*, Quilloin v. Walcott, 434 U.S. 246, 248, 254 (1978) (recognizing that "a father's interest in the 'companionship, care, custody, and management' of his children is 'cognizable and substantial,'" but holding that the state did not infringe upon this right by applying a "best interests of the child" standard to the unwed father's attempt to block the child's adoption); *cf.* Caban v. Mohammed, 441 U.S. 380 (1979) (invalidating on equal protection grounds a statute under which a man's children could be adopted by their natural mother and her husband without the natural father's consent).

38. 463 U.S. 248 (1983).

39. *Id.* at 259-60 (quoting Justice Stewart's dissent in *Caban v. Mohammed*, 441 U.S. 380, 397 (1979), that "[p]arental rights do not spring full-blown from the biological connection between parent and child. They require relationships more enduring.").

40. *Id.* at 261.

41. *Id.* As the Court explained:

> The significance of the biological connection is that it offers the natural father an opportunity that no other male possesses to develop a relationship with his offspring. If he grasps that opportunity and accepts some measure of responsibility for the child's future, he may enjoy the blessings of the parent-child relationship and make uniquely valuable contributions to the child's development. If he fails to do so, the Federal Constitution will not

putative father's constitutional rights were not violated by the state's failure to provide him with notice of pending adoption proceedings when the man failed to establish a substantial relationship with his child and failed to submit his name to the state's putative father registry.[42]

The Court also has held that public policy may prevail over a biological connection, as in the case of a married woman who conceives a child through sexual intercourse with a man other than her husband.[43] Although some states allow the biological father to bring suit to establish paternity in this situation,[44] many still recognize the marital presumption (that the mother's husband is the child's father) as a means of protecting the integrity of the family unit.[45] In fact, some states hold the marital presumption irrefutable.[46] Others allow the

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automatically compel a State to listen to his opinion of where the child's best interests lie.

Id. at 262.

42. *Id.* at 262-64.

43. *See, e.g.*, Michael H. v. Gerald D., 491 U.S. 110 (1989); *infra* notes 48-57.

44. *See, e.g.*, WASH. REV. CODE §§ 26.26.040, 26.26.060 (1997) (§ 26.26.060 provides that "a man alleged or alleging himself to be the father" has standing to bring a paternity action and § 26.26.040 provides that any presumption of paternity—including the marital presumption—may be "rebutted by a court decree establishing paternity of the child by another man"); Smith v. Jones, 566 So. 2d 408 (La. Ct. App. 1990) (holding that a biological father can bring an avowal action to rebut the statutory presumption of paternity in the mother's husband).

45. *See supra* note 21 and accompanying text; *see also* Vincent B. v. Joan R., 179 Cal. Rptr. 9, 10 (Cal. Ct. App. 1981) (stating that the conclusive presumption was based on "a matter of overriding social policy, that given a certain relationship between the husband and wife, the husband is to be held responsible for the child, and that the integrity of the family unit should not be impugned"), *appeal dismissed*, 459 U.S. 807 (1982); *In re* Marriage of Stephen B. and Sharyne, 177 Cal. Rptr. 429, 431-33 (Cal. Ct. App. 1981) (noting that the presumption was initially justified on the ground that biological paternity was impossible to prove, but after paternity tests became reliable, preservation of family integrity became the rule's paramount justification); *In re* Marriage of Hodge, 713 P.2d 1071, 1072 (Or. Ct. App.) (stating that the legislature enacted the conclusive presumption "to preserve family integrity and to protect children of the family"), *rev'd on other grounds*, 722 P.2d 1235 (Or. 1986);.

46. *See, e.g.*, OR. REV. STAT. § 109.070 (1997) (stating that "[t]he child of a wife cohabiting with her husband who was not impotent or sterile at the time of the conception of the child shall be conclusively presumed to be the child of her husband, whether or not the marriage of the husband and wife may be void").

California's Family Code similarly states that "the child of a wife cohabiting with her husband, who is not impotent or sterile, is conclusively presumed to be a child of the marriage," CAL. FAM. CODE § 7540 (West 1994), but qualifies this by allowing blood tests to determine that the husband is not the father in limited circumstances. *Id.* § 7541. More specifically, the statute provides:

(a) Notwithstanding Section 7540, if the court finds that the conclusions of all the experts, as disclosed by the evidence based on blood tests performed

presumption to be challenged by the presumed father, the mother, and the child, but not by someone claiming to be the biological father.[47]

The Supreme Court upheld California's irrebuttable presumption against a constitutional challenge in *Michael H. v. Gerald D.*, in which a man claimed to have fathered a child through an adulterous relationship with a married woman.[48] At issue in *Michael H.* was the application of California's custody and visitation statute, which provides that *a parent* has a statutory right to visitation "unless it is shown that such visitation would be detrimental to the best interests of the child."[49] Non-parents—more specifically, "any other person having an interest in the welfare of the child"—could obtain visitation rights only at the discretion of the court.[50] The plaintiff contended that he was a parent because blood tests

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pursuant to Chapter 2 (commencing with Section 7550), are that the husband is not the father of the child, the question of paternity of the husband shall be resolved accordingly.

(b) The notice of motion for blood tests under this section may be filed not later than two years from the child's date of birth by the husband, or for the purposes of establishing paternity by the presumed father or the child through or by the child's guardian ad litem. As used in this subdivision, "presumed father" has the meaning given in Sections 7611 and 7612.

(c) The notice of motion for blood tests under this section may be filed by the mother of the child not later than two years from the child's date of birth if the child's biological father has filed an affidavit with the court acknowledging paternity of the child.

(d) The notice of motion for blood tests pursuant to this section shall be supported by a declaration under oath submitted by the moving party stating the factual basis for placing the issue of paternity before the court.

(e) Subdivision (a) does not apply, and blood tests may not be used to challenge paternity, in any of the following cases:

(1) A case which reached final judgment of paternity on or before September 30, 1980.

(2) A case coming within Section 7613.

(3) A case in which the wife, with the consent of the husband, conceived by means of a surgical procedure.

Id.

47. *See, e.g.*, COLO. REV. STAT. § 19-4-107(1) (1990); WYO. STAT. ANN. § 14-2-104(a) (Michie 1997); *see also* UNIF. PARENTAGE ACT § 6, 9B U.L.A. 302-03 (1987), the full text of which is provided *infra* note 70.

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

49. CAL. CIV. CODE § 4601 (West Supp. 1989) (current version at CAL. FAM. CODE § 3100 (1994)).

50. *Id.* The exact text of the statute is as follows:

[T]he court shall grant reasonable visitation rights to a parent unless it is shown that the visitation would be detrimental to the best interest of the child. In the discretion of the court, reasonable visitation rights may be granted to any other person having an interest in the welfare of the child.

Id.

showed a 98.07% probability that he was the father of the child in question.[51] He alleged that he was denied the privileges of a parent under the custody statute, however, because of California's conclusive presumption of paternity in the husband of the child's mother.[52]

The Supreme Court upheld the California statute, but the scope of the decision is open to question because the justices were sharply divided on the key issue of whether an unwed father has a constitutionally protected liberty interest in establishing his parental relationship with the child. The plurality opinion, authored by Justice Scalia and joined by Chief Justice Rehnquist and Justices O'Connor and Kennedy, held that the putative father had not met his burden of establishing that the state had infringed upon a "fundamental" right "traditionally protected by our society."[53] The four dissenting justices—Brennan, Marshall, Blackmun, and White—disagreed, arguing that the Court's unwed fathers cases established the basic principle that "an unwed father who has demonstrated a sufficient commitment to his paternity by way of personal, financial, or custodial responsibilities has a protected liberty interest in a relationship with his child."[54]

Justice Stevens cast the deciding vote but sidestepped the critical issue. He simply assumed, for purposes of the case, that the putative father had a constitutional right to establish a relationship with the child.[55] He ultimately concluded that the state did not infringe upon that right because the statute allowed Michael H. to seek visitation rights as a "person having an interest in the welfare of the child[]" even though he was denied the status of a "parent."[56]

In addition to assuring equal protection for unwed fathers, the Supreme Court has altered traditional common law by denouncing the discriminatory treatment of illegitimate children. In a series of cases during the late 1960s and early 1970s, the Court held that illegitimate children have the same right to support, wrongful death actions, and other benefits for which legitimate children are eligible.[57] As a result, states have modified their parentage statutes to

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51. *Michael H.*, 491 U.S. at 110.

52. CAL. EVID. CODE § 621 (West Supp. 1989) (current version at CAL. FAM. CODE § 7540 (West 1994)).

53. Michael H. v. Gerald D., 491 U.S. 110, 121-27 (1989). "[T]o the contrary, our traditions have protected the marital family . . . against the sort of claim [the putative father] asserts." *Id.* at 124.

54. *Id.* at 142, 157-58.

55. *Id.* at 133.

56. *Id.*

57. *See* Gomez v. Perez, 409 U.S. 535, 538 (1973) (holding that "once a State posits a judicially enforceable right on behalf of children to needed support from their natural fathers there is no constitutionally sufficient justification for denying such an essential right to a child simply because its natural father has not married its mother"); Weber v. Aetna Cas. & Sur. Co., 406 U.S. 164 (1972) (holding that illegitimate children may not be excluded from sharing equally with other children in the recovery of workmen's compensation benefits for the death of their parent); Levy v. Louisiana, 391

eliminate the prior bias against illegitimate children. Although it is difficult to identify the precise status of the law across the United States today, a review of the Uniform Parentage Act of 1973 (UPA),[58] which has been adopted by eighteen states,[59] provides a general flavor of how the Supreme Court's constitutional doctrine has been coordinated with the traditional common law.

The Act begins by defining the "parent and child relationship" as the "legal relationship existing between a child and his natural or adoptive parents incident to which the law confers or imposes rights, privileges, duties, and obligations."[60] In deference to the Supreme Court's equal protection decisions, the Act's second section declares that "[t]he parent and child relationship extends equally to every child and to every parent, regardless of the marital status of the parents."[61] The remainder of the Act addresses the "*sine qua non* of equal legal rights—the identification of the person against whom these rights may be asserted."[62]

With respect to maternity, the Act provides that the child's natural mother "may be established by proof of her having given birth to the child, or under this Act . . . ."[63] This definition generally codifies the common law practice of determining maternity by proof of gestation but also allows maternity to be established by other means, as explained by Section 21 of the Act: "Any

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U.S. 68 (1968) (holding that illegitimate children may not be excluded from the benefit of a state-created right of action for the wrongful death of a parent). The rationale behind this change in the law was that:

> The status of illegitimacy has expressed through the ages society's condemnation of irresponsible liaisons beyond the bonds of marriage. But visiting this condemnation on the head of an infant is illogical and unjust. Moreover, imposing disabilities on the illegitimate child is contrary to the basic concept of our system that legal burdens should bear some relationship to individual responsibility or wrongdoing. Obviously, no child is responsible for his birth and penalizing the illegitimate child is an ineffectual—as well as an unjust—way of deterring the parent. Courts are powerless to prevent the social opprobrium suffered by these hapless children, but the Equal Protection Clause does enable us to strike down discriminatory laws relating to status of birth where—as in this case—the classification is justified by no legitimate state interest, compelling or otherwise.

Weber, 406 U.S. at 175-76 (footnotes omitted).

58. UNIF. PARENTAGE ACT, 9B U.L.A. 296 (1987).

59. Jurisdictions adopting the UPA include Alabama, California, Colorado, Delaware, Hawaii, Illinois, Kansas, Minnesota, Missouri, Montana, Nevada, New Jersey, New Mexico, North Dakota, Ohio, Rhode Island, Washington, and Wyoming. *Id.* 9B U.L.A. 287 (1987 & Supp. 1998).

60. *Id.* § 1, 9B U.L.A. 296 (1987).

61. *Id.* § 2, 9B U.L.A. 296 (1987).

62. *Id.* prefatory note, 9B U.L.A. 289 (1987).

63. UNIF. PARENTAGE ACT § 3, 9B U.L.A. 297-98 (1987). In cases of adoption, the Act provides that the child's relationship with an adoptive parent may be established by proof of adoption. *Id.* The Revised Uniform Adoption Act

interested party may bring an action to determine the existence or nonexistence of a mother and child relationship. Insofar as practicable, the provisions of this Act applicable to the father and child relationship apply."[64]

Determining paternity requires reference to several provisions of the Act, which, as one court described it, is much like "trying to obtain a permit from a bureaucracy and continually being referred to another department . . . ."[65] Section 4 of the Act sets forth five statutory presumptions regarding paternity.[66] The first three are related to the common law marital presumption that a child born to a married woman is presumed to be the child of the woman's husband.[67]

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64. *Id.* § 21, 9B U.L.A. 334 (1987). The comment to § 21 states:

> This Section permits the declaration of the mother and child relationship where that is in dispute. Since it is not believed that cases of this nature will arise frequently, Sections 4 to 20 are written principally in terms of the ascertainment of *paternity*. While it is obvious that certain provisions in these Sections would not apply in an action to establish the mother and child relationship, the Committee decided not to burden these—already complex—provisions with references to the ascertainment of *maternity*. In any given case, a judge facing a claim for the determination of the mother and child relationship should have little difficulty deciding which portions of Sections 4 to 20 should be applied.

Id. § 21 cmt., 9B U.L.A. 334 (1987)

65. Anna J. v. Mark C., 286 Cal. Rptr. 369, 373 (Cal. Ct. App. 1991), *aff'd sub nom* Johnson v. Calvert, 851 P.2d 776 (Cal.), *cert. denied*, 510 U.S. 874 (1993).

66. UNIF. PARENTAGE ACT § 4, 9B U.L.A. 298 (1987).

67. *Id.* § 4(a)(1)-(3), 9B U.L.A. 298-99 (1987). The full text of this Section is as follows:

> (a) A man is presumed to be the natural father of a child if:
>
> (1) he and the child's natural mother are or have been married to each other and the child is born during the marriage, or within 300 days after the marriage is terminated by death, annulment, declaration of invalidity, or divorce, or after a decree of separation is entered by a court;
>
> (2) before the child's birth, he and the child's natural mother have attempted to marry each other by a marriage solemnized in apparent compliance with law, although the attempted marriage is or could be declared invalid, and,
>
> (i) if the attempted marriage could be declared invalid only by a court, the child is born during the attempted marriage, or within 300 days after its termination by death, annulment, declaration of invalidity, or divorce; or
>
> (ii) if the attempted marriage is invalid without a court order, the child is born within 300 days after the termination of cohabitation;
>
> (3) after the child's birth, he and the child's natural mother have married, or attempted to marry, each other by a marriage solemnized in apparent compliance with law, although the attempted marriage is or could be

The final two presumptions recognize a man as the natural father if he receives a minor child into his home and openly holds out the child as his natural child or if he acknowledges his paternity in a writing filed with the appropriate authority.[68]

Although some states hold the marital presumption irrefutable, as mentioned above,[69] the UPA allows the marital presumption to be rebutted in an action by the child, the mother, or the presumed father, but only within five years of the child's birth.[70] Any other man alleging he is the biological father may not bring an action of his own to challenge the marital presumption, but may be

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declared invalid, and

(i) he has acknowledged his paternity of the child in writing filed with the [appropriate court or Vital Statistics Bureau].

(ii) with his consent, he is named as the child's father on the child's birth certificate, or

(iii) he is obligated to support the child under a written voluntary promise or by court order;

(4) while the child is under the age of majority, he receives the child into his home and openly holds out the child as his natural child; or

(5) he acknowledges his paternity of the child in a writing filed with the [appropriate court or Vital Statistics Bureau], which shall promptly inform the mother of the filing of the acknowledgment, and she does not dispute the acknowledgment within a reasonable time after being informed thereof, in a writing filed with the [appropriate court or Vital Statistics Bureau]. If another man is presumed under this section to be the child's father, acknowledgment may be effected only with the written consent of the presumed father or after the presumption has been rebutted.

Id.

68. *Id.* § 4(a)(4)-(5), 9B U.L.A. 299 (1987); see *supra* note 68 for full text of § 4.

69. *See supra* note 46.

70. UNIF. PARENTAGE ACT § 6(a)(2), 9B U.L.A. 302 (1987). The Act states, in pertinent part:

(a) A child, his natural mother, or a man presumed to be his father under Paragraph (1), (2), or (3) of Section 4(a), may bring an action

(1) at any time for the purpose of declaring the existence of the father and child relationship presumed under Paragraph (1), (2), or (3) of Section 4(a); or

(2) for the purpose of declaring the non-existence of the father and child relationship presumed under Paragraph (1), (2), or (3) of Section 4(a) only if the action is brought within a reasonable time after obtaining knowledge of relevant facts, but in no event later than [five] years after the child's birth. After the presumption has been rebutted, paternity of the child by another man may be determined in the same action, if he has been made a party.

Id.

declared the father if the marital presumption is rebutted in an action brought by the child, the mother, or the presumed father.[71]

The Act requires clear and convincing evidence to rebut the presumptions and provides that if the presumptions lead to conflicting results in a particular case, "the presumption which on the facts is founded on the weightier considerations of policy and logic controls."[72] Section 12 sets forth the types of evidence that may be considered, including:

> (1) evidence of sexual intercourse between the mother and alleged father at any possible time of conception;
> (2) an expert's opinion concerning the statistical probability of the alleged father's paternity based upon the duration of the mother's pregnancy;
> (3) blood test results, weighted in accordance with evidence, if available, of the statistical probability of the alleged father's paternity;
> (4) medical or anthropological evidence relating to the alleged father's paternity of the child based on tests performed by experts. If a man has been identified as a possible father of the child, the court may, and upon request of a party shall, require the child, the mother, and the man to submit to appropriate tests; and
> (5) all other evidence relevant to the issue of paternity of the child.[73]

The UPA does not mention DNA tests because it was promulgated before such tests came into existence. A number of states have subsequently modified their acts, however, to allow for genetic testing in addition to or instead of blood testing.[74]

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71. *Id.* If the case falls under one of the final two presumptions, an action may be brought by "[a]ny interested party." *Id.* § 6(b), 9B U.L.A. 302 (1987). If none of the presumptions applies, an action to determine paternity may be brought:

> [B]y the child, the mother or personal representative of the child, the [appropriate state agency], the personal representative or a parent of the mother if the mother has died, a man alleged or alleging himself to be the father, or the personal representative or a parent of the alleged father if the alleged father has died or is a minor.

Id. § 6(c), 9B U.L.A. 302 (1987).

72. *Id.* § 4(b), 9B U.L.A. 299 (1987). Section 4(b) provides that:

> A presumption under this section may be rebutted in an appropriate action only by clear and convincing evidence. If two or more presumptions arise which conflict with each other, the presumption which on the facts is founded on the weightier considerations of policy and logic controls. The presumption is rebutted by a court decree establishing paternity of the child by another man.

Id. § 4(b), 9B U.L.A. 299 (1987).

73. *Id.* § 12, 9B U.L.A. 317 (1987).

74. *See* § 12 note on Variations from Official Text, 9B U.L.A. 319 (Supp. 1998);

In summary, the thrust of modern parentage statutes—like the traditional common law—turns in large part on search for the biological parent. The preference for biology is tempered by social policy, however, as illustrated by the presumption of paternity in the husband of a married woman who gives birth. The following section looks at these concepts as they relate to parentage questions raised by new reproductive technology.

II. THE LEGAL RESPONSE TO ASSISTED REPRODUCTION

Medical science has made tremendous advances during the past several decades,[75] providing several ways of assisting reproduction by persons incapable of conceiving through natural means. Two methods in particular—artificial insemination[76] and in vitro fertilization[77]—have allowed the proliferation of voluntary surrogacy arrangements in which an infertile couple contracts with a surrogate mother to produce a child for the intended parents. Although many of these surrogacy arrangements have been carried out without conflict, some have resulted in highly publicized disputes between the surrogate and the intended

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750 ILL. COMP. STAT. 45/11 (1996). North Dakota further provides procedural rules for verifying the chain of custody of the genetic specimens and admissibility of the verified report from a court-appointed examiner. UNIF. PARENTAGE ACT § 12 note on Variations from Official Text, 9B U.L.A. 319 (Supp. 1998).

75. Twenty years have elapsed since Louise Brown was introduced to the world in July 1978 as the first child born through the use of in vitro fertilization. *First Test-Tube Baby 20 Years Old*, AP, July 25, 1998, *available in* 1998 WL 6698457. Artificial insemination was available prior to that time, but it was Brown's birth that thrust the new reproductive technology into the public consciousness.

76. Artificial insemination is one of the oldest and simplest forms of infertility treatment. OFFICE OF TECHNOLOGY ASSESSMENT, U.S. CONGRESS, INFERTILITY—MEDICAL AND SOCIAL CHOICES 126 (1988). In essence, the physician replicates the results of sexual intercourse by using a syringe or catheter to place sperm into the woman's cervical canal or uterus at a time when the woman is ovulating. *Id.*

77. In vitro fertilization is a more sophisticated fertility treatment in which eggs are collected from a woman—either through surgical procedures such as laparoscopy or nonsurgical retrieval guided by ultrasound—and fertilized with sperm in a culture dish. *Id.* at 123. After the fertilized eggs begin to cleave, they may be implanted within a woman's uterine cavity at the two-to sixteen-cell stage. *Id.* Another option is to freeze the embryos, using glycerol or another similar substance to protect the embryos from damage in the freezing process. *Id.* at 127-28.

In a more complicated variation on this process, called gamete intrafallopian transfer (GIFT), sperm and eggs are transferred directly into the woman's fallopian tubes via laparoscopy to allow fertilization to take place there. *Id.* at 123-24. A more recent variation is the zygote intrafallopian transfer, in which a fertilized egg is placed into the fallopian tubes after in vitro fertilization. G.W. Patton, et al., *Transvaginal Embryo Transfer During the Zygote Intrafallopian Tube Transfer Procedure*, 171 AM. J. OF OBSTETRICS & GYNECOLOGY 359 (1994).

parents. The following discussion looks at how the law has resolved these disputes, beginning with cases and statutory law concerning artificial insemination, followed by the legal response to in vitro fertilization.

