

3-1-2020

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Recommended Citation

LaPiana, William P. (2020) "Married Is as Married Does(?)," *ACTEC Law Journal*: Vol. 45: No. 3, Article 4. Available at: <https://scholarlycommons.law.hofstra.edu/actecj/vol45/iss3/4>

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Commentary and Dialogue

Married Is as Married Does(?)

William P. LaPiana*

*It is better to marry than to burn.*¹

Whatever today's understanding of the verse from the First Epistle to the Corinthians, it clearly conveys the idea that marriage is the way to cabin and control sexual desire, and, by extension, is the foundation of the idea of family since human reproduction therefore will take place between persons married to each other.

So much for theory, theological or otherwise. But it would be foolish to dismiss the role of children in the development of the legal shape of the institution of marriage. This brief comment to Prof. O'Brien's article argues that whatever the future of non-ceremonial marriage—and Prof. O'Brien makes a strong case for its reanimation in the law of the United States—the future of marriage is ineluctably linked to the development and acceptance of assisted reproductive technology (ART), the use of which in turn is creating new model families strongly influenced by the ascent of individuality and heightened liberty the article describes.

As Prof. O'Brien notes, children play an important part in the legal development of marriage, and he describes the institution beginning with couples sharing a mutual commitment “usually predicated upon survival, care of children, and perhaps emotional attachment.”² Even the extension of the right to marry to same-sex couples in *Obergefell v. Hodges*³ rests at least in part on the belief that “[m]arriage confers material protection for children and families,”⁴ a statement that leads one to wonder exactly what is the relationship between a couple, their raising children, and being a family. For some that relationship is a strong one. Both the American Law Institute's *Principles of the Law of Family Dissolution*, and Prof. Lawrence Waggoner's proposed Uniform De

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¹ 1 *Corinthians* 7:9.

² Raymond C. O'Brien, *Marital Versus Nonmarital Entitlements*, 45 ACTEC L.J. 79, 100 n.114 (2020).

³ *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015).

⁴ *Id.* at 2600.

Facto Marriage Act, discussed in the article, create a presumption that two persons are domestic partners where, among other criteria, the couple's "common child" is part of the couple's household.⁵ Under the ALI scheme, a couple maintaining a common household "are" domestic partners if their common child resides in the household for the period of time specified in state law; unmarried couples without common children also can be domestic partners, but even if they maintain a common household for the period of time specified by local law, they are only "presumed" to be domestic partners, a presumption that can be rebutted.⁶

Another example of the close link between marriage and parentage is directly related to the legalization of same-sex marriage. One of the oldest and most basic presumptions of family law is that a child born to a married woman is the child of her husband.⁷ That presumption has been extended to two married women, one of whom gives birth through ART. While this result is usually a matter of constitutional law, whether federal⁸ or state,⁹ the result is that parentage is determined by the status of being married, whether or not the spouse could be the other genetic parent of the child.¹⁰ As these cases show, the association between marriage and parentage is altered by the separation of genetics from parenthood made possible by ART.

In vitro fertilization (IVF) makes possible the separation of fertilization from coitus and the resulting embryo can be implanted in the uterus of a woman who is not the creator of the ovum and who is usually described as a gestational surrogate. A married couple who for whatever reason do not conceive a child through sexual intercourse can in many United States jurisdictions receive donations of ova and sperm, arrange for IVF of the ova with the sperm, and then contract with a gestational surrogate. There are five people involved in this arrangement, but where surrogacy contracts are legally enforceable, the married couple who

⁵ PRINCIPLES OF THE LAW OF FAMILY DISSOLUTION: ANALYSIS AND RECOMMENDATIONS § 6.03 (AM. LAW INST. 2002).

⁶ *Id.* § 6.03(3). Under section 6.03(5) parentage of the child can be legal parentage or parentage by estoppel.

⁷ This presumption is the basis of statutory rules making the husband of a woman who conceives through artificial insemination using the sperm of a man other than her spouse and then gives birth the father of the child. *See, e.g.*, TEX. FAM. CODE ANN. §§ 160.703, 160.704 (West 2019) (all children of assisted reproduction).

⁸ *Pavan v. Smith*, 137 S. Ct. 2075 (2017); *Henderson v. Box*, 947 F.3d 482 (7th Cir. 2020).