A. Conception Through Artificial Insemination

Artificial insemination has been available since the 1800s,[78] but was not widely used in the United States until the early 1940s.[79] In most cases, the treatment is used to allow a woman to bear her own child with the use of sperm from her husband or a donor, but the procedure also has been used in surrogacy arrangements in which a woman agrees to bear a child for another couple. The laws governing each scenario are discussed below.

1. The Use of Artificial Insemination by an Infertile Couple Using Donor Semen

Traditional parentage laws can be applied without complication when an infertile couple attempts to bear a child by having the wife artificially inseminated with the husband's sperm. Because the wife is the woman who gives birth, she automatically is considered the child's natural mother. The husband is presumed to be the father because of his marriage to the mother, but he also could establish paternity through genetic testing, if required, because he is the biological father as well.

When the couple uses donated sperm, on the other hand, application of traditional parentage laws could lead to anomalous results because it is the sperm donor, rather than the husband, who has a biological connection to the child. To prevent this unintended event, many states have enacted laws governing parental rights when artificial insemination is used in this manner. Illustrative is a section of the UPA, which provides that the mother's husband would be recognized as

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78. OFFICE OF TECHNOLOGY ASSESSMENT, U.S. CONGRESS, INFERTILITY — MEDICAL AND SOCIAL CHOICES 126 (1988). Dr. John Hunter, a Scottish surgeon, performed the first recorded use of artificial insemination on a human in 1799. Brent J. Jensen, Comment, *Artificial Insemination and the Law*, 1982 B.Y.U. L. REV. 935, 938. Dr. J. Marion Sims replicated the procedure in the United States in 1866. *Id.*

79. Jensen, *supra* note 78, at 938. "It has been estimated that in the United States 10,000 children were conceived by artificial insemination before 1941 and that 1,000 to 1,200 children were conceived by artificial insemination each year between 1941 and 1963." *Id.* That number increased to more than 65,000 children born in 1987 alone. Eric Lichtblau, *Artificial Insemination Data Raises Fears*, L.A. TIMES, Aug. 10, 1988, at 14, *available in* 1998 WL 2225082 (citing Office of Technology Assessment study that found more than 172,000 women resorted to artificial insemination to become pregnant in 1987, resulting in 65,000 births).

the natural father so long as he has given his written consent to the procedure.[80] A male who donates sperm for artificial insemination is not the father.[81]

This provision—the UPA's only attempt to address the ramifications of new reproductive technology[82]—marks a subtle, but significant, departure from the biological premise that drives the Act's other substantive provisions. One could argue that the rule merely revives the social policies underlying the traditional presumption that a child born to a married woman is the offspring of the woman's husband.[83] It is significant, however, that the provision is not an automatic presumption; rather, the husband must consent before being declared the natural father.

From a broader perspective, therefore, one could argue this provision links parental status with the parties' intentions or expectations of parenthood.[84] It

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80. The full text of the provision is as follows:

> (a) If, under the supervision of a licensed physician and with the consent of her husband, a wife is inseminated artificially with semen donated by a man not her husband, the husband is treated in law as if he were the natural father of a child thereby conceived. The husband's consent must be in writing and signed by him and his wife. The physician shall certify their signatures and the date of the insemination, and file the husband's consent with the [State Department of Health], where it shall be kept confidential and in a sealed file. However, the physician's failure to do so does not affect the father and child relationship. All papers and records pertaining to the insemination, whether part of the permanent record of a court or of a file held by the supervising physician or elsewhere, are subject to inspection only upon an order of the court for good cause shown.

UNIF. PARENTAGE ACT § 5(a), 9B U.L.A. 301 (1987).

81. *Id.* ("The donor of semen provided to a licensed physician for use in artificial insemination of a married woman other than the donor's wife is treated in law as if he were not the natural father of a child thereby conceived."). If applied in the *Baby M* case, this provision arguably could have precluded William Stern's claim to the child. The New Jersey legislature, however, had slightly modified subparagraph (b) to provide:

> *[u]nless the donor of semen and the woman have entered into a written contract to the contrary*, the donor of semen provided to a licensed physician for use in artificial insemination of a woman other than the donor's wife is treated in law as if he were not the father of a child thereby conceived and shall have no rights or duties stemming from the conception of a child.

N.J. STAT. ANN. 9:17-44 (West 1983) (emphasis added). William Stern's surrogacy contract with Mary Beth Whitehead would appear to meet the requirements of this statute, but other parts of the contract pertaining to Mrs. Whitehead's parental rights were held invalid as a matter of public policy.

82. The drafters made it clear, however, that while they thought it useful to address this particular fact situation, they did not intend to deal with the full range of "complex and serious legal problems raised by the practice of artificial insemination." UNIF. PARENTAGE ACT § 5 comment, 9B U.L.A. 301-02 (1987).

83. *See supra* note 21 and accompanying text.

84. *See In re* Marriage of Buzzanca, 72 Cal. Rptr. 2d 280, 286 (Cal. Ct. App. 1998)

recognizes that a sperm donor does not intend to become a father while, conversely, a husband who consents to artificial insemination of his wife with another man's sperm does expect to take on the rights and responsibilities of a parent even though he is not the biological father.

2. The Use of Artificial Insemination in Surrogacy Arrangements

The practice of artificial insemination is more controversial when used to impregnate a surrogate mother who intends to bear the child for another couple. Surrogacy arrangements were first placed under the public microscope in the case of *Baby M*,[85] which arose when William and Elizabeth Stern, unable to have their own children, arranged for surrogate Mary Beth Whitehead to produce a child through artificial insemination using Mr. Stern's sperm.[86] Although Mrs. Whitehead initially agreed to deliver the child to the Sterns and to take the necessary steps to terminate her parental rights so that Mrs. Stern could adopt the child, she ultimately reneged on the agreement and claimed the child as her own.[87]

When Mr. Stern brought an action to enforce the surrogacy contract,[88] the New Jersey Supreme Court invalidated the contract on public policy grounds and relied instead upon traditional parentage law to resolve the custody dispute.[89] The court held that payment of money to a surrogate was "illegal . . . perhaps criminal," and potentially degrading to women[90] and that the termination of Mrs.

(noting that the artificial insemination provision indicates a legislative intent to recognize parentage "where a person who caused a child to come into being had no biological relationship to the child").

85. *In re* Baby M, 537 A.2d 1227 (N.J. 1988).

86. *Id.* at 1235.

87. *Id.* at 1235-37.

88. Mrs. Stern was not a party to the contract, presumably to avoid the application of New Jersey's statute prohibiting "baby-selling." *Id.* at 1235 (citing N.J. STAT. ANN. § 9:3-54, which provides that any person who pays or accepts money in connection with any placement of a child for adoption is guilty of a misdemeanor).

89. *Id.* at 1234.

90. *In re* Baby M., 537 A.2d. 1227, 1240, 1250 (N.J. 1988) (rejecting Mr. Stern's claim that the payments made to Mrs. Whitehead were for her services—giving a child to Mr. Stern—rather than a fee for an adoption). In discussing the public policy underpinning the baby-selling statute, the court observed:

> The evils inherent in baby-bartering are loathsome for a myriad of reasons. The child is sold without regard for whether the purchasers will be suitable parents. . . . The natural mother does not receive the benefit of counseling and guidance to assist her in making a decision that may affect her for a lifetime. In fact, the monetary incentive to sell her child may, depending on her financial circumstances, make her decision less voluntary. . . . Furthermore, the adoptive parents may not be fully informed of the natural parents' medical history.

Whitehead's parental rights by contract was contrary to state laws providing for termination only when (1) there has been a voluntary surrender of a child to an approved agency accompanied by a formal document acknowledging termination of parental rights; or (2) there has been a showing of parental abandonment or unfitness.[91]

Because neither of these requirements had been met, the court concluded that Mrs. Whitehead retained her parental rights as the natural mother.[92] To determine custody between Mrs. Whitehead and the natural father, Mr. Stern, the court applied the usual "best interests of the child" test, ultimately holding that the Sterns would provide the most secure and stable environment.[93] Mrs. Whitehead was granted visitation rights.[94]

In short, the *Baby M* case was decided under the traditional regime awarding parental status on the basis of the biological connection. Because the arrangement involved artificial insemination, Mrs. Whitehead performed all of the usual biological functions of a mother by providing the egg that was fertilized by William Stern's sperm and by carrying the fetus to term. Thus, there was no question about the identity of the biological mother. The paternity

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> Baby-selling potentially results in the exploitation of all parties involved. . . . Conversely, adoption statutes seek to further humanitarian goals, foremost among them the best interests of the child. . . . The negative consequences of baby-buying are potentially present in the surrogacy context, especially the potential for placing and adopting a child without regard to the interest of the child or the natural mother.

Id. at 1241-42 (citations and footnote omitted).

91. *Id.* at 1242-44 ("[I]t is clear that a contractual agreement to abandon one's parental rights, or not to contest a termination action, will not be enforced in our courts. The Legislature would not have so carefully, so consistently, and so substantially restricted termination of parental rights if it had intended to allow termination to be achieved by one short sentence in a contract."). The court also criticized the irrevocability of Mrs. Whitehead's surrender of her parental rights without meeting the statutory prerequisites for voluntary surrenders. The court stated:

> These strict prerequisites to irrevocability constitute a recognition of the most serious consequences that flow from such consents: termination of parental rights, the permanent separation of parent from child, and the ultimate adoption of the child. . . . Because of those consequences, the Legislature severely limited the circumstances under which such consent would be irrevocable. The legislative goal is furthered by regulations requiring approved agencies, prior to accepting irrevocable consents, to provide advice and counseling to women, making it more likely that they fully understand and appreciate the consequences of their acts.

Id. at 1245.

92. *Id.* at 1252-53.

93. *Id.* at 1260-61.

94. *Id.* at 1263; *see also In re* Marriage of Moschetta, 30 Cal. Rptr. 2d 893 (Cal. Ct. App. 1994) (holding that surrogate, who was both the genetic and gestational mother of a child produced through artificial insemination, was the child's natural mother).

determination similarly followed the biological connection by identifying Mr. Stern, the sperm provider, as the father.

Other courts confronted with parentage claims in surrogacy cases involving artificial insemination have uniformly followed *Baby M* in refusing to enforce surrogacy agreements on the grounds that such agreements violate other state laws or public policy.[95] State legislatures, on the other hand, have taken two divergent approaches. Because most of these statutes address surrogacies arising through the use of in vitro fertilization as well as artificial insemination, they are discussed in greater detail in the following section.[96] To the extent that some of these statutes refer only to artificial insemination, it is significant to note for purposes of this part of the analysis that some of the states have enacted laws making surrogacy agreements void.[97] Others, however, have upheld such agreements.[98]

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95. *See, e.g.*, R.R. v. M.H., 689 N.E.2d 790 (Mass. 1998) (holding surrogacy agreement unenforceable because it violated statutory prohibition against compensation in connection with adoption and conflicted with adoption statute holding mother's consent unenforceable unless made more than four days after child's birth); *In re* Adoption of Paul, 550 N.Y.S.2d 815 (N.Y. Fam. Ct. 1990) (holding surrogacy agreement void and declaring surrogate mother to be child's natural mother because surrogacy agreement violated statutory prohibition against acceptance of compensation in connection with an adoption); *cf.* Doe v. Kelly, 307 N.W.2d 438 (Mich. Ct. App. 1981) (holding in a declaratory judgment action that state's baby-selling statute did not unconstitutionally infringe couple's right to procreate through surrogacy arrangement because couple could still procreate through this means; statute merely prohibited payment to surrogate). For further discussion of the conflict between surrogacy arrangements and public policy, see *infra* notes 238-41 and accompanying text.

Other courts, however, have found such agreements merely voidable, which allowed them to be upheld unless surrogate objected and claimed parental rights for herself. *See, e.g.*, Surrogate Parenting Assocs., Inc. v. Commonwealth, 704 S.W.2d 209 (Ky. 1986) (finding that surrogacy arrangement did not implicate concerns underlying baby-selling statute, but surrogate's promise to surrender custody and terminate parental rights was voidable under state's termination of parental rights statute), *modified by statute*, KY. REV. STAT. ANN. § 199.590(4) (Michie 1995) (holding surrogacy agreements void if surrogate is to be compensated).

96. *See infra* notes 102-03 and accompanying text.

97. *See, e.g.*, KY. REV. STAT. ANN. § 199.590(4) (Michie 1995) (declaring surrogacy contracts void if they provide compensation to surrogate for her artificial insemination and subsequent termination of parental rights); LA. REV. STAT. ANN. § 9:2713 (West 1991) (declaring as void any contract for surrogate motherhood, which is defined as "any agreement whereby a person not married to the contributor of the sperm agrees for valuable consideration to be inseminated, to carry any resulting fetus to birth, and then to relinquish to the contributor of the sperm the custody and all rights and obligations to the child").

98. Arkansas, for example, enacted a statute which provides that if a child is born to a surrogate from the use of artificial insemination, the child's legal parent(s) shall be the biological father and the woman who was identified to be the mother. ARK. CODE

In sum, the legal community is divided. While some states have rejected surrogacy arrangements and continue to adhere to the traditional rules linking biology and parentage, others have begun to recognize that new technology allows one to become a parent as a matter of choice and intentions rather than simply by nature and, to the extent those intentions are represented in a surrogacy agreement, they should be respected. This conflict between biology and intent is developed further in the following section.

B. In Vitro Fertilization—The Emergence of Non-Genetic Surrogate Mothers

Although in vitro fertilization typically is used to assist couples in producing their own biological children, the process also has fostered surrogacy arrangements because it bifurcates the biological functions of motherhood. In other words, it allows one woman to produce the ova for in vitro fertilization while another gestates the fertilized egg(s) and ultimately gives birth.[99] As alluded to above, a number of states enacted statutes addressing the validity of surrogacy agreements and, in some instances, spelling out parental rights when such agreements are void. Legislatures in other states, however, have left the parentage issue for the courts to decide under the state's existing parentage laws. This section begins by examining some of the modern statutes, followed by a review of the case law that has struggled to apply traditional parentage laws in the context of voluntary surrogacies.

1. Parentage Determinations Under Surrogacy Statutes

State legislatures have reacted to surrogacy arrangements in a variety of ways. Statutes vary not only with respect to the validity of such arrangements in general, but also about the default rules that should be applied to determine parentage when such agreements are void or not validly executed.

ANN. § 9-10-201(b), (c) (Michie 1993). More specifically, it states that:

> [I]n the case of a surrogate mother, . . . the child shall be that of: (A) The biological father and the woman intended to be the mother if the biological father is married; or (B) The biological father only if unmarried; or (C) The woman intended to be the mother in cases of a surrogate mother when an anonymous donor's sperm was utilized for artificial insemination.

Id.

99. Belsito v. Clark, 644 N.E.2d 760, 763 (Ohio Ct. C.P. 1994) ("By successfully implanting an embryo into the uterus of a female who has become known as the 'gestational surrogate,' . . . modern medicine has devised a way of separating birth from genetics.").

a. Validity of surrogacy statutes

Surrogacy statutes enacted during the last two decades fall across a wide spectrum. Some states have explicitly authorized the use of unpaid surrogacy agreements,[100] but only under strictly limited circumstances.[101] Other states have enacted statutes declaring all surrogacy agreements void and unenforceable, regardless of whether the surrogate receives compensation.[102] In the middle are statutes invalidating agreements in which the surrogate is compensated but silent

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100. *See* FLA. STAT. ch. 742.15 (1995); NEV. REV. STAT. § 126.045 (1995); N.H. REV. STAT. ANN. § 168-B:16 (1994 & Supp.1996); VA. CODE ANN. §§ 20-159, 20-160(B)(4) (Michie 1995).

101. Florida, New Hampshire, and Virginia permit surrogacies only if the intended mother is infertile or otherwise medically incapable of carrying a child to term and at least one of the intending parents must provide an egg or sperm. FLA. STAT. ch. 742.15(2), 742.16(6) (1995); N.H. REV. STAT. ANN. § 168-B:17 (1994 & Supp.1996); VA. CODE ANN. §§ 20- 160(B)(8), (9) (Michie 1995); *see also* UNIF. STATUS OF CHILDREN OF ASSISTED CONCEPTION ACT § 1(3) Alternative A comment, 9B U.L.A. 187 (Supp. 1998); *id.* § 6(b)(2) Alternative A, 9B U.L.A. 188 (Supp. 1998). Nevada would require that the egg and sperm of both intending parents be used. NEV. REV. STAT. § 126.045(4)(a) (1995).

All of the statutes authorizing surrogacy contracts require the intending parents to be legally married. FLA. STAT. ch. 742.15(1) (1995); NEV. REV. STAT. § 126.045(4)(b) (1995); N.H. REV. STAT. ANN. § 168-B:1(VII) (1994 & Supp.1996); VA. CODE ANN. § 20- 156 (Michie 1995); *see also* UNIF. STATUS OF CHILDREN OF ASSISTED CONCEPTION ACT § 1(3), 9B U.L.A. 187 (Supp. 1998). They also impose eligibility requirements on surrogates, requiring them to be a minimum age, *see, e.g.*, FLA. STAT. ch. 742.15(1) (1995) (18 or older), and in some cases, requiring a documented history of at least one prior pregnancy and viable delivery. *See, e.g.*, N.H. REV. STAT. ANN. § 168-B:17(V) (1994 & Supp.1996); VA. CODE ANN. § 20- 160(6) (Michie 1995); UNIF. STATUS OF CHILDREN OF ASSISTED CONCEPTION ACT Alternative A § 6(b)(6), 9B U.L.A. 191-92 (Supp. 1998).

New Hampshire and Virginia require judicial approval of the surrogacy agreement prior to conception. N.H. REV. STAT. ANN. § 168-B:16(I)(b) (1994 & Supp.1996); VA. CODE ANN. §§ 20- 160 (Michie 1995); *see also* UNIF. STATUS OF CHILDREN OF ASSISTED CONCEPTION ACT § 5(b) Alternative A, 9B U.L.A. 190-91 (Supp. 1998); Florida courts, however, conduct an expedited review after the child's birth. FLA. STAT. ch. 742.16 (1995).

To obtain this judicial approval, the contracts must contain certain mandatory terms; the parties may also be required to comply with other conditions which are "roughly analogous to adoption procedures currently in place in most jurisdictions." UNIF. STATUS OF CHILDREN OF ASSISTED CONCEPTION ACT § 6 Alternative A comment, 9B U.L.A. 192 (Supp. 1998); *see* FLA. STAT. ch. 742.15 (1995); N.H. REV. STAT. ANN. § 168-B:16-B:25 (1994 & Supp.1996); VA. CODE ANN. §§ 20-160 (Michie 1995).

102. *See* ARIZ. REV. STAT. ANN. § 25-218(A) (West 1991); D.C. CODE ANN. § 16-402(a) (1997); IND. CODE ANN. §§ 31-20-1-1, 31-20-1-2 (Michie 1997); MICH. COMP. LAWS ANN. § 722.855 (West 1993); N.Y. DOM. REL. LAW § 122 (McKinney Supp. 1997); N.D. CENT. CODE § 14-18-05 (1991); UTAH CODE ANN. § 76-7-204 (1995).

as to unpaid arrangements,[103] which suggests that the latter are implicitly authorized or, at the very least, voidable but not necessarily void.

The drafters of the Uniform Status of Children of Assisted Conception Act ("USCACA") recognized the intense debate over enforceability of surrogacy agreements and ultimately decided to give state lawmakers a choice between two alternatives.[104] Under one of these alternatives, private surrogacy agreements are not recognized at all.[105] Under the other alternative, they are recognized and enforceable, but only in strictly limited circumstances.[106]

b. Determining parentage in the absence of a valid surrogacy agreement

In states where surrogacy arrangements are legal, parental status obviously is determined by the terms of the agreement itself, assuming that the agreement fulfills all of the statutory requirements. If the agreement fails to satisfy these requirements, however, the statutes typically provide a default rule for determining parentage. Default rules also have been enacted in states refusing to recognize surrogacy agreements at all.

Many of these statutes express a preference for the gestational mother. North Dakota, for example, follows Alternative B of the USCACA, which provides that all surrogate agreements are void and that the surrogate is the child's mother.[107] Paternity depends, however, upon whether the surrogate is married and whether her husband was a party to the surrogacy agreement.[108] A handful of other statutes similarly express a preference for the gestational mother but provide varying rules governing paternity.[109] Other states, however, would

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103. *See* KY. REV. STAT. ANN. § 199.590(4) (Michie 1995); LA. REV. STAT. ANN. § 9:2713 (West 1991); NEB. REV. STAT. § 25-21,200 (1995); WASH. REV. CODE §§ 26.26.230, 26.26.240 (1996). Other states have not explicitly authorized surrogacy agreements, but have exempted them from state laws prohibiting payments in connection with adoptions. *See* ALA. CODE § 26-10A-34 (1992); IOWA CODE § 710.11 (1997); W. VA. CODE § 48-4-16(e)(3) (1996).

104. UNIF. STATUS OF CHILDREN OF ASSISTED CONCEPTION ACT, 9B U.L.A. 184-86 (Supp. 1998).

105. *Id.* Alternative B § 5, 9B U.L.A. 197 (Supp. 1998).

106. *Id.* Alternative A § 5, 9B U.L.A. 190 (Supp. 1998).

107. N.D. CENT. CODE § 14-18-05 (1997).

108. *Id.* (providing that surrogate's husband is the father if he is a party to the surrogacy agreement, but "[i]f the surrogate's husband is not a party to the agreement or the surrogate is unmarried, paternity of the child is governed by chapter 14-17 [the state's adoption of the Uniform Parentage Act]").