⁹ *McLaughlin v. Jones*, 401 P.3d 492 (Ariz. 2017).

¹⁰ For a decision resting on state family law and general principles of equitable estoppel where the sperm donor was known to the spouses, see *Christopher YY v. Jessica ZZ*, 69 N.Y.S.3d 887 (N.Y. App. Div. 2018) and *Joseph O. v Danielle B.*, 71 N.Y.S.3d 549 (N.Y. App. Div. 2018).

made all the arrangements are the parents of the child and the donors of the gametes and the gestational surrogate are not parents.¹¹ An unmarried person could also become a parent through surrogacy to the exclusion of the gamete donor or donors and the surrogate.¹²

Not every surrogacy arrangement proceeds according to a contract, or at least one that is legally recognizable. In those situations, there may be more than two persons who wish to have a parent-child relationship with the child where all of the persons involved not only know each other but remain in contact after the child's birth. In *David S. v. Samantha G.*,¹³ a married male couple, David S. and Raymond T., and a female friend, Samantha G., decided to have a child together.¹⁴ The men delivered sperm to the woman on alternate days, and she did become pregnant through artificial insemination without medical supervision.¹⁵ Testing showed Mr. S. to be the genetic father of the child, and he signed an acknowledgment of paternity when the child was five days old.¹⁶ The three adults sought clarification of their parental rights. The New York Family Court held that Mr. T. has standing to seek custody and visitation even though the child has two legal parents.¹⁷ This decision is consistent with another New York case in which the court issued a "triest custody order" giving joint custody to the biological father, his former wife, and another woman who is the biological mother and the partner of the father's ex-spouse, even though the child already had two legal parents.¹⁸

These New York cases deal only with custody, visitation, and the support obligation and do not create a parent-child relationship between the third parent and the child for all purposes—the child is not an heir in intestacy of the third person who has parental rights and obligations and vice versa, although the child might have a claim to be an heir under some version of the theory of equitable adoption, which varies greatly from jurisdiction to jurisdiction.¹⁹ Under the Uniform Parentage Act (2017), however, de facto parentage can be established through clear

¹¹ *What are Surrogacy Contracts?*, FAMILY TREE (Aug. 9, 2019) <https://family-treesurrogacy.com/blog/what-are-surrogacy-contracts>.

¹² See, e.g., *In re John*, 103 N.Y.S.3d 541, 546, 550 (N.Y. App. Div. 2019).

¹³ *David S. v. Samantha G.*, 74 N.Y.S.3d 730 (N.Y. Fam. Ct. 2018).

¹⁴ *Id.* at 731.

¹⁵ *Id.*

¹⁶ *Id.*

¹⁷ *Id.* at 734.

¹⁸ *Dawn M. v. Michael M.*, 47 N.Y.S.3d 898, 903 (N.Y. Sup. Ct. 2017).

¹⁹ Compare *O'Neal v. Wilkes*, 439 S.E.2d 490, 492 (Ga. 1994) (needing to prove binding promise between alleged parent and a person who had legal authority to offer the child for adoption), with *In re Estate of Ford*, 82 P.3d 747, 755 (Cal. 2004) (requiring clear and convincing evidence of an intention to adopt or of the decedent's statements that the child was an adopted or a genetic child), and *In re Estate of North Ford*, 200

and convincing evidence of seven factors all related to acting as a parent.²⁰ Once de facto parentage is established, the parent-child relationship exists for all purposes, presumably including inheritance and inclusion in class gifts in donative documents.²¹ The Act also includes an optional provision that allows a court to find that a person has more than two parents.²² Not surprisingly, the Act says nothing about the legal relationship between or among the parents, nor is the subject addressed by the two states that have statutes recognizing de facto parentage²³ nor by the court opinions that recognize de facto parentage under section 204(a)(5) of the 1973 Uniform Parentage Act, providing a man is presumed to be the father of a child if during the first two years of the child's life the man resided in the same household with the child and "held out the child as his own."²⁴

Assume a situation like that in *David S.*: the third parent is married to a biological parent and the other biological parent has no legal relationship to the married couple except as a parent of the child. On the death of the other biological parent, the child is an heir and can be the beneficiary of a will or of non-probate property, but the child's only right under a will is standing to challenge it (assuming the applicable omitted child statute does not apply) and in any event some or all of the decedent's assets may be outside of the probate estate. A will that does benefit the child or the other parents is open to challenge by the other heirs of the decedent and those heirs might be more inclined to challenge a will that benefits the married couple. It seems to be all but impossible to prove undue influence by one spouse on another, but the decedent is not a spouse.