109. For default rules in states that refuse to recognize surrogacy contracts, see ARIZ. REV. STAT. ANN. § 25-218(B), (C) (West 1991) (providing that the surrogate is the legal mother of a child born as a result of a surrogate contract and, if married, "her husband is presumed to be the legal father of the child. This presumption is rebuttable."); NEB. REV. STAT. § 25-21,200 (1995) (stating that "[t]he biological father of a child born pursuant to such a contract shall have all the rights and obligations imposed by law with

award parentage under a best interests test, as used in typical child custody disputes between divorcing or unwed parents.[110]

Virginia has a more complicated regime that adopted parts of Alternative A under the USCACA but substantially modified other parts of the uniform law. The Virginia statute provides that surrogacy contracts may be enforced even without prior court approval, but only if the surrogate voluntarily relinquishes her parental rights to the intended parents—at least one of whom is the genetic parent of the child.[111] If the surrogate does not voluntarily relinquish her rights, parentage is determined by the following formula:

> 1. The gestational mother is the child's mother unless the intended mother is a genetic parent, in which case the intended mother is the mother.
> 2. If either of the intended parents is a genetic parent of the resulting child, the intended father is the child's father. However, if (i) the surrogate is married, (ii) her husband is a party to the surrogacy contract, and (iii) the surrogate exercises her right to retain custody and parental rights to the resulting child pursuant to § 20-162, then the surrogate and her husband are the parents.
> 3. If neither of the intended parents is a genetic parent of the resulting child, the surrogate is the mother and her husband is the child's father if he is a party to the contract. The intended parents may only obtain parental rights through adoption . . . .[112]

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respect to such child"); UTAH CODE ANN. § 76-7-204(3)(a) (1995) (providing that "the surrogate mother is the mother of the child for all legal purposes, and her husband, if she is married, is the father of the child for all legal purposes").

For states that generally recognize surrogacy agreements, but provide default rules in the absence of such agreements, see FLA. STAT. ANN. §§ 742.11(2), 742.15(3)(e) (West 1997) (providing that in the absence of an approved surrogacy arrangement, the gestational mother and her husband are the parents); N.H. REV. STAT. ANN. § 168-B:2 (1994 & Supp. 1996) (providing that in the absence of an approved surrogacy agreement, the gestational mother is the legal mother and her husband is the presumed father).

110. *See, e.g.*, MICH. COMP. LAWS ANN. § 722.861 (West 1993) (providing that if there is a dispute over a child born under surrogacy agreement, "[t]he circuit court shall award legal custody of the child based on a determination of the best interests of the child" as defined in the state's child custody act); WASH. REV. CODE § 26.26.260 (1996) (providing that "the superior court shall award legal custody of the child based upon the factors listed" in the state's child custody act).

111. VA. CODE ANN. § 20-162 (Michie 1995); *see also id.* § 20-158(E)(4) ("After the signing and filing of the surrogate consent and report form in conformance with the requirements of subsection A of § 20-162, the intended parents are the parents of the child and the surrogate and her husband, if any, shall not be the parents of the child.").

112. *Id.* § 20-158(E).

The USCACA, on the other hand, would always award parentage to the gestational mother, but declare the surrogate's husband the legal father only if he was a party to the agreement.[113] If the surrogate is unmarried or her husband was not a party to the agreement, paternity is determined under the UPA. As a result, the genetic father would prevail if the surrogate is unmarried but the surrogate's husband otherwise would be the child's presumed father.[114] Where donor sperm or eggs are used, the USCACA would follow the artificial insemination provisions of the UPA[115] and other sperm/egg donor statutes[116] in providing that the donor is not the child's parent.[117]

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113. UNIF. STATUS OF CHILDREN OF ASSISTED CONCEPTION ACT § 5 Alternative A, 9B U.L.A. 190 (Supp. 1998). The full text of this provision is as follows:

> (a) A surrogate, her husband, if she is married, and intended parents may enter into a written agreement whereby the surrogate relinquishes all her rights and duties as a parent of a child to be conceived through assisted conception, and the intended parents may become the parents of the child pursuant to Section 8.
>
> (b) If the agreement is not approved by the court under Section 6 before conception, the agreement is void and the surrogate is the mother of a resulting child and the surrogate's husband, if a party to the agreement, is the father of the child. If the surrogate's husband is not a party to the agreement or the surrogate is unmarried, paternity of the child is governed by [the Uniform Parentage Act].

Id. at 190-91.

114. *Id.*

115. UNIF. PARENTAGE ACT § 5(b), 9B U.L.A. 301 (1987).

116. *See, e.g.*, CONN. GEN. STAT. § 45a-775 (1993) ("A donor of sperm used in A.I.D. [artificial insemination using donor sperm], or any person claiming by or through him, shall not have any right or interest in any child born as a result of A.I.D."); OK. STAT. ANN. tit. 10, § 555 (West 1998) ("An oocyte donor shall have no right, obligation or interest with respect to a child born as a result of heterologous oocyte donation from such donor.").

117. UNIF. STATUS OF CHILDREN OF ASSISTED CONCEPTION ACT § 4, 9B U.L.A. 189 (Supp. 1998). The Virginia statute and the Uniform Status of Children of Assisted Conception Act ("USCACA") also provide for parentage in the event the agreement is terminated after conception by a surrogate who has provided the egg for the assisted conception. *Id.* Alternative A § 7(b), 9B U.L.A. 194 (Supp. 1998) ("A surrogate who has provided an egg for the assisted conception pursuant to an agreement approved under Section 6 may terminate the agreement by filing written notice with the court within 180 days after the last insemination pursuant to the agreement."); VA. CODE ANN. § 20-161(B) (Michie 1995) (providing that surrogate who is also genetic parent may terminate agreement within 180 days of last performance of assisted conception). If the surrogate exercises this option, she will be deemed the mother of the child. UNIF. STATUS OF CHILDREN OF ASSISTED CONCEPTION ACT § 8(a)(2) Alternative A, 9B U.L.A. 195-96 (Supp. 1998); VA. CODE ANN. § 20-158(D) (Michie 1995).

Under the Virginia statute, the husband of the surrogate will be the father. VA. CODE ANN. § 20-158(D) (Michie 1995). The USCACA provides, however, that the surrogate's husband will be the father only if he is a party to the surrogacy agreement;

2. Case Law Applying Traditional Parentage Laws

In the absence of legislation that specifically addresses parentage in the context of surrogacy arrangements, courts must attempt to resolve such disputes through traditional parentage laws. Because these laws focus on the identity of the biological parent(s), however, they are difficult to apply to disputes involving children born through surrogacy arrangements using in vitro fertilization because two women have divided the biological functions of motherhood. Thus, courts must decide which of the two is the child's "natural" mother.

One response might be "both," but the handful of courts that have addressed this issue in voluntary surrogacy cases have unanimously rejected the concept of dual maternity.[118] In interpreting their own state's law, which, in all of the reported decisions, was adopted from the UPA, courts have acknowledged that the plain language of the statute suggests that both women can establish maternity. The relevant provision of the UPA provides that the relationship between the child and the natural mother "may be established by proof of her having given birth to the child, or under this Act."[119] The gestational mother obviously qualifies under the first clause while the genetic mother qualifies under the phrase "under this Act" because she can prove maternity through

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if the husband is not a party to the agreement or if the surrogate is unmarried, paternity is governed by the UPA. UNIF. STATUS OF CHILDREN OF ASSISTED CONCEPTION ACT § 8(a)(2) Alternative A, 9B U.L.A. 196 (Supp. 1998). As a practical matter, this means that the intending father will be deemed the legal father because, as the USCACA drafting committee points out, a surrogate can terminate the agreement after conception only if she provides the egg. *See id.* § 7(b) Alternative A, 9B U.L.A. 194 (Supp. 1998); *id.* § 8 Alternative A comment, 9B U.L.A. 196 (Supp. 1998). This means that the intending father must have provided the sperm because § 1(3) of the Act requires at least one intended parent to provide genetic material. *See id.* § 1(3), 9B U.L.A. 187 (Supp. 1998). The intended father, therefore, can establish paternity under the Uniform Parentage Act through this genetic connection. UNIF. PARENTAGE ACT § 12(3), 9B U.L.A. 317 (1987).

The committee recognized that having the legally recognized father and legally recognized mother in different households was "regrettable . . . and may precipitate litigation over custody . . . ." UNIF. STATUS OF CHILDREN OF ASSISTED CONCEPTION ACT § 8 Alternative A comment, 9B U.L.A. 196 (Supp. 1998). But the committee noted that the situation is not entirely unique in family law. *Id.*

118. *See id.* at 763; Johnson v. Calvert, 851 P.2d 776, 781 (Cal.), *cert. denied*, 510 U.S. 874 (1993); *see also* McDonald v. McDonald, 608 N.Y.S.2d 477 (N.Y. App. Div. 1994) (the court does not expressly address the issue, but by following *Johnson*, the court implicitly suggests that the Act contemplates only one mother).

119. UNIF. PARENTAGE ACT § 3(1), 9B U.L.A. 297-98 (1987).

blood or genetic testing.[120] Nonetheless, the courts have held that "society and the law recognize only one natural mother and father."[121]

Does the UPA express a preference for either the genetic or gestational function? The California Supreme Court could find none in the statute's plain language.[122] The court said that the statute, by stating that the natural mother may be established by "proof of [her] having given birth[,]" indicates that this is one of the permitted, but not exclusive, means of establishing maternity.[123] Moreover, the court noted that the provision concludes with a disjunctive—"or under this Act"—thereby creating an alternative to proof of having given birth.[124]

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120. *Johnson,* 851 P.2d at 781 ("[W]e are left with the undisputed evidence that Anna, not Crispina, gave birth to the child and that Crispina, not Anna, is genetically related to him. Both women thus have adduced evidence of a mother and child relationship as contemplated by the Act."); Belsito v. Clark, 644 N.E.2d 760, 763 (Ohio Ct. C.P. 1994) (stating that "both would be considered the mother of the delivered child: Carol, because she gave birth, and Shelly, because she provided the genetic makeup or imprint").

121. *Belsito,* 644 N.E.2d at 763; *see also Johnson,* 851 P.2d at 781 (stating that "for any child California law recognizes only one natural mother, despite advances in reproductive technology rendering a different outcome biologically possible"). In reaching this decision, the California Supreme Court declined the suggestion of the American Civil Liberties Union, an amicus curiae in the case, to find that the child had two mothers. *Johnson,* 851 P.2d at 781 n.8. The court said that "[e]ven though rising divorce rates have made multiple parent arrangements common in our society, we see no compelling reason to recognize such a situation here." *Id.* The court noted that the genetic parents had provided the child with a stable, intact, and nurturing home since shortly after birth and that recognizing parental rights in the surrogate mother would diminish the genetic mother's role. *Id.*

Support for the "one mother" position also can be found in the text of the statute itself, which refers to the relationship between "the" natural mother and child. UNIF. PARENTAGE ACT § 3, 9B U.L.A. 297-98 (1987) ("The parent and child relationship between a child and (1) *the* natural mother may be established . . . .") (emphasis added). This use of the singular would support a plain language analysis that the drafters of the UPA, and the legislators who adopted the law, intended to recognize only one mother. *See Johnson,* 851 P.2d at 795 (Kennard, J., dissenting) ("By its use of the phrase "*the* natural mother," . . . the UPA contemplates that a child will have only one natural mother.") (emphasis added).

The Ohio court reached this same conclusion by considering the legislative history and purpose of the Act. *Belsito,* 644 N.E.2d at 763 (noting that surrogacy technology did not exist when the statute was enacted and, therefore, "[i]t must therefore be assumed that the [legislature] did not intend for the law to result in two mothers. This conclusion is buttressed by the fact that the Uniform Parentage Act was intended to address solely the question of legitimacy of a child and not surrogacy.") (citation omitted).

122. *Johnson,* 851 P.2d at 781.

123. Johnson v. Calvert, 851 P.2d 776, 781 (Cal.), *cert. denied,* 510 U.S. 874 (1993).

124. *Id.*

From a historical perspective, the court noted, it is unclear exactly what role the childbirth test plays in establishing a child's biological mother. Although the test follows the maxim of *mater est quam gestation demonstat* (by gestation the mother is demonstrated), the court noted that the word "demonstrated" suggests an ambiguity:

> It is arguable that, while gestation may demonstrate maternal status, it is not the *sine qua non* of motherhood. Rather, it is possible that the common law viewed genetic consanguinity as the basis for maternal rights. Under this latter interpretation, gestation simply would be irrefutable evidence of the more fundamental genetic relationship.[125]

Concluding that the ambiguity is not explicitly resolved in the Act,[126] the court developed its own rule to break the statutory tie between gestational and genetic mother, ultimately awarding parentage to the person(s) who "intended" to produce and parent the child.[127] Although this position has been followed by other courts in California and New York, a dissenting judge in California has suggested that a "best interests of the child" analysis would provide a more appropriate tie-breaker. An Ohio court, on the other hand, concluded that genetics should be the determinative factor. These cases are discussed in greater detail below.

a. The Intent Test

By looking at the intentions of the parties, courts in California and New York have awarded parentage to the genetic mother in one case and to the gestational mother in another. In the most recent case, however, a California appellate court ruled in favor of a woman who had neither genetic nor gestational ties to the child.

The two California cases involved voluntary surrogacy arrangements. In the first of these decisions, *Johnson v. Calvert*,[128] the embryo was produced from the sperm and ova of the intending parents and implanted in the surrogate mother. When the relationship deteriorated between the surrogate and the intending parents near the end of the pregnancy, the intending parents filed a lawsuit seeking a declaration that they were the legal parents of the unborn

125. *Id.* at 781-82 (quoting Hill, *supra* note 19, at 370); *see also Belsito*, 644 N.E.2d at 763 ("[G]iving birth was synonymous with providing the genetic makeup of the child that was born. Birth and blood/genetics were one.").

126. *Johnson*, 851 P.2d at 782.

127. *Id.* at 782.

128. 851 P.2d 776 (Cal.), *cert. denied*, 510 U.S. 874 (1993).

child.[129] The surrogate mother answered with her own action to be declared the child's mother.[130]

Because both mothers presented sufficient proof of maternity under California's version of the UPA, the court found the parties' intentions, as manifested in the surrogacy agreement, dispositive.[131] The court noted that the intending couple, desiring to have children of their own genetic stock, affirmatively intended to create a child and took the necessary steps to arrange for that to happen.[132] The surrogate mother, on the other hand, agreed to facilitate the birth of the other couple's child.[133] Accordingly, the court concluded that:

> [A]lthough the Act recognizes both genetic consanguinity and giving birth as means of establishing a mother and child relationship, when the two means do not coincide in one woman, she who intended to procreate the child—that is, she 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.[134]

The court explained, in dictum, how the test would work when the roles are reversed—when the gestational mother has the requisite intent and conceives with genetic material from another woman.[135] The court stated that "in a true

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129. *Id.* at 778.

130. *Id.*

131. *Id.* at 782.

132. *Id.*

133. *Id.* As the court explained:

> Although the gestative function [the surrogate] performed was necessary to bring about the child's birth, it is safe to say that Anna would not have been given the opportunity to gestate or deliver the child had she, prior to implantation of the zygote, manifested her own intent to be the child's mother. No reason appears why [the surrogate's] later change of heart should vitiate the determination that [the intending mother] is the child's natural mother.

Id.

134. Johnson v. Calvert, 851 P.2d 776, 782-83 (Cal.), *cert. denied*, 510 U.S. 874 (1993). The court found support for its conclusion in the writings of several legal commentators. *See* Hill, *supra* note 19, at 415 (arguing that "while all of the players in the procreative arrangement are necessary in bringing a child into the world, *the child would not have been born but for the efforts of the intended parents*") (emphasis added); Marjorie Maguire Shultz, *Reproductive Technology and Intent-Based Parenthood: An Opportunity for Gender Neutrality*, 1990 WIS. L. REV. 297, 323 (arguing that "[w]ithin the context of artificial reproductive techniques, intentions that are voluntarily chosen, deliberate, express and bargained-for ought presumptively to determine legal parenthood").

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

'egg donation' situation, where a woman gestates and gives birth to a child formed from the egg of another woman with the intent to raise the child as her own, the birth mother is the natural mother under California law."[136]

A New York divorce court found this dictum persuasive when presented with those facts the following year in *McDonald v. McDonald*.[137] At issue was the custody of twins that were delivered by a woman unable to conceive naturally but successfully implanted with embryos created from her husband's sperm and a donor's ova.[138] During the divorce proceedings, the husband moved for immediate and sole custody of the twins on the ground that he was the "only genetic and natural parent available" to the children.[139] The court disagreed, following the California intent test to conclude that the wife was the child's natural mother because she gestated and gave birth to the twins with the intent to raise them as her own.[140]

The most recent California case, *In re Marriage of Buzzanca*,[141] tested the limits of current reproductive technology, as well as the UPA's ability to respond to that technology. The case arose when John and Luanne Buzzanca, a married couple unable to have their own children, secured a surrogate mother to carry an embryo produced from donor sperm and ova.[142] As a result, the child, named Jaycee, was genetically unrelated to either the Buzzancas or the surrogate mother. Less than a month before Jaycee was born, Mr. Buzzanca filed for divorce and disclaimed any responsibility for the child.[143]

Because the gestational mother also made clear that she had no interest in the child,[144] the trial judge "reached an extraordinary conclusion: Jaycee had no lawful parents."[145] The news media promptly criticized the decision as contrary to common sense—"How could the . . . judge rule that the man responsible for a child's creation, had no responsibility for her support?"[146]

The answer is simple: because the UPA did not contemplate, and therefore did not provide for, this extraordinary departure from the laws of nature. The Act, as explained above, focuses primarily on biology to determine parentage.[147] Thus, the natural mother would be either the woman who gave birth or the woman who was genetically related to the child—not Mrs. Buzzanca, who

136. *Id.*
137. 608 N.Y.S.2d 477 (N.Y. App. Div. 1994).
138. *Id.* at 478.
139. *Id.* at 479.
140. *Id.* at 480.
141. 72 Cal. Rptr. 2d 280 (Cal. Ct. App. 1998).
142. *Id.* at 282.
143. *Id.*
144. *Id.*
145. *Id.*
146. Ellen Goodman, *The Disturbing Case of a High-Tech Orphan*, BOSTON GLOBE, Sept. 14, 1997, at D7, *available in* 1997 WL 6269483.
147. See supra notes 58-74 and accompanying text.

provided neither the genetics nor the gestation of the child.[148] Similarly, Mr. Buzzanca could not be the father because he had not contributed the sperm[149] and was not governed by the statutory presumption of paternity based upon marriage to the natural mother.[150]

The facts also failed to fit within the artificial insemination provisions of the Act because, as a technical matter, the process involved in vitro fertilization rather than artificial insemination and, more importantly, the woman who was impregnated was not Mr. Buzzanca's wife.[151] The appellate court looked past the plain language of the statute, however, to find a legislative intent in the artificial insemination provision to assign paternity to the "person who caused a child to come into being" notwithstanding that person's lack of a biological tie to the child.[152]

> Just as a husband is deemed to be the lawful father of a child unrelated to him when his wife gives birth after artificial insemination, so should a husband and wife be deemed the lawful parents of a child after a surrogate mother bears a biologically unrelated child on their behalf. In each instance, a child is procreated because a medical procedure was initiated and consented to by intended parents.[153]

The appellate court also found support in the "intent test" enunciated in *Johnson*. Indeed, the *Johnson* opinion anticipated this scenario, stating in dictum, that "[i]n . . . the extremely rare situation in which neither the gestator nor the woman who provided the ovum for fertilization is willing to assume custody of the child after birth, a rule recognizing the intending parents as the child's legal, natural parents should best promote certainty and stability for the child."[154]

The *Buzzanca* court rejected Mr. Buzzanca's argument that *Johnson*'s "intent test" should be applied only when the intended parents have a biological tie to the child.[155] According to the *Buzzanca* court, "[t]he context was not limited to just *Johnson*-style contests between women who gave birth and women who contributed ova, but to any situation where a child would not have

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148. *In re* Marriage of Buzzanca, 72 Cal. Rptr. 2d 280, 282 (Cal. Ct. App. 1998). The trial court did not assign parental status to the gestational mother but, instead, accepted a stipulation that neither the surrogate nor her husband were the "biological" parents. *Id.*

149. *Id.*

150. *See* UNIF. PARENTAGE ACT § 4 (a), 9B U.L.A. 298-99 (1987).

151. *See id.* § 5, 9B U.L.A. 301 (1987).

152. *Buzzanca*, 72 Cal. Rptr. 2d at 286.

153. *Id.* at 282.

154. Johnson v. Calvert, 851 P.2d 776, 783 (Cal.), *cert. denied*, 510 U.S. 874 (1993).

155. *In re* Marriage of Buzzanca, 72 Cal. Rptr. 2d 280, 290 (Cal. Ct. App. 1998).

been born 'but for the efforts of the intended parents.'"[156] In short, "for all practical purposes [Mr. Buzzanca] caused Jaycee's conception every bit as much as if things had been done the old-fashioned way."[157]

b. The Best Interests Test

An alternative test was suggested by the dissenting justice in *Johnson v. Calvert*.[158] Justice Kennard agreed with the majority that the state's parentage act allowed both the gestational and genetic mother to establish proof of maternity and that the court needed to recognize some way of breaking the tie between these two individuals.[159] But she argued that a "best interests of the child" analysis more appropriately addressed "the paramount concern," which is "the well-being of the child that gestational surrogacy has made possible."[160]

> The allocation of parental rights and responsibilities necessarily impacts the welfare of a minor child. And in issues of child welfare, the standard that courts frequently apply is the best interests of the child. . . . This "best interests" standard serves to assure that in the judicial resolution of disputes affecting a child's well-being, protection of the minor child is the foremost consideration.[161]

Under this standard, the court's objective would be to determine "who can best assume the social and legal responsibilities of motherhood for a child born of a gestational surrogacy arrangement."[162] Justice Kennard stated that this determination should not turn on the parties' relative economic circumstances, which would typically favor the genetic parents who hired the surrogate, but should turn instead on factors pertinent to good parenting,[163] such as "the ability to nurture the child physically and psychologically . . . to provide ethical and intellectual guidance . . . [and] the 'well recognized right' of every child 'to

156. *Id.* at 291.

157. *Id.* at 291. The court stated that the artificial insemination statute codifies the common law rule of "parenthood by common law estoppel." *Id.* at 288. "[A] reasonable man who . . . actively participates and consents to his wife's artificial insemination in the hope that a child will be produced whom they will treat as their own, knows that such behavior carries with it the legal responsibilities of fatherhood and criminal responsibility for nonsupport." *Id.* at 286 (quoting People v. Sorenson, 437 P.2d 495, 499 (Cal. 1968)).

158. *Johnson*, 851 P.2d at 795 (Kennard, J., dissenting).

159. *Id.*

160. Johnson v. Calvert, 851 P.2d 776, 799-800 (Cal.), *cert. denied*, 510 U.S. 874 (1993).

161. *Id.* at 799 (citations omitted).

162. *Id.*

163. *Id.* at 800.

stability and continuity.'"[164] The gestational mother's intent to procreate would be relevant, but not dispositive.[165]

Justice Kennard acknowledged that a best interests test would require a case-by-case evaluation and, therefore, would not promote certainty in determining parentage.[166] But the individualized assessment would provide many protections for the parties, "such as judicial oversight, legal counsel, and an opportunity for the court to determine who best can provide for the child."[167]

c. The Preference for Genetics

The Ohio Court of Common Pleas rejected both the "intent" and "best interests" tests in favor of a bright-line standard favoring the genetic parent(s).[168] The court criticized the "intent test" as unworkable for several reasons, perhaps most significantly because it failed to fully recognize the historical preference for genetic relations and the genetic provider's fundamental rights to decide whether to procreate and raise a child of one's own genes.[169] Accordingly, the court held that genetics should prevail over gestation unless the genetic parents waived those rights in favor of the gestational surrogate.[170]

The court stated that procreation, which it defined as "the replication of the unique genes of an individual," should occur only with that individual's consent.[171] Moreover, the court found that any decision to implant genetic material into a surrogate mother with the understanding that the surrogate would raise the resulting child involved the surrender of parental rights.[172] "If we are to respect the right of procreation and parentage when a gestational surrogate is used, one of the first questions asked must concern consent of the genetic

164. *Id.* (citations omitted).

165. *Id.*

166. Johnson v. Calvert, 851 P.2d 776, 800 (Cal.), *cert. denied*, 510 U.S. 874 (1993).

167. *Id.*

168. Belsito v. Clark, 644 N.E.2d 760, 764-66 (Ohio Ct. C.P. 1994).

169. *Id.* The court also found the "intent test" unworkable because it would be difficult to prove intent in some cases and because the test conflicted with two public policies. *Id.* at 764-65. The first is the policy against enforcing or encouraging private agreements to give up parental rights. *Id.* at 765. The second is the policy underlying the state adoption laws, i.e., giving a natural mother an "unpressured opportunity before a disinterested magistrate to surrender her parental rights[;]" providing a means to review the suitability of adoptive parents; and promoting stability in the child-parent relationship by issuing a judicial determination that clearly terminates the rights of the natural parents and establishes those of the adopting parents. *Id.*

170. *Id.* at 766-67.

171. *Id.* at 766.

172. *Id.*

parents. The *Johnson* test fails to give that priority, and thus fails to provide adequate protection of basic rights."[173]

The court found it significant that historically and at common law, the primary means of establishing parentage was through blood relations, and in modern society, the term "blood relations" equates to shared DNA or genetics.[174] Although the female who gave birth is considered to be the natural parent, the court stated that "[t]he rationale behind that rule . . . is that for millennia, giving birth was synonymous with providing the genetic makeup of the child that was born. Birth and blood/genetics were one."[175]

The court noted that recognizing the genetic parent as the natural parent is in the best interests of the child and society because "[t]he genetic parent can guide the child from experience through the strengths and weaknesses of a common ancestry of genetic traits."[176] In addition, the court found that the rule would avoid or minimize the concerns of a surrogate selling her right to be determined the natural parent,[177] and the genetics test would be easier to apply because of the certainty allowed by modern genetics testing.[178]

The court recognized that, in some cases, a genetically unrelated surrogate mother (such as in the *McDonald* case discussed above)[179] may wish to be recognized as the legal parent.[180] To address this scenario, the court adopted a two-part inquiry, starting from the position that a child's natural parents are those determined by their genetic link to the child. Thus, the second part of the inquiry—determining the persons who will raise the child—must be determined by the consent of the genetic parents.[181] If the genetic parents have not waived or relinquished their rights, then they will be determined to be the legal parents.[182] In short, "the birth test becomes subordinate and secondary to genetics."[183]

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173. *Id.*

174. Belsito v. Clark, 644 N.E.2d 760, 763 (Ohio Ct. C.P. 1994).

175. *Id.*

176. *Id.* at 766.

177. *Id.* "Since she has not contributed to the genetics of the child, and the genetic parent or parents have not waived their rights, she cannot be determined the natural parent. She cannot sell a right she does not have." *Id.* This view is somewhat circular, however, and discounts the procreative and parental rights of the gestational mother. *See infra* notes 292-307 and accompanying text.

178. *Belsito*, 644 N.E.2d at 766.

179. *See supra* notes 137-40 and accompanying text.

180. Belsito v. Clark, 644 N.E.2d 760, 767 (Ohio Ct. C.P. 1994). The court found support for this proposition in the adoption laws and in the state's artificial insemination law—all of which allow someone other than the genetic parent to become the legal parent if the genetic parent relinquishes or waives the rights and duties of parentage. *Id.*

181. *Id.*

182. *Id.*

183. *Id.*

C. Summary

Courts and legislatures have taken divergent paths in trying to adapt traditional parentage laws, which are aimed at identifying the biological parent, to disputes involving children conceived through modern reproductive technology. When faced with children who have both a genetic mother and a gestational mother as a result of voluntary surrogacy arrangements, states have had to make difficult legal and policy decisions in choosing between the two.

Some states have opted for a bright-line test, simply declaring a preference for one or the other, such as the Ohio court's common law rule favoring the genetic parent or state statutes preferring the gestational mother. Other states have adopted more flexible standards, looking to either the intent of the parties or the best interests of the child in order to determine parentage. Each decision has required a careful consideration of existing legal theories and public policy.

Until recently, these parentage disputes have arisen only in cases involving voluntary surrogacies, in which a surrogate mother has expressly agreed to carry a child to be raised by someone else. The California fertility clinic scandal,[184] however, raises the specter of involuntary or accidental surrogacies—those in which a genetic mother's fertilized egg is implanted into another woman as a result of theft or misdelivery. The following section attempts to define a standard to be applied in those cases.

III. DETERMINING PARENTAL RIGHTS WHEN GENETIC MATERIAL IS MISDELIVERED OR STOLEN

Although courts and legislatures have taken several different tracks in determining parentage in cases of assisted reproduction, all of the approaches represent a balancing of two fundamental considerations: the rights of the parents (or would-be parents) and the best interests of the child. This Section analyzes these interests to determine how they may be best accommodated in determining parentage of a child born to a gestational mother implanted with the genetic material of another without the latter's consent.

A. Parental Rights

The parental rights doctrine, as explained in preceding sections, has a long common law heritage and is constitutionally protected. The difficulty in cases involving modern reproductive technology, however, is to determine who holds these rights. Courts and commentators have suggested a variety of legal theories and public policy considerations to guide this determination in the voluntary surrogacy cases. For the reasons discussed below, none of these theories or

184. *See supra* notes 1-10 and accompanying text.

policies provides a definitive answer for cases involving stolen or misdelivered genetic material.

1. Property Theory

Basic property law provides a potential analytical framework for cases of stolen or misdelivered genetic material. Under this view, genetic material is considered the property of the progenitors and, therefore, they have exclusive rights to the fruits or profits from that property. As discussed below, however, property law does not provide a perfect analogue.

Genetic material has been treated as property in some contexts, such as in disputes between genetic providers and institutions holding the genetic material. In *York v. Jones*,[185] for example, the court applied basic property principles in a dispute between a fertility clinic and a couple that had asked the clinic to transfer their last remaining embryo to another facility.[186] The court held that the cryopreservation agreement between the first fertility clinic and the genetic providers created a bailment and that the clinic had an obligation to return the bailed property (the embryo) at the couple's request.[187]

The California Supreme Court also alluded to property concepts when it adopted the intent test in *Johnson v. Calvert*.[188] More specifically, the court found support for its test in the writings of several commentators, including a law review article which stated that "[t]he mental concept of the child is a controlling factor of its creation, and the originators of the concept merit full credit as conceivers."[189] Dissenting Justice Kennard observed that this concept

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185. 717 F. Supp. 421 (E.D. Va. 1989).

186. *Id.* at 425.

187. *Id.* The court's reasoning is as follows:

> While the parties in this case expressed no intent to create a bailment, under Virginia law, no formal contract or actual meeting of the minds is necessary. Rather, all that is needed "is the element of lawful possession however created, and duty to account for the thing as the property of another that creates the bailment . . . ."
>
> . . . .
>
> In the instant case, the requisite elements of a bailment relationship are present. It is undisputed that the Jones Institutes' possession of the pre-zygote was lawful pursuant to the Cryopreservation Agreement. The defendants also recognized their duty to account for the pre-zygote by virtue of a paragraph in the Cryopreservation Agreement purporting to disclaim liability for any injury to the pre-zygote. Finally, the defendants consistently refer to the pre-zygote as the "property" of the Yorks in the Cryopreservation Agreement.

Id. (citations omitted).

188. 851 P.2d 776 (Cal. 1993), *cert. denied*, 510 U.S. 874 (1993); *see supra* notes 129-37 and accompanying text.

189. *Johnson*, 851 P.2d at 783 (quoting Andrea E. Stumpf, Note, *Redefining Mother: A Legal Matrix for New Reproductive Technologies*, 96 YALE L.J. 187, 196

is "comfortingly familiar" because it has its roots in basic intellectual property law, i.e., "an idea belongs to its creator because the idea is a manifestation of the creator's personality or self."[190]

One major problem with employing a pure property analogy, however, as Justice Kennard and several commentators have pointed out, is that children are not property.[191]

> While it is true that at common law parental rights were in many ways strikingly similar to property rights, this similarity no longer exists. Thus, while a sperm or egg donor may have something approximating a property right in his or her gametes, their status with respect to an embryo is less certain. The continuum running between the jurisprudential categories of property and personhood is unclear. For example, the progenitors of a frozen embryo awaiting implantation in the uterus may be treated as property owners in some contexts and as prospective parents in others. But certainly, upon birth, the property metaphor is no longer apposite.[192]

Accordingly, courts have struggled to define the status of embryos and other genetic material, with more recent decisions rejecting the strict property analogy in favor of an entirely new classification.[193] In *Davis v. Davis*,[194] for

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(1986)).

190. *Id.* at 796 (Kennard, J., dissenting) (quoting Justin Hughes, *The Philosophy of Intellectual Property*, 77 GEO. L.J. 287, 330 (1988)).

191. *Id.* Judge Kennard, in dissent, stated:

> Unlike songs or inventions, rights in children cannot be sold for consideration, or made freely available to the general public. Our most fundamental notions of personhood tell us it is inappropriate to treat children as property. Although the law may justly recognize that the originator of a concept has certain property rights in that concept, the originator of the concept of a child can have no such rights, because children cannot be owned as property.

Id. at 796.

192. Hill, *supra* note 19, at 392 (footnotes omitted).

193. The American Fertility Society has described the debate over the status of preembryos as follows:

> Three major ethical positions have been articulated in the debate over preembryo status. At one extreme is the view of the preembryo as a human subject after fertilization, which requires that it be accorded the rights of a person. This position entails an obligation to provide an opportunity for implantation to occur and tends to ban any action before transfer that might harm the preembryo or that is not immediately therapeutic, such as freezing and some preembryo research.
>
> At the opposite extreme is the view that the preembryo has a status no different from any other human tissue. With the consent of those who have

example, the Tennessee Supreme Court found that gamete providers have "an interest in the nature of ownership" in the preembryos created from their eggs or sperm, but the court emphasized that the interest was "not a true property interest."[195] At issue in *Davis* was the disposition of several preembryos upon the divorce of the progenitors. The wife initially indicated that she still wanted to use the preembryos to bear a child, but the husband objected because he did not wish to become a parent outside the bounds of marriage.[196] The intermediate appellate court relied on *York v. Jones*[197] to award the Davises "joint custody" of the preembryos, but the state supreme court criticized that view for improperly implying that the couple's interest was a property interest.[198]

The state supreme court also rejected the trial court's view that preembryos should be treated as persons.[199] Instead, the court concluded that preembryos "occupy an interim category that entitles them to special respect because of their potential for human life."[200] Although the progenitors do not have a true property interest, "they do have an interest in the nature of ownership, to the extent that they have decision-making authority concerning disposition of the preembryos . . . ."[201]

Because the Davises had not agreed on the disposition of the preembryos, either at the time the preembryos were created or at the time of their divorce, the court decided the case as an issue of procreational rights, balancing Mary Sue Davis's right to procreate against Junior Davis's right to avoid procreation.[202]

> decision-making authority over the preembryo, no limits should be imposed on actions taken with preembryos.
>
> A third view—one that is most widely held—takes an intermediate position between the other two. It holds that the preembryo deserves respect greater than that accorded to human tissue but not the respect accorded to actual persons. The preembryo is due greater respect than other human tissue because of its potential to become a person and because of its symbolic meaning for many people. Yet, it should not be treated as a person, because it has not yet developed the features of personhood, is not yet established as developmentally individual, and may never realize its biologic potential.

Davis v. Davis, 842 S.W.2d 588, 596 (Tenn. 1992) (quoting American Fertility Society, *Ethical Considerations of the New Reproductive Technologies*, J. AM. FERTILITY SOC'Y, June 1990, at 34S-35S), *cert. denied*, 507 U.S. 911 (1993).

194. 842 S.W.2d 588 (Tenn. 1992), *cert. denied*, 507 U.S. 911 (1993).

195. *Id.* at 597.

196. *Id.* at 589. Mary Sue Davis later changed her mind and indicated that she wished to donate the preembryos to another couple for implantation. *Id.* at 590.

197. *See supra* notes 185-87 and accompanying text.

198. *Davis*, 842 S.W.2d at 596-97.

199. *Id.* at 594-95.

200. Davis v. Davis, 842 S.W.2d 588, 597 (Tenn. 1992), *cert. denied*, 507 U.S. 911 (1993).

201. *Id.*

202. *Id.* at 601-04.

The court ultimately concluded that Junior Davis's right should prevail because Mary Sue Davis's interest—to donate the preembryos to another couple—was significantly less important than Junior Davis's interest in avoiding parenthood.[203]

A California appeals court relied upon *Davis* to hold that a sperm donor who subsequently committed suicide had a property-type interest in his sperm that became part of his estate when he died.[204] The dispute in *Hecht v. Superior Court* concerned fifteen vials of frozen sperm that the decedent had conveyed to his girlfriend through his will.[205] "Although [the sperm] has not yet been joined with an egg to form a preembryo, as in *Davis*, the value of sperm lies in its potential to create a child after fertilization, growth, and birth."[206] Accordingly, the court held that the sperm donor, at the time of his death, "had an interest, in the nature of ownership, to the extent that he had decision making authority as to the use of his sperm for reproduction." The court concluded that this interest was properly part of the decedent's estate, thereby giving the probate court jurisdiction over the matter.[207]

In summary, the courts have begun to recognize a special status for genetic material because of its potential to create human life. This theory has significant implications with respect to the progenitor's procreational rights, discussed in greater detail below,[208] but makes traditional property doctrines inapplicable.

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203. *Id.* at 604. The court indicated that the case would be closer if Mary Sue Davis had been seeking to use the preembryos herself and could not achieve parenthood through any other reasonable means, including adoption. *Id.*

In a more recent decision on facts similar to the *Davis* case, the New York Court of Appeals declined to address the status of the preembryos. Kass v. Kass, 696 N.E.2d 174 (N.Y. 1998). Instead, the court resolved the issue through the couple's agreement with the fertility clinic, which stated that in the event that the couple was unable to make a decision regarding the disposition of the frozen preembryos, the preembryos would be donated to the in vitro fertilization program for research. *Id.* at 180.

204. Hecht v. Superior Court, 20 Cal. Rptr. 2d 275 (Cal. Ct. App. 1993).

205. *Id.* at 276-77.

206. *Id.* at 283. In reaching its decision, the appellate court found its case distinguishable from *Moore v. Regents of University of California*, in which the California Supreme Court held that a leukemia patient had no property interest in cells that were removed from his body during treatment and subsequently used in potentially lucrative medical research without his permission. *Id.* at 280-82 (citing *Moore*, 793 P.2d 479 (Cal. 1990)). The appeals court noted that the patient in *Moore* did not expect to retain possession of his cells after removal. *Id.* at 280-81 n.4. The decedent in *Hecht*, on the other hand, had demonstrated an intent to maintain control over his sperm through his contract with the sperm bank. *Id.*

207. *Id.* at 283. The court emphasized, however, that its opinion did not address the validity or enforceability of the will. *Id.* at 283, 284. Because of this and other unadjudicated issues, the court denied as premature the girlfriend's petition to have the sperm distributed to her. *Id.* at 284.

208. *See infra* notes 266-307 and accompanying text.

Moreover, even if property principles were applied by analogy, a court would likely conclude that the gestational mother has better title than the genetic provider. Under the doctrine of accessions, as explained in the landmark case of *Wetherbee v. Green*,[209] "one whose property has been appropriated by another without authority has a right to follow it and recover the possession from any one who may have received it" even if the property has increased in value by the addition of labor or money.[210] But this rule is subject to an exception for property that has changed form or otherwise has been improved significantly by an innocent party.[211] "When the right to the improved article is the point in issue, the question, how much the property or labor of each has contributed to make it what it is, must always be one of first importance."[212] Thus, the owner of raw material such as wood loses title to it when it is converted into a musical instrument because "in bringing it to its present condition the value of the labor has swallowed up and rendered insignificant the value of the original materials."[213]

Applying this analysis to a bifurcated reproductive process suggests that the gestational mother would prevail because her physical investment is markedly greater than that of the genetic mother. This is not to say that the genetic mother has not made a significant investment. To the contrary, the physical removal of her eggs is a risky and physically demanding process.[214] But, as one scholar has observed, the genetic mother's contribution might "seem trivial compared to the rigors and the around the clock demands of pregnancy and childbirth."[215] Indeed, another commentator has described the gestational period as thirty-eight to forty weeks of "full time work—twenty-four hours a day, seven days a

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209. 22 Mich. 311 (1871).

210. *Id.* at 313.

211. *Id.* at 315-21; RAY ANDREWS BROWN, THE LAW OF PERSONAL PROPERTY §§ 6.1-6.3 (Walter B. Raushenbush ed., 3d ed. 1975).

212. *Wetherbee*, 22 Mich. at 319.

213. *Id.* at 319-20.

214. Johnson v. Calvert, 851 P.2d 776, 790 (Cal.) (Kennard, J., dissenting) ("To undergo superovulation and egg retrieval is taxing, both physically and emotionally; the hormones used for superovulation produce bodily changes similar to those experienced in pregnancy, while the surgical removal of mature eggs has been likened to caesarian-section childbirth.") (citing CARMEL SHALEV, BIRTH POWER: THE CASE FOR SURROGACY 117-18 (1989)), *cert. denied*, 510 U.S. 874 (1993); Randy Frances Kandel, *Which Came First: The Mother or the Egg? A Kinship Solution to Gestational Surrogacy*, 47 RUTGERS L. REV. 165, 188 (1994) ("The genetic mother suffers the risky surgical removal of her eggs, often preceded by harrowing years of infertility treatments and clinicalized sexual relations which have been carefully timed to coincide with her ovulatory cycle.").

215. SCOTT B. RAE, THE ETHICS OF COMMERCIAL SURROGATE MOTHERHOOD, 87-88 (1994) ("At the end of the process of birth, the woman who gives birth to the child will have contributed much more of herself than the egg donor in order to bring about the child's birth.").

week—without any time off: 'Pregnancy and childbirth are hazardous, time-consuming, painful conditions.'"[216]

Consequently, when a gestational mother has produced a child from another woman's genetic material, one reasonably could conclude that the gestational mother's labor and materials made a significantly greater contribution to the final product than the genetic mother's egg production. Accordingly, the gestational mother would likely prevail under the accessions doctrine[217] in the unlikely event that a court accepts a pure property rights analysis for claims concerning children.

2. Causation Theory

Courts also have alluded to tort principles—more specifically, the concept of "but for" causation—in their analysis of the involuntary surrogacy cases. But this standard is ambiguous in the context of stolen or misdelivered embryos.

The California Supreme Court's intent test in *Johnson v. Calvert* was derived in part from the writings of Professor Hill, who observed that "while all of the players in the [surrogacy] arrangement are necessary in bringing a child into the world, *the child would not have been born but for the efforts of the intended parents*. . . . [T]he intended parents are the first cause, or the prime movers, of the procreative relationship."[218] Thus, in *Johnson*, the court ruled in

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216. Nancy W. Machinton, Comment, *Surrogate Motherhood: Boon or Baby-Selling—The Unresolved Questions*, 71 MARQ. L. REV. 115, 125 (1987) (quoting Robert C. Black, *Legal Problems of Surrogate Motherhood*, 16 NEW ENG. L. REV. 373, 380 (1981)); *see also* Kandel, *supra* note 214, at 188-89 (discussing the risks and stress of a typical pregnancy and noting that "[t]he relative biological strangeness of the fetus to the gestational mother, as compared to a woman carrying a child conceived through sexual intercourse, demands an even greater biological investment from her during the pregnancy").