If the third parent is not married to another parent, the child has even less legal protection. We assume that the economic interests of minor children at least will be protected by whatever legal device prevents disinheritance of a surviving spouse and that non-marital children are often the subject of some sort of agreement to support during life and perhaps to make a gift at death. The structure of the Uniform Probate

A.3d 1207, 1215 (D.C. 2019) (requiring clear and convincing evidence "that decedent objectively and subjectively stood in the shoes of" claimant's parent).

²⁰ UNIF. PARENTAGE ACT § 609(d) (UNIF. LAW COMM'N 2017).

²¹ *Id.* § 203.

²² *Id.* § 613 alternative B.

²³ DEL. CODE ANN. tit. 13, § 8-201(c) (2020); ME. STAT. tit. 19-A, § 1891 (2019).

²⁴ *Elisa B. v. Superior Court*, 117 P.3d 660, 667 (Cal. 2005); *In re S.N.V.*, 284 P.3d 149, 150 (Colo. App. 2011); *Frazier v. Goudschaal*, 295 P.3d 542, 549-50 (Kan. 2013); *Partanen v. Gallagher*, 59 N.E.3d 1133, 1137 (Mass. 2016); *Chatterjee v. King*, 280 P.3d 283, 286 (N.M. 2012); *In re Parentage of L.B.*, 122 P.3d 161, 165 (Wash. 2005). *But see* *L.P. v. L.F.*, 338 P.3d 908, 919 (Wyo. 2014) (whether or not to recognize de facto parentage is for the legislature to decide).

Code's intestacy provisions for surviving spouses is based at least in part on the idea that decedents "see the surviving spouses as occupying somewhat of a dual role, not only as their primary beneficiaries, but also as conduits through which to benefit their children."²⁵ Without the status of surviving spouse, however, there is no conduit in intestacy nor is there likely to be any way for the family to have access to the property of the deceased parent, especially if the child is not an heir of the decedent.

Now add the fact that all the adults maintained a common household in which the child was raised, a prerequisite for finding a domestic partnership under the *ALI Principles* and for finding de facto parentage under the Uniform Parentage Act section 609(d)(1). The basic argument Prof. O'Brien makes—"the state structure of marriage should not thwart the fundamental right of individuals to form families in the manner that privacy and liberty sustains . . ."²⁶—applies to these families of more than two adult partners, especially where the relationship among them is founded on their parentage of a child or children living with them, whether parentage comes from biology, adoption, or de facto parentage (whether or not extending to property rights at death). As we have seen, the combination of medical technology and growing ideas of individuality and liberty makes it more likely that more than two persons can plausibly claim the role of parent in a person's life.

The legal and policy mechanism for tipping the balance in favor of changing legal rules related to the family often is the concept of "the best interest of the child."²⁷ Where the child's emotional and financial security can be enhanced by creating a legal relationship among all those who are in some way legal parents of the child, courts and legislatures may be inclined to find a way to do so, just as the courts seem more and more inclined to find that a child can have more than two parents for purposes of custody, visitation, and support. And once the multiple parent household is seen as a unit, economic partnership arguments for existence of rights in the property of a deceased partner, whether through community property or the elective share, become easier to make to courts and legislatures.

Another way to put it is that the cases and statutes dealing with the parentage of a child born to a married couple show marriage driving parentage no matter what the biological relationship between parents

²⁵ Lawrence W. Waggoner, *The Multiple-Marriage Society and Spousal Rights Under the Revised Uniform Probate Code*, 76 IOWA L. REV. 223, 232 (1991).

²⁶ O'Brien, *supra* note 2, at 100.

²⁷ See, e.g., *In re Jacob*, 660 N.E.2d 397, 399, 402 (1995) (best interest of the child an important component of decision allowing second parent adoption under existing statutes).

and child. Perhaps we are on the verge of parentage, no matter how created, driving marriage. The future of non-ceremonial marriage may be even more significant than Prof. O'Brien hopes.