217. This assumes, however, that the gestational mother innocently obtained the other woman's genetic material and was not providing gestational services as part of a surrogacy contract. The law has long recognized that a wrongdoer acquires no title in the goods of another "either by the wrongful taking, or by any change wrought in them by his labor or skill, however great that change may be." Wetherbee v. Green, 22 Mich. 311, 316 (1871). *But see* BROWN, *supra* note 211, § 6.2 (suggesting that it is questionable whether the traditional view would be followed by modern courts when the value of the resulting product is "out of all proportion" to the value of the original materials). The application of this rule to misdelivered or stolen genetic material is discussed further below. *See infra* notes 354-62 and accompanying text.

Similarly, title remains with the original property owner if he or she employs another to fabricate a final product using the original materials as well as materials of the employee or contractor. BROWN, *supra* note 211, § 6.3. Thus, in a surrogacy arrangement, "the surrogate has no more of a claim to the 'property' . . . than a builder has in a house constructed for another." Hill, *supra* note 19, at 408.

218. *Johnson*, 851 P.2d at 782 (citing Hill, *supra* note 19, at 415).

favor of the couple who arranged for a surrogate mother to carry and deliver the child. The court observed that the surrogate mother's role was necessary to bring about the child's birth, but "it is safe to say that [the surrogate mother] would not have been given the opportunity to gestate or deliver the child had she, prior to implantation of the zygote, manifested her own intent to be the child's mother."[219]

Justice Kennard's dissent in *Johnson* criticized the use of the "but for" test, arguing that under California law, causation is determined by a "substantial factor" test rather than a "but for" analysis.[220] Moreover, in her view, neither test is dispositive in a contest between a genetic mother and a gestational mother because "[b]oth . . . are indispensable to the birth of a child in a gestational surrogacy arrangement."[221]

The same arguments apply in the context of children born from stolen or misdelivered genetic material. One could argue that the gestational mother is the "but for" cause of the child's birth because she had the intent to have a child and was carrying out this intent by having an embryo implanted in her. Although the genetic mother's eggs played a necessary role in producing the embryo, they were not the "but for" cause of the pregnancy because the gestational mother could have used someone else's genetic material. In the Jorges' case,[222] in fact, the gestational mother had no knowledge that the embryos implanted in her were produced with Loretta Jorge's eggs; to the contrary, the gestational mother believed that her own eggs were used.[223]

Conversely, one could argue that the genetic mother is the "but for" cause of the child's birth because she intended to have a child, as manifested by her participation in the in vitro fertilization process and the harvesting of her eggs.[224]

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219. *Id.* at 782.

220. Johnson v. Calvert, 951 P.2d 776, 795-96 (Cal.) (Kennard, J., dissenting), *cert. denied*, 510 U.S. 874 (1993). The "but for" test has been stated as follows: "[t]he defendant's conduct is a cause of the event if the event would not have occurred but for that conduct; conversely, the defendant's conduct is not a cause of the event, if the event would have occurred without it." W. PAGE KEETON ET AL., PROSSER & KEETON ON THE LAW OF TORTS 266 (5th ed. 1984). The substantial factor test recognizes that torts may have multiple causes and therefore, a defendant's conduct is considered to be the cause of an event if "it was a material element and a substantial factor in bringing it about." *Id.* at 267.

221. *Johnson*, 851 P.2d at 796 ("The proposition that a woman who gives birth to a child after carrying it nine months is a 'substantial factor' in the child's birth cannot reasonably be debated. Nor can it reasonably be questioned that 'but for' the gestational mother, there would not be a child.").

222. *See supra* notes 1-10 and accompanying text.

223. Similarly, if a gestational mother knows that she is using someone else's eggs, she generally does not intend to do so without the donor's consent—and relinquishment of rights to the genetic material and any child produced from it.

224. This theory arguably would apply even in the cases where doctors surreptitiously removed eggs from fertility clinic patients who thought they were merely

Thus, the genetic mother was the prime mover of the procreative process. Although the gestational mother played a necessary role in producing the child, the genetic mother could have achieved that same result by gestating the genetic material herself or, like the intending parents in *Johnson*, by hiring a surrogate who had no intent to produce a child for herself.

The only distinction, then, between the genetic and gestational mother is timing. Both mothers have the intent and, presumably, the ability[225] to produce the child. The gestational mother simply is the first to achieve implantation.

In short, this scenario presents one of the classic cases of multiple causes, where each actor could have produced the result on her own but their actions in fact concurred to bring about the event, and, therefore, suggests that the "substantial factor" test would be the most appropriate.[226] Under this test, as Justice Kennard observed, both women "have substantial claims to legal motherhood. Pregnancy entails a unique commitment, both psychological and emotional, to an unborn child. No less substantial, however, is the contribution of the woman from whose egg the child developed and without whose desire the child would not exist."[227] Tort theory, therefore, does not dispose of the dispute, but instead suggests that each woman is jointly responsible and would have an equal claim.

3. Contract Theory

Contract theory is the third principle that courts and commentators have relied upon in voluntary surrogacy cases. This theory also is inapplicable, however, in cases of stolen or misdelivered genetic material.

Under the contract view, the parties to a voluntary surrogacy arrangement are expected to fulfill the bargained-for expectations of the other parties to the agreement.[228] Thus, a surrogate mother who has agreed to carry the child for

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undergoing diagnostic examinations. *See supra* note 7. Although these women had not consented to the removal and fertilization of their eggs, one could argue that they had manifested an intent to conceive a child by undergoing the diagnostic examinations as part of fertility treatment.

225. One could argue that the genetic mother's ability to conceive is questionable in light of her resort to infertility treatments such as in vitro fertilization. That argument incorrectly assumes that the treatments stem from a fertility problem of the genetic mother; to the contrary, the problem may lie with the genetic mother's mate (or, in some cases, the genetic mother may be seeking in vitro fertilization with donor sperm because she does not have a mate).

226. PROSSER ET AL., *supra* note 220, at 266-67.

227. Johnson v. Calvert, 851 P.2d 766, 788 (Cal.) (Kennard, J., dissenting), *cert. denied*, 510 U.S. 874 (1993).

228. *Johnson*, 851 P.2d at 783. "Within the context of artificial reproductive techniques . . . intentions that are voluntarily chosen, deliberate, express and bargained-for ought presumptively to determine legal parenthood." *Id.* (quoting Marjorie Maguire

someone else should not be allowed to renege on her agreement by subsequently claiming rights in the child.[229] Similarly, a progenitor who voluntarily agrees to donate an egg or sperm to another should be precluded from claiming an interest in a child born from that genetic material.[230]

This theory has been criticized for failing to recognize that "courts will not compel performance of all contract obligations"—particularly those involving personal service[231]—and that specific performance is especially inappropriate in parentage cases. "Just as children are not the intellectual property of their parents, neither are they the personal property of anyone, and their delivery cannot be ordered as a contract remedy on the same terms that a court would, for example, order a breaching party to deliver a truckload of nuts and bolts."[232]

But even assuming that the contract theory is valid in voluntary surrogacy cases, the theory is inapposite to genetic material that has been misdelivered or stolen because, by definition, there has been no agreement in the latter case. The only agreement that exists is between the fertility clinic and each of its patients, who typically stipulate that their genetic material (embryos or sperm) may be frozen and stored *for their own use*[233] and are not to be released from storage for any purpose without the patients' consent.[234] Although these agreements provide for alternative dispositions, such as donation to other couples or for research, such alternative dispositions would take place only if the genetic providers no longer intended to use the genetic material for themselves or are unable (such as in the case of a divorce) to make a decision regarding disposition.[235]

Shultz, *Reproductive Technology and Intent-Based Parenthood: An Opportunity for Gender Neutrality*, 1990 WIS. L. REV. 297, 323).

229. Hill, *supra* note 19, at 415-16.

230. *Id.*

231. *Johnson*, 851 P.2d at 796 (Kennard, J., dissenting) (noting that "even when a party to a contract for personal services (such as employment) has wilfully breached the contract, the courts will not order specific enforcement of an obligation to perform that personal service").

232. *Id.* at 796-97 (Kennard, J., dissenting).

233. *See, e.g.*, Kass v. Kass, 696 N.E.2d 174, 176 (N.Y. 1998) (quoting from agreement in which patients consented to retrieval of more eggs than could be transferred in one in vitro fertilization cycle but stipulated that "[t]he excess eggs are to be inseminated and cryopreserved for possible use by us during a later IVF cycle"); *see also* Kelleher & Christensen, *supra* note 3 (Jorges signed a form directing that all of Mrs. Jorge's eggs be fertilized with Mr. Jorge's sperm and used by them to achieve pregnancy).

234. *See, e.g.*, *Kass*, 696 N.E.2d at 176 (quoting from agreement which stated that the progenitors have "the principal responsibility to decide the disposition of our frozen pre-zygotes. Our frozen pre-zygotes will not be released from storage for any purpose without the written consent of both of us . . . .").

235. *Id.* The agreement signed by Maureen and Steve Kass provided that:

2. In the event that we no longer wish to initiate a pregnancy or are unable to make a decision regarding the disposition of our stored, frozen pre-zygotes,

The contract with the fertility clinic (or sperm bank) could be modified to provide for waiver of parental rights—either by the gestational parent or the genetic parent—in the event that genetic material is switched by mistake or theft. Given the patients' strong desire to have children, however, it seems unlikely that they would knowingly and voluntarily waive these rights at the outset of their fertility treatment. Moreover, it raises questions such as: Which parent(s) would a standardized agreement prefer—the gestational parent or the genetic providers? Or should the preference be left to the patient?[236]

In short, contract theory may provide a principled, though controversial, means of resolving disputes for voluntary surrogacy cases. But like its tort and property counterparts, it fails to provide a definitive resolution of parentage issues in cases of misdelivered or stolen genetic material.

4. Public Policy Concerns

Voluntary surrogacy arrangements have raised a number of public policy concerns, prompting many states to enact legislation prohibiting or regulating the practice.[237] Some of these public policy issues have no relevance outside the arena of voluntary surrogacy arrangements, but others do require consideration in the context of switched genetic material.

The primary objection to voluntary surrogacy arrangements is the possibility they present for baby brokering, the exchange of parental rights for money or other valuable consideration in adoption or related proceedings.[238]

> we now indicate our desire for the disposition of the pre-zygotes and direct the IVF program to (choose one):
>
> . . .
>
> (b) Our frozen pre-zygotes may be examined by the IVF Program for biological studies and be disposed of by the IVF program for approved research investigation as determined by the IVF Program.

Id. at 176-77.

236. This scenario would respect the personal choices that patients might make, but it presents the possibility of mismatched preferences, i.e., where the gestational parent would specify that the genetic parent(s) take priority and the genetic parents waive their rights in favor of the gestational parent.

237. *See supra* notes 102-03 and accompanying text.

238. Alice Hofheimer, Note, *Gestational Surrogacy: Unsettling State Parentage Law and Surrogacy Policy*, 19 N.Y.U. REV. L. & SOC. CHANGE 571, 580-91 (1992). The New Jersey Supreme Court described the myriad of evils inherent in baby bartering as follows:

> The child is sold without regard for whether the purchasers will be suitable parents. . . . The natural mother does not receive the benefit of counseling and guidance to assist her in making a decision that may affect her for a lifetime. In fact, the monetary incentive to sell her child may, depending on her financial circumstances, make her decision less voluntary. Furthermore, the adoptive parents may not be fully informed of the natural parents' medical

Thus, many states have enacted statutes that prohibit or restrict agreements that require the surrogate to relinquish parental rights, particularly if the arrangement is commercial in nature.[239] In the absence of specific legislation on surrogacy arrangements, several courts similarly have held that such agreements are void for violating state statutes or public policy prohibiting baby-selling.[240]

Baby-selling laws are irrelevant, however, to disputes over children born from switched genetic material because neither the genetic mother nor the gestational mother has agreed to transfer parental rights for money. In fact, the dispute arises because both mothers are asserting an intent to keep and raise the child.

Baby-selling laws aside, courts have found that surrogacy arrangements conflict with other state laws and policies, such as: (1) laws requiring proof of parental unfitness or abandonment before termination of parental rights or adoption is allowed; (2) laws that make surrender of custody and consent to adoption revocable in private placement adoptions; and (3) the public policy of assuring equal rights for both natural parents.[241] But, again, these concerns have

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history.

> Baby-selling potentially results in the exploitation of all parties involved. Conversely, adoption statutes seek to further humanitarian goals, foremost among them the best interests of the child. The negative consequences of baby-buying are potentially present in the surrogacy context, especially the potential for placing and adopting a child without regard to the interest of the child or the natural mother.

In re Baby M., 537 A.2d 1227, 1241-42 (N.J. 1988) (citations and footnote omitted); *see also* Johnson v. Calvert, 851 P.2d 776, 792 (Cal.) (Kennard, J., dissenting) ("Surrogacy critics . . . maintain that the payment of money for the gestation and relinquishment of a child threatens the economic exploitation of poor women who may be induced to engage in commercial surrogacy arrangements out of financial need."), *cert. denied*, 510 U.S. 874 (1993); Surrogate Parenting Assocs., Inc. v. Commonwealth, 704 S.W.2d 209, 211 (Ky. 1986) (stating that statute "is intended to keep baby brokers from overwhelming an expectant mother or the parents of a child with financial inducements to part with the child").

239. *See* Hofheimer, *supra* note 238, at 581 (stating that most statutes "reach only those agreements that require a surrogate to relinquish parental or custodial rights and thus appear to permit arrangements that do not involve the transfer of parental rights" and a majority of the statutes "afford different treatment to commercial and noncommercial arrangements, generally voiding or criminalizing participation in the former, and ignoring or regulating the latter"); *supra* notes 102-03 and accompanying text.

240. *See, e.g.*, *In re* Baby M., 537 A.2d 1227, 1240-42 (N.J. 1988) (stating that although the surrogacy agreement specified that the fee was being paid for the surrogate mother's services and expenses and not for giving up parental rights, the court concluded that the payments were in fact made in connection with an adoption); *In re* Adoption of Paul, 550 N.Y.S.2d 815, 817 (N.Y. Fam. Ct. 1990) (holding that surrogacy agreement violated New York's "well-established policy against trafficking in children").

241. *Baby M.*, 537 A.2d at 1242-47; *see also* Belsito v. Clark, 644 N.E.2d 760, 765-66 (Ohio Ct. C. P. 1994) (stating that surrogacy arrangements fail to provide

little significance outside voluntary surrogacies. These laws and policies are intended to protect parental rights, but they beg the question of who is entitled to such rights. These laws and policies do not dictate which of two potential mothers must be declared the legal parent of a child produced from a stolen or misdelivered embryo; rather, they establish the rights that must be accorded the legal parent after a parentage determination is made.

Two policy issues that do have validity in switched genetic material cases as well as voluntary surrogacy cases are the concerns about the devaluation of the role of the gestational mother[242] and the psychological effects of requiring a gestational mother to relinquish a child she has nurtured in her body for nine months.[243] With respect to the first issue, critics have long condemned surrogacy arrangements for "dehumanizing" women by treating the surrogate as a "container" or a "rented womb."[244] Parentage decisions created by switched genetic material have the same dehumanizing potential, particularly if the state's law expresses an inflexible preference for genetic parents, as in the Ohio court's decision in *Belsito v. Clark*,[245] and thereby discounts the significance of the gestational mother's contribution to the birth of the child.[246]

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protections of state adoption laws and conflict with state policy prohibiting surrender of parental rights by private contracts); *cf.* Johnson v. Calvert, 851 P.2d 776, 798 (Cal.) (Kennard, J., dissenting) (observing that surrogacy arrangements lack protections of the USCACA, i.e., judicial oversight, legal counsel for the gestational mother, medical and mental health evaluations, and a requirement that all parties meet the standards of fitness for adoptive parents), *cert. denied*, 510 U.S. 874 (1993).

242. *See, e.g.*, *Johnson*, 851 P.2d at 798 (Kennard, J., dissenting). This argument often is linked with a criticism that surrogacy arrangements "'commodify' women and children by treating the female reproductive capacity and the children born of gestational surrogacy arrangements as products that can be bought and sold." *Id.* at 792 (citation omitted). This commodification argument is inapplicable to the case of switched genetic material, however, for the same reasons discussed above in relation to the baby-selling statutes.

243. *Id.* at 792 (Kennard, J., dissenting).

244. *Id.* at 792, 797-98 (Kennard, J., dissenting) ("A pregnant woman intending to bring a child into the world is more than a mere container or breeding animal; she is a conscious agent of creation no less than the genetic mother, and her humanity is implicated on a deep level."); BARBARA KATZ ROTHMAN, RECREATING MOTHERHOOD — IDEOLOGY AND TECHNOLOGY IN A PATRIARCHAL SOCIETY 244 (1989) (expressing concern that when technology is used in a surrogacy arrangement, the birth mother "is declared to be only a 'rented womb,' . . . and the *real* mother is declared to be the woman who produced the egg").

245. *See supra* notes 168-83 and accompanying text.

246. Indeed, as one commentator has acknowledged, the gestational mother's physical involvement in the procreative process is superior to that of a genetic provider, stating that:

> The birth mother risks sickness and inconvenience during pregnancy. She faces the certain prospect of painful labor. She even risks the small but qualitatively infinite possibility of death. Throughout all of this discomfort,

Similarly, a woman who mistakenly gestates someone else's embryo is likely to experience the same prenatal bonding as a surrogate mother and, therefore, suffer from the same psychological impact of relinquishing the child after birth. In fact, the impact may be even greater in the case of switched genetic material than in the voluntary surrogacy context because in the latter scenario, the surrogate mother entered into the arrangement with knowledge that she was carrying the child for someone else and, therefore, may not have developed a deep attachment to it.[247]

Yet, a genetic parent may also suffer psychological trauma if his or her genetic offspring is awarded to the gestational mother. As one commentator observed: "It is beyond dispute that an important aspect of parenthood is the experience of creating another in one's 'own likeness.' . . . The significance of the genetic connection between parent and child undoubtedly is part of what makes infertility a painful experience . . ." and creates a desire to use reproductive technologies to create a child rather than to adopt someone else's.[248]

The genetic connection also may create a sense of responsibility in the genetic provider, as recognized in the *Davis v. Davis* case.[249] In upholding Junior Davis's right to avoid procreation against his wife's interest in donating their preembryos to an infertile couple, the court noted Mr. Davis's concern that his offspring be raised in a suitable environment.[250] The court recognized that refusal to permit donation of the embryos would impose on Mary Sue Davis "the burden of knowing that the lengthy IVF procedures she underwent were futile, and that the preembryos to which she contributed genetic material would never become children[,]" but the court concluded that this burden was less significant than Junior Davis's interest in avoiding parenthood.[251] "If she were allowed to donate these preembryos, he would face a lifetime of either wondering about his parental status or knowing about his parental status but having no control over it."[252]

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and uncertainty, it is her body which remains the cradle for the growing fetus. By comparison, the physical involvement of the sperm donor is de minimis. While the egg donor physically risks more than the sperm donor, her level of physical involvement pales in comparison with that of the gestational host.

Hill, *supra* note 19, at 408 (footnote omitted).

247. *See* Hill, *supra* note 19, at 406 (stating that more study is needed, but hypothesizing that "[i]f the postrelinquishment experience of birth mothers is at all related to their previous feelings regarding the child, then it is possible that women who do not expect to raise the child may be relatively less affected by relinquishment").

248. *Id.* at 389.

249. 842 S.W.2d 588 (Tenn. 1992), *cert. denied*, 507 U.S. 911 (1993).

250. *Id.* at 603-04. As a child of divorced parents, he was "vehemently opposed to fathering a child that would not live with both parents." *Id.* at 604.

251. *Id.* at 604.

252. *Id.*

The strength of this genetic tie is illustrated by the Jorges' reaction upon learning that another couple was raising children born from Mrs. Jorge's eggs.[253] An attorney gave the Jorges the address of the birth parents on the condition that they not try to contact the children.[254] The Jorges, however, could not resist going to the birth parents' neighborhood the next day so that Basilio Jorge could "see if [the birth father] can support the children."[255] On subsequent occasions, the Jorges made arrangements to have the children videotaped at the bus stop, and Loretta Jorge herself took a still photograph of one of the twins outside the child's school.[256] Their attorney said the photographs were taken because "that is all she has of these children."[257] Other highly publicized cases have shown a similar desire by mothers to be rejoined with their genetic offspring.[258]

In short, both gestational and genetic parents have made significant contributions, both biologically and psychologically, to the procreation of a child born from stolen or misdelivered genetic material. Accordingly, there is no compelling public policy justification for choosing one set of parents over the other.

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253. *See* Kelleher & Christensen, *supra* note 3, at A1.

254. *See* Kelleher & Christensen, *supra* note 3, at A1.

255. *See* Kelleher & Christensen, *supra* note 3, at A1.

256. *See* Kelleher & Christensen, *supra* note 3, at A1.

257. Kelleher & Christensen, *supra* note 3, at A1. The Jorges have replayed the videotape over and over, and Loretta Jorge sees her own image recreated in the children. "That's the way I walked when I was a little girl . . . And she's very bossy, just like I was."

258. Mary Beth Whitehead, the surrogate mother in *Baby M* who realized after birth that she could not give up the child, fled to another state with the baby when the intended parents initiated a custody suit. *In re* Baby M, 537 A.2d 1227, 1237 (N.J. 1988) (stating that Mrs. Whitehead also made threats "to kill herself, to kill the child, and to falsely accuse Mr. Stern of sexually molesting Mrs. Whitehead's other daughter"). Regina and Ernest Twigg, who alleged that their daughter was switched with another infant in the hospital after birth, also engaged in extreme measures that were criticized by the court. Twigg v. Mays, No. 88-4489-CA-01, 1993 WL 330624, at *5 (Fla. Cir. Ct. Aug. 18, 1993). The court stated:

> [The Twiggs'] position is that their interests, whatever they might be, are paramount. They believe that Kimberly's wishes, feelings and interests should not be considered in this case. They remain firmly convinced that Robert Mays played a knowing and intentional part in the "swap" and show no intention of ever giving up that conviction. They caused false letters to the editor to be printed in the newspaper printed in Kimberly Mays' hometown, the only effect of which was to further traumatize her. It would be difficult to conclude that this conduct showed "substantial concern for the welfare" of Kimberly.

Id.

5. The Intent Test

The most progressive view urged by commentators and adopted by two courts in voluntary surrogacy cases is to determine parentage based upon the intent of the parties.[259] This position has considerable merit in voluntary surrogacies because the very premise of a surrogacy arrangement is that the gestational mother intends to bear a child for another person or persons or, conversely, a genetic provider intends to donate eggs or sperm to a gestational mother who intends to raise the child. Yet, to the extent that this theory relies upon the property, tort, and contract theories discussed above, the intent test has already been discredited as a reliable determinant in cases of switched genetic material. More importantly, however, the test simply does not work for all such cases.

The intent test certainly might be helpful in some cases involving stolen or misdelivered genetic material. One example might be a genetic mother who has genetic material in storage but has subsequently decided that she no longer desires to use it for herself, perhaps because she was able to bear a child through a previous in vitro fertilization treatment or because her marital circumstances have changed. Similarly, a gestational mother might disclaim an interest in a child that is not her genetic offspring. Although many gestational mothers are likely to feel a bond with the child notwithstanding their original desire to have their own genetic offspring, some gestational parents may prefer not to raise a child that is not their own.[260]

The intent test works, then, in the limited circumstances in which only one mother maintains an intent to parent the child. As a practical matter, there would be no real dispute in such cases because one set of prospective parents is voluntarily waiving their claim to the child. The intent test, therefore, merely allows courts to formalize the parentage determination and take care of formalities such as changing the birth certificate and officially extinguishing the claims of the non-intending parents.[261]

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259. *See supra* notes 128-57 and accompanying text.

260. A recent Florida case illustrates one way in which this might arise. Michael and Elizabeth Higgins underwent in vitro fertilization in 1994 and Elizabeth gave birth to twins the following year. *Father Isn't the Father: Couple File Suit*, ORLANDO SENTINEL, Nov. 14, 1996, at D1, *available in* 1996 WL 12425965. Although Michael Higgins is African-American, the twins appear to be Caucasian like their mother and the couple's lawsuit alleges that "[i]t became immediately apparent that the children did not appear to be a product of their union." *Id.* Their attorney stated that Michael Higgins could not bond with the children, which caused marital discord leading to the couple's separation. *Id.*

261. For examples of statutory provisions authorizing the substitution of birth certificates following a judicial order of parentage, see ARK. CODE ANN. § 9-10-201(c)(2) (Michie 1993); FLA. STAT. ANN. § 742.16(8) (West 1998).

The test is unsuitable, however, in other cases of switched genetic material. The classic example is presented by prospective parents who have stored frozen embryos for later attempts at implantation if their first attempt at implantation fails or if they desire additional children. This couple obviously intends to use the embryo to produce a child for themselves. The gestational mother, likewise, intends to bear a child for herself. She may believe that the embryo is her own or that it was produced from donated gametes, but in any event, she had no intention of carrying the child for someone else.

Loretta Jorge provides an example of a case in which the intent test fails. She went to a fertility clinic with the intent to conceive and bear her own genetic offspring. It is unclear from news reports whether she knew that some of her eggs were still in storage or whether they were misdelivered immediately after being removed from Mrs. Jorge. What is clear, however, is that she did not intend for her eggs to be transferred to another woman, nor did the gestational mother intend to have someone else's eggs implanted in her.[262]

One writer has suggested that the intent test could be adapted to declare parentage in the parent(s) who had the specific intent to produce a child *from this particular embryo*.[263] Thus, a genetic mother would prevail over a gestational mother whose specific intent was to produce her own genetic offspring.[264] The test also would favor the gestational mother who intended to produce a child from donated genetic material over a genetic mother who has stored her eggs or embryos for use at some indefinite time in the future.[265]

The latter scenario, however, disregards the genetic mother's intent in preserving the genetic material in the first place—to save it for her own attempts to initiate pregnancy at a later date. Perhaps more importantly, however, the

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262. This same analysis applies to the California cases in which eggs were surreptitiously taken from women during diagnostic examinations. *See supra* note 7. These women most likely sought treatment at the fertility clinic in order to have their own children and had no intent to provide eggs for another woman. In fact, some expressly refused consent when asked if they wanted to donate extra eggs to infertile women. *See* Marcida Dodson, *Fertility Patient Oks $460,000 UC Settlement Litigation*, LOS ANGELES TIMES, Feb. 20, 1998, at B4, *available in* 1998 WL 2400729 (describing patient who underwent diagnostic surgery in which some eggs were removed; when asked if she would donate her extra eggs, the woman specifically declined to do so). The recipients, on the other hand, believed that the eggs came from legitimate donors. Michelle Nicolosi & Susan Kelleher, *Test Finds Genetic Mother of Boy Born in Egg Swap*, ORANGE COUNTY REGISTER, Feb. 20, 1998, at A1, *available in* 1998 WL 2614213.

263. Karen T. Rogers, *Embryo Theft: The Misappropriation of Human Eggs at an Irvine Fertility Clinic Has Raised a Host of New Legal Concerns for Infertile Couples Using New Reproductive Technologies*, 26 SW. U. L. REV. 1133, 1147 (1997) ("If the recipients are indeed without fault in causing the embryo misuse, they arguably have a superior claim under this [intent] analysis as they intended to bring about the birth of this particular child whereas the donors' intent had not yet fully manifested.").

264. *Id.*

265. *Id.*

absence of her consent shows that the genetic provider has not waived her constitutionally protected parental rights, as discussed in the following section.

6. The Constitutional Right to Procreate and Parent

The United States Supreme Court has long recognized the right to procreate and the right to care for one's offspring as among the liberty interests protected by the Constitution. It is unclear, however, who holds these rights when a child has two biological mothers, as in the assisted reproductive technology cases, and how far these rights extend.

"The decision whether or not to beget or bear a child is at the very heart" of the cluster of privacy rights protected by the Due Process Clause of the Fourteenth Amendment.[266] Thus, more than a half century ago, the Supreme Court struck down a state law requiring sterilization of habitual criminals, stating that "[m]arriage and procreation are fundamental to the very existence and survival of the race."[267] The Court has reaffirmed this concept in subsequent decisions concerning an individual's right to avoid procreation, i.e, upholding the right to use birth control products by married[268] and single persons[269] and the right to terminate a pregnancy through abortion.[270]

Closely allied to the right to procreate is the right to parent, the right to "the companionship, care, custody, and management" of a child after birth.[271] The

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266. Carey v. Population Servs. Int'l, 431 U.S. 678, 685 (1977).

267. Skinner v. Oklahoma, 316 U.S. 535, 541 (1942) (decided on equal protection grounds). In an earlier decision, the Court upheld a Virginia law providing for sterilization of "mental defectives." Buck v. Bell, 274 U.S. 200 (1927) (finding that sterilization was justified as a means of promoting the welfare of both the mental patient and society). *Buck* has never been explicitly overruled, but the Court's subsequent ruling in *Skinner* suggests that compulsory sterilization laws are unconstitutional unless the state shows a compelling governmental interest and that its law is narrowly tailored to achieve that interest.

268. Griswold v. Connecticut, 381 U.S. 479 (1965) (holding that state's law prohibiting the use of contraceptives an unconstitutional infringement on the right of marital privacy).

269. Eisenstadt v. Baird, 405 U.S. 438, 453 (1972) (striking down a state law prohibiting sale of contraceptives to unmarried persons, the court observed that "[i]f the right of privacy means anything, it is the right of the *individual*, married or single, to be free of unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child") (emphasis added); *see also* Carey v. Population Servs. Int'l, 431 U.S. 678 (1977) (invalidating state law prohibiting sale of contraceptives to minors).

270. Roe v. Wade, 410 U.S. 113, 153 (1973) (striking down Texas criminal abortion statute, the Court concluded that the "right of privacy . . . is broad enough to encompass a woman's decision whether or not to terminate her pregnancy").

271. Stanley v. Illinois, 405 U.S. 645, 651 (1972). "The child is not the mere creature of the State; those who nurture him and direct his destiny have the right, coupled

Supreme Court has emphasized on several occasions that these rights and responsibilities "reside first in the parents, whose primary function and freedom include preparation for obligations the state can neither supply nor hinder."[272] Thus, as discussed in greater detail in Section I above,[273] the Court has recognized that a biological parent has a constitutionally protected interest in his relationship with his offspring that must be accorded due respect in parentage disputes, adoptions, and dependency proceedings.

The Supreme Court has not yet faced the issue of whether procreational and parental rights exist when a child is produced with the assistance of reproductive technology. State courts, however, have recognized that the right to procreate is implicated in disputes concerning the disposition of genetic material such as frozen sperm and embryos.[274] Because genetic material has the potential to create human life and, therefore, affect the gamete provider's procreational status, courts have held that gamete providers have primary decision-making power as to whether the genetic materials are used or destroyed.[275]

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with the high duty, to recognize and prepare him for additional obligations." Pierce v. Soc'y of Sisters, 268 U.S. 510, 535 (1925). These "'additional obligations' . . . include the inculcation of moral standards, religious beliefs, and elements of good citizenship." Wisconsin v. Yoder, 406 U.S. 205, 233 (1972); *see also* Michael H. v. Gerald D., 491 U.S. 110, 118-19 (1989). The court in *Micheal H.* cites to a California statute which identifies rights of a custodial parent as including:

> [T]he child's care; the right to the child's services and earnings; the right to direct the child's activities; the right to make decisions regarding the control, education, and health of the child; and the right, as well as the duty, to prepare the child for additional obligations, which includes the teaching of moral standards, religious beliefs, and elements of good citizenship.

Id. at 118-19. Some commentators have suggested that the right to be a parent is included within the right to procreate because "the procreative right is virtually empty unless it ensures progenitors the right to acquire parental rights in the child." Hill, *supra* note 19, at 367-68. *But see In re* Baby M, 537 A.2d 1227, 1253-54 (N.J. 1988) ("The custody, care, companionship, and nurturing that follow birth are not parts of the right to procreation; they are rights that may also be constitutionally protected, but that involve many considerations other than the right of procreation.").

272. Prince v. Massachusetts, 321 U.S. 158, 166 (1944); *see also* Smith v. Organization of Foster Families for Equality and Reform, 431 U.S. 816, 843 (1977) (quoting *Prince*); Stanley v. Illinois, 405 U.S. 645, 651 (1972) (quoting *Prince*).

273. *See supra* notes 33-56 and accompanying text.

274. *See* Hecht v. Superior Court, 20 Cal. Rptr. 2d 275 (Cal. Ct. App. 1993); Davis v. Davis, 842 S.W.2d 588 (Tenn. 1992), *cert. denied*, 507 U.S. 911 (1993).

275. *See Davis*, 842 S.W.2d at 602 (holding that the right to procreate gives gamete providers the right to decide whether preembryos may be used or destroyed because this decision impacts upon the gamete provider's individual reproductive status); *Hecht*, 20 Cal. Rptr. 2d at 283 (citing *Davis*'s procreation analysis to recognize that a sperm donor had decision-making interest regarding disposition of the sperm after his death).

State courts also have recognized these rights in parentage disputes over children born through reproductive technology.[276] There is room for debate on this issue, however, under the Supreme Court's analysis in the *Michael H.* parental rights case.[277] As explained above, four justices found, and one assumed, that an unwed father had a constitutionally protected right to establish a relationship with his biological offspring.[278] But the four justices who joined the plurality opinion concluded that no such right existed in that case because the law has not traditionally protected the interests of an unwed male who fathers a child through an extramarital affair with a married woman.[279]

The plurality acknowledged the Supreme Court precedents which had recognized that an unwed father could establish a liberty interest by demonstrating a biological connection with the child as well as an established parental relationship or acceptance of parental responsibilities.[280] But the plurality qualified the holdings of those cases, stating that a constitutionally protected liberty interest does not rest on those two factors alone "but upon the historic respect . . . traditionally accorded to the relationships that develop within the unitary family . . . 'Our decisions establish that the Constitution protects the sanctity of the family precisely because the institution of the family is deeply rooted in this Nation's history and tradition.'"[281] The plurality stated that society has not traditionally protected a parental claim from someone in Michael H's position.[282] "[T]o the contrary, our traditions have protected the marital family . . . against the sort of claim Michael asserts."[283]

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276. *See* Johnson v. Calvert, 851 P.2d 776, 786 (Cal.) ("To the extent that tradition has a bearing on the present case, we believe it supports the claim of the couple who exercise their right to procreate in order to form a family of their own, albeit through novel medical procedures."), *cert. denied*, 510 U.S. 874 (1993); *Baby M.*, 537 A.2d at 1253 (stating that right to procreate is "the right to have natural children, whether through sexual intercourse or artificial insemination"); Belsito v. Clark, 644 N.E.2d 760, 766 (Ohio Ct. C.P. 1994) (stating that the decision to allow "implantation of . . . egg and sperm with the understanding that the surrogate will raise the resulting child also involves the surrendering of parental rights").

277. Michael H. v. Gerald D., 491 U.S. 110 (1989), discussed *supra* notes 48-57 and accompanying text.

278. See *supra* notes 48-56 and accompanying text.

279. *Id.*

280. *Michael H.*, 491 U.S. at 123 (citing Stanley v. Illinois, 405 U.S. 645 (1972) and its progeny, Quilloin v. Walcott, 434 U.S. 246 (1978); Caban v. Mohammed, 441 U.S. 380 (1979); Lehr v. Robertson, 463 U.S. 248 (1983)).

281. *Id.* at 123-24 (quoting Moore v. East Cleveland, 431 U.S. 494, 503 (1977)); *see also* Wisconsin v. Yoder, 406 U.S. 205, 232 (1972) ("The history and culture of Western civilization reflect a strong tradition of parental concern for the nurture and upbringing of their children. This primary role of the parents in the upbringing of their children is now established beyond debate as an enduring American tradition.").

282. *Michael H.*, 491 U.S. at 124.

283. Michael H. v. Gerald D., 491 U.S. 110, 124 (1989).

Under this restrictive view, procreation through reproductive technology arguably is not constitutionally protected because such technology has only recently emerged and, therefore, is not part of our history or tradition. The dissenting justices in *Michael H.*, however, suggested the Court's prior opinions had not "looked to tradition with such specificity" in defining liberty interests.[284] "Surely the use of contraceptives by unmarried couples, or even by married couples, . . . and even the right to raise one's natural but illegitimate children, were not 'interest[s] traditionally protected by our society,' at the time of their consideration by this Court."[285]

The trial court in *Baby M* took this approach, declining to consider whether reproduction by artificial insemination and the use of surrogates was a historically protected method of reproduction. Instead, the court took a broader focus, finding that there is a long tradition of protecting the right to reproduce.[286] "[I]f one has a right to procreate coitally, then one has the right to reproduce non-coitally. If it is the reproduction that is protected, then the means of reproduction are also to be protected."[287] Accordingly, there are valid reasons to find that assisted reproduction falls within the constitutionally protected rights to procreate and parent.[288]

Assuming that a constitutional right to procreate or parent exists with respect to modern technology, it is unclear who holds such rights when one woman provides the genetic material that another woman gestates to bear a child. The Supreme Court precedents have linked parental rights to the "biological connection" between an unwed father and his child, but who is a child's "biological" mother when the reproductive function is shared by two women?[289]

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284. *Id.* at 139.

285. *Id.* (citations omitted).

286. *In re* Baby M.,525 A.2d 1128, 1164 (N.J. Super. Ct. Ch. Div. 1987), *aff'd in part and rev'd in part*, 537 A.2d 1227 (N.J. 1988).

287. *Id.* (holding that the use of surrogates was a protected means of procreation).

288. This is not to say that the state can never restrict a person's right to procreate or parent. It simply means that the state must meet a strict scrutiny analysis in adopting such restrictions because the state is treading on fundamental rights. Accordingly, the Supreme Court has recognized that states may restrict parental rights "if it appears that parental decisions will jeopardize the health or safety of the child, or have a potential for significant social burdens." Wisconsin v. Yoder, 406 U.S. 205, 233-34 (1972); *see also* Prince v. Massachusetts, 321 U.S. 158, 166 (1944) (stating that "the state as *parens patriae* may restrict the parent's control by requiring school attendance, regulating or prohibiting the child's labor, and in many other ways").

289. The Supreme Court's cases have not defined the term "biological," but the word is typically defined as "relating to biology or to life and living things: belonging to or characteristic of the processes of life." WEBSTER'S THIRD NEW INT'L DICTIONARY 218 (1981). "Biology" is defined as "a branch of knowledge that deals with living organisms and vital processes . . . commonly being restricted to consideration of principles of wide application to the origin, development, structure, functions, and

The Supreme Court's fathers' rights cases implicitly acknowledge that a genetic provider has the requisite biological connection to a child because these cases have recognized a parental right in biological fathers, whose sole function in many cases is to provide the genetic seed from which the child is produced.[290] As a matter of equal protection, then, a state that allows biological fathers to establish parentage through genetic testing arguably must afford that same right to genetic mothers.[291]

The rights of a gestational mother are less clear. While society has a long tradition of recognizing the woman who gave birth as the child's natural mother,[292] it is unclear whether maternal status was based upon her gestational role, or because "giving birth was synonymous with providing the genetic makeup of the child that was born."[293]

The *Johnson* court attempted to resolve these competing claims through its intent test, declaring the legal mother to be the one who intended to procreate for purposes of raising the child.[294] The surrogate mother, therefore, "is not exercising her own right to make procreative choices; she is agreeing to provide a necessary and profoundly important service without (by definition) any expectation that she will raise the resulting child as her own."[295] Conversely, when the gestational mother bears a child from a donor's egg, the gestational mother is exercising the right to procreate while the genetic donor is not.

This view has some merit, particularly in light of the Supreme Court cases stating that a "biological connection" alone does not establish parental rights in

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distribution of living matter as represented by plants and animals and to the generally recurrent phenomena of life, growth, and reproduction . . . ." *Id.* Under this definition, both the genetic and gestational mothers would seem to qualify as "biological" parents because both genetic material and gestation are essential to human reproduction.

290. Some commentators have criticized this view as patriarchal. "The reason why genes are so highly valued, some claim, is because men's contribution to procreation is entirely genetic and, therefore, men can identify with a woman who asserts a parental-rights claim based on genetics." Anne Reichman Schiff, *Solomonic Decisions in Egg Donation: Unscrambling the Conundrum of Legal Maternity*, 80 IOWA L. REV. 265, 275 (1995); *see also* ROTHMAN, *supra* note 244, at 40-45 ("When we accept the patriarchal valuing of the seed, there is no doubt—the real mother, like the real father, is the genetic parent.").

291. *See* Soos v. Superior Court, 897 P.2d 1356 (Ariz. Ct. App. 1994) (declaring state surrogacy statute unconstitutional because it automatically granted the surrogate the status of legal mother and denied genetic mother the opportunity to prove maternity); *see also* Hofheimer, *supra* note 238, at 596 ("States that have granted parental rights to the biological fathers of surrogacy children will be constrained by the Equal Protection Clause to grant genetic-intended mothers equal rights.").

292. *See supra* note 19 and accompanying text.

293. Belsito v. Clark, 644 N.E.2d 760, 763 (Ohio Ct. C.P. 1994); *see also supra* note 126 and accompanying text.

294. Johnson v. Calvert, 851 P.2d 776 (Cal.), *cert. denied*, 510 U.S. 874 (1993).

295. *Id.* at 787.

an unwed father.[296] Thus, a biological father must establish something more—an acceptance of responsibility and/or the establishment of a parental relationship—which is exactly what California's intent test requires. Just as an unwed father accepts responsibility for the child after birth, intending parents in fact accept responsibility prior to conception. This test is inconclusive, however, when both mothers possess the requisite intent, as is the case when one woman mistakenly gestates another woman's genetic material without the latter's consent.[297]

The *Belsito* court took a different approach to procreational rights, suggesting that only genetic parents have procreational or parentage rights,[298] because procreation is "the replication of the unique genes of an individual . . . ."[299] Thus, a gestational mother cannot be considered the child's natural parent because "she has not contributed to the genetics of the child, and the genetic parent or parents have not waived their rights . . . ."[300] This definition seems inappropriately narrow because it ignores the vital role that a gestational mother performs in the procreation process.

Moreover, even if a gestational mother does not qualify under a strict definition of biological parent, the Supreme Court has stated that "biological relationships are not [the] exclusive determination of the existence of a family."[301] Rather, "the importance of the familial relationship, to the individuals involved and to the society, stems from the emotional attachments that derive from the intimacy of daily association, and from the role it plays in 'promot(ing) a way of life' through the instruction of children, as well as from the fact of blood relationship."[302] A gestational mother certainly fits this definition given her role in the reproductive effort. Indeed, in his dissent in the *Stanley* case, Chief Justice Burger suggested that a state would be "fully justified in concluding, on the basis of common human experience, that the biological role of the mother in carrying and nursing an infant creates stronger bonds between her and the child than the bonds resulting from the male's often casual encounter."[303]

Assuming that the Court would recognize a constitutionally protected parental right outside of blood relations, however, the parameters of such a right are unclear. In ruling on a claim brought by foster parents, the Court found that some foster family relationships fit this definition, but the Court suggested that

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296. *See supra* notes 33-56 and accompanying text.

297. *See supra* notes 259-62 and accompanying text.

298. *Belsito*, 644 N.E.2d at 766.

299. Belsito v. Clark, 644 N.E.2d 760, 766 (Ohio Ct. C.P. 1994).

300. *Id.*

301. Smith v. Organization of Foster Families for Equality and Reform, 431 U.S. 816, 843 (1977).

302. *Id.* at 844 (quoting Wisconsin v. Yoder, 406 U.S. 205, 231-33 (1972)) (footnote omitted).

303. Stanley v. Illinois, 405 U.S. 645, 665 (1972) (Burger, C.J., dissenting).

a foster parent's interest in continuing this relationship deserved at best only limited constitutional protection.[304] As the Court explained, a foster care relationship is established as a matter of contract with the state and, therefore, is subject to the contract terms concerning the state's right to remove the children from foster care and return them to their natural parents.[305] The Court also noted that recognizing a constitutional right in the foster parents would derogate the constitutional rights of the natural parents.[306] Accordingly, the Court held that the foster family's interest must be "substantially attenuated where the proposed removal from the foster family is to return the child to his natural parents."[307]

A similar argument could be advanced against recognizing parental rights in a gestational mother because to do so would conflict with the constitutional rights of the genetic mother. On the other hand, one could argue that recognizing rights in the gestational mother is analogous to recognizing simultaneous parental rights in fathers and mothers. In the latter situation, both parties play an indispensable role in producing the genetic seed from which a child is born. The gestational mother, likewise, plays an indispensable role in the child's development during pregnancy. Accordingly, just as courts have traditionally recognized parental rights in both fathers and mothers, the law should now recognize the parental rights of dual mothers.

This conclusion is consistent with an equal protection analysis. Assuming that procreation through modern technology is constitutionally protected, a gestational mother obviously would be exercising procreational rights if she becomes pregnant through in vitro fertilization using a donor's eggs. It would be purely arbitrary to say that this same woman could not establish procreational rights if she has mistakenly used another woman's eggs without consent.[308]

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304. *Smith*, 431 U.S. at 844. In *Smith*, the Court suggested:

> [W]here a child has been placed in foster care as an infant, has never known his natural parents, and has remained continuously for several years in the care of the same foster parents, it is natural that the foster family should hold the same place in the emotional life of the foster child, and fulfill the same socializing functions, as a natural family.

Id.

305. *Id.* at 845.

306. *Id.* at 846. As the Court explained:

> It is one thing to say that individuals may acquire a liberty interest against arbitrary governmental interference in the family-like associations into which they have freely entered, even in the absence of biological connection or state-law recognition of the relationship. It is quite another to say that one may acquire such an interest in the face of another's constitutionally recognized liberty interest that derives from blood relationship, state-law sanction, and basic human right an interest the foster parent has recognized by contract from the outset.

Id.

307. *Id.* at 847.

308. This begs the question, of course, as to whether or not the woman can

In sum, both women have equally persuasive constitutional claims and, to the extent that both are innocent victims of unfortunate circumstances, it would be difficult to justify a parentage decision looking solely at the claim from the parents' perspective. Moreover, deciding these claims based solely upon the interests of these adults ignores an equally innocent, but considerably more vulnerable, party—the child. The parentage determination, therefore, should not turn solely on parental rights, but instead should also consider the best interests of the child.

B. Best Interests of the Child

The common law's parentage rules were based upon the traditional belief that being with one's "natural" parents was in the child's best interests because "natural bonds of affection lead parents to act in the best interests of their children."[309] When a child is conceived through natural intercourse, this traditional belief leads to a bright-line test awarding parentage to the child's biological parents. When a child has two "biological" mothers, however, both women share a natural bond of affection with the child. Thus, some other means must be devised to determine how the child's best interests can be served.

Some have argued for a bright-line test, contending that placement with the gestational mother is always in the child's best interest or, conversely, that the child's interests are always best served by being with the genetic mother. Others have argued for a multi-factor best interests analysis like that used in custody disputes between parents in the divorce setting. As discussed more fully below, each position has its strengths and weaknesses. Thus, this Article concludes that the preferable approach lies somewhere between the two extremes.

1. A Bright-Line Test Favoring Genetics or Gestation

Adoption of a categorical or bright-line test has considerable appeal because it allows parentage to be determined with certainty from the moment of a child's birth. A multi-factor test, on the other hand, would hold parental status in limbo until a judicial officer could weigh the factors and render a determination. In terms of family stability, therefore, a bright-line test would be preferable, but the test is vulnerable to criticisms on other fronts.

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establish *parental* rights in both situations. But the same can be said of the genetic mother who has exercised her procreational right by undergoing fertility treatments that produced the frozen eggs or embryos that were wrongfully implanted in the gestational mother.

309. Parham v. J.R., 442 U.S. 584, 602 (1979) (citing 1 WILLIAM BLACKSTONE, COMMENTARIES *447).

First, there is considerable disagreement as to which mother should prevail under a bright-line test. The arguments generally fall into a "nature" versus "nurture" debate: those who favor the genetic mother focus on the bonds of nature, i.e., the concept of genetic identity, while those who favor the gestational mother focus primarily on the social bonding that occurs between the child and mother during pre-natal and post-natal nurturing.

A child's genetic identity obviously is based upon the genetic code received from the egg and sperm providers. Thus, the genetic mother shares half of the genes that dictate the child's physical attributes, including a predisposition to certain medical conditions, and perhaps certain mental or psychological attributes as well.[310] Several courts have found that this link is a powerful factor in the child-parent relationship because "[h]eredity can provide a basis of connection between two individuals for the duration of their lives[]"[311] and "[t]he genetic parent can guide the child from experience through the strengths and weaknesses of a common ancestry of genetic traits."[312]

The importance of this genetic identity is illustrated by the desire of some adopted children to find their biological parents or separated siblings.[313] But, the impact of separating a child from a genetic parent is unclear. Some commentators have suggested that genetics is of "compelling importance" to an individual's sense of identity while the gestational mother plays only a minor role in developing the child's identity.[314] "Although the child may be curious about the woman who carried and gave birth to her, she can think of her much in the same way as a child raised in infancy by a hired nanny might think of the nanny."[315] Other commentators have argued the converse. In their view, "[a] child may experience a natural curiosity regarding her parentage and biological

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310. Expert testimony in a California surrogacy case showed that:

> [T]he whole process of human development is "set in motion by the genes." There is not a single organic system of the human body not influenced by an individual's underlying genetic makeup. Genes determine the way physiological components of the human body, such as the heart, liver, or blood vessels operate. Also, . . . it is now thought that genes influence tastes, preferences, personality styles, manners of speech and mannerisms.

Anna J. v. Mark C., 286 Cal. Rptr. 369, 380 (Cal. Ct. App. 1991), *aff'd sub nom.* Johnson v. Calvert, 851 P.2d 776 (Cal.), *cert. denied*, 510 U.S. 874 (1993). Some researchers, however, have criticized the claim that genetics can affect human behavior. *See, e.g.*, Schiff, *supra* note 290, at 276 n.55 (citing RUTH HUBBARD & ELIJAH WALD, EXPLODING THE GENE MYTH (1993)).

311. *Anna J.*, 286 Cal. Rptr. at 381.

312. Belsito v. Clark, 644 N.E.2d 760, 766 (Ohio Ct. C.P. 1994).

313. RAE, *supra* note 215, at 83 (noting that this phenomenon also has been observed in children born through artificial insemination in which donor sperm was used).

314. Hofheimer, *supra* note 238, at 602.

315. *Id.* at 609.

legacy,"[316] but separation from the genetic parent does not necessarily translate into a loss of the child's sense of self-identity.[317]

The genetic connection often has great significance from the mothers' perspective as well as from that of the child. In fact, it is the desire for genetic reproduction that drives many women to seek fertility treatment rather than to adopt a child. Thus, regardless of whether a gestational mother has subsequently bonded with the non-genetically related child she has carried, her initial conduct shows that she, too, considered genetics to be a paramount factor. That would not be the case, however, with women who have chosen fertility treatments for other reasons, such as to avoid long waiting lists at adoption agencies or because they desire the experience of pregnancy and prenatal bonding, which they could not obtain through adoption.

Yet, genetics is not the only factor that determines a child's identity. A developing fetus obviously depends entirely upon the gestational mother for sustenance and protection during the pregnancy[318] and continues to use the mother's blood, nutrients, and antibodies for some time after birth.[319] More than just a human incubator, however, the gestational mother makes a significant contribution to the child's emotional and psychological development as well.[320] Indeed, a number of studies support the view that an unborn child's personality begins to develop in the womb and, therefore, "the woman who carries the child plays a formative role in either assisting or hindering that development."[321]

It is clear, therefore, that a gestational mother and child begin to develop a significant bond during pregnancy, and this bond continues to strengthen after birth. What is less clear is the harm that the child will suffer if this bond is discontinued after birth. A number of studies have shown the importance of

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316. Hill, *supra* note 19, at 404; *see also* ROTHMAN, *supra* note 245, at 40 (describing genetic relations as a "source of pleasure" but not the determining factor of parentage).

317. Hill, *supra* note 19, at 404 (arguing that the claim linking genetics to self-identity "is predicated upon a troublesome view of personal identity, which implies that every adopted child is hopelessly insecure and devoid of self-respect. It appears to confuse the psychological notion of self-identity with the relatively more superficial knowledge of one's biological legacy.").

318. Schiff, *supra* note 290, at 274 ("[T]he nine-month gestational period involves a dynamic and intense process, during which the mother's body constantly supplies essential nutrients, eliminates toxins, and provides warmth and protection to the developing fetus.").

319. Anna J. v. Mark C., 286 Cal. Rptr. 369, 378 (Cal. Ct. App. 1991), *aff'd sub nom.* Johnson v. Calvert, 851 P.2d 776 (Cal.), *cert. denied*, 510 U.S. 874 (1993).

320. RAE, *supra* note 215, at 87-91.

321. *Id.* at 91. Rae cites a number of scientific studies, including: B.R.H. Van den Bergh's studies linking the emotions of the mother during pregnancy to the child's temperament after birth; studies of the emotional impact on children born to schizophrenic women; and studies linking a woman's attitude toward the child during pregnancy to the emotional and physical health of the child at birth. *Id.* at 89-90.

developing secure emotional ties between a child and at least one parent figure early in childhood.[322] But one commentator suggests that there is no evidence that the child must form this relationship with the gestational mother.[323] To the contrary, research indicates that "the younger the child, the shorter the period required to completely break his emotional ties to his natural parents."[324] In fact, with infants, it may take "as little as an hour to form a new bond with another person."[325] The bonding factor, therefore, may have diminished importance in the case of a newborn or infant.[326] With older children, however, some commentators have suggested that the "familial relationship" should be accorded considerable weight because "[t]his social relationship is much more important, to the child at least, than a biological relationship . . . ."[327]

In short, strong arguments exist on both sides of the issue, leading some commentators to suggest that there is "no persuasive basis for a categorical preference for either a gestational or genetic contributor to receive exclusive recognition as 'mother.'"[328] Moreover, even if agreement could be reached on a categorical norm, the bright-line test is subject to a second criticism that applies to such tests in general: the failure to provide flexibility for cases that fall outside the norm. In other words, application of a categorical test might automatically award parentage to the gestational mother without considering whether, under the particular circumstances of a case, the child's interests would

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322. Hill, *supra* note 19, at 402-03. These studies have shown, for example, that:

> [I]nfants failing to form a bond with any adult are likely to lack the ability to form deep and enduring relationships later in life[,] . . . infants who are placed for adoption after nine months of age have difficulties with a variety of "socioemotional" matters, including establishing certain kinds of relationships with others . . . [and] the quality of attachment in infancy may affect the IQ of the child and the development of the child's sense of self-identity, thereby affecting the child's ability to cope with various environments including schools.

Hill, *supra* note 19, at 402.

323. Hill, *supra* note 19, at 403.

324. Stephanie Hawkins Smith, Note, *Psychological Parents vs. Biological Parents: The Courts' Response to New Directions in Child Custody Dispute Resolution*, 17 J. FAM. L. 545, 546 (1979).

325. Hill, *supra* note 19, at 403 (citing THOMAS R. VERNAY & JOHN KELLY, THE SECRET LIFE OF THE UNBORN CHILD 148 (1981)).

326. William P. Hoffman, Jr., Recent Developments, *California's Tangled Web: Blood Tests and the Conclusive Presumption of Legitimacy*, 20 STAN. L. REV. 754, 761 (1968) (suggesting that "[i]n the case of a young child the most palpable relation that anyone has to the child is a biological relationship").

327. *Id.*

328. Shultz, *supra* note 134, at 332; *see also* Schiff, *supra* note 290, at 277, 287 (granting legal maternal status to either of them on the basis of biological connection is difficult to justify).

be better served by the genetic mother. It is these individualized considerations that are highlighted in the analysis discussed below.

2. Individualized Assessments Using a Multi-Factor Test

There is strong precedent for using a multi-factor analysis to decide between competing parental claims. The test has long been used by family law courts to determine who should have control and care of a child as between a husband and wife upon divorce or between a biological mother and father who have never married. The goal of the best interests test is not "adjudicating rights *in* the children, as if they were chattels, but rather . . . making the best disposition possible for the welfare of the children."[329] Thus, "the state's interest in the growth and development of healthy and productive and stable citizens, as well as the child's own interest in being protected, are more important than the rights or needs of the parents."[330]

Some states provide only very generalized guidelines for their best interests tests, thereby giving courts broad discretion in making custody determinations.[331] Other states set forth specific factors that the court should consider in making its decision.[332] Thus, multi-factor tests range from the simple five-point analysis of

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329. 2 JOHN P. MCCAHEY ET AL., CHILD CUSTODY & VISITATION LAW AND PRAC. § 10.01[2][b] (1998) (quoting May v. Anderson, 345 U.S. 528 541 (1953) (Jackson, J., dissenting)). The distinction between parental rights and a child's welfare is significant because under the parental rights doctrine, a fit parent "has a right to the custody, care, and companionship of his or her child even if the best interests of the child would be better served by being placed with a third party." Hill, *supra* note 19, at 363. The best interests analysis is used, however, when a court is determining who should get custody as between two fit, legal parents.

330. 2 JOHN P. MCCAHEY ET AL., *supra* note 329, § 10.01[2][a].

331. 2 JOHN P. MCCAHEY ET AL., *supra* note 329, § 10.06[2][b][iii] (stating that "[a]pproximately one-third of the states do not enumerate specific factors in their custody statutes").

332. 2 JOHN P. MCCAHEY ET AL., *supra* note 329, § 10.06[2][b][iii].

the Uniform Marriage and Divorce Act[333] to statutes listing more than a dozen enumerated factors.[334]

Most of these factors could be applied to determine custody in cases involving a choice between two mothers. The ultimate goal, of course, is to identify the parent or parents best able "to nurture the child physically and psychologically" and to provide "stability and continuity."[335] Thus, considerations that may differentiate between two mothers would include marital status and stability,[336] the existence of siblings (especially if genetically related to the child in question),[337] the extent to which the child has bonded with the

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333. UNIF. MARRIAGE & DIVORCE ACT § 402, 9A U.L.A. 561 (1987). The Act provides, in pertinent part:

> The court shall determine custody in accordance with the best interest of the child. The court shall consider all relevant factors including:
>
> (1) the wishes of the child's parent or parents as to his custody;
>
> (2) the wishes of the child as to his custodian;
>
> (3) the interaction and interrelationship of the child with his parent or parents, his siblings, and any other person who may significantly affect the child's best interest;
>
> (4) the child's adjustment to his home, school, and community; and
>
> (5) the mental and physical health of all individuals involved.
>
> The court shall not consider conduct of a proposed custodian that does not affect his relationship to the child.

Id.

334. *See, e.g.*, COLO. REV. STAT. ANN. 14-10-124 (1.5) (West 1997) (listing 13 factors to consider). Two commentators who surveyed investigative reports and court orders in contested custody cases across the country have compiled a list of 10 major factors that courts have considered, with 43 subfactors. 2 JOHN P. MCCAHEY ET AL., *supra* note 329, § 10.06[2][b][v] (citing Jessica Pearson & Maria A. Luchesi Ring, *Judicial Decision-Making in Contested Custody Cases*, 21 J. FAM. L. 703, 709 (1983)).

335. Johnson v. Calvert, 851 P.2d 776, 800 (Cal.) (Kennard, J., dissenting), *cert. denied*, 510 U.S. 874 (1993).

336. Courts typically place great value on promoting family stability, as illustrated by the discussion above concerning the presumption of paternity in the husband of a married woman. *See supra* note 45 and accompanying text. As a corollary philosophy, courts tend to honor a cultural preference for the conventional nuclear family. One commentator stated:

> The nuclear family is the preferred, if not practiced, form of household among the educated middle class people whose opinions heavily impact legal decision-making. A household which is based on marriage is typically assumed to be more stable, emotionally consistent, and supportive than other types of households. Since children need stable, emotionally consistent and supportive homes, the thinking goes, it seems natural that they should be raised in nuclear families. Any other option is second best.

Kandel, *supra* note 214, at 185.

337. Thus, a court might consider the psychological benefits of being raised with other children as opposed to being an only child. To the extent that the siblings are genetically related to the child, this factor also addresses the psychological concerns of

gestational mother,[338] the capacity to assume the role of primary caretaker,[339] and the ability to accept and foster a continuing relationship between the child and the non-custodial parent(s).

The chief benefit of a multi-factor test is its flexibility, i.e., its ability to accommodate the individualized circumstances of each particular case.[340] The test also addresses many of the public policy concerns underlying state laws regarding adoptions and termination of parental rights.[341] By having a court make the custody determination, the law would protect and accommodate the parental rights of the parties, rather than unilaterally denying parental status on the basis of a categorical test. At the same time, a multi-factor test would protect the child's interest by ensuring placement in the care of competent and caring parents.

The tradeoff, however, is a lack of certainty because parental status remains in limbo until a judicial determination can be made. In addition, the test itself offers courts very little guidance about the relative importance of each factor. Thus, it is unclear whether the court should give all of the factors equal weight and declare a winner based upon who has the most factors in her favor, or whether the court should give some factors more weight than others.

3. Between the Two Extremes—A Modified Best Interests Test

From a theoretical perspective, the multi-factor best interests test appears to offer a fair and impartial method of determining parentage. Instead of denigrating the value of one category of mothers while elevating the importance of the other, the multi-factor test starts from the premise that genetic and gestational mothers as a class have equal significance in a child's life. The test

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genetic identity. *See supra* notes 310-17 and accompanying text.

338. As explained above, this factor grows in significance with the age of the child. *See supra* notes 322-27 and accompanying text.

339. This factor would consider which parent can make the commitment of time, energy, and emotional support required for good parenting. A court might consider, for example, whether both spouses work outside the home, requiring someone else to provide extensive child care. But this factor, like the best interests test itself, is not susceptible to a bright-line test. In some cases, a stay-at-home mother is preferable to placing the child in someone else's care while the parent or parents are working. But, on the other hand, a high-quality day care environment can give children a significant advantage over their peers by helping to build their social skills as well as giving them a jump on their formal education. Thus, the court should consider the specific circumstances of each case before deciding how the child's best interests would be served.

340. Although some commentators have criticized the test as being too "indeterminate" or "amorphous," the flexibility of the test allows judges to tailor a decision to the particular circumstances of a given case and to reflect changing social values. 2 JOHN P. MCCAHEY ET AL., *supra* note 329, § 10.06[2][a].

341. *See supra* note 241 and accompanying text.

then attempts to determine on an individualized basis which parent would better serve the child's interests in a particular case.

As a practical matter, however, results would be skewed in favor of the gestational mother. Whether expressly prioritized in a statute or left to the judge's discretion, one of the most critical factors in the best interests test is the length of time that a child has bonded with a parent. In the case of switched genetic material, that parent will always be the gestational mother because she would have possession of the child at birth and retain control under the status quo until a different determination can be made by a court.[342] Given the delays inherent in the judicial system, it is likely to be a year or more before that determination can be made. Thus, the best interests analysis is almost always going to favor the gestational mother because only the most compelling circumstances are likely to overcome the child's need to continue the significant bond that develops while the case is being litigated.

A court could mitigate this effect to some extent by providing for visitation or other contact by the genetic mother or parents while the case is pending. But this limited contact still would not allow the genetic mother to establish the type of bond that the gestational mother would have as a result of her day-to-day nurturing of the child.

Under these circumstances, adoption of a bright-line test awarding parentage to the gestational mother would appear to be the more prudent course. It would allow parentage to be determined with certainty immediately upon the child's birth without pursuing a lengthy judicial process that, in all likelihood, will end up with the same result. Yet, that test is still troubling because it fails to recognize that in some cases, the child's best interests will be served by placement with the genetic mother notwithstanding the length of time that the child has been with the gestational mother.

One way to accommodate all of these interests is to adopt a modified best interests analysis which recognizes a presumption in favor of the gestational mother, but allows the courts to place the child with the genetic mother if there are circumstances suggesting that such placement is in the child's best interests regardless of the bond the child has developed with the gestational mother. Thus, a genetic mother might prevail, for example, if the gestational mother is shown to have a drug addiction, pending criminal charges requiring incarceration, or other proven inability to care for the child. Other arguments could be made that placement with the genetic mother is preferable because the child shares genetic characteristics such as ethnicity or other physical or mental attributes with the genetic mother, suggesting that the child could better relate to and receive emotional support from the genetic mother in coping with these

342. In fact, the New Jersey Supreme Court stated that in a dispute between a surrogate and a biological father, "only in the most unusual case should the child be taken from its mother before the dispute is finally determined by the court on its merits." *In re Baby M*, 537 A.2d 1227, 1261 (N.J. 1988).

attributes. In the absence of such factors, however, the child would remain with the gestational mother.

There is room for debate as to how this analysis should be used in parentage determinations. The best interests test historically has been used to determine how to divide care and custody as between a child's two legal parents. Thus, it comes into play only after a court has determined the identity of the legal parents and assumes that both parents should have some parental role, although one may be subordinate to the other. One judge has suggested, however, that the test be moved up in the process when there are competing claims for maternity by a gestational and genetic mother.[343] In this case, the test would be used to determine which of two potential mothers is entitled to parental status; the other would have no rights whatsoever.

Use of the best interests test in this latter scenario is premised upon the traditional belief, as discussed earlier, that a child can have only one natural mother and one father.[344] This belief was once well-grounded in biological fact, of course, but it is out of step with reality now that reproductive technology has made it possible for a child to have two biological mothers. Yet, courts have adamantly refused to recognize both women as parents.[345]

This reluctance may be explained by a desire to preserve the conventional norm of the nuclear family,[346] as well as concern about the practical consequences of recognizing two women as legal parents, i.e., the difficulties of dividing custody of the child between two mothers.[347] This situation is not significantly different, however, from the traditional division of custody between a legal mother and a legal father upon divorce. It simply means that a court potentially may have parental claims from three parties—two biological mothers and the biological father—rather than the typical claim involving one mother and one father. In the vast majority of cases, however, the father will be the spouse of one of the mothers. As a result, the court faces a straightforward question of

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343. *See supra* notes 159-67 and accompanying text.

344. *See supra* notes 118-21 and accompanying text.

345. *See supra* notes 118-21 and accompanying text.

346. Kandel, *supra* note 214, at 168 (describing the concept of the nuclear family as a "fundamental assumption[]" that "act[s] almost unconsciously to powerfully direct thought processes and can inhibit creativity in legal decision-making") (citing Janet L. Dolgin, *Just a Gene: Judicial Assumptions About Parenthood*, 40 UCLA L. REV. 637, 640-41 (1993)); *see also* Schiff, *supra* note 290, at 287 (noting that recognition of dual mothers would depend upon the "willingness of the legal system to depart from the traditional definition of family"); Shultz, *supra* note 134, at 332 (suggesting that the child should have two biological mothers, but noting that the concept "is unconventional, and therefore unlikely to be imposed").

347. Shultz, *supra* note 134, at 332 ("[T]he practical fact that both women would have to be willing to cooperate in a plan of access to the child means that such an arrangement would be difficult if imposed rather than chosen.").

determining how much time the child will spend between two households, just as in the typical divorce case, or a surrogacy situation like the *Baby M* case.[348]

Obviously, a court will want to provide as much stability and normalcy for the child as possible, which is true whether the custody dispute is between a mother and father or between two mothers.[349] But with a wide range of custody and visitation options now available,[350] the court should be able to fashion an arrangement that protects the child while still acknowledging the interests of all parents. In some cases, for example, the circumstances may permit a shared custody arrangement or placement of the child in the legal custody of one mother with visitation for the other. In other cases, it may be advisable to suspend one parent's visitation rights, limiting the contact to communication between only the custodial and non-custodial parents until the child reaches an appropriate age to understand the circumstances of his or her birth and is able to decide for himself or herself whether contact with the other parent would be desirable.

One could argue that the latter arrangement would be tantamount to terminating the non-custodial party's parental rights.[351] But such an order would be constitutionally permissible if required to protect the best interests of the child.[352] Moreover, this process is more analytically honest—and perhaps more

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348. Cases could arise in which the biological father is not married to either mother, such as when donor sperm is used without the donor's consent or waiver of parental rights. This would pose a more complicated scenario, requiring a court to divide a child's time between three households (that of the genetic mother, gestational mother, and genetic father). But this is only incrementally more difficult than dividing custody and visitation among two households.

349. Shultz, *supra* note 134, at 332 n.100 (discussing the unworkability of joint custody arrangements between mothers and fathers in divorce cases).

350. In earlier years, courts typically awarded sole legal custody to only one parent, giving the other limited visitation rights. 2 JOHN P. MCCAHEY ET AL., *supra* note 329, § 10.03[3][c][ii] (defining sole custody as placing primary decision-making authority and control in one parent with whom the child usually resides). But a much wider variety of custody arrangements is now widely used, including "joint or shared custody" and "alternating, rotating, or shifting custody." 2 JOHN P. MCCAHEY ET AL., *supra* note 329, § 10.03[3]. Although the latter types of arrangements were once disfavored because they were perceived as causing too much instability for the child, they have gained more widespread acceptance in recent years. 2 JOHN P. MCCAHEY ET AL., *supra* note 329, § 10.03[3][c][vi]. The courts, therefore, have the ability to tailor custody decisions to the individualized needs of a particular case.

351. *See In re* Baby M, 537 A.2d 1227, 1255 (N.J. 1988) ("It seems obvious to us that since custody and visitation encompass practically all of what we call 'parental rights,' a total denial of both would be the equivalent of termination of parental rights.").

352. *See* Quilloin v. Walcott, 434 U.S. 246 (1978) (recognizing that an unwed father's interest in the "companionship, care, custody, and management" of his children is "cognizable and substantial," but holding that the state did not infringe upon this right by applying a "best interests of the child" standard to the father's attempt to block the child's adoption).

psychologically palatable to the woman whose parental rights are curtailed because it recognizes that this person is a parent, but concludes that she must be deprived of most of the benefits of parenthood in order to protect the best interests of the child.[353]

The only real obstacle to dual motherhood, then, is society's reluctance to accept the new facts of nature as supplemented by modern technology. The courts have avoided facing this reality in surrogacy cases by fashioning rules, such as the intent test, that would grant parental status to only one biological mother, but deny it to the other. But for the reasons discussed above, these rules are unworkable in the context of children born from misdelivered or stolen genetic material. Thus, rather than trying to arbitrarily choose between the genetic and gestational mother, it would make more sense to treat them equally and determine that they are both parents. Their claims can then be resolved as a matter of custody, as the law historically has done when there is a dispute between two parties who have equal parental rights.

C. The Special Case of Stolen Embryos

The preceding discussion has assumed good faith on the part of the gestational mother, i.e., that she had no knowledge that she was gestating genetic material without the permission of the genetic provider. A different case arises if the gestational mother participates in the theft of the genetic material or otherwise knows that she is the recipient of such material. In this latter case, the law may seek to avoid rewarding the wrong and, therefore, refuse to declare parental rights in the gestational mother. The better view, however, is to decide the case under a best interests analysis.

Under traditional property law, a person who wrongfully obtains another's property does not acquire title to that property, even if the wrongdoer substantially enhances the value of the property through his or her labor and materials.[354] Thus, by analogy, a gestational mother who knowingly receives the stolen genetic material of another woman arguably should be denied parental rights in the child that develops from the genetic material even though the gestational mother has expended considerable time, labor, and risk in nurturing the fetus. A more modern approach, however, might find this rule too harsh, particularly if the gestational mother's investment and the value of the end

353. One benefit the mother would retain as a result of her parental status is the right to petition the court for a change of custody in the event that the custodial parent(s) are not acting in the best interests of the child. As such, it addresses the concerns of genetic parents like Junior Davis who feel an innate responsibility to ensure the well-being of their genetic offspring. *See supra* note 252 and accompanying text.

354. Wetherbee v. Green, 22 Mich. 311, 316 (1871); BROWN, *supra* note 211, § 6.2.

product are "out of all proportion" to the value of the genetic materials prior to gestation.[355]

Moreover, as noted above, property principles do not provide a perfect analogue to parentage disputes. Thus, while public policy in property law suggests that we not reward the wrongdoer, family law concepts would recognize a competing—indeed, paramount—policy of protecting the best interests of the child. The aim of making parties whole "should not be at the expense of innocent parties."[356]

The *Twigg v. Mays*[357] case provides a good example of these competing policies. The Twiggs were seeking a judicial declaration that Kimberly Mays was their biological daughter, having been switched shortly after birth with a child born to another couple. Despite the Twiggs's highly publicized claims that the other couple was intentionally involved in the swap and blood tests that showed a 95% probability that the Twiggs were Kimberly's biological parents, the Florida courts denied the Twiggs standing to pursue their claim.[358] In reaching this decision, the appellate court acknowledged that natural parents have certain presumptive rights of custody, but said those rights are not absolute.

> Children are not property, but individuals whose needs and physical and mental well-being find protection in the law. The cases dealing with custody contests between a natural parent and a third party are replete with declarations that the privilege of custody of the natural parent must yield if such custody will be detrimental to the welfare of the child.[359]

Accordingly, the appellate court remanded the case and directed the trial court to determine whether there was any probability that the Twiggs would prevail or, conversely, whether their request for relief would be denied because of the probable detrimental effects on the child.[360] On remand, the trial court concluded that the Twiggs, by engaging in various types of inappropriate conduct,[361] had not shown substantial concern for the welfare of the child and, therefore, their complaint was dismissed for lack of standing.[362]

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355. BROWN, *supra* note 211, § 6.2 (suggesting that it is questionable whether the traditional view would be followed by modern courts when the value of the resulting product is "out of all proportion" to the value of the original materials).

356. Rogers, *supra* note 263, at 1151.

357. No. 88-4489-CA-01, 1993 WL 330624 (Fla. Cir. Ct. Aug. 18, 1993); *see supra* notes 11-14 and accompanying text.

358. *Twigg*, 1993 WL 330624 at *2; Mays v. Twigg, 543 So. 2d 241, 243 (Fla. Dist. Ct. App. 1989).

359. *Twigg*, 543 So. 2d at 243.

360. *Id.*

361. *See supra* note 258 and accompanying text.

362. *Twigg*, 1993 WL 330624 at *5-6.

The *Twigg* case shows that a modified best interests test can be applied in cases of stolen genetic material as well as in cases where the switch occurs from a mistake. In the case of theft, however, the balance should tip in favor of the genetic mother. Thus, if the gestational mother is shown to have participated in the wrongdoing, the test would presume that custody should be given to the genetic mother. The gestational mother would prevail only if she could demonstrate that it would be in the child's best interests to remain with her notwithstanding her involvement in the wrong, i.e., that the child would suffer detrimental effects if removed from the gestational mother.

IV. RESOLVING PARENTAGE CLAIMS WITH A COMBINATION OF INTENT + BEST INTERESTS

The discussion in Section III suggests that a two-part analysis should be used to determine parentage when a child has two biological mothers as a result of stolen or misdelivered genetic material. The first step of the analysis would consider the intent of the parties, which would allow courts to legalize the parentage expectations of the parties in cases in which there are no conflicting claims to the child. The second step would use a modified best interests analysis to resolve custody issues in the remaining cases in which both mothers have satisfied the intent requirement. Application of this test is described below, with suggestions of how to incorporate the standard into the Uniform Parentage Act (UPA).

A. Explanation and Analysis of the Test

The first step of the intent + best interests analysis is to determine who has the intent to parent the child. The law should start with the assumption, as in all other parentage cases, that the woman who gives birth is the child's natural and legal mother. Her intent to procreate and raise the child may be implied from her participation in the in vitro fertilization process. Accordingly, in the absence of a claim from a woman stating that she is the genetic mother, the gestational mother's status would be exclusive and absolute.[363]

A genetic mother can establish parentage by proving her genetic link with the child, that her genetic material was used without her consent, and that she has not waived her parental rights. If the gestational mother disclaims intent to parent the child after learning that another woman's genetic material was implanted without the latter's consent, the genetic mother's status would be exclusive and absolute. If, however, the gestational mother maintains an intent

363. Thus, she would be considered the natural mother even if she was improperly implanted with someone else's genetic material and declares that she had no intent to raise the child. In essence, the gestational mother becomes a parent by default unless the genetic provider indicates an intent to parent the child.

to parent the child, both women will be the child's natural and legal mothers and their rights will be determined as a custody issue under the second step of the analysis.

The custody determination should be made through a modified best interests analysis, which recognizes a presumption in favor of awarding primary custody to the gestational mother because of the length of time in which the child has bonded with the gestational mother while the parentage issue is litigated. The genetic mother could overcome this presumption only by pointing to other circumstances which would suggest that placement with the genetic mother is in the child's best interests notwithstanding the length of time that the child has bonded with the gestational mother.

Once primary custody is determined, the court should apply the best interests analysis to determine what contact, if any, the child should have with the other mother. This may result in a shared or joint custody arrangement if the parties are able and willing to work together. More likely, however, the court will allow only limited visitation by the non-custodial mother or, in some circumstances, may provide only for communication between the two biological mothers with the stipulation that the child would be informed of the other parent at an appropriate time in the future and allowed to make contact on his or her own if desired. In making these determinations, courts should consider whether mediation will help provide an appropriate resolution.[364]

Although the intent + best interests analysis is subject to criticism because it lacks the certainty of a bright-line declaration of parentage,[365] its strength is in

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364. The Irvine, California, cases provide an excellent example. One genetic mother whose eggs were misappropriated decided not to seek custody of the boy who was born to another woman. Dodson, *supra* note 262, at B4. But she has established contact with the birth parents and stated that she "expect[ed] to be part of his life when his birth parents feel it is appropriate." Dodson, *supra* note 262, at B4. If this woman had decided to formalize her rights through litigation, her case would be appropriate for mediation because of her willingness to consider the child's best interests and the birth parents' willingness to work with the genetic mother.

Loretta Jorge's case may be a candidate for mediation as well. Her attorney has indicated that Mrs. Jorge's greatest motivation is the interests of the twins: "Loretta . . . knows her children eventually are going to know the story of their genesis and find out who their biological mother is. She doesn't want them to think she never tried to see them, especially since they live in the same neighborhood." Diane Seo, *Ex-UCI Patient Seeks to Meet Twins Born to Someone Else*, L.A. TIMES, Feb. 19, 1996, at 1, *available in* 1996 WL 5242524. Although Mrs. Jorge has officially requested custody or visitation, Smolowe & Weingarten, *supra* note 2, at 80, there is a possibility that she would agree to something less if her real goal is only to ensure that her genetic offspring do not think that she abandoned them.

365. *See* Johnson v. Calvert, 851 P.2d 776, 782 n.10 (Cal.) (criticizing the dissent's suggestion of best interests test because it "fosters instability" during the custody litigation, as compared with a categorical test that could be mechanically applied to determine parentage and thereby avoids prolonged litigation), *cert. denied*, 510 U.S. 874

its flexibility. Rather than declaring the gestational mother to be the legal parent in all circumstances (or expressing an opposite preference for the genetic parent), the intent + best interests test recognizes that procreation and parentage is a highly personal, individualized decision. We cannot assume that a gestational mother will always want to parent the genetic child of another woman or that a genetic mother whose eggs were harvested as much as a decade earlier still has a desire to parent a child born from those eggs. The intent test, therefore, legalizes the expectations of the parties rather than imposing an arbitrary determination of parentage based upon a bright-line standard.[366]

The intent + best interests test also may be criticized for its suggestion that *both* mothers should have legal standing if they both express the requisite intent to parent the child. Admittedly, the concept of dual motherhood is contrary to society's preference for the nuclear family. In addition, resolution of their competing claims as a custody matter will require greater involvement by the courts than would be required under a bright-line test that awards legal rights to one mother and denies any standing to the other. But given the increasing number of multi-parent families created by divorce, the concept of having two sets of parents is not an extreme departure from today's norms.

More importantly, however, failure to grant legal status to both mothers is unjust and unneccessary. Both women play a vital role in the birth of the child and, given the strong divergent viewpoints on this issue, the American public is unlikely to reach a concensus as to which mother should be granted parental status while declaring the other to be persona non grata. Thus, instead of trying to force this unique situation into the traditional one-mother cubbyhole, the intent + best interests test respects the significant contributions of both women and treats them both as legal parents. At the same time, the test recognizes that the child's best interest is served by having only one mother care for and nurture the child on a daily basis. Instead of taking the draconian measure of cutting off one mother's legal status altogether, however, the intent + best interests test would grant one mother primary custody and determine what contact, if any, with the other mother is appropriate under the circumstances of each particular case.

In short, the intent + best interests test places the need for individual treatment above the desire for absolute certainty as to parentage. Yet the test maintains a considerable degree of stability because under the modified best

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(1993).

366. A bright-line test declaring the genetic mother to be the natural mother, for example, might impose parentage on a party that no longer desires to be a parent while denying the right to a desiring genetic mother. The converse would be true for an inflexible rule declaring the gestational mother to be the natural mother. To award parental rights to the desiring party under these scenarios, the court would have to use the more cumbersome process of state adoption laws to terminate the parental rights of the natural mother as declared by the statutory rule and permit the desiring party to adopt the child.

interests analysis, the gestational mother would presumptively receive primary custody because of the length of time that the child has bonded with her. Thus, a woman who gives birth to a child ordinarily can be assured that she will maintain custody of the child in the absence of unusual circumstances.

Unlike a bright-line standard, however, this test does not completely cut off the interests of the genetic mother. Although she may not be able to enjoy all of the pleasures of parenthood, she is allowed to maintain some connection with the child, even if it is only the right to have the child be informed of her status as a genetic parent sometime in the future. Perhaps more importantly, however, this proposal gives her peace of mind by granting her some measure of legal standing to ensure the well-being of her genetic offspring.[367]

The intent + best interest test, therefore, attempts to accommodate the needs and interests of all parties. The mother who is granted primary custody will enjoy most of the benefits of parenthood but must give up some privacy and exclusivity in her parental rights in order to accommodate the needs of the other mother. The non-custodial mother, on the other hand, is deprived of a close relationship with the child but, in comparison with the current state of the law, gains formal recognition of her role as a biological parent and her desire to protect the child's welfare. Most importantly, however, the test ensures that the predominant consideration in this process is the best interest of the child.

B. Incorporating the New Standard into Existing Law

For states that have adopted the UPA, courts can adopt the intent + best interest test without any further legislative action because, as discussed above, the plain language of the Act suggests that both the gestational mother and the genetic mother can establish maternity.[368] Some courts already have suggested that an intent test be used to break the tie between these two prospective mothers in voluntary surrogacy cases.[369] The intent + best interests analysis would simply take that test one step further, recognizing that an intent analysis alone

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367. In fact, public comments made by some of the couples involved in the Irvine, California, fertility clinic scandal suggest that concern for the child's well-being is a predominant consideration for many of the genetic parents. *See, e.g.*, Dodson, *supra* note 262, at B4 (quoting one genetic mother as saying: "It was heartbreaking to learn . . . that the child that I had hoped for, prayed for and suffered for was stolen from me and born to another woman . . . . I am comforted, however, to have learned that he has been growing up in a family that loves him, has cared for him and provides a positive, supportive home for him"); Kelleher & Christensen, *supra* note 3, at A1 (quoting Basilio Jorge as saying he felt a need to check out the gestational parents "to see if [the birth father] can support the children"). Allowing a genetic mother to establish parental rights also addresses Loretta Jorge's paramount concern that her twins would think she did not care about them. *See* Kelleher & Christensen, *supra* note 3, at A1.

368. *See supra* notes 119-21 and accompanying text.

369. *See supra* notes 128-36 and accompanying text.

would not resolve most disputes that arise from stolen or misdelivered genetic material.

For purposes of clarity, however, it would be preferable for legislatures to incorporate this test into their parentage statutes through a provision such as the following:

> A woman who gives birth to a child shall be presumed to be its natural mother and listed as such on the child's birth certificate. This presumption may be rebutted by clear and convincing evidence that the gestational mother received genetic material from another woman without the latter's consent and that the genetic mother indicates her intent to parent the child.
>
> If both the gestational mother and genetic mother indicate an intent to parent the child, both shall be declared the legal parents and the court shall determine custody through a modified best interests analysis. Under this analysis, the court shall presume that primary custody should be awarded to the gestational mother, but this presumption may be rebutted by clear and convincing evidence that placement with the genetic mother is in the child's best interests. A substitute birth certificate may be issued upon a court order awarding parental status to the genetic mother or to both mothers.

V. CONCLUSION

Modern reproductive technology has made it possible for a child to have two biological mothers, one that provides the genetic material and one that nurtures the developing fetus through pregnancy. Under current adaptations of the law, however, only one of these women may be declared the child's legal mother. Thus, when the two women have knowingly and voluntarily combined efforts to produce a child, courts have fashioned categorical standards that award parental rights to one of the mothers and totally deny parental status to the other.

Although these standards may be justifiable in the context of voluntary surrogacies, they are inappropriate for cases in which a gestational mother is implanted with the genetic material of another without the latter's consent. This Article, therefore, suggests a two-part test to resolve parentage disputes in these cases of involuntary surrogacy.

The first part of the test looks at the intent of the mothers. If only one of the mothers expresses a desire to parent the child, the courts should recognize that woman as the child's legal mother. If, on the other hand, both women demonstrate an intent to parent the child, the law should recognize both as the child's legal mothers and resolve their competing claims as a custody matter. Because a gestational mother takes immediate possession of the baby upon birth and will establish a significant bond with the child while a case is litigated, this Article proposes a modified best interest test to determine custody. This test would presume that it is in the child's best interests to award primary custody to

the gestational mother, but would leave the door open for evidence to the contrary. Courts should then determine what level of contact with the non-custodial mother, if any, is in the child's best interests.

In short, the time has come to accept the new reproductive reality and recognize that, in this unique situation, a child can have two legal mothers, each with some degree of parental rights. In many cases, the parental status of the non-custodial mother may be extremely limited, the contact restricted only to communication with the custodial mother until the child reaches adolescence. But even this limited recognition and contact is preferable to the current system, which awards legal rights to only one of the mothers and declares the other *persona non grata.*

Obviously, the non-custodial mother will be disappointed that she cannot enjoy all the pleasures of parenting. But giving her some legal standing should address two of her other most significant concerns: (1) that her contribution to the creation of this child is given appropriate respect; and (2) that she has at least some legal means of ensuring that the child is well cared for by the custodial mother. Moreover, it is hoped that at the bottom line, she will embrace the need to put the child's best interests first. Indeed, as King Solomon so wisely recognized in the most renowned maternity dispute of all,[370] putting the child's best interests first is one of the defining characteristics of being a parent.

370. 1 Kings 3:16-28. In this biblical story, two women claimed to be the mother of an infant. Solomon resolved the dispute by ordering: "Divide the living child in two, and give half to the one, and half to the other." When one of the women protested, urging the King to give the child to the other woman to spare its life, the King altered his command: "Give the living child to the first woman, and by no means slay it; she is its mother." *Id.*